Hiring and Firing
Chinese and foreign employees in China:
The reality, the rights and obligations of the employer

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Managing Partner
1. Introduction
   • Labor contracts and civil contracts
   • Chinese vs. foreign employees

2. Entering into a labor contract
   • Content
   • Procedure
   • Social charges
   • Non-competition clause
   • Maternity leave
3. Reasons for termination initiated by the employer
   • Thirty days’ notice
   • Immediate termination
   • When termination is not permitted

4. Consequences
   • Procedure
   • Financial consequences
1. Introduction

2. Entering into a labor contract

3. Reasons for termination initiated by the employer

4. Consequences
1. Introduction (1/4)

A. Labor contracts and civil contracts

• Different types of contracts may be used in order to obtain a service from a party to be rendered to another party. This is especially the case for inspection services, consulting services, or other similar types of work.

• These contracts may have different names such as: a consultancy agreement, service agreement or an employment agreement.

• These kinds of contracts are subject to the Contract Law. The beneficiary of the services employs an outsourced service provider named the “contractor”. This can be similar to a labor contract since the contractor is an individual.
1. Introduction (2/4)

- These kinds of agreements do not replace labor contracts. For example, the service provider must remain independent. As a result of its independence, the service provider is seen as a type of business entity responsible for quality of the services rendered and the payment of its social charges and taxes on its revenues.

- As a consequence, the fees paid to the service provider are higher than a paid salary. However, minimal salary regulations are not applicable.

- Currently in China, these kinds of contracts are often used by a foreign entity to procure services from an individual based in China.

- The risks in this case are not certain as a labor contract is not feasible (there is no legal employer) so the labor law is not directly infringed. However, the contractual terms of this type of contract must be different than a labor contract to avoid any risks (of blacklisting for example).
1. Introduction (3/4)

- The risks may be higher when the service contract is entered into by a qualified employer (as defined by the labor law) and a Chinese individual.

- In this case, we advise paying careful attention to the terms of the contract. For example the contractor must be independent in his work and the fees paid must not be comparable to a salary.

- Also, we advise that the beneficiary asks the contractor to prove that he pays income tax and to clarify his status under China law (to provide a business registration, for example).
1. Introduction (4/4)

B. Local vs. foreign employees

• Local employees are not subject to working permit regulations, but foreign employees are.

• As foreign employees require a working permit, an employment agreement cannot be entered directly with the foreign individual. (A labor contract is preferred. Otherwise the foreign individual can first register a business entity.)

• Revenues of foreigners working in China are now subject to social charges (increasing the costs for foreign employees).

• Both local and foreign employees are subject to the Labor Law and Labour Contract Law of the PRC: their rights and obligations are the same.
1. Introduction

2. Entering into a labor contract

3. Reasons for termination initiated by the employer

4. Consequences
2. Entering into a labor contract (1/10)

A. Content

• The employer's name, address, legal representative or managing director;

• The worker's name, address, ID number or number of any other valid identity certificate;

• Term (commencement date and expiry date if fixed-term or commencement date and indication of unfixed-term);

• Description of the position and duties;

• Indication of the place where the employee will work, working time/hours, rest and vacation;
2. Entering into a labor contract (2/10)

- Safety rules and working conditions;
- Remuneration and social insurances;
- Disciplines rules;
- Conditions for termination;
- Liability for the violation of the labor contract; and
- Duration of the probation period, confidentiality clause, training and any other clauses the parties agree on.
2. Entering into a labor contract (3/10)

B. Procedure

• The contract must be in writing. Most of local authorities as Shanghai city require the contract be in Chinese language (or if the contract is in bilingual version the Chinese version prevails). In Guangdong province, an English version is sufficient.

• The employer cannot retain the ID card of the employee or other documents.

• The labor contract must be entered into within one month of the employee commencing work.

• Part-time contract (up to 24 hours per week) does not need to comply with the same rules: no requirement to have a contract in writing, no termination rules (termination at any time on both sides), no probation and no exclusivity of services.
2. Entering into a labor contract (4/10)

C. Social charges

• There are six types of social charges: pension, maternity, unemployment, medical insurance, housing fund and social endowment.

• Rates are determined locally for both employer’s and employee’s parts.

