

HUMAN RESOURCES IN CHINA



THE TECHNICAL GUIDE

Enhance the effectiveness of the recruitment process in your China organization and stay on top of the most relevant regulatory issues on hiring and managing staff in China

Labor Contract — Probation — Compensation
Social Security — Individual Income Tax — Severance Pay
Termination — Confidentiality

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Enhance the effectiveness of the recruitment process in your China organization and stay on top of the most relevant regulatory issues on hiring and managing staff in China. Whether you are a recruiting professional, a hiring manager or another HR-related professional with a focus on China, this Guide covers the basic legal aspects around labor contracts, social insurance payments, overtime, employee termination, and more. In addition, it introduces tools to design interview questions, minimize recruitment biases, or assess competencies.

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Rödl & Partner is not just a collection of accountants, auditors, attorneys, management and tax consultants working in parallel. Rather, we work together, closely interlinked across all service lines. We think from a market perspective, from a client's perspective, where a project team possesses all the capabilities to be successful and to realize the client's goals.

Our interdisciplinary approach is not unique, nor is our global reach or particularly strong presence among family businesses. It is the combination that cannot be found anywhere else - a firm that is devoted to

comprehensively supporting German businesses, wherever in the world they may be.

Rödl & Partner in China

Rödl & Partner was one of the first German professional services firms to receive a license to operate in the country and has been advising clients in China since 1995.

We also hold a license to provide legal services, enabling us to support our clients in all legal, tax, accounting and audit related matters. Our comprehensive advisory from a single source translates into a decisive advantage in ensuring the success of our clients' engagements in China.

We assist our clients from our wholly owned offices in Beijing, Guangzhou, Shanghai, Hong Kong, as well as Taicang. Our experienced teams support mainly German and European companies that operate in China via subsidiaries and offices, carry out one-off projects or want to gain a foothold in the Chinese market.

The focal point of rendered services is legal and tax structuring and restructuring of foreign investors' engagements in China. Many years of local experience have allowed us to gain an in-depth insight into the specific challenges and opportunities of China as an investment destination. Our clients can benefit from this knowledge, coupled with the high standard of service and expertise of an international organization.

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Introduction



1. INTRODUCTION

This Guide is the materialization of the effort between Rödl & Partner and Direct HR Group to briefly encapsulate the basics of recruiting, hiring and termination of employment in China.

When putting this Guide together, we aimed to bring recruiting professionals, hiring managers, and other HR-related professionals a framework for systematic approach by the recruitment function, while remaining compliant with the current regulatory framework in China.

Chapter 2 covers some of the most relevant issues involved in hiring and managing staff in China: labor contract, employment handbook, probation period, non-compete and confidentiality agreements, employment of foreigners in China, and working overtime.

Chapter 3 presents the latest developments on Social Security and the new Individual Income Tax (IIT) Law - since January 2019. They are both highly relevant to employers, for it is their responsibility to calculate and withhold the payments on social security and IIT. Distinctions are also made between the obligations of Chinese nationals and those of foreign employees with regards to contributions to Social Security and IIT payments when such differences are relevant.

Having covered the basics on Social Security and IIT, Chapter 4 lays out a map of the different funds that go on top of the gross salary of the employees: how the contributions to social security funds and individual income tax are calculated, based on the gross salary.

Chapter 5 covers the legal requirements to terminate an employment contract in China. Labor laws and regulations are very employee-friendly in China, thus employers need to be aware of the tools at their disposal to remain compliant in the event of revoking an employment contract.

In Chapter 6, recruiters - whether in-house or external - will find a series of field-proven techniques to minimize dead-angles, oversights, or biases during the selection process. The goal is to present a systematic approach when conducting structured interviews: a selection method with one of the highest prediction values in future performance (See Figure 1.1 in the next page)

This Guide intends to offer HR managers, directors, or executives with responsibility over the recruiting function, a tool to stress-test hiring and managing processes for their China operation, while remaining compliant with Chinese labor laws and regulations.

to enhance the effectiveness of the recruiting process, without compromising on the quality of hire.

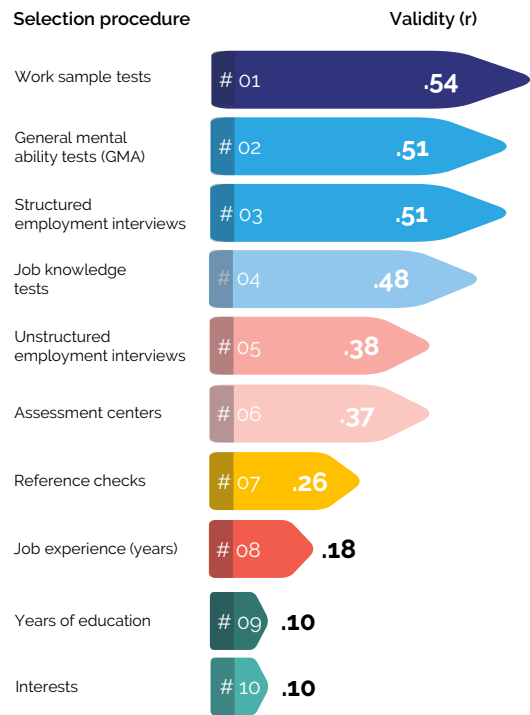
Hiring managers will get to understand why their contribution is essential when working hand in hand with recruiters, to shape the profiles of new hires in a way they are relevant to the business. Hence the importance of collaboration, of tearing down silos that add friction to the exchange of information. We are aware that it is not always possible to have hiring managers and recruiters sit together in the same location. However, given the current state of technological advancements in communication this should not be an obstacle for crystal clear and open interchanges of critical information to secure proper alignment.

Finally, Chapter 7 tackles an often overlooked but highly critical step when recruiting staff: the confirmation of a candidate’s credentials and other relevant information. Although screening for academic credentials and past employment may look relatively straightforward, this chapter introduces some useful recommendations. It also offers some insights on how to screen for evidence of criminal conduct, for certain jobs in China require to have a clean criminal record.

Regulatory issues are based on the state of legislation in China as of May 2020. However, it should be noted that laws and regulations may be amended at any time, as the regulatory landscape is constantly evolving. Furthermore, the content of this Guide is based on legislation at the national level. In the provinces as well as at lower administrative levels (cities, districts), further, differing regulations and requirements for approvals may exist. Such deviating regulations and requirements from the national laws may contain stricter as well as milder regulations. Employers need to be aware that it is not enough to be compliant with the national guidelines: they must be mindful of the requirements that apply by the jurisdiction(s) where they operate in China.

For HR managers, directors or executives in China with responsibility over the recruiting function, this Guide will help them to stress-test their hiring and managing staff processes. Hopefully, it will help them to find some inspiration on how to improve them too.

Figure 1.1
PREDICTIVE VALIDITY OF SELECTION METHODS



Source: Adapted from Hunter, John E; Schmidt, Frank L.(1998) "The Validity and Utility of Selection Methods in Personnel Psychology: Practical and Theoretical Implications of 85 Years of Research Findings". Psychological Bulletin Vol. 124. N.2, pp 262-274.

Hiring in China



2.1 LABOR CONTRACT REVIEW & MANAGEMENT

Traditionally, Chinese laws and regulations regarding employment are very employee-friendly. For instance, non- or late conclusion of employment contracts may lead to high expenses for employers as the laws provide detailed remedies for the employee.

Chinese labor laws are particularly focused on the protection of employees. This is specifically reflected in a number of obligations imposed on employers.

To avoid significant disadvantages for employers, while remaining compliant with Chinese laws and regulations, the conclusion of an employment contract with every employee is an absolute must.

Legal Environment

The main provisions of Chinese laws concerning the rights and obligations of employers and employees are derived from the Labor Law and the Labor Contract Law. In addition, there are further regulations regarding labor disputes or paid annual leave as well as employment promotion. For full-time employees, irrespective of the duration of the employment contract, i.e., fixed-term, open-ended, and project-based employment contracts, the Labor Contract Law outlines a large number of detailed provisions. In contrast, there are hardly any provisions for part-time employment contracts.

Issues in Practice

Before Signing a New Employment Contract

According to the Labor Contract Law, if an employer hires an employee that is still employed with another employer it may be held liable for the losses incurred to the other employer due to the double employment. Therefore, an employer should conduct an employee due diligence and should ask the future employee to provide proof of termination of all former employments and confirmation of completion of all hand-over or other termination procedures, as well as the non-existence of contractual obligations that prevent the employee to enter into the new employment contract, i.e., a non-competition agreement. Such confirmations and guarantees should be included in the employment contract.

Employers should require future employees' proof of termination of former employment, to avoid being held liable for losses incurred to other employers due to double employment.

Written Employment Contracts With All Employees

According to Chinese labor laws, a written employment contract must be concluded with all full-time employees. This applies regardless of the duration of the employment contract, i.e., fixed-term, open-ended and project-based employment contracts. However, such a requirement does not exist for part-time employment contracts. Nevertheless, it is strongly recommended also to have a written employment contract with all part-time employees at least for the reason to have evidence of the contractual stipulations that rule such employment. All employment contracts should be bilingual, as Chinese authorities will only accept contracts in Chinese language.

Non- or Late Conclusion of Employment Contracts

The time of signing an employment contract is of the essence. An employer is obliged to execute the employment contract with an employee within one month after the commencement of employment. Failure of the employer to do so for a period of more than one month and less than one year, the employer will be required to pay a double monthly salary to the employee for every month of employment. Further, if even after one year no written employment contract has been concluded, the employment of the employee will be deemed open-ended. If an employee fails to sign the employment contract, such penalty should not apply to the employer as such circumstance is not attributable to the employer. However, in such an event, the employer should demand the employee to sign the employment contract within the first month or otherwise the employment contract will be terminated. Such notification should be in writing, and receipt by the employee should be recorded.

Term of Initial Employment

Due to the limited possibilities to terminate an employment contract and/or the possible high amounts of severance pay, it might be advisable to conclude fixed-term employment contracts instead of open-ended employment contracts, at least for the initial hiring. However, since the possible length of the probation period depends on the term of the contract and due to the mandatory stipulation in the Labor Contract Law that a fixed-term employment contract will be deemed open-ended in case of its third

An employer is obliged to execute the employment contract with an employee within one month after the commencement of employment.

renewal, the initial employment term may be difficult to determine as an employer wishes to have sufficient time to evaluate the employee but also to reduce the risks to a minimum. In general, a three years initial employment term may be the best solution to balance both interests. Setting a fixed term of three years allows an employer to use the longest probation period of six months. In the case of an initial employment term of two years, the probation period may not exceed two months. Furthermore, a two-fold renewal of a short-term employment contract will automatically lead to open-ended employment in case that the employer wants to employ the employee further. However, a longer initial employment term of, for instance, four or five years, would increase the risk of more significant problems to terminate the employment and a higher amount of severance payment.

A two-fold renewal of a short-term employment contract, in case that the employer wants to employ the employee further, will automatically lead to an open-ended employment contract.

Renewal of Fixed-term Employment Contracts

Employers should carefully watch all fixed-term employment contracts. In the event of a soon-to-expiry of such contract, an employer should promptly - before the expiration - decide whether to keep the employee and renew the employment contract, or to terminate the contract. In the latter case, the employer, in general, must pay severance pay and, together with the employee, go through termination procedure. However, in the event that the employee refuses to renew the employment as far as the offered conditions of the second employment are the same or better conditions like those of the preceding employment no severance must be paid. Under no circumstances should the employer have the employee work after the expiration of the employment contract because the employee would then work without a written employment contract.

Use of Contract Templates Issued by Labor Authorities

Labor authorities of certain localities provide templates of employment contracts for use by employers. However, the use of such templates should be avoided. Often, such contract templates are incomplete, not reflecting the latest changes in laws and regulations, favor the employees and do not protect the employer. Furthermore, as these contract templates are standard templates, they will not take into consideration the specific situation and needs of the employer.

Mandatory Content of Employment Contracts

The Labor Contract Law requires the inclusion of certain mandatory provisions in an employment contract. These mandatory provisions include basic information on the employer and the employee, term of employment, job description and workplace, working hours, rest and vacation, remuneration, social insurance, labor protection, working conditions, and protection against occupational hazards (See Figure 2.1.1). In the event that one or more of the mandatory provisions in the employment contract are missing, the labor authority will order rectification. If the absence of such provisions results in damage to the employee, the employer must pay indemnification.

Part-time Employment Contracts

Even if there are only very few stipulations regarding part-time employment contracts, violation of these regulations may result in heavy payment obligations of the employer. Therefore, firstly, even if part-time employment contracts can be concluded orally, there should always be a written employment contract. Secondly, the part-time employment contract should specify the daily working hours - no more than four - and the weekly working hours - no more than twenty-four hours. The attendance time of a part-time employee should be monitored and recorded in order to provide an evidence. Thirdly, no probation period should be agreed upon. Fourthly, the part-time employment contract must be terminable by both parties at any time, and the employer should not promise to pay any severance in case of termination. Fifthly, there should be a 15-day payment cycle for the salary of the part-time employee. Sixthly, before entering into a part-time employment contract, it should be clarified if social contributions must be paid. Any deviation, e.g., promise to pay severance, or payment of social contributions although not required at the locality, may result in the consideration that the employment is not deemed part-time but full-time employment, with the consequence that all stipulations governing full-time employment apply to the employment.

Figure 2.1.1
MANDATORY CONTENT LABOR CONTRACTS
IN CHINA



Employer and Employee Information: name, address and ID number of the employee; business name, address, name of the legal representative of the employer



Term of Employment: definition of the employment period and whether it is a fixed-term, open-ended or project-based contract



Job Description: responsibilities, duties and obligations of the job. A general description suffices



Work Schedule and Leaves: working hours system, rest times, and all the entitled leaves (national holidays, annual, sick, personal...)



Remuneration: monthly base salary; commissions, bonuses and allowances; how overtime shall be paid if incurred upon



Social Insurance: the contract must contain a reference to employee's social benefits, which will be contributed by both parties according to the relevant laws and regulations



Labor Protection: working conditions, occupational safety, environment and occupational hazard prevention



Other Specifications: confidentiality agreements, conflicts of interest, working discipline and regulations, or any other company policies which may require to be included in the contract

Source: Rödl & Partner

2.2 EMPLOYMENT HANDBOOK

The Chinese Labor Contract Law only provides for the signing of an employment contract and sets forth a minimum of particulars which the employment contract must contain. However, in addition to an employment contract, similar to the standard in many Western countries a company should also have an employment handbook.

An employment handbook provides a uniform set of internal rules and guidelines with regards to various matters and issues that may arise at a workplace, such as work time, employee dress codes, vacation policies, IT and data protection policies, procedures, and grounds regarding discipline and termination of employees.

A well-drafted employment handbook can serve as a protection for an employer against unfounded claims of its employees or, for example, as a tool for an employer wishing to terminate a troublesome employee.

Legal Environment

The Chinese labor laws or other laws neither require nor prevent an employer from the stipulation and implementation of additional internal rules and regulations which govern the employment relationship with the employee, such as an employment handbook. However, employers should pay attention that the employment handbook has effect in the relation with the employee.

Issues in Practice

Reasons for Implementing an Employment Handbook

The Chinese labor laws, in particular the Labor Contract Law, contain only the very essential and basic provisions on the content of an employment contract. Many provisions are vague and use indeterminate legal terms whose interpretation regularly causes problems in practice. Therefore, especially in areas where employment issues can easily arise and may be highly possible, including but not limited to overtime work and compensation, disciplinary actions, internal dispute settlement but also employee benefits, training, health and safety, a well-drafted employment handbook may set out the

A well-drafted employment handbook can serve as a protection for an employer against unfounded claims of its employees.

internal rules and policies in order to prevent lengthy and costly employment disputes. Furthermore, an employer may explicitly stipulate rules regarding labor discipline and the consequences of violation or misconduct of these rules (e.g., harassment, theft, fraud, bribery) up to and including termination of the employment in appropriate circumstances. The violation of such rules by an employee can make it easier for an employer to justify the employee's termination.

Size of Employer

Many countries provide for relaxation of labor law requirements for smaller enterprises (e.g., facilitation of dismissals of employees if the number of employees does not exceed a certain number). However, this does not apply to China. Chinese labor laws and regulations make no differentiation between large and small enterprises. Therefore, even enterprises with only a few employees should have an employment handbook. This is all the more true as smaller enterprises often do not have large financial resources. Claims for compensation by employees, for example for unlawful dismissal, can therefore quickly become a major problem for the employer, especially if several employees are involved.

