

# China Employment Law Guide



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# PREFACE



Dear Reader,

This is a remarkable time for labor and employment law in China. The *Employment Contract Law*, which became effective on January 1, 2008, significantly changed the relationship between employer and employee to bring China more in line with international standards.

Further, the All-China Federation of Trade Unions, the umbrella organization for all labor unions in China, has promised to continue its campaign to unionize foreign-invested enterprises. Its stated goal is next to pressure companies to sign collective contracts, including collective wage agreements, with their labor unions.

As a result of these developments, employers must develop better methods to manage their workforce and labor costs. Companies must be aware of the key legal challenges in China. Failure to do so can lead to significant financial, legal, and reputational risks. We hope that this Employment Law Guide will help you to navigate successfully the challenges ahead.

Please do not hesitate to call me or one of my colleagues in the Employment Law Group for assistance on any of the matters in this Guide.

Best regards,

A handwritten signature in black ink, appearing to read 'A. Lauffs'. The signature is stylized and written in a cursive-like font.

Andreas Lauffs  
Head of Employment Law Group

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## INTRODUCTION

### Past Regime under the Labor Law

Labor laws and regulations in the People's Republic of China have undergone marked changes in recent years. These changes are part of China's redesign of its legal framework to support the development of its socialist market economy, a process that began close to three decades ago.

To help transform and modernize China's past labor system into a labor contract system based on greater freedom of employment, China promulgated the *Labor Law of the People's Republic of China* (Labor Law), effective January 1, 1995. The Labor Law applies to private companies and State-owned enterprises (SOEs), and their employees in China. Thus, the Labor Law covers employment by foreign-invested enterprises (FIEs) such as Sino-foreign joint ventures and wholly foreign-owned enterprises (commonly called WFOEs).

At the national level, numerous specialized regulations and notices have followed the promulgation of the Labor Law. The Labor Law and national regulations are further supplemented by local regulations in many cases. For example, provinces, major cities (such as Beijing and Shanghai), and special economic zones (such as Shenzhen) have their own employment contract regulations.

### Problems under the Labor Law Regime

Despite these statutory protections, abuses of employee rights under the new system continued to persist, mainly attributable to blatant violations of the law by unscrupulous employers, inconsistent and loose administrative enforcement at the local level, employee's lack of knowledge of their rights or simple fear of employer retribution if those rights were asserted.

Common problems included failure to sign employment contracts, extending working hours beyond statutory limits without paying the required overtime, delaying the payment of wages, providing unsafe working conditions, failing to pay social insurance contributions and tax, etc.. These problems, combined with mass lay-offs and private companies that are trying to cut labor costs, have contributed to increasing levels of labor unrest throughout the country, which has become one of the major areas of concern for the Chinese Communist Party.

## New Regime under Employment Contract Law

In order to address the increasing labor unrest and widespread media reports of employer abuse of employee rights, the National People's Congress (NPC), on June 29, 2007, passed the Employment Contract Law, with effect from January 1, 2008. While the Labor Law still is in effect and remains the foundation piece of legislation for the employment law regime of China, the Employment Contract Law included significant changes to the existing legal framework. The most significant changes being: specific penalties for not signing employment contracts with employees; limits on the use of fixed-term contracts to increase job security of employees; specific employee consultation procedures in order to adopt company rules, policies, and regulations; and greater protection for employees who are hired through employment service agencies.

The overall effect of the Employment Contract Law will be to increase individual employee rights as well as strengthen the structures for collective employee representation. While employment contracts signed before the effective date of the Employment Contract Law will continue to be valid and effective, the new requirements in the Employment Contract Law will prevail in the case of any conflict with the provisions in existing employment contracts.

This plethora of legal sources has not answered all of the issues or questions facing businesses, employers and practitioners of law in China. Not only the legislation itself but also the interpretation of that legislation and local practice play important roles in China's labor market today.