• There is a distinction part between employees registered in the city where they work and migrant workers. Foreign employees are generally considered as migrants. There may be also a distinction between State-owned company and private company.

• In coastal cities, social charges are around at 40% of the salary.
2. Entering into a labor contract (5/10)

<table>
<thead>
<tr>
<th>Type of Social Insurance</th>
<th>Rate for Employer</th>
<th>Rate for Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>State-owned</td>
<td>Other Enterprise</td>
</tr>
<tr>
<td>Social Endowment Insurance</td>
<td>20%</td>
<td>12%</td>
</tr>
<tr>
<td>Maternity Insurance</td>
<td>0.5% / 1% / 1.5%</td>
<td>N/A</td>
</tr>
<tr>
<td>(depends on employer’s industry)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unemployment Insurance</td>
<td>2%</td>
<td>1%</td>
</tr>
<tr>
<td>Social Medical Insurance</td>
<td>8%</td>
<td>2%</td>
</tr>
<tr>
<td>Medical Subsidy for Serious Diseases</td>
<td>0.26% of average salary in Guangzhou</td>
<td>N/A</td>
</tr>
<tr>
<td>Housing Fund</td>
<td>5% to 20% (employer’s discretion but minimum is 5%)</td>
<td>5% to 20% (can not be less than the amount paid by the employer</td>
</tr>
</tbody>
</table>
## 2. Entering into a labor contract (6/10)

<table>
<thead>
<tr>
<th>Type of Social Insurance</th>
<th>Rate for Employer</th>
<th>Rate for Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Urban Employee</td>
<td>Non-local Rural Employee</td>
</tr>
<tr>
<td>Social Endowment Insurance</td>
<td>22%</td>
<td>8%</td>
</tr>
<tr>
<td>Maternity Insurance</td>
<td>0.8%</td>
<td>N/A</td>
</tr>
<tr>
<td>Employment Injury Insurance</td>
<td>0.5%</td>
<td>0.5%</td>
</tr>
<tr>
<td>Unemployment Insurance</td>
<td>1.7%</td>
<td>N/A</td>
</tr>
<tr>
<td>Medical Treatment Insurance</td>
<td>12%</td>
<td>2%</td>
</tr>
<tr>
<td>Housing</td>
<td>7%</td>
<td>7%</td>
</tr>
</tbody>
</table>

Data is for Shanghai.
2. Entering into a labor contract (7/10)

<table>
<thead>
<tr>
<th>Type of Social Insurance</th>
<th>Rate for Employer</th>
<th>Rate for Employee</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Resident Employee</td>
<td>Non-resident Employee</td>
</tr>
<tr>
<td>Social Endowment Insurance</td>
<td>20%</td>
<td>8%</td>
</tr>
<tr>
<td>Maternity Insurance</td>
<td>0.8%</td>
<td>N/A</td>
</tr>
<tr>
<td>Employment Injury Insurance</td>
<td>0.2% to 2% (varies depending on employer’s industry)</td>
<td>N/A</td>
</tr>
<tr>
<td>Unemployment Insurance</td>
<td>1.0%</td>
<td>0.2%</td>
</tr>
<tr>
<td>Medical Treatment Insurance</td>
<td>10%</td>
<td>2% + RMB 3.00</td>
</tr>
<tr>
<td>Housing Fund</td>
<td>12%</td>
<td>12%</td>
</tr>
</tbody>
</table>
2. Entering into a labor contract (8/10)

D. Non-competition clause

• In China, non-compete clauses are limited in time (two years maximum) and scope (geographic/industry restrictions).

• Non-compete clauses only apply to senior managers, technicians and related senior employees who are privy to confidential information.

• Upon termination, the employer must pay compensation to the former employee on a monthly basis throughout the course of the non-compete period:
  – The amount of the compensation generally falls between 20 percent and 60 percent of the former employee’s average salary over the previous year.
  – The employer does not have to pay any social charges on this compensation and any income tax due must be paid by the employee.
2. Entering into a labor contract (9/10)

E. Maternity leave

• In China, the duration of maternity leave is 98 days, with 15 days to be taken before the date of the birth (as birth is usually given by caesarean, the date is known in advance or at least scheduled).