Timing of Implementation

Ideally, the employment handbook should already be available before a (newly established) company in China hires employees. The subsequent implementation of an employment handbook is possible but entails a greater effort for the employer since doing so could result in employees wanting to assert their right to have a say and make requests for changes, especially concerning employee rights. In addition, there is a risk that individual employees may not be willing to sign the subsequently introduced employment handbook. In this case, the employer has no right to terminate the employees concerned.

Employee Handbook Implementation

For the legally effective implementation of an employment handbook, a reference to its existence and a provision in the employment contract that the employment handbook applies to the employee is not sufficient. Rather, the employment handbook should be handed to the employee, and the employee should have sufficient time to read the employment handbook,

An effective implementation of the employment handbook should allow the employees enough time to read it and put forward questions. After this, the employees should sign an acknowledgement.

to understand its content, and to ask questions. After this, the employee should sign an acknowledgment and acceptance sheet which should be added to the employee's file.

Language and Exhaustiveness

The language of the employment handbook should be simple, clear, and cumbersome legal wording should be avoided.

Furthermore, the employment handbook should be as detailed as possible. For example, a dismissal for threatening may be unlawful because the employer's employment handbook does not mention threats; thus, there is no basis for the dismissal.

Finally, as a matter of course, the employment handbook should also be in Chinese language.

Recommended Minimum Content

As already mentioned in Reasons for Implementing an Employment Handbook, it should cover especially sensitive areas of employment where disputes may easily arise.

Such areas may include, but not be limited, to employer's employment policies, employee's registration and probation period, office disciplines, handling of business trips, remuneration and performance appraisal, employee benefits, training and development, safety and health, compliance regulations, general and labor discipline, termination of the employment contract, and confidentiality (See Figure 2.2.1). The detailed content also depends on the business activities of the employer, i.e., the employment handbook of a Sales WFOE may partly have a different focus than the employment handbook of a Production WFOE and vice versa, and depends as well on the locality of the employer. As a matter of course, the stipulations of the employment handbook itself should not in any way violate the Chinese laws and regulations at national and local levels. Any action by an employer based on such unlawful stipulation is itself against the law, and the employee may challenge the action.

Figure 2.2.1
EMPLOYMENT HANDBOOK CONTENT



Source: Rödl & Partner. Note that this is not an exhaustive list of contents

2.3 PROBATION PERIOD IN CHINA

China’s labor and employment laws and regulations, in particular the Labor Contract Law of the People’s Republic of China (PRC), allow the conclusion of probation periods in employment contracts. However, the concept of employee’s probation periods differs from such concepts in other countries like Germany. In particular, the Labor Contract Law does not make a termination during the probation period easier but merely exempts the employer from paying severance.

Legal Environment

The Labor Contract Law provides different maximum terms of probation periods depending on the term of the employment. In detail, the Labor Contract Law stipulates the following terms as in Figure 2.3.1.

Irrespective of the term of the probation period, any probation period is regarded as part of the term of the employment. If an employment contract provides only for a probation period, or provides for a probation period without a specific term, then there is no probation period. In the first case, the term of the probation period shall be deemed as the term of employment.

An employer may only once conclude a probation period with a specific employee. According to the wording of the Labor Contract Law, this also applies to cases in which an employee shall be re-hired after a period the employee was hired at another employer, or if the employee is assigned to a new position which requires a new employment contract.

During the probation period, an employee may terminate the employment contract by giving three days’ notice, while an employer may terminate an employee during the probation period only if there is a statutory reason to do so.

During the probation period, the employer and the employee can agree on a lower monthly salary. However, the monthly salary during the probation period may not be lower than the lowest wage for the same position at the same employer, and may not be less than 80% of the salary agreed on in the employment contract, whichever is lower. As a matter of course, the salary during a probation period may not be below the minimum wage rate at the place where the employment unit is located.

Figure 2.3.1
CHINA PROBATION PERIODS

Term of Employment	Probation Period
Up to 3 months. Contracts for a limited purpose	No probation period
More than 3 months and less than 1 year	1 Month
More than 1 year and less than 3 years	2 Months
More than 3 years	6 Months

Source: Rödl & Partner

Issues in Practice

Conclusion of Probation Periods

Regulations on probation periods are not legally required content of an employment contract. If an employer wishes to impose a probation period, such probation period must be clearly stated in the employment contract, and the employee must agree by signing the employment contract. Therefore, the stipulation of probation periods in other internal rules and regulations of the employer, such as an employment handbook, will not be sufficient since such regulations are unilaterally imposed by the employer and not the result of negotiations between the employer and the employee. Furthermore, as stated above, during the probation period the salary can be lower than the contractually agreed salary to be paid upon completion of the probation period. However, this reduction of the monthly salary during the probation period must also be explicitly stated in the employment contract.

The probation period, and any reduction of the monthly salary during such period, must be stated in the employment contract.

Termination of an Employee During Probation Period

As mentioned above, the conclusion of a probation period does not make it easier for an employer to unilaterally terminate an employment contract with an employee. According to the Labor Contract Law, and the most common reason an employer may unilaterally terminate the employment during the probation period, is if the employee demonstrably does not meet the recruitment requirements during the probation period. What does it mean in practice? The employer must be able to prove that the prerequisites to terminate the employee are fulfilled. Employers should, therefore, provide every new employee with a detailed written employment contract, a job description, and other internal rules and regulations. The employer should ensure that the employee signs all such documents to be able to prove that the employee was well informed about his/her tasks and obligations.

In case an employee fails to perform, the employer should record every instance of such non-performance. In case of termination during the probation period, the employer must state the reasons for the termination. The keeping of the contractual documents and the written documentation of non-performance or misconduct, therefore, does not serve only for the defense in a possible legal dispute but also for a duly

substantiation of the termination. However, such detailed substantiated notice of termination, if not convincing, may give the employee reason to challenge the termination.

Training During Probation Period

Since an employee can terminate his/her employment contract by giving three days' notice without giving cause during the probation period, employers may consider to postpone a cost-intensive training until the expiry of the probation period if the employer is not sure whether the employee will fit the job requirements, or to implement a separate agreement on a fixed term of employment in the employment contract in return for providing the training. Such agreement on a fixed term of employment may also include a regulation that the employee shall pay damages up to the amount of the training costs in case of his/her breach of the agreement on a fixed term of employment.

Conclusion of Longer Probation Periods

Any probation period in an employment contract exceeding the statutory maximum term of probation periods will be deemed void. That means an employer cannot terminate an employee referring to the above-described reason for termination if the statutory maximum probation period has expired, irrespective of the employment contract providing for a longer probation period. This further has the consequence that even if there is a statutory reason for termination and the termination can be duly justified, the employer must nevertheless pay severance to the employee. Such an unlawful contractual provision may also attract the attention of the competent authorities.

Short-time Employment Instead of Probation Period

An employer may conclude a short-time employment contract with an employee in order to prove during its term if the employee is fit and meets the recruitment requirements. If so, both the employer and employee may re-new the employment contract; if not, the employee, after expiration of the employment contract, will leave the employer. With this set up an employer avoids the potential challenges related to terminating an employee during a probation period. Such a strategy would not violate the Labor Contract Law.

However, it may not be suitable in practice since all

legal formalities must also be followed for the short-time employment contract. In case of non-renewal of the employment contract, severance must be paid. Furthermore, in case of a third time renewal of an employment contract, the term of such contract will be deemed open-ended.

2.4 CONFIDENTIALITY AND NON-COMPETITION AGREEMENTS

The Chinese labor laws and regulations allow an agreement on confidentiality as well as on non-competition (“non-compete”). However, the agreement on a non-compete obligation is only possible under certain conditions. Confidentiality and non-compete may be concluded in a separate agreement or in the employment contract.

Legal Environment

Confidentiality Agreements

According to the Chinese Labor Law, the parties of an employment contract may agree on matters concerning keeping the business secrets of employers confidential. The Chinese Labor Contract Law extends the scope of a confidentiality agreement to industrial property rights (“IP Rights”). Both laws do not contain any restrictions in such a way that such agreements can only be concluded with senior managers. Therefore, confidentiality agreements can and should consequently be concluded with all employees (See Figure 2.4.1).

Non-compete Agreements

According to the Labor Contract Law, it is also possible to agree on non-compete clauses if the respective employee is subject to a confidentiality obligation. Such non-compete must include the payment of compensation to an employee during the non-compete period after termination of the employment. In case of breach of a non-compete, the agreement may stipulate the payment of contractual damages.

It should be noted that post-contractual non-compete obligations may only be concluded with senior management, senior technicians, and other employees who are subject to a confidentiality obligation. The general scope, geographical scope, as well as the duration of the non-compete, must be clearly stipulated in the non-compete agreement.

In principle, a non-compete period must not exceed two years.

Figure 2.4.1
CONFIDENTIALITY AND NON-COMPETE AGREEMENTS



Source: Rödl & Partner

Issues in Practice

Limitation of Non-compete Agreements

As stipulated in the Labor Contract Law, non-compete agreements may be concluded with senior management, senior technicians and all employees who are subject to a confidentiality obligation. Hence, it is advisable to include confidentiality obligations in every employment contract.

In determining whether a non-compete obligation can be agreed, several factors have to be taken into account such as whether and to what extent an employee has access to confidential information, the employee's salary, job title and position, tasks and responsibilities, his/her ability to use confidential information, etc. In this respect, there are no specific requirements as to whether an employee qualifies for a non-compete under the categories specified in the Labor Contract Law. This will have to be assessed and determined on a case-by-case basis.

Therefore, an employer may not include a non-compete clause into every employment contract with any employee, in particular if an employment contract is to be concluded with an ordinary employee performing simple tasks. Furthermore, not unusual are also non-compete clauses in which the employer reserves the right to decide whether or not they should take effect upon termination of the employment. The validity of such a clause remains unclear and may depend on the locality. Thus, in order to avoid undesirable legal consequences, before terminating an employment contract containing such a clause, an employer should clarify and decide whether or not the non-compete clause shall apply.

General and Geographical Scope

The general and geographical scope of a non-compete should be specified in the employment contract.

The general scope usually includes to work for a competing employer that produces or deals in the same type of products, or is engaged in the same type of business as the original employer of the employee, or to establish an own business to produce or deal in the same type of products or engage in the same type of business as the original employer.

The general and geographical scope of a non-compete should be specified in the employment contract.

The geographical scope should be stipulated as broad as possible. However, it should be within the borders of reasonableness and the laws and regulations. When it comes to reasonableness, factors to consider are the business scope of the employer, its business area, and its size. Also, the position of the employee should be taken into account. The conclusion of a too broad geographical scope does not automatically lead to the invalidity of the non-compete. Rather, in such cases, the court usually will adequately reduce the scope, while a subsequent extension of the scope is generally not possible.

In a non-compete clause, if not specified, compensation is at 30 percent of the employee's average monthly salary in the twelve months before the employment termination.

Amount of Compensation During the Post-contractual Non-compete

During the post-contractual non-compete, as compensation, an employer is obliged to pay a certain monthly amount to the (former) employee. The amount of this economic compensation is not stipulated in the laws and regulations, and thus, can be freely agreed and such agreement would prevail.

If the amount is not specified in the non-compete clause, depending on the locality, such non-compete clause would not be deemed invalid, and the employer must pay 30 percent of the employee's average monthly salary in the twelve months before the termination of the employment. If this amount is lower than the local minimum wage, the employer must pay the local minimum wage. Payment of the compensation and the enforceability of the non-compete are closely connected: in the event of non-payment, the employee is not bound by the non-compete and can work freely with a competitor. If a non-compete clause does not provide the payment of compensation at all, such non-compete would be not enforceable in court.

Violation of Non-competes

A non-compete clause may contain the (former) employee's obligation to pay damages to the employer in the event of violation of the non-compete by the (former) employee. However, there is no general rule on the amount of such damages. The amount of the damages should be an approximate estimation of the damage that the employer might suffer as a result of an infringement of the non-compete, but such amount should also be proportionate to the amount received by the (former) employee as compensation for the non-compete

obligation. The agreement of a too high penalty could lead to a reduction of the same by a court. It is also possible that in such a case a court may decide that no damages at all are payable. The payment of damages to the employer by the (former) employee does not release the (former) employee from its non-compete obligation. Rather, the employer may demand the continuation of the non-compete obligation.

Period and Termination of Non-competes

The period of a non-compete may not exceed two years from the termination or end of the employment. The conclusion of a longer period will be likely deemed void and unenforceable.

An employer may unilaterally terminate a non-compete agreement after the non-compete period has begun. However, in this event the employer must pay a penalty in the amount of three months compensation or, depending on the locality, even more. If the non-compete provides for the employer's unilateral right to terminate the non-compete without payment of compensation, such agreement will unlikely be perceived as valid by a court. There are no specific rules or interpretations regarding the unilateral termination of a non-compete before the non-compete period has begun. The general possibility of such termination and the amount of potential compensation would be decided on a case-by-case basis. Furthermore, if the employer fails to pay compensation for at least three months, the (former) employee is entitled to unilaterally terminate the non-compete agreement and claim for compensation provided the (former) employee complied with the non-compete and did not otherwise cause the non-payment of the compensation.

If the non-compete provides the employer unilateral rights to terminate the agreement without compensation to the employee, such contract will most likely be deemed invalid if challenged in court.

2.5 EMPLOYMENT OF FOREIGNERS IN CHINA

Many companies ask themselves what opportunities there are for the deployment of foreign employees in China. Foreign nationals sent out on work assignments in China do not want to be treated less favorably in legal and tax terms than in their home country, and also want to be socially covered. An examination of the individual situation is, therefore, advisable before the assignment abroad begins.

Because of the difficulties in the application for a Chinese work permit, it is advisable to go for a local employment contract rather than a dispatch contract.

Legal Environment

The employment of foreigners in China is mainly governed by the Rules for Administration of Employment of Foreigners in China. Once a foreigner has obtained the work permit and residence permit, his/her employment will be governed by the Chinese labor laws and regulations as well as the laws and regulations regarding social insurance and individual income tax. If the foreigner still has a registered residence in the home country or receives income in another country, the foreigner may continue to be subject to the relevant labor, social security and tax laws and regulations of such country.

Issues in Practice

Employment Contract or Dispatch Contract

In order to take up employment in China, an employee can be dispatched to the Chinese subsidiary or employed locally by it. However, a local employment contract should be considered for a more extended stay of the foreigner, as dispatch contracts are generally only suitable for shorter stays. In the case of a dispatch contract, the employment relationship between the foreign parent company and the employee will continue and no local employment relationship between the foreigner and the Chinese subsidiary will be established even though the employee will actually work for the subsidiary. In practice, however, when deploying a foreign employee to China on a dispatch contract, he/she will be very likely to face difficulties in many Chinese cities. Such challenges include, in particular, problems in the course of application for the Chinese work permit. Many Chinese labor authorities request the submission of an additional local employment contract to grant a work permit, and thus, consequently, a signed local employment contract between the foreigner and the

Chinese subsidiary must be provided to the labor authority. In summary, it can be said that in most cases the conclusion of a local employment contract is preferable to avoid complications.

Risks of Dual Employment

In case of deploying the foreigner on a dispatch contract, the local employment contract can usually be drafted relatively simple. It should be consistent with most terms of the dispatch contract. However, the existence of two employment contracts may cause risks. Such risks include, for example, income tax implications and, in case of termination of the foreign employee, the proper and aligned termination of both contracts.

Avoidance of a De Facto Employment Contract

In the event that the local Chinese labor authority accepts a dispatch contract (i.e., is not requiring the submission of a local employment contract), attention should be paid that the Chinese subsidiary does not issue any document to the dispatched employee that can directly or indirectly prove an employment relationship between the subsidiary and the dispatched employee, e.g. a reference letter. The reason for this is that in the event of a dispute, the dispatched employee could prove the existence of an employment relationship with such documents. This could have significant consequences for the subsidiary. Since Chinese labor laws and regulations require the existence of a written employment contract, when no such contract has been concluded the employee could claim double compensation.

Advantages of Local Employment

In order to avoid the difficulties associated with a dispatch contract, foreign employees should be employed locally. Thus, the challenges in applying for the work permit would be avoided and other risks minimized. If a local employment contract is to be concluded, the provisions of the Labor Contract Law, to which the employment contract is fully subject, must be observed.

