



GLOBAL EXPANSION GUIDEBOOK EMPLOYMENT

China



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INTRODUCTION

Welcome to the 2024 edition of DLA Piper's *Global Expansion Guidebook – Employment*.

GLOBAL EXPANSION GUIDEBOOK SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics that companies need to know. The *Global Expansion Guidebook* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

EMPLOYMENT

As business grows more global, the challenge for in-house counsel and HR professionals responsible for workforce issues and employment law compliance is intensifying. This guide is designed to meet that challenge head on and has been produced in response to feedback from clients in both established and emerging international businesses. We hope it will become an invaluable resource for you.

This 2024 edition of our popular guide covers all of the employment and labor law basics in 63 key jurisdictions across the Americas, Asia Pacific, Europe, the Middle East and Africa. From corporate presence and payroll set-up requirements, language rules, minimum employment rights, business transfer rules, through to termination and post-termination restraints, we cover the whole employment life span.

We have used our global experience and local knowledge to bring you this newest edition of our guide. With over 300 lawyers, DLA Piper's global Employment group is one of the largest in the world, with one of the widest geographical footprints of any global law firm. We partner with our clients, wherever they do business, to find solutions and manage risk in relation to their legal challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to take advice in relation to specific matters. If you wish to speak to any of our contributors, their contact details are set out towards the back.

We hope that you find this guide valuable and we welcome your feedback.

To learn more about DLA Piper's global Employment practice, visit www.dlapiper.com or contact:

Brian Kaplan
Co-Chair, Global Employment practice
brian.kaplan@dlapiper.com

Ute Krudewagen
Co-chair, International Employment practice
ute.krudewagen@dlapiper.com

Pilar Menor
Co-Chair, Global Employment practice
pilar.menor@dlapiper.com

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CHINA



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LEGAL SYSTEM, CURRENCY, LANGUAGE

Civil law. The official currency is the Chinese Renminbi (CNY). The official language is Mandarin.

CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign entity cannot engage employees in China without setting up a representative office or a subsidiary. Once established, payroll must be set up. Note that representative offices of foreign companies must engage an agency to engage its workforce.

PRE-HIRE CHECKS

Required

Immigration compliance.

Permissible

Reference and education checks are common. There is no restriction on criminal record checks; however, based on the requirements of the Personal Information Protection Law, the employer must obtain the consent of the applicants before obtaining or processing such information.

IMMIGRATION

A work permit is required for any non-PRC-passport holder, except for Taiwan, Hong Kong and Macao residents with mainland travel cards, and a grading evaluation for expatriate employees applies. Foreign workers are categorized into 3 types: high-end foreign talents, foreign professionals and foreign employees. A quota is imposed on foreign employees who primarily engage in temporary, seasonal, non-technology or service-related work. Limitations on the number of foreign professionals are floatable to market demand, and high-end foreign talents are encouraged to work in China without any restriction on numbers.

HIRING OPTIONS

Employee

Indefinite, fixed-term, full-time or part-time. Note that, after 2 consecutive fixed-term contracts, the employee may be entitled to an indefinite-term contract.

Independent contractor

It is uncommon for independent contractors to be engaged directly. Such a relationship is likely to be considered de facto employment.

Agency worker

Labor dispatch arrangements are becoming increasingly regulated in terms of treatment of labor dispatch workers and the numbers that can be hired within a single workplace. Because of this, labor dispatch arrangements are becoming a less attractive hiring option.

The rules are more relaxed for representative offices as they cannot hire local staff directly and must therefore rely on agencies.

EMPLOYMENT CONTRACTS & POLICIES

Employment contracts

A written contract in Chinese is required. If a contract is in a foreign language, a translation into Mandarin is highly recommended, and the risk of not translating the contract may be significant.

Probationary periods

PRC labor laws only allow a maximum probation period of 1 month for contracts less than 1 year, 2 months for contracts longer than 1 year but less than 3 years, and 6 months for contracts of 3 years or longer.

Policies

The absence of a disciplinary policy may make a termination based on misconduct difficult. Where an employer formulates, amends or decides rules or important events concerning issues that are directly related to the interests of the employees, such rules or important events shall be discussed at the meeting of employees' representatives or the general meeting of all employees. The employer shall also put forward proposals and opinions to the employees and negotiate with the trade union or the employees' representatives on an equal basis to reach agreements on these rules or events. In addition, the employer shall make an announcement regarding the rules and important events that are directly related to the interests of the employees or inform the employees of these rules or events.

Third-party approval

No requirement to lodge employment contract or policies with or get approval from any 3rd party, but the employer must go through a consultation process with relevant representatives to implement and vary employment policies.

