



China Law Alert

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Overview of Labour Contract Law in China

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SEPTEMBER 2007

Overview of Labour Contract Law in China

The Labour Contract Law of China, first drafted almost three years ago, was enacted on 29 June 2007 by the Standing Committee of the National People's Congress, and will take effect on 1 January 2008. From the perspective of an employer, implementation of the Law will substantially increase labour costs and reduce flexibility, compared to existing practices. A summary of the Law is as follows:

Labour Contract Shall Be in Written Form

Compared to existing labour laws and regulations, the Law puts more emphasis on the legal liabilities of an employer that fails to implement the labour contract in written form.

According to the Law, a written contract shall be formed in the establishment of an employment relationship. In situations where an employment relationship already has been established with no written contract, a written contract shall be formed within one month of the date of retaining an employee. If an employer forms a written labour contract with an employee more than one month but less than one year after the date on which the employer started retaining the employee, the employer shall pay the employee's monthly salary at double the usual amount.

Furthermore, should an employer fail to establish a written labour contract with an employee for more than one year after the date at which the employer retained the employee, a labour contract without a fixed term is deemed to be established with that employee.

Long-Term Labour Relationship

The Law is meant to maintain a long-term labour relationship between an employer and an employee, in order to better protect the rights and interests of the employee. According to the Law, a labour contract without a fixed term shall be established, at the request or consent of an employee, if the employee already has worked for the employer for 10 consecutive full years, or if the labour contract is to be renewed after two fixed-term labour contracts have been concluded consecutively. Should the employer fail to form a labour contract without a fixed term with the employee in the aforementioned circumstances, the employer is liable to pay double the amount of the employee's monthly salary.

Furthermore, upon the early termination of a labour contract with a fixed term, an employer shall be liable for severance pay. An exception is a circumstance in which the employee is unwilling to resume the employment relationship, even if the employer improves or maintains the same working conditions. The burden of proof for this exception is on the employer.

In addition, all the conditions and causes for termination of labour contracts are legally justified with no possibility for mutual agreement between an employer and an employee on the same subject matter.

Strictness of Probation Period

Compared to the existing labour laws and regulations, the provisions on probation periods are more rigorous in respect to the terms, salaries, terminations of labour relationships and consequences.

First, the term of the probation period has been shortened; it now must be no longer than six months. The salary during the probation period shall not be lower than the minimum salary for the same post at the same company, or lower than 80 per cent of the salary stipulated in the labour contract; nor may it be lower than the minimum salary of the city or district where the employer is

located. Should the employer intend to terminate the labour relationship within the probation period, justified reasons shall be presented by the employer. This is different from the current practices, where no reason is necessary for terminating a labour relationship within the probation period. Should the employee intend to terminate the labour relationship within the probation period, he or she shall inform the employer three days in advance, with or without justified reasons.

Mutual Agreement on Non-Compete Obligations

According to the Law, non-compete obligations are confined only to senior managers, senior technicians and other personnel accountable for non-disclosure obligations. Both the employer and employee may agree in a labour contract the scope, jurisdiction and term for the non-compete obligations, but the term of the non-compete obligation shall be no more than two years. The compensation for non-compete obligations may be mutually agreed upon, and such compensation may be paid on a monthly basis immediately after the termination or dissolution of the labour contract.

In terms of violation of the non-compete obligations, the employee is liable for liquidated damages as maintained in the labour contract. Additionally, the employee shall also be liable if the employer suffers any economic losses as a result of the employee's violation.

The Law has no provision for the release of the non-compete obligations. This issue is expected to be clarified in later implementation rules.

Freedom of Employee Resignation

Given the limited occasions for liquidated damages as governed by the Law, an employee has with more freedom when resigning or changing jobs. An employee may choose to dissolve the labour contract if he or she notifies the employer in writing 30 days in advance. No justified reason is required to support such a resignation. However, should the resignation lead to the violation of the employee's non-compete or non-disclosure obligations, giving rise to losses or damages to the employer, the employee is liable for the compensation to the employer.

Another restriction applying to employees relates to service period provisions. If an employer pays special expenses for an employee's training, the employer may reach an agreement on the service period with the employee. If the employee violates the stipulations on the service period, he or she shall pay the employer a penalty for breach of contract, in an amount not exceeding the training expenses attributable to the unfulfilled service period.

Except for violation of stipulations regarding the service period and provisions of non-compete obligations, no other circumstances should be specified for liquidated damages.

An employee may dissolve the labour contract by notifying the employer at any time, given certain situations. Such situations include the following: if the employer fails to provide labour protection or conditions as agreed; fails to pay salaries fully and on time (including overtime payment); fails to pay for social insurance charges as legally required; and other circumstances.

A employee may resign immediately without notification if the employer forces him or her to work by violence or threat, illegally limits the employee's personal freedom, or illicitly commands or forces the employee to perform operations which may endanger the employee's personal safety. Under each of these circumstances, the employer is liable for severance pay to the employee.

