ADVANT Beiten

EMPLOYMENT

Labour relationships are mainly governed by the PRC Labour Law, the PRC Labour Contract Law and related rules, regulations and implementing rules. Besides such State-level legislation, many locally applicable rules and regulations have to be considered when assessing labour legal compliance in China. The aforesaid labour legislation applies to all companies in the PRC, including Foreign Invested Enterprises (**FIEs**), and covers both foreign and Chinese employees.

1. Employment of PRC National Staff: direct hires and labour dispatch

Direct Hire by FIEs: Domestic enterprises as well as FIEs can and generally must employ their Chinese national staff directly.

Labour Dispatch for Representative Offices (ROs): ROs of foreign companies in China cannot hire PRC staff directly but must recruit all PRC national staff through qualified human resources agencies holding the necessary licenses in the PRC. If these agencies do not have any suitable staff available, they will place advertisements for the ROs to find suitable staff. Such PRC staff is then employed by the agency based on a labour contract. In turn, the agency and the foreign company who has established the RO in China will enter into a labour dispatch service agreement which sets out the framework for the labour dispatch. For each individual staff dispatched, in addition a labour dispatch notice will be signed between the agency and the foreign company. Generally, the reputable nationwide agencies use standard form agreements for which there is only limited room to negotiate. In addition, the foreign company/the RO can enter into supplementary agreements with the dispatched PRC staff to regulate matters not otherwise (or in insufficient detail) regulated in the labour contract/labour dispatch agreement (e.g. confidentiality, reporting, code of conduct, office-specific matters and alike). The agencies receive a monthly fee depending on their internal fee schedules and depending on different types of services they provide (which can even include tax declaration, payroll etc.). The agencies are obliged to pay for various forms of social insurance on behalf of the employees and for the mandatory housing fund contributions. These “employer” contributions are covered by the payments made by the RO to the agency.

Labour Dispatch for FIEs: FIEs and domestic PRC enterprises only employ personnel through qualified human resources agencies to a **very** limited extent. Legislation requires “equal pay for equal work” for direct hires and dispatched staff, mandates that the number of dispatched staff retained by a company cannot exceed 10% of the total number of its employees and stipulates that labour dispatch shall not be regarded as the main/regular form of employment but shall only be admissible in special cases, namely for:

- temporary positions with a term of no longer than six (6) months;

- auxiliary positions in non-core business operations that serve the core business positions of the company;

- substitute positions performed in replacement of the permanent staff members during periods when such staff members are unable to discharge their job responsibilities because of e.g. leave (maternity, study or vacation) or similar reasons.

2. Employment of non-PRC (Foreign) Staff

FIEs as well as domestic PRC enterprises can employ their foreign staff directly (or if such staff is sent from the foreign headquarters to China also employ such staff based on secondment agreements).

ROs cannot hire foreign staff directly but need to hire the foreign staff abroad and second him/her to China.

China-based employers (or the Chinese units receiving the seconded staff from abroad) must obtain an employment license to legally employ a foreign employee and the foreign staff usually requires a work permit, an employment visa ("**Z-Visa**") and a residence permit to legally reside and work in China.

2.1 UNIFIED WORK PERMIT PLAN AND CATEGORIZATION OF FOREIGN STAFF

The PRC State Administration of Foreign Experts Affairs ("SAFEA") streamlined the application process for work permits by applying a Unified Work Permit Plan under which a unified work permit has to be obtained by foreigners wishing to work in China. With the unified work permit, foreigners working in the PRC obtain a personalized, perpetual numeric ID (similar to the PRC ID card number of Chinese nationals) under which the foreign staff's employment history will be recorded.

The Unified Work Permit Plan implements a three-tiered classification system administered by SAFEA under which foreign staff gets classified as „A", „B", or „C" Level Foreign Employees, depending on an employee's score according to the new classification system. The score is based on factors such as position, salary, academic and professional credentials, work experience, age, language skills etc. A-level employees can submit online-only applications for their Work Permits and these applications will often be more easily approved while lower-level employees may face tighter scrutiny and also overall access of such employees to the China labour market is more tightly controlled.

2.2 APPLICATIONS FOR PERMITS, LICENSES AND VISA

Generally, the following general steps are required to obtain the necessary licenses and permits to legally employ foreign staff in China (local variations will apply and contacting the local authorities to inquire about the actual requirements is absolutely necessary):

- Employers first apply to the competent labour authority for an employment license for the employer to qualify to employ foreign staff;
- Afterwards, employees (or on their behalf their China employers) apply to the locally competent SAFEA for a „Work Permit Notice“;
- With the „Work Permit Notice“, the employee applies for a Z-visa at his/her home country with the PRC embassy or consulate;
- With the Z-visa, the employees can enter the PRC and within 15 days of entry, his/her employer applies to the local labour authority to obtain a work permit;
- After the work permit has been received and within 30 days of entry, the employee applies to the local Public Security Bureau for a foreigner residence permit that states the purpose of residence as “employment”.