Prerequisites for the Applicant

The work permit regulation was updated in 2017, implementing a point system for the application of a foreigner's work permit in China. The applicant can

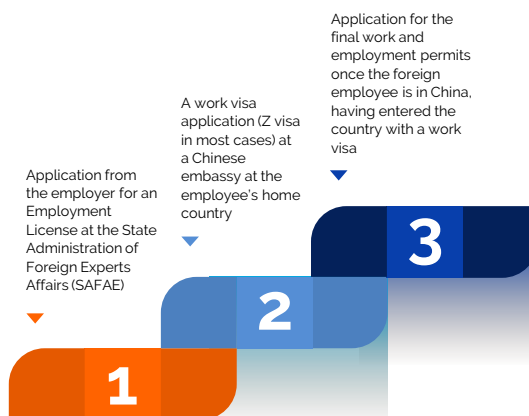
If the local Chinese labor authority accepts a dispatch contract, the Chinese subsidiary must take the precaution of not issuing any document that could prove an employment relationship with the dispatched employee.

obtain the work permit successfully when he/she gets over 60 points according to the scoring criteria published by the competent authority of issuing the work permit. Foreign employees may not exceed a certain age limit: 60 years for men, 55 years for women. Applicants must have a certain qualification level (at least a bachelor's degree), and a minimum of two years of work experience are required. In addition, proof is required that no equally suitable local employee is available.

Obtaining a Work Permit in China

A work permit is usually required to take up employment in China. The application procedure consists of three steps (See Figure 2.5.1): the employer must obtain a pre-approval (notification of the work permit) from the relevant labor authority; application for, in most cases, a Z visa (visa to take up work) in the employee's home country; and application for the (final) work permit and residence permit in China. The documents to be attached to the application also include a certificate of no criminal record. It should also be noted that if an employee does not have a bachelor's or master's degree, a certificate must be provided stating that the degree (diploma, state examination) is comparable to a bachelor's or master's degree.

Figure 2.5.1
OBTAINING A WORK PERMIT IN CHINA



Source: Rödl & Partner

Tax Assessment Implications

Generally, income generated in China is subject to individual income tax. Income includes all wages and salaries, bonuses, and awards paid directly to the expatriate by the Chinese subsidiary. Remuneration paid, for example, by the parent company to the employee may also be subject to individual income tax, provided that this remuneration is debited to the Chinese subsidiary. The tax liability in China for non-Chinese income also depends on how many days the employee actually works in China. Expatriates who have been living in China for more than six years are subject to unlimited tax liability regarding their world income in China.

The monthly individual income tax results from the gross salary less a standard basic deduction of RMB 5,000 per month. In addition, so-called specific deductions can be applied. Those include the employee contribution to the Chinese social insurance system (if applicable) and other deductions such as reasonable accommodation costs, home travel, relocation

expenses, school fees, language courses, and meals and laundry. The Chinese employer withholds the tax payable and pays it directly to the tax authorities on a monthly basis.

For further details on individual income tax, see 3.2. Individual Income Tax (IIT) Law in the next chapter.

Disclosure Obligation in Case of Dual Employment

In practice, it also occurs that in the case of dual employment (e.g., as a senior manager in the parent company as well as in the Chinese subsidiary), the employee is also paid two salaries. In this case, the respective salaries should be determined and paid according to the actual work carried out in both companies. For the purposes of income taxation, the employee is then obliged to disclose both incomes to the tax authorities. In such a case, the Chinese tax authority will assess the days of the employee's actual presence in China and compare them with the taxes paid. In the case of irregularities, an additional tax payment may be imposed.

Social Insurance Payments for Foreigners

According to the Social Insurance Law of the PRC, foreigners working in China and their local employers are required to contribute to China's social security system. This obligation, though, has not been implemented in all cities and regions yet. As social insurance is administered locally, contribution ratios differ from city to city and region to region.

A more in-depth discussion of social insurance in general, and its implications for foreign nationals, is available in the next chapter.

According to the Social Insurance Law of the People's Republic of China, foreigners working in China and their local employers are required to contribute to China's social security system.

2.6 WORKING TIME, OVERTIME COMPENSATION

Chinese Labor Law and Regulations provide different working time systems as well as detailed rules regarding the compensation of overtime work.

Legal Environment

According to the Chinese Labor Law, employees shall work for not more than eight hours a day and not more than 44 hours a week on average. However, this stipulation has been modified by various provisions adopted in connection with the Labor Law, and the standard working time is eight hours per day and 40 hours per week (the so-called "Standard Working Hours System"). As a consequence, any work exceeding eight hours per day or 40 hours per week is regarded as overtime work, and an employee must be compensated for any overtime worked.

Against the background that the Standard Working Hours System is very inflexible and very often does not meet the requirements of enterprises especially in the management sector, there is also the possibility of implementing two further working time systems: the Flexible Working Hours System and the Comprehensive Working Hours System.

The Flexible Working Hours System provides no limits regarding an employee's working hours. However, the application of the Flexible Working Hour System is only permitted for senior management and sales and marketing personnel of enterprises. In addition, the implementation of the Flexible Working Hour System in most cities requires prior approval of the competent labor authority.

The Comprehensive Working Hour System allows to calculate an employee's working hours on certain periods (weeks, months, quarters of a year) whereby the weekly average working hours shall be essentially consistent with the Standard Working Hour System. Furthermore, the Comprehensive Working Hour System is only applicable to certain industries such as railways, aviation, shipping, fisheries, construction or tourism. The implementation of the Comprehensive Working Hours System also requires prior approval of the competent labor authority.

Under both the Standard and the Comprehensive

Any work exceeding eight hours per day or 40 hours per week is regarded as overtime work, and an employee must be compensated for any overtime worked.

Working Hour Systems, an employer is obligated to compensate an employee’s overtime work according to the standards presented in Figure 2.6.1.

Overtime work shall not exceed three hours per day and 36 hours per month.

Issues in Practice

Arrangement of Overtime Work

The performance of overtime work should in principle be regulated in the employment contract and the employment handbook. Furthermore, it should be ensured that overtime is generally instructed as well as documented by superiors or management personnel in order to avoid "voluntary" performance of overtime work by employees and the associated costs or troubles after termination of the employment. This also applies to management personnel unless such personnel has been approved to work under the Flexible Working Hours System. An employer and management personnel should agree on the Flexible Working Hours System in the employment contract. However, prior written approval of the competent labor authority must be obtained (indispensable condition). Courts have stated in their decisions that the prior approval of the Flexible Working Hours System is mandatory, and thus, the contractual agreement of the Flexible Working Hours System and the compensation of all overtime hours by payment of the salary is invalid without approval, and overtime worked as well as penalties had to be paid.

Definition of "Senior Management"

As mentioned above, the Flexible Working Hours System is only permitted for senior management and sales and marketing personnel of enterprises. So which positions and functions fall under the term "Senior Management"? As seen often, the Chinese laws and regulation use vague legal terms, and the interpretation of the terms is therefore carried out by the authorities (which also explains local differences in the interpretation). However, the Legal Representative and the General Manager should be regarded as senior management. Other management personnel may qualify as senior management if designated as such in internal rules and regulations of the enterprise, in particular the articles of association. It may therefore be advisable to already provide for such senior management positions in the articles of association,

Figure 2.6.1
COMPENSATION FOR OVERTIME WORK

Timing of Overtime Work	On a Working Day	On a Weekend or Rest Day	Statutory Holiday
Compensation	150% of the hourly wages for all hours outside the normal working daily hours	200% of the daily wages or the hourly wages, in case there is no arrangement for rest at a later time	300% of the daily wages or the hourly wages

Source: Rödl & Partner

e.g. chief financial officer, chief technical officer, chief sales officer, etc. However, the final decision as to whether a manager is classified as senior management personnel remains with the competent regulatory authority. This also means that an employee can be classified as a senior manager even if the position is not designated as senior management in the articles of association.

Refusal of Overtime Work

An employer may not simply order an employee to work overtime, even if it is within the permitted range of the law. The Labor Contract Law explicitly prohibits employers from forcing employees to work overtime (with the exception in case of an emergency as further defined in the laws and regulations). Therefore, it is necessary that the employee has previously agreed to work overtime. This is why overtime should be stipulated in the employment contract as well as other internal rules such as an employment handbook. It follows: if overtime work is not agreed in the employment contract or other internal rules to be signed by the employee, refusal to work overtime has no consequences for the employee. Disciplinary measures would be null and void as they have no legal basis. If overtime work has been agreed, disciplinary action may be taken in the event of refusal.

Documentation of Overtime Work

It is not uncommon for overtime work to be ordered orally. It is furthermore not unusual for an employee not to demand payment for overtime work at first. However, it cannot be argued from this that the employee is waiving the respective overtime payment. Rather, an employee can claim payment of outstanding wages for up to one year after termination of the employment. As the labor arbitration commissions are very employee-friendly, simple evidence such as entries in presence lists signed by a supervisor or witness evidence is sufficient for the assertion of such claims, and thus, shifting the burden of proof to the contrary to the employer. Therefore, proper documentation of all overtime work done by an employee should be a matter of course.

Shifting of Working Time

An employer may rearrange the working time of an employee in a way that the employee works on one or two working days more than eight hours, and, as

compensation, less than eight hours on other working days of the same week, not exceeding 40 working hours at all. However, even in such case the employer must pay for overtime. As mentioned above, the standard working time is eight hours per day and 40 hours per week. The laws and regulations do not allow for much flexibility, and the standard working time for a working day is limited to eight hours.



FOR MORE INFORMATION

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Social Security & Individual Income Tax in China



3.1 SOCIAL SECURITY IN CHINA

When hiring an employee in China, not only the salary should be taken into consideration but also the key payroll items, i.e., social insurance contributions and individual income tax, which may impact the costs for the employer significantly.

Social Security: Social Insurance and Housing Funds

The social insurance system in China is mainly based on the Social Insurance Law and its implementing provisions. There are five required forms of social insurance in China:

- Pension or retirement fund
- Medical insurance fund
- Unemployment fund
- Work injury fund
- Maternity fund

All five social insurances are mandatory for Chinese employers. To those social insurance funds, it should be added a Housing Fund (also known as the Housing Provident Fund), which was officially established in 1999. As opposed to the social insurance funds, the housing fund has no social pool: the entire amount goes directly to the employees' housing fund accounts. The goal for the housing fund is to ensure that workers save to purchase a house. It can be used for the down payment on a house or to subsequently pay back the mortgage loan. In some cities, it can also be used for renting an apartment. In any case, the housing fund can only be used by employees for house-related expenses and, if unused, is returned once they retire or stop working.

For clarification purposes, we will refer to social security contributions when referring to the combined contributions to the housing fund and the mandatory social benefits (social insurance) - See Figure 3.1.1

Social security in China is a complex issue, since it is organized on a regional level. The social insurance (pension, medical, unemployment, work-related injury, and maternity) is regulated by the Ministry of Human Resources and Social Security (MOHRSS). Each local bureau of the MOHRSS establishes the percentages the employee and the employer should contribute to each of the five social insurance funds.

Figure 3.1.1
COMPONENTS OF SOCIAL SECURITY IN CHINA



Source: Rödl & Partner

In turn, the guidelines on the housing fund are established at the national level by the Regulations on Management of Housing Provident Fund. It is administered by the Ministry of Housing and Urban-Rural Development, and local Housing Fund Bureaus. Regional governments set the contribution rates to the housing fund, resulting in percentages differing among cities and provinces.

The housing, pension, medical insurance, and unemployment funds are contributed both by the employer and the employee. The work injury and maternity funds are contributed only by the employer, though in some instances there is no established maternity fund (i.e., as of 2020 in Hefei, Huizhou, Fuzhou, Tangshan, Zhuzhou, Changchun, Kunming, and Yuxi there is not any required contribution to the maternity fund).

To illustrate such complexity let's take, for instance, Suzhou and Taicang. The latter is a county-level city under the jurisdiction of Suzhou, but they have different contribution rates both for the housing fund and the social insurance fund. Even within Suzhou and Taicang different rates may apply too (See Figure 3.1.2).

An employer has to contribute 8 percent of the employee gross base salary to the medical insurance fund in Taicang, whereas in Suzhou that is 7.5 percent; In Taicang, the contribution to the work injury fund can go from 0.3 to 1.5 percent of the gross base salary, whereas in Suzhou, contribution rates can range from 0.15 to 1.5 percent.

It should be noted that employers in China must withhold the contributions to the social insurances and the housing fund from the salary of the employee and remit them to the local bureaus.

Lower/Upper limits of social insurance calculation base: there are minimum and maximum social insurance payments for both employees and employers. According to China's Social Insurance Law, the lower and upper limits are 60 and 300 percent of the previous year's monthly average salary of the labor force.

Regional differences arise again, with regions using different percentages to establish those limits. For instance, in Beijing the lower limit is at 40 percent and not 60 percent, although the upper limit remains at

Figure 3.1.2
CONTRIBUTION TO SOCIAL SECURITY FUNDS IN
SUZHOU & TAICANG, 2020
Data in percent

	Suzhou ¹		Taicang	
	Employer	Employee	Employer	Employee
Housing Fund ²	8/10/12	8/10/12	8/10/12	8/10/12
Pension Fund	16	8	16	8
Medical Insurance Fund	7.5	2	8	2
Unemployment Fund	0.5	0.5	0.5	0.5
Work Injury Fund ³	0.15 to 1.5	-	0.3 to 1.5	-
Maternity Fund	0.8	-	0.8	-

Source: Rödl & Partner. 1.- Within Suzhou, different rates apply (i.e., Suzhou city, Suzhou Industrial Park). 2.- The company chooses which rate to use from the three available options. Once a contribution rate is determined, it also applies to the employee. 3.- Contribution rates to the work injury fund vary within Suzhou and Taicang

300 percent.

As of May 2020, the lower limit in Taicang was at RMB 3,030, whereas in Suzhou, the lower limit was RMB 3,020. If employees' salaries in those regions are below the respective lower limits, the employee and the employer must make social insurance contributions based on the lower limits, as if those figures were the actual salary.

Lower/Upper limits of housing fund calculation base: similar to the five social insurances, there are also minimum and maximum housing fund payments for both employers and employees. The limits are established again at the regional or city level. Most cities have limited the maximum base to 300 percent of the local average salary. The lower limit is established based either on the local minimum wage or a percentage of the average wage.

Issues in Practice

Employees Urge for Non- or Reduced Payment of Social Security Contributions

In practice, it is quite common for local employees to request either no contributions or only reduced contributions be paid to the various social security insurances. This is often due to the fact that social security systems are established at the local level. Many employees who come from other provinces fear that the contributions are not passed on to their "home insurances", meaning that they do not acquire any rights against the insurance at their place of residence. For these employees, social security contributions are lost income.

An employer should never get involved in such arrangements. The payment of the contributions is required by law. Therefore, on the one hand, there would be a violation of the law. On the other hand, there is also a risk that an employee may change his/her mind and demand payment of contributions from the employer. Finally, social security authorities can take action. Such actions may include seizure of the employer's assets in the amount of the outstanding social security contributions.

Payment of Contributions on the Basis of the Minimum Wage

Another phenomenon that is still common in practice is that employers register properly with the social security authorities but pay contributions only on the basis of the minimum wage. Such conduct also violates the relevant laws. The basis for calculating monthly social security contributions is generally 1/12 of the employees' previous year's total income and the actual salary for newly hired employees. Henceforth, in view of the implementation of the social credit system, data from various authorities will be brought together and synchronized. Potentially the salary data reported to the tax authority will become known to the social security authority, and any discrepancies will be brought to light. The inadequate payment of contributions will cause legal as well as financial consequences for the employer.

Payment of Social Insurance Contributions in Cash

Some local employees tend to ask their employers to

The basis for calculating monthly social security contributions is generally one twelfth of the employees' previous year's total income, or of the actual salary for newly hired employees.

pay them the social insurance contributions in cash. This is especially the case for employees who work in different cities than the registered address of the employer. In such case, paying contributions to an employee at a location where the company is not registered (i.e. does not have an own subsidiary or branch), so far in practice the social insurance contributions can be paid under the name of a designated HR agency. Therefore, to avoid any difficulties as mentioned above, an employer should not accept such employees' requests and withhold and pay all taxes and contributions according to the law.

Social Insurance Contributions for Part-time Employees

Part-time employees are generally exempted from contributions to the social insurances. They may participate on a voluntary basis and pay the contributions on their own. However, according to the wording of the Social Insurance Law, this refers only to pension insurance and basic health insurance. For work-related injury insurance and unemployment insurance, the law generally speaks of "workers". Against this background, it should be clarified with the local social security authority which insurance contributions are mandatory to be paid before hiring a part-time employee.

Payment of Social Insurance Contributions During Leaves

Employers sometimes are of the opinion that no social security contributions have to be paid during the employee's statutorily permitted absence from work, e.g., sick leave. This applies in particular to employers who originate from countries that do not have a nationally organized social security system. However, the obligation to pay social security contributions is, in principle, tied to the effective existence of an employment contract. Since an employee's employment contract is still valid in any case of permitted absence, the employer is under the obligation to pay the corresponding social security contributions. Nevertheless, in the case of a permitted absence, an employee's salary may be reduced so that social security contributions may be decreased accordingly.

