The Legal 500 Country Comparative Guides

China: Employment & Labour Law

This country-specific Q&A provides an overview to employment & labour law laws and regulations that may occur in China.

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1. **Does an employer need a reason in order to lawfully terminate an employment relationship? If so, describe what reasons are lawful?**

In China, a legal reason provided in the labour contract law (LCL) is always required for an employer to terminate an employment relationship, and such reasons are classified into two situations:

1. Unilateral termination due to the employee's fault ('Termination for cause') – Termination is allowed only if:

a. It is proven that the employee fails to meet the recruitment conditions within the probation period; or

b.the employee seriously violates the internal rules and bylaws established by the employer; or

c. the employee causes severe damage to the employer due to seriously neglecting his/her duties or seeking private benefits; or

d. the employee simultaneously enters an employment relationship with another employer and thus seriously affects his/her completion of the tasks assigned by the employer, or the employee refuses to resolve such concerns after his/her employer points them out; or

e. the employment contract is fully or partially invalid because the employee forced the employer to sign the contract against its will by means of deception or coercion or by taking advantage of the employer's difficulties; or

f. the employee is under investigation for criminal liabilities according to the law.

2. Unilateral termination without employee's fault ('Termination without cause') – Termination is allowed only if:

a. The employee is sick or injured due to a non-work-relatedreason and cannot resume his/her original position after the expiration of the medical treatment period nor any other position arranged by the employer; or

b. the employee is incompetent in his/her position and still fails to meet the position requirements after training or transfer to another new position which his/her employer arranged; or

c. the performance of the employment contract cannot continue due to a considerable change to the objective situation on which the contract is based, and both the employer and the

employee cannot reach an agreement on amending it after mutual negotiation; or

d. mass redundancy is also allowed when the employer meets the statutory conditions provided in LCL (see question 2).

2. **What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned?**

A large number of dismissals or redundancies can only be undertaken when certain conditions and legal procedures stipulated in LCL are met.

1. 'Mass redundancies' refer to the termination of at least 20 employees, or less than 20 but accounting for at least 10% of the total number of employees.
2. Legal reasons shall be satisfied, such as the employer is under restructuring according to the enterprise bankruptcy law, or encounters serious difficulties in production and business operation, or changes the products; or makes important technological update, or adjusts the methods of its business operation, or considerable changes to the objective economic situation mean the performance of the employment contract can no longer continue.
3. Legal procedure must be complied with, for example, the employer shall draft an explanation 30 days in advance to the trade union or to all its employees, solicit their opinions and report the final redundancy plan to the labour administration.
4. All employees being laid off must receive severance payment from the employer involved according to LCL.
5. The employer shall take the employees' years of service, the term of his/her contract and his/her family's needs into consideration when it decides the priority of employees to be kept.

3. **What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?**

In general, a worker's employment cannot be terminated solely on the basis of a business sale. Whether the employment relationship can be terminated legally depends on different scenarios. For example, in the case of a shut-down and where the legal entity does not exist anymore, the employees can be terminated and the employer shall pay economic compensation to the employees. In circumstances where one company is merged into another company, the existing labour contract shall remain valid and the employing unit which succeeds to its rights and obligations shall continue to perform the original labour contract. If the business sale causes the objective situation to change significantly as provided in LCL, the company may have a reason to do unilateral termination after going through the legal procedures as well as paying the relevant compensation, etc.

4. **What, if any, is the minimum notice period to terminate employment?**

The employee can unilaterally terminate the employment contract by written notice to the

employer 30 days in advance, or by written notice 3 days in advance if submitted during the probation period.

In relation to an employer terminating the employment contract, notice 30 days in advance or one month's salary in lieu of notice must be given in the case of legal termination without cause (see question 1); while a notice 30 days in advance to the trade union or all employees is required in cases of mass redundancy (see question 2). Except for the period above, the employer is entitled to immediately terminate without any advance notice when the employee is at fault (see question 1).

5. **Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?**

   The employer may pay one-month's salary in lieu of notice to the employee when it has the right to unilaterally terminate without fault (see question 1).

