



PRC Labour Law Affecting Expatriates

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Introduction

PRC Labour Law Affecting Expatriates

This presentation will target the **impact of the Labour Law** on **Expatriates** working in China.

Particular attention will be put on the following legal and tax aspects

- General principles of the PRC Labour Law
- The main provisions of the Labour contract
- How to Intern in China
- Different visas and procedures in China

- Individual Income Tax with the 5 years Rule
- Allowances for foreign employers
- Registration at AIRE
- Yearly Tax Declaration

Labour Law in China

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Employment Legal System

- **Labor Law** of the People's Republic of China, effective July 1, 1995.
- **Employment Contract Law** of the People's Republic of China, effective January 1, 2008, amended with effect from July 1, 2013.
- **Employment Promotion Law** of the People's Republic of China, effective January 1, 2008.
- Law of the People's Republic of China on the Mediation and Arbitration of Employment Disputes, effective May 1, 2008 (**Employment Disputes Law**).
- **Labor Union Law** of the People's Republic of China, effective October 27, 2001.
- Implementing Regulations for the Law of the People's Republic of China on Employment Contracts, effective September 18, 2008 (**ECL Implementing Rules**).
- Opinion on Several Questions Regarding the Implementation of the Labor Law of the People's Republic of China, issued August 4, 1995 (**Labor Law Opinion**).
- Law of the People's Republic of China on Entry and Exit Control, effective July 1, 2013 (**Immigration Law**).

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Labour Law

China promulgated the Labor Law of the People's Republic of China (Labor Law), effective January 1, 1995.

The Labor Law applies to private companies and State-owned enterprises (**SOEs**), and their employees in China. Thus, the Labor Law covers employment by foreign-invested enterprises (**FIEs**) such as Sino-foreign joint ventures and wholly foreign owned enterprises (commonly called **WFOEs**).

At the national level, numerous specialized regulations and notices have followed the promulgation of the Labor Law.

The Labor Law and national regulations are further supplemented by local regulations in many cases.

Labour Law – General Principles

Article 10 The State shall create conditions for employment and increase opportunities therefore by means of promotion of economic and social development.

The State shall encourage enterprises, institutions and public organizations to initiate industries or expand businesses for the increase of employment, within the scope provided by laws, and administrative rules and regulations.

The State shall support labourers to achieve employment by organizing themselves on a voluntary basis or by engaging in individual businesses.

Article 11 Local people's governments at various levels shall take measures, by developing employment agencies of various forms, to provide employment services.

Article 12 Labourers, regardless of their ethnic group, race, sex, or religious belief, shall not be discriminated against in employment.

Article 13 Women shall enjoy the equal right, with men, to employment. With exception of the special types of work or post unsuitable to women as prescribed by the State, no unit may, in employing staff and workers, refuse to employ women by reason of sex or raise the employment standards for women.

Labour Contract Law

While the Labor Law still is in effect and remains the foundation piece of legislation for the employment law regime of China, the Employment Contract Law included significant changes to the existing legal framework.

Significant changes

- **Specific penalties** for not signing employment contracts with Employees
- **Limits on the use of fixed-term contracts** to increase job security of employees
- Specific **employee consultation procedures** in order to adopt company rules, policies, and regulations
- Greater **protection for employees** who are hired through employment service agencies

Key Issues

1. **Working hours:** An employee should not work more than 40 hours per week.
1. **Rest days:** Normally the rest day are Saturday and Sunday, but the entity can make adjustment based on its operation needs.
2. **Overtime:** Pursuant to Article 41 of the Labor Law the employer can prolong work hours due to needs of production or businesses after consultation with its trade union and labourers. The work hours to be prolonged, in general, shall be no longer than one hour a day, or no more than three hours a day if such prolonging is called for due to special reasons and under the condition that the physical health of labourers is guaranteed. The work time to be prolonged shall not exceed, however, 36 hours a month.

