



**Newsflash: PRC Employment Contract Law  
4 July 2007**

**PRC Employment Contract Law Enacted**

On 29 June 2007, the Standing Committee National of the People's Congress of the People's Republic of China (**PRC**) promulgated the long-awaited *Employment Contract Law (Law)* which will take effect as of 1 January 2008.

**REMINDER: Don't forget to register for the [PRC Employment Contract Law Forum 2007](#), to be held in Beijing on 23 and 24 July 2007.**

**Please visit [our website](#) for a list of topics and senior speakers from central and local government agencies.**

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This newsflash summarizes key provisions of the Law:

**1. Applicable Scope**

*Private entities*

The Law applies to all employers (including enterprises, sole proprietorships and private enterprises and their employees within the PRC. It governs the establishment of employment relationships as well as the conclusion, performance, modification, termination and expiry of employment contracts (*Art 2*).

*Public entities*

In addition, the Law must be followed by government agencies, public institutions and social organizations (*Art 2*). Employment contracts between public institutions and their subcontracted personnel may also be subject to special rules where other laws or regulations apply (*Art 96*).

**2. Requirements Concerning a Company's Rules and Policies**

When formulating, revising or deciding upon important matters or labor policies that directly involve the primary interests of employees,<sup>1</sup> the employer must raise its

<sup>1</sup> *E.g.*, remuneration, working hours, rest and leave periods, labor safety and hygiene, insurance and benefits, training, etc.

proposal and supporting rationale for discussion at an assembly of employee representatives, or with all its employees, and engage in mutual and equitable consultations with the trade union or employee representative to confirm such matters or policies (*Art 4*).

### **3. Employment Relationships and Employment Contracts**

#### *Formation of employment relationships*

All employment contracts must be concluded pursuant to the principles of legality, equity, fairness, mutual consultation and good faith (*Art 3*).

Employers must maintain employment registers of all their employees for the record. An employment relationship is established between an employer and an employee as of the date of hiring (*Arts 7 and 10*).

#### *Requirement to sign written contract*

A written employment contract must be executed when the employment relationship is formed. If an employment contract was executed before the employee started work, the employment relationship will be deemed to have begun on the employee's first day of work (*Art 10*).

If an employee has been hired (*i.e.*, the employment relationship has been established) without a written employment contract, then a written contract must be concluded within 1 month of his first work day (*Art 10*).

#### *Penalties*

In addition, if the written employment contract has not been executed more than 1 month, but less than 1 year, after the hiring date, then the employer must pay the employee twice his usual remuneration for each month that the contract remains outstanding (*Art 82*).

### **4. Non-Fixed-Term Employment Contracts**

#### *Definition*

Non-fixed-term employment contracts are those agreed between the employer and employee not to contain a definite expiry date (*Art 14*).

#### *Circumstances under which non-fixed-term contracts must be concluded*

Non-fixed-term contracts are concluded under the following circumstances:

- where the employer and employee have mutually agreed to do so;

- where the employee requests or agrees to renew or sign a fixed-term employment contract that has already been renewed twice consecutively<sup>2</sup> (unless Arts 39, 40(1) and 40(2) applies to the employee);<sup>3</sup> or
- where an employee who has worked for the same employer continuously for 10 years or more requests or agrees to sign his employment contract (*Art 14*).

As of 1 year after the date on which an employment relationship was formed without a written contract, the parties will automatically be deemed under the Law as having concluded a non-fixed-term employment contract (*Art 14*).

*Penalty for failing to conclude non-fixed-term contracts*

If an employer fails to conclude a non-fixed-term employment contract in violation of the Law, the employer must pay the employee twice his remuneration for each month commencing from the date on which the non-fixed-term employment contract should have been concluded (*Art 82*).

**5. Probationary Periods**

*Length limitations*

The Law sets limits on the lengths of probationary periods, according to the term of the employment contract, as detailed in the following table:

<b><u>Length of Employment Contract (years)</u></b>	<b><u>Max. Length of Probationary Period (months)</u></b>
< 1	= 1
= 1 < 3	= 2
= 3	= 6

Under the Law, the same employer may stipulate only a single probationary period for each employee (*Art 19*).

There can be no probationary period if an employment contract is project-based or has a fixed-term of less than 3 months (*Art 19*).

