



How the new law serves to provide opportunities for companies to improve HR practices ?

By Michael J. Rosenthal

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China's new employment contract law, which will become effective January 1, 2008, seeks in part to address potential abuses and exploitive practices by employers by affording greater protections to workers. Some businesses have complained that the new law will substantially increase labor costs and reduce flexibility, thus causing some companies to reconsider their operations in China. The new law does provide additional employment restrictions, however if best practices are implemented to ensure compliance, employers should pleasantly find that the result is greater efficiency, higher productivity and reduced turnover.

SIGNIFICANT CHANGES

The modifications to the China employment law¹, which will require changes to HR practices, include the following²:

Automatic Renewal and Severance: In the past, some companies have sought to avoid paying benefits for full time employees, such as social security and health insurance, by engaging in such practices as hiring "temporary employees" with fixed term contracts on an ongoing basis, or dismissing and then re-employing employees with new contracts. In response, the new law requires that after the successful conclusion of two fixed term contracts³, an employee has the right to a renewed contract on the same terms as the previous contract. In the alternative, companies must provide thirty day notice of termination, and/or pay severance of one month's wage for each full year worked, up to a maximum of twelve years severance.⁴The amount of severance is to be calculated based on the employee's tenure and average monthly income.

¹ This document should not be construed as legal advice, which can only be provided by a licensed practitioner.

² The law contains many changes ranging from job creation to antidiscrimination. For more detailed information, check e.g. www.bakernet.com.

³ Previously such a right attached after 10 years of continuous employment.

⁴ A company will not owe severance if an employee refuses to renew a contract containing the same or better conditions.

Probationary Period Restrictions: Some employers have imposed lengthy probationary periods to avoid paying full time employee benefits and allow for easier termination of those employees who are not as good as expected in the interview stage. In response, the new law provides that employees may not be placed on more than one probationary period, nor paid less than 80 percent of the local minimum wage during the probationary period. Additionally:

- For a contract less than three months there can be no probationary period
- For a contract of three months to one year, a probationary period may be no more than one month
- For contracts of 1 to 3 years, a maximum probationary period of 2 months is allowed
- For contracts in excess of 3 years, a maximum probationary period of 6 months is allowed.

Signed Contracts Required: It is estimated that almost half of all employees in China are not paid on time or forced to work unpaid overtime. Additionally, Chinese courts have strict evidentiary requirements, and without an employment contract, enforcement is not likely. To help address these issues, employers must provide to each worker a signed contract within the first month of commencing work, which fully informs the worker of the nature of the job, the working conditions, compensation and conditions under which employees can be terminated. Failure to do so can result in the employer paying to the employee a penalty of double salary, and if the failure continues for one year, the employment will be deemed permanent.



Labor Union Consent: In an effort to ensure fairness in company rules and employee terminations, employee unions or employee representatives if non-unionized (collectively herein “unions”) will play a greater role. The new law provides that company rules and regulations are not binding unless negotiated and agreed upon by the applicable union. Additionally, the employer must notify the union prior to terminating an employee. The union may request the employee not be terminated if such termination does not comply with the law, and the employer is obligated to respond in writing to such union request ⁵

⁵ While the law states that only notification of the union is required, some commentators suggest that in practice consent must be obtained.

BEST PRACTICES

The new employment law leaves a number of questions unanswered and it will take time before the full implications are more clearly understood and enforcement can be measured. In the meantime, companies should begin preparations for compliance. Multinational companies with experience in countries that have such worker's rights in place should find such adjustment easier. The following briefly outlines recommendations to comply with the new law, and explains the potential benefits of complying.

Education: All too often people have misconceptions about legal rights. From the management side this can lead to bad or illegal practices. From the worker side this can result in resentment and poor behavior. Thus, it is critical that employees and management learn the details of the new law. To start, a point person should be designated to ensure that accurate information is disseminated in a concise and efficient method. The process of education will provide an excellent opportunity to determine if there are HR issues which concern employees, and how those issues can be improved. Some companies may think that they benefit from getting away with providing staff with as little benefits as possible and not educating staff in the hope that they never assert such rights. While this may appear to be an attractive short-term strategy, the truth is that those employees who believe they are treated fairly are more loyal and supportive of the company, willing to follow directions, and interested in contributing to the success of the business.

Standardization and Documentation: Creating standardized processes and forms will greatly reduce the burden placed on managers, improve efficiency, promote a more fair system and, equally as important, give the perception of fairness. Such standardization is particularly important for written documents such as position descriptions, interview questions, company policies, employee reviews, and those addressing hiring and employee misconduct.

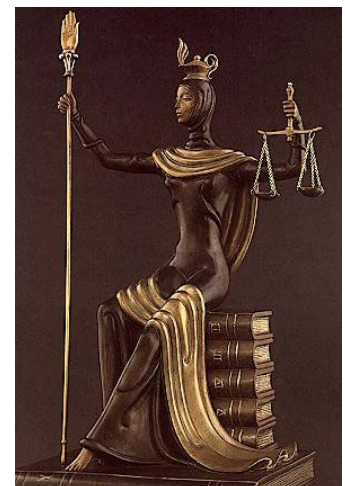
Due to the reduced probationary periods and required labor union review of terminations, the need for documentation of employee substandard conduct or misconduct has become more acute. A well documented file will be much more effective in a termination case than none at all, and the better the documentation, the more likely the outcome will be favorable for the employer. All substandard performance and alleged violations should be immediately and thoroughly considered in a fair and consistent manner (within the parameters of the law). Upon gathering relevant information, the employee should be provided an opportunity to explain their side. This process may result in surprise discoveries. The suspected "violation" may be nothing more than hearsay, or another party may actually be at fault. Some employees may fully accept responsibility, attempt to rectify the situation, and go on to become more productive. No matter what the root cause or problem, allowing a dysfunctional relationship to continue without addressing the concerns is never good, as it will allow issues to fester and can result in both employees losing confidence in management and the continuation of bad practices. Lingering doubts about employee performance may cause building resentment by staff and colleagues, and soon alienate

employees, including some that do not deserve such treatment. Even good employees may after time feel that the company has failed them, and eventually become bad employees.

