

FAQs on China Employment Law Basics

By Yuhua Yang | Patrick Gu | Alicia Wang | Rhea Yu

Is there any limitation on background checks?

Yes. The Personal Information Protection Law of the People's Republic of China ("PIPL"), which will take effect on November 1, 2021, provides some guidance to employers on the handling of candidates' and employees' personal information. The most important requirement is that employers shall have legal grounds to handle candidates' and employees' personal information. Thus, if employers will conduct reference checks or entrust any third party to do that, employers must have at least one due cause set forth in the PIPL, includes:

- 1) Obtaining candidate's or employee's consent;
- 2) Where necessary to conclude or fulfil a contract in which the employee is an interested party (e.g., an employment contract);
- 3) Where necessary to conduct human resource management in accordance with validly adopted company rules and collective contracts;
- 4) Where necessary to fulfil a legal obligation (e.g., employee social insurance registration).

Besides, employers are entitled to know an employee's basic information related to the employment contract, and the employee is obligated to inform the employer of the said information truthfully. However, the background checks or interview questions should not infringe employees' privacy rights or equal employment rights expressly stated in the law.

When collecting or using employees' personal information obtained via background checks or interview questions, the employer must keep the personal information strictly confidential throughout their recruitment process and future activities. They should not divulge, distort or damage such information, or sell or illegally provide the same to others. The best practice is to keep a filing system for all such information and track how the employer handles it.

.....
For more Llinks publications,
please contact:

Publication@llinkslaw.com

What are the anti-discrimination rules?

It goes without saying that discriminatory conditions are not allowed in the whole recruitment process.

Currently, the rules on anti-discrimination are scattered throughout various laws and regulations, such as the Labour Law and the Law on Promotion of Employment. China is also a signatory to international conventions against discrimination such as the *Discrimination (Employment and Occupation) Convention (ILO Convention No.111)*, the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Elimination of All Forms of Discrimination Against Women*.

Protected characteristics include nationality, race, gender and religious belief.

However, these rules are still general and impractical. Local laws do not specify what discrimination towards each protected characteristic is, how to determine its existence, allocate the burden of proof and what remedies should be granted.

Currently, employment discrimination could be litigated under Labour Law, Employment Promotion Law, and Tort Liability Law in China. In a case in 2017, the company put an employee on paid leave because the employee was diagnosed as infected by HIV, and the company was finally ruled by the court to allow the employee to resume work at the original position. In early 2019, China's Ministry of Human Resource and Social Security, together with several other ministries and government departments, issued a Guidance on Supervision of Recruitment Activities and Promotion of Women's Right to Employment ("**Guidance**"). In the Guidance, several exercises such as adding gender-specific requirements in the job description, asking female candidates' marital status and including a pregnancy test in their onboarding health check are discriminatory. Breaching of the Guidance can lead to an administrative penalty or a fine of RMB 10k to 50k.

However, employment discrimination cases are rare in China because it is difficult to adduce evidence under current legislation, and there are no comprehensive remedies for employment discrimination violations.

What are the formality requirements of an employment contract?

First of all, a written employment contract covering all employment terms is a must for full-time employment relationships. Failing to sign a contract may cost the employer double pay for the employee in a certain period. Foreign natives employed by any Chinese entity need a work permit that needs to be applied for.

In practice, a tribunal or court may find an employment relationship valid even without a contract – this usually happens when the relationship can be established and supported by the fact that the person is working for the employer and abide by their internal policies and many other criteria.

The law gives a one-month grace period to employers starting from the employee's first day of work. An employer is legally obliged to execute a written employment contract with its employee within the one month, or it will

have to pay double wages to the employee for the period starting from the second month of employment until the employment period hits one year, after which, the employer will be deemed to have entered an open-ended contract with such employee.

What should be included in an employment contract?

Key points to include in an employment contract include the term of the contract, work location, working time, overtime payment, bonus and incentive pay, employer's right to change position and salary, general rules for termination, usually by way of referring to the employers' code of conduct and the employee handbook, and the rules for termination compensation.

When an employee has completed two fixed-term contracts or has worked for over ten years with the same employer and without any terminating situations happening, he or she shall be entitled to enter into an open-ended contract with the employer unless the employee opts out of it.

In addition, an employer and an employee may, in their sole discretion, agree on matters such as probation period (up to six months), training, confidentiality, supplementary benefits, insurance and restrictive covenants for senior staff. It is also worth considering adding clauses about the alteration of employment terms, which will allow adjustment to salary/position/location of work. To mitigate the risk of employment disputes, many employers give weight to customised termination terms – this can be done by way of a detailed list or by referring to its internal policies and particular policies designed for senior positions.

