



The Labor Law in China

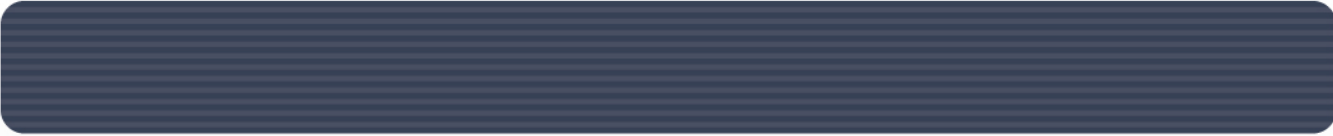
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Why is labor law a hot topic?

- To successfully compete, businesses need sound HR system
- Employment disputes can greatly undermine HR system
- One aspect of sound HR system is controlling legal risks

Outline

- 1. Introduction to the labor law regime in China
- 2. Employment contract and job offer letter
- 3. Hiring discrimination
- 4. Fixed term versus open-ended employment
- 5. Overtime pay
- 6. Non-compete agreement
- 7. Termination and Severance
- 8. Miscellaneous



Part One

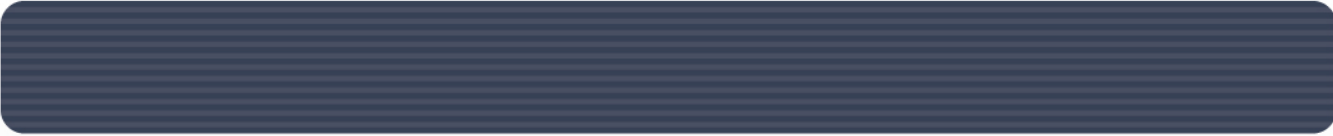
Introduction to the Labor Law Regime in China

Relevant laws & regulations

- *Employment Law* 《劳动法》 (1994)
- *Employment Contract Law* 《劳动合同法》 (2008)
- *Employment Promotion Law* 《就业促进法》 (2008)
- *Employment Dispute Mediation & Arbitration Law* 《劳动争议调解仲裁法》 (2008)
- *Implementation Rules for Employment Contract Law* 《劳动合同法实施条例》 (2008)

Ramifications of recent legislation

- In general, more favorable to employees and gives them more rights
- Employees have become more aware of their rights, and more assertive
- As workers no longer need to pay any fee to file an employment arbitration claim, the number of claims is increasing dramatically



Part Two

Employment Contract and Job Offer Letter

Employment contract

- An employment contract is an agreement between the employer and the employee that establishes an employment relationship and clearly sets out the parties' rights and obligations

Written employment contracts required

- A written employment contract must be signed no more than one month after start of actual work
 - Otherwise, double salary
 - Exception for part-time employment
- Contracts may be for a fixed-term, open-ended or for piece-work

Required contents of employment contract

- Name, domicile and legal representative of employer
- Name, address and ID card number of employee
- Term of employment
- Description of work and location of workplace
- Working hours and resting hours / rest days
- Compensation
- Social insurance
- Workplace safety

Suggestion to employers

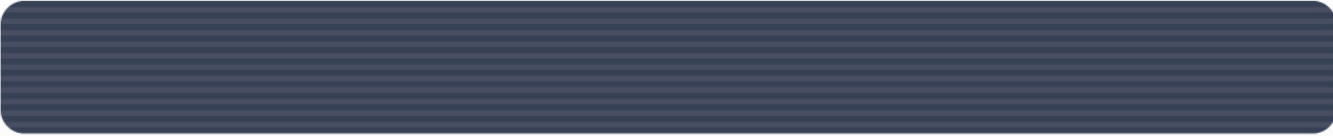
- Complete all necessary reviews (e.g. diploma, health check) prior to signing the employment contract
- Must sign employment contracts
- Company has the right to refuse employment or terminate employment if employee refuses to sign an employment contract

Job offer letter

- The legal position of a job offer letter is unclear: does the letter constitute a written employment contract upon acceptance or does a further written contract need to be signed?
 - A letter usually does not contain all terms to be contained in an employment contract
 - Are the terms in the letter binding, with supplemental terms to be added by a further agreement?
- An arbitrator may hold the company to the terms of the job offer letter even if the company purports to revoke or amend it after sending it out
 - If an arbitrator finds the job offer letter to be a contract and the company did not honor it, the company must pay double wages

