

Employment Law in China



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4th Edition



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Foreword

The past few decades have seen China develop into one of the most dynamic countries in the world. Businesses from all over the globe have been positioning themselves to be part of the world's fastest growing economy. China's employment market has become a vibrant platform for employers and job seekers to seek and to be sought.

Dealing with employment law in China is no child's play. While all employers and employees in domestic and foreign-invested enterprises in China must comply with national as well as local regulations, rapid development of the employment market has led to a shortage of professionals, resulting in the import of expatriates and training to cultivate domestic talent in order to maintain and enhance competitiveness. No company can afford not to know the governing rules and international practices that apply to employing staff in China.

Employment Law in China provides an insight into specific issues from recruitment and conclusion of contract to termination and dispute resolution. It is a practical guide to help you tackle difficult legal matters as well as softer human resources issues. *Employment Law in China* is an indispensable tool for managers, human resources practitioners and professionals alike.

We trust that you will find *Employment Law in China* to be an invaluable resource in dealing with complex employment issues in China.

CCH Editors

January 2011

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CHN ¶1-001 Country profile

China's population, especially in all major cities, is remarkably homogeneous, both racially and linguistically. The racial minorities there, though over 100 million in number, are concentrated in the border regions of the country and are almost totally unrepresented in the urban workforce of the country. The Eastern Seaboard, comprising the provinces of Guangdong in the south through Fujian, Zhejiang and Jiangsu in the centre of the country, to Shandong in the north, contains the majority of the population and industry.

The vast size of China's population, however, means that there are still distinct population centres outside the Eastern Seaboard, such as the southwest area of Sichuan and Kunming provinces bordering Myanmar (Burma) and Thailand, which contain well over 100 million people and are thus economically very significant.

Despite the overwhelming unity in terms of language, everyday culture (eating habits and entertainment, etc), education systems and the like that the entire country displays, there are still a number of important regional differences of which the regional Human Resources (HR) manager must still be aware. Perhaps most importantly, until very recently regional mobility within China was very limited apart from the political and military worlds. Staff at every level have been reluctant to leave their own locality to be posted to another area of the country.

There are many factors behind the reluctance to relocate. Relationships, or *guanxi*, developed in a locality over many years, remain an undeniably crucial factor in doing business in China. This complex cultural reality, reinforced by a social and legal infrastructure lacking in transparency and levels of mutual trust, discriminates against the effectiveness of newcomers and "outsiders".

This conservative antipathy to relocation, once recognised and acknowledged, can be successfully handled by HR managers in a number of ways, from customised compensation and benefits policies through to building corporate culture values and programs. At the same time, China's rapid development is having an effect on this phenomenon and the reluctance of local staff to

relocate is diminishing. It is also worth remembering that married couples in China, especially if they do not have children, are on the whole more willing than their counterparts in the West or elsewhere to live separately for most of the year if their work requires it. But in all these circumstances, family get-togethers remain of great importance, most notably at Chinese New Year (a lunar festival that usually falls within the first two months of the calendar year).

This conservative approach however may be on a changing trend. In a survey conducted in 2009, 47% of respondents (the finding was based on interviews with over 1,070 people conducted by Manpower's Cross-city Talent Migration Survey) said that they would consider relocation in a year or two if there are viable opportunities.

CHN ¶1-011 Business statistics

China's national business statistics have become an area of some controversy. Headline figures provided by government units between 1980 and 2000 presented a picture of amazing performance in almost every sector at any time. While scepticism among the population towards such data has always existed, this has recently been reinforced by critical analysis from China's own national audit office, as the need for transparency over propaganda in economic data is increasingly acknowledged. On top of this, respected foreign academics, such as Rawski of the USA, have raised serious doubts on the veracity of China's published economic statistics. These factors reinforce the need for foreign business people to treat official economic data with sufficient scepticism. But such scepticism must equally not be overdone. Analysts of China's economy also comment that with the leadership transition in 2002/2003, emphasis appears to have shifted somewhat away from rapid economic growth as the sole criterion, with greater focus on sustainability and environmental concerns. China's population profile is also undergoing rapid change. Detailed census results (the latest was conducted in 2010) provide an interesting picture. In brief, the Government's long-term goal of ensuring the population will not exceed 1.5 billion has led to the one-child policy (implemented most strictly in urban centres but less so in the countryside and among national minorities). This has resulted in rapid growth of the percentage of the elderly among the population and a resulting overhang in pension liabilities, a serious issue pending resolution.

It has been announced that the one-child policy will continue during the 12th Five Year Plan period (2011–2015).

