

Legal Commentary

April 26, 2024

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Key Distinctions in U.S. and Chinese Employment Laws & Practices

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The employment laws and practices in the U.S. and China exhibit significant differences across various aspects. Chinese investors, when conducting business in the U.S., frequently encounter challenges stemming from the application of Chinese employment ideas and experience to their labor and employment practices in the U.S. This newsletter aims to assist Chinese investors in understanding the below key differences in employment laws and practices between the two countries, thereby enabling them to avoid potential problems and issues.

Basis of employment law

I. U.S.

The U.S. employment law framework is predominantly state-based, allowing for diverse labor standards across different regions. This decentralized approach results from the federal system of government, where states have significant autonomy in legislating employment matters. Consequently, laws concerning wages, hours of work, leave policies, and termination vary widely from one state to another. For instance, California has some of the most stringent labor laws in the country, offering extensive protections to employees, while other states might offer less protections to the employees. This diversity necessitates businesses to have a nuanced understanding of each state's legal environment in which they operate, ensuring compliance across multiple jurisdictions. For Chinese-invested corporations or businesses operating nationally, this can mean juggling a myriad of regulations, requiring diligent legal and HR efforts to maintain compliance.

II. China

China, with its centralized legal system, provides a more uniform framework for employment law. Governed by national legislation, such as the Labor Law and Labor Contract Law, these regulations are applied consistently across all regions and provinces. The national laws cover a wide array of employment aspects, including contracts, wages, working hours, and termination, ensuring a consistent approach to employment practices throughout the country. However, as regulations and guidelines at the central level are relatively brief, many difficult issues are left to be resolved. A

considerable number of these issues are regulated at the local level by local laws and regulations and other local policies or normative documents instead; and at the same time, a significant portion of those issues are resolved by local adjudicative bodies in a public or internal manner, resulting in the obvious territorial differences of the practices. There are some labor disputes that brings different viewpoints at the regional level, or even within the same court district, but depend more on the case-by-case discretion of the adjudicators.

Written employment contract requirement

I. U.S.

In the United States, there is no universal mandate for written employment contracts across all jobs. This results in a flexible approach where employment terms are often agreed upon verbally or through offer letters and company policies. Written contracts are typically reserved for executive roles, specialized positions, or instances where unique job duties or compensation arrangement need to be explicitly outlined. However, in the absence of formal contracts, ambiguities can arise about employment terms, potentially leading to disputes. The varied approach to document employment terms in the U.S. provides flexibility but also demands that employers and employees clearly understand their rights and obligations, potentially through supplemental documentation like employee handbooks or policy manuals.

II. China

The requirement for written employment contracts in China is a fundamental aspect of its labor law, emphasizing formalized and documented labor relations. Failure to provide a written contract within the specified timeframe can result in penalties for the employer, including the requirement to pay double the employee's salary. Moreover, if a written contract is not provided within a year, the employment relationship is deemed to be a non-fixed term contract, providing greater job security for the employee. This approach underscores the importance of diligent HR practices and thorough contract management from the onset of employment.

At-will employment vs. non-fixed term employment

I. U.S.

The concept of at-will employment in the United States underpins the country's labor market, emphasizing flexibility and adaptability. This doctrine allows either the employer or the employee to terminate the employment relationship at any time, for any lawful reason, or for no reason at all, without incurring legal liability. This system affords employers the flexibility to make personnel decisions swiftly, in response to market dynamics, operational needs, or individual employee performance. However, it also places a degree of uncertainty on employees, who can be terminated without notice or cause. The at-will doctrine is subject to several important exceptions, including prohibitions against wrongful dismissal and discriminatory practices as outlined in various federal and state laws. For instance, anti-discrimination laws at the federal level, such as Title VII of the Civil Rights Act, protect employees from being terminated on the basis of race, color, religion, sex, or national origin.

II. China

In China, the concept of non-fixed term employment offers a stark contrast to the U.S. system. After completing two consecutive fixed-term contracts, or under certain conditions specified by labor laws, employees typically gain the right to a non-fixed term contract (which is also often perceived as a permanent contract). This type of contract significantly enhances job security for employees, as unilateral termination by the employer is rigorously regulated in China. Employers must have a justifiable reason, often related to performance or operational needs, and follow a stringent process for unilaterally terminating an employee. Therefore, a non-fixed term contract poses challenges to the employer to end employment relationships.