## APPLICABLE LAWS

China's current legal system concerning employment was established with the promulgation in 1995 of the Labor Law and in 2008 of the Employment Contract Law, together with their respective supplementing legislation. The main laws and regulations governing the employment arena include, among others, the following:

- *Labor Law of the People's Republic of China*, effective July 1, 1995.
- *Employment Contract Law of the People's Republic of China*, effective January 1, 2008, amended with effect from July 1, 2013.
- *Employment Promotion Law of the People's Republic of China*, effective January 1, 2008.
- *Law of the People's Republic of China on the Mediation and Arbitration of Employment Disputes*, effective May 1, 2008 (Employment Disputes Law).
- *Labor Union Law of the People's Republic of China*, effective October 27, 2001.
- *Implementing Regulations for the Law of the People's Republic of China on Employment Contracts*, effective September 18, 2008 (ECL Implementing Rules).
- *Opinion on Several Questions Regarding the Implementation of the Labor Law of the People's Republic of China*, issued August 4, 1995 (Labor Law Opinion).

- *Law of the People's Republic of China on Entry and Exit Control*, effective July 1, 2013 (Immigration Law).

These State-level laws and regulations form the basis of the employment contract system in China. However, locally promulgated legislation may also govern, from such places as major municipalities (Beijing, Shanghai, Tianjin, and Chongqing), Special Economic Zones (such as Shenzhen Special Economic Zone), open coastal cities, and provinces. . Local legislation should be consistent with national legislation, but if conflicts are found, they should be carefully examined to determine, under law and in practice, which rule should be applied in a particular case.

## **RELEVANT GOVERNMENT AUTHORITIES**

The Ministry of Human Resources and Social Security (MOHRSS) is the main government authority in charge of employment and social insurance issues. Local labor bureaus are responsible for enforcing the national and local labor and employment regulations at the local level.

## **KEY EMPLOYMENT LAW COMPLIANCE ISSUES**

### **Working Hours**

Chinese regulations provide for a standard working hours system under which employees should not work more than eight hours per day and 40 hours per week.

However, Chinese law also provides for alternative working hours systems. Upon government approval, an employer may institute the Comprehensive Working Hours System or the Flexible Working Hours System. Under the comprehensive working hours

system, employers may require employees to work longer hours without paying for overtime so long as the average hours worked in a certain period do not exceed the limit on total hours for that period. If the limit is exceeded, then overtime compensation must be paid. Under the flexible working hours system, an employer may require certain staff, such as high-ranking managerial staff and sales staff, to work in excess of 40 hours per week without paying overtime compensation. Local rules may have specific provisions concerning alternative working hours systems.

## Rest days

The statutory minimum is one rest day per calendar week, which can be any day of the week. Saturdays and Sundays are generally rest days in China. An employer can arrange to have its employees take rest days on any other days.

## Overtime & overtime payment

Under the standard working hours system, employees that work over eight hours per day or 40 hours per week are entitled to the following compensation:

- Overtime on workdays – 150% of normal wages
- Overtime on rest days – compensatory leave or 200% of normal wages
- Overtime on statutory holidays – 300% of normal wages

Employees working under the comprehensive working hours system or the flexible working hours system are usually not entitled to overtime payment.

Before having employees work overtime, employers must consult with the employees and the labor union (if any). Overtime hours generally should not exceed one hour per day, or three hours per day under special circumstances, and no more than 36 hours per month.

## Annual leave

Employees who have worked between one year and less than 10 years are entitled to five days of paid annual leave. Those who have worked at least 10 years but less than 20 years are entitled to 10 days of annual leave. Finally, employees will be entitled to 15 days of annual leave once they have worked for at least 20 years.

Employees should take their entire annual leave entitlement each year. If an employee does not use all of the employee's annual leave in a certain year, and does not agree to carry the leave forward, then the employer must pay the employee 200% of the employee's average daily wage for each day of unused annual leave, in addition to regular salary.

## Minimum wage requirement

Under China's minimum wage system, minimum wage levels are fixed by the local governments and are adjusted regularly.