All information, whether leading to the conclusion that a violation has occurred or not, should be documented. A finding of no fault will vindicate employees who do not deserve to be labeled as “trouble makers” and will prove that the company is unbiased and thorough. Inquiries resulting in a finding that an employee has erred should be placed in writing with a copy provided to the employee (signed as received) detailing the specific ways in which the employee can improve, or in the case of serious violations, notification of termination to the union. The manager should then orally discuss the matter with the employee and explain the company rules to ensure there is no ambiguity. In every instance the process should remain the same. By following a specific process, using standard forms, and acting in a timely fashion, it is more likely that a correct result will be reached, and one that is perceived as fair. Since breaches involve questions of degree, it is far easier to make a fair judgment if company rules contain definitive standards upon which all conduct can be judged. Maintaining reliable documentation is extremely important as multiple violations of minor misconduct may eventually form a basis for termination depending on the nature and frequency.

All too often managers think about the process merely to punish, while underutilizing the process for development purposes. Mistakes should be considered an indicator that greater training or coaching is needed. The reward for helping employees overcome their shortcomings, in contrast to new recruitment, is employees that are better trained and more loyal, and a savings of time and money seeking, hiring and training new personnel.

Although the law states only that the union must be notified of terminations and provided an opportunity to express their views, in practice it may require something more akin to consent. This will not be nearly as onerous if the company has followed the process outlined above. Well-documented violations which have been repeatedly discussed with the employee along with suggestions for improvement which were not followed will elicit a very different response from the union than undocumented oral allegations. This concrete documentation may also help address future inquiries of equal or greater importance that may be brought by the government or the press, which can seriously affect the reputation of a company.



Similarly, managers should regularly review employee performance and carefully document accomplishments, shortcomings and future plans. Through this process, managers can better learn the strengths and weaknesses of their staff, and provide training when necessary. These reviews should also provide time for the manager to identify company policies or processes that should be improved, or discover

resources that are needed. If employees receive regular reviews it will help them stay focused and provide better relations with management. If employees are unable to perform, it will provide a basis for appropriate adverse action in accordance with the law. Compliance with the new legal requirement that employment contracts contain a detailed position description will be extremely beneficial in such employee reviews and inquiries regarding conduct. In order to create such descriptions, companies will need to fully understand their mission and needs for each specific employee. This may help businesses better utilize their resources. It will also be much easier to terminate employees if it can be proven that they have simply not performed the well-defined set of duties contained in the signed contract. Companies should be careful upon renewal or change of the contract to ensure that specified duties as contained in the revised contract are the actual duties which the employee should be performing.

Improved Recruiting: Due to the reduced probationary period and the automatic contract renewal provision, companies will find it harder to terminate employees. Because employees will become more entrenched, it will be more important to hire the right people from the start. Thus, companies should place even more focus on the hiring process. Particularly, businesses can:

- **Clearly Identify Positions:** As discussed above, developing detailed position descriptions that reflect the true needs of the business will place companies in a better position to hire the right people for the position. Too often neither the employee nor the manager is fully aware of the company needs, and thus matching applicants is unduly difficult. In some instances, the mere process of better defining positions and the managerial chain of command may result in enhanced efficiency. Moreover, the employee contracts, which must be signed within one month of commencing work, should also contain a very clear description of the employee's duties, deliverables and functional skill set.
- **Improved Interviews:** Based on accurate descriptions, employers must prepare interview questions that get to the root of their needs. Questions must probe the interviewee's true character and background. For example, in looking for an administrative assistant, the ability to organize is a necessary skill. It is not enough for the applicant to say that they are organized, understand the value of organization, and will bring organizational skills to the job. It is incumbent upon the interviewer to ask direct questions, such as: "How do you organize?"; "What methods or programs do you use?" or "Can you give me detailed examples of exactly how you have organized projects in the past?"



- **Verification:** It is easy to make claims at an interview, but do those claims hold up? If you are looking for skills like translation, editing or typing, you can easily administer your own test. Make sure each candidate is given the same test and timed. Other claims, such as length of service or responsibilities in previous jobs can only be verified by checking references and previous employers. Anyone who is unwilling to provide you good references or allow you to contact a previous or present employer should be considered suspect. If they have not told their present employer they are seeking another job, you should expect they will do the same to you in the future. No matter how good the applicant may appear, it is only through background research that claims can be confirmed.
- **Psychometric Profiling:** Using the right psychometric profiling tool can tell you a lot about the characteristics of a potential hire, provided that: (1) the test is fully localized; and (2) the people interpreting the test understand how to read the results and understand the corporate culture. Relying on off-the-shelf tests, which are based on outdated theories, and do not address the unique issues in the specific culture will provide disappointing results. Thus, testing should always be conducted with a specifically-tailored tool, unique for the culture, and be administered and interpreted by people who are properly trained.

CONCLUSION

Effectively complying with the new China employment law will require additional education, standardization, clarification, documentation and improved hiring practices. While this will create some additional work, if done right, companies should realize significant benefits in regard to improved efficiency, employees that better match job roles, and more productive workers.

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