Work permits are usually valid for a fixed duration and can be renewed if and as necessary.

If the employer or place of work indicated on the work permit changes, the work permit needs to be changed accordingly. If the employment terminates or ends, the employer must deregister the work permit and the residence permit.

For staff who is applying for the first time for the above licenses, permits and visa, the whole application process is rather complex and time consuming and realistically a few months should be calculated for completing the above-described processes. Typically, the following requirements need to be fulfilled to be eligible to apply for the requisite permits, licenses and visa to legally work in China as a foreign national:

- China Employer hold valid business licenses or similar document;
- Employee can prove at least an academic degree of Bachelor level and two years relevant work experience abroad (high level foreign talent (A-level) can be free of age, academic qualifications and work experience restriction);
- Employee has no criminal record abroad;
- Employees has a clean bill of health/medical report;

- Employee has a labour contract in/for China;

- Employee is above 18 years of age and has not reached 60 years of age (exceptions can be granted for senior positions and top-level talent).

All application documents that are not in Chinese language must be translated into Chinese and certain documents also must be notarized/legalized and authenticated by the competent foreign and Chinese authorities.

3. PRC Labour Contracts

Any labour contract with a PRC employer (whether foreign invested or not) must be governed by PRC laws and cannot be legally governed by foreign jurisdictions (irrespective of whether the staff is of PRC or foreign nationality).

Types of contracts: PRC labour laws differentiate between full time labour contracts and part time labour contracts and labour contracts for a special project. We will in the following only focus on full time labour contracts.

Written form: If an employer fails to enter into a written employment within thirty days as of the work commencement, the employee is entitled to claim double salary and if no written contract is concluded within one year of commencement of work, the employee is entitled to enter into a non-fixed-term labour contract.

Term: Full time employment contracts under PRC law can either be open term, fixed term or project based contracts. Fixed term contracts can be concluded for any term of below ten (10) years. There are certain circumstances when an employee has a right to ask for an indefinite term labour contract, e.g. among others if an employee has worked for the same employer for ten (10) consecutive years, he/she is entitled to ask for an open term contract. Also e.g. upon the expiration of two consecutive fixed term contracts (concluded after 1 January 2008 and irrespective of their terms) with the same employer, employees are entitled to an open term contract if they so elect. Foreign staff shall in general not enter into labour contracts in excess of a five year term (even though in practice longer terms often are agreed upon).

Probation Period: Depending on the duration of the contract term, a probation period can be agreed upon. If the term of a labour contract is more than three months and less than one year, the probation period may not exceed one month; if the term is between one year and less than three years, the probation period may not exceed two months; and if the term is fixed for three (3) or more years or is open-ended, the probation period may not exceed six months. The wage of an employee during probation shall not be lower than the lowest wage level for the same job of the employing unit or be less

than 80% of the wage agreed upon in the labour contract, and shall not be lower than the minimum wage rate in the place where the employing unit is located.

Hours of Work: The basic work week is 40 hours/week and eight hours/day (not necessarily Monday to Friday, the days can be decided by the employer). For overtime work, overtime pay of between 150% to 300% of the regular salary applies. Overtime work shall not exceed one hour per day and 36 hours per month.

For positions which due to their nature require flexibility of working time and the standard working schedule is not suitable, such as senior managers, sales staff, construction workers, drivers, etc., employers may adopt more flexible working time calculation methods such as e.g. the non-fixed working time schedule. Such schedule is generally subject to the labour authority's approval. The application is required for a job position, not for an individual employee. Under the non-fixed working time schedule, no overtime payment is required for working hours beyond the standard working time schedule, but the employer must arrange for additional rest time.

Medical Treatment Periods: The medical treatment period for non-work-related illness ranges from three to 24 months depending on the number of years an employee has been working for the employer. According to general statutory regulations, during medical treatment periods, employers must pay only a certain percentage of the employee's remuneration.