Although part-time employees are generally exempt from contributing to the social insurance funds, the employer should clarify with the local social security bureau which insurance contributions are mandatory in the case of a part-time hire.

Social Security for Foreigners

According to the Social Insurance Law of the PRC, foreigners working in China and their local employers are required to contribute to China's social security system.

As a general rule, the employer of a foreign national in China should pay the five forms of social insurance (pension or retirement fund, medical insurance fund, unemployment fund, work injury fund, and maternity fund). And the foreign employee should generally contribute to the pension, medical, and unemployment funds.

In practice, since social security is managed at the regional level in China, employers and foreign employees face different scenarios across the country. In most regions, it is indeed mandatory to contribute to the five social insurance funds. However, there are some regions which do not require it: in Shanghai it is not mandatory for employers to contribute social insurance for their foreign employees, though foreign employees may participate in the social insurance system; in Dalian, only pension and medical insurance funds are to be contributed by the employers.

If an employer operates in several regions, it should check within each of the respective local bureaus of the MOHRSS, whether foreign employees should contribute to social security. The comprehensive national framework under the Social Insurance Law serves as a guideline. To be fully compliant, employers have to ensure they follow the local regulations.

To add further complexity, China has signed bilateral social insurance exemption agreements for foreign citizens of some countries: France, Luxembourg, Serbia, Finland, Denmark, Germany, Switzerland, Netherlands, Spain, Japan, Canada, and South Korea. Through such agreements, foreign employees from those countries can be exempted from certain social insurance contributions. These bilateral agreements differ per country. Each agreement defines the range of exemptions (which insurance funds are exempt) and the type of personnel that can benefit from the exemptions.

Social Insurance Accounts When Leaving China

If a foreigner leaves China before reaching the required pension age, the individual social insurance

account is kept. It will be renewed on a cumulative basis if the foreigner returns to China for employment.

When leaving for good, foreigners can claim the balance in their social insurance individual accounts after applying, via a written application, to the local Human Resources and Social Security Bureau before leaving China.

Again, some differences arise at the regional level. In Shanghai, for instance, foreigners who had chosen to participate in the social insurance system can withdraw their savings from their individual social insurance accounts in one lump sum after the end of the labor relationship, regardless of whether they are leaving China or – when having reached the statutory pension age – are unable to receive the monthly pension.

Housing Fund

With regard to the mandatory housing fund, neither the employers nor the foreign employees are required to contribute to it. However, many cities allow foreigners to make housing fund contributions on a voluntary basis in an attempt to attract foreign talents: they are exempt from Individual Income Tax, as long as those contributions don't exceed the compulsory contribution rates for Chinese nationals.

3.2 INDIVIDUAL INCOME TAX (IIT) LAW

The new Individual Income Tax (IIT) Law in China came into effect on January 1, 2019. It is the seventh major revision since the original IIT Law was passed in 1980, and it is probably the one that has introduced some of the most comprehensive reforms.

In this section, we attempt to cover the most relevant aspects of the new law, paying also attention to those that impact foreigners. However, one important aspect that has not changed is that the employers remain responsible for calculating and withholding IIT.

Tax Residency Rules

One of the key amendments to the new IIT Law is the change to the tax residency. An individual with a Chinese passport or a Chinese household registration (hukou) is generally regarded as having a domicile in China. In general, a foreign national is treated as a non-domicile individual in China, and he/she will be taxed in accordance with the length of his/her stay in China.

Chinese tax residency is determined based on having a domicile in China, and the number of days spent in China. A natural person who is either domiciled or not domiciled in China, but who remains in China for 183 days or more in a tax year, is considered a Chinese tax resident. Other persons are defined as non-tax residents (See Figure 3.2.1).

The day on which a foreigner stays in China for less than 24 hours is excluded when calculating the 183-day threshold. Therefore, the entry and exit dates are not counted.

If a foreign individual is tax resident in China for over six years, they will be taxed on their worldwide income. However, foreigners who are tax residents in China can be exempted from taxation of their worldwide income: when foreigners leave China for more than 30 consecutive days in any year in which they reside in China for 183 days or more, the computation of the six years will restart.

Under the new IIT Law, the tax residency status of a non-domiciled employee has to be determined in advance for monthly IIT declarations. However, by the end of the tax year, the number of days in China and, therefore, the current tax status may turn out different

Figure 3.2.1
TAX RESIDENCY STATUS IN CHINA
After the new Individual Income Tax Law, since January 2019

	Criteria	Taxable for...
Tax Residency	Individuals have their domicile in China (on account of domiciliary registration, family ties or economic interests) or;	...their worldwide income (income sourced in and outside China)
	Do not have a domicile in China, but with presence in China over 183 days or more with a consecutive six-year record or;	
	Do not have a domicile in China, but with presence over 183 days for less than six years	... their China sourced income* and non-China sourced income borne by a PRC entity
Non-Tax Residency	Individuals with no domicile in China, and in China for less than 183 days in a tax year (January 1 to December 31)	...their China sourced income borne by PRC entities or borne by overseas entities
	Individuals with no domicile in China, and in China for less than 90 days in a tax year (January 1 to December 31)	... China sourced income borne by PRC entities

Source: Rödl & Partner. *China sourced income: remuneration of an employment exercised in China, regardless of where it is paid

from the initial estimation.

If the tax residency status is updated as a consequence of the above disparity, the actual tax liability may differ as well, as:

- a) for non-residents, the monthly IIT declarations are made on a single month basis, underlying monthly income tax brackets, and
- b) for residents, the monthly IIT is declared on a cumulative basis, underlying annual income brackets.

Consolidation of IIT Calculation

The new IIT Law defines two new categories of income: comprehensive income and income from operations.

The new category 'comprehensive income' groups four types of income from the previous IIT Law: income from salary and wages, income from the provision of independent professional services, income from author's remuneration, and income derived from royalties. The last three types of income were previously taxed at a flat rate of 20 percent, whereas now – under the comprehensive income umbrella – they are taxed across seven levels of progressive rates, from 3 to 45 percent.

The new category 'income from operations' comprises two types of income from the previous IIT Law:

- a) income from sole proprietors and merchant's production and business operations, and
- b) income from contracting or leasing services provided to enterprises and institutions.

For this new category, there is no change in the tax rating that applied to the former two types of income: five levels, from 5 to 35 percent.

Other categories of income under the previous IIT Law remain the same: income from interest, stock dividends; income from the lease or transfer of property; and contingent and other forms of income. In the new IIT

Law, they remain taxed at a flat 20 percent rate.

Tax Brackets

The new IIT Law has adjusted the tax brackets applying to the comprehensive income and income from operations. The indicated progressive tax rate levels in Figure 3.2.2 are applied to a tax resident's annual consolidated income, which includes wages and salaries, personal service compensation, author's compensation, and royalties.

The IIT rates apply equally to tax-resident payers as well as to non-tax resident payers. However, as mentioned earlier, IIT declarations for tax residents are made on a cumulative basis, thus underlying annual taxable income; whereas for non-tax residents, IIT declarations are on a monthly basis underlying monthly income tax brackets.

The reform has not modified the tax rates but has widened the lower tax brackets, while narrowed the middle one. Higher tax brackets remained unchanged. In addition, the reform has also increased the standard deductions at all levels, except the lowest one.

Figure 3.2.2 COMPARING INCOME TAX BRACKETS & STANDARD DEDUCTIONS
On comprehensive income for tax-residents, before and after January 2019

Level	Before			After	
	Annual Taxable Income (RMB)	IIT Standard Deduction	Tax Rate (%)	Annual Taxable Income (RMB)	IIT Standard Deduction
1	0 – 18,000	0	3	0 – 36,000	0
2	18,000 – 54,000	1,260	10	36,000 – 144,000	2,520
3	54,000 – 108,000	6,660	20	144,000 – 300,000	16,920
4	108,000 – 420,000	12,000	25	300,000 – 420,000	31,920
5	420,000 – 660,000	33,060	30	420,000 – 660,000	52,920
6	660,000 – 920,000	66,060	35	660,000 – 920,000	85,920
7	Over 960,000	162,060	45	Over 960,000	181,920



The reform has not modified the tax rates. They remain in 7 progressive levels, from 3 to 45 percent



The lower tax brackets (levels 1 to 3) have been widened, while the middle tax bracket (level 4) has been narrowed. The reform did not impact the higher tax brackets (levels 5 to 7)



The reform has increased the so-called Standard Deductions at all levels (except that of level 1)

Source: Rödl & Partner

Standard Basic Deductions, Specific Deductions, New Special Additional Deductions, and Other Deductions

The new IIT Law unifies standard deductions of tax-residents and non-tax residents to RMB 60,000 annually (RMB 5,000 / month for tax withholding purpose). In the previous Law, the standard deduction was RMB 3,500 / month for Chinese nationals, and RMB 4,800 / month for foreign nationals.

Contributions made to the social security system, in accordance with the Social Security Law, as well as contributions made to the housing fund are deductible for IIT purposes. In the case of foreign employees, these specific deductions apply only to those who had chosen to contribute voluntarily to the housing fund and to the employee contributions made to the pension, medical, and unemployment funds.

In addition to the standard and specific deductions, the new IIT Law introduced a series of special additional deductions for certain expenditures that apply to both tax-residents and non-tax residents (See Figure 3.2.3):

- Continuing education expenses: between RMB 400 / month, over a maximum of 48 months for education expenses at the degree level; or RMB 3,600 / year, for advance vocational training (only deductible in the year of obtaining the certificate).
- Expenses for supporting elderly care (older than 60 years): up to RMB 2,000 / month.
- Housing mortgage interest for first-time buyers: up to RMB 1,000 / month.
- Rental expenses: RMB 800 or RMB 1,100 or RMB 1,500 per month, depending on the location.
- Medical treatment for serious illnesses: deduction based on actual amount for expenses over RMB 15,000 that are incurred by the taxpayer, with an upper limit of RMB 80,000 per year.
- Children’s education: RMB 1,000 / month for each child.

To benefit from these deductions, the relevant information (contracts, invoices, etc.) must be provided to the tax bureau and keep that information filed for five years.

Foreigners who want to apply for these deductions also need to provide their tax ID, which can be obtained through the tax bureau.

Figure 3.2.3
NEW IIT SPECIAL ADDITIONAL DEDUCTIONS

New special additional deductions	Deductible amounts
School and higher education for children	RMB 12,000 per year for each child (RMB 1,000 per month)
Continuing education with degree	RMB 4,800 per year (RMB 400 per month)
Advance vocational training	RMB 3,600 per year (only deductible in the year of obtaining the certificate)
Medical treatment of critical illnesses	Deduction based on the actual amount for expenses over RMB 15,000 that are borne by the taxpayer. Upper limit is RMB 80,000 per year
Interest expenses of housing loan for first time buyers	RMB 12,000 per year (RMB 1,000 per month)
Rental expenses	RMB 9,600 to RMB 18,000 per year (varying among cities)
Caring for parents (older than 60 years)	RMB 24,000 per year (RMB 2,000 per month)

Source: Rödl & Partner

It is important to note that, under the previous IIT Law, foreigners working in China who qualified as tax residents, were already entitled to certain tax-exempt allowances, provided that the amounts were reasonable and substantiated by invoices: housing expenses, meals and laundry expenses, relocation expenses upon start or end of an assignment in China, Chinese language training, children's education expenses incurred in China, business travel expenses, and personal trips to their home countries (two flights per year).

Foreigners who fulfill the tax-residency requirements can still apply for tax-exemptions on these allowances for another three years, between January 1, 2019, and December 31, 2021, according to the 'Notice on Transitional Matters concerning Preferential Policies after the Amendment of IIT Law' (Circular 164) released jointly by the Ministry of Finance and the State Administration of Taxation of the PRC. However, they need to choose between the old tax-exempt allowances or the new six special additional deductions. Once decided, the choice cannot be changed within a tax year.

For foreigners who qualify as tax-residents, the allowances deductible under the previous IIT Law remain more attractive than the six new special additional deductions for those foreigners with higher wages, or who travel often abroad, or get their income from companies overseas, since such expenses usually represent between 20 to 30 percent of their salary. The new special additional deductions, on the other hand, are likely to be a better choice for foreign employees (non-tax residents) with lower wages, as the deductions are based on total amounts paid. Nevertheless, from January 1, 2022, foreigners will no longer be able to claim the old tax-exempt allowances, only the special additional deductions.

Finally, prior to the revision of the IIT Law, for tax-resident foreigners there were certain deductible items such as employee contributions to corporate annuities, commercial pension insurance premiums eligible for IIT deferral treatment, or commercial health insurance premiums eligible for IIT incentives. Such deductible items remain in the new IIT Law, but no provisions regarding the limitations, applicable time period, or applicable areas of relevant expense deductions are stipulated.

Commercial health insurance has been a common

Foreigners who are tax-residents can still apply - with conditions - for tax-exempt allowances from the previous IIT Law, for a transition period that extends until December 31, 2021.

benefit enjoyed by foreign employees, thus paid premiums on those insurances could represent additional deductions if eligible. It is difficult to assess how accessible the tax-deferred commercial pension insurance might be for foreign employees: the overall implementation of commercial pension insurances is still being piloted, following the Notice on the Pilot of Deferred Commercial Retirement Insurance for Individual Tax on April 2018, by the Ministry of Finance.

IIT on Annual Bonus

Under the previous IIT Law, annual bonuses enjoyed a preferential tax treatment and were taxed as a separate source of income different from the annual salary. The annual bonus had to be divided by 12 to determine the applicable tax rate and deductible factor. To the resulting amount it corresponded a specific tax rate and deduction, within the existing tax brackets.

With the new IIT Law, annual bonuses are taxed on a combined basis with other comprehensive income of the year. According to Circular 164, a three-year transition period applies (from January 1, 2019, to December 31, 2021) to resident taxpayers, where the former preferential tax treatment can still be applied. However, Circular 164 does not mention such options are available to non-resident taxpayers. Thus, for foreign individuals, taxation on annual bonuses differs based on whether they qualify or not as tax-residents in China.

Tax Obligations for Employees and Employers

Among others, according to the new IIT Law and resolutions, an annual filing is mandatory for tax residents under the following circumstances:

- taxable income from two or more sources amounting to RMB 60,000 or above (after standard and special deductions),
- taxes withheld based on monthly filings are below the taxes payable calculated at year end, or
- a tax refund is required.

As mentioned earlier, an obligation that has not changed is that of any natural or legal person who makes payments of personal income to a tax resident to be responsible for IIT payments as a withholding

With the new IIT Law annual bonuses are taxed on a combined basis with other comprehensive income of the year, instead of being considered as a separate source of income.

agent.

Tax-withholding agents shall calculate the IIT of the payroll payments to taxpayers underlying the total taxable income year-to-date. But in practice, the continuous IIT declaration can be interrupted, for example, due to a job change of the taxpayer during the year. Ultimately, the annual IIT declaration must be based on the comprehensive income of the taxpayer. If the employee changes jobs within a tax year, the new employer will have no access to the previous IIT declaration data (i.e., income, taxes paid), and the interruption of the cumulative basis will likely result in wrong IIT declarations/ payments. However, employers need to ensure to fulfill the IIT withholding obligation. The interruption of the cumulative basis could be resolved during the annual IIT filing. In practice, this approach may cause misunderstandings as, in general, the annual filing of comprehensive income is the taxpayers primary responsibility, but taxpayers can engage withholding agents to handle the filing. But as the withholding agent may not be aware of all income sources of the employee, the taxpayer remains responsible for the authenticity and completeness of the supported information. Therefore, it is important to clarify the responsibilities of each party at an early stage.

3.3 FINAL CONSIDERATIONS

The new IIT Law will allow low- and mid-income earners greater tax savings. All taxpayers, regardless of income, will benefit from a wider range of deductions.

Employers should ensure that all their employees - whether local or foreign - are informed in a timely manner about the implications of the new IIT Law reforms, as well as on how such changes may impact their salary structure.

Given the wide range of the reforms implemented, with more regulations and guidelines expected from the State Council in due course, the advantages of outsourcing are obvious. By outsourcing secondary functions, companies can concentrate on their core business. Another important point is cost saving. There is a qualitative advantage choosing a specialized service provider, especially in the area of HR and payroll, with its fast-changing regulatory requirements, outsourcing will ensure to comply with the latest regulations and allow access to up-to-date knowledge.

Under the new IIT Law, low- and mid-income earners will generally enjoy greater tax savings. All taxpayers, regardless of income, will benefit from a wider range of deductions.