## Maternity benefits

Female employees are entitled to not less than 98 days of maternity leave, commencing 15 days prior to the projected birth. In the event of difficult labor, the maternity leave is extended by an additional 15 days. Where the female employee bears more than one child in a single birth, she shall be granted an extra maternity leave of 15 days for each additional child born.

In some localities such as Shanghai, an extra 30 days of leave is granted for late childbirth, defined as a first pregnancy occurring after the age of 24. A female employee is also entitled to two half-hour nursing breaks each working day during the first year after her child's birth, and those nursing breaks are considered working time.

## RETIREMENT

The national retirement age for male workers is 60, and the national retirement age for female workers is 50 (55 if in managerial or technical positions).

## EMPLOYMENT CONTRACT

### Written Contract

An employer must conclude an individual written employment contract with each full-time employee. An employment contract may be in a foreign language. However, in the event of a conflict with a Chinese version, the Chinese version will prevail.

### Indirect Employment

Representative offices are not permitted to directly employ their staff. Instead, Representative offices obtain their Chinese-national staff through arrangements with labor service companies, the largest and most well known of which is the Foreign Enterprise Service Corporation (FESCO). Expatriate (non-Chinese) staff generally are employed by the foreign parent company and assigned to work at the representative office.

### Mandatory Provisions in Employment Contracts

Employment contracts must include the following basic mandatory terms:

- (1) the name, domicile and legal representative or main person in charge of the Employer;
- (2) the name, domicile and number of the resident ID card or other valid identity document of the worker;
- (3) the term of the employment contract;

- (4) the job description and the place of work;
- (5) working hours, rest and leave;
- (6) labor compensation;
- (7) social insurance;
- (8) labor protection, working conditions and protection against occupational hazards; and
- (9) other matters which laws and statutes require to be included in employment contracts.

Also, relevant local regulations may stipulate additional matters to be included in employment contracts. Moreover, in practice, employers generally wish to supplement the minimum applicable requirements with other commercial terms. Employers also have the option of providing supplemental explanations concerning the mandatory terms and other terms in an employee handbook.

## De Facto Employment

While employment contracts should be in writing, Chinese law recognizes the concept of *de facto* employment relationships. Where a *de facto* employment relationship is deemed to exist, employers generally owe most of the same duties to an employee as are required by law where a written contract is in place. Local regulations, such as those for Shanghai, may provide special treatment concerning employment contracts-in-fact as opposed to written employment contracts.

## Consequences for Failure to Conclude a Written Contract

If an employment contract is not signed with an employee within one month of the employee beginning to work for the employer, then the employee is entitled to 200% of the employee's wage. If no employment contract is signed within one year of the

employee's commencement of work for the employer, then the parties shall be deemed to have concluded an open-term employment contract.

## **TERMINATION**

### **No at-will Termination**

In China, there is no concept of "at will" employment as in some other countries. While employees generally may resign upon 30 days' prior notice to the employer, employers in China are permitted to unilaterally terminate employees only in accordance with circumstances stipulated in relevant laws and regulations.

### **Termination Grounds**

Under six statutory termination grounds, an employee can be dismissed with no notice and no severance:

- if the employee has not satisfied the conditions of employment during the probation period;
- if the employee seriously violates the company's rules or regulations;
- if the employee commits serious dereliction of duty or graft resulting in major harm to the company's interests;
- if the employee is prosecuted for a criminal offense according to law;
- the employee has additionally established an employment relationship with another employer which materially affects the completion of his tasks with the first-mentioned employer, or he refuses to rectify the matter after the same is brought to his attention by the employer; or

- the employee uses such means as deception or coercion, or takes advantage of the employer's difficulties, to cause the employer to conclude an employment contract, or to make an amendment thereto, that is contrary to the employer's true intent.