Suggestion to employers

- Don't just rely on a job offer letter to serve as a written employment contract
- To preempt any misunderstanding, use the term “employment letter of intent” and indicate in the letter that nothing is binding until the parties sign a formal employment contract



Part Three

Hiring Discrimination

Forbidden grounds for discrimination

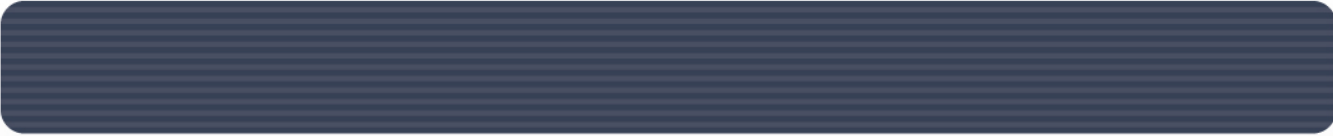
- Ethnicity, race, sex, religion
- Sex may be a legitimate ground for hiring discrimination only for positions that the government has explicitly recognized as unsuitable for women
- Job advertisements must also comply with the above

Forbidden grounds for discrimination

- Having certain diseases is usually not a legitimate ground for hiring discrimination
- An employer in Guangxi who refused to hire a hepatitis B carrier was found by court to have discriminated as the applicant's physical state has nothing to do with the job position (mobile phone fixer) and ordered mental distress damages and a written apology

Suggestion to employers

- When making a hiring decision, the employer should choose based on working ability of the job applicant
- An employer should not discriminate on grounds not relevant to working ability (such as, in most cases, height, sex, hepatitis B, etc.)

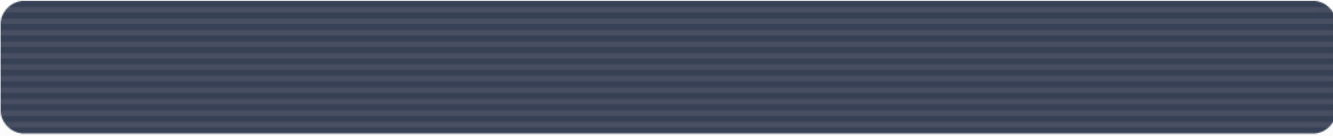


Part Four

Fixed Term Versus Open-Ended Employment

- In general, the parties may choose the term of the employment relationship – whether it is a fixed term or open-ended

- However, under the following circumstances, if the employee requests or agrees to continue employment, the employee may choose whether the contract will be fixed term or open-ended:
 - Employee has worked there for 10 years continuously
 - Two fixed term contracts have already been performed, and the parties intend to renew the term again



Part Five

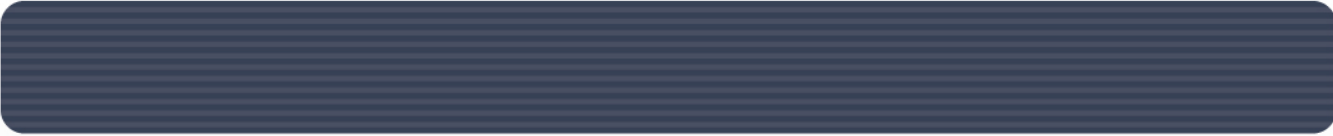
Overtime Pay

Three kinds of “overtime” under PRC law

- Overtime hours
 - Legally allowed: 44 hour / week + 36 overtime hours / month
 - 1.5x regular pay
- Working on rest days
 - 2x regular pay
 - No need to pay overtime if rest day can be made up
- Working on statutory holidays
 - 3x regular pay
 - Statutory holidays cannot be made up

Calculating “regular pay”

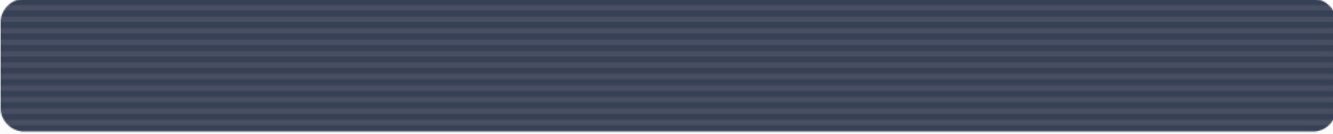
- No state-level standards yet
- Some places allow parties to agree on what “regular pay” is in the employment contract, others do not
- Bonuses, benefits and allowances not included