LANGUAGE REQUIREMENTS

Some cities may require a Chinese employment contract (ie, in Shanghai, an employment contract must be written in Chinese), and, if the content of the employment contract written in both Chinese and a foreign language is inconsistent, the Chinese employment contract will prevail.

If the employment contracts, policies or other documents must be submitted to the labor arbitration commission or court in China, they must be in Chinese.

WORKING TIME, TIME OFF WORK & MINIMUM WAGE

Employees entitled to minimum employment rights

All.

Working hours

40 hours per week and 8 hours per day, except in the case of a flexible working hour system and comprehensive working hour system, which requires approval from the local labor authority.

Overtime

For work in excess of the standard working hours, overtime is due; the amount ranges between 150 and 300 percent of the employee's daily salary rate or hourly salary rate, depending on when the employee carried out the overtime.

Wages

Minimum wage stipulated by local regulations.

Vacation

Employees who have worked for 1 full year or more after graduation are entitled to 5 to 15 days' annual leave with pay. The duration of leave for each employee is determined by reference to their accumulated years of work (with all employers, not just the current employer).

Sick leave & pay

Generally, reduced pay may be paid for sick leave days according to the local standard.

Maternity/parental leave & pay

98 days' statutory entitlement of maternity leave. Additional maternity leave may apply, depending on location. Employees that experience a difficult childbirth receive 15 extra days. For multiple births (eg, twins or triplets), 15 extra days may be added for each child. After giving birth, female employees are entitled to 1 paid working hour per day for nursing purposes until the baby is 1 year old. Parental leave varies from 7 to 30 days, depending on location.

With the introduction of the 3-child policy and release of the amended national family planning regulations in 2021, more than 20 provinces and cities in China (such as Beijing, Shanghai, Guangdong and Zhejiang) amended local family planning rules, extending maternity leave, paternity leave and granting new types of family leaves – for example, childcare leave and elderly care leave – to female and/or male employees.

Other leave/time off work

Employees may also be entitled to leave for other purposes, such as marriage; work-related injury; voting; attending trade union activities; attending meetings held by the government as an elected representative; or serving as a people's juror, witness or defender in a people's court, among others.

DISCRIMINATION & HARASSMENT

Characteristics protected from unlawful discrimination and harassment include communicable disease status, disability, migrant worker status, race, nationality, ethnicity, religion or belief and sex.

The Civil Code sets out a clear definition of sexual harassment. This includes widening the scope to protect female employees, requiring employers to provide an internal mechanism for employees to lodge complaints, providing a mechanism for employees to lodge complaints with relevant government agencies and requiring employers to take reasonable efforts to prevent sexual harassment in the workplace.

The amendment to the Law on the Protection of Women's Rights and Interests (the Revised Women Protection Law) came into effect on January 1, 2023 and employers have since faced new obligations relating to the prevention of discrimination and harassment, as well as the investigation and handling of relevant complaints. The Revised Women Protection Law requires employers to incorporate provisions on the protection of rights and interests of female employees in their individual employment contracts, policies and collective contracts (if applicable).

WHISTLEBLOWING

No separate legislation on whistleblower protection; however, certain clauses of some laws and regulations (eg, Criminal Procedure Law, Law on the Protection of Women's Rights and Interests, Regulations on Labor Security Supervision) encourage employees to raise concerns about the company's lack of compliance to the government or police.

Employers are entitled to set up their whistleblowing programs at their sole and absolute discretion.

BENEFITS & PENSIONS

Employers and employees are required to contribute to certain mandatory social insurance and housing fund schemes in China. Social insurance includes pension, medical insurance, unemployment insurance, work-related injury insurance and maternity insurance. Employers are also required to contribute to social insurance for employees who are foreigners or Hong Kong, Macau and Taiwan residents. The minimum contributions required by employers and employees are determined by the local labor and social security bureaus.

On January 17, 2023, the Ministry of Human Resources and Social Security issued the Measures for the Administration of Supervisory Reports with Respect to Social Insurance Funds, which came into force on May 1, 2023. Any organization or individual can report an institution, entity, or individual for suspected fraudulent obtainment, illegal obtainment, misappropriation or embezzlement of social insurance funds, to a human resources and social security administrative department.

DATA PRIVACY

The Regulations on Employment Services and Employment Management require that an employee's personal data is kept confidential and not made public without the employee's consent.

The PRC Cyber Security Law imposes new security and data protection obligations on "network operators," puts restrictions on transfers of data outside China by "key information infrastructure operators" and introduces new restrictions on critical network and cybersecurity products.

