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# EMPLOYMENT LAW OVERVIEW **CHINA** 2021-2022

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# I. GENERAL OVERVIEW

China, as one of the fastest-growing economies and most populous countries, plays a critical role in business, industry and politics. However, many outsiders encounter significant difficulty understanding Chinese labour law and find themselves in challenging and uncomfortable situations. This may be due to the law's specificity and scope, which forms a labyrinth of interconnected regulations and rules governing minutia ranging from severance to trade unions. Routine tasks in other jurisdictions can be much more dramatic affairs in China. This can be daunting, but our hope is that after reading this article, you will have the tools and foundation to successfully navigate Chinese labour law.

## 1. INTRODUCTION

Labour law generally refers to the rules and regulations governing employment relationships and other social relationships that are closely connected with employment relationships. Chinese labour law applies to all businesses, individual economic organisations, private non-profit entities, etc. in the People's Republic of China (the "PRC") and the individuals who have employment relationships with such entities and organisations. Employment relationships between government offices, public institutions and social groups and their employees are also governed by Chinese labour law. Employers and employees (except part-time employees) are required to establish employment relationships by entering into written employment contracts. However, even if the parties fail to execute valid written employment contracts, an employment relationship can still be deemed to exist if the parties act as if they are bound by such a contract.

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## 2. KEY POINTS

- Employers must sign the employment contract with full-time employees or the employer shall pay double the monthly wage to the employees, for at least 11 to 12 months.
- Probation periods shall not be longer than what is permitted by law and one employee can only have one probation period, otherwise the employer shall pay compensation to the employee for the exceeded probation period or the second probation period performed by the employee.
- Amending an employment contract (e.g. job title) must be agreed by both employer and employee in written form.
- Internal rules which may affect employees' personal interests must fulfill the consultation process, or they will not take effect (e.g. they will not apply to the employees).
- In China, termination must be based on the grounds permitted by law. Otherwise, the labour relationship may be reinstated, even after termination (e.g. employers may be forced to re-hire terminated employees or pay double severance).
- Chinese severance pay practices are unique, in that a highly paid employee's severance is capped, which can result in a senior manager's severance being lower than that of a junior employee.
- Chinese employers cannot require employees to pay liquidated damages, except in limited situations involving non-competition and service-period duties.
- Employees are not entitled to organise labour strikes under Chinese law. However, employees will still engage in self-organised strikes; these strikes are not legally supported by trade unions.

### 3. LEGAL FRAMEWORK

Chinese labour law is not codified in a singular piece of legislation and actually draws from a variety of sources. The main sources that comprise China's labour laws are:

- the Chinese Constitution;
- national laws, in particular the Labour Law and the Labour Contract Law;
- administrative regulations promulgated by the State Council;
- regulations promulgated by the Ministry of Human Resources and Social Security (the "MOHRSS") and other ministries and commissions of the State Council;
- judicial interpretations released by the Supreme People's Court and the Supreme People's Procuratorate; and
- local regulations and decrees of provinces, autonomous regions, municipalities directly under the central government and other large cities.

In addition, judicial documents from local courts and procuratorates, rules and regulations of communities and industries, as well as customs and more can also serve as references in labour cases.

### 4. NEW DEVELOPMENTS

In 2019 and late 2020, various Chinese governmental departments enacted new regulations on a wide range of employment law matters, of which the following deserve special attention by entities doing business in China.

#### A. PERSONAL INFORMATION PROTECTION

The Third Session of the 13th National People's Congress of the PRC voted and passed the Civil Code, which entered into force on 1 January 2021. The Civil Code includes new rules on the protection of an individual's privacy as well as their personal information. According to the Civil Code, the processing of personal information shall respect the following principles with the aim to be legitimate, just, necessary and not excessive. In addition, the Civil Code also requires that the processing of personal information must meet certain statutory

conditions, such as (i) the processing of personal information shall be subject to consent of the individual; (ii) the rules for information processing shall be made public; and (iii) the purpose, method and scope of the information processed shall be explicitly stated. In the context of an employment relationship, it is important for employers to abide by the Civil Code when handling an employee's personal information, during both the recruitment process and the performance of the employment contract.

#### B. TRADE SECRETS

China has taken a series of legislative actions to strengthen its protection of trade secrets. In April 2019, the Standing Committee of the National People's Congress decided to amend the PRC Anti-unfair Competition Law and provide better protection for trade secrets. According to this amendment, in the event of a serious, malicious and unlawful infringement of trade secrets by a commercial entity, the people's courts in China may impose punitive damages on the infringer. Furthermore, the courts can exercise their discretionary power and award compensation in the (maximum) amount of RMB 5 million, if the loss suffered by the trade secret owner, or the benefit obtained by the infringer, is difficult to determine.

In September 2020, the Supreme People's Court released the Provisions on Several Issues Concerning the Law Application in Trial of Civil Cases on Trade Secrets Infringement (the "Provisions"). The Provisions explicitly list different measures for the protection of trade secrets. The condition granting employers the option to provide training to their employees, as an effective protective measure to safeguard trade secrets, is confirmed by the Provisions. Furthermore, the Provisions also include more detailed rules concerning the identification of trade secrets, findings of infringement, civil liabilities for infringement, etc.

#### C. SOCIAL INSURANCE

In November 2019, the Ministry of Human Resources and Social Security and the National Healthcare Security Administration jointly issued the Interim Measures for Hong Kong, Macao and Taiwan Residents to Participate in Social Insurance in Mainland China (the "Interim Measures"). The

Interim Measures has been in effect since the beginning of 2020 and explicitly require employers in mainland China to contribute to all five types of social insurance for employees from Hong Kong, Macao and Taiwan. The Interim Measures have also clarified the process on registering social insurance for the employees from Hong Kong, Macao and Taiwan and confirmed that said employees shall be entitled to the corresponding social insurance benefits in mainland China.

## D. TRAVEL BAN

The outbreak of the COVID-19 pandemic has caused severe difficulties to numerous employers in China. To control the pandemic, the Ministry of Foreign Affairs and the National Immigration Administration Bureau jointly released the Announcement on Temporary Suspension of the Entries by Foreign Nationals Bearing Valid Chinese Visa and Residence Permit (the “Announcement”) in March 2020.

Pursuant to the Announcement, foreign nationals who hold a visa or residence permit other than the diplomatic, official, courtesy or Category C visas are restricted from entering China; if foreign nationals plan to engage in necessary economic, trade, scientific or technological activities or to fulfill emergent humanitarian needs in China, they may apply for a visa at the Chinese embassy or consulate and may enter China with a visa granted after the Announcement.

In September 2020, the Ministry of Foreign Affairs and the National Immigration Bureau released the Announcement on Allowing Three Kinds of Foreign Nationals with Valid Residence Permit to Enter China. This new announcement relieves, to a certain extent, the travel ban imposed by the March 2020 announcement and allows foreign nationals who hold a valid residence permit for work, personal affairs or reunion purposes, to enter China.

# II. HIRING PRACTICES

## 1. REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

Under PRC law, expatriates working in China must be in possession of a work permit and a residence permit (for employment purposes) otherwise their employment may be considered illegal. In cases of illegal employment, the employer and the foreign employee may be penalised by the authorities, and their relationship will not be protected by labour law.

To obtain a work permit and residence permit for a foreign employee, an employer must apply to the government for the notification of a work permit for the foreigner. With the notification of the work permit, the foreigner may apply for a work visa. After obtaining the work visa, the foreigner should apply for a work permit within 15 days of entering or reentering China. With the work permit, the foreign employee should apply for a residence permit within 30 days after entering or reentering China.

If the foreigner first entered China on another type of visa, such as a visit visa or tourist visa, he or she may go to Hong Kong to obtain a work visa (after obtaining the notification of the work permit). However, occasionally, the foreigner may need to return to his or her home country for the work visa due to China's fluctuating immigration policies. Also, chief representatives and representatives of representative offices do not need to apply for the notification of a work permit, and can use representative certificates to directly apply for the work permit and the residence permit.

Work permits usually have a term of one year and never exceed five years even if certain conditions are satisfied. Residence permits usually have the same term as work permits. If the employer intends to continue to employ the foreigner after the expiration of the work permit and the residence

permit, the employer must apply for a renewal of the permits at least 30 days before their expiration. The employment relationship automatically expires if the work permit or residence permit becomes invalid or is cancelled.

In addition, foreigners who come to China to perform special tasks in the areas of technology, scientific research, management or guidance with Chinese business partners or other reasons and stay in China less than 90 days (the "Short-term Work") must apply to the relevant authorities for their approval letters, certificates of employment, invitation letters or confirmations of invitation and work visas. If they intend to perform the Short-term Work in China in excess of 30 days, they must apply for residence permits (for employment purposes). However, foreign employees who are dispatched to the branches, subsidiaries and representative offices in China by foreign companies and stay in China for fewer than 90 days, are not considered to be performing Short-term Work and shall apply for business visas (M visas).

