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# PRC Adopts Labour Contract Law

On 29 June 2007, the Standing Committee of the National People's Congress adopted the new Labour Contract Law ("LCL"), which take effect on 1 January 2008. There has been much debate and discussion surrounding the LCL since the first draft was issued in March 2006.

The purpose of this note is to provide a summary of the main provisions in the new Labour Contract Law.

## Introduction

The stated purpose of the LCL is to improve the employment contract system, to specify the rights and obligations of all parties to employment contracts, to protect the lawful rights and interests of employees, and to build and develop stable employment relationships between employers and employees.

## Employment contracts

Article 10 of the LCL states that in order to establish a labour relationship between employers and full-time employees, a written employment contract must be concluded within one month of employment. If an employer fails to conclude a written employment contract within one month from the date on which the employee began work, the employer shall pay the employee twice his or her salary each month, as stated in article 82. If an employer fails to conclude a written employment contract within one year, the employer and employee are deemed to have concluded an open-ended employment contract. Where an employment contract is concluded before an employee starts working for the employer, the employment relationship is established on the date on which the employee begins work.

The employment contract shall specify basic information about the employer and the employee, employment period, job description, place of work, working hours, breaks, leave, remuneration, social insurance, labour protection, working conditions, protection against occupational hazards, and other matters required by laws and statutes. An employer and employee may also negotiate and stipulate other terms in the employment contract, such as probation period, training, confidentiality, supplementary insurance, and other benefits.

## Fixed-term and open-ended contracts

Under the LCL, fixed-term employment is allowed but is strictly regulated. These regulations aim to prevent employers using fixed-term contracts as a way to allow contracts with unsatisfactory employees to expire without paying severance pay. Article 44 provides that an employer can terminate a fixed-term contract only with good cause or in the case of mass redundancy. Article 46 states that an employer must pay severance pay to an employee if a fixed-term contract expires and the employer fails to renew the contract, unless the employee fails to renew the contract even though the new employment terms are equal or better than those stipulated in the current contract.

The LCL encourages open-ended contracts, which are contracts where the employer and the employee have agreed not to stipulate a definite end date. An employer and an employee may negotiate an open-ended employment contract. In addition, an open-ended contract may be concluded if the employee agrees to renew their contract under any of the following circumstances, except where the employee requests a fixed-term contract:

1. the employee has been working for the employer for a consecutive period of not less than 10 years;
2. when the employer introduces the employment contract system or the state owned enterprise that employs him re-concludes its employment contracts as a result of restructuring, the employee has been working for the employer for a consecutive period of not less than 10 years and is less than 10 years away from his legal retirement age; or
3. prior to the renewal, a fixed-term employment contract was concluded on two consecutive occasions.

The existing labour law states that if an employee has worked for their employer for a consecutive period of not less than 10 years, and they meet a consensus to extend the labour contract, then they can conclude an "open-ended employment contract". The new law abolishes the term "meet a consensus", thus the scope of open-ended employment contracts has been broadened. The consequences when an employer refuses or fails to conclude an open-ended employment contract when required are stipulated in article 82: the employer shall pay the employee twice his or her salary each month.

## Probationary periods

The LCL restricts the length of probation periods for short-term contract employees, but provides more freedom for employers who offer longer employment contracts. If the employment contract is between three months and one year, the probationary period must not exceed one month. If the contract term is one to three years, the probationary period may not exceed two months. Where the employment contract is more than three years or is open-ended, the probationary period can be up to six months. Only one probationary period is allowed for each employee. The employee's salary during the probationary period shall not be less than the lowest wage paid to an employee in the same position in the company or 80 percent of the salary agreed to once the probationary period ends.

## Confidentiality and non-competition clauses

The LCL allows employers to include confidentiality and non-competition provisions in employment contracts relating to the confidentiality of trade secrets and to intellectual property, the duration of which shall not exceed two years, reduced from three years under current labour laws. The employer must pay compensation to the ex-employee monthly for the duration of the competition restriction. If the employee breaches the restriction then they must pay a fine to the employer. The scope, territory and terms of competition restrictions are subject to negotiation between the employer and employee. Restrictions on competition are limited to senior management, senior technicians and other staff with confidentiality obligations. ## Termination of employment contracts

An employee may terminate an employment contract if their employer fails to provide the conditions or protections stipulated in the contract; fails to pay mandatory social security; fails to pay wages or salary; or establishes rules that violate laws or regulations, thus infringing upon the employee's rights and interests. Any employee may terminate a contract with 30 day's written notice during the normal employment period or three days' oral or written notice during the probationary period.

The LCL allows employers to terminate an employment contract, without severance pay, if the employee:

1. fails to meet the conditions of employment during the probationary period;
2. is in violation of the employer's rules and regulations;
3. commits serious dereliction of duty, or practices graft that causes material damage to the employer;
4. simultaneously works for others in a manner that seriously affects his or her job performance for the current employer and refuses or fails to take corrective action after the current employer has raised the issue;
5. deceives, coerces or takes advantage of the employer's difficulties, to cause the employer to conclude or amend an employment contract; or
6. commits a crime.

The employer must inform the trade union in advance and provide a reason for the intended termination.