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Deconstructing Labor Costs in China

4

4.1 INTRODUCTION

The purpose of this chapter is to offer HR, Compensation & Benefits professionals in China an initial mapping of the different funds that go on top of the gross salary to employees. Having already reviewed social security and individual income tax in China in the previous chapter, here we will look at how the contributions to those funds are calculated; and what is ultimately the total cost for an employer when given a gross salary.

Because it is highly intertwined with the above, this section will also cover the necessary calculations to derive from the gross salary the actual net salary the employee will take home. This is also highly relevant to the employer since, in China, it is the employer's responsibility to calculate and withhold the payments on the employee side for the employee's individual income tax, as well as the employee's social security monthly payments.

Definitions

Prior to addressing the mathematics and calculations implicit in the purpose stated in the above introduction, it is necessary to establish some definitions.

The following are concepts that we will be referring to later on, and it is important to clarify them beforehand. The social security and individual income tax law in China have been extensively discussed in the previous sections of this chapter.

Monthly BASE salary: The fixed amount the employer guarantees the employee on a monthly basis. The base salary has to be stated in the labor contract.

Monthly GROSS salary: Adding to the base salary, an employer might offer an employee fringe benefits such as bonuses, allowances, or even stock. Employers should be wary though about including such payments in the labor contract, as this will make them legally bound to pay them. In the labor contract provisions can be stated that benefits will be paid if performance is above a certain level of expectations and if the business performs well.

Individual Income Tax (IIT): A progressive tax system with tax rates ranging from 3 to 45 percent. An employer is responsible for deducting IIT on salary

income before paying a net amount to its employees. Payments of IIT from other sources of income are the responsibility of the individuals. For more on IIT, refer to 3.2 Individual Income Tax (IIT) Law in the previous chapter.

Monthly NET salary: The monthly net salary is the actual amount the employee will receive in his/her pocket every month, after adding to the base salary whichever allowances may apply, overtime pay, and bonuses; and deducting the employee's individual income tax (IIT) and the portion of the mandatory social benefits payable by the employee.

This is, first and foremost, an employee-relevant definition. However, for the reasons already explained in the introduction, the monthly net salary is also highly relevant to the employer.

All Chinese employees and employers are required to contribute to social security on a monthly basis. For more details on social security contributions from part-time employees, see page 44.

Monthly TOTAL employer cost: This is an employer-relevant definition. The addition of the base salary, allowances, bonuses, non-mandatory benefits (i.e., non-mandatory housing fund, non-mandatory pension plans), and the employer's portion of the mandatory social benefits results in the Monthly TOTAL employer cost.

Mandatory social benefits (social insurance and housing fund): for a thorough review of the different funds that constitute the social security in China see 3.1 Social Security in China in the previous chapter.

In China, it is the employer's responsibility to calculate and withhold the payments on the employee side for the employee's individual income tax and social security monthly payments.

4.2 TURNING DEFINITIONS INTO FORMULAS

Monthly TOTAL Employer Cost

As introduced in the previous section, in addition to the Monthly Gross Salary an employer has to add the contributions established for each of the five social insurance funds and the housing fund. Each of the six funds has an established rate of contribution applicable to the employer. The rates vary at the regional level, and they are applied to the “**Social Security Calculating Base**”, which is defined not by the monthly gross salary paid to an employee but by the employee’s average income the previous year, from January to December.

The different components to get to Monthly Total Employer Cost are summarized in Figure 4.2.1.

An employer has to check whether the Social Security Calculation Base falls below or above the caps established for the Housing Fund and the Social Insurance Fund at the location(s) it operates. If that is the case, the caps should be used instead as the base for calculations. For more on the lower and upper limits of the social insurance and housing funds, see 3.1 Social Security in China in the previous chapter.

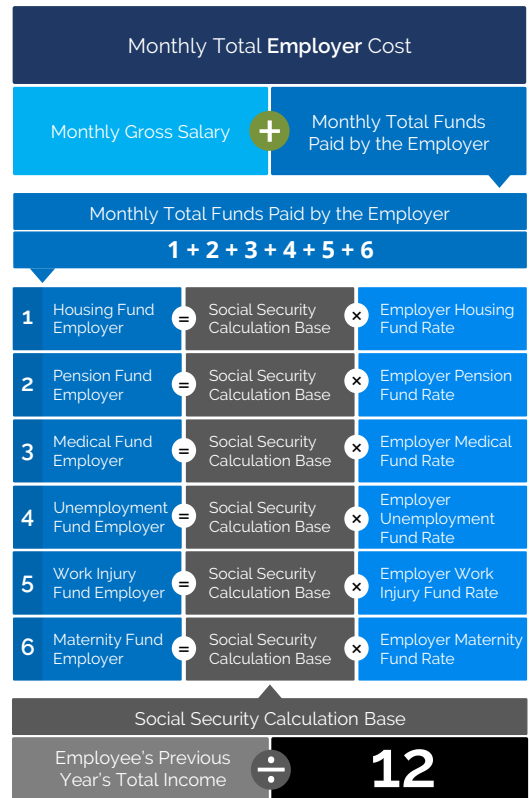
Monthly NET Salary

From the monthly gross salary (base salary plus any additional benefits the employer might offer, i.e., allowances, bonuses), the employee has to deduct the Individual Income Tax (IIT), as well as all the monthly social security contributions that apply to the employee (See Figure 4.2.2 in the next page).

In Figure 4.2.2 we break down the calculations for the Individual Income Tax (IIT) payable by the employee. The employer will be responsible for calculating the year-to-date IIT payable with the applicable annual tax rate (See Figure 4.2.3 in the next page) and deduct the accumulated IIT paid up to the last month in order to get the IIT payable of the current month.

As already mentioned, the new IIT Law adopts a unified deduction (a monthly standard deduction) for resident and non-resident taxpayers of RMB 5,000. In addition, the new law introduces “Special Additional Deductions” for specific expenditures such as children’s education expenses, continuing education

Figure 4.2.1
MONTHLY TOTAL EMPLOYER COST

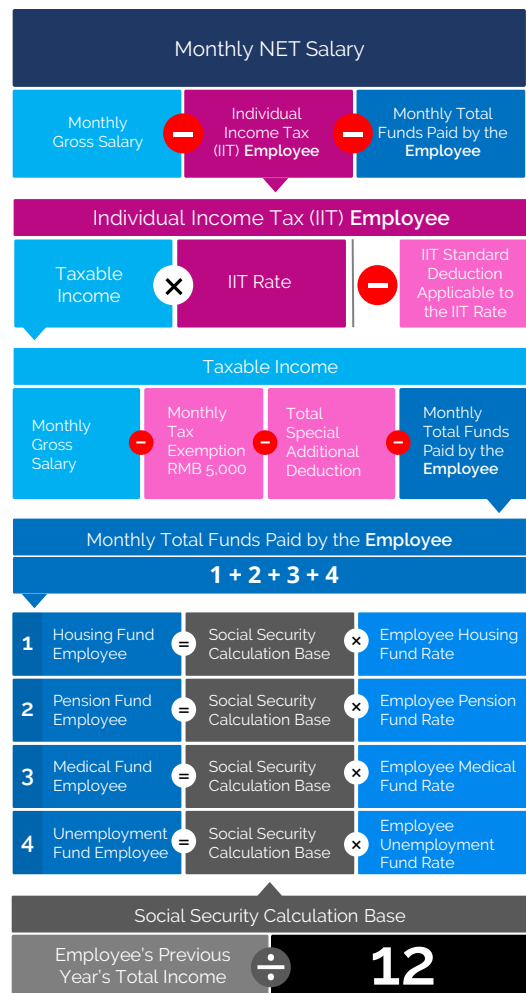


Source: Direct HR Group

expenses, healthcare for serious illnesses, housing mortgage interests, housing rent, and elderly support.

Thus to obtain the taxable income, from the Monthly Gross Salary the employer will deduct on behalf of the employee the standard tax exemption, the total special additional deductions and the contributions to the housing fund and the three social insurance funds that apply to the employee (pension, medical, and unemployment fund).

Figure 4.2.2
MONTHLY NET SALARY, TAXABLE INCOME



Source: Direct HR Group

Figure 4.2.3
TAX CALCULATION RATES FOR RESIDENT TAXPAYERS

Level	Annual Taxable Income (RMB)	Tax Rate (%)	IIT Standard Deduction
1	0 – 36,000	3	0
2	36,000 – 144,000	10	2,520
3	144,000 – 300,000	20	16,920
4	300,000 – 420,000	25	31,920
5	420,000 – 660,000	30	52,920
6	660,000 – 920,000	35	85,920
7	Over 960,000	45	181,920

Source: Direct HR Group

4.3 TURNING FORMULAS INTO PRACTICAL EXAMPLES

To better illustrate the calculations with regards to the actual payments to be made for funds and taxes by the employer and the employee let's use a numerical example. Here are the premises:

- The employee is a Chinese national (a resident taxpayer) employed in Taicang.
- The employee's base salary is RMB 20,500/month. In addition, he/she receives another RMB 4,500/month in allowances. Which results in a Monthly Gross Salary of RMB 25,000.
- The monthly total special additional deductions amount to RMB 1,000.
- For simplification purposes, we assume that RMB 25,000/month was also the amount he/she was paid during the previous year on a 12-month basis (so that the Monthly Social Security Calculation Base is equal to the Monthly Gross Salary).

Since we are referring to Taicang, we need to look at the relevant contributions for both the employer and the employee to the five social insurance benefits and the housing fund for the city. They were presented in Figure 3.1.1 in the previous chapter, alongside those of Suzhou. Find them again in Figure 4.3.1.

Example of Monthly TOTAL Employer Cost

To get to the Monthly TOTAL Employer Cost, we require two ingredients: the monthly gross salary, which we already know, and the total funds the employer has to contribute on a monthly basis to the social security.

In order to calculate the social security funds which are payable by the employer, we need to establish first the **Social Security Calculation Base**. According to the premises set for this example, the annual income of this employee the year prior was RMB 300,000 or RMB 25,000/month. However, that amount is above the caps established by Taicang's local labor and housing fund bureaus (see Figure 4.3.2).

Therefore, in this particular example, the Social Security Calculation Base won't be equal to the Monthly Gross Base Salary. And since the lower/upper limits for the social insurance and house funds are different in Taicang, rather than referring to the Social Security Calculation Base, it is more

Figure 4.3.1
CONTRIBUTION RATES
TO SOCIAL SECURITY IN TAICANG, 2020

Social Security Funds	Employer (%)	Employee (%)
Housing Fund	8 /10/12	8/10/12
Pension Fund	16	8
Medical Fund	8	2
Unemployment Fund	0.5	0.5
Work Injury Fund	0.3 to 1.5	-
Maternity Fund	0.8	-

Source: Rödl & Partner

Figure 4.3.2
LOWER & UPPER LIMITS TO HOUSING AND SOCIAL
INSURANCE FUNDS (RMB/MONTH) IN TAICANG, 2020

	Lower Limit	Upper Limit
Housing Fund	3,030	23,700
Social Insurance Funds	3,030	16,842

Source: Direct HR Group

accurate to refer instead to *housing fund calculation base* on the one hand, and the *social insurance calculation base* on the other.

Thus, the calculation base won't be RMB 25,000/month but, in accordance with the limits established, the housing fund calculation base will be RMB 23,700 / month, and the social insurance fund calculation base will be RMB 16,842 / month.

With these upper limits we can then proceed to the calculation of the Monthly Total Funds by the Employer, as they were presented in Figure 4.2.1. We assume that the employer chooses to contribute 8 percent to the housing fund and 1.5 percent is that rate that applies to work injury:

- Monthly Housing Fund (Employer):
RMB 23,700 x 0.08 = RMB 1,896

- Pension Fund (Employer):
RMB 16,842 x 0.16 = RMB 2,694.72
- Medical Insurance Fund (Employer):
RMB 16,842 x 0.08 = RMB 1,347.36
- Unemployment Fund (Employer):
RMB 16,842 x 0.005 = RMB 84.21
- Work Injury Fund (Employer):
RMB 16,842 x 0.015 = RMB 252.63
- Maternity Fund (Employer):
RMB 16,842 x 0.008 = RMB 134.74

Adding up the six funds, the **Monthly Total Funds Payable by the Employer** is RMB 6,409.66, and the **Monthly TOTAL Employer Cost** is RMB 31,409.66 (Monthly Gross Salary RMB 25,000 + Monthly Total Funds Payable by the Employer RMB 6,409.66).

Example of Monthly NET Salary

To obtain the Monthly NET Salary, we must deduct from the Monthly Gross Salary the IIT of the employee as well as his/her social security contributions, as seen in Figure 4.2.2. Since we need the social security contributions to establish the IIT, we start calculating the Monthly Total Funds Payable by the Employee.

In accordance with the upper limits to the housing and social insurance funds in Taicang, as well as the employee's contribution rates to each of the funds in the region presented in Figure 4.3.1:

- Monthly Housing Fund (Employee):
RMB 23,700 x 0.08 = RMB 1,896
- Pension Fund (Employee):
RMB 16,842 x 0.08 = RMB 1,347.36
- Medical Insurance Fund (Employee):
RMB 16,842 x 0.02 = RMB 336.84
- Unemployment Fund (Employee):
RMB 16,842 x 0.005 = RMB 84.21

Adding up the different funds, the **Monthly Total Funds Payable by the Employee** is RMB 3,664.41. Thus, following on Figure 4.2.2, the **Taxable Income** for the employee is:

Monthly Gross Salary RMB 25,000 - Monthly Tax Exemption RMB 5,000 - Monthly Total Special Additional Deduction RMB 1,000 - Monthly Total Funds Employee Pays RMB 3,664.41 = RMB 15,335.59.

According to Figure 4.2.3, a monthly taxable income

of RMB 15,335.59 leaves a resident taxpayer taxable at an IIT rate of 20 percent and allows him/her a monthly standard deduction of RMB 1,410 (the annual deduction at his/her level of taxable income is RMB 16,920).

Therefore, the **Individual Income Tax (IIT) Payable by the Employee** is:

[Taxable Income RMB 15,335.59 X IIT Rate 20 percent] - IIT Standard Deduction RMB 1,410 = RMB 1,657.12.

Finally, the **Monthly NET Salary** of our employee in Taicang will be:

Monthly Gross Salary RMB 25,000 - IIT Tax Employee RMB 1,657.12 - Monthly Total Fund the Employee Pays RMB 3,664.41 = RMB 19,678.47.

4.4 FINAL CONSIDERATIONS

Although both the employer and the employee are required to make contributions, it is the responsibility of the employer to calculate and withhold the payments for both.

The contribution base to social security is determined by the average income of an employee in the previous year, rather than by the payment the employee receives each month.

There may be situations in which the social security contribution base exceeds or falls below certain predefined caps. Because those caps differ for the housing fund and the social insurance funds, it is more appropriate to refer to the contribution base as the housing fund contribution base and to the social insurance contribution base, respectively.

For employers, it is not enough to be compliant with the national guidelines. They need to be aware of the social security contribution rates that apply in the jurisdiction(s) where they have operations in China. Because the contribution rates vary by region (city, province), social security in China becomes a complex issue:

- Housing fund contribution rates are the same for both the employer and the employee, with few exceptions (i.e., in Xiamen, the employer contributes 12 percent, whereas the employee contributes 8 percent). As of May 2020, housing fund contribution rates for the employer and the employee ranged from 5 to 12 percent across regions.
- The social insurance contribution rates are higher for the employer than for the employee, as employees are only required to contribute to three out of the five social insurance funds (pension, medical, and unemployment). For the employer, social insurance contribution rates range from the minimum 15.9 percent (in Dongguan) to a maximum of 31.2 percent (Baoding), with 25.2 percent being the most common social insurance contribution rate for employers across regions. In the case of the employee, the minimum rate is 8.5 percent (Huzhou, Zhoushan), and the maximum 11 percent (Zunyi). The most common social insurance contribution rate for employees is 10.5 percent.

Due to the divergences across regions in China, to support HR professionals we have designed a salary tax calculator (salary.directhr.cn). Visitors to the site can provide either an intended monthly gross salary, a monthly net salary, or a monthly total employer cost, and they will get in return the corresponding values for the two missing metrics that are consistent with the input value. In addition, the calculator offers a breakdown of the different funds and taxes the employer and the employee will have to contribute.

Currently, the calculator covers over 90 different regions in China and allows to discriminate between contributions for local and foreign employees. All tax calculations are based on the new IIT Law. Visit salary.directhr.cn for more.



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Discipline,
Termination,
Severance Pay
in China



5. DISCIPLINE, TERMINATION, SEVERANCE PAY

As already mentioned in previous chapters of this guide, Chinese labor laws and regulations are traditionally very employee-friendly. Termination without notice, but also a timely termination of an employee by referring to the statutory reasons for termination, often turns out to be very difficult or even impossible. Employers should, therefore, ensure that the employment contract and, in particular, an employment handbook contain detailed provisions on work discipline, disciplinary measures and reasons for termination. In most cases of termination of employment, the employer is obliged to pay a severance payment to the employee.