Non-compete issues

I. U.S.

The approach to non-compete agreements in the U.S. varies significantly across states, reflecting the decentralized nature of its legal system. Generally, non-compete agreements are enforceable if they are considered reasonable in scope, duration, and geographic area, and if they protect legitimate business interests such as trade secrets or customer relationships. However, the definition of what is 'reasonable' can differ greatly. For instance, California is known for its strong stance against non-compete agreements, deeming them unenforceable in most cases. Conversely, states like Texas and Florida are more amenable to enforcing such agreements, provided they meet certain criteria. Employers using non-compete agreements must carefully draft these clauses to ensure they are compliant with the specific laws of each state where they operate. Moreover, there is an increasing trend towards legislative action limiting the use of non-competes, particularly for lower-wage employees. Employers must stay informed about evolving laws in this area and consider alternative strategies, such as non-solicitation or confidentiality agreements, to protect their business interests.

II. China

In China, non-compete agreements are recognized and enforceable but are subject to specific statutory limitations under the Labor Contract Law. These agreements can only be applied to senior management, senior technicians, and other personnel with access to trade secrets. The law caps the post-termination non-compete period to a maximum of two years and requires employers to pay economic compensation to the employee during the non-compete period. This compensation must be sufficient to support the livelihood of the employee and must not be lower than the local minimum wage standards, often subject to negotiation during the drafting of the agreement. Failure to provide this compensation can render the non-compete clause unenforceable.

Wages and payment of wages

I. U.S.

The wage structure in the U.S. encompasses a wide range of factors including federal and state laws, industry standards, and individual employer policies. The Fair Labor Standards Act (FLSA) sets the

baseline for minimum wage and overtime pay but allows states to establish higher minimum wage rates. This leads to significant variation across the country; for example, states like Washington and Massachusetts have higher minimum wages compared to states like Georgia. Overtime payment rules, particularly for exempt and non-exempt employees, add complexity to wage management. Exempt employees, generally salaried individuals in executive, administrative, or professional roles, are not eligible for overtime pay under the FLSA, whereas non-exempt employees must be paid overtime for hours worked beyond the standard 40-hour workweek. The classification of employees as exempt or non-exempt is a critical aspect of wage management, requiring employers to carefully assess job duties and compensation levels. In addition to these federal standards, employers must also navigate state-specific wage and hour laws, which can include regulations on meal and rest breaks, minimum wage rates, and pay frequency. For instance, California has stringent requirements for meal and rest breaks and imposes additional penalties for non-compliance. These variances necessitate a comprehensive approach to payroll management, ensuring adherence to both federal and state wage laws.

II. China

Wage regulations in China are primarily aimed at ensuring fair compensation and protecting workers from exploitation. Each region within China sets its own minimum wage standards, which are periodically reviewed and adjusted according to local economic conditions. This regional variation allows for a degree of flexibility, acknowledging the diverse cost of living across different parts of the country. In addition to meeting these minimum wage standards, employers in China are also obligated to comply with laws governing the payment of overtime. These regulations ensure that employees are adequately compensated for extra work hours. Employers are subject to penalties for late or non-payment of wages.

Leave and holidays

I. U.S.

The approach to employee leave in the U.S. is characterized by a lack of federal mandates for paid vacation or sick leave, leading to a high degree of variability in leave policies among employers. The Family and Medical Leave Act (FMLA) provides for unpaid leave for certain family and medical reasons, but eligibility is limited to employees of larger employers and those who have met specific service requirements. Outside of FMLA, many employers offer paid leave benefits as a competitive advantage to attract and retain talent. The nature and extent of these benefits can vary widely, often depending on the industry, the size of the employer, and the level of the position. Some states and cities have enacted their own laws requiring employers to provide certain types of paid leave. For instance, California requires employers to provide paid sick leave, and New York has a paid family leave program. These state and local mandates create a patchwork of leave regulations across the country, with some employees receiving generous paid leave benefits and others having minimal or no paid leave. Additionally, the U.S. observes several federal public holidays, but there is no legal requirement for employers to offer these days as paid time off. As a result, public holiday observance can vary between employers, with some offering paid holidays as part of their benefits package and

others not. In industries where talent competition is particularly high, employers often use generous leave policies as a key component of their compensation packages. This varied landscape of leave entitlements in the U.S. highlights the need for employers to carefully consider their leave policies in the context of legal requirements, industry norms, and recruitment and retention strategies. Employers must balance compliance with state and local laws with the competitiveness of their overall benefits package, particularly in a market where employee expectations for work-life balance and flexible working arrangements are evolving.

