

# Can I Fire a Non-Compliant Employee in China?

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During our investigations in China, once we substantiate an allegation, we are regularly asked, “So can we terminate or discipline the employee?”

This article provides some practical suggestions on how investigations can be structured and executed in China to empower companies to make personnel decisions in line with their compliance policies and to minimize the risk of wrongful termination suits, which can result in the company paying the employee twice the legally required severance compensation or, in extreme cases, the reinstatement of non-compliant employees at the company. The article will not attempt to describe all aspects of investigations or employment law in China, which can be nuanced and complicated, or to provide legal advice regarding specific situations, given that each situation will be somewhat different.

## Part 1: Steps to Take Prior to an Investigation

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### PRC Employment Law and Contracts with Employees

The PRC Labor Contract Law is the main statute governing employment relationships in China and requires employers to sign written contracts with employees. PRC law provides six statutory

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Only qualified nationals of the People’s Republic of China working in PRC law firms are permitted to practice PRC law. Accordingly, as is true for all non-PRC law firms, we cannot express any legal opinion concerning the interpretation or application of PRC law. If a formal PRC legal opinion is required in relation to any specific issues discussed herein, our practice is to arrange for such an opinion to be provided by one of our correspondent law firms in the PRC and to work closely with such PRC law firm in that exercise.

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grounds for an employer terminating the contract for cause; the two most common during investigations are “seriously violating the rules and regulations of the employer” and “causing major losses” to the employer due to “serious dereliction of duty or engagement in malpractice for personal gain.”<sup>2</sup>

PRC law does not specify what types of conduct could be viewed as “seriously violating the rules and regulations of the employer,” a “serious dereliction of duty,” or “engagement in malpractice for personal gain.” In addition, companies often adapt global templates to China, which typically do not address what constitutes these specific categories of conduct.

The most common issues we see in employment contracts that can cause problems during an investigation and for subsequent disciplinary actions are:

- The contract is in English only.
- The contract does not detail the company-specific grounds for termination. In addition to the general legal standard of “seriously violating the rules and regulations of the employer,” companies should be able to point to specific provisions, ideally in the contract itself or at least in the Employee Handbook (see below) about types of “serious violations” of company policy that can result in discipline, including termination.
- The contract does not include provisions specifying that the company requires an employee to cooperate (and specifically what that means, such as sitting for an interview and providing relevant oral information and documents, answering questions truthfully, and providing access to company data on mobile devices) during a review or investigation. These provisions can also be covered in a separate policy, as discussed below.
- The contract lacks privacy-specific provisions whereby the employee consents to the employer (or the employer’s agent) accessing and exporting company data on mobile devices, including company data stored on personal devices.

### **Employee Handbook and Other Policies**

Most companies operating in China have a China-specific employee handbook (员工手册) or equivalent, which typically includes a detailed recitation of the company’s rules, such as attendance requirements, annual leave, benefits, and certain company policies, such as employee discipline. In addition to the employee handbook, multinational companies frequently have separate company-wide policies that employees in China must abide by. These policies might include anti-corruption, use of company IT assets, financial accounting, trade controls, or trade secrets.

Both the employee handbook and any other freestanding policies that apply to China-based employees must go through the “consultation” process described in Article 4 of the PRC Labor Contract Law. In brief, the company needs to solicit feedback from employees via an internal labor union or “employee representatives” about any policies before they can become effective under PRC law. Typically, a company sends out the policy to all employees asking for feedback

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<sup>2</sup> The other four statutory grounds are: (1) being convicted for criminal responsibility in accordance with law; (2) being proved unqualified for recruitment during the probation period; (3) concurrently establishing a labor relationship with another employer, which seriously affects his/her work performance; and (4) when the contract was entered into by deception or coercion. PRC Labor Contract Law, Art. 39.

under Article 4, waits for any feedback, considers the feedback, finalizes the policies, and sends the final version of the policy to all employees. If a company fails to go through this consultation procedure, an employee may challenge—often successfully—this failure during a wrongful termination suit, and a labor arbitration tribunal or court may conclude that the handbook or policy is not binding as a source of disciplinary action.

The most common issues that we see related to employee handbook and similar free-standing policies are:

- The handbook and policies are English-only. The policies are not legally required to be in Chinese, but not accurately translating the handbook and key policies into Chinese allows an employee to argue during a wrongful termination suit that the employee did not fully understand the company's rules and expectations due to language gaps. Further, labor arbitration tribunals need Chinese versions or translations of documents, so not having a Chinese version could lead to a later dispute during a wrongful termination suit about how to translate key terms in the policy.
- The handbook and policies do not contain details about what type of conduct will lead to discipline.
- The company does not require employees to acknowledge in writing (ideally in a Chinese-language acknowledgement) that they received, understand, and agree to comply with the handbook and key policies and procedures, as well as any updates. These acknowledgments can be important evidence in a subsequent employment action.
- The company does not adequately preserve records that the employee received the handbook and policies, such as originals of the signed acknowledgement forms. (For example, we have seen issues arise because the records of which employees received the handbook are in the inbox of someone who has subsequently left the company, or the records are available only in hard copy and stored in a warehouse, but no one can remember exactly where.)
- The company updates the policies but fails to go through the “consultation” process again or have employees acknowledge the updates.

