

EMPLOYMENT LAW OVERVIEW

CHINA 2019-2020

Zhong Lun Law Firm / Proud Member of L&E GLOBAL



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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 labor 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 labor law.

1. INTRODUCTION

Labor law generally refers to the rules and regulations governing employment relationships and other social relationships that are closely connected with employment relationships. Chinese labor law applies to all businesses, individual economic organizations, private non-profit entities, etc. in the People's Republic of China (the "PRC") and the individuals who have employment relationships with such entities. Employment relationships between government offices, institutions and social groups and their employees are also governed by Chinese labor 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.

2. KEY POINTS

- In China, labor relationships may be reinstated even after termination – employers may be forced to re-hire terminated employees.
- Chinese labor law is based on contract, and offer letters or oral commitments are often legally insufficient to establish labor relationships.
- Chinese severance pay practices are unique, which can result in a senior manager's severance being lower than a junior employee's.
- Chinese employers cannot require employees to pay liquidated damages except in limited situations involving non-competition and service-period duties.
- Labor strikes are not permitted under the law, but employees still engage in strikes through self-organization; these strikes are typically unsupported by trade unions, which may even actively resist such efforts by employees.

3. LEGAL FRAMEWORK

Chinese labor 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 labor laws are:

- the Chinese Constitution;
- national laws, in particular the Labor Law and the Labor 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;
- local regulations and decrees of provinces, autonomous regions, municipalities directly under the central government and other large cities; and

- judicial interpretations released by the Supreme People's Court and the Supreme People's Procuratorate.

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 labor cases.

4. NEW DEVELOPMENTS

In 2018 and early 2019, various Chinese governmental departments have enacted new regulations in a wide range of aspects. The following are new developments and regulations focused on employment law implementation that may deserve special attention by entities doing business in China.

A. PERSONAL INFORMATION PROTECTION

With the development of big data industry, personal information leakage is on the rise. However, China has not specifically legislated personal information protection, rather only includes some relevant provisions, standards and methods in some guidelines and legal documents with relatively lower authority. At the 2018 annual meeting of the National People's Congress and the Chinese People's Political Consultative Conference (the "NPC" and the "CPPCC"), several NPC representatives and CPPCC members proposed to speed up legislation on personal information protection to specify the basic principles and norms for the collection, utilization and processing of personal information, clarify the legal liability for misuse of personal information, and provide remedies and prescribe procedures for personal information protection.

B. SOCIAL INSURANCE

The General Office of the Central Committee of the Communist Party of China and the General Office of the State Council issued the National Tax and Local Tax Collection and Management System Reform Plan (the "Reform Plan"). The Reform Plan confirms that from beginning of the year 2019, basic pension insurance premiums, basic medical insurance premiums, unemployment insurance premiums, work-related injury insurance premiums, and maternity insurance premiums

will gradually start to be uniformly collected by the tax authorities. Moreover, the Reform Plan proposes to merge national tax and local tax authorities first, and the merged tax authorities will undertake the duty of collecting social insurance premiums and governmental non-taxable revenue. Upon completion of the Reform Plan, it shall be reasonably expected that a stricter supervision and regulation will be imposed on company's fulfillment of the statutory obligation in respect of the social insurance contribution for employees.