Under three of the statutory termination grounds, an employee must be provided 30 days' prior written notice and severance:

- if the employee has fallen ill or sustained a non-industrial injury and, at the end of the medical treatment period, can neither engage in the original work nor in other work arranged by the company;
- if the employee is incompetent and remains incompetent after training or assignment to another post; or
- if performance of the original employment contract becomes impossible due to a major change in the objective circumstances upon which the employment contract was based at the time of its conclusion, and consultations between the parties fail to produce agreement on amendment of the employment contract.

An employer must give notice to the labor union prior to any unilateral termination by the employer, regardless of the particular grounds for the unilateral termination. The labor union has a right to raise objections to the termination, but it cannot directly overturn the termination.

## Special Categories of Protected Employees

An employer is prohibited from dismissing employees in any of the following situations, unless the termination is during the probationary period or for cause:

- if the employee suffers from an occupational disease or has sustained an industrial injury, and is confirmed to have lost or partially lost the ability to work;

- during the stipulated period of medical treatment for a non-work related illness contracted or injury suffered by the worker;
- during pregnancy, confinement and the nursing period;
- if the employee is engaged in operations exposing him to occupational disease hazards and has not undergone a pre-departure occupational health check-up, or is suspected of having contracted an occupational disease and is being diagnosed or under medical observation;
- if the employee has been working for the Employer continuously for not less than 15 years and is less than 5 years away from his legal retirement age;
- if the employee is still in his or her term as union chairman, vice-chairman, or union committee member; or
- if the employee is still in his or her term as collective bargaining representative during collective bargaining negotiations.

## **COLLECTIVE DISMISSALS**

There are also grounds for collective dismissals of employees (defined as 20 or more employees, or 10% or more of the workforce):

- the employer has serious difficulties in terms of production or operation;
- the employer is undergoing restructuring under the Enterprise Bankruptcy Law;
- the employer switches production, introduces a major technological innovation or revises its business method, and, after amendment of employment contracts, still needs to reduce its workforce;

- other major changes in the objective economic circumstances relied upon at the time of conclusion of the employment contracts, rendering them unable to be performed.

Termination on these grounds requires 30 days' notice to a labor union or all employees (if the employing company has no labor union) about the redundancy plan and then submission of the redundancy plan to the local labor bureau. In addition, employees with long fixed-term contracts, open-term contracts, or who are the sole breadwinners in the family should be retained with priority.

## **WRONGFUL TERMINATION**

Unless an employer can prove that a unilateral termination is based on one of the above-mentioned statutory grounds, the termination will be deemed to be unlawful. Under the Employment Contract Law, the employee can demand reinstatement in the event of unlawful termination. If the employee does not wish to continue working for the employer or if reinstatement is not possible, then the employer must pay the employee double the amount of severance that would need to be paid if the employee had been lawfully terminated.

## **STATUTORY SEVERANCE**

### Situations in which Severance is Payable

An employer must pay statutory severance to an employee if: the employer unilaterally terminates the employee (except for terminations during the probationary period or for cause), both parties mutually agree to terminate employment after the employer suggests mutual termination, or the employee resigns

because of employer abuse. Severance must also be paid when a fixed-term contract expires (with certain exceptions), or in certain other circumstances when the employment contract automatically ends, such as when the employer goes out of business.

## Calculation Formula

The formula for severance is one average month's wages of the relevant employee for each year of service to the employer. Under the Employment Contract Law, for any period of service that is less than six months, the employee is entitled to a half-month's wages, while for any period of service between 6 months and one year, the employee is entitled to a full month's wages.

The average month's wage is calculated by taking the total amount of compensation paid to the employee during the final 12 months of employment (including base salary, overtime, bonuses, subsidies, allowances, and commissions) and dividing this amount by twelve. In addition, under the Employment Contract Law, if an employee's monthly wage exceeds 300% of the average monthly wage in the municipality where the employer is located, then the average monthly wage amount of the employee (for severance calculation purposes) will be capped at 300% of the local average monthly wage. In some cases, severance is limited to a maximum of 12 months' wages.