<sup>2</sup> The number of consecutive renewals for fixed-term employment contracts is calculated starting from the first renewal of the contract after 1 January 2008 (*Art 97*).

<sup>3</sup> Art 39 specifies the circumstances under which an employer may terminate an employment contract with immediate effect. Arts 40(1) and 40(2) specifies the circumstances under which an employer may terminate an employment contract by serving 30 days' advanced written notice, viz:

- (1) the employee has contracted an illness or sustained a non-work related injury and, following the completion of the medical treatment period, is unable to undertake his work, and is unable to undertake other work arranged by the employer; or
- (2) the employee is incompetent and remains so even after training and reassignment to a new position.

### *Salary limitations*

During the probationary period, the salary for an employee may not be lower than the lowest salary for the same position or 80% of the salary provided in the employment contract (*Art 20*).

### *Penalties*

Where an employer has asked an employee to perform a longer probationary period in violation of the Law and the matter is brought to the attention of the local labor department, the authorities must order rectification. Specifically, the employer must compensate the employee in an amount based on the employee's monthly salary at the time the probationary period was completed multiplied by the extra period served as probationary period (*Art 83*).

## **6. Payment of Wages**

Employers must pay remuneration on time and in full, in accordance with the national regulations and the provisions of the employment contracts. If an employer fails to remunerate an employee on time or in full, the Law provides that the employee may request an order from the local people's court for the employer to pay (*Art 30*).

## **7. Conditions for Termination by Employees**

### *Mutual Consultation and Notice*

An employee may terminate his employment contract through mutual consultation with the employer (*Art 36*) or by providing the employer with 30 days' prior written notice.

### *Probationary period*

During his probationary period, the employee may terminate the employment contract with only 3 days' written notice (*Art 37*).

### *Immediate termination*

An employee may terminate his employment contract with immediate effect if the employer has:

- failed to provide working conditions as stipulated in the employment contract;
- failed to pay remuneration on time or in full;
- failed to contribute social insurance premiums on behalf of the employee;
- implemented policies that violate the Law, damaging the rights and interests of the employee;

- entered into the employment contract against the true intentions of a party, or through the use of fraud, coercion or exploitation of the unfavorable position of that party;
- fulfils other pre-conditions stipulated in the relevant laws; or
- used violence, intimidation or the unlawful restraint of individual freedom to compel an employee to work, or instructs an employee to violate the Law or engage in reckless work that endangers his personal safety (*Art 38*).

## **8. Conditions for Termination by Employers**

An employer may terminate an employment contract through mutual consultation with the employee (*Art 36*) or with immediate effect where the employee:

- fails to meet the conditions for employment during his probationary period;
- has committed a serious violation of the employer's policies;
- has committed a serious dereliction of duty or engaged in embezzlement, causing severe damage to the employers' interests;
- has simultaneously established an employment relationship with another employer, thereby severely hampering his ability to complete work duties, or has refused to rectify such a situation notwithstanding the employer's request to do so;
- concluded the employment contract against the true intentions of a party, through the use of fraud, coercion or exploitation of the unfavorable position of that party; or
- is being investigated for criminal liabilities (*Art 39*).

## **9. Retrenchment of Employees**

### *Pre-conditions for retrenchment*

Provided that an employer has complied with the procedures for consulting with the trade union or the employees and reported the proposal to the labor departments in accordance with the Law, it may retrench 20 or more employees or 10% of its workforce if:

- it is undergoing restructuring pursuant to the Enterprise Bankruptcy Law;
- severe conditions exist that limit the manufacturing or operating capacity of the enterprise;
- the enterprise is changing its operations, implementing significant technical reforms or adjusting its operations and, following modification of employment contracts, it still needs to retrench employees; or

- major changes have occurred in the objective circumstances under which the employment contracts were concluded, such that the contracts could no longer be performed (*Art 41*).

#### *Priorities in retrenchment*

When undertaking retrenchments, top priority must be given to retaining employees:

- who have signed fixed-term employment contracts with relatively long terms;
- who have concluded non-fixed-term employment contracts; and
- whose households have no other employed individuals and with elderly or minor dependents (*Art 41*).

### **10. Severance Pay**

Monetary compensation must be paid to employees in accordance with the number of years they have worked for their employer at the rate of 1 month's salary per full year of service. Where the period of service is 6 months to 1 year, it must be calculated as a full year; where it is less than 6 months, the monetary compensation payable is 1/2 month's salary.