Legal Environment

The main provisions of Chinese law concerning termination are contained in the Labor Contract Law. Its Article 39 governs the termination without notice of an employee. According to it, an employer may have an employment contract revoked if an employee is found in any of the following circumstances:

- being proved unqualified for recruitment during the probation period;
- seriously violating the rules and regulations of the employer;
- causing major losses to the employer due to serious dereliction of duty or engagement in malpractices for personal gain;
- concurrently establishing a labor relationship with another employer, which seriously affects the accomplishment of the task of the original employer, or refusing to rectify after the original employer brings the matter to his/her attention;
- invalidating the employment contract as a result of the circumstance specified in Subparagraph (1) of the first paragraph of Article 26 of the Labor Contract Law (i.e., conclusion or modification of an employment contract against a party's true intention by means of deception or coercion); or
- being investigated for criminal responsibility in accordance with the law.

According to Article 40 of the Labor Contract Law, an employer may terminate an employment contract with notice or payment in lieu instead of notice if:

- the employee is unable to take up his/her original

Figure 5.1
LEGAL REQUIREMENTS TO TERMINATE AN EMPLOYMENT CONTRACT IN CHINA

- 1 The employee does not meet the conditions for employment during the probation period
- 2 The employee breaches rules and regulations stipulated by the employer
- 3 The employee causes substantial damage to the employer as a result of serious dereliction of duty
- 4 The employee has established a labor relationship with another employer that impacts the completion of tasks with the existing employer, or refuses to terminate such employment relationship after being required to do so by the existing employer
- 5 The employee uses deception or coercion to cause the employer to terminate the labor contract or to make amendments to it that are contrary to the employer's true intent
- 6 The employee is subject to criminal investigation

Source: Rödl & Partner

work or any other work arranged by the employer on the expiration of the specified period of medical treatment for illness or for injury incurred when not at work;

- the employee is incompetent for the post and remains incompetent after receiving training or being assigned to another post; or
- the objective conditions taken as the basis for conclusion of the contract have greatly changed, so that the original employment contract cannot be performed and, after consultation between the employer and the employee, no agreement is reached on modification of the contents of the employment contract.

The Labor Contract Law further stipulates that an employer, with the exception of a few specific cases, must pay compensation to the employee in the event of termination. If the employer gives notice in violation of the Labor Contract Law, double compensation will have to be paid.

Issues in Practice

Importance of Internal Regulations on Work Discipline and Disciplinary Measures

An essential and in practice important reason for termination is a serious breach by the employee of the employer's internal rules. This underlines once again the importance of the existence of such internal rules such as the employment handbook, code of conduct, etc. These rules and regulations should be as detailed as possible and should include without limitation stipulations regarding punctual attendance, behavior at the workplace, compliance with fire, environmental and other protection guidelines of the employer, stipulations regarding personal behavior towards superiors and colleagues, obligation to provide truthful information, obeying of instructions of superiors, etc. The internal rules should make it immediately clear to an employee whether his/her behavior is still tolerated or constitutes a violation of the rules. These rules of conduct should then be followed by provisions providing for disciplinary measures in the event of misconduct. Disciplinary measures should be proportionate to the offense and may initially include verbal or written warnings. In the event of further offenses, disciplinary measures should be extended to the possibility of termination of the employment contract if a certain number of disciplinary measures have been reached. Serious offences such as sexual

One reason for termination is a serious breach by the employee of the employer's internal rules. This underlines the importance of the existence of such internal rules, such as the employment handbook.

harassment or drug abuse may be defined in the internal rules as serious violations of the employer's internal rules under Article 39 of the Labor Contract Law that justify immediate termination without notice. However, attention should be paid that the internal rules and regulations are enforceable in China. An employer should make sure that all oral or written warnings and all other disciplinary measures are recorded and filed.

It is the responsibility of the employer to pay attention that its rules and regulations are enforceable in China.

Mutually Agreed Termination

The Labor Contract Law provides for the conclusion of a termination agreement as an option to terminate an employment contract. Such a termination agreement is often the fastest and legally secure way to terminate an employment relationship and can help to avoid lengthy and possibly costly legal disputes. There are no special rules for termination agreements, and terms and conditions are freely negotiable. Once such an agreement is signed and executed, it will provide legal certainty. However, a major disadvantage of a termination agreement can be that employees often require a higher severance payment than required by law for their willingness to enter into such an agreement.

Termination During Probation Period

An employee on probation may be terminated if proved to be unqualified for the recruitment. However, it should also be observed that the employee's tasks and duties are described in detail, for example in a job description, so that it can be objectively demonstrated that the employee cannot perform them accordingly and thus proves himself/herself to be unqualified.

Termination with Notice or Payment in Lieu

Another frequent reason for termination in practice - in this case termination with 30 days' notice or payment of an additional monthly salary - is restructuring within the employer or disappointment in turnover expectations or change in market conditions and expectations, which require a reduction in personnel. Such termination may be justified due to major change in the objective circumstances relied upon at the time of signing of the employment if, after consultations, employer and employee are unable to reach an agreement on amending the labor contract. However, the Labor Contract Law does not further specify "major

change” or “objective circumstances”. An employer, therefore, should be able to present reasonable and comprehensible reasons for the necessity to terminate the employee.

Furthermore, there must be no other position at the employer for the employee to be terminated. Furthermore, such termination requires (i) consultation with the employee concerned, and (ii) notification of the trade union (no approval required, but the employer must consider and respond to comments of the trade union). To summarize, there is a high risk that the requirements of such termination cannot be fulfilled and that the employee may challenge the termination as unlawful dismissal.

Mass Redundancy

Mass redundancy is permitted provided that at least 20 employees or 10 percent of the total staff are affected, but only if the employer undergoes a reorganization in accordance with the PRC Enterprise Bankruptcy Law, or has significant difficulties in its business operation, or switches production, adjusts its business model, and after modifying its labor contracts, still needs to reduce its personnel or has experienced other significant changes that modified the economic circumstances which formed the basis for its having signed the labor contracts, and it is unable to perform under the contracts. In practice, apart from presenting evidence of the existence of one of the reasons for termination, mass redundancy requires to go through a complex procedure. This includes, among other things, the presentation of the mass redundancy plan to the trade union, if any, or all employees; to report the mass redundancy plan to the competent labor authority; to conduct a social selection; and to give certain employees priority to retain (i.e., those who have a relatively long-term fixed labor contract, or those who have an open-term labor contract, or those who are the only employed member in a household and need to support elderly or minor dependents). As can be seen, the requirements for mass redundancy are high, and there is a high risk that these requirements cannot be fulfilled and employee(s) may challenge the termination.

Exclusion of Termination

In addition to the difficulties of justifying a termination with legal certainty, the Labor Contract Law also provides regulations regarding protection against

Requirements for mass redundancy are high. There is a high risk the employer cannot fulfill those requirements, and employee(s) may challenge the termination.

termination. Under the following circumstances, the termination of an employment is not permitted if the employee (i) has engaged in work in which he/she is exposed to occupational hazards and has not undergone the relevant health check before termination or is suspected of having contracted an occupational illness and is being diagnosed or under medical observation, (ii) has contracted an occupational illness or suffered a work-related injury and is confirmed to have lost fully or partially his/her labor capacity, (iii) is undergoing the medical treatment period (a form of statutory sick leave ranging from 3 to 24 months) for his/her non-work-related injury or illness, (iv) is currently pregnant, on maternity leave, or is within the nursing period (the baby's first year), or (v) has worked for the employer for 15 consecutive years and will reach statutory retirement age in less than five years.

Unilateral dismissal is only to be considered if the employer has enough evidence to support it, as employees very often challenge those dismissals and courts often decide in an employee-friendly manner.

Termination Procedure

In general, the termination of an employee requires certain steps to undertake. Most important for the employer is to collect sufficient evidence that can support to justify the termination. There may be a high risk of relying on only one or two reasons, especially if each reason is not yet all too serious in itself. If enough and sufficient evidence has been gathered, the next step should be to discuss the matter with the employee concerned and to confront him/her with the facts. After this initial confrontation, a negotiation process usually starts, in which a possible different position of the employee in the company, if conceivable for the employer, or the modalities of termination are discussed. However, the termination proceedings are not finished until a termination agreement has been signed by both the employer and the employee. Unilateral dismissal by the employer should only be considered if the evidence is more than sufficient, as employees very often challenge unilateral dismissals and the courts often decide in an employee-friendly manner.

Termination by Employee

Employees may terminate an employment contract by submitting a formal resignation letter and giving at least 30 days' notice. This period is mandatory and cannot be legally extended. Although a longer notice period could be agreed in the employment contract, this would be ineffective in the event of a legal dispute. The very short notice period can often lead to internal

problems within the employer, be it to find a successor of a senior manager, to integrate such successor in the business organization, or deregister a General Manager or Legal Representative from the business registrar of the company. Employers should, therefore, be particularly careful when recruiting senior managers and general managers.

Termination of a Part-time Employee

Either of the two parties to a part-time employment may give notice to the other party at any time to terminate the employment. In such case, the employer is not obliged to pay any financial compensation.

Unlawful Termination

After termination, the employee concerned may bring a claim to the competent labor arbitration commission or to a court. In case that said commission or the court deems the termination unlawful, the employee can demand to be reinstated or double statutory severance pay.

Remaining Payment Obligations

In case of termination, severance payment is one of the most important issues for employees. In this respect, employers should also take into consideration possible further claims of employees other than the severance pay: bonuses, compensation for unused leave days, reimbursement of work-related expenses, or overtime pay. Employers, therefore, should determine all outstanding payments and possible claims of the employee before starting the negotiation of the termination conditions or before a unilateral termination.

Severance Payment Calculation

In practice, in all cases of termination, statutory severance payment must be paid to the employee. Severance pay amounts to one month's salary per year of service. An employment period ranging from six months to one year is to be counted as one year. If the employee has worked for less than six months, he/she will be entitled to half a month's salary.

Monthly salary refers to the average monthly income for the twelve months prior to the termination. If the monthly wage of the employee exceeds three times the average monthly wages of

employees in the municipality where the employer is located, severance pay shall be paid to him/her at the rate of three times the local average monthly wages and the number of years involved shall not exceed twelve years.



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Conducting Interviews in China



6.1 DESIGNING INTERVIEW QUESTIONS

The goal in an interview - whether it is a recruitment interview, a salary negotiation, or a sales negotiation with a prospect client - is to fill in the gaps between what you know so far and what you would like to know from your counterpart.

The recruitment interview becomes a process of bridging, of unveiling critical pieces of information that will take the interview to its end goal: the gathering of the necessary evidence to realize an objective assessment of the candidate.

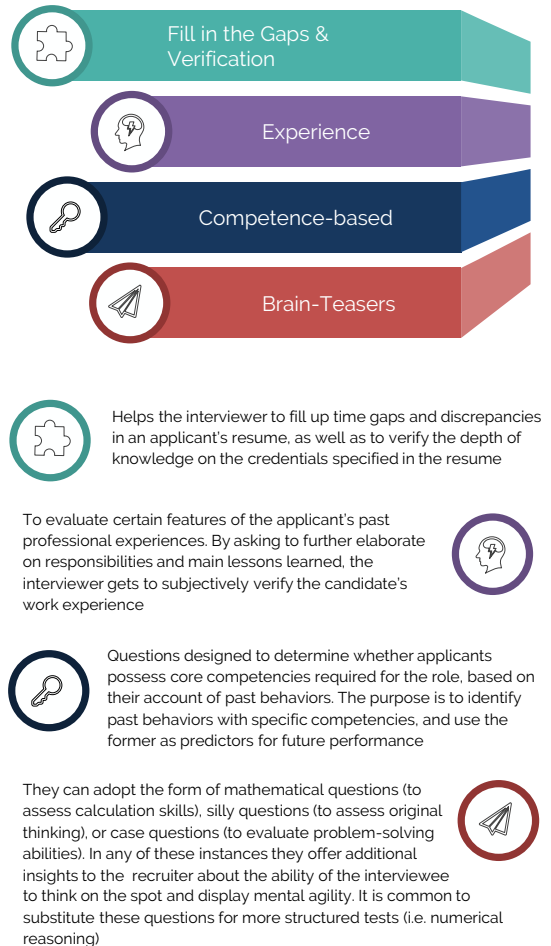
A recruitment interview is also a negotiation of sorts, for the candidate is also trying to assess whether the opportunity is worth his/her while and, therefore, he/she will try to pick up on any signals that might support the candidate's decision-making. In a similar fashion, the recruiter wants to collect as much information as possible from the candidate that relates to the job at hand, so whatever decision that comes further down the line is based in as much objective data as possible.

Collecting information in a recruitment interview from a candidate and making an objective assessment is not something that one does without preparing. In this chapter, we will cover how to design interview questions within the Competency-Based Interviewing (CBI) framework.

When designing the interview questions recruiters will first consider the core competencies needed for the specific role they are looking to recruit. Core competencies will be derived from a thorough analysis of the job description and discussions with relevant stakeholders (hiring managers, subject matter experts, high-performers who held that job role in the past,...).

However, competency-based questions will not be the only questions in an interview. In Figure 6.1.1 a summary of the primary type of questions that are commonly used in recruitment interviews is presented. There is a particular type of questions that we do not recommend using: brain-teaser questions. Some of the questions in Figure 6.1.1 can be replaced by structured and proven tests such as numerical reasoning, instead of using brain-teasers, and emotional intelligence (EQ) tests. Whenever possible,

Figure 6.1.1
INTERVIEW QUESTIONS. TYPES
Different types of questions that go into an interview, based on the features they look to assess



Source: Direct HR Group from various sources

In any interview the goal is to bridge the gap between what you know so far and what you would like to know from your counterpart.

it is advisable to use those instead of trying to tackle them with questions in an interview because of the following two key reasons:

- 1) Not all competencies can be measured with structured interviews. If you remember from Figure 1.1 in the first chapter of this Guide, when we introduced the different predictive validity measures of several selection methods, structured interviews were amongst the ones with the highest predictive values. However, information gathered using other tools (i.e., assessment centers) adds to the overall validity. That is, the validity of different assessment methods compounds and, as previously discussed, it is often a question of balancing validity with budget. Recruiters can leverage on already existing and field-proven tools that add extra points of information for competencies that are hard to be measured in an interview.
- 2) Whether it is face-to-face, phone, video or via chat, the number of core competencies that can be assessed throughout an interview is around four to six. Nothing is set in stone, and that is only a good rule of thumb. Note, though, that more than six competencies usually becomes a challenging task for the interviewer. Therefore, if there is a competency or a set of them that can be assessed through other means, this will free resources to allow the recruiter to focus only on those that are better appraised in an interview format.

In the following sections of this chapter we will discuss how to select the competencies we are going to assess in the interview; second, we will create questions accordingly; and finally, we will take a look at how to set up an evaluation system with the purpose of removing, to the extent that is possible, subjectivity and bias.

Not all competencies can be measured with structured interviews. Using additional tools, like assessment centers, adds information that is otherwise hard to measure in an interview.

Which Competencies?

We mentioned that not all competencies are best assessed via CBIs. So, which competencies are most appropriate for such interviews? Figure 6.1.2 introduces a set of competencies we believe are best assessed via competency-based interviews.

The relevant competencies for a given role are to be found in: the search brief you as a recruiter should have been provided with; your notes in the meetings you had with the hiring manager(s) and other stakeholders; and in the final job description you put together to advertise the vacancy. See Figure 6.1.3 in the next page for an example of specific job requirements taken from a real assignment.