6. **Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to say at home and not participate in any work?**

   There are no laws or rules in China regulating the legal term of 'garden leave', however such a practice exists where employers grant employees 'garden leave' on full pay. Ordinarily the legal risks for the company in these circumstances are not very high, unless the employees claim the work conditions differ from those stipulated in the employment contract. In this situation, the evaluation of the relevant consequences can be made on a case by case basis.

7. **Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.**

   The employer shall give a written notice in advance or pay one month's salary in lieu of notice, in situations where termination without fault of employees (see question 1) is permitted. Furthermore, some requirements of procedure shall be followed under different circumstances, such as in cases of dismissing an incompetent employee. In this case the employer must provide a training for the employee to improve his/her performance or assign him/her to a new position. If the employee continues to display incompetency after this process, the employee may be legally dismissed. In cases of mass redundancy, employers must also follow certain conditions and procedures (see question 2).

8. **If the employer does not follow any prescribed procedure as described in response to question 7, what are the consequences for the employer?**

   If the employer fails to follow any of the prescribed procedures as described in response to question 7, then such behaviour shall be deemed as illegal termination and the employee is

entitled to the ‘double economic compensation’ (see question 15) or reinstatement.

9. **How, if at all, are collective agreements relevant to the termination of employment?**

   Collective contracts may agree on remuneration, working time, rest and vacations, conditions for termination and other matters. Such conditions are reached by employees and their employer via a process of mutual negotiation in accordance with legal procedure. In this way, the collective contract is binding on all the employees. To some extent, it will be relevant to the termination of employment. For example, if the employer fails to pay the remuneration stipulated by the collective contract and one employee resigns due to this fault of the employer, in that scenario the employer is at risk of being liable to pay economic compensations to the employees.

   Additionally, the bargaining representatives on behalf of the employees are entitled to certain special protections in case the employment contracts expire during the period of collective negotiation. Generally, the term of employment contracts between employers and representatives of employees must be continued until the expiration of the negotiation period.

10. **Does the employer have to obtain the permission of or inform a third party (eg local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?**

    Yes, in some circumstances the employer has to inform or report to a third party. For example, when a redundancy occurs in a company the employer must explain the reasons to the trade union or the whole staff 30 days in advance, get their opinions and report the redundancy plan to the local labour authority. Also, the employer shall inform the trade union in advance when it intends to terminate any employment unilaterally. If the employer contravenes laws, regulations or the employment contract, the trade union can require the employer to rectify the errors. The employer must consider the opinions of the trade union and inform the trade union of the result.

    If an employer fails to fulfil such procedures, the termination will be deemed as illegal and the employer should bear the relevant liabilities (see question 8).

11. **What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?**

    According to the existing laws and regulations of China, discrimination towards workers is forbidden in certain cases. More specifically, the employees can bring a claim to the People’s Court if the employer:

    1. Establishes discriminatory restrictions for the rural workers; or
    2. refuses to hire females or heightens the recruiting standards for females on the basis of

gender; or
3. adds any contents in the labour contract restricting female workers from getting married or bearing children; or
4. establishes discrimination against the disabled; or
5. refuses to hire a worker who is a carrier of an infectious disease or hepatitis, violates no relevant regulations, etc.

Any employer who impairs the legitimate rights and interests of employees and causes any property losses or other damages may bear civil liabilities, and criminal liabilities if any crime is committed.

As to harassment, this concept does not exist in the current national laws and regulations of the PRC. However, similar concepts exist in civil and criminal law. Whether the workers are entitled to protection from harassment during their employment depends on many factors, such as whether it violates any stipulations from relevant law or internal regulations, providing that the employer has put such regulations in place.

12. **What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?**

Provided that an employee, who is under any of circumstances mentioned in question 11, is dismissed when he/she is not at fault, it will be deemed as illegal termination and the employee is entitled to the 'double economic compensation' or re-instatement. The employer should bear civil liabilities, and criminal liabilities if any crime is constituted (see question 11).

As to the consequences of harassment, the company may incur liabilities stemming from the commission of an act of 'illegal termination' pursuant to the relevant civil and criminal law.