The Civil Code strengthens protection on individuals' privacy and personal information. It improves the legal definition of personal information and clarifies the connotation, principles and conditions of handling personal information as well as strengthens the information security obligations of processors.

The Personal Information Protection Law (PIPL) came into effect on November 1, 2021, setting out the first comprehensive legal regime regulating the protection of personal information in China. There are requirements on notification and obtaining separate consent when collecting, processing and transferring personal information. Additional legal grounds for processing personal information in addition to the general "consent-based" approach are included in the PIPL.

China continues to promote legislation related to personal information protection. On September 1, 2022, the Measures for the Security Assessment of Outbound Data Transfers (the Measures) came into effect, setting forth requirements for outbound data transfer. According to the measures, organizations may transfer or access most personal data outside of Mainland China if required conditions and procedures have been fulfilled, while certain data must nonetheless stay in Mainland China unless special sectoral approvals are obtained.

In February 2023, the Cyberspace Administration of China (CAC) released the Measures for the Standard Contract for Cross-Border Transfer of Personal Information (Measures), which has been effective since June 1, 2023. The Measure requires employers who adopt the China standard contractual clauses (SCC) route for cross-border transfers of China personal data to file their signed China SCCs together with the supporting personal information impact assessment report with their local CAC branch by no later than November 30, 2023. However, on September 28, 2023, the CAC released a Draft Provisions on Regulating and Promoting Cross-border Data Flows, which proposed that employee data, necessary for HR management, may be exempt from the cross-border data transfer burdens.

RULES IN TRANSACTIONS/BUSINESS TRANSFERS

No automatic transfer of employment in an associated company transfer or change of business ownership. Therefore, the previous employer must terminate the employee's employment contract, and the new employer must offer – and the employee must accept – employment. If the new employer recognizes the service years with the previous employer, then the previous employer may be able to avoid liability for a severance payment.

EMPLOYEE REPRESENTATION

Trade unions are prevalent in state-owned enterprises. In most cities, local regulations require employers to set up employee representative councils (ERC). However, failure to set up an ERC is not subject to penalties. Many businesses have no union or other worker representation. Industry-level collective bargaining agreements are uncommon.

TERMINATION

Grounds

There is no at-will employment in China, and termination of employees must be for cause.

Employees subject to termination laws

All employees.

Restricted or prohibited terminations

Employees:

- Who are pregnant, on maternity leave or in the nursing period
- Who are suffering from work-related injuries or occupational diseases
- Who have been employed by the employer for more than 15 years and have less than 5 years from the statutory retirement age (60 for male employees, 55 for female employees holding office positions and 50 for female factory workers) or
- Who are on sick leave (for certain cumulative periods depending on the employee's seniority), may not be unilaterally terminated

May not be unilaterally terminated.

Third-party approval for termination

Trade unions should be notified of any unilateral termination.

Mass layoff rules

Strict information and consultation rules apply where 20 individuals or equal to or more than 10 percent of the total number of employees are to be made redundant.

The employer must also notify the trade union and all employees of the redundancies and report to the local labor bureau.

Notice

30 days' prior notice. Not required for misconduct cases or termination due to failure to meet the conditions of employment during the probation period.

Statutory right to pay in lieu of notice or garden leave

There is a statutory right to make a payment in lieu of notice. Garden leave with full pay is also permissible.

Severance

Severance pay is based on the number of years an employee has worked with the employer at the rate of 1 month's wage for each year worked, rounded up to the nearest 0.5 or 1 year. The wages used for calculation during service years after 2008 are subject to a statutory cap.

POST-TERMINATION RESTRAINTS

Those that protect the employer's legitimate business interests may be enforced if reasonable.

Non-competes

No more than 2 years. Compensation is required per local rules.

Customer non-solicits

Permissible, but relatively difficult to enforce.

Employee non-solicits

Permissible, but relatively difficult to enforce.

WAIVERS

Enforceable to waive contractual rights. While an employee may be asked to waive statutory rights, there is some uncertainty as to whether such a waiver would be effective to prevent an employee from subsequently bringing a claim for statutory rights.

REMEDIES

Discrimination

Correction, apology, moral damages, compensation for direct losses.

Unfair dismissal

The Court or Labor Tribunal may make an order for reinstatement or double statutory severance pay.

Failure to inform & consult

May be deemed as illegal dismissal.

CRIMINAL SANCTIONS

Limited circumstances, such as failure to pay salary in bad faith, may result in criminal sanctions.

KEY CONTACTS



Johnny Choi

Partner

DLA Piper Hong Kong

johnny.choi@dlapiper.com

T: +852 2103 0488

[View bio](#)

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