II. China

In contrast to the U.S., China offers a more standardized leave system, mandated by national legislation. Employees in China are entitled to paid annual leave, which increases with their years of service, encouraging long-term employment relationships. This leave entitlement starts from 5 days for employees who have worked for 1 to 10 years, increasing to 10 days for 10 to 20 years of service, and up to 15 days for more than 20 years of service. Besides annual leave, Chinese employees also benefit from a range of public holidays. These holidays are uniformly observed across the country, contributing to the overall leave entitlement of employees. Additionally, China's labor laws provide for various other types of leave, including marriage leave, maternity leave, paternity leave, and bereavement time-offs, which are up to local regulations and standards.

Hiring practices

I. U.S.

The hiring process in the U.S. is influenced by a broad spectrum of federal and state laws designed to promote fairness, equity, and non-discrimination. Employers are bound by laws such as the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and the Equal Pay Act, which collectively prohibit discrimination based on factors including race, color, religion, sex, national origin, age, disability, and gender identity. The enforcement of these laws, overseen by agencies like the Equal Employment Opportunity Commission (EEOC), requires employers to adopt fair hiring practices, including job postings, interview processes, and candidate evaluations. Employers must also navigate state-specific regulations, which can include laws on background checks, drug testing, credit checks, and salary history inquiries. For instance, some states have "ban-the-box" laws that restrict inquiries about a candidate's criminal history during the early stages of the hiring process. Additionally, various states have enacted legislation to address pay equity, such as prohibiting employers from asking about a candidate's previous salary. This complex legal landscape demands that employers maintain up-to-date knowledge of applicable laws and ensure their hiring processes are compliant, fair, and inclusive. Employers also face challenges in aligning their recruitment strategies with business objectives while navigating these legal requirements. In practice, this often means developing standardized hiring procedures, training hiring managers on non-discriminatory practices, and implementing systems to ensure compliance throughout the recruitment process.

II. China

In China, hiring practices are governed by principles of fairness and non-discrimination as outlined in the Labor Law and other relevant regulations. However, the approach is more regulated in terms of adherence to legal and contractual obligations. Employers are required to ensure compliance with laws regarding employment contracts, social insurance enrollment, and other statutory requirements from the outset of the employment relationship. The hiring process often places emphasis on candidates' qualifications, credentials, and suitability for the role within the framework of Chinese labor laws.

Discrimination and harassment laws

I. U.S.

The framework in the U.S. for preventing and addressing workplace discrimination and harassment is comprehensive and multifaceted. Federal laws, such as the Civil Rights Act, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act, provide broad protections against discrimination in various aspects of employment. Additionally, the U.S. Equal Employment Opportunity Commission (EEOC) actively enforces these laws, offering guidance to employers and recourse to employees who face discrimination or harassment. Employers are required to establish clear policies, provide training, and promptly investigate complaints to foster a workplace free of discrimination and harassment. Many states and local jurisdictions have enacted laws that expand these protections, covering additional categories such as sexual orientation, gender identity, and marital status. For example, states like California and New York have comprehensive anti-discrimination laws and mandatory training requirements on sexual harassment. This layered legal environment necessitates that employers not only comply with federal standards but also stay informed of state-specific requirements. Implementing best practices, such as regular training, clear reporting mechanisms, and effective complaint resolution processes, is essential for employers to maintain a compliant and inclusive workplace. Moreover, the focus on diversity, equity, and inclusion (DEI) in corporate culture further drives employers to go beyond mere legal compliance, adopting proactive strategies to create a diverse and supportive work environment.