The Employment Contract Law includes a grandfather provision for any period of service prior to January 1, 2008. Severance shall be calculated under the old formula existing prior to January 1, 2008 (details may vary by locality, but the same general formula of one month for each year of service would apply), and severance shall be calculated under the new formula in the Employment Contract Law for any period of service after January 1, 2008.

## **AUTOMATIC ENDING OF EMPLOYMENT CONTRACT**

An employment contract automatically ends upon the occurrence of any of the following circumstances:

- (1) its term expires;
- (2) the employee has commenced drawing his basic old age insurance pension in accordance with the law;
- (3) the employee dies, or is declared dead or missing by a People's Court;
- (4) the employer is declared bankrupt;
- (5) the employer has its business license revoked, is ordered to close or is closed down, or the employer decides on early liquidation; or
- (6) another circumstance specified in laws or administrative statutes arises.

## **EMPLOYEE RESIGNATION**

Generally, an employee can resign for any reason by providing the employer 30 days' prior written notice. However, during the probationary period, the employee can resign by providing three days' notice. In the case of employer abuse of the employee's rights, the employee can resign immediately. If the employee has access to confidential information, then the employer and employee may agree to extend the notice period to a maximum of six months (however, local labor officials in some cities may take the view that extended notice periods are no longer enforceable).

## **VARIATION OF EMPLOYMENT CONTRACT**

Any amendment to an employment contract requires written consent from both the employer and the employee.

## **NOTIFICATION**

Under national guidelines issued by the Ministry of Labor and Social Security (now called MOHRSS) in December 2006, an employer has 30 days from when it hires a new employee or renews an employee's contract to report the following pieces of information to the local labor bureau: the total number of employees it is hiring, the name of each employee, the sex of each employee, the ID number of each employee, and the contract terms of each employee. Within seven days of an employment relationship being terminated or ending, the employer should report to the local labor bureau: the number of employees being terminated or whose contracts have ended; their names; and the length of time they worked at the company. If an employer changes its name, legal representative, form of organization, or organization code, then it should report this to the labor bureau within 30 days of the change. Implementation of these national guidelines varies by locality. For example, while Shanghai has implemented this reporting system, Beijing currently has not.

Employers may also need to notify the local social insurance bureau and tax bureau about hires and terminations, depending on local policy.

## RESOLUTION OF EMPLOYMENT DISPUTES

### Means of Employment Dispute Resolution

Employment disputes may be settled using one or more of the following procedures:

- Consultation
- Mediation
- Arbitration
- Court proceedings

### Consultation

Parties to a dispute normally are expected to consult with each other to try to resolve their differences, but consultation is not a legal requirement. If an employment contract provides for consultation, it is advisable to limit and specify a deadline for the consultation period.

### Mediation

Mediation is generally handled internally within an enterprise, but a party may also submit a dispute to a qualified external mediation organization. It is a voluntary process, but, if successful, the parties must honor the mediation agreement. A mediation committee must be composed of employee representatives, selected or appointed by union members or elected by employee representative congresses, and company management representatives, appointed by the “responsible person” at the enterprise (usually the board chairman or general manager).

If mediation is not undertaken or fails, either party may initiate employment arbitration proceedings. (Mediation is deemed failed

if not completed within 15 days from the date of application for mediation.) Employment dispute arbitration commissions are established at the local (county or municipal) level, and whenever a claim is submitted to the arbitration commission, an arbitration tribunal, usually composed of three arbitrators, is formed to hear the case. However, simple cases may be handled by a single arbitrator. Preliminary matters such as jurisdiction, statute of limitations, and sufficiency of evidence must be decided by the tribunal.

## Arbitration

Parties can appoint lawyers to represent them in hearings. At the beginning of formal arbitration hearings, the presiding arbitrator(s) must attempt to settle the dispute. If the parties agree to settle the dispute, the arbitration tribunal must prepare a settlement agreement. This agreement shall be legally effective from the date on which it is served.