C. WORK PERMIT

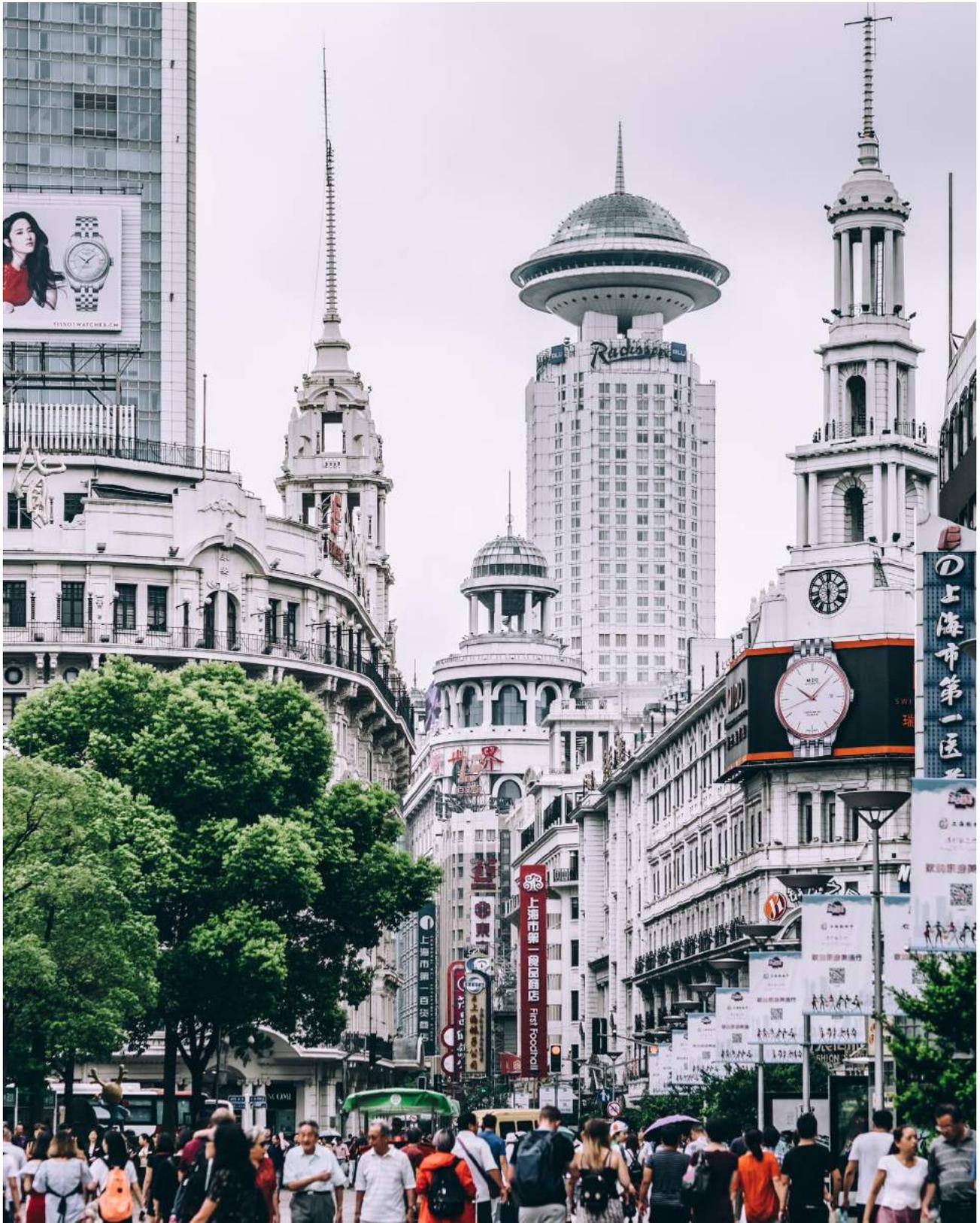
The State Council released the Decision on the Cancellation of Several Administrative Licensing, resolving to abolish the requirement for Taiwan, Hong Kong and Macao residents to attain a permit for work in Mainland China which was originally subject to approval and regulation by human resources and social security departments. Therefore, residents from Taiwan, Hong Kong and Macao will no longer need to apply for a work permit or comply with other related employment registration procedures in Mainland China. After cancellation of the above administrative approval, human resources and social security departments will promulgate supporting polices and regulations on employment service, social security, unemployment registration, labor right protection for resident from Taiwan, Hong Kong and Macao in order to strengthen supervision both in the course and afterwards.

D. INDIVIDUAL INCOME TAX

The National People's Congress has promulgated the new PRC Individual Income Tax with a series of revisions. Among the new revisions, it is noticeable that foreign citizens who have stayed in Mainland China for more than 183 days during one calendar year will be deemed a resident taxpayer and obligated to report their incomes sourced from both domestically within China and internationally to the Chinese tax authorities.