The one-child policy, combined with a cultural preference for sons, is leading to an imbalance between the male and female population. However, so far this is not overtly obvious among the urban workforce. For further discussion see Employment Issues CHN ¶50-381.

Maintaining employment is a high priority for the Government and a significant factor in welcoming foreign investors. Many millions of workers have been laid off from unsupportable State-owned industrial complexes. Unfortunately, most of those laid off are poorly equipped for employment in modern industry or the service sector. As a result, the actual unemployment level is a sensitive and hard-to-obtain figure. But unemployment is a live issue. Unemployment insurance by employers and employees is increasingly standard in Joint Ventures (JVs) and Wholly-Foreign Owned Enterprises (WFOEs), and this is an area undergoing rapid development.

CHN ¶1-021 Education

Education levels are also an area of significant change. Political turmoil in the 1960s and 70s led to a widespread breakdown in educational provision, especially at the tertiary level. This has led to local managers in their late 40s and 50s often totally lacking anything like the qualifications and educational level of their foreign counterparts.

Since the late 1970s, the education system has been resuscitated but retains the scars. Traditionally elite academies returned to prominence — Tsinghua and Peking University in Beijing, Fudan in Shanghai and a handful of others — and the distance between them and other universities appears to be growing. The nationwide trend is an intensive focus on English language learning at every level. MBA enrolment within China is also on the rise.

Many foreign employers have found that locals employed for several years in local enterprises have developed negative work habits, and so prefer to employ graduates straight out of college. Much training is required, and employee loyalty is often very limited. Creative thinking, innovation and a willingness to undertake responsibility have traditionally not been developed at all by the local education system and so are lacking. A rigid hierarchical and overly deferential system has been the norm at local enterprises, alongside nepotism, petty corruption and factional disputes. Regional HR managers have a big job in China to overcome these obstacles and begin to establish best-practice norms.

CHN ¶1-031 Labour supply trends

Immigration into China is rare and not encouraged, an unsurprising fact given the country's already huge population. One significant exception is the welcoming back of "overseas Chinese". This policy is deliberately left vague and originates in China's claims of sovereignty over all people anywhere of "Chinese" race. Thus overseas Chinese can include those from Hong Kong, Macau and Taiwan, but also long-naturalised Singaporean-born, American-born, Australian-born or British-born Chinese and others, and definitely "returnees", or those who left China in the last 20 years or so, especially those who left to study.

The exact position of such people, in terms of nationality, tax liabilities and more, is a complex situation about which HR managers need to have sufficient knowledge and to have developed internal policies. The same applies to other foreign workers. Essentially the Government's position towards foreign workers of all types is restrictive. Those without "special skills" are not welcome, and those with special skills only temporarily and subject to a number of visa and residence regulations. The long-term goal is for these skills and positions to be localised. However, in general, a looser policy has applied for many years and looks likely to continue. Nonetheless, the legal obligations for residence and work permits and related permissions very much still apply and the HR manager needs to be knowledgeable about all of these. This also applies very much to taxation of personal income in China, another sector undergoing rapid change. For further details on work permits see Expatriates and Foreign Workers CHN ¶100-001.

CHN ¶1-041 Managing information

For reasons of its unique political development, the entire issue of record keeping for local employees in China differs considerably from that in practice in most developed economies. This is due to the *dang'an*, or personnel file, system. Under this, the record keeping of all Chinese staff is a highly-controlled issue under the direct control of the Government. These are secretive files of many aspects of one's life as recorded by authorities at all levels from primary school through neighbourhood watch committees up to all employers. Under tight central control, these files follow individuals throughout their life. As such, this system has little to do with record keeping as a matter of tracking employee performance as developed in best-practice human resource management. However, these two systems cannot help but overlap in China. On the one hand, managers of foreign companies must be aware of the system described above, which is not generally subject to any alteration by employers. On the other hand, in individual circumstances it may well be possible to develop a method of tracking employee performance and appraisal that is separate and distinct.

The guidelines for access to, and review of, such information, and its use by multinational companies in China is therefore an important and sensitive issue that is very much at the forefront of human resource management practice in China, and for which there is currently little experience. It is a confused and complicated regulatory system. The first place to start may well be adapting internal corporate policies to this unique environment in close liaison with the local company workforce and management.

CHN ¶1-051 Registration

Registering and setting up a business is a lengthy and time-consuming business in China, and almost always requires the assistance of legal

specialists or other consultants, although it is becoming easier. Also important is maintaining all valid registrations and permissions, usually on an annual basis, as well as keeping up-to-date with changes in local legal requirements and the frequent policy changes in all business areas, from land to HR to tax and more. Establishing and maintaining good relations with a host of local (and national) government bodies is often the easiest way to do this.