If the attempt to settle fails or one of the parties challenges the settlement before it has been served with the settlement agreement, the arbitration tribunal must proceed with the arbitration hearing. An arbitration award must be made within 45 days from the date of receipt of the application. An extension of up to 15 days may be granted for more complicated cases.

## Court Proceedings

If a party is dissatisfied with the award, it may (subject to certain exceptions) bring a lawsuit to a People's Court within 15 days from the date of receipt of the written arbitral award. A People's Court may refuse to recognize an award on broad grounds, including insufficient evidence or incorrect application of the law.

Under the Employment Disputes Law, the statute of limitations period is one year from the date that a party knew or should have known of the violation of its rights.

## **LABOR UNIONS**

### All Unions Come under the Umbrella of the ACFTU

There are no independent union organizations in China, and all unions must belong to the All-China Federation of Trade Unions (ACFTU). The ACFTU is an organization reporting to the Communist Party, with branches at the provincial level, city level, and district level.

### No Legal Requirements to Set Up Unions

Technically speaking, an enterprise does not need to take positive action to establish a labor union. However, if its employees request a labor union to be set up, the enterprise should not obstruct the establishment of the labor union. In practice, local ACFTU branches increasingly put pressure on enterprises to set up labor unions from the top down. However, in the case of Wal-Mart in 2006, the ACFTU for the first time ever used grassroots techniques to establish unions from the bottom up.

### Collective Contracts

Collective contracts may be concluded between an enterprise and its labor union or elected employee representatives (if the enterprise has no labor union). If a union or an elected employee representative submits a written request for collective bargaining, the employer generally cannot refuse to engage in collective bargaining. Collective contracts are binding for all employees of a company. Accordingly, individual employment contracts cannot include standards that are lower than those set forth in the collective contracts. However, it is possible to agree in an individual employment contract on terms that are more favorable to the employee.

## **SOCIAL INSURANCE**

### **Mandatory Participation in Social Insurance Scheme**

Both Chinese citizens and directly-hired foreign national employees are required to participate in China's social insurance scheme. In practice, local implementation of the requirement for foreign nationals to participate varies.

## **THE FIVE SOCIAL INSURANCE FUNDS**

China's social insurance scheme consists of five funds:

- Old Age Pension Insurance
- Basic Medical Insurance
- Occupational Accident Insurance
- Unemployment Insurance
- Maternity Insurance

Employers and, in some cases, employees are required to make contributions to these funds, in accordance with rates determined by local authorities.

### **Housing Funds**

In addition, employers and employees are required to contribute to a Housing Provident Fund for the purpose of buying, building and renovating employee housing. As in the case of social insurance, expatriate employees are not permitted or required to participate.

## IMMIGRATION

### Work Visas for Foreign Nationals

Foreign nationals coming to work in China for FIEs or Representative Offices are regulated by the Immigration Law. Under the Immigration Law, foreign nationals, except those with permanent resident status in China, may not work in China without obtaining prior permissions from the relevant authorities. Foreign nationals who wish to work in China should generally apply for a work visa to enter China.

To apply for a work visa, the employer in China should firstly obtain an Employment License (or a Representative Certificate if the applicant will work at a Representative Office) or, under certain circumstances, a Foreign Expert License, which will be submitted to a relevant approval authority for the issuance of a Visa Notification Letter for the applicant to apply for a single-entry work visa outside China. After entering China, the foreign national must register with the Public Security Bureau, undergo a medical examination, and obtain an Employment Permit (or a Foreign Expert Certificate) and Residence Permit. These procedures apply even to short-term employment in China, and also apply to foreign nationals employed by companies outside China if the foreign nationals work for more than three months in China.

Chinese nationals with permanent resident status in Hong Kong, Macau, Taiwan or foreign countries are also generally required to obtain an Employment Permit to work in China.