The new PRC Individual Income Tax Law also prescribed that special expenses incurred by employees are additionally deductible from their taxable income. To be specific, the expenses incurred by the employees for the following items can be deducted at a capped or fixed amount from

employees' taxable income: children's education, continuing education, medical treatment for serious illness, house rental, repayment of housing loan and support of the elder parents.



II. PRE-EMPLOYMENT CONSIDERATIONS

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

The PRC labor laws and regulations will not be applicable to the employment relationship established between a foreign-registered employer and its employees. But, 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 foreigner employer is only allowed to hire employees through local HR agent in China.

2. LIMITATIONS ON BACKGROUND CHECKS

According to PRC Labor Contract Law, the 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 litigated pursuant to PRC Tort Law and other applicable laws. In addition, according to the Decision of the Standing Committee of the National People's Congress on Strengthening Network Information Protection (the "Decision"), when collecting or using employees' personal electronic information obtained via background checks or application/interview questions, the employer shall follow the principle of lawfulness, properness and necessity, and explicitly disclose the purposes, methods and scopes for collection and use of the information. Furthermore, the Decision provides that the employer must keep in strict confidence the personal electronic information of citizens collected in their business activities. They shall not divulge, distort or damage such information, or sell or illegally provide the same to others.

III. EMPLOYMENT CONTRACTS

1. MINIMUM REQUIREMENTS

Under the Labor Contract Law, a written employment contract is necessary to establish an employment relationship. However, a part-time employee, who works no more than 24 cumulative hours per week and four average hours 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 within this grace period or else it will owe double wages to the employee for each month of employment after this grace period without a written contract. 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 Labor 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.

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 Labor 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 must offer the employee an open-ended contract. 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 poor, 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 labor 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 between three months and one year, the probationary period may not exceed one month;
- where the term of an employment contract is between one and 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.

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 the 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 certain circumstances:

- the employee, after undergoing a 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 in performing the duties of his or her position and remains so after undergoing training or an adjustment of his or her position;
- a major change in the objective circumstances relied upon at the time of conclusion of the employment contract 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 and provide relevant information regarding the employer's production and operation status.

IV. WORKING CONDITIONS

1. MINIMUM WORKING CONDITIONS

An employer should provide an employee with a clean and safe working environment in compliance with all applicable laws and regulations regarding safety and hygiene. The conditions should also contain all required protections against any occupational hazards involved in the employee's position. An employer must also provide an employee with necessary labor protection equipment in accordance with relevant law. Moreover, employees whose positions involve handling or coming into contact with hazardous materials must undergo regular occupational health checks.

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 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 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 such amounts from any payments and pay such amounts to the tax authority on behalf of their employees.

3. MAXIMUM WORKING WEEK

The maximum standard working hours in China are eight hours per day and 40 hours per week for employees working under the standard working hour system. An employer must ensure that every employee has at least one rest day each week.

4. OVERTIME

In some circumstances, an employer may extend the working hours of an employee after consulting with the trade union and the employee concerned. Specifically, hours can be extended to accommodate changes in production or business operations. Generally however, 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 does not exceed 36 hours.

Employers are required to pay increased wages to employees in the following circumstances:

- 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 (where the rest day cannot be postponed or deferred to another date);
- 300% of an employee's normal wage for working on an official public holiday.

Employees working under the flexible working hour system are not entitled to overtime 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 Labor Law, an employer must establish a sound labor safety and hygiene system and strictly implement State rules and standards of labor safety and hygiene, conduct labor safety and hygiene education among its employees, prevent accidents and reduce occupational hazards. The employer must also provide its employees with labor safety and hygiene conditions and necessary articles for labor protection in conformity with the regulations of the State, and organize its 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 Labor Law, and enhances the penalties for violating work safety laws.