## 2. DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

The PRC labour laws and regulations will not be applicable to the employment relationship established between a foreign-registered employer and its employees. However, if the foreign company plans to recruit and have employees work in China, in order to avoid the risk of permanent establishment, foreign companies are usually required to incorporate subsidiary company or representative office in China. The subsidiary company incorporated in China can directly hire employees or retain employees seconded from foreign parent companies. A representative office

established by a foreign employer is only allowed to hire Chinese employees through a local HR agent in China.

### **3. LIMITATIONS ON BACKGROUND CHECKS**

According to PRC Labour Contract Law, employer is entitled to know an employee's basic information, which directly relates to the employment contract and the employee is obligated to inform the employer of the said information truthfully. However, the background checks or application/interview questions shall not infringe employees' privacy rights or equal employment rights; otherwise the employer could be liable to litigation pursuant to PRC Tort Law and other applicable laws. For any personal information obtained through background checks, employers shall fulfill the requirements of the Civil Code to process such information. Pursuant to the Civil Code, the processing of personal information shall respect the following principles with the aim to be legitimate, just, necessary and not excessive. Moreover, employers are required to obtain consent from individuals for collecting personal information. In practice, to avoid potential disputes, it is advisable for employers to obtain the job applicant's consent before implementing the background checks.

### **4. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS**

Issued by nine departments accorded top-level authority in China, the Circular Related to Further Action to Promote Employment for Women details the restrictions imposed on employers and human resource agents when engaging with female candidates during the recruitment process. When interviewing prospective female candidates, employers are explicitly restricted from raising questions about marital status or pregnancy status. The penalties for an employer's breach of this restrictive rule include a fine up to RMB 50,000.

# III. EMPLOYMENT CONTRACTS

## 1. MINIMUM REQUIREMENTS

Under the Labour Contract Law, a written employment contract is necessary to establish a full-time employment relationship. However, a part-time employee, who works no more than 24 cumulative hours per week and four hours, on average, per day, is subject to different requirements and may be employed under an oral contract.

The law gives a one-month grace period to employers that commences upon the employee's first day of work. The employer must execute a written employment contract with the employee within this grace period, otherwise it will owe double wages to the employee for each month of employment after this grace period without a written contract, and such period shall not be longer than 11 or 12 months, if the fixed-term employment contract is not renewed once it expires, but the employee continues to work for the employer. If an employer fails to execute a written employment contract with a full-time employee for over a year, the employer and the employee shall be deemed to have executed an open-ended employment contract.

The Labour Contract Law requires an employment contract to include the following items:

- name, domicile and legal representative or person in charge of the employer;
- name, domicile and ID card number or number of another valid identification document of the employee;
- contract term;
- job content and place of work;
- working hours, rest and leave;
- compensation;
- social insurance;

- workplace protection, workplace conditions and protective measures against occupational hazards; and
- other matters required by laws and administrative regulations.

In addition, an employer and an employee may, in their sole discretion, agree on matters such as probation, training, confidentiality, supplementary insurance, welfare, other incentives and other matters in the employment contract.

Usually, the contents of an employment contract can only be modified in writing after both parties have reached a consensus through mutual negotiation. However, a verbal modification of an employment contract may also be valid if the modification has actually been performed for longer than one month and does not violate any law, administrative regulation, state policy, public order or good morals, and the employee does not raise an objection within one month after the modification.

## 2. FIXED-TERM/OPEN-ENDED CONTRACTS

Employment contracts in China can have three different types of terms: fixed, open-ended or terms that expire upon completion of an assignment. Under the Labour Contract Law, if an employer opts to enter into a fixed-term contract with an employee, after the completion of two fixed terms, that employer will be obligated to execute an open-ended contract upon the employee's request. Since open-ended contracts are inherently difficult to terminate, employers may want to use fixed-term contracts for new hires. This would give the employer a chance to evaluate its new employees. If the employee's performance is deemed unsatisfactory, a fixed-term contract provides the

employer with the option of discontinuing the employment relationship at the end of the term.

### 3. TRIAL PERIOD

In China, the employee trial period is also known as the probationary period. A probationary period is commonly included in employment contracts. However, Chinese labour law contains restrictions on the length of the probationary period. Probationary periods must conform to the following parameters:

- where the term of an employment contract is three months or more, but less than one year, the probationary period may not exceed one month;
- where the term of an employment contract is one year or more, but less than three years, the probationary period may not exceed two months; and
- where the term of an employment contract is three years or more, or where the term is open-ended, the probationary period may not exceed six months.

The employer may agree on a probationary period with the same employee only once. Probationary periods are not permitted for employment contracts that expire upon completion of an assignment or those with terms shorter than three months.

### 4. NOTICE PERIOD

In China, an employee may unilaterally terminate his or her employment contract by giving a written notice 30 days in advance or 3 days in advance during probationary period. On the other hand, an employer may unilaterally terminate an employment contract by giving a written notice 30 days in advance or providing one month's salary in lieu of notice in the following three circumstances:

- the employee, after exhausting the legally prescribed period of medical treatment for an illness or non-work-related injury, can perform neither his or her original work nor other work arranged for him or her by the employer;
- the employee is incompetent to carry out his or her work and remains so after receiving training or an adjustment of his or her work;

- a major change in the objective circumstances relied upon at the time of conclusion of the employment contract that renders the contract non-performable and, after consultations, the employer and the employee are unable to reach an agreement on amending the employment contract.

In addition, if the employer intends to reduce its workforce by 20 persons or more or by a number that is less than 20 but accounts for 10% or more of the total number of its employees, the employer must explain the situation to the trade union or all employees 30 days in advance, provide relevant information regarding the employer's production and operation status and make a formal report to the local labour authorities.

# IV. WORKING CONDITIONS

## 1. MINIMUM WORKING CONDITIONS

The employment relationship established under the PRC employment laws and regulations is highly regulated. Employers are under a legal obligation to provide the minimum working conditions in the following aspects: i) labour remuneration; ii) rest and holidays; iii) working hours; iv) compensation for overtime work; v) contribution for social insurance; vi) payment of statutory severance where applicable; and vii) provide for a safe and healthy working environment and measures for protection against occupational hazards.

## 2. SALARY

Employers and employees should specify salaries in their employment contracts. Full-time employees should be paid their salary at least once a month. Employees' monthly salaries should not be less than the minimum monthly wage published by local governments. An employer should pay salaries to its employees in accordance with the law for official public holidays, marriage or bereavement leave and for any periods when they participate in social activities such as exercising the statutory election rights. Furthermore, employers may arrange compensation and bonus policies according to the law and their own needs. These policies may include content on performance bonuses, annual bonuses, stock options, etc. Individual income taxes and other taxes payable by employees are the responsibility of employees. However, employers should withhold individual income taxes and the employee's portion of social insurance contributions from the employee's salary and pay such amounts to the competent government departments on behalf of their employees.

## 3. MAXIMUM WORKING WEEK

There are three working hour systems designed for full-time employees in China. Under the standard working hours system, employees work for eight hours per day and 40 hours per week and shall be guaranteed at least one rest day each week. The flexible and comprehensive working hour systems are usually applied to jobs that can be difficult to perform within a fixed working hours scheme. For employees under a flexible working hours system, PRC employment laws and regulations do not impose a limit on working hours, but require the employers to take appropriate measures to ensure that their employees are afforded time to rest.

## 4. OVERTIME

In some circumstances, an employer may extend the working hours of an employee to accommodate changes in production or business operations, after consulting with the trade union and the employee concerned. Generally, overtime should be limited to one hour per day. In special circumstances, the overtime should be capped at three hours per day, provided that the employee's health is not affected and the total monthly overtime shall not exceed 36 hours.

Employers are required to pay overtime compensation to employees under the standard working hours system as follows:

- 150% of an employee's normal wage for extended work hours on workdays;
- 200% of an employee's normal wage for working on rest days (if employers fail to provide comp-days);

- 300% of an employee's normal wage for working on an official public holiday.

Employees working under the flexible working hours system are not entitled to overtime compensation, unless otherwise provided by local government regulations.

## 5. HEALTH AND SAFETY IN THE WORKPLACE

### A. EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

According to PRC Labour Law, an employer must establish a sound labour safety and hygiene system and strictly implement state rules and standards of labour safety and hygiene, conduct labour safety and hygiene education among its employees, prevent accidents and reduce occupational hazards. Employers must also provide their employees with labour safety and hygiene conditions and necessary articles for labour protection in conformity with the regulations of the state and arrange for employees, whose work involves occupationally hazardous substances, to undertake regular occupational health checks.