Paid Annual Leave and Public Holidays: Employees are entitled to paid annual leave based on their employment duration (this refers to their aggregate employment duration with all employers and thus is not restricted to the service term with the current employer) at the following minimum levels: five days for employees with an employment duration of one up to ten years; ten days for employees with an employment duration of ten up to 20 years and 15 days for employees with an employment duration of above 20 years of employment. Paid leave shall generally not be carried forward to the next year but shall be taken during the year of entitlement. Where employers require employees to carry paid leave over to the next year, it may be carried over to the next year only. As for the annual leave due but not taken by the employees, the entity shall pay the employees 300% of their daily wages for each day of the annual leave due and not taken.

In addition, employees are entitled to Chinese public holidays at full pay of salary.

Salaries: Employers are entitled to set salaries at their discretion and based on the rule of equal pay for equal work (e.g. no differences may be made based on race, gender, religion or on an arbitrary basis). Salaries may not be lower than the locally published minimum wage standards set by the local governments.

Mandatory Social Insurance and Housing Fund: As a rule foreign staff holding work permits as well as all Chinese full-time staff must participate in the mandatory basic social insurance, namely pension, medical (now also more and more including the previously separate maternity insurance), work-related injury insurance and unemployment insurance. In addition, PRC staff must participate in the mandatory housing fund (for foreigners this is not mandatory but in some locations possible on a voluntary basis).

Exemptions for foreigners to participate in the mandatory PRC social insurance may e.g. apply in cases where a foreigner working in the PRC does not hold and is not required to hold a work permit or where his/her employment relationship is governed by a bilateral social insurance treaty which exempts certain (but normally not all) of the PRC social insurance contributions.

Employers must withhold employee contributions from monthly salary payments and pay the employee's and employer's contributions to the social security and housing fund accounts. Fines can be imposed for late payment. Actual contribution amounts vary locally. Contributions by and for Chinese and foreign employees are calculated equally (except for housing fund which is not applicable for foreign staff). Retirement benefits are available after employees have reached the statutory retirement age, provided at such times contributions were paid for at least 15 years. Foreigners who permanently leave China can ask for a refund of their employee contributions to the pension insurance allocated to the employee's personal account.

Social insurance contributions shall be made to the tax authority in charge of the employer.

Confidentiality Provisions: Under PRC labour laws, confidentiality obligations may only be applied in regard to trade secrets and intellectual property of the employer. While it may be comparatively easy to determine the scope of intellectual property owned and/or legally utilized by an employer, it may be more difficult to determine in each and any case what constitutes a trade secret of any given employer. According to the PRC Anti-Unfair Competition Law, a trade secret refers to "*the technical information and business information that are not known to the public and have commercial value and for which corresponding confidentiality measures have been taken by their rights holders*". Thus, it is crucial for the employer to ensure that all confidential information as defined in the labour contract and related internal rules and regulations is subject to measures by which the employer attempts that such information is kept secret. Otherwise, unless the respective confidential information constitutes intellectual property, according to the prevailing definition of "trade secrets" and pursuant to the new law, the relevant information may not be validly covered under a confidentiality obligation.

Post-Contractual Non-Compete Obligations: For post-contractual periods, an employer may impose post-contractual non-competition obligations on certain categories of employees, i.e. the senior management, senior technical staff and other staff bearing the obligation of confidentiality. A "non-competition obligation" is specifically defined by law as an obligation not to: a) be employed by any entity who manufactures, operates or engages in products or business that fall within the same category as those of the employer; or b) engage on his own behalf in the manufacture or operation of products or business that fall within the same category as those of the employer. The post-contractual non-competition period must not exceed two years after the termination or expiry of the employment contract and requires that the employer shall pay a monthly compensation during the post-contractual non-competition period of at least 30% of the average monthly salary of the last 12 months before the termination of the contract.

Labour Termination: An employer and employee may terminate a labour contract upon agreement. In addition, an employer or employee may terminate a labour contract unilaterally before the end of its term under the circumstances described below (these are – based on general legal understanding – the ONLY admissible termination reasons and cannot be opted out based on a bilateral agreement and cannot be extended based on a bilateral agreement, at least not to the detriment of the employee).

a) An **employer** may terminate a labour contract before the end of its term with immediate effect:

- when the employee is proved to be unqualified during the probationary period;
- when the employee has seriously violated labour discipline or the rules and regulations of the employer validly implemented with the involvement of the employees or their representatives (employee's representative council or trade union);
- when the employee has committed serious dereliction of their duties or has practiced favoritism or other irregularities resulting in serious losses being incurred by the employer;
- when the employee has concurrently established an employment relationship with another employer that materially affects the performance of their duty with the primary employer, or the employee refuses to rectify the situation after being notified by the employer or
- when the employee has been accused of criminal liability.

b) An **employer** may terminate a labour contract before the end of its term by providing 30 days' notice:

