

Critical Chinese labor and employment law questions for global employers

By Johnny Choi

For multinationals, China is one of the most significant markets for expansion. But Chinese authorities are more likely to cast a critical eye on the activities of foreign-owned enterprises, making compliance with local labor and employment requirements crucial.

In this article, we look at nine critical issues in Chinese labor and employment law to help multinationals better understand the unique features of the largest labor market in the world.

1. Can you hire employees in China without a legal presence?

No. Companies must have a local, legal corporate presence within the territory of China to engage employees. Only registered organizations that can independently be held liable, such as enterprises, individual economic entities and private non-enterprise organizations, can directly hire employees in China. Thus, the best practice is to set up a subsidiary, branch or even a representative office in China. Note, however, that a representative office (unlike a subsidiary or branch) cannot engage in actual transactions or directly hire employees; it must use a third-party agency, such as a foreign service company.

Some companies hire other types of workers in China without establishing a legal presence. This approach will give rise to its own issues.

2. Is a written employment contract required, and is an electronic version of the contract permissible?

Yes, a written employment contract is required in China. If the parties do not execute a written contract, then after one year, the employer and the employee are deemed to have established a non-fixed term (ie, permanent) employment relationship. This is not the wisest approach, however: failure to create a written employment contract can subject an employer to severe penalties (including payment of double the employee's monthly salary) whether or not the employer is at fault.

Although it is commonplace for many employment documents to be created and stored electronically, Chinese courts still prefer to see hard copies. It is therefore essential to have a physical personnel file management system in addition to any legally permitted electronic personnel files.

3. How difficult is it to terminate an employee in China?

Extremely difficult. Chinese law is highly protective of employees. Unilateral termination is very challenging and must be based on causes specified under the employment laws. These causes include poor performance (subject to significant limitations!), gross misconduct, criminal conviction, long-term sick leave and significant organizational changes or restructurings. Even if termination is based on one of these causes, employers must follow certain procedures and produce substantial evidence to

justify the termination. The penalty for a wrongful termination is payment of damages or reinstatement. Given the difficulties of termination, mutual termination agreements are common.

4. Is a fixed-term employment contract permissible?

Yes. Although other jurisdictions frown on fixed-term employment agreements, fixed-term agreements are common in China. However, once an employee has worked for a consecutive period of no less than ten years or the employer has signed two fixed-term employment agreements with the employee, then the employer must execute an indefinite-term agreement with the employee. Thus, employers should think carefully about the duration of the first employment contract and diligently track the employee's performance; this information could help the employer avoid the obligation to sign an indefinite-term agreement.

5. Is an employee handbook required?

Not technically required, but strongly recommended. A well-drafted and "democratically" implemented handbook (or a stand-alone policy) is almost always required to successfully defend a labor dispute in China. Chinese law requires that a handbook or policy that directly impacts its employees' interests (eg, those concerning remuneration, working hours, rest and vacation periods, occupational safety and health, and discipline) must be "democratically" rolled out and revised. The democratic process primarily consists of three stages: discussion; negotiation; implementation. Each stage requires different participants, such as the labor union (if any), employee representatives, or all staff if no collective organization exists within the company. Note that employee consent to the handbook is not required.

6. Does Chinese employment law differ from province to province?

Yes. Even though China has only one national employment law, the provinces and larger cities also have their own legislative powers. Furthermore, the labor arbitration tribunals and courts of Beijing, Shanghai, Guangzhou and Shenzhen, the most influential cities in China, each have their own special rules and interpretations of employment laws. In Shanghai, for instance, employees must be paid at least the minimum wage after deductions have been made for social insurance, housing fund and other benefits. In Shenzhen, in contrast, such amounts are included in the minimum wage calculation, meaning an employee's actual take-home pay theoretically could be less in Shenzhen than in Shanghai.

7. How do employment matters impact transactions?

It depends. Because there is no unified transfer-of-business law in China, there are no hard and fast rules that govern employee matters in transactions. As a general rule, however, there are no automatic transfer rules in case of an asset sale, so companies may need to transfer impacted employees via mutual termination and transfer agreements.

8. Are there other hiring alternatives besides direct employment?

Yes. To reduce labor costs or increase flexibility with respect to labor, many companies with operations in China prefer outsourcing or engaging labor dispatch workers through agencies.

Although it is permissible to hire dispatched workers, they can only be brought on for temporary, auxiliary or subsidiary

roles.

Part-time employment is another option. Unlike full-time employees, part-time employees who work no more than four hours per day and 24 hours per week are not entitled to certain minimum rights, such as a written employment agreement, overtime pay, vacation and other types of paid leave.

In contrast, an independent contractor relationship is generally not recognized in China. If companies wish to engage contractors, it is recommended to contract with the consultant's company (rather than with the individual contractor) this may be deemed a (valid) commercial agreement between two corporate entities.

9. Is a non-unionized foreign company affected by local labor unions?

Yes. Trade unions can influence a non-unionized workforce due to their dual roles representing the interests of both the state and labor. For example, an employer that unilaterally terminates an employee should notify the company's union, even if the employee is not a union member. In recent years, the local union has actively encouraged foreign companies to establish in-house company unions. If such unions are established, the company is required to pay union dues, which are 2 percent of total payroll, whether or not the employees are union members.

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