13. **Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?**

Yes, some categories of employees cannot be dismissed unless he/she is at fault as stipulated by the LCL. Such special protection is given to employees who:

1. Are exposed to occupational hazards and have not undergone the necessary occupational medical exams before termination, or are likely to have contracted an occupational disease or are under medical observation; or
2. has an occupational disease or a work-related injury during the execution of his/her duty and it is confirmed that the employee has lost his/her capacity to work in whole or in part; or
3. suffers from a non-work-related injury and is within the statutory medical treatment period; or

4. is pregnant, on maternity leave or during the lactation period; or
5. has been working for the employer for 15 consecutive years or more and is less than 5 years from statutory retirement age.

14. **Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?**

From the labour law perspective, there is no clear law or regulation providing special protection to whistle-blowers and such special protection from termination of employment is only provided to the five groups of people outlined above (see question 13).

15. **What financial compensation is required under law or custom to terminate the employment relationship? How do employers usually decide how much compensation is to be paid?**

According to LCL, the financial compensation employers shall pay to their employees pursuant to the termination of employment relationships can be categorized as two types: the first is economic compensation paid to employees based upon the different scenarios of termination; the second is other financial compensation paid to special types of employees.

As to the economic compensation, according to the LCL, the economic compensation shall be paid under statutory circumstances, which can generally be divided into five groups.

1. When the employer is at fault first (such as failure of paying the labour remunerations in time and in full, etc.,) employees are entitled to terminate the employment relationship unilaterally and claim economic compensation from the employer.
2. The employer proposes to terminate the employment contract and with the conditions of the termination being concluded through negotiations between the two parties, following negotiations.
3. The employer has the legal basis to unilaterally terminate (see question 1&2) without employees' fault.
4. Unilateral termination enacted by the employer in response to challenges to the integrity of the business such as being declared bankrupt, business license being revoked, closing down, dissolving its business entity, liquidating its business entity, etc.
5. The employer terminates a fixed-term employment contract due to the expiration of the contract terms, unless the employee refuses to renew the contract even though the conditions offered by the employer are the same as or better than those stipulated in the current contract.

The calculation of economic compensation is based on the number of years the employee has worked for the employer and at the rate of one month's wage for each full year the employee worked. Any period of not less than six months but less than one year shall be counted as one year. The economic compensation payable to an employee for any period of less than six months shall be one-half of his monthly wages.

Meanwhile, the LCL sets a limitation on compensation for the termination for high-income employees. If the monthly wage of an employee is higher than three times the local average monthly wage of employees (hereafter referred to as 'capped number'), the rate for the economic compensation to be paid to him shall be the 'capped number' and shall be for no more than 12 years of his employment.

The term 'monthly wage' refers to the employee's average monthly wage for the 12 months prior to the termination of his employment contract.

For the second type of financial compensation, it is required to be paid to employees in certain limited circumstances, these being: extra medical treatment subsidy related to sickness and lump-sum disability subsidy for re-employment related to industrial injuries, etc.

16. **Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply.**

In China, the employer can reach an agreement with a worker on the termination of employment where the employee waives his rights unless the agreement falls into the scenarios which render the agreement invalid pursuant to the Contract Law of the PRC, such as damaging the public interests, violating the mandatory provisions, etc. Accordingly, this agreement cannot entirely avoid the risk of litigation brought by the employee. The employee retains the right to sue and the judge will consider all the relevant rights of employee to determine whether this agreement meets the abovementioned exceptions or whether it is obviously unjust to the employee or not.

17. **Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.**

Yes, the employer may restrict an employee from working for competitors after the termination of employment where the following requirements are satisfied:

1. Non-competition clauses or a non-competition agreement shall be concluded between the employer and employees who fall into the scope of senior managers, senior technicians, and the other employees who have the obligation to keep trade secrets of employers; and
2. the non-competition agreement shall not be contrary to any laws or regulations and shall include all the requisite contents like the scope, geographical range and time limit for non-competition (not exceeding two years), etc.; and
3. the non-competition behaviours are generally limited to work in any other employers producing or engaging in products of the same category, or to engage in business of the same category as this employer; and
4. the employer shall pay compensation legally for non-competition within the non-

competition period by month.