In addition, we have seen issues arise because companies do not have key policies in place that provide justification for taking certain steps during or after an investigation.

- An often overlooked policy is the IT use policy stating that the employee consents in advance to the company accessing, monitoring, searching, reviewing, and disclosing to third parties inside and outside of China any information stored on company-owned IT assets, or requiring access to company data on personal devices. With the enactment of the PRC Cybersecurity Law in 2017, [the Personal Information Protection Law in 2021](#), [the Data Security Law in 2021](#), and a raft of subsequent implementing regulations, a robust IT use policy—also ideally in Chinese—is key to ensuring that a company can lawfully access and use information stored on its own assets during investigations and as a basis for subsequent employment actions. Some companies also display a customized legal notice or start-up message that reminds employees of the policy when employees login to company computers or networks. Without a robust and properly implemented IT use policy, an employee facing termination may challenge the evidence-collection process as not compliant with company policy and therefore not admissible in a wrongful termination suit.

- Another commonly overlooked policy is one that requires full cooperation with investigations, including providing relevant evidence, sitting for witness interviews, and not obstructing investigations. From time to time, we encounter an employee who refuses to participate in an interview or who attempts to set terms for providing evidence that are unacceptable to the company, such as answering only certain questions, demanding to review the findings of the investigation before they are final, refusing to provide access to company data on mobile devices, or deleting business-related communication on their company-owned or personal mobile devices. We also sometimes encounter employees trying to obstruct an investigation through coaching other witnesses or destroying evidence. Absent a detailed and enforceable policy on these issues, terminating an employee for non-cooperation or obstruction during an investigation might result in a wrongful termination suit that the company may well lose.

## Part 2: Steps to Take During an Investigation

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Companies can take steps during the investigation to minimize litigation risk in a subsequent wrongful termination suit.

### Administrative Leave

Although administrative or “garden” leave is not a recognized category under PRC employment law, companies can instruct an employee in China not to come to the office for a short period of time (e.g., during an investigation), especially when the employee’s presence might complicate the investigative process. The company typically continues to pay the employee during this period, because not paying the employee during employment could violate the employee’s rights. Companies also often suspend or cut off the employee’s access to some or all company email, network drives, and databases, such as through use of a company or personal phone or tablet.

### Use of Public Notaries

If a company expects litigation or administrative proceedings in China to result from an investigation, a best practice to collect evidence is to involve a public notary (公证), an office that falls under the purview of the Ministry of Justice. Notaries can have differing levels of familiarity with investigative processes: some are more experienced with the forensic process for collecting electronic data, such as server emails and laptop or mobile phone images, and are thus more efficient. To ensure availability during a forensic collection, public notaries should be scheduled in advance if possible.

Evidence collected in China *without* involving a notary can still be submitted to and accepted by a tribunal or court in China, but during a wrongful termination suit, an employee is more likely to challenge such evidence as inauthentic or altered because it did not follow a sufficient chain of custody.

### Collection of Electronic Data

As noted above, a robust IT use policy—ideally in Chinese, enacted via the consultation process, and acknowledged in writing by the employee—is a key element to increase the likelihood that a company can use data collected during an investigation as evidence in a subsequent wrongful termination suit.

Separate from the IT use policy, we recommend seeking consent in writing from the employee at the time of imaging any personal devices, such as mobile phones or tablets, which can sometimes be the only way to access key evidence, such as discussions via [WeChat](#). Otherwise, an employee may assert a violation of privacy rights or challenge the company's use of such evidence as a basis for termination or discipline.

### **Interviews and Interview Notes**

We almost always recommend conducting interviews of Chinese employees in Chinese. Even when an employee appears to have excellent written and/or spoken English skills, conducting the interview in Chinese undercuts a later argument during a wrongful termination suit that the employee did not fully understand the questions or misspoke due to a language gap.

Prior to an interview, companies need to make a tactical decision about whether to allow the employee to review and sign any notes taken during the interview. It is common practice among some companies in China to have the note taker prepare a transcript or a near-transcript immediately after the interview for the employee to review and sign. If the employee does not make material changes to the notes, a company can use that signed document as evidence in subsequent legal proceedings in China, such as a wrongful termination suit. In our experience, the local China human resources team typically will advocate for having the investigation team prepare such a transcript and for the employee to review and sign the interview notes to improve the company's chances of prevailing during a wrongful termination suit.