- if, after undergoing a period of medical treatment, the employee with an illness or non-work-related injury is unable to perform their original work duties and is also unable to perform another job arranged by the employer;

- when the employee is not competent to perform their duty and remains unqualified even after training or being moved to another post or

- when a labour contract can no longer be implemented due to major changes in the objective conditions that were relied on as the basis for concluding the labour contract and an agreement to amend the labour contract cannot be reached by the employer and employee through consultation.

c) If any of the following circumstances make it necessary to reduce the workforce by at least 20 persons, or at least 10% of the total number of the enterprise's employees, the **employer** may reduce the workforce subject to statutory procedure:

- restructuring pursuant to Enterprise Bankruptcy Law;

- serious difficulties in production and/or business operations;

- the enterprise switches production, introduces new major technical innovation or adjusts its method for business operation and, after amendment of the labour contract, it is still necessary to reduce the workforce;

- a major change in the objective economic circumstances relied upon when the labour contract was executed renders performance impossible.

If an employer needs to reduce staff under such a situation, the labour union or all staff must be informed 30 days in advance. Staff may be reduced after the opinions of the labour union or all staff have been solicited and a report has been made to the labour authority.

When laying off employees, the employer must give priority to retaining employees who:

- have concluded with the employer a fixed-term labour contract with a "relatively" long term;

- have concluded with the employer a non-fixed-term labour contract;

- are the only ones in their families to be employed and whose families have an elderly person or a minor for whom they need care.

d) An **employee** may terminate a labour contract before the end of its term with immediate effect without prior notice to its employer if:

- the employer forces the employee to work through means of force, threat or illegal restriction of personal freedom;

- the employee is instructed in violation of rules and regulations or is peremptorily ordered by their employer to perform dangerous operations that threaten their personal safety;

- the employer fails to provide the labour protection or working conditions specified in the labour contract;

- the employer fails to pay labour remuneration in full and on time;

- the employer fails to pay social insurance premiums for the employee in accordance with the law;

- the employer has rules and regulations that violate laws or regulations, which harm the employee's rights and interests;

- the employer disclaims its legal liability or denies the employee's rights in the labour contract;

- the employer violates the mandatory provisions of any law or administrative regulation, e.g., refuses to pay an employee overtime or pays the employee below the local minimum wage;

- the employer causes the labour contract to be invalid due to (i) use of coercion, deception or taking advantage of the employee's difficulties to make the employee sign the labour contract; (ii) a disclaimer of the employer's legal liability or denial of the employee's rights; or (iii) a violation of mandatory legal provisions.

e) An **employee** may without any reason terminate a labour contract before the end of its term by providing 30 days' prior notice. Within the probation period, an employee may terminate a labour contract by providing three days' prior notice.

A labour contract becomes invalid if a party is forced to conclude or amend the labour contract contrary to its true intent by means of fraud, coercion or by taking advantage of such party's vulnerability.

Economic Compensation (Severance Payment): Severance payments for labour termination must be made in certain cases stipulated by law (e.g. unilateral termination by the employer (other than in cases warranting immediate termination), mass dismissals, unilateral termination by the employee with immediate effect, mutual termination agreements etc.).

Severance payment shall be paid on the basis of the number of years a person works with the given employer, the rate being one month's salary for the work of one full year. If an employee has worked for six months or more but less than one year, the time shall be calculated as one year; and if he has worked for less than six months, he shall be paid half of his monthly salary as severance payment.

Severance payment must be paid in one lump-sum and latest on the effective date of termination or work handover (if that were earlier).

If the actual monthly salary of the employee who shall be dismissed equals or is higher than triple the local average monthly salary at the seat of the employer, then triple of the local average monthly salary ("**CAP**") shall be used as basis to calculate the statutory severance payment. If the actual average monthly salary of the staff to be terminated is lower than the CAP, the actual average salary as paid during the past 12 months prior to termination would serve as basis for calculation of statutory severance payment.

If the termination is due to medical reasons (which are narrowly defined), the employer must pay an additional medical subsidy that amounts to at least six months' salary and, in cases of severe or fatal illness, such amount is increased by 50% to 100%.

Note: For contracts which have entered into prior to 1 January 2008, special rules apply which deviate from the above rules.

Labour Disputes: Usually an initial attempt is made to settle disputes internally through mediation by a labour union and representatives of the employee and employer. If no settlement can be reached, a labour dispute arbitration commission will adjudicate the dispute. Time limitations that depend on the nature of the case apply for seeking arbitral decisions. A party to a labour dispute that disagrees with the arbitral award may in certain cases file a suit at the local People's Court and if dissatisfied with the result, file a last instance claim with intermediate People's Court.