The Work Safety Law of the PRC further clarifies employers' work safety duties and obligations under the Labour Law and prescribes the administrative and criminal penalties an employer and its responsible personnel may face for violating work safety laws.

In addition, the Administration Norms of Employers' Notification and Warning of Occupational Hazards (the "Norms") address issues such as standardising the administration on employer's notifications and warnings of occupational hazards; prevention and control of occupational hazards; and measures for protecting the health of its employees.

The Norms define the "Employer's Notification of Occupational Hazards" and require the employers to sign employment contracts with employees, release announcements and offer training to employees, which would enable employees to truly understand the occupational hazards that occur or

exist in the workplace, the prevention measures, the influence on health and the results of health checks. Also, the Norms define the "Employer's Warning of Occupational Hazards" and require employers to put up the graphic signs, warning lines, warning languages, written notice and combined signs in the workplace, so as to remind the employees to be cautious about occupational hazards and take appropriate protective measures. Employers who violate the Norms will be punished according to the Law on Prevention and Control of Occupational Disease of the PRC, Regulations on the Supervision and Administration of Occupational Hygiene in Workplaces and other laws and regulations.

### B. COMPLAINT PROCEDURES

Any person or entity is entitled to complain or report to the competent work safety supervisory authority, regarding an employer's violation of laws and regulations with respect to occupational disease, hazards or accidents. Such violations include the following scenarios:

- where occupational diseases or hazards exist in the workplace, and the employer fails to meet specific requirements for occupational health;
- when any acute accident due to occupational hazards occurs or is likely to occur in the workplace, and the employer fails to immediately take emergency and control measures, or to make a timely and truthful report to the local public health authority;
- where the employer fails to take measures for prevention and treatment of occupational diseases;
- where the employer fails to ensure necessary funds are used for prevention and control of occupational diseases or misappropriates or diverts such funds; and
- where the employer fails to provide effective facilities or personal protective equipment to employees for prevention and treatment of occupational diseases.

If any complaint or report is made to the work safety supervisory authority, the said authority will usually undertake the following procedures: i) visit the reported company and its workplaces, conduct occupational disease and hazard testing, access relevant information, conduct investigation and

collect evidence; ii) access and duplicate documents of the company concerning prevention and control of occupational diseases and hazards and collect relevant samples on site; iii) order the company to cease and desist any ongoing unlawful actions; iv) order the operations that cause occupational diseases, hazards or accidents suspended and then seal off the facility or equipment that has caused or may cause such occupational risks; and v) control the scene where the occupational diseases, hazards or accidents transpired.

When it is substantiated by the work safety supervisory authority that the employer has committed a violation in respect of prevention and control of occupational disease, the errant employer will be subject to the following punitive measures: i) warned and ordered to rectify within specific time limit; ii) a fine with its amount determined based on severity of the circumstance; or iii) ordered by local government to shut down the specific operation that generated the occupational disease hazards or the entire operation of the employer.

## C. PROTECTION FROM RETALIATION

The PRC Labour Law explicitly stipulates that if employers unreasonably obstruct the labour administrative authority, relevant authorities or their officials from exercising the right of supervision and inspection and retaliate against the whistleblower, the labour administrative authority or relevant authorities may impose a fine on the employer, and the criminal liability of responsible personnel will be pursued, if the retaliatory action constitutes as a crime.

# V. ANTI-DISCRIMINATION LAWS

## 1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

Currently, the rules on anti-discrimination are scattered throughout various laws and regulations, such as the PRC Employment Law, the PRC Employment Promotion Law, the PRC Protection of Women's Rights and Interests Law, and the PRC Protection of Disabled People Law. However, these anti-discrimination rules are very general and impractical and do not specify what discrimination is, how to determine its existence, how to allocate the burden of proof in establishing it and what liability should be imposed.

## 2. EXTENT OF PROTECTION

According to the PRC Labour Law, employees shall not be discriminated against due to their ethnicity, race, gender or religious belief. The Regulation on Employment Service and Employment Management formulated by the Ministry of Human Resource and Social Security further expands the scope of protection, and specifies that employees shall also not be discriminated against due to disability or for migrating from rural areas. Also, employers shall not refuse to employ a job candidate on the basis that he or she is a carrier of any infectious pathogen unless otherwise provided by laws and regulations. Particularly, an employer is forbidden to include provisions in its labour contracts or internal policies restricting the rights of its female employees to marry and reproduce. If a female employee believes her right to marry or give birth has been violated, she may bring a case before the court and even seek compensation.

## 3. PROTECTIONS AGAINST HARASSMENT

Harassment in China is mainly addressed as sexual harassment in legislation. The 2005 PRC Protection of Women's Rights and Interests Law explicitly states that sexual harassment against women is banned and victims are entitled to complain to the employer or the relevant authorities.

The Special Rules on the Labour Protection of Female Employees issued by the State Council in 2012, further provide that employers shall prevent and prohibit the sexual harassment of female employees in their workplaces. However, neither of these two laws includes a clear definition of "sexual harassment" nor do they contain any specific obligations for employers to prevent and prohibit sexual harassment.

The PRC Civil Code, effective from the beginning of 2021, prescribes that both men and women are under the protection against sexual harassment and employers are obligated to take reasonable precautions, handle complaints, investigate and discipline, and prevent sexual harassment, conducted by exploiting authority or subordinate relationships or by other means. The victims of sexual harassment may file a claim against the offender demanding an apology, moral damages, or other civil remedies. In the latest development on anti-sexual-harassment rules, the PRC Civil Code also describes sexual harassment as actions that are against the will of another (or others) and can be conveyed via language, words, photos, physical movement or by other means.

In 2008, a human resource manager in Chengdu was sentenced to five months' criminal detention for harassment of a female employee. This was the first sexual harassment case where the offender

received criminal sanctions. Compared with many other countries, the anti-harassment legislation in China is rather nominal and in practice, it is believed that very few remedies are ultimately awarded to most harassment victims. In view of this, the legal practitioners in China have long urged for the establishment of legal system with a more comprehensive anti-sexual-harassment protection.

## 4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Under the PRC Protection of Disabled People Law, employers shall provide disabled employees with appropriate working conditions and labour protection, and make appropriate modifications to the working place, equipment and living facilities.

## 5. REMEDIES

Currently in China, employment discrimination could be litigated according to PRC Labour Law, Employment Promotion Law and Tort Liability Law. One discrimination case in 2017, the company put an employee on paid leave due to the fact that the employee was diagnosed as infected by HIV and the company was ordered by the court to allow the employee to resume working in his original position. Still, employment discrimination cases are rare in China because, under current legislation, it is difficult to adduce evidence and there are no comprehensive remedies for employment discrimination violations.

## 6. OTHER REQUIREMENTS

The PRC laws and regulations on employment discrimination do not specifically prescribe any detailed restriction in respects of quotas, diversity or affirmative action. But employers in China are in fact encouraged to employ a certain proportion of disabled employees and provide them with appropriate types of work and positions. Where the employer fails to employ enough disabled employees at a certain proportion of the whole staff (e.g. 1.5% in Shanghai) as required by the local

government, such employer shall be obligated to contribute to the Disabled Person Employment Security Fund (the "Fund") on an annual basis. The Fund is established and committed to improving employment opportunities for disabled individuals and protect their legitimate interests in dealings with different employers. In practice, from an economic perspective, large companies usually choose to retain a satisfactory percentage of disabled employees, so that the company will be exempt from contributions to the Fund.

In December 2019, the National Development and Reform Commission, together with five other central governmental departments, released the Overall Plan for Refining the Disabled Person Employment Security Fund and Facilitating the Employment of the Disabled (the "Plan"). The Plan expressly stipulates that, as from 1 January 2020, employers with no more than 30 employees are exempt from contributions to the Fund. Following the Plan, various provincial and municipal governments updated the calculation formula relating to an employer's contribution to the Fund. Take Shanghai as an example, two different calculation formulas have been released and will be applied based on the proportion of disabled employees:

- Employers whose disabled employees account for 1% or more of the total staff –  
The annual contribution amount for the Fund = (1.5% - Ratio of disabled employees) × the sum of the employer's social insurance contribution base of last year × 50%;
- Employers whose disabled employees account for less than 1% of the total staff –  
The annual contribution amount for the Fund = (1.5% - Ratio of disabled employees) × the sum of the employer's social insurance contribution base of last year × 90%.

In addition, pursuant to the PRC Regional Autonomy Law, employers in national autonomous regions are expected to give priority to recruiting candidates with minority ethnicity.

# VI. PAY EQUITY LAWS

## 1. EXTENT OF PROTECTION

General provisions on the principle of “equal pay for equal work” exist in different PRC laws. The PRC Constitution provides that the state shall protect the rights and interests of women, implement equal pay for equal work by men and women, and train and select female officials. The PRC Labour Law also prescribes that wages shall be distributed according to contribution and equal pay for equal work shall be implemented.

