

10.1. Labor Law, Labor contract law and their implications (RC)

Introduction

There are mainly two laws in place which regulate the working environment in China:

- Labor Law (1995)

The labor law gives a general overview about the relevant regulations considering labor and the responsibilities of the employer.

- Labor Contract Law (2008)

Additionally, the Contract law gives additional provisions concerning how labor contracts should be concluded, terminated, what key elements they should include and rules for compensation.

While this document here outlines the most important points from the author's point of view, it is recommended to check the relevant articles when analyzing special cases.

In these laws there are sometimes also "other relevant laws" mentioned and local regulations might exist which should be also considered when handling special cases.

Please use this document as an overview but consult a specialist or lawyer for advice if you need a deeper analysis.

Working Contract according to the law

While the working contract can specify more contents, the following contents are required by law:

1. name, domicile and legal representative or main person in-charge of the Employer;
2. name, residential address and number of the resident ID card or other valid identity document number of the worker;
3. term of the labor contract;
4. scope of work and place of work;
5. working hours, rest and leave;
6. labor compensation;
7. social insurance;
8. labor protection, working conditions and protection against occupational hazards; and

9. other issues required by laws and regulations to be included in the labor contract

The labor contract should be provided in written form in two copies of which one the company and the other one the employee should keep. Amendments to the contract can be done when both parties agree and should follow the same form with two copies.

If a written contract is concluded too late, the employee might be entitled to twice the wage payments.

In general it is advisable to regulate as many critical points as possible in the working contract since otherwise provisions of a collective contract if existing, "equal pay for equal work" provisions or the rules of the state will apply in disputes.

The employer has to truthfully advise the employee on the real working conditions and compensation.

If a company is hiring an employee that is still working for another company, it might be liable for damages together with the employee: During the hiring process it should be ensured that all former employment agreements have been terminated at the start of the employment contract.

Voluntariness, Non-Discrimination and Juveniles

Labor contracts have shall be concluded by the principles of equality, voluntariness and agreement through consultation.

The Labor Law forbids discrimination due to nationality, race, sex or religious belief.

Women can solely be excluded from certain positions if they are not suitable according to state regulations, e.g. working in mines or high above the ground

The minimum age for legal employment is 16 years except in special cases in sports or special skill units.

In several articles, the laws also mention the principle of "equal pay for equal work".

Labor Union

While the Labor Contract Law defines the role of the Labor Union also as a function to “protect the lawful rights and interests of workers”, currently this seems to be more on paper than in reality.

Labor Unions in reality often do not have this function but provide more a “feel-good”-function for company staff organizing company activities and handing out gifts.

Probation period

A probation period is limited to 6 months and must be paid with at least 80% of the agreed wage and shall not be less than the minimum wage of the location of the employer.

Also during probation, rules on termination of the contract apply.

Additional optional components

The following components can be added in general, please refer to the original law to check for possible limitations:

- Professional training during probation
- Non-Competition Clauses (which is strictly limited and the employer has to compensate for)
- Protection of Intellectual property or trade secrets

Limited vs unlimited contracts

An employer and employee can agree on time-fixed contracts, unlimited contracts or contracts until a certain task is completed - this should be clearly documented. Especially at the extension of limited contracts it should be checked if according to the law this could lead automatically to an unlimited contract. It is important to note that even when a limited contract comes to an end and the employer offers no additional employment, the employee is entitled to compensation according to the law.

Compensation/Salary

Compensation has to be paid out on time on a monthly basis, in full and overtime payments

have to be calculated correctly. The wage must not be less than the local minimum wage.

If this is not followed, the employee is entitled to additional compensation payments of 50-100% of his wage.

Social Insurance and Welfare

The labor law regulates the establishment of a social insurance system which brings treatment to laborers who

- Retire
- Suffer diseases or injuries
- Become disabled during work or suffer occupational diseases
- Become jobless
- Provide birth.

The level of this social insurance shall be in line with social and economic development and social sustainability. Further details are regulated in other laws and regulations.

The state encourages the employer to set up supplementary insurance for laborers according to its practical conditions.

Health, Safety and Fiduciary Duty

According to the law, the employer has to ensure the health and safety of the employee and provide proper training. They also have to carry out regular health examination for laborers engaged in work with occupational hazards.

Laborers should strictly follow the rules on safe operation in the process of labor.

During the construction of new projects, renovation or expansion of existing projects the health and safety facilities have to be considered.