• Dystocia and multiple births entitle the mother to receive an extra of 15 days (per each child).

• In the case of abortion or if the pregnancy ends prematurely for other reasons, a leave of 15 days is granted for a pregnancy lasting less than 4 months, and 42 days for a pregnancy lasting beyond 4 months.
2. Entering into a labor contract (10/10)

- In Shanghai and Beijing, to encourage females to delay age of motherhood, mothers over 24 years old are given an additional 30 days of leave – in Beijing the father may enjoy the additional 30 days instead.

- In Guangzhou and Shenzhen:
  - The mothers over 24 years old are granted an additional leave of 15 days (half less than in Beijing or Shanghai);
  - Laparotomy in addition to Dystocia allows the mother to be granted an additional leave which is not 15 days (as for dystocia nationwide) but 30 days;
  - If the parents commit to not have more than a child and obtain the requisite certificate, an additional 35 days’ leave is granted.
1. Introduction

2. Entering into a labor contract

3. Reasons for termination initiated by the employer

4. Consequences
3. Reasons for termination initiated by the employer

(1/5)

A. Thirty days’ notice permitted

• If, after expiry of the period of treatment for illness or accident not related to employment, the employee remains unfit for duty and cannot take any other position as arranged by the employer;

• If after having received training or the position is adjusted, the employee’s skills remain unfit; and

• If, after a change of objective context surrounding the contractual terms of the contract, the contract is rendered impossible to execute and the parties do not reach an agreement for the amendment of the contract:
  • refers both to any fundamental changes in the objective context of the contract, as well as major changes in the economic context.
3. Reasons for termination initiated by the employer (2/5)

B. Immediate notice

• Serious violation of the rules and regulations of the employer;

• Gross negligence in work performance or seeking a personal interest that causes serious prejudice to the employer;

• Conclusion of a labour contract with another employer during the execution of the first contract while:
  • That other employment is likely to seriously disrupt the execution of the first contract, or
  • The employee refuses to rectify the situation after the first employer requested it.
3. Reasons of the termination initiated by the employer (3/5)

- The contract is void due to duress or fraud against the employer; and

- The employee has been convicted of a crime.
3. Reasons of the termination initiated by the employer (4/5)

C. Termination not permitted

• Where employee is, during its employment, exposed to risks of disease and:
  • The employer failed to organise a preventive diagnose for the employee before it leaves office, or
  • The employee may have contracted an occupational disease (and is under diagnoses or hospitalized);

• The employee is suffering from a disease related to its employment or became partially handicapped due to a work related accident;

• The employee is ill or injured for reasons not related to its work but is in a period of convalescence;
3. **Reasons of the termination initiated by the employer (5/5)**

- The employee is pregnant, on maternity leave or during lactation; and

- The employee has worked continuously for fifteen years or more for the employer and is five years or less to the legal age of retirement.
1. Introduction

2. Entering into a labor contract

3. Reasons for termination initiated by the employer

4. Consequences
4. Consequences (1/2)

A. Procedure

• Written notice in writing is required when a thirty days’ notice is applicable (not required for immediate termination). The content of such notice is not defined.

• The relevant labour union must be informed in writing whenever the employer terminates a labour contract unilaterally.

• Where an employment contract is terminated, the employer must provide the employee with a certificate of termination containing:
  • The effective date when the contract was terminated;
  • The date when the termination occurred;
  • The position held by the employee; and
  • The total duration of employment.
4. Consequences (2/2)

B. Financial consequences

• Economic compensation: applicable when the contract is terminated for reasons justifying a thirty days’ notice (not applicable to part-time labor contract).
  • It amounts to one month salary per year of service (based on the average salary of the last twelve months, including bonuses, allowances and other benefits in money);
  • When the employee's salary is more than three times the local average salary of the previous year as published by the local authority, compensation is based on three times the monthly local average salary instead of the employee’s salary; and
  • In the event that the compensation is subject to the above limit, the compensation may only be up to a maximum of twelve months salary (the compensated period is limited to twelve years)

• Double compensation: applicable in particular to the dismissal of a woman during pregnancy, maternity leave or breastfeeding period.
Questions & Answers Session

Thanks for your time!
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