The PRC Labour Contract Law specifically prescribes the equal pay for equal work under the context of a labour dispatchment relationship, according to which, dispatched employees shall be entitled to receive the same pay as employees directly hired and working in the same positions. In addition, the same labour remuneration system shall be used for the dispatched employees and directly-hired employees, based on the principle of equal pay for equal work.

In some areas in China, the people’s courts have issued judicial opinions that provide further details to guide the hearings in cases involving equal pay. According to the judicial opinions issued by the Shanghai High People’s Court, “equal work” cannot be simply determined based on the employees working in the same position, but rather the court should comprehensively consider the factors, such as employees’ work experience, work skills, work enthusiasm and other special circumstances, and employers are allowed to pay employees working in the same position according to different remuneration standards based on these factors.

## 2. REMEDIES

An employee may challenge equal pay practices by filing labour arbitration/litigation against the employer; the available remedy for such claims is to force the employer to make up the difference in salary. In addition to the judicial proceedings, employees may also apply to the trade union and

request mediation for resolving the dispute with the employer regarding salary standards.

## 3. ENFORCEMENT/ LITIGATION

In view of the judicial practice in China, most cases involving a claim seeking to remedy salary differences based on the principle of “equal pay for equal work” have not, generally, been supported by the courts, as it is extremely difficult for employees to prove that the employer has violated the principle of “equal pay for equal work”.

An employer usually defends and justifies certain employees, who are paid higher wages despite working in the same position as the (employee) petitioner, by pointing out their superior education, work experience, work skills, performance, etc. In addition, employers in China are not obliged to release information regarding an employee’s salary, which functions as a practical barrier that prevents employees from initiating a claim based on equal pay.

## 4. OTHER REQUIREMENTS

Except for the provisions mentioned above, there are no other rules in the current PRC legal scheme that would compel employers to take any positive action on equal pay.

# VII. SOCIAL MEDIA AND DATA PRIVACY

## 1. RESTRICTIONS IN THE WORKPLACE

Employers in China may impose restrictions on employees' electronic communications. The restrictive requirements are usually phrased as i) the electronic communication systems including the computers, Internet systems, telephone, voice mail and email systems provided to employees by the employer, shall belong to the employer and only be used for work-related purposes; and ii) the employees shall not have a legitimate expectation of privacy protection in regard to the said electronic systems. The aforementioned restrictive requirements are often documented in the employer's internal policies and become binding on the employees after undergoing the due procedures.

### A. CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Under PRC Labour Contract Law, the employer could formulate its internal policies in accordance with law. If such policies involve the matters such as working hours, work discipline, etc., which have a direct impact on employees' immediate rights and interests, the said policies shall be discussed by the employee representative congress or all employees, and then determined by the employer after consultation with the labour union or employee representatives (the "Democratic Procedures").

Therefore, if the employer's restriction on employees' use of electronic communications is a part of its internal policies, which have undergone the said Democratic Procedures and have been announced to all employees, or informed to a specific employee, or is incorporated in the

employee's employment contract, it could be valid and enforceable.

As employees' electronic communications may include personal information that can be identified under the PRC Civil Code, the employer shall also be aware of observing the PRC Civil Code when processing such information.

## 2. EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

Similar to the restrictions on employees' usage of electronic communications, an employer may also formulate its social media policy to require its employees to refrain from making disparaging comments about the employer. The social media policy also needs to undergo the Democratic Procedures before it can (legally) be enforced.

In a recent case decided by the Beijing No. 3 Intermediate Court, the employee circulated multiple articles on the Internet about the employer. As a result, the employer terminated the employee for breaching the non-disparagement obligation as prescribed in the employee handbook. The Court determined that the employee's online articles were derogatory and aggressive and therefore it was legal for the employer to terminate the employment relationship, pursuant to its employee handbook.

However, the nature of the non-disparagement obligation conflicts with an employee's freedom

of speech, to a certain extent. Sometimes, it is also difficult to objectively determine whether or not the employee's words are disparaging to the employer. Thus, employers in China are often advised to be cautious when disciplining employees for violating their non-disparagement obligation.

Regarding the confidential information, pursuant to PRC Labour Contract Law, confidentiality obligation could be agreed upon between the employer and employee in the employment contract. If the employee has divulged confidential information to any third party, the employer could claim any damage incurred thereof against the employee. In practice, for more effective regulation purposes, employers may specify the restrictions regarding employee's use of social media and not divulging confidential information in their internal policies (e.g. explicitly stated in the employee handbook that employees are not allowed to comment on any affairs related to the employer in a public nature or on their own social media). The employer may, in accordance with internal policies, impose disciplinary measures on the employees if they use social media to disparage the employer or divulge confidential information.

# VIII. TERMINATION OF EMPLOYMENT CONTRACTS

## 1. GROUNDS FOR TERMINATION

PRC labour law generally favours employees and therefore contains many statutory provisions on termination of employment contracts that protect employees' rights and interests. The statutory grounds for termination are:

- termination by mutual agreement;
- termination by employee;
- termination by employer;
- automatic termination.

### A. TERMINATION BY MUTUAL AGREEMENT

Employers and employees may terminate their employment contracts at any time upon mutual agreement. Termination by mutual agreement is often used by employers to encourage employees to leave, while reducing the risk of being sued for illegal termination.

### B. TERMINATION BY THE EMPLOYEE

It is usual for employees to voluntarily terminate their employment. Employees may terminate their employment by giving their employers 30 days' prior written notice (or three days' notice if the employee is still within the probationary period). Where the employer is at fault according to the law, such as failing to provide labour protection or labour conditions pursuant to the provisions of the employment contract or failing to promptly pay labour remuneration in full, the employee is entitled to immediately terminate the employment by giving the employer notice. Where an employer uses means such as violence, threats or unauthorised detention to coerce an employee into working for the

employer, gives orders in violation of rules or forces an employee to engage in risky work that endangers the employee's personal safety, the employee may immediately terminate the employment without informing the employer in advance.

### C. TERMINATION BY THE EMPLOYER

PRC labour law only permits an employer to immediately and unilaterally terminate an employment contract when the employee commits a misconduct listed in Article 39 of the PRC Labour Contract Law. An employer may also terminate an employee with either 30 days' prior written notice or a month's salary in lieu of notice, under the circumstances described in Article 40 of the PRC Labour Contract Law. An employer may also terminate an employee if it satisfies the conditions for reduction in force and completes the required procedures contained in applicable employment laws.

### D. AUTOMATIC TERMINATION

In any of the following circumstances, the employment contract should terminate automatically, unless otherwise provided by law:

- the term of the employment contract expires;
- the employee reaches the statutory retirement age or starts to enjoy retirement benefits;
- the employee passes away, or is declared dead or lost by the people's court;
- the employer is declared bankrupt under the law;
- the employer's business license is revoked or the employer is ordered to close down or de-register, or decides to liquidate in advance; or
- other circumstances in which the employment contract should terminate according to the laws or administrative regulations.

Labour arbitrators and courts in China interpret these statutory termination provisions as exhaustive. In other words, employers cannot add any additional conditions for termination in its employment contract and terminate its employees based on such additional conditions. However, the employer may reasonably define serious misconduct in its employee handbook (also known as a staff handbook). Employees who commit any such serious misconduct will be deemed as materially violating the internal rules of the employer, which constitutes one of the statutory termination grounds.

## 2. COLLECTIVE DISMISSALS

Collective dismissals usually take place in the context of reduction in force, which include the following circumstances:

- the employer is restructuring pursuant to the Enterprise Bankruptcy Law;
- the employer is experiencing serious difficulties in production and/or business operations;
- the employer switches production, introduces a major technological innovation or revises its business method, and, after amendment of employment contracts, still needs to reduce its workforce; or
- other objective economic situations on which the employment contract is based, have changed considerably and renders the employer unable to perform the employment contract.

Under the PRC Labour Contract Law, if an employer intends to reduce its workforce by 20 persons or more or by a number that is fewer than 20 but accounts for 10% or more of its total number of employees for the reason mentioned above, the employer must explain the situation to its trade union or all of its staff 30 days in advance. The employer must also seek the opinion of the trade union or its employees and submit a redundancy report to the labour administrative authorities, which will accept the report for 15 days, without objection. Only then may the employer implement the redundancy.

Also, when reducing its workforce, an employer is required to give priority to retaining the following employees:

- those who have fixed-term employment contracts with a relatively long term;

- those who have open-ended employment contracts; or
- those who are the sole income earner for their families and must support elderly or minors.