If an employee violates stipulations of a valid non-competition, it must pay the employer a penalty for breaching the contract and continue to fulfil the non-competition obligation as agreed.

18. **Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?**

The worker is obliged to keep the information related to the employer confidential after the termination of employment, if such information falls into the scope of trade secrets as defined in the Anti-Unfair Competition Law of the PRC (utilized technical and business information which is unknown by the public; may create business interests or profit for its legal owners; and is maintained secrecy by its legal owners).

However, in practice, many employers choose to enter into a confidential agreement/clause with his employees, making clear the definition and scope of the company's 'trade secrets' and the confidentiality duty of the employees to reduce the potential legal risks.

19. **Are employers obliged to provide references to new employers if these are requested?**

Employers are not obliged to provide references of an outgoing employee to the new employer. However, the employer is obliged to issue a certificate of termination of employment to the employee at the time of termination, bearing the terms of the employment contract, the date when it is terminated, the position of the employee and the working time of the employee with this employer. Additionally, the former employer shall write the reason for dismissal impartially upon the request of the employee.

20. **What, in your opinion, are the most common difficulties faced by employers when terminating employment and how do you consider employers can mitigate these?**

In general, the most common difficulties faced by employers when terminating employment are the following:

1. In certain cases employers may not understand and apply the law properly due to the lack of clarity of some of the statutory conditions.
2. Under current legislation, employers are required to set up internal rules to provide further guidance for the employees, such as explaining what kinds of behaviours are deemed as a serious violation. However, many employers fail to do so, and accordingly, fail to meet the statutory conditions for unilateral termination.
3. The burden of proof required for the termination of employment is borne on the employer. In order to satisfy the burden, sufficient and firm evidence is required to satisfy all the rules (laws and regulations, work rules, democratic procedures, regular

training, etc.), facts (statements, testimonies, records, etc.) and procedures (notifications, right to defend, etc.), to form a chain of evidence. It is the employer's responsibility to effectively collect, manage and use evidence when confronted with employment disputes. However, many fail to do this to a satisfactory standard.

4. The LCL stringently regulates procedures in certain circumstances of termination. Many regions of China have disparate understandings of these procedures which presents employers with extra challenges when managing unilateral termination.

To mitigate these difficulties, employers need to pay attention to both prevention and handling capacity.

1. **Prevention in daily management:**
   a. Manage the risks through the whole employment process in the period of recruitment, incumbency and dismissal, and particularly pay attention the work rules, contract formulation, and evidence management.
   b. Enhance the awareness and ability of management and build high-level human resource management systems, especially in setting up internal rules as required by law.
   c. Make and keep the company's labour relationship harmonious, through the procedure of training, conferences and communication channels to prevent risks in the early stages.
2. **Handling in emergencies:**
   a. Formulate an action plan, which needs to make the time schedule and task assignment clear enough to handle the termination step by step.
   b. Implement the action plan effectively.
   c. Obtain understanding and support from local governments and the local federation of trade unions, especially in the cases of mass layoffs.

3. **In either case, outside specialists can play an important role to help employers to solve the difficulties to a certain extent.**

21. **Are any legal changes planned that are likely to impact on the way employers approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?**

An interpretation (V) of the Supreme People's Court of Several Issues on the Application of Law in the Trial of Labor Dispute Cases is scheduled for publication during 2020.

This is a judicial interpretation of a unique source of China law, drafted by the Supreme People's Court. In China, even if the law being interpreted is not clearly defined, it will be considered as clearly defined if there is a provisional judicial interpretation. The judicial interpretation can be cited as a legal basis at trial.

Regarding judicial interpretations of labor law, 4 interpretations have been released. It has been over 6 years since the Interpretation (V) was released in 2013. With the increasing

complexity of labor disputes, the 5th interpretation will provide solutions that are more in line with present day legal requirements and judicial theory.

Employers must follow existing laws and regulations as closely as possible in order to ensure compliance and avoid unnecessary legal risks.