### Chinese Laws Apply to Foreign Nationals

The employment of foreign nationals by Chinese employers is governed by Chinese law, though it is unclear whether foreign nationals are subject to all the same mandatory labor standards as PRC nationals. For example, the Shanghai High People's Court has issued a notice (only binding on Shanghai courts)

stating that foreign nationals are only subject to mandatory labor standards in five areas and the parties are free to agree by contract on all other matters. Other localities have yet to adopt such a clear policy on these issues. Disputes may be arbitrated and litigated in China pursuant to Chinese law. Foreign nationals in representative offices usually can be hired with employment contracts governed by foreign law.

## **HARASSMENT AND DISCRIMINATION**

The Employment Promotion Law of January 1, 2008 includes a section on non-discrimination. Significant provisions are:

- Discrimination based on ethnicity, race, sex, religion, handicapped status or infectious illness status, or against migrant workers, would be an actionable claim.
- Employers cannot refuse to hire individuals who carry an infectious illness (e.g., hepatitis B and HIV carriers). However, if the individual is diagnosed as still not having been cured or if there are still concerns about whether the individual is infectious, then that individual may not engage in work that is prohibited under any laws, regulations or Ministry of Health rules for those who can easily spread infectious illness.
- Age discrimination is not specifically prohibited.

China's Law on the Protection of Rights and Interests of Women, adopted April 3, 1992, and last amended in 2005, states that women shall enjoy "equal rights" with men, and shall not be discriminated against. China explicitly prohibited sexual harassment in a 2005 amendment to the Women's Protection Law. The Women's Protection Law allows women to report harassment to their employers or governmental agencies, and to file civil suits against their harassers for the harassment. Many local provinces have also imposed obligations on employers to protect women from sexual harassment.

To find out more about how our Employment Law Group  
can add value to your business, please contact:

Andreas Lauffs

Direct: +852 2846 1964 (Hong Kong)  
andreas.lauffs@bakermckenzie.com

Joseph Deng

Direct: +86 10 6535 3937 (Beijing)  
Direct: +86 21 6105 5988 (Shanghai)  
joseph.deng@bakermckenzie.com

Jonathan Isaacs

Direct: +852 2846 1968 (Hong Kong)  
jonathan.isaacs@bakermckenzie.com

## **BAKER & MCKENZIE – CHINA OFFICES**

### **China - Beijing**

Baker & McKenzie LLP  
Suite 3401, China World Office 2  
China World Trade Center  
1 Jianguomenwai Dajie  
Beijing 100004  
People's Republic of China  
Intn'l Tel: +86 10 6535 3800  
Tel: 6535 3800  
Fax: +86 10 6505 2309

### **China - Hong Kong - SAR**

Baker & McKenzie  
14th Floor, Hutchison House  
10 Harcourt Road  
Hong Kong, SAR  
  
23rd Floor, One Pacific Place  
88 Queensway  
Hong Kong SAR  
Intn'l Tel: +852 2846 1888  
Tel: 2846 1888  
Fax: +852 2845 0476

### **China - Shanghai**

Baker & McKenzie LLP  
Unit 1601, Jin Mao Tower  
88 Century Avenue, Pudong  
Shanghai 200121  
People's Republic of China  
Intn'l Tel: +86 21 6105 8558  
Tel: 6105 8558  
Fax: +86 21 5047 0020

### **Vietnam - Hanoi**

Baker & McKenzie (Vietnam) Ltd.  
(Hanoi Branch Office)  
Unit 1001, 10th floor  
Indochina Plaza Hanoi  
241 Xuan Thuy Street, Cau Giay  
District  
Hanoi 10000  
Socialist Republic of Vietnam  
Intn'l Tel: +84 4 3 825 1428  
Fax: +84 4 3 825 1432

### **Vietnam - Ho Chi Minh City**

Baker & McKenzie (Vietnam) Ltd.  
12th Floor, Saigon Tower  
29 Le Duan Blvd.  
District 1, Ho Chi Minh City  
Socialist Republic of Vietnam  
Intn'l Tel: +84 8 3 829 5585  
Fax: +84 8 3 829 5618

[www.bakermckenzie.com](http://www.bakermckenzie.com)

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