Protection on Dismissal

The Law implements more constraints on labour contract termination and dissolution in order to strengthen the protection of the employee and restrict the employer's rights in terminating and dissolving labour contracts.

Faulty Dissolution

An employer could dissolve a labour contract without notification in advance under the following circumstances: an employee seriously violates the rules of an employer; the employee causes severe damage to the employer by seriously neglecting his or her duties or seeking private benefits; the employee establishes a simultaneous relationship with another employer that could interfere with completion of tasks for the original employer; the employment contract is invalidated because of the employee's actions; or the employee is subject to criminal liabilities.

However, before the dissolution, the employer shall notify the labour union and take into consideration the opinions of the labour union.

Non-Faulty Dissolution

An employer should notify the employee of dissolution either 30 days in advance, or by additional payment of one month's salary, if the dissolution is for justifiable reasons. Justifiable reasons include illness or a non-work-related injury, incompetence for the post as assigned and change of objective circumstances. The labour or trade union shall also be notified and consulted in this respect.

Dissolution Prohibited

An employer should in no case dissolve a labour contract if an employee falls within any of the following circumstances: occupational disease hazards; having lost or partially lost capacity to work due to occupational disease or a work-related injury; medical treatment for illness or a non-work-related injury; or pregnancy, confinement or a nursing period. An employer also must not dissolve a labour contract if an employee has been working for the employer continuously for not less than 15 years and is less than five years away from legal retirement age.

Laying Off Employees

If an employer intends to lay off employees in the amount of more than 20 individuals, or over 10 per cent of the total staff, the employer shall make an explanation to the labour union or to all employees 30 days in advance. Furthermore, the lay-off plan shall be submitted to the labour authority. The labour union is not intended to approve the lay-off plan, but rather to supervise and provide opinions thereon.

It should be noted that at the time of the lay offs, the priority of retention shall be given to employees with long-term contracts or contracts without a fixed term, and employees whose family has no other labour force and has elderly or minor members to support. Should the employer recruit again within six months, the laid-off employees shall be given priority.

Legal Consequences for Illegal Dissolution

Double the amount of severance pay will be paid if an employer illegally dissolves or terminates a labour contract.

Wider Application of Severance Pay

According to the Law, the application of severance pay is applied to the following situations: the employee dissolves the contract for justified reasons; the employer dissolves the contract without fault or by laying off employees; the employer proposes to dissolve the contract in agreement with the employee; the fixed-term contract expires with no renewal except as selected by the employee; or the employer is bankrupt, revoked of business license or ordered to close.

When applying the rules of severance pay, the pay shall be calculated by the number of working years multiplied by the monthly salary. Any period of at least six months but less than one year shall be counted as one year. The severance pay for any period of less than six months shall be half the monthly salary.

Notwithstanding the above, for employees with a salary exceeding three times the average salary of the district, the maximum amount of severance pay shall be three times the average salary of the local district multiplied by a maximum of 12 years.

Regarding the payment procedure of the severance pay, the Law stipulates that the employer shall make the payment at the same time as the employee completes the procedures for the hand-over of his or her work as agreed.

Specialized Collective Bargaining Contract

In contrast to the existing labour laws and regulations, the Law specifies collective bargaining contracts in several categories, including corporate-wide contracts, specialized contracts (*e.g.*, safety and hygiene, protection of female employees and salary adjustment mechanisms), industry-wide contracts (*e.g.*, construction, mining and catering), and region-wide contracts.

Trade unions or employee representatives may negotiate with an employer on the collective bargaining contract applicable in the same company, industry or region. For a collective bargaining contract applicable in the same company, the contract shall be reviewed and approved by a congress of employees or a congress of employee representatives, and the contract will take effect, if there is no objection from the local labour authority, within 15 days of the submission.

Flexible Part-Time Employment

The Law specifies part-time employment where the remuneration is calculated on an hourly basis. The maximum remuneration settlement and payment shall not exceed 15 days each. The average working hours of a worker shall not exceed four hours per day and an aggregate of no more than 24 hours per week.

As opposed to regular employment, part-time employment allows for oral agreement with no probation period. Both the employer and the employee may terminate the employment relationship at any time by notifying the other party, and no severance pay is applicable.

Rigid Internal Employment Rules

Under current practices, an employer can create internal employment rules to its own satisfaction. However, under the Law, the trade union or employee representatives will have more participation in this process.

The employer may still specify its internal employment rules in terms of remuneration, working hours, holidays, safety and hygiene, welfare, training, discipline, production quota and so forth. The employer shall make a public announcement of the rules and important events directly relating to the interests of the employees, or inform the employees directly.

The drafting and amendment of the internal employment rules shall be submitted to a congress of employees or employee representatives for comments and opinions, and finalized after consultation and agreement with either the trade union or employee representatives. During the process of implementation, if the trade union or employee representatives deem any part of the internal employment rules inappropriate, they are entitled to pointing that part out and consult with the employer for any necessary improvement or change.