



Globalizing in China in 2012

Insights

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As the world embarks into the Year of the Dragon, China is making every effort to draw in more and more international business to add to its already skyrocketing economy. China's current Labor Law is expected to be amended in 2012. The issue is to what degree and to what effect the 2012 amendments, if enacted, will have on employers. The changes and effect of the 2012 amendments are yet to be fully known or disclosed, but it is now a good time for all of us to review and ensure compliance with the complexities of China's labor laws to: (1) reduce risks of legal liability and (2) understand and implement any changes that may be required should the 2012 amendments be enacted.

China's employment laws have experienced significant changes from the Iron Rice Bowl employment system 35 years ago (e.g. guaranteed job security with steady income and benefits similar to, but not identical, to the English concept of a breadwinner with 'cradle to grave' socialism), to the liberalization of the labor market under the Labor Law of 1994, and then to the Labor Contract Law in 2008 which affected the large majority of full-time positions and required employers to provide employees with written contracts. Although we do not anticipate a complete transformation from the current Labor Contract Law of 2008, employers should understand that China's contract employment system is the opposite of the United States' at-will employment system since the law provides that all employees must be engaged under a written employment contract, which shall at minimum include:

- **Terms of Employment.** In China, the law provides for three types of employment terms: definite, indefinite, or piecemeal (a compensation system in which employees are paid for each unit produced or action performed, not on the basis of time worked).
- **Job Descriptions.** Employees must be provided an accurate reflection of the duties and responsibilities of the job position.
- **Place of Work.** It is important to state the actual place of work, as well as any other locations at which the employee may report to perform work.
- **Working hours, Rest and Leave Periods.** Compliance with laws regulating working hours, designated rest and leave periods, and holidays provided to the employee should be detailed in the contract, as well as the statutory rule on vacation for employees based on years of service.
- **Wages.** Minimum wages must be paid which are set at the provincial and municipal level, and measured by two standards – monthly and hourly. The concept of a "salaried" employee is not

measured by two standards - monthly and hourly. The concept of a salaried employee is not fully integrated into the Chinese workforce; therefore, a salary needs to be converted to an hourly wage in the contract. It is noteworthy to mention that it is customary and standard practice to pay an extra month of salary (13th month) prior to the Chinese New Year as part of compensation, and the contract should reflect this 13th month of wages.

- **Social Insurance.** Employers and employees must contribute to a basic pension insurance fund that is administered at the provincial or municipal level, and the contract should accurately reflect the percentage contribution both the employer and employee shall contribute. If a supplementary pension insurance fund is available for employees as an option to join, the contract should state such and reflect the percentage contribution.
- **Labor Protections.** The contract must state and provide for the specific Work-Related Injury Insurance system as each province in China has its own Work-Related Injury Insurance Regulations requiring employers to pay the medical expenses of injuries, disability, and occupational diseases. It is noteworthy to mention that the law prohibits employers and employees from contractually opting out of the Work-Related Injury Insurance system.
- **Description of Working Conditions.** The contract should provide a general description of working conditions as China's Labor Law requires employers to inform employees of any occupational hazards during the hiring process, to comply with health, safety, and hygienic working conditions (e.g. Safe Production Law and Occupational Disease Law), and imposes punishments, including but not limited to, warning notices, administrative fines and penalties, and workplace closures of employers for violations of health and safety regulations.

Other terms that should be included in the contract consist of bonuses or a bonus system, other benefits above and beyond the statutory minimum (e.g. supplemental medical insurance above the national basic medical insurance system), and travel expense and reimbursement policies. Additionally, depending on the position, an employer may want to consider addenda to the contract (or even separate agreements referenced by the employment contract) for protection of trade secrets and intellectual property, a training agreement detailing employee training, and a 'sign-off' agreement by which the employee affirmatively acknowledges receipt and understanding of the rules and regulations and agrees to abide by those rules.

During the duration of the contract after the probationary period (which is generally one to six months), it is very difficult to involuntarily separate an employee since an employee can only be terminated for cause which must be clearly proven, with the exception of redundancy and mass layoff related separations, separation at the end of the contract and separation during the probationary period. Although an employee can unilaterally terminate an employment contract by providing the employer with 30-days notice before resigning from the company, an employer can only unilaterally terminate an employment contract if an employee seriously breaches the employer's rules and regulations outlined and detailed in the contract.

Under the Labor Contract Law, an employer cannot simply terminate an employee for incompetence alone. If an employee is incompetent, the employer must provide further training to the employee or

re-assign the employee prior to terminating the contract. Therefore, employers generally: (1) implement standard operating procedures in China to maintain a detailed set of rules and regulations stated in the contract and to which employees affirmatively agree in the 'sign-off' agreement; (2) maintain thorough disciplinary records and efforts to improve in order to be able to establish "proof" for termination, dismissal, or involuntary separation. If a termination of employment is deemed without cause, the employer and employee must reach a severance agreement for an amount to be negotiated. However, an employer must keep in mind that a severance for a termination or dismissal with cause is calculated roughly one month of wages for each year of service; therefore, a severance for a termination or dismissal without cause always exceeds the customary 'one-month pay for each year worked' equation.

The transformation of China's economy and evolution of its labor laws in recent decades have built a foundational framework for labor protection and workforce progression. We will provide information on any new amendments effectuated in 2012 to help optimize your economic growth in China.