



DEVELOPMENTS IN CHINA'S LEGAL SYSTEM EMPLOYMENT LAW DEVELOPMENTS

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FOCUS TODAY

- **Brief Overview of Labor Contract Law**
- **Recent Clarifications and Significant Open Question**
- **Foreign Employees, Labor Dispatch Agencies and Registered Representative Offices**
- **Tips from China HR Insight**



US- CHINA ECONOMICS AND EMPLOYMENT DEMOGRAPHICS

	<u>United States</u>	<u>China</u>
GDP – Purchase Parity	\$14.26 Trillion	\$7.973 Trillion
GDP Growth (2009)	-6.4 to +3.5%	9%
GDP Per Capita	\$46,900	\$6,000
Labor Force	154.3 Million	807.3 Million (+ 150M rural workers)
Unemployment (2009)	9.8%	4% (Official) 9-20% (Other)



PRIMARY PRC EMPLOYMENT LAWS

- **Labor Law of the PRC (1994)**
- **Labor Contract Law of the PRC (2007)**
- **Implementing Regulations for LCL (2008)**
- **Labor Arbitration and Dispute Resolution Law of the PRC (2008)**
- **Implementation Rules for Employment Arbitration (2009)**
- **Trade Union Law of PRC (1994)**
- **Also for Foreign Employees:**
 - **Alien Control Law of PRC (1986)**
 - **Rules for Administration of Employment of Foreigners (1996)**
- **These laws are supplemented by a myriad of national and local laws, regulations, measures and circulars**



PRC EMPLOYMENT LAWS

- **Elaborate and endlessly confusing to foreign investors.**
- **The labor law system is more protective of employees than U.S. labor law and much closer to the kind of detailed employee protection regimes which prevails in Germany and other EU countries.**
- **While implementation of the new Labor Contract Law is challenging:**
 - **In large part, it carries forward the requirements of the Labor Law in effect since 1995.**
 - **Many companies did not comply with that law, and they are now told, that will not be tolerated.**
 - **Compliance is a must, and is achievable with solid HR system, and good legal and business advice.**



LABOR CONTRACT LAW IN A NUTSHELL

- **A contract must be given to nearly all employees, except:**
 - **Part time employees placed (not more than 4 hrs/day or 24 hrs/week on average)**
 - **Employees assigned by approved labor “dispatch” agencies**
 - **Certain assigned foreign employees remaining in the home company’s employ**
- **All other employees receive one of 3 types of contracts:**
 - **Fixed term (with expiration date)**
 - **Project based (expires on completion of task), or**
 - **Open ended (no expiration date).**
- **Employees must be given a written contract within 30 days of starting work, and if not, double wage penalties up to one year apply. After 1 year’s delay, any fixed term contract is deemed open ended.**



LABOR CONTRACT LAW IN A NUTSHELL, continued

- **Very detailed content must be included in all contracts (e.g. duration, job description, working hours, rest, vacation, social insurance, etc.).**
- **After two fixed term contracts, the employer must offer an open ended employment contract to employee.**
- **After the probationary period, the employer may only terminate employee based on one or more of the 14 specified grounds (“statutory and good cause”) (e.g., material breach of rules, serious dereliction of duty, continued incompetence after training, etc.), depending on the grounds, immediately or upon 30 days notice (or equivalent salary payment).**
- **Employees have 13 specified grounds where they are permitted to terminate the contract (with varying length of notice).**



LABOR CONTRACT LAW IN A NUTSHELL, continued

- **While in probationary period (from one to six months depending on length and type of employment), employee can be terminated as unfit for position.**
- **Unless the employer has statutory good cause, a severance of one month per year (with 6 or more months being treated as a year), up to 12 months at not more than three times the average monthly wage in the locality, must be paid to a terminated or laid off employee or one whose fixed term contract is not renewed.**
- **All disputes are heard and decided by the local Labor Arbitration Committees under the PRC Labor and Dispute Resolution Law, and are final and binding where the amount disputed does not exceed 12 months' local minimum wage or the dispute concerns national work standards, (e.g., work and rest hours, leaves, social insurance and the like). Otherwise, appeals are to the People's Court on very limited review.**