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Key Issues

- 4. Annual leave:** employees who have worked between one year and less than 10 years are entitled to five days of paid annual leave. Those who have worked at least 10 years but less than 20 years are entitled to 10 days of annual leave. Finally, employees will be entitled to 15 days of annual leave once they have worked for at least 20.
- 5. Minimum wage requirement:** the minimum wage levels are fixed by the local government.
- 6. Maternity benefits:** the female employees are entitled to not less than 98 days of maternity leave and, in the event of difficult labor, the maternity leave is extended by an additional 15 days.
- 7. Retirement:** the national retirement age for male workers is 60 and for the female workers is 55 (55 if in a managerial or technical position).

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Conclusion of Labour Contract

Written Contract

An employer must conclude an individual written employment contract with each full-time employee. An employment contract may be in a foreign language. However, in the event of a conflict with a Chinese version, the Chinese version will prevail.

A labour contract shall be concluded in written form and contain the following clauses:

- Term of a labour contract;
- Work assignment;
- Labour protection and working conditions;
- Labour remuneration;
- Labour discipline;
- Conditions for the termination of the labour contract; Liabilities for the violation of the labour contract.

Apart from the required clauses specified in the preceding paragraph, a labour contract may contain other clauses agreed upon by the parties through consultation.

Indirect employment

Representative offices are not permitted to directly employ their staff. Instead, Representative offices obtain their Chinese national staff through arrangements with labor service companies, the largest and most well known of which is the Foreign Enterprise Service Corporation (**FESCO**).

Expatriate (non-Chinese) staff generally are employed by the foreign parent company and assigned to work at the representative office.

Mandatory Provisions

Employment contracts must include the following basic mandatory terms:

- the name, domicile and legal representative or main person in charge of the Employer;
- the name, domicile and number of the resident ID card or other valid identity document of the worker;
- the term of the employment contract;
- the job description and the place of work;
- working hours, rest and leave;
- labor compensation;
- social insurance;
- labor protection, working conditions and protection against occupational hazards;
- other matters which laws and statutes require to be included in employment contracts.

Termination of the Contract

In certain cases an employee can be dismissed with **no notice and no severance**:

- if the employee has not satisfied the **conditions of employment** during the probation period;
- if the employee seriously **violates the company's rules or regulations**;
- if the employee commits **serious dereliction of duty or graft** resulting in major harm to the company's interests;
- if the employee is prosecuted for a **criminal offense** according to law;
- the employee has additionally established an **employment relationship** with another employer which materially affects the completion of his tasks with the first-mentioned employer, or he refuses to rectify the matter after the same is brought to his attention by the employer;
- the employee uses such means as **deception or coercion, or takes advantage** of the employer's difficulties, to cause the employer to conclude an employment contract, or to make an amendment thereto, that is contrary to the employer's true intent.

Labour Law in China

Termination of the Contract

An employee must be provided **30 days'** prior written notice and severance in the following cases:

- if the employee has fallen **ill or sustained a non-industrial injury** and, at the end of the medical treatment period, can neither engage in the original work nor in other work

arranged by the company;

- if the employee is **incompetent** and remains incompetent after training or assignment to another post;
- if **performance** of the original employment contract impossible due to a major change in the objective circumstances upon which the employment contract was based at the time of its conclusion, and consultations between the parties fail to produce agreement on amendment of the employment contract.

Employee Resignation

A worker may have the labor contract revoked by giving a written notification to the employing unit **30 days in advance**. During the probation period, a worker may have the labor contract revoked by notifying the employing unit of his intention **three days** in advance.

Automatic Ending of Employment Contract

An employment contract automatically ends upon the occurrence of any of the following circumstances:

- its term expires;
- the employee has commenced drawing his basic old age insurance pension in accordance with the law;
- the employee dies, or is declared dead or missing by a People's Court;
- the employer is declared bankrupt;
- the employer has its business license revoked, is ordered to close or is closed down, or the employer decides on early liquidation;
- another circumstance specified in laws or administrative
- statutes arises.

Notification

Under national guidelines issued by the Ministry of Labor and Social Security (now called MOHRSS) in December 2006, an employer has **30 days** from when it hires a new employee or renews an employee's contract to report the following pieces of information to the local labor bureau:

- the total number employees it is hiring
- the name of each employee, the sex of each employee
- the ID number of each employee
- the contract terms of each employee

Within **seven days** of an employment relationship being terminated or ending, the employer should report to the local labor bureau:

- the number of employees being terminated or whose contracts have ended
- their names
- the length of time they worked at the company

If an employer changes its name, legal representative, form of organization, or organization code, then it should report this to the labor bureau within **30 days** of the change. Implementation of these national guidelines varies by locality.