The following cases may also prevent a termination of the working contract:

- If an occupational disease has occurred or it has not been checked for
- During illness or non-work-related injury while the prescribed medical treatment is still ongoing

- Pregnancy, Confinement or nursing period of a female employee
- An employee works more than 15 years for the entity and is less than 5 years away from retirement
- Other laws or administrative regulations

Working Hours

Working hours shall not be more than 8 hours a day or 44 hours a week and one day of rest per week shall be guaranteed. Exceptions are possible if they are approved by labor administrative departments.

If the entity is a production business, it can prolong the working hours after consultation with the laborers and the union by an hour a day in general, by three hours a day under special reasons but not more than 36 hours a month. The health of the employees has to be guaranteed if the working hours are extended due to special reasons.

There are certain regulations in place which lift these time limits in rare cases.

Pregnant women enjoy special protection considering overtime or night-shifts.

An employer is not entitled to force an employee into overtime, if overtime is willingly accepted by the employees it has to be paid with the overtime wages:

- 150% of the normal wage in longer working hours
- 200% of the normal wage if laborers work during resting days and they cannot compensate the lost resting day on another day
- 300% of the normal wage on legal holidays.

Vacation and public holidays

The employees are entitled for paid leave during public holidays. Additionally, they get paid annual leave if they worked for at least a year in the company and in special occasions e.g. Marriage or periods of Mourning.

Pregnant women are entitled to maternity leaves of no shorter than 90 days.

Limitations of authority to give directives of the employer

The employer is limited in his authority to give directives to the employee in the following cases:

- Working overtime, which has to be willingly done by the employee
- Perform dangerous tasks

Changes which do not need consent

- Changing company name, legal representative or investor do not have an influence on the contract

Training

The labor law promotes training of employees by the state, government organizations at all levels and asks the employer to establish a system for professional training including extraction and using funds to provide laborers with trainings in a planned way.

Termination by the employee

In general, terminating a working contract requires negotiation between employer and employee except in specific cases stipulated by the Labor contract law.

An employee can quit with a 3 day notice within the probation period and 30 days after in certain cases, in serious cases he might terminate the contract immediately.

While the law is pretty straight-forward with the definition of valid cases in which the employee can terminate the contract, in reality most cases of termination rely very much on negotiation.

Even while the employee is liable for damages brought to the company due to an unlawful termination of his contract, these damages might be hard to prove.

Termination by the employer

Termination by the employer is possible, if the employee

- Does not meet the requirements during probation
- Materially breaches the rules and regulations of the employer
- Causes substantial loss to the company due to serious dereliction of duty or engagement in graft of personal gain
- Establishes an employment relationship with another employer which has serious impact on his work performance
- Is subject to criminal liability.

Additionally, with a 30-day notice or by paying a month of additional salary, the employer can terminate the contract if

- If an employee is unable to perform resume his original work nor other work after the expiration of prescribed medical treatment or a non-work-related illness
- The employee is incompetent and remains incompetent after training
- A material change makes both parties unable to perform according to the contract and both parties cannot agree on amendments in the contract.

Additional reasons for termination are possible especially in mass-layoffs or restructuring of the company.

Employment contracts are notoriously hard to dissolve without compensation if a fault of the employee cannot be proven. Therefore, it is advisable to clearly define the rules and regulations and document any violations against them if you need a reason to terminate a contract.

The labor union has to be informed about the reasons if the employer wants to unilaterally terminate the contract.

Additional requirements after Termination/Revocation

When a contract is terminated or revoked, the employer should issue an according certificate to the employee within 15 days. The employee shall handover his work and company property and if a compensation payment is required, it should be finished when handover is completed.

Disputes

Disputes should be settled in the following escalation stages:

- Negotiation between employee and employer
- Mediation, inside of the employer
- Arbitration with representatives of the labor administrative departments, trade union and employer representatives
- Court.

Supervision and Inspection

The labor administrative departments are responsible for inspection and supervision of the implementation of the rules promulgated by the law. They are entitled to review relevant materials to check the company's compliance in general. This department can also be called for support by an employee if his rights have been infringed.

Additional reviews can be done by specialized government departments, e.g. for production safety, health and construction.

The labor contract law also mentions that an individual or an organization can report violations of the law and might reward those who provided valuable information.

Special provisions

The Labor Contract Law includes additional special provisions about

- Collective Contracts
- Work Placement / Staffing Firms
- Part-Time Labor

Additional reads:

For more information, be sure to find the "Labor contract law" and the "Labor Law" with your favorite search engine.