Figure 6.1.2

COMPETENCIES IN CBI

Key core competencies that can be measured in competency-based interviews, together with some basic dimensions each of the competencies can be broken down

Interpersonal Skills	Verbal communication Non-Verbal communication Conflict resolution Active listening Teamwork
Organizational Ability	Planning and budgeting Time management Task prioritization Attention to detail, focus on quality
Problem Solving	Analytical / logical thinking Creative / lateral thinking
Judgement	Rational thinking Ability to consider multiple points of view / cultural differences
Influential Leadership	Strategic thinking Delegation Flexibility Negotiation Motivation / Inspiration Responsibility Integrity and ethics
Technical Skill*	Knowledge Experience

Source: Direct HR Group from various sources. *Technical skills vary with every role. Its inclusion here as a competency refers not to the specific technical skill, but to the ability of applying it with expertise, knowledge and experience in the role at hand

We are going to perform the following exercise. Let's assume that all has gone according to plan and that, at this stage, the job description is a truthful representation of all the requirements needed for a successful applicant to get the job. That is, it contains all the relevant information provided by all stakeholders with interest to close that position. Let's then use the job requirements, and proceed to deconstruct them to see if we can identify some of the core competencies introduced in Figure 6.1.2¹

Some comments about the deconstruction of the job description into a set of competencies, as shown in Figure 6.1.3:

- 1) Often for what appears to be a single requirement, more than one competency is involved. For example, in (E) a successful candidate is required to be a "Strong communicator with the ability to influence at all levels". This entails both strong interpersonal skills (verbal communication, conflict

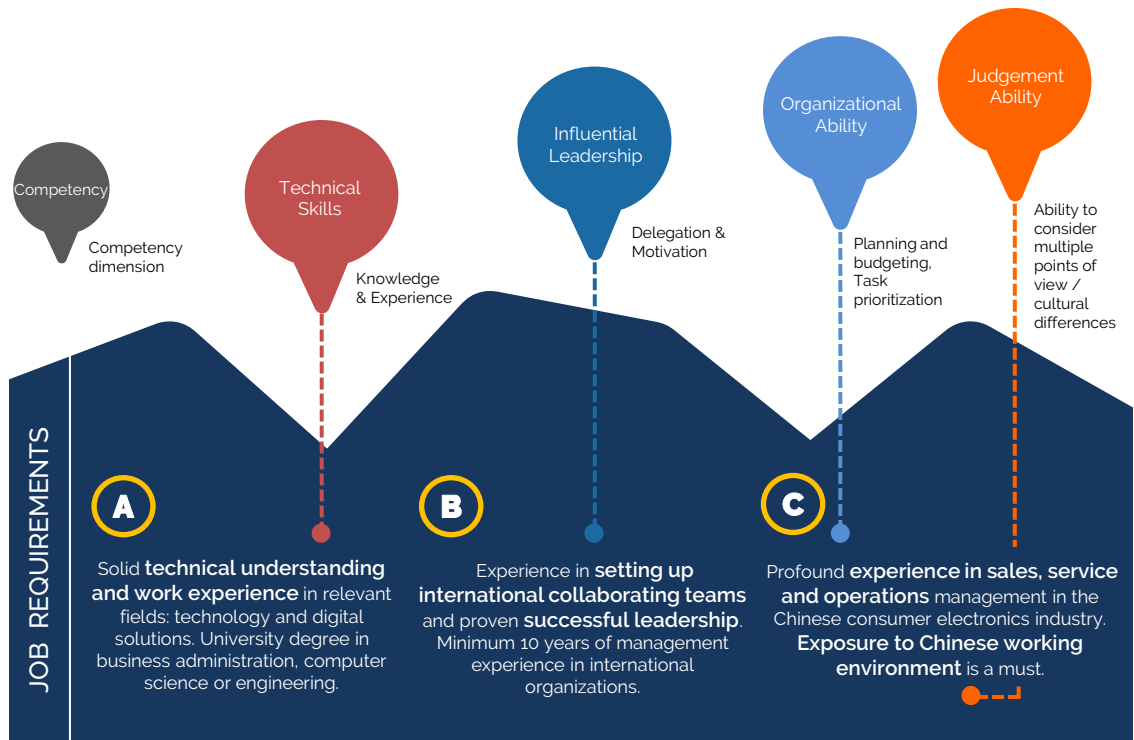
resolution) as well as influential leadership (delegation, motivation).

- 2) On the other side, the same competency may come up several times across different requirements. The competency organizational ability appears both in requirement (C) "...experience in sales, service and operations management...", (D) "Strong business acumen...", and (E) "Structured working style...".

As a rule of thumb when doing this exercise, we advise that you write down all the competencies you consider every single requirement entails.

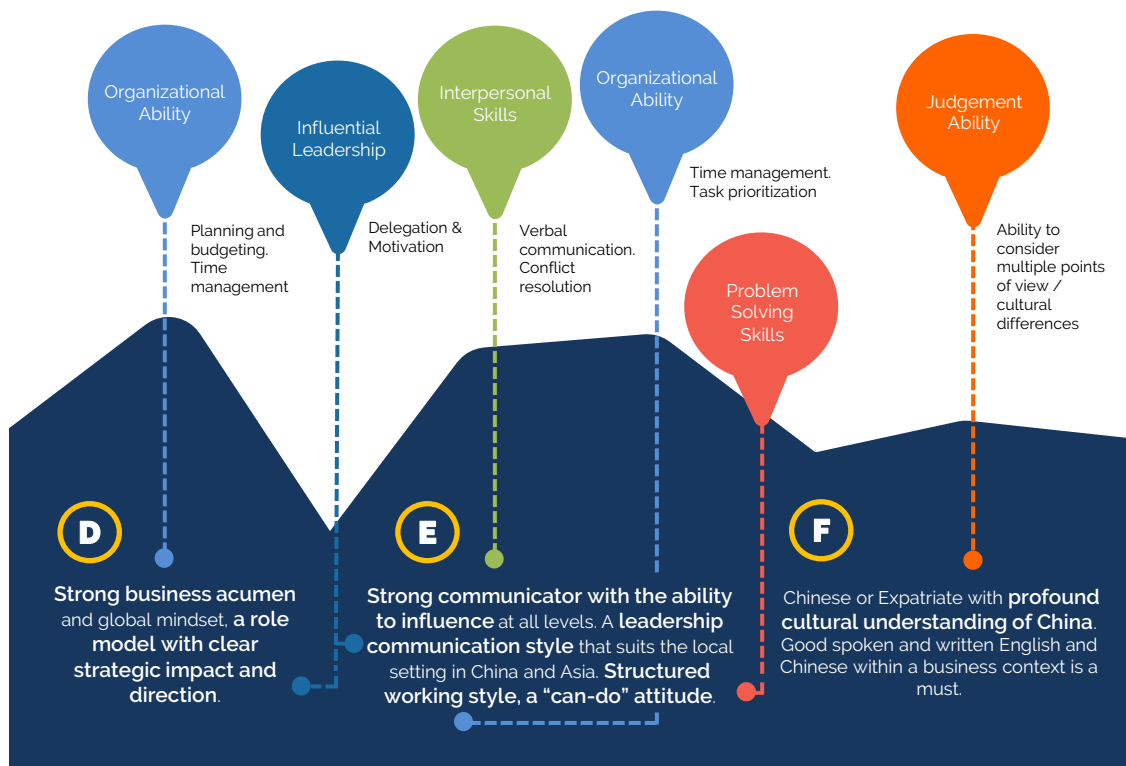
Once you are done going through all the requirements, you will be able to look at all the competencies and, from a more comprehensive perspective, see which one(s) appear to be more common across the set of requirements for that specific job role.

Figure 6.1.3
OBTAINING COMPETENCIES FROM THE JOB REQUIREMENTS
Deriving the core competencies and their specific dimensions using job requirement analysis



Source: Direct HR Group. Excerpt from a real-case client assignment, with minor modifications.

When designing the specific questions, you will then consider which competencies you might want to double-down on. A warning though: that a certain competency is derived more often than others from the job description does not imply it is more important. So, no competency should be left behind when preparing the questions using the job description (provided these competencies can be assessed via an interview, of course). Later in this chapter we will discuss the possibility of assigning different weights to competencies if some are considered to be more relevant than others.



Creating Interview Questions

Once there's a clear break down with regards to the different competencies we want to tackle in an interview, it is time to write down the specific questions.

Because the interviewer (you) and the interviewee do not share a common frame of reference, the questions should provide a **context**, a given scenario, to start with.¹ Given that context, you are looking to assess if the interviewee is able to describe which **actions** he/she took and what the **results** were of those actions. This combination of context - actions - results has been dubbed the **CAR interview method** (See Figure 6.1.4). A slight variation of CAR is known as the STAR approach, with the acronym standing for situation, tasks, action and results.

Because the response of the interviewee might be vague, incomplete or solely based on an opinion you should also have prepared some clarification questions with the purpose to obtain a better understanding of the taken actions and realized results. These type of questions are often referred as follow-up or probing questions.

To help you write these behavioral interview questions you should rely on subject matter experts - high-performing employees, supervisors and managers - that possess the knowledge for the job at the level of the position that has to be filled.

For a given competency it is advisable to prepare two or three questions to support collecting examples of behaviors from previous (recent) work experiences during the interview that relate to that competency (See Figure 6.1.5 in the next page).

Here we share some criteria for writing questions:

Simplicity: always ask one question at a time. Do not include questions within a question. That is don't try to aim at more than one competency at a time (or at more than one specific dimension of a competency at a time).

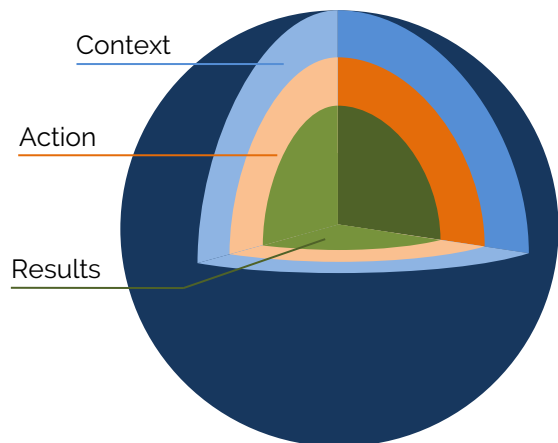
Open questions: answers cannot be "yes"/"no". Questions should give room to the interviewee to elaborate. Open questions usually start with: "Tell us about", "Describe a time where", or "Share".

Neutrality: the right answers cannot be deduced from the way questions are formulated.

Follow up: follow up questions should be ready if answers do not provide enough clarity with regards to context, actions and or results.

It is advisable that prior to using the behavioral interview with actual candidates we share it with other colleagues to test it. The test will help to fine-tune the wording and indicate if and what revisions need to be made.

Figure 6.1.4
THE CAR APPROACH TO INTERVIEWS



Context. As interviewer your questions should give room for the candidate to expose the situation or the challenge that was faced. If the interviewee does not provide a clear context you will need to ask him/her for a clarification



Actions. You want to gather evidence to understand which actions were taken to address the situation or face the challenge



Results. Understanding the outcome resulting from the actions taken. Gather facts and figures, statistics or any quantitative evidence the interviewee is able to provide

Source: Bluesteps.com

Figure 6.1.5
DESIGN CBI QUESTIONS. TURNING COMPETENCIES INTO QUESTIONS
Examples



Source: Direct HR Group

From the competencies laid out in Figure 6.1.5 let's take, for example, problem solving. We will take two of the proposed questions to assess it, and then we will prepare follow-up, probing questions (PBQs) to clarify context, actions and results (See Figure 6.1.6).

Figure 6.1.6
DESIGN PROBING QUESTIONS

Q1 Describe a situation in which you had to address a problem where its cause was not clear to the organization.

C What was the problem exactly?
What consequences was the problem having?
When was that?

A What did you do to understand the causes?
How did you do it?
What was your role?

R What happened?
What did you find out?
What was the outcome?

Q2 How did you handle a member of your team who was falling behind the work schedule and the time for project delivery was getting close?

C When was that?
What was the reason for the co-worker's delay?
How did you notice it was that specific team member?

A What actions did you take?
Who did you talk with?

R What happened with the project?
How were your actions perceived by the team member?
How were your actions perceived by the rest of the team?
In hindsight, would you act differently today in that given situation?

Source: Direct HR Group

Creating a Scoring Key

As previously mentioned, CBI requires that interviewers have a set of scoring keys, or rating scale, to be able to evaluate every candidate's competency as objective as possible.

It is crucial that **all interviewers share the same scale**. The first step here is to establish one proficiency level scale for all competencies (i.e., a range from 0 to 4, or a range from 0 to 6; where 0 indicates no proficiency at all and 4 or 6 the highest). Following that first step, tag and define each of the proficiency levels.

For instance, here we present a **5-scale evaluation**: excellent, good, average, poor, and no evidence.

Excellent (Score 4): the interviewee presented a relevant situation (pertinent to the question) that showed a strong demonstration of the competency through clear evidence of relevant behaviors.

Good (Score 3): the interviewee provided solid evidence, via a wide range of relevant behaviors, demonstrating he/she possesses the competency.

Average (Score 2): the interviewee provided pertinent evidence of having demonstrated the competency, via several relevant behaviors.

Poor (Score 1): the interviewee provided little positive evidence of having demonstrated the competency, with limited relevant behaviors.

No evidence (Score 0): the interviewee was not capable of providing any evidence of having demonstrated the competency.

Other potential scales could look like:

- A. Far exceeds requirements (Score 4), Exceeds requirements (3), Meets requirements (2), Less than requirements (1), Misses requirements (0).
- B. Expert (Score 5), Advanced (4), Intermediate (3), Basic (2), Awareness (1), Not Aware (0).

Rather than the specific range and labels that we want to assign to the scales, which is more or less a question of personal preferences, what is more relevant is that all competencies are measured using the same scale

Figure 6.1.7
RATING SCALES
Example



0

No evidence. The interviewee was not capable of providing any evidence of having demonstrated the competency

1

Poor. The interviewee provided little positive evidence of having demonstrated the competency, with limited relevant behaviors

2

Average. The interviewee provided pertinent evidence of having demonstrated the competency, via several relevant behaviors

3

Good. The interviewee provided solid positive evidence of having demonstrated the competency, via a wide range of relevant behaviors

4

Excellent. The interviewee presented a relevant situation (pertinent to the question) that showed a strong demonstration of the competency through clear evidence of relevant behaviors

Source: Adapted from *Competency-based Interviewing. Assessing Candidates Based on Their Past Performance*. UNESCO (2016)

What is relevant is that all competencies are measured using the same scale and that all interviewers apply the same criteria, rather than the actual values of the scale itself.

and that all interviewers apply the same criteria.

Additionally, before the interview, we might want to determine which sort of answers, for each question, would score **positive** points and which would count as **negative** scores.

Let's take the competency 'proving solving skills' and its formulation "Describe a situation in which you had to address a problem whose cause was not clear to the organization."

The positive and negative points could be:

Positive: recognizes his/her limitations, uses effective strategies, demonstrates a constructive approach towards the issue, takes ownership.

Negative: tries unsuccessfully to fix the situation by himself/herself, uses inappropriate strategies, does not reframe the problem as a challenge, does not take ownership.

The positive/negative points might help us better assess interviewees. Imagine for instance the case where two candidates are given the same score for a specific question: the observation of positive/negative points can help to decide which candidate fared best.

Since we now have the specific questions for each competency, the follow-up questions, the scoring key, and the positive and negative points we are in the position to put together a question-assessment template (See Figure 6.1.8).

Finally, if we consider that one competency, or a set of competencies, is more relevant than others, then competencies might also be assigned a specific weight. For example, given the particular role we are selecting for, we might conclude that judgment is more relevant than the others because the position requires a great deal of experience in a cross-cultural environment. We could, therefore, determine that this competency is 50 percent more relevant than the others in the interview.

Figure 6.1.9 in the next page represents an example of an Interview Assessment, with a summary of all the scores from an interviewee, the different weights to each competency (optional), and the overall score for the interview.

Figure 6.1.8
QUESTION ASSESSMENT TEMPLATE

Q1. Describe a situation in which you had to address a problem where its cause was not clear to the organization				
Context Follow-up				
a) What was the problem exactly? b) What consequences was the problem having? c) When was that?				
Action Follow-up				
a) What did you do to understand the causes? b) How did you do it? c) What was your role?				
Results Follow-up				
a) What happened? b) What did you find out? c) What was the outcome?				
Positive points	Negative points			
<ul style="list-style-type: none"> ↪ Recognizes limitations ↪ Uses effective strategies ↪ Shows a constructive approach to the issue ↪ Takes ownership 	<ul style="list-style-type: none"> ↪ Tries to fix the situation alone unsuccessfully ↪ Uses ineffective strategies ↪ Does not reframe the problem as a challenge ↪ Does not take ownership 			
Interviewer's Notes from Question 1:				
Final Score Question				
No Evidence	Poor	Average	Good	Excellent
0	1	2	3	4

Source: Adapted from *Competency-based Interviewing. Assessing Candidates Based on Their Past Performance*. UNESCO (2016)

Figure 6.1.9
INTERVIEW ASSESSMENT TEMPLATE

Position		Date	
Candidate		Interviewer	

Question	COMPETENCY	Weight*	Score	Weighted Score
#1	Problem Solving Skills	1		
#2	Influential Leadership: Delegation	1		
#3	Influential Leadership: Motivation	1		
#4	Organizational Ability: Planning and budgeting, Task prioritization	1		
#...		
#n	Judgement: Ability to consider multiple points of view/cultural differences	1.5		
			Overall Score	

Comments
Write here the level of engagement of the candidate, the quality of his/her communication or any other relevant comment related to the position.