Employers may also need to notify the local social insurance bureau and tax bureau about hires and terminations, depending on local policy.

Internship in China

It is **illegal** for foreign students to work **without authorization** or **beyond the scope authorized**.

The anticipated national framework **has yet to be published**, but local policies give further information (e.g. Shanghai).

Procedure for applying to internship

- The student needs a **residence permit X1** as short-term students with X2 visas do not have such opportunity, this means the student needs to be **enrolled in a Chinese university**;
- The student needs **the approval of the school**, an **agreement** between the school and the student allowing the latter to intern off-campus or have a part-time job;
- The student then needs to apply to the **exit-entry administration** for **notation** on the residence permit showing location and period of internship.

Internship in China

Visa problems and lack of clarity

- Both the “**work-study**” in accordance with school’s regulations and the **F visa** previously including “internships lasting less than six months” have been **deleted** from current regulations.
- The internship status is a **legal ambiguity** as to which visa, if any, is appropriate for an internship. M or F visa are no longer allowed as they served as **employment in disguise** for people ineligible for work visas (lack of degree or experience). Yet, they are still used. All parties involved should be aware of the **legal risks** of these arrangements.
- Employers will not be able to escape **liability for unauthorized employment** where the facts establish that there is a labour relationship.
- This topic will remain unsettled until a **clear statement of policy** is provided by immigration authorities.

Visas for Expatriates

- The **C visa (“crew visa”)** is issued to foreign crew members of aircraft, trains and ships, motor vehicle drivers engaged in cross-border transport activities, and also to the accompanying family members of the above-mentioned ship’s crew members.
- The **D visa (“permanent resident visa”)** is issued to those who are going to reside in China permanently.
- The **F visa** is issued to those who are invited to China for exchanges, visits, study tours and other activities.
- The **G visa (“transit visa”)** is issued to those who are going to transit through China en route to a third country.
- The **J visa (“journalist visa”)** is issued to resident foreign journalists/media staff of foreign news organizations stationed in China for a long-term period (J1) or a short-term one (J2).
- The **L visa (“tourist visa”)** is issued to those who are going to travel to China for tourism.

Visas for Expatriates

- The **M visa (“business visa”)** is issued to those who are invited to China for commercial and trade activities.
- The **Q visa** is issued to those who are family members of Chinese citizens or of foreigners with Chinese permanent residence and intend to go to China for a long-term family reunion (Q1) or short-term one (Q2).
- The **R visa** is issued to those who are high-level qualified talents or whose skills are urgently needed by China.
- The **S visa** is issued to relatives of foreigners working or studying in China for the purpose of long-term visit (S1) or short-term one (S2), or to those who intent to visit China for other private reasons (same distinction of time on the Chinese territory).
- The **X visa (“student visa”)** is issued to those intending to study in China for a long-term period (X1) or a short-term one (X2).
- The **Z visa (“work visa”)** is issued to those taking up a post or employment or giving commercial performances in China

Visas for Expatriates

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DISCLAIMER: Please carefully note that the **following information** are general policies .

Every city can apply the general rules in a stricter or more flexible way.

Visas for Expatriates

Procedure to change from a student visa to a working visa

- In order to change a student visa (X) to a work visa (Z), the type of X visa needs to be taken into account
- If the student has a **X1 visa** (long-term studies, more than 180 days), he **can stay in China**, go to the Administration and apply to a working visa
- If the student has a **X2 visa** (short-term studies, no more than 180 days), he **has to leave China** and apply from abroad to a working visa.

To **change** from a **M visa (business)** to a **work visa (Z)**, the procedure is the same has with the X1 visa : **no need to leave China**.