Furthermore, the following employees are protected from reduction in force:

- those who are engaged in work involving occupational disease or hazards, without having undergone a pre-departure occupational health examination, or who are suspected of having contracted an occupational disease and are being diagnosed or under medical observation;
- those who have been confirmed as having lost or partially lost their capacity to work due to an occupational disease or a work-related injury sustained with the employer;
- those who have contracted an illness or sustained a non-work-related injury, and the statutory medical treatment period has not expired;
- female employees in their pregnancy, maternity leave or breastfeeding period; and
- those who have been working continuously for the employer for not less than 15 years and are less than 5 years away from the statutory retirement age.

Even if a redundancy proposal has been reported to the labour department and the employer proceeds to terminate its employees, such terminations may still be reversed by a labour arbitration commission or a court. One common reason for such reversal is that the employer improperly terminates an employee who should have been specially protected or fails to give priority to retaining the three kinds of employees discussed above. In order to avoid such mistakes, the employer needs to carefully check and investigate its employees' situations before implementing the redundancy plan, which may be not easy without support of legal counsel. It may be especially difficult to learn which employees are sole income earners and have the elderly or minors to support.

## 3. INDIVIDUAL DISMISSALS

As mentioned above, an employer may unilaterally terminate an employment contract immediately when the worker commits any of the following types of employee misconduct contained in Article 39 of the Labour Contract Law:

- the employee fails to satisfy the recruitment conditions during the probationary period;
- the employee seriously violates the labour disciplines or the employer's rules and regulations;
- the employee causes serious damage to the interests of the employer due to his or her serious dereliction, or his or her engagement in malpractice for personal gain;
- the employee has established employment relationship with another employer, which materially affects the completion of his or her tasks with the original employer, or the employee refuses to rectify per the employer's request;
- the employment contract is invalid because the employee used means such as deception or coercion, or took advantage of the employer's difficulties to cause the employer to conclude the contract or to make an amendment thereto, which is contrary to the employer's true intent;
- the employee is held criminally liable under the law.

Furthermore, the employer may also terminate an employment contract by giving the employee 30 days' prior written notice or one month's salary in lieu of notice under any of the following circumstances described in Article 40 of the Labour Contract Law:

- the employee, after exhausting the statutory medical treatment for an illness or non-work-related injury, remains unable to perform his or her original job duties, and is also unfit for another job assigned by the employer;
- the employee is incompetent in fulfilling his or her duties, and remains so after undergoing further training or an adjustment of his or her position;
- the employment contract cannot be performed due to major changes of the objective circumstances under which the contract was originally concluded, and the employer and the employee fail to reach agreement on modification of the contract after mutual consultation.

#### A. IS SEVERANCE PAY REQUIRED?

Under the Labour Contract Law, for mutual terminations proposed by the employer, unilateral terminations by the employer via notice under the three statutory circumstances, redundancy terminations for economic reasons, unilateral

terminations by the employee for the employer's fault or constructive terminations due to the employer's reasons, the employer is required to pay severance based on the employee's years of service. Severance is calculated at a rate of one month's salary (the "Average Monthly Salary") for each full year of service. Service periods greater than or equal to six months are rounded up to a full year, and periods fewer than six months are considered half-years (the employer would owe a half month's salary). The Average Monthly Salary means the average monthly wage of the employee over the last 12 months prior to his or her termination date. If the employee's Average Monthly Salary is more than three times the local average monthly salary, according to the local government, severance will be calculated at three times this local average monthly salary. In other words, the Average Monthly Salary for severance calculations is capped at three times (3x) the local average monthly salary and when this cap is reached, the compensable years for severance calculation shall not exceed 12 years, pursuant to the Labour Contract Law.

## 4. SEPARATION AGREEMENTS

### A. IS A SEPARATION AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

A separation agreement is required in the event of mutual termination. As mentioned above, termination by mutual agreement is often used by employers to reduce the risk of being sued for wrongful termination. Therefore, when the employer decides to terminate an employee, a separation agreement would be considered a best practice.

### B. WHAT ARE THE STANDARD PROVISIONS OF A SEPARATION AGREEMENT?

The law does not specify the standard provisions in a separation agreement. However, in practice a separation agreement for mutual termination typically includes the last working day, severance amount and payment date, last month salary payment, payment of social insurance and housing

reserve fund, the employee's obligations to hand over work and return the employer's properties, waiver and release, confidentiality, etc.

### C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

According to PRC Labour Contract Law, if the employee has been working with the employer for more than 15 years and it is less than 5 years for him or her to reach the statutory retirement age, the employer shall not lay him or her off for economic reasons or unilaterally terminate his or her employment contract, unless the employee's behaviour falls within the types of misconduct detailed in Article 39 of the Labour Contract Law. However, in the event of mutual termination, the employer is also able to reach a separation agreement with the aged employees. Due to the legal protection afforded to aged employees, the employer may need to pay ex-gratia severance in addition to the mandatory severance provided in the Labour Contract Law, as an incentive for the employee to sign the separation agreement.

### D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

If the employer and the employee have an agreement on the post-employment non-competition obligation, the separation agreement shall have a clause to specify whether or not the employer releases the employee from the post-employment non-competition obligation. In addition, the separation agreement may include provisions about non-solicitation, non-disparagement, non-interference, etc. when necessary, especially for senior employees.

## 5. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

Employees may initiate labour arbitrations in response to any unilateral termination by their employers. Either the employee or employer may appeal a labour arbitration's decision to the court

if dissatisfied with its decision, unless otherwise prescribed by law. During the labour arbitration or litigation, the employer must provide solid evidence to support the termination and assume the burden of proof. If the unilateral termination by the employer is finally judged as wrongful, the employee may request the employer to continue to perform the employment contract (i.e. reinstatement of employment) and provide back pay of salary and social insurance contributions for the period of dispute resolution. Where the employee does not request continued performance of the employment contract or the employment contract cannot be reinstated, the employer must pay the employee compensation equal to double the statutory severance. Due to the high risk of a unilateral termination leading to a labour dispute (arbitration and/or litigation), employers should view unilateral termination as a last resort.

## 6. WHISTLEBLOWER LAWS

The PRC Labour Law explicitly stipulates that if employers unreasonably obstruct the labour administrative authority, relevant authorities or their officials from exercising the right of supervision and inspection, and retaliate against the whistleblower, the labour administrative authority or relevant authorities may impose a fine on the employer.

From the perspective of corporate governance and a company's operational compliance, Chinese legislation has not yet formulated an independent sector of laws to govern the rights and obligations of the whistleblower. Except for the abovementioned provision, a similar concept on whistleblower protection can also be found in the PRC criminal laws and regulations, where criminal liability is to be pursued by the public prosecutor, and the identity of the whistleblower is kept undisclosed for avoidance of potential retaliation against the whistleblower and of impeding any ongoing investigation.

# IX. RESTRICTIVE COVENANTS

## 1. DEFINITION OF RESTRICTIVE COVENANTS

In PRC Labour Contract Law, there is no express definition of restrictive covenants. Nevertheless, restrictive covenants are commonly used in practice. For example, an employment contract and a separation agreement may include an obligation not to violate the conflict of interest policy, confidentiality obligation, non-disparagement obligation, non-solicitation obligation and non-compete obligation.

## 2. TYPES OF RESTRICTIVE COVENANTS

### A. NON-COMPETE CLAUSES

According to PRC Labour Contract Law, an employer and an employee may add a post-termination non-compete clause in a labour contract or confidentiality agreement. Employees who may be subject to non-compete obligation include senior management, senior technical personnel and others who have confidentiality obligations.

The maximum non-competition term is 24 months. During the non-compete period, the employer is obliged to pay compensation to employees for the performance of non-compete obligations after termination of employment, and the employer is entitled to have the employee assume the agreed liabilities for the violation of non-compete obligations.

The regulations and practical rules for post-employment non-competition usually vary by region. However, the Interpretations of the Supreme People's Court on Several Issues Relating to Laws Applicable for Trial of Labour Dispute Cases (IV),

which was promulgated in 2013, enjoys a nationwide legal effect and contains several important rules about non-compete obligations.

The following rules deserve special attention:

- if the compensation for employees abiding by the non-compete obligations is not explicitly stipulated in writing, then the non-compete clause is still binding upon the employees;
- the default standard for the monthly non-compete compensation is 30% of employees' average monthly salary in the last 12 months prior to employment termination, which shall be no lower than the monthly minimum wage announced by the local government;
- if an employer fails to pay such compensation for three months, the employee is entitled to request relief from the non-compete clause; and
- an employer may waive the employee's non-compete obligation during the restricted period and such employer shall pay three additional months of compensation, if so requested by the employee.

### B. NON-SOLICITATION OF CUSTOMERS

Although a non-solicitation obligation is not expressly incorporated into PRC Labour Contract Law, normally in the employment contract or specific non-competition and non-solicitation agreement, the employer will request that during the employment period, and for a certain period of time after termination of the employment relationship, the employee shall not solicit any customer, consultants, agents, representatives, vendors, etc. of the employer or its affiliates.