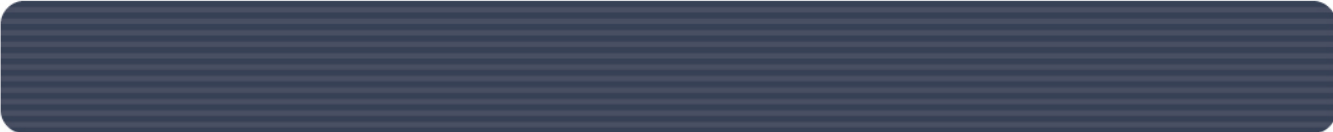


Part Six

Non-compete Agreement

- Under PRC law, non-compete provisions in an employment contract are generally enforceable, however
 - Only senior management, senior technical staff and other employees subject to a non-compete duty during their employment may undertake a non-compete duty after leaving
 - The employer must pay a monthly stipend as compensation for non-competition
 - Non-compete duty may not exceed two years

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- The non-compete undertaking may be contained in the employment contract or in a separate agreement
 - Remedy for breach – parties may agree on liquidated damages



Part Seven

Termination and Severance

Termination for cause

- Employer breaks employment-related laws
- Employee seriously breaks laws or has a serious dereliction of duty
- Employee is incompetent after demotion (30-day notice)

Demotion procedure

- An employer may unilaterally change the employee's job position, but must have proof that the employee is not competent at the original position
- For example, the employee did not pass competency tests, even after several tries
- The procedure for determining competency must be objective and reasonable – not a pretext or a sham
- Employer may lower wages upon demotion, but cannot set it arbitrarily – must be comparable to similar positions

Immunity to demotion / termination for incompetence

- Employee is suffering from work-related injuries, pregnant, nursing or under medical treatment,
- Employee worked for over 15 years and less than 5 years from retirement

Termination at will

- Employee can terminate at will by giving 30 days notice
- Employer not allowed to terminate at will

Employer in distress

- Employer may terminate with 30 days notice if a material change in circumstances frustrates the original intention of entering into the employment contract, causing the contract to be impossible to perform
- “劳动合同订立时所依据的客观情况发生重大变化，致使劳动合同无法履行，经用人单位与劳动者协商，未能就变更劳动合同内容达成协议的。”
- If employer must layoff 20 people or 10% of the workforce, it must make an announcement to employees and the layoff plan must be reported to the authorities

Illegal termination

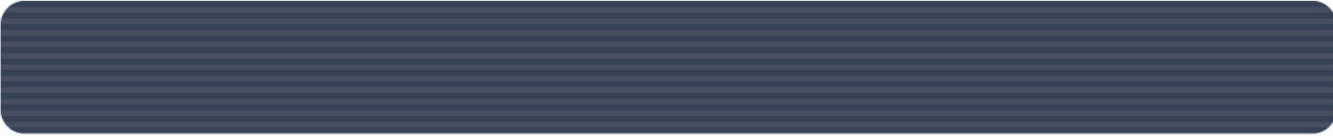
- Illegal termination results in double severance

Severance pay

- Must be paid when fixed or open-ended contracts terminate except
 - Employee terminates at will,
 - Employer terminates due to violation of laws or serious dereliction of duty, or
 - Still in probation period
- Also payable for fixed term contracts that expire unless employer offers extension and employee refuses
 - I.e.) cannot avoid severance pay through multiple fixed term contracts

Severance pay

- Calculation
 - 1 month salary for each for year of work, up to 12 years
 - 1 month salary for a stub of more than 6 months
 - 1/2 month salary for a stub of less than 6 months
 - Salary is calculated as average salary over past 12 months – but capped if 3x more than local average salary



Part Eight

Miscellaneous

Employer-sponsored training

- In general, if an employee quits, the employer may not impose any sort of fine or penalty
- However, an exception is available where the employer provides “specialized technical training” and incurs costs for such training
- In that case, the employer and employee may enter into a “training agreement” setting forth a definite term of service
 - If the employee quits before the term of service is completed, the employee is liable to pay for a pro-rata part of the training costs

Employer-sponsored training

- “Specialized technical training” excludes training by the employer itself but rather refers to training conducted by a third-party where the employer pays the costs on behalf of the employee

Suggestion to employers

- Consider forming a separate entity to conduct training for employees, billing the employer for the costs
- This way, you may elect to enter into training agreements with employees in order to recoup part of the training costs if the service term is not completed

Foreigners working in China

- Before employing a foreigner, the employer apply for (on the foreigner's behalf) and obtain a work permit
- Without proper authorization, a number of laws may be violated, including immigration laws



THANK YOU.

Questions & Comments

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