How long such registration takes depends entirely on the size, nature, form and significance to China of the foreign investment being proposed. A simple business licence for a representative office can be secured within a few weeks or less. A massive investment in a previously-restricted area of the economy and in a more innovative corporate form may take a decade or more, and involve persistent lobbying at a high level.

As an evolving command economy environment, China has a huge bureaucracy which shows no signs of shrinking. In fact, the opposite may well be the case as the regulatory burden grows. Moreover, much of the institutional government regulatory framework in place bears little or no resemblance to its counterparts in developed economies. Systems and structures left over from the past, such as the “Personnel File” and others, remain solidly in place. In addition, new burdens and structures (eg the pension, health and unemployment insurance mechanisms) are added. Each has their own government regulatory bureaucracy, often jealous of their own territory and far from willing to work with their peers.

CHN ¶1-061 Law and practice

As befits an avowedly socialist, if not Communist, country, issues of labour and employment are important and sensitive in China. There is a large body of labour law and a history of egalitarian social practice that can weigh heavily against modern best practice employment, staffing and compensation structures.

The labour scene is closely regulated, although this may not appear to be so at first glance. On the labour and blue-collar level, there are official State-recognised (and State-mandated) union bodies with a highly-structured presence. These may have cells at every level. Higher levels of Chinese enterprises are also supervised and regulated by chamber of commerce-like bodies. In reality, these structures answer to and are controlled ultimately by government and party bodies, especially as the vast majority of Chinese partner foreign companies are working with are ultimately State-owned. This is important to remember on several levels.

Firstly, the apparently high level of autonomy in managing the Chinese workforce in practice in WFOEs is the result of political policy and not freedom on the part of the workforce. For example, the policy imperative over the last 20 years and for the time being is to facilitate foreign investment

through the provision of a tightly-controlled local workforce. Secondly, it is also important to remember that one's counterparts in a Chinese enterprise's management level do not have the same management control in many areas as do those in a multinational company, despite appearances.

There is a growing regulatory burden in all areas, on top of an already large amount of labour and workplace regulation for a supposedly developing economy. This applies especially to workplace safety, accident compensation and related issues, although it is now expanding to pension, unemployment and health insurance provision.

Enforcement is the key. If applied rigorously and uniformly, the investment environment in China would not be as attractive as it might at first appear to many foreign companies. The gift of lax enforcement, which remains the norm, rests with the labour authorities. Therefore a cooperative and amiable relationship with the several different regulatory bodies involved is wise.

The challenge is to know what is understood as the minimum requirement, and stick to it. This may also change over time and as policy develops, or in response to events. Maintaining close relationships with the official regulators and their representatives in local government and within the workplace, as well as keeping close relationships at unofficial levels with all layers of the local workforce, is vital.

The legal system in China does not operate in a similar way to those in America or Europe. Judgments, punishments and consequences are the object of discussion and interaction rather than automatic sanction by neutral bodies. Regulatory authorities within local and national government, such as labour regulators and authorities, retain the scope of implementing their own rules rather than judicial bodies alone. Local knowledge is crucial in preventing misunderstandings from becoming crises. This may take the form of unofficial consultants, the Chinese partner, experienced managers of one's own company (especially those with cultural and linguistic expertise), or a mixture of all of these and others.

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CHN ¶10-001 Introduction

As organisations restructure in response to changes in their operating environments, the role of the HR function is changing, both in terms of its role in managing the change process and its role in the organisation in general. In most cases, the HR function is moving away from a functional base towards a more strategic role.

As many functional HR roles are either being devolved to line managers or outsourced, many HR functions within the organisation have been considerably diminished, if not made redundant.

CHN ¶10-011 Impact of globalisation

From an HR manager's perspective, globalisation and China's entry into the World Trade Organisation (WTO) present an opportunity in terms of the "macro" environment to introduce to the local workforce and management a number of international best-practice management and training tools previously considered too controversial. These could range from 360 degree appraisal techniques to streamlining or reorganising the hierarchy, or any other policy that fits the particular workforce or situation.

CHN ¶10-021 The challenges of the regional HR manager

Corporate culture

China's unique environment presents many challenges to even the most experienced HR managers. Perhaps the greatest challenge is corporate culture, which is at its best expressed in the concept of individual loyalty and identity. China's development and history has led to a social culture of little trust between all levels of society.

This has repercussions in all areas of company life. Teamwork is rare, little understood and very challenging, though not impossible, to introduce. Minimum standards of social behaviour taken for granted in Western Europe, America and other developed economies, are apparently lacking. This can