Visas for Expatriates

Necessary documents to obtain a working permit and residence permit without leaving China

- Passport copy and current visa copy
- CV (in English or Chinese) and copy of bachelor or higher degree
- Copy of the Business License, of the Organization Code License and of the company Approval Certificate
- Copy of a reference letter from any foreign company to prove 2 years full-time working experience (after graduation) in current field and position
- Original Labor bureau's card
- Request form
- Employment contract
- Registration Form of Temporary Residence
- Health certificate
- Passport photographs

Visas for Expatriates

Procedure to obtain a working permit and residence permit without leaving China

- The first step to apply for a 1-year working permit and residence permit is to **collect all the necessary documents** and fill in the request form.
- When this has been done, one can apply to the **working license**.
- To apply to the 1-year working residence permit, the **original passport is** needed to be submitted and one might need to go to the government office for a **small interview**. A **travel certificate** is issued allowing one to travel inside Mainland China but not internationally.
- After this step is completed, it is **possible to apply for a 1-year work permit** and after, a **1-year residence permit**.

Visas for Expatriates

Procedure to transfer a working permit and residence permit

- In order to transfer a work permit, one must **first assemble all the required documents** (e.g. copy of highest degree, copy of the new company's Business Licence, original passport with valid residence permit).
- After this step, it is then necessary to **apply for a new working permit**. This new application needs to be **stamped by the new company**.
- When this step has been completed, it is necessary to **apply for the Alien Employment Permit with the new company**.
- An **option** is possible to change the former company residence permit to a one month 0 entry M visa. This step is **highly recommended**, as Chinese authorities have become stricter about this step and it avoids penalty and qualification of illegal employment.
- After all these steps have gone through, one can apply to his **new Residence permit of the new company**.

Taxes for Expatriates

Individual Income Tax (IIT) for foreign employers – 5 years rule

- An individual who has resided in China for **more than 90 days** (extendable to 183 days according to DTA) but **less than one year** during the tax year is subject to IIT on all China-sourced income paid. Income earned while working overseas (i.e., foreign-sourced income) in the tax year is not Chinese IIT taxable.
- A foreign individual who is deemed to have resided in China for **more than 1 year but less than 5 years** must pay IIT for China-sourced income and also for income paid by Chinese employers during any temporary absences from the country. Income obtained from foreign employers for work done during a temporary absence is not taxable.
- Under the five-year rule, any expatriate who has resided in China for **more than 5 consecutive full years** will become liable for income earned worldwide.

Note: China-sourced income refers to income paid by both Chinese and overseas entities for work in China

Taxes for Expatriates

Allowances for foreign employees

- The Chinese Tax Bureau allows foreign staff to **deduct** certain “**allowances**” before calculating the tax burden on their monthly salary. These include:
 - **Housing**, meals, and laundry allowances;
 - Relocation expenses upon **commencement or cessation of employment** in China;
 - Reasonable **business travel expenses** and two personal trips to the individual’s country of origin;
 - Reasonable allowances for **language training** and **children’s education** (school should be located in Mainland China).
- **To be recognized for deduction** by tax authorities: allowances should be included in the employee’s contract and employee should produce, every month, an official “fapiao” for the expenses. Documentation should be kept by the company and be at the disposal of tax authorities.

Taxes for Expatriates

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Registration at AIRE

- **A.I.R.E.** (Registry of Italians Resident Abroad) enrolment is obligatory for:
 - citizens who take up **residence** in a **foreign country** for **more than 12 months**;
 - citizens residing abroad either as a result of **being born there** or **having obtained Italian citizenship** for any reason whatsoever.
- **Declaration** (special form available) made to the locally competent consular office **within 90 days of transfer abroad**. This involves the simultaneous **cancellation from the Civil Registry (APR)** of the municipality of residence in Italy.
- A.I.R.E. **enrolment is free of charge** and updating of the A.I.R.E. is the citizen's responsibility

Taxes for Expatriates

Yearly tax declaration

- IIT is, generally, collected via **withholding at source**.
- **Monthly withholding** by the employer established in China (during the first 15 days of the month following the receipt of income). In case withholding scheme is **not feasible**, the **taxpayer** should make **monthly self-assessments** and payments.
- **Annual filing** is required **within 3 months** of the **end of a calendar year**.
- Surcharge and penalties:
 - Taxpayer: late payment surcharge is imposed on a daily basis at a **rate of 0.05%** of the **amount of underpaid tax**.
 - Withholding agent: Penalties (**from 50% to 300%** of the **under-withheld IIT** depending on the seriousness of the case) may be imposed in addition to the **late payment surcharge**.

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