II. China

In China, there are anti-discrimination employment laws in place that aim to prevent bias based on factors such as ethnicity, race, and gender, etc. Also, there are some provisions introduced by the Civil Code requiring all employers to proactively prevent sexual harassment in the workplace. These protections may not be as aggressively pursued by the employees as those in the United States, and workplace issues are more often resolved internally rather than through formal legal channels. In recent times, there has been a growing awareness and public dialogue surrounding workplace discrimination and harassment in China, particularly in relation to gender-based ones.

Social security and benefits

I. U.S.

The U.S. social security system provides a basic level of protection for employees, covering retirement, disability, and survivors' benefits. Employers and employees contribute to this system through payroll taxes. Beyond social security, other benefits like health insurance, retirement savings plans, and paid leave are not federally mandated and vary widely among employers. Some states have enacted laws requiring employers to provide additional benefits. For instance, several states mandate employers to offer retirement savings plans if they do not provide a pension or 401(k) plan. Similarly, states like California have their own health insurance mandates, and a growing number of states require paid sick leave. These variances create a complex landscape for employers, who often use additional benefits as a means to attract and retain talent. In competitive job markets, comprehensive benefits packages that include health insurance, retirement savings options, and generous leave policies can be crucial in securing top talent. Employers need to balance the cost of these benefits with their value in recruitment and retention, all while ensuring compliance with state-specific regulations.

II. China

The social security system in China is comprehensive and mandatory, covering pension, medical insurance, unemployment insurance, work injury insurance, and maternity insurance. Both employers and employees contribute to these funds, with rates varying by region. This system ensures a broad safety net for employees across different life stages and circumstances. Additionally, as required by national regulations, both employers and employees pay contributions to a housing fund, further supporting employees' welfare. For employers, managing social security and housing fund contributions is an integral part of payroll administration, requiring careful attention to regional differences in contribution rates and compliance requirements.

Health and safety

I. U.S.

Ensuring workplace health and safety is a critical responsibility for employers in the U.S. The Occupational Safety and Health Administration (OSHA) sets and enforces standards to provide safe and healthy working conditions. These standards cover a wide range of safety issues, from hazardous material handling and machine guarding to ergonomic practices and air quality. Employers are required to comply with OSHA regulations, which includes providing appropriate training, maintaining safe working environments, and reporting certain types of injuries and illnesses. Many industries have specific OSHA standards that must be followed, adding layers of complexity for businesses operating in sectors like construction, manufacturing, or healthcare. Additionally, workplace health and safety have been evolving to include considerations of mental health and wellness, especially in response to changing work environments and increased awareness of these issues. This evolution has led to a broader interpretation of what constitutes a safe and healthful workplace, with employers increasingly adopting holistic approaches to employee well-being. Non-compliance with OSHA regulations can result in significant penalties, including fines and, in severe

cases, criminal charges. In addition to federal OSHA regulations, states may operate their own OSHA-approved workplace safety and health programs with standards that are at least as effective as federal OSHA. These state plans can impose additional requirements on employers. Thus, maintaining compliance with health and safety regulations is a critical aspect of risk management for employers, necessitating ongoing vigilance, training, and investment in safety initiatives.

II. China

Workplace health and safety in China are governed by a framework of national laws and regulations, with increasing attention being given to this area in recent years. Employers are required to provide a safe working environment, conduct regular safety training, and supply necessary protective equipment. The government has been strengthening these regulations and enforcement in response to several high-profile industrial accidents, signaling a growing commitment to worker safety. For businesses operating in China, understanding and adhering to health and safety regulations is crucial, not only for legal compliance but also for ensuring the well-being of their workforce.

Data and privacy protection issues

I. U.S.

In the United States, data privacy and protection in the employment context are governed by a combination of federal and state laws. The lack of a unified federal data privacy law means that employers must navigate a complex array of regulations. For instance, the Health Insurance Portability and Accountability Act (HIPAA) governs the confidentiality of medical information, and the Fair Credit Reporting Act (FCRA) regulates the use of consumer reports and credit checks for employment purposes. Additionally, some states have implemented comprehensive data protection laws, such as the California Consumer Privacy Act (CCPA), which grants specific rights to California residents regarding their personal information. The CCPA has implications for employers who collect and process personal data of their employees. Furthermore, the increasing prevalence of remote work and digital communication platforms has raised new challenges in maintaining data security and protecting employee privacy. Employers must ensure robust data security measures to protect sensitive employee information from cyber threats. This environment requires employers to be vigilant in their data management practices, ensuring compliance with applicable laws and maintaining the trust of their employees. Best practices include regular data security training, implementing strong cyber security measures, and maintaining transparency with employees about data collection and usage.