Digital contracts are getting popular among employers as the global mobility trend grows. However, it is important to choose a digital signature software provider that is licensed by the Chinese local authorities. Until now, it is only e-signatures via licensed software that Chinese courts recognise.

Trade Union

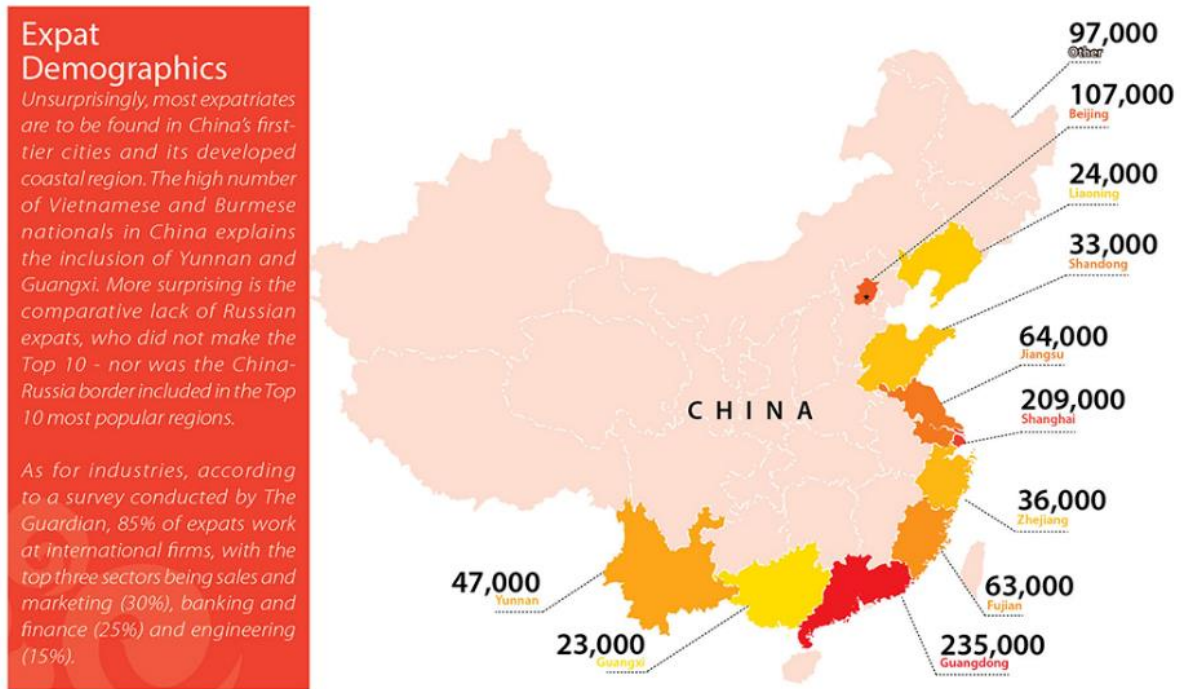
In China, all trade unions must be affiliated with the All-China Federation of Trade Union (hereafter referred to as “**ACFTU**”), and there are no independent trade unions in China. Employees have the right to join or organise trade unions under the law.

If an employer carries out disciplinary action against an employee and the union believes it is inappropriate, the union can raise objections. When an employer unilaterally terminates an employee's labour contract, they should first notify the union of their reasons even if such employee is not a member of the union. Such requirement is mandatory even though the company has no its own trade union. It should notify the upper-level union organization where the company locates. However, in practice, the upper-level union will not give any comments on it.

Technically speaking, an employer does not need to take proactive actions to establish a trade union. However, if its employees request the establishment of a trade union, the company cannot obstruct the process. In practice,

local ACFTU branches have increasingly pressured enterprises to set up trade unions from the top town. In general, labour unions in China are not considered disruptive and maintain a peaceful relationship with employers, with only rare exceptions.

Expatriates in China



(Source of graphic: [Top 10 des nationalités d'expats en Chine - Marketing Chine \(marketing-chine.com\)](http://marketing-chine.com), 2016)

The 2020 census result (published in May 2021) showed that there are currently 845,697 foreign nationals, and among them, 521,344 are for business and work purposes:



As long as a foreigner works in China and receives remuneration from his/her employer, the employer is obliged to apply for a work permit for the foreign employee.

The first step for the employer would be to file an application form together with supporting documents for approval for foreign nationals' working permits with the relevant industrial supervision authority. Once the employer obtains the approval, the employee will be able to apply for a work visa to enter China. The employer will be able to apply for a work permit for the employee within 15 days of entering China. Within 30 days of obtaining the work permit, the foreign employee shall apply for a residence permit with a local police station.

