China Employment Law: Issues and Considerations for U.S. Companies

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Introductions

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Topics for Discussion

• Overview of some key employment law issues in China - including frequently encountered issues for U.S. companies with local workforces in China

• Some significant recent China employment law developments for US Employers

• Practical observations about best practices and strategies for U.S. companies growing and administering workforces in China
Overview of Some Key Employment Law Issues in China
Employment Laws in China

• Labor Law: Effective 1 January 1995

• Labor Contract Law: Effective 1 January 2008; amended 1 July 2013

• Labor Dispute Mediation and Arbitration Law: Effective 1 May 2008

• Relevant implementation rules, administrative regulations, case law, etc.
Types of Employment Contracts in China

• Non-fixed Term Contracts
  • May be terminated only for prescribed reasons

• Fixed Term Contracts
  • Specified term – then automatically terminates
  • Automatically converts to non-fixed term contract:
    • after 10 years of employment; OR
    • after two consecutive fixed terms if the employee requests

• Staffing Agency workers
Obligations on Employers – Employment Contracts

• Written employment contract required within one month of commencement
  • If more than one month but less than one year – double salary
  • If more than one year – employment deemed to be open-ended

• Prescribed content, including:
  • Information about employer
  • Term
  • Scope and place of work
  • Working hours and leave
  • Compensation
Company Policies and Rules

- Internal rules, including policies in an employee handbook, must comply with prescribed procedures when implemented or amended to be legally binding:
  - Must be provided to and discussed with all employees or an employee representative body;
  - Union or employee representatives must be consulted; and
  - Final version of rules must be published.
Working Hours and Overtime

- Working hours systems in China
  - Standard working hour system: 8 hours a day, 40 hours a week
  - Maximum working hours requirements

- Overtime rates
  - 150% salary in working days
  - 200% salary or time off in lieu in weekends
  - 300% salary in public holidays

- Limited exceptions to overtime obligations
  - Senior management
  - Employers can implement:
    - Flexible working hour system
    - Comprehensive working hour system
Annual Leave

• Employees are entitled to paid annual leave after having been employed continuously for at least one year with employer.

• Statutory annual leave entitlement is based on length of service in workforce:
  • 1 -10 years’ service = 5 days of annual leave
  • 10 years’ - 20 years’ service = 10 days of annual leave
  • 20+ years’ service = 15 days of annual leave

• Compensation payable for failure to grant annual leave
  • Where an employer cannot arrange annual leave for employees due to operational reasons, the employer must pay 300 percent of the employee’s daily wages for each day of untaken annual leave.
Termination

- There is no “at-will” employment in China
- Termination of employees is only permitted for a limited number of prescribed reasons
- Termination without notice is permitted only in limited circumstances, including when an employee:
  - is proven during the probation period not to satisfy the requirements for employment;
  - materially breaches the employer’s rules and regulations; or
  - commits a serious dereliction of duty causing substantial damage to the employer.
Termination

- Termination requires 30 days’ prior written notice (or payment of wages in lieu) if:
  - after a period of medical care, the employee cannot return to work;
  - the employee cannot adequately perform even after training or adjustment of the employee’s position; or
  - a major change in circumstances means the contract cannot be performed and the employer and the employee are unable to agree on amending the employment contract.
Restructures/Redundancies

• To make redundant: (i) more than 20 employees; OR (ii) fewer than 20 employees but more than 10% of an employer’s workforce, must satisfy the ‘statutory reasons’ for termination and comply with the required ‘statutory procedures’ for implementation

• Statutory Reasons
  • Reorganization; Serious operational difficulties; Change of business; Major changes to objective economic conditions of the company

• Statutory Procedures
  • Notify all personnel 30 days in advance
  • Consult with union
  • Provide layoff plan to the local labor administration
Severance Pay

• **Calculation of Severance Pay**
  • Based on the number of years an employee has worked with the employer at the rate of one month’s wages for each full year of service
  • Any period of at least 6 months but less than one year count as one year
  • “Monthly salary” refers to the employee’s average monthly pre-tax income during the last 12 months’ service
  • For service years after 1 January 2008: a cap of 12 months calculated at 3X the reported average wage in the local jurisdiction applies
Restrictive Covenants

• Non-competes limited to senior managers, senior technical personnel and employees with access to trade secrets
  • Limited to 2 years
  • Compensation required
  • Difficult to obtain injunctive relief – liquidated damages are more typical
Trade Unions in China

• Structure of Chinese trade unions:

  • A unified organizational system headed by All-China Federation of Trade Unions (“ACFTU”)

    • ACFTU is established at the national level as the highest body of all levels of local trade unions and industrial unions

    • Higher level trade union organizations lead the lower level ones, and the establishment of various levels of trade unions must be reported to the trade union at the next higher level for approval

    • Company trade unions are established taking the company as a unit, and they are the base level trade union organizations
Trade Unions in China

- Function of Chinese trade unions:
  - Protecting employee benefits; and assisting the company in exercising its business management rights
  - Discussing and passing new internal labor policies
  - Company must report to the trade union if unilateral termination
Some Frequently Encountered Issues for US Companies

- Employment without (or with inadequate or incorrect) written employment contracts
- Validity and enforceability of internal policies – including in connection with confidential information
- Working hours and overtime pay
- Annual leave issues – statute v policy
- Temporary worker structure and administration
- Termination issues – reason, process/evidence and approach
- Termination payments – approach and amount precedents
- Trade union issues
Some Recent China Employment Law Developments
China Employment Contract Law Amendment – Staffing Agency Workers

• Effective July 1, 2013

• Legislation limits the use of staffing agency workers to three types of positions:
  • Temporary - a maximum of 6 months’ duration
  • Auxiliary - not engaged in the principal business of the employer
  • Substitute - replaces another employee who cannot work for a certain period of time

• Maximum proportion of workforce can be staffing agency workers
China Employment Contract Law Amendment – Staffing Agency Workers

• “Equal pay for equal work” requirement - applying the same compensation standards for temporary employees and directly-hired employees who hold the same positions

• The relevant national authority will announce the permitted ratio of total temporary employees to total direct-hire employees
Judicial Interpretation – Non-competes

• An interpretation on non-compete issues was promulgated by the Supreme Court on February 1, 2013
  • when parties mutually agree upon a non-competition covenant without designating compensation, 30% of average monthly salary will apply
  • an employee has the right to terminate a non-competition agreement if the employer fails to pay the stipulated non-competition compensation for 3 months
  • an employer has the right to release the employee from non-competition obligations during the non-competition period by paying 3 months’ non-compete compensation
Observations about Best Practices and Strategies for U.S. Companies Growing and Administering Workforces in China
Practices and Strategies

• Make sure **employment contracts** are in place and meet legal and commercial requirements – including probationary period and term

• Develop an **Employee Handbook**, specifying, among other things:
  • Code of Business Conduct
  • Working hours and overtime procedures
  • Confidentiality rules
  • Annual leave entitlement and administration
  • Disciplinary action/s for types of misconduct
Practices and Strategies

• **Follow appropriate procedures** to lawfully implement the Handbook

• Maintain good employment records

• Develop approach for dealing with trade unions

MAKE SURE EVERYTHING IS IN CHINESE
Any questions?
Thank You

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