II. China

In China, data privacy and protection are increasingly important issues, with the introduction of comprehensive laws such as the Cybersecurity Law and the Personal Information Protection Law. These laws establish strict guidelines for the collection, storage, processing, and transfer of personal data. Employers in China are required to implement robust data protection measures, obtain consent for data collection, and ensure the security of personal data. This is particularly relevant for multinational companies that may transfer employee data across borders, as cross-border data

transfers are subject to stringent regulations. The evolving nature of these laws and the increasing emphasis on data security in China require employers to stay abreast of legal developments and adapt their data management practices accordingly.

Termination process and severance issues

I. U.S.

The termination process in the United States varies depending on the state laws, the specifics of the employment contract, and the circumstances of the termination. Under the at-will employment doctrine, employers have considerable flexibility in making termination decisions, but they must ensure that these decisions do not violate federal or state anti-discrimination laws, breach contract terms, or contravene any specific statutory protections. For example, terminating an employee for whistleblowing activities or in retaliation for taking FMLA-protected leave is prohibited. Employers are advised to document performance issues and disciplinary actions to support termination decisions, reducing the risk of wrongful termination lawsuits. In cases of mass layoffs or plant closures, employers may be subject to additional regulations, such as the federal Worker Adjustment and Retraining Notification (WARN) Act, which requires advance notice to employees. Severance pay in the U.S. is not mandated by federal law but may be offered as part of a termination agreement or as a policy by the employer. Many companies use severance packages as a way to mitigate potential disputes and assist employees in their transition. These packages often include a combination of continued salary payments, benefits coverage, and sometimes outplacement services. The terms of severance are frequently negotiated and may be subject to conditions such as non-disparagement or non-compete clauses. Overall, the termination process in the U.S. demands careful consideration of legal requirements, fairness, and potential reputational impacts, requiring employers to balance their operational needs with the rights and well-being of employees.

II. China

The termination process in China is regulated, requiring employers to have valid grounds and follow specified procedures. Chinese labor laws categorize terminations into several types, including those based on employee misconduct, mutual agreement, redundancy, major change of objective circumstances and failure of the employee to perform job duties, etc. Employers must adhere to these legal grounds and often need to provide evidence or follow specific steps, such as attempting to reassign employees or offer trainings to employees before termination. Severance pay is generally required unless the termination is due to employee misconduct or the employee's fault. The amount of severance is based on the number of years of service, with the calculation typically being one month's salary for each year of service. In cases of redundancy, employers are also required to follow certain procedures, such as prioritizing retention of employees with longer service or family responsibilities, soliciting opinions from trade union or all employees, and reporting to local labor administration authorities.

Handling of employment disputes

I. U.S.

In the United States, parties involved in employment disputes often take a proactive and assertive approach, driven by a legal system that emphasizes individual rights and adversarial resolution. Employees, supported by labor laws and a robust legal infrastructure, are empowered to assert their rights and pursue legal action when they believe their rights have been violated. This may involve seeking legal counsel to navigate the complexities of the legal process, filing complaints with government agencies such as the Equal Employment Opportunity Commission (EEOC), or pursuing litigation in state or federal courts. Employers, on the other hand, typically approach employment disputes with a focus on risk management, compliance, and protecting their interests. They may implement policies and procedures to prevent disputes, provide training on employment laws and regulations, and maintain detailed documentation to defend against potential claims. When disputes arise, employers may engage legal counsel to represent their interests, negotiate settlements, or defend against claims in litigation or arbitration proceedings.

II. China

In recent years, employees' awareness of their legal rights and protections when it comes to their employment has been growing. As a result, more and more individuals are choosing to pursue legal action in cases of labor disputes. Procedurally, employees or employers should submit arbitration applications to the local labor arbitration commission where the employment contract is performed, as a prerequisite step before filing to the court. If a party is not satisfied with the arbitration award, it may bring a lawsuit to the court within 15 days after receiving the written arbitration award. If it fails to bring a lawsuit within the time limit, the written arbitration award takes effect.

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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