Work permits usually have a term shorter than five years. Residence permits usually have the same term as work permits. Suppose the employer intends to continue to employ the foreigner after the expiration of the work permit and the residence permit. In that case, they must apply for a renewal of the permits 30 days before their expiration. The employment relationship is automatically terminated if the work permit becomes invalid or is cancelled.

From 2018, Taiwan, Hong Kong and Macao citizens will no longer need to apply for a work permit or comply with other related employment registration procedures in Mainland China. They can use their travel ID documents for employment-related affairs in China – e.g. to register for social insurance.

How to handle the termination of employment contracts?

Termination of the employment contract can be done unilaterally or bilaterally.

Unilateral termination

Chinese Employment Contract Law provides reasons for unilateral termination on the employer's side, which include:

- Poor performance of the employee during the probation period;
- Gross misconduct;
- Severe dereliction of duties by the employee and caused damage to the employer;
- The employee having a collateral employment relationship with other employers, causing work conflict with current employer and refuses to correct after warning; and
- The employee being exposed to criminal liability.

In practice, the burden of proof on the employer's side is usually quite high due to China's current labour law system designed to lean towards the protection of employees. It is always advisable for employers to have established rules and systems as to the termination grounds and process.

Employer unilateral termination in certain situations requires the employer to give the employee a notice one month in advance before the termination date or payment of one month's salary in lieu of notice; these include:

- The employee being unable to take up the original work or other work arranged due to illness or non-work-related injury;
- The employee being not competent and remain unqualified for the designated work after training or job adjustment;

- Significant changes in the objective conditions when the employment contract was entered into rendering the employment contract unable to be performed, and both parties are unable to reach an agreement on changes of the employment contract after negotiation.

In the event of redundancy where affected staff is more than 20, or less than 20, but more than 10% of the workforce, the employer shall explain the situation to the trade union 30 days in advance and report to the supervising government authority.

An employee is entitled to unilaterally terminate his/her employment contract when the employer fails to comply with what was agreed in the employment contract or violates such employee's legal rights – e.g. failing to pay the remuneration on time, failure to enrol the employee into statutory social security, implementing unlawful internal policies or entering into the employment contract by fraud or duress.

Depending on the specific circumstances, many employers seek to negotiate a mutual termination by agreement with the employee, where conflicts can be much more moderate, and future litigation risks are more manageable than unilateral termination. A well-drafted termination agreement should always be in place.

Where applicable, the severance pay for each year served is one month's salary. For severance pay calculation purposes, an employee's salary is up to a cap of triple the amount of local average monthly salary, meaning this figure will be different in different provinces. When the time served in a year is less than six months, it will be counted as half a year, and when it is more than six months but less than twelve months, it will be counted as one year. Due to historical changes to Chinese Labour Law, the calculation rules can be complex, and it is always advisable to speak to a local legal team to get things right in the first place.

If you would like to know more information about the subjects covered in this publication, please contact:



Yuhua Yang
+86 10 8519 2266
+44(0)20 3283 4337
yuhua.yang@llinkslaw.com



Patrick Gu
+86 21 3135 8722
patrick.gu@llinkslaw.com

SHANGHAI

19F, ONE LUJIAZUI
68 Yin Cheng Road Middle
Shanghai 200120 P.R.China
T: +86 21 3135 8666
F: +86 21 3135 8600

BEIJING

4F, China Resources Building
8 Jianguomenbei Avenue
Beijing 100005 P.R.China
T: +86 10 8519 2266
F: +86 10 8519 2929

SHENZHEN

18F, China Resources Tower
2666 Keyuan South Road, Nanshan District
Shenzhen 518063 P.R.China
T: +86 755 3391 7666
F: +86 755 3391 7668

HONG KONG

Room 3201, 32/F, Alexandra House
18 Chater Road
Central, Hong Kong
T: +852 2592 1978
F: +852 2868 0883

LONDON

1/F, 3 More London Riverside
London SE1 2RE
United Kingdom
T: +44 (0)20 3283 4337
D: +44 (0)20 3283 4323



www.llinkslaw.com



Wechat: LlinksLaw

WE LINK LOCAL LEGAL INTELLIGENCE WITH THE WORLD

This publication represents only the opinions of the authors and should not in any way be considered as legal opinions or advice given by Llinks. We expressly disclaim any liability for the consequences of action or non-action based on this publication. All rights reserved.

© Llinks Law Offices 2021