In addition, the Administration Norms of Employers' Notification and Warning of Occupational Hazards (the "Norms") address issues such as notifications and warnings of occupational hazards, prevention and control of occupational hazards and protection of employees' health. The Norms require employers to not only specify certain basic issues related to workplace safety in their employment contracts (such as the potential occupational hazards at their workplaces, the potential consequences thereof, the protective measures and relevant treatments {such as job subsidy and work-related injury insurance}, etc.), but also to enable employees to truly understand this information by releasing public announcements, holding training seminars, etc. Also, employers should use graphic signs, attention-grabbing lines, warnings and notices as well as combined signs throughout the workplace to remind employees of occupational hazards and to encourage them to take relevant 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

Employees are entitled to complain or report to competent work safety supervisory authority regarding their employer's occupational disease, hazards, accidents or any violations as described below: (1) where occupational diseases or hazards exist in the workplace, and the employer fails to meet specific requirements for occupational health; (2) when any hazardous factor of occupational diseases emerges in the workplace, and the employer fails to make a timely and truthful report to the local public health authority; (3) where employer fails to take measures for prevention and treatment of occupational diseases; (4) where employer fails to ensure necessary funds are used for prevention and control of occupational diseases or misappropriates or diverts such funds; or (5) where 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 may usually undergo the following procedures: (1) enter the complained or reported company and its workplaces, conduct occupational disease hazard testing, access relevant information, conduct investigation and collect evidence; (2) access and duplicate documents of the company concerning prevention and control of occupational disease hazard and collect relevant samples on site; (3) order the company to cease and desist any ongoing unlawful actions; (4) order the operations that cause occupational disease, hazards, or accident to be suspended, seal up facility or equipment that caused or may cause occupational disease, hazards, or accidents; (5) control the site of occupational disease, hazards, or accidents.

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: (1) warned and ordered to rectify within specific time limit; (2) a fine with its amount determined based on severity of the circumstance; or (3) ordered by local government to shut down the specific operation that generated the occupational disease hazards or the entire operation of the employer.

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 Labor Law of the People's Republic of China, and the Law of the People's Republic of China on Promotion of Employment. However, these 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 Law of the People's Republic of China on Promotion of Employment and the Regulations on Employment Service and Employment Management newly amended by the MOHRSS, employers, when recruiting new employees, shall not discriminate against female employees, ethnic minority workers, disabled people, and rural workers. 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 labor contracts or internal regulations restricting female employees' right to marry and reproduce. If a female employee believes her right to marry or give birth has been violated, the employee 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 our legislation. The 2005 Law of the People's Republic of China on the Protection of Women's Rights and Interests explicitly states that "sexual harassment against women is banned. The victims shall be entitled to complain to the entity or the relevant organs." The Special Rules on the Labor Protection of Female Employees issued by the State Council in 2012 provides that "Employers shall prevent and prohibit the sexual harassment of female employees in their work places." However, neither of the two laws includes a clear definition of "sexual harassment" nor contains specific employer duties to prevent and prohibit sexual harassment.

4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Under the Law of the People's Republic of China on the Protection of Disabled People, employers shall provide disabled employees with appropriate working conditions and labor protection, and make appropriate modifications to the working place, equipment and living facilities.

5. REMEDIES

Currently, employers who violate laws regulating sexual harassment may only be punished under tort law or criminal law. 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, in which the defendant received criminal sanctions. Compared with many other countries, the harassment legislation in China is very new. Apart from tort liabilities and criminal penalties, PRC law does not impose other duties on employers or employees. Therefore, legal practitioners in China have urged for the establishment of a more comprehensive anti-sexual harassment labor protection regime in the near future.

Currently in China, employment discrimination could be litigated according to PRC Labor Law, PRC Employment Promotion Law and PRC Tort Liability Law. In 2017, in one discrimination case, 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 finally ruled by the court to allow the employee to resume work at the original position. However, 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. 1.6% 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 annual contribution amount for the Fund = (the number of total employees in last year × the

proportion of disabled employees required by local government – the number of disabled employees retained in last year) × the employee average annual wage in the last year.