However, the practice of having witnesses review and sign notes can result in two challenges—one practical and the other legal. The practical challenge is that an employee may regret making a key statement or admission by the end of an interview and try to alter or remove it upon reviewing the notes, or the employee may insist that the note taker misheard a key statement. The employee may demand to change key content in the notes before the employee is willing to sign, or the employee may decline to sign altogether, both of which undercut the utility of the signed notes as evidence.

The legal challenge is that having the employee review and sign the interview notes risks waiving any work product protection and/or other professional privileges in the United States and in many other common-law jurisdictions. For an investigation involving China-only issues that do not implicate laws outside of China, having an employee review and sign notes may be low risk and quite useful in any subsequent wrongful termination suit in China. For investigations that have a U.S. law angle or potential for U.S. government enforcement—e.g., FCPA, U.S. trade controls, accounting issues at a U.S.-listed company—should consider the possibility of [waiver of privileges and work product protections](#) that would otherwise protect the relevant material from disclosure in subsequent government investigations or civil litigation in the United States. Further, the type of evidence that might be most useful in a wrongful termination suit in China, such as an admission by an employee of intentional wrongdoing, could increase the risk of legal exposure in a U.S. enforcement proceeding.

## **Part 3: Steps to Take After an Investigation**

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After identifying evidence to substantiate a compliance violation, a company must make a disciplinary decision by weighing (1) whether the company has thoroughly investigated the issue to withstand potential scrutiny, (2) whether the conduct clearly violated an enforceable policy (see Part 1 above), (3) the strength of the evidence and the applicable standard of proof, (3) the best way to separate the employee, (4) the company's disciplinary actions taken against other

employees in similar situation, and (5) the company's appetite for a wrongful termination suit and potential disruption to the company's business operations in China, such as through negative publicity.

Note that the standard of proof to justify a termination for a labor arbitration tribunal (discussed below) may be different than the standard used during a company's internal decision-making process. A company may use a "more likely than not" standard globally for determining violations of company policy and may decide that global consistency—and establishing a strong culture of compliance—tip a decision toward termination, even if the evidence may be insufficient to likely win a later wrongful termination suit. In our experience, global legal and global human resources functions can have differing views from local human resources (and sometimes local legal) functions in China on what standard is sufficient to justify a termination.

### **Options for Separating a Non-Compliant Employee**

Three main avenues exist in China for separating an employee when the evidence has substantiated a violation: (1) unilateral termination, (2) mutual termination/separation, and (3) voluntary resignation by an employee. (Also, if an employee's employment contract is about to expire, an employer in most cases can simply choose not to renew.)<sup>3</sup>

#### **1. Unilateral termination (i.e., termination for cause)**

As discussed above, PRC law does not enumerate available statutory grounds for termination for cause, so a company needs to rely on a clear basis in an enforceable policy to terminate an employee for cause. Typically, the company drafts a short termination letter in Chinese (or a bilingual letter) outlining the conduct that led to the termination, citing the specific provisions in the employment contract, employee handbook, and/or applicable policies that led to the termination under the Labor Contract Law. The employee acknowledges receipt of the termination letter in writing. If the company cannot deliver the termination letter to the employee in person, the next-best option is to use certified mail and to request a response via email to prevent the employee from later arguing that the employee did not receive the termination letter.

The main benefit of unilateral termination is holding the employee accountable for non-compliance and creates a stronger compliance culture for both internal and external audiences. (The company also does not need to provide a severance package to the terminated employee.) The main downside, however, is that the employee is free to sue for wrongful termination, which the company would need to address in front of a PRC labor arbitration tribunal.

#### **2. Mutual termination (also known as mutual separation)**

In mutual termination, both the employer and employee agree to end the employment relationship. Typically this involves a written agreement and payment of severance. (The calculation of the statutory severance under PRC law is complicated but typically involves a payment equivalent to one month of salary for every year of service, with certain rounding and caps.) Despite the statutory calculation, the employer and employee can—and often do—reach their own agreement for a higher severance amount.

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<sup>3</sup> This article does not address economic layoffs.



The main benefits of a mutual termination are: (1) It greatly reduces the risk of a wrongful termination suit, and (2) the company can include provisions in the severance agreement that can provide extra protection to the company, such as a release, non-disclosure agreement, non-disparagement clause, non-compete clause, and future cooperation provision. Note that in some cases, the departing employee may have certain leverage and thus frequently requests more money than the statutory severance. As a result, others in the company (or outside of the company, such as a government regulator) might view the arrangement as an unjust payout to a wrongdoer.

### 3. Voluntary resignation by the employee

Sometimes the company can suggest to the employee that it would be in everyone's interest for the employee to resign and move on, and the employee agrees to resign voluntarily.