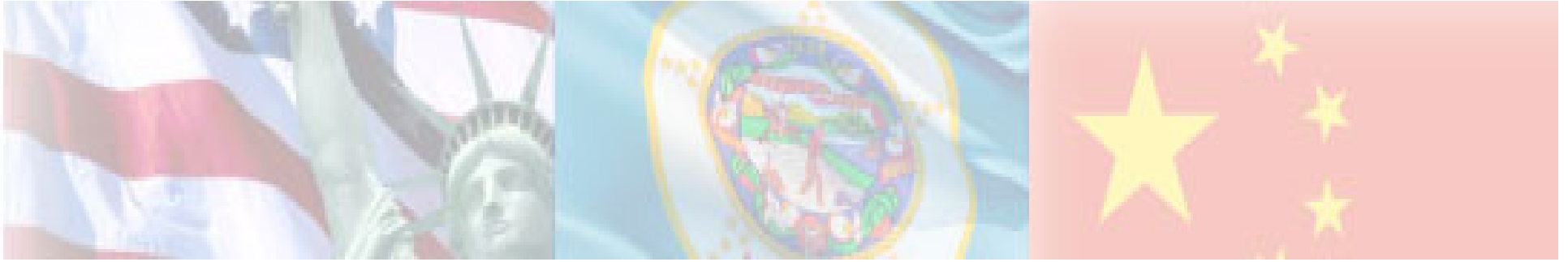
LABOR CONTRACT LAW IN A NUTSHELL, continued

- **Employer may not reduce work force by 20 employees (or if less, more than 10% of the total employees) except on specified grounds (e.g., serious business failure, restructuring, bankruptcy, revamp of business model, business license revocation, etc.), giving priority to retaining those with longer tenure or sole wage earners with dependent families and providing severance to the laid off workers (except those terminated for statutory good cause).**
- **In such RIFs, as in any situation where an employers' decision materially affects employees, the law requires consultation and negotiations with the trade union or employees' representatives to "amend" or "perfect" the action.**



LABOR CONTRACT LAW IN A NUTSHELL, continued

- **Employees and employers must bring their claims to the local Labor Arbitration Committee within one year after they knew or should have known, or if dispute under a contract, within one year after the contract has expired or been terminated.**
- **Noncompete and confidentiality obligations can only be imposed on key employees (e.g., senior management and technical personnel, those with access to business secrets); can only extend for two years maximum, and must provide compensation for the noncompete period.**
- **Contracted liquidated damages may be recovered for noncompete violation, but the China Supreme Court has required certain upward or downward adjustments in amounts based on actual loss.**



OTHER POINTS TO REMEMBER

- **Minimum Wage:** As set by the local government, after consultation with trade union and employer associations.
- **Wage During Probation Period:** Must be at least 80% of wage provided in remainder of contract or for a similarly situated, existing employee, and more than minimum wage.
- **Working Hours:** 8 hours per day, 5 days and 2 rest days per week, up to 40 hours per week on average, with hours in excess at overtime wages of:
 - **Working days:** 150% standard wages;
 - **Rest days:** 200% standard wages; and
 - **Holidays:** 300% standard wages
- **Statute of Limitations** for overtime claims is two years, or one year from termination (unlike the one year limitation covering virtually all other types of employee claims).



OTHER POINTS TO REMEMBER, continued

- **Vacations and Holidays:** Employees are entitled to 11 public holidays, plus earned vacation days of 5, 10 or 15 days, depending on one, two or three years of service.
- **Maternity Leave:** At least 90 days' paid leave for female employees, and contract can not be terminated, nor wages reduced, during pregnancy, maternity leave or while still breast feeding.
- **Social Insurance and Welfare** under the six programs must be provided to China national employees, but not foreign employees.



SPECIAL SITUATIONS – FOREIGN EMPLOYEES

- **Foreign Employees** still employed by the home company, but assigned/delegated to work for a PRC affiliate will not be subject to the Labor Contract Law, and are governed by their home country's law.
- **Foreign Employees** directly and legally employed (meeting all visa and work permit requirements) by a PRC based employer, including a subsidiary of the foreign parent, would appear to be entitled to many of the contractual protections of the Labor Contract Law, but are not entitled to PRC social insurance and welfare benefits, nor paid maternity leave. However, questions remain regarding the application of various aspects of the Law.