## C. NON-SOLICITATION OF EMPLOYEES

In addition to the obligation of non-solicitation of customers, non-solicitation of employees is also requested by most employers in practice. For instance, the employer will request that during the employment period and for a certain period of time after termination of the employment relationship, the employee shall not directly or indirectly solicit, induce, recruit or encourage any employees or any other member of the employer to leave their employment.

## 3. ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

If an employer has a non-compete agreement with an employee, but does not want to enforce such agreement, it is advisable for the employer to expressly waive the non-competition duties before the termination of employment. Otherwise, once the employment is terminated, the employer will be obliged to pay the non-competition compensation on a monthly basis, or would need to pay three additional months' non-compete compensation if it intends to rescind the non-compete agreement.

Under PRC Labour Contract Law, the employee can be required to pay liquidated damages to the employer only under two circumstances, one of which is the violation of his or her non-compete obligation. In other words, if the employee has violated his or her non-compete obligation, the employer may require the employee to bear the agreed liabilities, which usually include payment of the liquidated damages, refund of the paid compensation, continued performance of the non-compete obligation and compensation for actual losses suffered by the employer, beyond the amount of liquidated damages.

For non-solicitation obligations, the employer may enforce the relevant clauses in the employment contract, etc. and claim damages for any loss incurred thereof. In non-solicitation cases, employers are usually required to provide factual evidence of the solicitation and the related actual losses.

Where a non-competition or non-solicitation obligation is breached, despite the remedies in the form of economic compensation, it is often quite difficult for judicial bodies to rule on the specific performance of the non-competition or non-solicitation obligation, as such enforcement is believed to conflict, to a certain extent, with personal freedom.

## 4. USE AND LIMITATIONS OF GARDEN LEAVE

The concept of garden leave does not derive from the PRC employment laws and regulations, but it is widely used in daily HR practice in China. Garden leave refers to the period when the employee is relieved from all job duties, maintains his/her employment relationship with the employer and receives normal remuneration. Garden leave is often arranged in the situations where i) the employee is suspected of misconduct and under investigation; or ii) the employer expects the employee to break away with the confidential information or trade secrets, before the employee's departure from the company.

The use of garden leave is unlimited in most cities in China. However, we have seen exceptional cases where the arrangement of garden leave is viewed as a deprivation of the employee's working conditions, which entitles the employee to terminate the employment and claim severance from the employer.

# X. TRANSFER OF UNDERTAKINGS

## 1. EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

Under the Labour Contract Law, when an employer decides major company matters that directly implicate the interests of employees, the employer should discuss such matters with the employee representative congress or its entire staff. It should only make a decision after consulting with the trade union or employee representatives. The consultation procedure is designed to give the trade union and employees a chance to express their opinions, but the employer has the authority to make the final decision.

A transfer of undertaking may include many scenarios, such as mergers and acquisitions. The key issue is whether such transfer will materially affect the interests of some or all employees. Under PRC law, if the transfer only involves a change of shareholders with the employer remaining unchanged, the performance of employment contracts will not be affected. Furthermore, in case of a merger, the original employment contracts may remain valid and the surviving party will continue to recognise and perform the employment contracts. In both of these scenarios, the consultation obligation would not be triggered because the employees' interests are not materially affected (there are different requirements for the restructuring of state-owned enterprises).

Another scenario involves the acquisition of assets, which may be defined by the labour law as a material change in the objective conditions on which the employment contracts were based. Such change would usually result in a shift of employment relationships or redundancies. Accordingly, the acquisition of assets itself would

not trigger the consultation obligation; but if the acquisition of assets results in mass redundancy of employees, then a similar consultation obligation is required to be performed by the employer.

## 2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

### A. EQUITY DEAL

A change of shareholders and a merger would not affect the performance of employment contracts and therefore neither the transferor nor the acquiring party is obliged to pay severance to employees. However, in practice, employees often demand severance and even collectively oppose such transfer, because they misconstrue a change of shareholders as a termination of employment or they worry that their rights and interests will be impaired after the transfer. Therefore, to appease these employees, some acquiring parties may promise that they will not reduce employees' compensation or benefits after the transfer and may even undertake to refrain from collective layoffs for a certain period (such as two years) following the consummation of the transfer of undertaking.

### B. ASSET DEAL

In the event of the acquisition of assets, the acquiring party is not legally obliged to employ the employees of the target company, unless both the acquiring party and the employee agree to establish an employment relationship. If both the acquiring party and the employee agree on the transfer of employment, they may enter into a tri-party agreement together with the transferor to stipulate that the transferor and the employee

will terminate their employment contract and that the transferee and the employee will sign new employment contracts. This may raise the issue of severance. According to the Implementation Rules of PRC Labour Contract Law, the transferor may ask the acquiring party to assume the employees' seniority. In other words, any seniority of transferred employees may be carried over to the acquiring party after the acquisition and no severance is paid until the employee is actually terminated during the employment with the acquiring party. This option for the transferee to carry over the employees' seniority reduces immediate transaction costs for the transferor, and thus it is the more common practice.

When the employment contract between the acquiring party and the employee is finally terminated, the employee may be entitled to receive severance according to law. At that time, the continuous seniority with the transferee and the transferor will be combined together for severance calculation. However, some employees may firmly request severance even when they agree to transfer their employment relationship to the acquiring party. This makes the payment of severance difficult to avoid.

If the employee does not want to transfer to the acquiring party or the acquiring party does not want to hire an employee, the transferor may terminate the employment contract with the employee by a mutual termination agreement. If the employee refuses to sign the mutual termination agreement, the transferor may offer to amend the employment contract for the reason that the objective situation has materially changed and then unilaterally terminate the employment contract, by giving the employee 30 days' prior written notice or one month's salary in lieu of notice, when the parties fail to reach an agreement on the amended employment contract.

# XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## 1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

### A. TRADE UNIONS

In China, all trade unions are under the leadership of the All-China Federation of Trade Unions (“ACFTU”). ACFTU is a national-level organisation that reports directly to the Chinese Communist Party and has branches at the provincial, city and district levels. Technically speaking, an enterprise does not have to take positive action to establish a trade union. However, if its employees request for the establishment of a trade union, the enterprise cannot obstruct the process. In practice, local ACFTU branches have been observed increasingly pressuring enterprises to set up trade unions from the top down.

In the case of Wal-Mart, the ACFTU publicly condemned Wal-Mart for refusing to establish trade unions and threatened to file a lawsuit against Wal-Mart. In 2006, almost 30 Wal-Mart employees requested to have a trade union instated, which led to the formal establishment of a trade union at Wal-Mart.

### B. EMPLOYERS' ORGANISATIONS

The China Enterprise Confederation (originally known as the “China Enterprise Management Association”) and China Enterprise Directors Association (the “CEC/ECDA”) are non-profit national organisations that are registered with and approved by the Ministry of Civil Affairs of the PRC. The government department responsible for

overseeing the CEC/ECDA is the State-owned Assets Supervision and Administration Commission of the State Council. The CEC/ECDA have legal person status and are created to promote reforms within enterprises, improve management within enterprises, act as a liaison between enterprises and governments and protect the legitimate rights and interests of enterprises and entrepreneurs.

CEC is the sole representative from China within the International Organisation of Employers. Currently, most provinces, autonomous regions and municipalities, which are directly under the central government, various national industry departments, industrial cities and tens of thousands of large and medium-sized business have established their own enterprise management associations. The number of enterprises with such management associations has reached hundreds of thousands. These various associations comprise an interconnected national system of management associations.

## 2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

The fundamental rights and responsibility of trade unions is to safeguard the legal rights and interests of employees. Specifically, trade unions should i) harmonise employment relationships and safeguard the rights and interests of employees by conducting equal negotiations for employees and forming collective contracts; ii) organise and coordinate employee participation in democratic decision making, democratic management and democratic supervision according to relevant law and via the employee representative congress or other channels; and iii) maintain close contact with employees, listen to their views and demands and

forward the same to the management of employers, exhibit concern for their daily lives, help them resolve difficulties and serve them wholeheartedly.

An enterprise may form collective contracts with its trade union (or its elected employee representatives if the enterprise has no trade union). If a union or an elected employee representative submits a written request to engage in collective bargaining, the employer generally cannot refuse without just cause.

Collective contracts are binding on the employer and all of its employees. Accordingly, individual employment contracts cannot include standards that are lower than those set forth in the collective contracts. However, it is possible to have terms in individual employment contracts that are more favourable to the employees than what the collective contracts provide. If an employer violates the collective contract and infringes upon the employee's interests, the trade union may insist that the employer should bear the burden of liability. If there is a dispute arising from performance of the collective contract and it cannot be resolved through negotiation, the trade union may file for arbitration and litigation in accordance with the law.