The main benefits here are no risk of a wrongful termination suit, reducing the risk of negative publicity (although the separating employee may still approach the media or become an anonymous whistleblower), and no money paid to a wrongdoer. However, companies may find it difficult to tactfully convince the employee to agree to resign because the employee will not be entitled to any severance. In addition, without a severance agreement, the company is typically unable to set up additional protections discussed above, such as a non-disclosure agreement.

## **Wrongful Termination Cases in China**

The statute of limitations for labor disputes is one year, starting from the date the employee knows or should have known that the employee's rights have been infringed, which is typically the day the company informs the employee about the termination.

PRC labor arbitration tribunals, which hear all wrongful termination suits in the first instance, are widely perceived to be employee-friendly. PRC courts and tribunals typically use a "highly probable" standard for evaluating evidence, and in a wrongful termination suit, the employer has the burden of showing that the termination was justified. PRC courts and tribunals rely more heavily on written evidence rather than oral testimony. As a result, typically the documentary evidence a company presents needs to be relatively strong to convince a labor arbitration tribunal to uphold the termination.

An employee does not need to have a lawyer to file a wrongful termination suit, but numerous lawyers in China take on wrongful termination cases, typically on contingency, because companies may choose to avoid litigation and settle for an amount more than the statutory severance.

The likelihood that the facts underlying a termination decision could become public can help inform the decision of how to separate an employee with minimal risk to the company. Hearings in labor arbitration cases are typically open to the public, but in our experience, are rarely well attended.<sup>4</sup> The decisions in labor arbitrations typically are not public; if either party appeals, the court judgment typically is published online, although access has become more limited recently.

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<sup>4</sup> Court hearings (but not labor arbitration hearings) in China are by default open to the public (including via live stream), and court rulings are required to be posted to the court's website, unless an exception applies. A company can ask the court for a closed hearing if trade secrets might be disclosed during the hearing.

If the company loses at the labor arbitration tribunal, the company can appeal to a local court, and can then appeal the local court's decision if needed. If the company loses this second appeal, it will need to either pay double the statutory severance or reinstate the employee if so requested by employee. In our experience, reinstatement is a very unusual outcome, as typically the company has filled the position already, or a court or tribunal is less enthusiastic about ordering a company to take back an employee who has been terminated for cause.

### **Other Considerations When Terminating Employees**

We list below other considerations when separating an employee in China due to misconduct, in addition to normal business considerations of transitioning job responsibilities and authorizations.

- In advance of a termination notification, to prevent loss of IP or trade secrets, monitor whether the employee may be exporting or downloading work files to external storage devices, cloud storage, personal email addresses, databases, or parties in anticipation of termination.
- Ensure that the employee's IT access is fully cut off. In most cases, ensure that the employee's laptop or other company-issued devices are not immediately recycled, in case the company later needs to access that data, such as for additional investigation or to respond to requests stemming from litigation or a government inquiry. Also, if the terminated employee has company information on his/her personal mobile device or personal WeChat, ensure that it is deleted before termination becomes final (when the departing employee may no longer cooperate).
- Check whether the employee is part of company-related WeChat groups, both formal and informal. If so, ensure that the employee is removed from these groups during administrative leave or at the time of separation. This step can minimize the risk of a former employee making inappropriate posts in the WeChat group and also ensure that company information is not inadvertently shared with a former employee via the group.
- Consider the pros and cons of publicizing the anonymized facts of the case within the company. While the company would still want to protect the employee's rights of privacy and reputation under Chinese law, sharing information about improper conduct can help to emphasize the importance of compliance and may help to dispel inaccurate information about the circumstances of the employee's departure.
- If the employee has access to the company's corporate assets (e.g., [chop/seal](#), business license, original contracts), ensure that the employee returns all assets prior to or at the time of separation to avoid the assets being held "hostage" by a disgruntled employee.
- Similarly, if the employee is a signatory on a company bank account or listed as the legal representative or a director/supervisor on the company registration records in China, ensure that those are promptly changed.
- If the person is listed in agreements as the point of contact for notifications under contracts, promptly notify the counterparties of the change in the point of contact.
- Consider monitoring the Chinese press for the employee's name (in addition to the company's name). If the investigation identified widespread or serious misconduct, or if the employee was a senior manager or executive, consider preparing a standby statement in Chinese and English if media inquiries arise about the employee's departure.



- In case the employee files a complaint with the government, consider whether the company has conducted sufficient investigative work to have confidence that it knows of and has addressed problems before the authorities do.
- Add the employee to a “do not hire” list. This is particularly important for companies with large operations in China and high turnover because institutional memory may not necessarily prevent the rehiring of an employee who left the company due to misconduct.