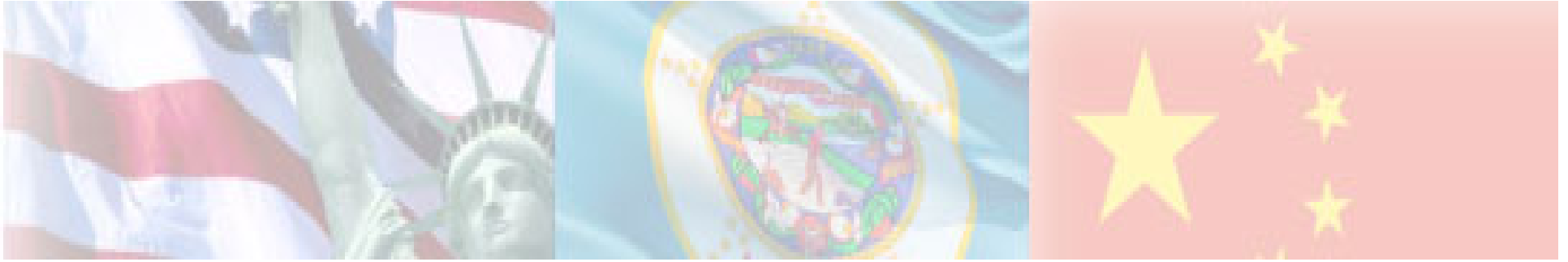
WHO CAN EMPLOY A PRC WORKER

- A recognized PRC entity, such as a Joint Venture or WFOE, can employ a Chinese Worker.
- A Register Representative Office (RRO) can not directly employ a Chinese worker. The RRO must use the intermediary of an approved labor dispatch agency (LDA)
- The LDA is the employer under the LCL, and must offer at least two year fixed term contracts to its employees, and pay them at least the minimum wage during periods where they are not placed.
- LDAs may not hire or place part time workers (not more than 4 hrs/day; 24 hrs/week on average). The LDA and the company will be subject to fines where the company engages part time workers via an LDA.
- HR Expert Giorgini warns that you should not change the form of company in order to directly hire Chinese workers.



SIGNIFICANT LCL CLARIFICATIONS

- The double monthly penalty starts to accrue after the first month of work. (Contract should be signed within the first month.)
- A worker is entitled to an open end contract after ten years continuous service beginning before January 1, 2008, the LCL effective date, and all service, regardless of transfers to different branches and “resign and then rehire” papers, will be counted.
- As specified in the LCL and confirmed in the Regs, there are 14 grounds permitting the employer to terminate, and 13 grounds permitting the employee to do so, and the parties can not add to or modify their grounds.



SIGNIFICANT LCL CLARIFICATIONS, continued

- The express 6 month limit in the draft Regs on a LDA placing a temporary worker with a company has eliminated, allaying concerns that RROs would be unable to keep such workers after 6 months.
- Severance also must be paid to employees with project based contracts, expiring on completion of project.
- The Regs confirm contracts expire at the employees legal retirement age (ranging from 55 to 60 for men and 50 to 55 for women depending on nature of employment).



SIGNIFICANT OPEN QUESTIONS

- Just how long can an employer keep workers placed by an LDA before they are no longer “temporary, ancillary or substitute position” in light of the further ban that the LDA shall not conclude several consecutive short term dispatch agreements for the same employee for a company.
- Do contracts expire at the employees retirement age, whether they are project based, fixed term or open ended?
- How will the courts deal with noncompete obligations that are unreasonable in length (e.g., more than 2 years), scope (e.g., beyond employers’ industry or geographic markets)? Will a “blue pencil” rule be permitted or the noncompete deemed void?



SIGNIFICANT OPEN QUESTIONS, continued

- What level of compensation is required during the noncompete period?
- What is the extent and kind of negotiations required before an employer can refuse the working employee a previously offered contract and terminate the employee without legal exposure?
- How does an employer fulfill his obligation to consult (and negotiate) with the trade union as to a proposed change affecting employees?

China Challenges: Top Tips

- Don't underestimate the value of just being an American
- Don't mistake linguistic fluency for cultural fluency
- Being a successful leader at home does not necessarily equate to being a successful leader in China
- Understanding 'face' may save you from lawsuits
 - In a lawsuit or arbitration filed by an employee, you'll lose
- Your Chinese staff does not need Facebook, Twitter, or LinkedIn in order to talk to friends, classmates, or colleagues
- Listen
- Find top notch legal and HR advisors and heed their advice.