The LCL also allows employers to terminate employment with 30 day's written notice or payment of one month's salary under the following circumstances:

1. where an employee cannot carry out the job they were employed for, nor another job for the same employer because of illness or non-work related injury;
2. the worker is incompetent and remains so even after training or adjustment of their position; or
3. major changes in circumstances make the original employment contract impossible to perform and the employer and employee are unable to reach an agreement regarding changes to the contract.

The LCL forbids the termination of an employment contract if the employee has suffered a work-related injury or occupational disease; is pregnant or nursing; or has worked for the company continuously for at least 15 years and is within five years of retirement.

## Redundancy

Article 41 specifies that if an employer wishes to reduce their workforce by over 20 employees or, if less than 20 employees, 10 percent of the total number of employees, they must first consult with and consider the opinions of the union or all employees at least 30 days in advance. Such significant redundancies are only permitted if the employer is on the verge of bankruptcy or is experiencing serious production and management difficulties. Significant redundancies are also allowed if they are necessary after changes in production, introductions of major technological innovations, or changes in operational modes, even after the modification of employment contracts, or where other major changes in the objective circumstances cause the employment contracts to become impossible to perform.

If significant redundancies are necessary, the LCL requires that when employers are deciding which employees to retain, priority is given to employees who have concluded fixed-term contracts with a relatively long term; have signed open-ended contracts; are the only member of their family with employment and who are providing for an elderly person or a minor. If the employer hires within six months of the redundancies, preference must be given to those people made redundant.

## Severance pay

Article 46 stipulates that an employer shall pay severance pay to an employee under the following circumstances:

1. the employee terminates the contract because the employer fails to provide labour protections or working conditions, or fails to pay social insurance or full salary on time, or violates rules and regulations on concluding and enforcing employment contracts;
2. the employer proposes to terminate the employment contract and the employer and employee then terminate the contract after negotiations;
3. the employer terminates the employment contract because the employee cannot perform a job due to incompetence or a major change in the objective circumstances upon which the contract was based makes the contract impossible to perform;
4. the employer reduces the number of employees because it needs to restructure pursuant to the Enterprise Bankruptcy Law;
5. the employer terminates or fails to renew a contact when it expires, unless the employee fails to renew the contract even though the new contract terms are equal to or better than those of the current contract;
6. the employer goes bankrupt, has its business licence revoked, or is ordered to close or is closed down; or
7. other circumstances specified in laws or administrative statutes.

Severance pay is paid at the rate of one month's salary for each year of employment. For high-income employees where their salary is greater than three times the average monthly wage of local employees, the severance pay shall be three times the average monthly wage of local employees and shall not exceed 12 years. Any period of between six months and one year will count as one year and the severance pay for any period of less than six months shall be one-half of an employee's monthly salary.

## Role of Trade unions

Trade unions shall be involved in mass redundancy schemes, as outlined above. Trade unions are also to be consulted regarding the interests of employees. Article 4 of the LCL provides that employers must establish rules and regulations to ensure that employees enjoy their labour rights and perform their labour obligations. When an employer formulates, revises, or decides on rules and regulations that have a direct bearing on the immediate interests of its employees, such as issues concerning compensation, work hours, rest, leave, work safety and hygiene, insurance, benefits, employee training, work discipline, or work quota management, employers must first discuss these issues with employee representatives or all employees. If an employee or a trade union is of the opinion that a rule or regulation under implementation is inappropriate, the employee or union is entitled to inform the employer, who is then required to improve the rule or regulation through consultation with employees.

Trade unions are also able to conclude collective contracts, as laid out in article 51, on areas such as labour compensation, working hours, breaks, leave, work safety and hygiene, insurance, and benefits. Industry-wide or area-wide collective contracts may also be concluded between the trade union and enterprises in industries such as construction, mining, catering etc., within areas below county level. If an employer breaches the collective contract and infringes upon the labour rights and interests of the employees, then the trade union may demand that the employer assume liability.

## Payment Decrees

If an employer does not pay all of the salary due to an employee, the employee may apply to the local court for an order to pay under article 30.

## Training clause and liquidated damages clause

If an employer provides special funding for an employee's training, the employer may introduce an agreement specifying a term of service with the employee as stipulated in article 22. If the employee then breaches the term of service, they must pay liquidated damages to the employer as agreed. Damages may not exceed the cost of training paid for by the employer, and is based on the unperformed portion of the service term.

## Part-time employees

Part-time employees are defined in article 68 as employees who work no more than four hours per day or 24 hours per week, on average, for the same employer. Oral contracts are allowed for part-time employees and probationary periods are forbidden. Either party may terminate the contract without penalties such as severance pay. The employee should be paid at least every 15 days and the hourly salary should not be lower than the minimum hourly rate published by the government.

## Employment placement agencies

Under the LCL, staffing firms are considered to be employers and are required to fulfil all employers' obligations. In addition, staffing companies are required to enter into fixed-term employment contracts with employees, of at least two years. When a staffing firm cannot provide employment during the fixed-term contract, they must pay the employee a statutory minimum wage. This note contains a summary only of the principal provisions of the new Labour Contract Law. It does not constitute legal advice and specific advice should be sought in any particular situation.

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