The Fund is established and committed to improve employment opportunities for disabled individuals and protect their legitimate interests in dealings with different employers. In practice, from an economic perspective, big companies usually choose to retain a satisfactory percentage of disabled employees so that the companies will be exempt from contribution to the Fund.

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

VI. SOCIAL MEDIA AND DATA PRIVACY

1. RESTRICTIONS IN THE WORKPLACE

Under PRC Labor 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 labor union or employee representatives. Therefore, if the employer's restriction on employees' use of Internet and social media during working hours is a part of its internal policies, which have undergone the said democratic process 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.

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

According to one case ruled by Beijing No.1 Intermediate Court in 2014, if an employer terminates the employment relationship with an employee for the reason that the employee's Weibo posts or other network speech have violated the company's rules and regulations, it has to prove the Weibo post (network speech) was sent by the employee and the employer does have relevant management rules. If the employer's internal rules

are unclear, it is difficult for the judge to consider rightful termination. Therefore, if the employer intends to prohibit employee's use of social media to disparage the employer or any personnel of the employer, it must have clear management rules which have undergone the democratic process.

Regarding the confidential information, pursuant to PRC Labor 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 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.

VII. AUTHORISATIONS FOR FOREIGN EMPLOYEES

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 penalized by the authorities, and their relationship will not be protected by labor 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 30 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, but 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 30 days before their expiration. The employment relationship is automatically terminated if the work 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 employment licenses, 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 must apply for trade visas (M visas).

VIII. TERMINATION OF EMPLOYMENT CONTRACTS

1. GROUNDS FOR TERMINATION

PRC labor law generally favors 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 the employee;
- Termination by the 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 not unusual 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 labor protection or labor conditions pursuant to the provisions of the employment contract or failing to promptly pay labor 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 unauthorized 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 labor 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 Labor Contract Law. An employer may also terminate an employee with one month's prior written notice under the circumstances described in Article 40 of the PRC Labor Contract Law. In such cases, if the employer wants the employee to leave immediately, the employer may pay the employee one month's salary in lieu of notice. An employer may also terminate an employee if it satisfies the conditions for redundancy for economic reasons and completes the required procedures contained in applicable labor laws.

D. AUTOMATIC TERMINATION

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

- the term of the employment contract has expired;
- the employee has reached the statutory retirement age;
- the employee has passed away, or is declared dead or lost by the people's court;
- the employer is declared bankrupt according to law;
- the employer's business license is revoked or the employer is ordered to close down or de-register, or decides to dismiss in advance; or

- other circumstances in which the employment contract should terminate according to the law or administrative regulations.

Labor 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 use such additional conditions to terminate its employees. The only way in which the termination provisions of an employment contract may differ from statutory termination conditions is by optional reference to an employee handbook (also known as a staff handbook).

2. COLLECTIVE DISMISSALS

Collective dismissals usually take place in the context of redundancy for economic reasons, 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 the employer is unable to perform the employment contract.

Under the Labor 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 labor administrative authorities. Only then may it 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 redundancy for economic reasons:

- those who are engaged in work involving occupational disease hazards who have not undergone a pre-departure occupational health exam, 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 set period of medical care therefore 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 five years away from legal retirement age.

Even if a redundancy proposal has been reported to the labor department and the employer proceeds to terminate its employees, such terminations may still be reversed by a labor 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 employee commits any of the following misconducts contained in Article 39 of the Labor Contract Law:

- the employee fails to satisfy the employment conditions during the probationary period;
- the employee seriously violates the labor 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 neglect of duties, or his or her engagement in malpractice for personal gain;
- the employee has established an additional employment relationship with another employer, which materially affects the completion of his or her tasks with the employer, or the employee refuses to rectify the matter 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 Labor Contract Law:

- the employee, after undergoing a legally prescribed period of medical treatment and recuperation 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 any 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 Labor Contract Law, for mutual terminations proposed by the employer, unilateral terminations by the employer, 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 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 using three times this local average monthly salary. In other words, three times the local average monthly salary is the cap for severance calculations, and in this case, the severance shall not exceed 12 months.