### 3. TYPES OF REPRESENTATION

#### A. EMPLOYEE CONGRESS / EMPLOYEE REPRESENTATIVES' CONGRESS

The trade union is the operating organ of the employee congress and employee representatives' congress (the "EC/ERC") and is responsible for carrying out their routine activities. The EC/ERC are the basic forms in China for enterprises to exercise democratic management, and for employees to exert their rights to participate in democratic management.

In China, state-owned enterprises usually establish a trade union and EC/ERC, and private businesses are also encouraged by the government to establish trade union and EC/ERC. In practice, private businesses, if they would like to have a

trade union, usually establish a trade union and organise the EC/ERC only when necessary. In Shanghai, where an enterprise's total number of employees is fewer than 100, the enterprise usually needs to organise an EC instead of an ERC. Local governments in various regions of China (such as Shanghai and Gansu province) may have different provisions on how to convene and hold the EC/ERC.

When an enterprise creates or revises internal policies or makes other decisions on major matters that directly affect employees' interests such as issues related to remuneration, working hours, rest periods and off days, work safety and health, insurance and welfare, staff training, labour discipline and work quota management, etc. it should discuss such matters with the ERC or all its staff. Employees should be given the opportunity to make proposals and provide their opinions in this process, and the employer should hold fair negotiations with the trade union or employee representatives before finalising any decision. During the implementation of any internal policies or major decisions, the trade union or the employees have the right to raise their concerns with their employer on any inappropriate issues. Such issues will be corrected and addressed through negotiation, but the employers retain the right to make the final decision. Employers should announce or notify their employees of any decisions on internal policies and major matters that directly implicate the interests of employees.

Employee representatives shall be elected through the democratic process for the ERC. The number of employee representatives is determined based on the percentage of total employees, but there should be at least 30, pursuant to the Regulations of Shanghai Municipality on Employee Representatives Congresses.

According to the Regulations of Shanghai Municipality on Employee Representatives Congresses, the voting process of employee representatives shall be held when at least two thirds of the total employees in the electorate (determined by different branches, departments, etc.) are present and the candidate shall at least receive a majority of the votes in the electorate, in order to be the representative. It is also required that employees' representatives shall be composed mainly of grassroots employees and the number of middle and senior management personnel,

usually, shall not be greater than 20% of the total representatives. In addition, the ratio of female representatives shall generally match the ratio of female employees in the company.

## B. GENERAL ASSEMBLY OF UNION MEMBERSHIP / UNION MEMBER REPRESENTATIVE CONGRESS

The general assembly of union membership or the union member representative congress (the “GAUM/UMRC”) is the power and authority of a trade union, which is held once or twice a year. The representatives of the UMRC are democratically elected among union members. Trade unions with members fewer than 100 should convene a GAUM. The functions and powers of the GAUM/UMRC include reviewing and approving work reports and financial reports from trade union committees (the “TUC”) and work reports from finance scrutiny committees (the “FSC”). They are also responsible for electing the members of the TUC and FSC and removing the elected representatives or TUC members.

## C. TRADE UNION COMMITTEE (“TUC”)

TUCs are the permanent body of and answerable to the GAUM/UMRC. Elected by either the GAUM or the UMRC, the TUC should report its work to and subject itself to the supervision of GAUM/UMRC. A trade union with more than 25 members should establish a TUC. A trade union with fewer than 25 union members may establish a TUC by itself, jointly establish a TUC with other trade unions, or elect one person as a union organiser to coordinate union members in the performance of union activities. If a trade union has a large number of female members, a female trade union committee can also be established in addition to the normal TUC. If a trade union has few female members, the TUC can reserve spots for female members to ensure that they are represented.

## D. FINANCE SCRUTINY COMMITTEE (“FSC”)

Trade unions should set up a system of scrutinising and monitoring their budgets, financial accounts

and funds according to independent accounting principles. Unions of all levels should establish FSCs. FSC members are elected by the GAUM/UMRC. The election results should be submitted to the high-level union for approval. The FSC will be responsible for reviewing the expenses and income of the unions. The results of these reviews should be periodically reported to the GAUM/UMRC for monitoring purposes. The GAUM/UMRC has the right to present their views about the use of union funds and, if necessary, implement changes or amendments.

Unions receive their funding from a variety of sources including i) union fees paid by union members; ii) fees allocated to unions by enterprises, public institutions and government authorities, which have established trade unions (they are typically required to set aside 2% of the total employee wages per month to the union); iii) a certain percentage of profits from the union’s enterprise or public institutions; iv) subsidies from the government; and v) other income. Union funds are typically used to serve employees or for union activities.

## E. TRADE UNION PRESIDENT, DEPUTY PRESIDENT AND COMMITTEE MEMBER

The trade union president or deputy president is elected either by the GAUM/UMRC directly or by the TUC. Dismissal of the president or deputy president requires convening the GAUM/UMRC for discussion. The dismissal must be supported by a majority of the GAUM/UMRC members to pass.

Enterprise trade unions with more than 200 employees can appoint a full-time trade union president. The labour contract terms of full-time trade union presidents, deputy presidents or committee members are automatically extended on the date they take office. The length of the extension is equal to the term of office. If a non-full-time trade union president, deputy president or committee member’s residual employment term is shorter than their office term, the employment term will be automatically extended to the expiry date of the office term. These extensions do not apply where the president, deputy president or committee member commits an act of serious

misconduct or reaches the statutory retirement age.

## 4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

According to the Regulations of Shanghai Municipality on Employee Representatives Congresses, employee representatives shall: i) learn and propagate among employees relevant laws, regulations and policies, improve their own qualities, reinforce the ability of participating in democratic management, and performing duties properly; ii) communicate with employees in the electorates, listen to employees' opinions and suggestions, and express employees' wishes and requests; iii) implement ERC resolutions and properly complete all work assigned by the ERC; iv) promptly circulate information about the performance of their duties and their participation in ERC activities, and accept the assessment and supervision by employees; and v) observe the employer's rules and keep the employer's trade secrets confidential.

## 5. EMPLOYEES' REPRESENTATION IN MANAGEMENT

According to PRC Company Law, limited liability companies invested and incorporated by two or more state-owned enterprises or by two or more state-invested entities, shall have employee representatives in their board of directors. For entities solely owned by the state, there shall be an employees' representative appointed as board director. Other limited liability companies or companies limited by shares may opt to have employee representatives in their board of directors. Employees' representatives who sit on the board of directors shall be appointed by company employees via an ERC or EC or other forms of democratic election.

In addition, according to PRC Company Law, the board of supervisors shall include shareholders' representatives and an appropriate number

of employees' representatives; the ratio of employees' representatives shall not be less than one-third, and such ratio shall be stipulated by the articles of association of the company. Employees' representatives sitting on the board of supervisors shall be appointed by company employees via an ERC or EC or other forms of democratic election.

## 6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Apart from the abovementioned employee representative bodies, grassroots Chinese Communist Party ("CCP") federations could also help employees to organise, receive information concerning the employees' appeals and provide assistance to resolve disputes between employers and employees, in order to establish and maintain harmonious employment relationships. According to the CCP Constitution, any employer with more than three CCP members shall establish a grassroots CCP organisation. In addition, PRC Company Law provides that employers shall provide the necessary conditions to facilitate the CCP activities.

# XII. EMPLOYEE BENEFITS

## 1. SOCIAL SECURITY

The Chinese government has advanced the nation's social security systems to include the basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance and maternity insurance to protect the basic rights of citizens. These systems enable participating individuals to obtain assistance from the state (according and subject to certain conditions and procedures) in special circumstances such as when they reach old age, suffer certain illnesses, suffer a work-related injury, become unemployed, undergo maternity, etc. Additionally, employers and employees both participate in a housing provident fund system in accordance with the law.

Generally, employers in China contribute social security premiums and housing provident funds for their employees pursuant to the law. Employees themselves also contribute their own social security premiums and housing provident funds pursuant to the law. Employers typically withhold a portion of their employees' monthly salaries to help them complete their social insurance and housing fund contributions. The employer's obligation to contribute to social security premiums and housing provident funds, cannot be exempted by mutual agreement with employees.

Expatriate employees hired by Chinese employers are also required to participate in the social security system when they complete the employment formalities required by law. However, expatriate employees may be exempt from social security contributions under a treaty or convention. Expatriate employees are not required to participate in the housing fund system. However, those with permanent resident status may choose to contribute to the housing funds at their own discretion.