Where the employee's monthly salary exceeds 3 times the local average monthly salary, the standard used to calculate the monetary compensation payable to him shall be capped at that level. Further, a total amount not exceeding 12 years of service may be used in calculating the monetary compensation (*Art 47*).

### **11. Collective Contracts**

An enterprise's employees may negotiate as a single party, on an equal basis with the employer, to conclude collective contracts concerning remuneration, working hours, rest and leave entitlements, labor safety and hygiene, insurance, benefits and other matters (*Art 51*).

### **12. Secondment of Employees**

#### *Registered capital requirement*

Entities that second services must be established in accordance with the Company Law and must have paid-in capital of no less than RMB 500,000 (*Art 57*).

#### *Secondment contracts and remuneration*

In addition, entities that second services must conclude fixed-term employment contracts of 2 or more years with the relevant employees. During periods in which seconded employees have no work assignments, the entity seconding their services must also remunerate them on a monthly basis at no lower than the minimum wage rate for the area where the entity is located (*Art 58*).

Entities that second services must conclude labor secondment agreements with each entity that hires the seconded employees, and must notify the seconded employees of the details of their secondment agreements (*Arts 59 and 60*).

*Restriction on position to be filled by seconded employee*

Seconded employees generally should fill temporary, supplementary or substitute positions (*Art 66*).

### **13. Trade Unions**

To protect the lawful rights and interests of employees, trade unions must supervise and inspect the performance of employment contracts and collective contracts by employers. If an employer violates the Labor Law, a regulation, the employment contract or the collective contract, the trade union is entitled to issue its opinion to, or demand rectification by, the employer.

If an employee applies for labor arbitration or files for litigation, the trade union may also render support and assistance to that individual (*Art 78*).

Seconded employees are entitled to participate in or organize trade unions at entities that second labor services and at any hiring entities (*Art 64*).

### **14. Part-time Employees**

A part-time employee is an employee who generally works no more than 4 hours per day and no more than 24 hours per week for an employer (*Art 68*).

Oral agreements may be concluded for part-time employment (*Art 69*).

Either party may notify the other of the termination of part-time employment at any time. Monetary compensation is not payable for such termination (*Art 71*).

### **15. Legal Liabilities**

*Illegal probationary periods and failure to conclude employment contracts*

Please see sections 3, 4 and 5 above for a summary of the legal liabilities relating to illegal probationary periods, and failure to conclude employment contracts.

*Requirement to provide proof of termination*

An employer must provide an employee with proof that his employment contract has been terminated or has expired. If the employer fails to do so, the employee may bring the matter to the attention of the competent local labor department for rectification. Moreover, if the employee has incurred losses as a result of that failure, the employer will be liable to compensate him accordingly (*Art 89*).

*Liability for hiring employee who is not properly terminated*

Employers and employees are jointly liable for compensating the original employer if an employee is hired without his employment contract with his prior employer not having yet expired or been terminated, thereby causing damages to that original employer (*Art 91*).

**16. Rules Concerning Transitional Periods**

*Employment contracts*

Employment contracts lawfully concluded prior to the implementation of the Law (1 January 2008) which continue after that date must continue to be performed (*Art 97*).

If an employment relationship was established prior to 1 January 2008, but without a written employment contract, a contract must be concluded within 1 month after the Law's implementation (*Art 97*).

*Severance Pay*

Monetary severance compensation must be paid with respect to employment contracts that exist on the date when the Law is implemented but subsequently expire or are terminated. Such compensation is calculated based on the basis of the years of service provided by the relevant employee as of 1 January 2008. Prior to 1 January 2008, the rules on severance pay currently in effect will continue to determine the payment and amount of severance compensation (*Art 97*).

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***Note: A full translation of the Law (98 Articles) together with the original Chinese version is available to our clients for a preferential fee of US\$250 (or RMB/HK\$1,935). Non-clients may purchase these materials for US\$380 (or RMB/HK\$2,945). Please send your request to [newsletter@TransAsiaLawyers.com](mailto:newsletter@TransAsiaLawyers.com).***

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We hope that you have found our newsletter helpful. If you have any questions, please contact Isabelle Wan at [iwan@TransAsiaLawyers.com](mailto:iwan@TransAsiaLawyers.com).

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