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 illegal termination. Therefore, a Separation Agreement is also considered as the best practice when the employer decides to terminate employees.

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

The law does not specify the standard provisions in a Separation Agreement. But 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 Labor 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 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 has misconducts contained in Article 39 of the Labor 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 of aged employees, the employer may need to pay ex-gratia severance in addition to the mandatory severance provided in the Labor Contract Law in exchange of the employee's signing of the Separation Agreement.

D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

If the employer and the employee have agreement on post-employment non-competition obligation, the Separation Agreement shall have a clause to specify whether the employer releases the employee from the post-employment non-competition obligation or not. 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 labor arbitrations in response to any unilateral termination by their employers. Either the employee or employer may appeal a labor arbitration's decision to the court if dissatisfied with its decision. During the labor 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 illegal, the employee may request the employer to continue to perform the employment contract (i.e. reinstatement of employment) and provide back pay. Where the employee does not request continuous performance of the employment contract or the performance of the employment contract cannot be continued, the employer must pay the employee compensation equal to double the severance for normal termination. Due to the high risk of unilateral termination, employers should view unilateral termination as a last resort.

6. WHISTLEBLOWER LAWS

From the perspective of corporate governance and company's operation compliance, the Chinese legislation has not yet formulated an independent sector of laws to govern the rights and obligations of the whistleblower. A similar concept on whistleblower protection can 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 remains 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 Labor Contract Law, there is no express definition of restrictive covenants. However, restrictive covenants are commonly used in practice. For example, an employment contract and a Separation Agreement may include obligation of not violating the conflict of interests 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 Labor Contract Law, an employer and an employee may add a post-termination non-compete clause in a labor 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. The employer is obliged to pay compensation to employees who observe non-compete obligations after termination of employment.

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 Labor Dispute Cases (IV), which was promulgated in 2013, contains several uniform rules about non-compete obligations. The following three rules deserve special attention: (1) if the compensation for abiding by the non-

compete obligations is not stipulated in the non-compete clause, the non-compete clause is still valid and the monthly compensation will be 30% of the employee's average monthly salary for the twelve months prior to his or her termination; (2) if an employer fails to pay such compensation for three months, the employee is entitled to request rescission of the non-compete clause; (3) an employer may request rescission of the non-compete clause during the restricted period, but it must pay three additional months' of compensation to the employee .

B. NON-SOLICITATION OF CUSTOMERS

Although non-solicitation obligation is not expressly incorporated into PRC Labor 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 non-compete agreement with an employee, but does not want to enforce such agreement, the employer should 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 Labor Contract Law, the employee may 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 claim liquidated damage against him or her. For non-solicitation obligation, the employer may enforce relevant clauses in the employment contract, etc. and claim damage if any loss incurred thereof.

4. USE AND LIMITATIONS OF GARDEN LEAVE

Although garden leave is not mentioned in the labor law, it is very similar to the period of breaking away from secrets under PRC laws. According to the Circular of the Labor Department on Certain Issues about Enterprise Employee Movement, the employer and employee could agree that for a certain period (no longer than 6 months) before the employment contract expires or the employee terminates the employment, the employer could adjust the employee's position and modify the employment contract accordingly. This is the period of breaking away from secrets and is aimed at protecting employers' confidential information, trade secrets, etc. This period of breaking away from secrets is acknowledged and applicable in many provinces including Shanghai, Jiangsu, etc.

X. TRANSFER OF UNDERTAKINGS

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

Under the Labor 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 recognize 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 is the acquisition of assets, which may be defined by the labor 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 consultation obligation would be triggered and the employees affected have the option of transferring to the acquiring party.

2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

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.