## 2. HEALTHCARE AND INSURANCES

### A. BASIC PENSION INSURANCE

Employers and employees must both contribute basic pension insurance premiums pursuant to national and local law. Where an employee has contributed basic pension insurance for 15 cumulative years and has reached the statutory retirement age, he or she may collect pension on a monthly basis. The exact amount of such pension is determined according to factors such as his or her cumulative contribution period, his or her wage, the average monthly wage of employees in his or her locality, the total amount in his or her pension account, the average life expectancy of the urban population, etc.

### B. BASIC MEDICAL INSURANCE

Employers and employees both must contribute basic medical insurance premiums pursuant to national and local law. The costs of employees' prescription drugs, medical treatments, medical services and use of other healthcare facilities for emergencies or rescue operations will be covered by the basic medical insurance fund pursuant to national and local laws, as long as such costs are consistent with basic medical insurance policies and incurred at approved medical institutions.

### C. WORK-RELATED INJURY INSURANCE

Employers are required to contribute work-related injury insurance premiums according to the combined wages of all staff and a fee rate determined by the social security agency. Employees do not need to contribute to work-related injury insurance. Employees who suffer an accidental injury or contract an occupational illness in the course of work will be entitled to work-related

injury insurance benefits if the injury or illness is verified as work related. If these employees are also evaluated and determined to have a disability grade, they will be entitled to disability benefits.

## D. UNEMPLOYMENT INSURANCE

Employers and employees must both contribute unemployment insurance premiums pursuant to national and local law. An unemployed person who has contributed unemployment insurance premiums for at least one year before becoming unemployed, and has completed unemployment registration, may collect unemployment insurance benefits from the unemployment insurance fund.

## E. MATERNITY INSURANCE

Employers are required to contribute maternity insurance premiums pursuant to national and local law. Employees are not required to make such contributions. Maternity insurance benefits cover the medical costs for childbirth and provide a maternity allowance. Most cities in China have combined the maternity insurance with the basic medical insurance for unified collection. Each female employee is entitled to a 98-day maternity leave for childbirth, including 15 days that may be taken before childbirth. The maternity leave may also be prolonged according to local regulations.

For example, the local regulation in Shanghai prolongs the maternity leave to 128 days in total. In cases of difficult birth, the maternity leave may be extended for an additional 15 days. In the event of multiple births (such as twins), maternity leave will be extended by 15 days for each additional childbirth. In the event that a female employee undergoes an abortion within the first four months of pregnancy, she will be entitled to a 14-day maternity leave. In the event that a female employee undergoes an abortion after the first four months of pregnancy, she will be entitled to a 42-day maternity leave.

## F. HOUSING FUND

Employers and employees both must contribute to the housing provident fund pursuant to national and local law. The housing provident fund is used for employees to purchase, construct, renovate

or rebuild personal dwellings. National labour legislation gives local governments broad flexibility in regulating the social insurance and housing fund and the precise contribution requirements may vary across different provinces or regions in China. Therefore, it is important to confirm the exact contribution rates required by local governments for social security and housing funds in the place where the employee's social insurance and housing fund are registered.

## G. SUPPLEMENTARY COMMERCIAL INSURANCE

Apart from the abovementioned mandatory insurances, employers are free to purchase supplementary commercial insurance for their employees at their own discretion. For example, some employers provide a comprehensive health insurance plan (covering medical and dental expenses as well as accidental death and severe bodily harm) for employees and their dependents. However, this is entirely optional.

# 3. REQUIRED LEAVE

## A. HOLIDAYS AND ANNUAL LEAVE

In the beginning of each year, the State Council will announce a holiday schedule which indicates 11 national holidays, including 1 day for the New Year Holiday, 3 days for the Chinese New Year, 1 day for Tomb Sweeping Day, 1 day for Labour Day, 1 day for Dragon Boat Day, 1 day for Mid-Autumn Day and 3 days of leave for National Day.

According to the Regulations on Paid Annual Leave of Employees, employees who have worked between one and ten cumulative years are entitled to five days of annual leave. Employees who have worked between ten and twenty cumulative years are entitled to ten days of annual leave. Employees who have worked for more than twenty cumulative years are entitled to fifteen days of annual leave. If the employer fails to arrange annual leave for employees due to business reasons, the employer must pay an encashment to employees for such accrued, but untaken annual leave. The encashment value should total 300% of an employee's daily normal salary for each accrued, but untaken day

of annual leave (100% has been included in the monthly salary and therefore only 200% shall be paid additionally).

## B. MATERNITY AND PARENTAL LEAVE

On 27 December 2015, the PRC Standing Committee of the National People's Congress issued the new Population and Family Planning Law of the People's Republic of China (the "Family Planning Law") which formally abandoned China's decades-long one-child policy and allows all couples to have two children. Late marriage and late childbearing are no longer encouraged under the Family Planning Law, and maternity leave may be extended by local rules.

## C. SICKNESS AND DISABILITY LEAVE

During an employee's sick leave period, his or her salary will be determined and paid based on the standard of sick pay and sick benefits during the medical treatment period according to state laws and local regulations. If an employee suffers from a non-work-related illness or injury and needs to stop working as a result of medical treatment, a medical treatment period between 3 and 24 months will be granted according to local regulations in the place where the employee works, and based on the employee's years of service with the current employer and all previous employers (e.g. the employee's entire employment history). If an employee cannot perform his or her original work or other work arranged by the employer after his or her statutory medical treatment period expires, the employer has the right to terminate the employment contract and pay severance upon giving the employee a 30-days' advance written notice or one month's payment in lieu of notice. In addition, subject to local regulations in different cities, the employer may pay medical treatment subsidies equivalent to 6 to 12 months of his or her salary based on the seriousness of his or her sickness.

Disability could be caused by a non-work-related injury or a work-related injury. If the employee's disability is caused by a non-work-related injury, the employee could enjoy the same benefits (sick pay, medical leave and medical treatment subsidies) as in the event of illness. If an employee

needs to suspend his or her work in order to receive medical treatment for a work-related injury or an occupational disease, his or her original wage and welfare benefits shall remain unchanged during the suspension period. The suspension period is generally no longer than 12 months. Where the work-related injury is severe or the circumstance is exceptional, after being assessed by the local work capability assessment committee, the said suspension period could be extended by no longer than 12 months. After the disability grade is determined by the local work capability assessment committee, the employee shall not be entitled to his or her original wage and welfare benefits, but can enjoy the following disability benefits:

- If an employee is assessed as having a disability between grade one and grade four, the labour relationship shall remain unchanged, and the employee shall withdraw from his or post and enjoy i) a lump sum disability allowance paid by the work-related injury insurance funds according to his or her disability grade; and ii) a monthly disability subsidy paid by the work-related injury insurance funds according to his or her disability grade.
- If an employee is assessed as having a disability between grade five and grade six, the employee shall a) enjoy a lump sum disability allowance paid by the work-related injury insurance funds according to his or her disability grade; b) retain the employment relationship; and c) enjoy a monthly disability subsidy paid by the employer according to his or her disability grade, if it is difficult for the employer to arrange work for him or her, which shall be no lower than the local minimum salary. If the employee decides to terminate the employment relationship, he or she shall enjoy a lump sum work-related injury medical allowance paid by the work-related injury insurance funds and a lump sum disability employment allowance paid by the employer based on the standards prescribed by the local governments.
- If an employee is assessed as having a disability between grade seven and grade ten, the employee shall enjoy i) a lump sum disability allowance paid by the work-related injury insurance funds according to his or her disability grade; ii) if the employment contract expires or the employee decides to terminate the employment contract, a lump sum work-related injury medical allowance paid by the work-related injury insurance funds;

- and iii) a lump sum disability employment allowance paid by the employer based on the standards prescribed by the local governments.
- If an employee with a work-related injury has been assessed as having a disability grade and confirmed by the work capability assessment committee as requiring daily life care, expenses incurred for daily life care shall be paid monthly by the work-related injury insurance funds.

## 4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Currently in China, mandatory and typically provided pensions only include the basic pension insurance. Recently, the government decided to reduce the employer's pension insurance contribution rate to lower the cost of private businesses. The Circular of the General Office of the State Council on the Comprehensive Plan for Reducing Social Insurance Contribution Rate requires that, starting from 1 May 2019, if the employer's contribution rate for the basic pension insurance in any province (city, district) is higher than 16%, it can be reduced to 16%.

## 5. ANY OTHER REQUIRED OR TYPICALLY PROVIDED BENEFITS

Marriage leave is stipulated by the local population and family planning regulation and its length ranges from 3 to 30 days, in different cities of China. When a member of the employee's immediate family (parents, spouse or children) passes away, the employee may be given 1 to 3 days of compassionate leave with the approval of the employer, under specific circumstances. Pursuant to the PRC Labour Law, marriage leave and compassionate leave shall both be considered as paid leaves.

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# ZHONG LUN LAW FIRM

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*This memorandum has been provided by:*

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