4. Trade Unions

Employees of PRC companies (including FIEs) are entitled to set up a trade union or join one if it is already existing. If there are fewer than 25 employees, the PRC Trade Union Law provides for a single union representative. If there are more than 25 employees, a union committee can be established.

Irrespective of whether a company has established a trade union, it shall pay 2% of the aggregate salaries paid by the company to the trade union fund (such contributions can then be used for eligible employee activities/benefits). The collection of trade union funds is generally handled through the local tax bureaus.

The All-China Federation of Trade Unions and local trade union federations strongly promote the establishment of trade unions in enterprises, including FIEs.

Violations of trade union laws can trigger lower grade valuations in the various social enterprise credit system qualification regimes (e.g. according to the Measures for Grade Evaluation of Corporate Labour Security and Law-Compliance and Integrity, enterprises are classified into A, B or C level).

Union representatives are entitled to attend company board meetings and comment on issues such as salaries, social benefits, work safety and social insurance but have no voting right in such meetings.

Employers are obliged to notify trade unions in advance in case of staff dismissals initiated by the employer. If the trade union considers the termination of a labour contract violates legal provisions, it has the right to express its opinion, and the employer is required to consider (but not necessarily follow) it. Courts have found that enterprises that do not have their own trade union notify the local level union office.

There is no law permitting employees to strike.

5. Internal Rules and Regulations (Employee Handbooks)

Employers shall have internal rules and regulations for labour-related matters that apply to all staff of the employer. Such internal rules and regulations (e.g. an Employee Handbook) are applicable to all employees of the company, including senior management personnel. Any individual agreement in a labour contract overrides the provisions of the internal rules and regulations.

These internal rules and regulations are a vital piece of HR management in China. A material breach of internal rules and regulations of an employer (such as the Employee Handbook) by an employee is one of the statutory reasons for dismissal without prior notice and thus it is generally desirable to subject all employees to such rules. Chinese labour law does allow employers (within reason) to define what shall constitute such a material breach in their internal rules and regulations. Moreover, there is no legal definition of internal rules and regulations and an Employee Handbook is only one example. Internal guidelines are also regarded as internal rules and regulations of an employer.

In order to validly implement internal rules and regulations that have a direct bearing on the interests of the employees (such as remuneration, working hours, rest and vacation, work safety and hygiene, insurance, benefits, employee training, work discipline and work quota management, etc.) a democratic implementation process involving all employees or their representatives is required. Such statutory implementation process of internal rules and regulations such as an Employee Handbooks generally includes i) discussions with all the employees or employee representative congress (if any); ii) collection of comments made by all the employees or the employee representative congress (if any); iii) discussion the comments with employee representatives or the trade union established within the Company (if any); iv) issuance of the final version to all the employees.

6. Employee Data Privacy

Starting 1 November, 2021, employers must observe data privacy laws concerning their employees as protected under the Personal Information Protection Law (**PIPL**).

In large parts, the requirements under the PIPL resemble those under the German GDPR rules:

Personal information refers to any information on identified or identifiable natural persons that have been recorded by electronic or other means, excluding information that has been anonymized.

Personal data handling includes data collection, storage, use, processing, transfer, provision, disclosure, and deletion, amongst other things.

Personal information handlers (e.g. employers managing the data of their employees) may only handle personal information if one of the following conditions applies: (1) obtaining individuals' consent; (2) where necessary to conclude or fulfill a contract in which the individual is an interested party, or where necessary to conduct human resources management according to lawfully formulated labour rules and structures and

lawfully concluded collective contracts; (3) where necessary to fulfill statutory duties and responsibilities or statutory obligations; (4) where necessary to respond to sudden public health incidents or protect natural persons' lives and health, or the security of their property, under emergency conditions; (5) handling personal information within a reasonable scope to implement news reporting, public opinion supervision, and other such activities for the public interest.

Where personal information is handled based on individual consent, the consent is provided by individuals is valid only under the conditions of complete knowledge, voluntariness and explicit statement. Thus, labour contracts should have a full explanation on the scope of the personal information of the employee handled and the scope of how, where and for which purposes it is handled (e.g. locally stored, transferred to or accessible by headquarters abroad, shared with banks and authorities, etc.) and state an express consent by the employee to such measures.

For any transfer of personal information to abroad, the data handler in China must not only obtain and informed consent from each individual data subject (employee) but also obtain the necessary government assessment/authority or enter into a data transfer agreement within the PRC legal limits to be legally allowed to remit data to abroad. Violation of these rules may trigger a black-listing in the corresponding China authorities' blacklist.

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