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 continue the 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 with compensation and benefits equal to or better than those of the original employment contract. This raises the issue of severance. According to the law, the transferor may pay employees severance due to the termination of the original employment or it may let the acquiring party 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 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 transferor will be considered (his or her seniority with the transferor as well as his or her seniority with the acquiring party after the acquisition). 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 must be affiliated with the All-China Federation of Trade Union (hereafter referred to as "ACFTU") and there are no independent trade unions in China. ACFTU is a national-level organization that reports directly to the Chinese Communist Party and has branches at the provincial, city, and district levels.

Technically speaking, an enterprise does not need to take positive action to establish a trade union. However, if its employees request the establishment of a trade union, the enterprise may not obstruct the process. In practice, local ACFTU branches have been increasingly pressuring enterprises to set up trade unions from the top down. Also, in the case of Wal-Mart in 2006, the ACFTU, for the first time ever, used grassroots techniques to establish unions from the bottom up.

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 organizations 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 Organization of Employers. Currently, 30 provinces, autonomous regions and municipalities, which are directly under the central government, 28 national industry departments, 260 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 (1) harmonize employment relationships and safeguard the rights and interests of employees by conducting equal negotiations for employees and forming collective contracts; (2) organize 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 (3) maintain close contact with employees, listen to and forward their views and demands to management, 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 use terms in individual employment contracts that are more favorable to the employees than what the collective contracts provide.

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. In China, state-owned enterprises must establish a trade union and EC/ERC, and private businesses are also encouraged by the government to establish a trade union and EC/ERC. In practice, private businesses, if they would like to have a trade union, usually establish a trade union and organize the EC/ERC only when necessary. Where an enterprise in Shanghai is required or needs to organize the EC/ERC while the total number of its employees is fewer than 100, the enterprise must organize an EC instead of an ERC. Enterprises that do not have a trade union must report to the high-level trade union in the event that it intends to organize an EC/ERC and must perform all relevant work under the guidance and supervision of that high-level union. Local governments in various regions of China may have different provisions on EC/ERC procedures. 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, labor discipline and 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 finalizing any decision. During the implementation of any regulations 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. Employers should announce or notify their employees of any decisions on regulations and major matters that directly implicate the interests of employees.

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") oversees grassroots trade unions. 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. Grassroots trade unions with fewer than 100 members should establish a GAUM.

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 TUCs should report their work to the GAUM/UMRC and are subject to their supervision. 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 organizer 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 scrutinizing 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 (1) union fees paid by union members; (2) fees allocated to unions by enterprises, institutional organizations 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); (3) a certain percentage of profits from the union’s enterprise or institutional organization; (4) subsidies from the government; and (5) 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 labor 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 outstanding employment

duration is shorter than their period of office, the duration will be automatically extended to the expiry date of the term of office. These extensions do not apply where the president, deputy president or committee member commits a serious misconduct or reaches the legal retirement age.

F. NUMBER OF REPRESENTATIVES

Employee representatives shall be elected 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.

G. APPOINTMENT OF REPRESENTATIVES

Employee representatives should be elected through democratic process. 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, department, etc.) are present and the candidate shall at least have a majority voting in the electorate to be the representative. It is also required that employees’ representatives shall be composed mainly of grassroots employees and the number of senior managements generally shall not be greater than 20% of the total representatives. In addition, the number of female representatives shall be in line with the number of female employees in the company.

4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

According to the Regulations of Shanghai Municipality on Employee Representatives Congresses, employee representatives shall (1) learn and propagate among employees relevant laws, regulations and policies, reinforcing the ability of participating in democratic management and performing duties properly; (2) communicate with employees in the electorates, listening

to employees' opinions and suggestions and expressing employees' requests; (3) implement EC resolutions and properly complete all work assigned by the EC; (4) promptly circulate information about the performance of their duties and their participation in EC activities, and accept the assessment and supervision by employees; and (5) observe the employer's rules and keep the employer's trade secret confidential.

According to the CCP Constitution, any employer with more than three CCP members shall establish a grassroots CCP organization. In addition, PRC Company Law provides that employers shall provide the necessary conditions to facilitate the CCP activities.

5. EMPLOYEES' REPRESENTATION IN MANAGEMENT

According to PRC Company Law, limited liability companies invested and incorporated by two or more state-owned enterprises or other entities with state-owned investment shall have employee representatives in their board of directors. Other limited liability companies or companies limited by shares may 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") organizations could also organize employees, know the appeals of employees, and help solve disputes between employers and employees in order to establish and maintain harmonious employment relationships.

XII. EMPLOYEE BENEFITS

1. SOCIAL SECURITY

The Chinese government has set up social security systems such as basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance, maternity insurance, etc. 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 separate 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.

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. Employers and employees are required by law to contribute to their respective social security premiums and housing provident funds and cannot be exempt by special agreement or arrangement.

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 basic pension benefits on a monthly basis. The exact amount of such benefits is determined according to factors such as his or her cumulative contribution period, his or her wage, the average 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 of their employees 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. Those whose injuries are verified and who have lost their ability to work will also 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. However, the government is now working to combine maternity insurance and basic medical insurance, which reflects the government's target of lowering employers' operation cost. This means private businesses in China may not be required to pay maternity insurance for their employees in the future. 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. 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. Local governments may have different regulations regarding 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 labor legislation gives local governments broad flexibility in implementing labor law, which means exact 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 employment agreement is performed.

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 (including medical, dental and accidental death and dismemberment) for employees and their dependents. However, this is entirely optional.

3. REQUIRED LEAVE

A. HOLIDAYS AND ANNUAL LEAVE

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

Annual Leave: according to the government 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 20 cumulative years are entitled to ten days of annual leave. Employees who have worked for more than 20 cumulative years are entitled to 15 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. This encashment should total 300% (100% has been included in the monthly salary and therefore only 200% needs to be additionally

paid) of an employee's daily normal salary for each accrued but untaken day of annual leave.

B. MATERNITY / PATERNITY LEAVE

On December 27, 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 "Law") which formally abandons China's decades-long one-child policy and allows all couples to have two children. According to the Law, late marriage and late birth are no longer encouraged, and maternity leave may be extended by local rules.

C. SICKNESS 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 leave 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. If an employee cannot perform his or her original work or other work arranged by the employer after his or her period of medical care 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.

D. DISABILITY LEAVE

Disability could be caused by non-work-related injury or 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 labor relationship shall remain unchanged, and the employee shall withdraw from his or post and enjoy (1) a lump sum disability allowance paid by the work-related injury insurance funds according to his or her disability grade; and (2) 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 (1) enjoy a lump sum disability allowance paid by the work-related injury insurance funds according to his or her disability grade; and (2) retain the employment relationship, or enjoy a monthly disability subsidy paid by the employer according to his or her disability grade, 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 a lump sum disability allowance paid by the work-related injury insurance funds according to his or her disability grade; and (2) 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 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 decides to reduce the employer's pension insurance contribution rate to lower the cost of private businesses. The Circular of the Ministry of Human Resource and Social Security on Periodically Lowering Social Insurance Premium Rate requests that from May 1, 2016, if employers' pension insurance contribution rate in any province (city, district) is greater than 20%, it shall be reduced to 20%, and if the said rate is 20% and the cumulative balance of the pension insurance fund could afford at least nine months' payment in any province (city, district), it may periodically be reduced to 19% in two years' term.

Carol Zhu, Partner
Zhong Lun Law Firm
carolzhu@zhonglun.com
+86 6061 3081



ZHONG LUN LAW FIRM

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This memorandum has been provided by:

Zhong Lun Law Firm
Level 10 & 11, Two IFC, No. 8 Century Avenue,
Pudong New Area, Shanghai 200120, P.R. China
P +8621 6061 3081
www.zhonglun.com

CONTACT US

For more information about L&E Global, or an initial consultation, please contact one of our member firms or our corporate office. We look forward to speaking with you.

L&E Global
Avenue Louise 221
B-1050, Brussels
Belgium
+32 2 64 32 633
www.leglobal.org





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