Source: Direct HR Group, adapted from marsdd.com. *For this position we have considered the competency Judgement more important than the others. In particular, about 50 percent more important. The score of the interviewee for that competence will be multiplied by 1.5. The overall score will result from the addition of all the weighted scores

6.2. CREATE AN INTERVIEWER'S GUIDE

Once the questions and rating scales have been defined, we can proceed to put it all together in an interviewer's guide.

The purpose of such a guide is twofold: in the first place, to sum everything up in the document to train interviewers; second, a go-to resource they can come back to anytime during the selection process.

The interviewer's guide content is usually structured in two distinct blocks: a dynamic one, unique to the specific role the interview process is aiming to recruit for; and a more static block with general advice on conducting an interview, regardless of the position.

Let's start with the contents of the dynamic block. As you might have guessed, this section should contain the elements we have been developing so far:

1. A definition of each of the competencies relevant for the specific role.
2. The required competency levels of each competency.
3. The interview questions that we have already designed: the main questions, and the follow-up questions.
4. The scoring key.

The second block, the one we are going to develop in further detail in this section, will provide general instructions about the interview process: how to prepare for the interview, recommendations about taking notes during the interview, rating mistakes and common biases, and other pitfalls to avoid.

Prepare for the Interview

Prior to the interview itself, you should:

- a) Ensure the candidate meets the minimum requirements for the position. That means a thorough read of the resumé, application form, cover letter or other relevant materials. Is all the relevant information provided by the candidate in these materials? Are there any gaps in the dates provided for past job experiences/academic years? If so, make sure you address them in the interview. Do previous work experiences appear to be relevant? Have management positions been held (if required for the current role)?

The interviewer's guide usually contains two blocks: one that refers to the specific role, and another block with general advice on conducting the interview.

b) Check the interview questions and materials necessary for the interview. You already have a clear understanding of the questions you will ask, based on the required competencies; you also have a list of follow-up or probing questions, as well as a list of positive/negative points to check for during the interview. Finally, you have the information or gathered the materials that will be presented to the candidate during the interview: information about the project or department he/she is being considered for, organizational charts, information about the company, conditions of employment and benefits, etc. It is highly advisable that all those materials are available in both Chinese and English.

Recommendations on Taking Notes

Taking detailed and regular notes of observable behaviors and verbal responses during the interview is crucial. Documenting your learnings about the candidate during the interview will support you later to make your evaluation as objective as possible. See Figure 6.2.1 with a few tips on how to go about taking notes.

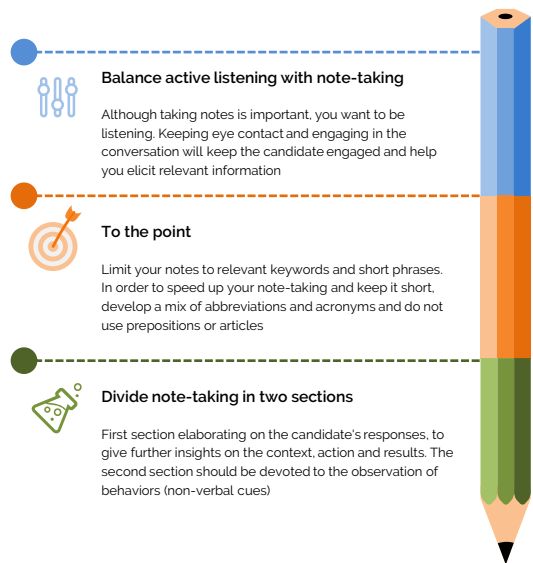
Taking notes during the interview will reduce the cognitive effort and memory loss that would entail retrieving those observations once the interview is concluded, when you are most likely to miss/not recall important information or remember it in a distorted way. Attribution or stereotyping biases may influence the subsequent retrieval of information (more about biases later in this chapter).

Taking notes is also helpful to avoid primacy and recency effects: the tendency to better remember information provided at the beginning and the ending of the interview, at the expense of potentially valuable information supplied during the lengthier middle. In addition, notes will help produce and justify a candidate's rating and, overall, reduce variance (disagreement) across evaluations of several candidates.

Notes should be taken in the vicinity of the interview question(s) where verbal cues or behaviors took place. That is, using a standardized form as seen in Figure 6.1.8 in the previous section.

Focus solely on what is verbally said or observed behaviors (non-verbal cues). The challenge here is to

Figure 6.2.1
THE ART OF TAKING NOTES IN AN INTERVIEW



Source: Direct HR Group from various sources

avoid taking notes based on subjective impressions or opinions.

Do not write down impressions that are not backed-up by job-related facts or use subjective language. You can take a moment after the interview to elaborate on your notes and to make sure they are as fact-based as possible. An example of a subjective note is “the candidate is very unstructured in his/her answers”. One way to put it objectively could be to pair the observed behavior with required competencies: “The role requires organization and prioritizing skills. The candidate did not display the ability to present arguments in a structured and concise manner”.

Common Biases and Rating Mistakes

As previously mentioned, the main purpose of structure-based interviews is to ensure standard, consistent evaluations across candidates.

In the interview process, interviewers incur in biases consciously or unconsciously that result in unequal opportunities for candidates.

Biases undermine the consistency and fairness intended with structured interviews. Orchestras in the U.S. were mostly composed of men in the 70s, with the top five orchestras having fewer than 5% of female musicians.² To address such a gender imbalance, orchestra conductors started holding blinded auditions where musicians would play hidden behind a curtain. Consequently, gender, race, personal connections, or reputation stopped accounting for anything in auditions and the only thing that mattered was the music that came from behind the curtain. The proportion of women playing in the larger orchestras has grown by a factor of five since blinded auditions became the norm - a great leap, though they still make up for only one-quarter of the musicians.

Some rating errors include, for instance, giving all candidates only high ratings or only low ratings.

In Figure 6.2.2 in the next page, there is a brief overview of the most common rating errors and biases to be taken into consideration.

Explicit as well as implicit biases - the ones we don't realize we have - will result in misleading hiring decisions if not accounted for.

How to Minimize Biases?

Whether it is an attribution (“Similar to me”) or halo effect bias, the best course of action is to avoid jumping to conclusions too fast. When evaluating, interviewers should concentrate on the responses given by the candidate rather than on the outward characteristics or personality of the candidate; hold back from considering any non-performance related factors. A re-examination of the scores of the candidate based on the hand notes interviewers wrote during the interview might also help to reduce biases.

Another way to tackle biases is to conduct interviews using a panel of interviewers, rather than being led by just one interviewer. This is a way to even out individual judgments. Yes, there might be individual errors, but since all panelists share a common basis when all judgments are averaged, the average usually is accurate. However, a panel might not work if all panelists share the same bias and/or if panelists evaluations influence one another - that is, if

assessments from different panelists are correlated.

How to Minimize Rating Errors?

By understanding the competencies assessed and comparing the behaviors observed in the interview with the behaviors used to establish the proficiency-level ratings for each competency.

When there are doubts on whether to award a high or a low score, interviewers need to understand a high score does not indicate a perfect performance and a low score does not indicate a complete lack of performance. It means, in the high score cases, that the interviewee demonstrated more of the competency than is generally common, and in low score cases, it means the interviewee did not show much of the competency in his/her responses.

Figure 6.2.2
MOST COMMON BIASES AND RATING MISTAKES DURING AN INTERVIEW



Source: Direct HR Group, adapted from various sources

Do's and Don'ts: Tips for Conducting the Interview

Do's

- Leave enough time for the interview, so you don't have to rush it to an abrupt end. Take into consideration questions from the candidate when scheduling the meeting. Usually, 60 to 75 minutes is a good rule of thumb.

You are representing your organization. Therefore, you want to be on time and dress according to the explicit or implicit codes that are part of your organization's culture. It is also a way to convey an accurate image of your organization, so the job applicant gets a better understanding of the company.

- Be attentive and supportive. This will help you create a more considerate atmosphere, allowing the candidate to talk more openly.

- Introduce yourself briefly, in less than one minute: what do you do in the company, how long have you been there, and your background if you consider that is relevant.³
- Provide a brief overview of what your organization does, why it does it, and some of the most recent milestones. Then introduce the role, the responsibilities it entails, and what a typical working day looks like.
- Present the opportunities for growth, development and career possibilities for the role.⁴ Although it looks obvious, often this is not appropriately addressed. Bear in mind that the candidate will ultimately have to decide whether the position represents a good career move.
- Focus on the person.⁵ You already have the resume. Your goal here is to find out whether the candidate has the necessary proficiency-level for the relevant competencies.

Halo effect

The tendency to like or dislike everything about a person, based only on very limited information. Taking just a very limited piece of information we build unfounded associations, including things that we have not observed. Because someone shows he/she is such a great speaker, we may incorrectly assume such an individual might be also be a very creative person or an excellent problem solver.

In the **context of an interview**, the halo effect increases the weight of first impressions, causing the interviewer to build associations that are not founded on observations. It might induce higher ratings for Problem Solving just because the candidate has a high score in verbal communication (Interpersonal Skills), irrespective of the candidate's performance on Problem Solving. It also increases the likelihood to dismiss information that might contradict the first impression.



Leniency

The reverse of strictness: a tendency to give high ratings to all candidates.

Central Tendency

As opposed to leniency and strictness - which are about extreme ratings - interviewers might present a tendency to rate all competencies at the middle of the scoring scale.



- Keep an open-mind: listen actively and engage in the conversation making proper use of follow-up questions when necessary. Find out what is important to the candidate, to see if that is a good match for the role and the company.
- Related with the above, keep eye-contact with the candidate. Be mindful of your body language: lean in when he/she speaks, sit up straight, smile.
- Keep it professional. You can be friendly but within reason.
- Be open and transparent if the candidate enquires about the challenges the organization faces or those of the specific role. You do not want the candidate to leave with a sweetened version of what the current reality is.
- Inform the candidate about the next steps. Confirm when he/she will be hearing back from you as well as other time frames: how long the whole process might take, whether there is a holiday coming soon that might have an impact on the hiring schedule or any foreseeable eventuality that could cause delays on feedback to avoid unnecessary anxiety on the candidate's side. Offer the candidate to reach out to you if there are further questions.

Don'ts

- Perhaps the biggest pitfall for the interviewer when conducting the interview is to believe that the heavy lifting is only on the candidate's side. Do not be complacent. When introducing the *does* we provided a set of recommendations that, if followed, will help you to stay sharp. Remember this is a two-way communication and you must be engaged.
- The interview is about the candidate. Avoid talking too much about you, or your organization. Although it is necessary to strike the right tone as a desirable employer, this is not a sales pitch. If the candidate asks you a very specific question keep it to the point and get back to the conversation. If you realize, once the interview is over, that you have talked more than the interviewee then you did not do it right.
- Avoid sounding like a robot when introducing

Be open and transparent. You do not want the candidate to leave with a sweetened version of what the current reality is.

yourself, the role or your organization. You will strike the candidate as someone that is not interested in him/her. This will most likely discourage the candidate and jeopardize the interview.

- Do not show, verbally or non-verbally, whether you agree or disagree with the candidate's answers.

Avoid other non-verbal clues that show you are not interested: fidgeting, checking your phone, not keeping eye-contact, not smiling. As with your phone, it is even better that you don't even have it visible: research shows that the mere presence of a smartphone lowers the quality of in-person conversations.⁶

- Do not inquire about marital status, spouse's occupation, actual or planned children. In China, candidates are less reluctant to facilitate details on marital status or their spouse's job, but they would not appreciate further enquiring about their children or parents' situation.
- Avoid discussions on topics such as social, religious, political, or moral values.
- Avoid using questions that require a yes or no for an answer.
- Avoid using brain-teasers (i.e., how many golf balls could fit in an airplane?). They lack validity: the ability to solve brain teasers does not correlate with job performance.⁷ Google popularized these type of questions in recruitment interviews, but they were later on discontinued.⁸
- Keep the jokes for another occasion. You sure are funny, but this is not the time.
- Avoid identifying with the candidate. Again, keep it always professional.
- Refrain from being condescending or patronizing.
- Refrain from the urge to steer the candidate towards an answer by following up your question with examples. This is a natural tendency. However, let silence do the work: ask your question and stop. Silence gives room for the candidate to think.

The biggest pitfall for the interviewer is to be too relaxed when it is time to start the interview. Do not be complacent. Remember this is a two-way communication and you must be engaged.

6.3 CONDUCTING THE INTERVIEW

Stage 1. Opening. Welcome

Present yourself by name and function. Put the candidate at ease (see Do's and Don'ts in the previous section of this chapter). Make sure the candidate is comfortable. Offer the candidate coffee, tea or water.

The goal here is to eliminate barriers that prevent the candidate from presenting himself/herself as truthful as possible. This warming up process should take somewhere around five to eight minutes, since in China the welcoming is perceived as of higher importance due to Chinese culture specific behavior.

Brief the candidate. Explain how the interview is going to look like, how long it might take. Tell the candidate to focus on critical facts when answering. Let the candidate also know that you will be taking notes.⁹

Stage 2. Introductory questions: Review Resume & Assess Motivation

Go through any gaps in the CV that you had previously spotted when preparing for the interview.

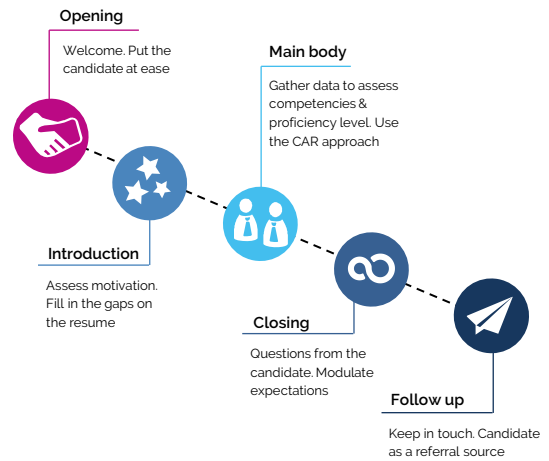
Learn about the candidate's motivation for the role. "What are you looking for in this job?" It is an excellent opportunity to understand if the candidate is looking for growth, or if he/she is an achiever and feels his/her current job is not serving that goal anymore. It allows you to understand if the candidate is running away from a job that is bad or if he/she is looking for something better.

Whatever the intrinsic motivation of the candidate, this is a question better addressed at the beginning of the interview. If asked at the end, you would most likely obtain an answer conditioned by the information elicited by the candidate during the interview. That is, an answer modulated to fit into the job requirements rather than the underlying factors that fuel motivation in the job applicant.

Stage 3. Main Body of the Interview

Focus on what is relevant, by not losing sight of the competencies that are relevant for the position and follow the questions you had designed, always giving

Figure 6.3.1
STAGES OF AN EMPLOYMENT INTERVIEW



Source: Direct HR Group

priority to open-ended questions.

You may pose questions on salary level, but interviewees have the right to not disclose such information. We do not recommend asking questions that are irrelevant to the requirements of the job at hand.

Since February 2019, the 'Circular about Further Regulating Recruitment and Promoting Women's Employment' - a joint notice issued by nine government bodies, including the Ministry of Human Resources and Social Security (MOHRSS) and the Ministry of Education - banned from asking women about their marital and childbearing status or to take a pregnancy test in their medical examination, as part of a series of measures to address gender-based discriminatory practices when hiring female candidates. If the relevant government authorities receive a complaint from an individual, the government authority will investigate and provide a warning and/or give a penalty and/or expose the violation in the media.

If Required, Guide the Candidate

Do not accept answers that are not relevant, superficial or too short. Get facts and specific details about the candidate's accomplishments.

When necessary, you will have to guide the candidate to stay on course but be mindful of doing it in a neutral way. Avoid using follow-up questions that already suggest a response, whether positive or negative. Whenever the candidate is elaborating on a situation that appears to be insignificant, going into examples that are too far away in time, failing to conclude on what was the outcome, or it is unclear what role the candidate played, you will have to intervene:

- Request another example, something that is more spot-on with regards to the initial question (do so politely).
- Request an example from the candidate's most recent job.
- Ask directly about the result.
- Ask what the candidate did in that situation: "What was exactly your role?"

Do not accept answers that are not relevant, superficial or straight to the point. Get facts and specific details about the candidate's accomplishments.

Major Accomplishments/Challenges and CAR Sequencing

The interview should contain a balance between questions that look for evidence about the candidate's past achievements (i.e., inspirational leadership) and questions that look for evidence on how the candidate fared when confronted with challenges (i.e., integrity and ethics).

Additionally, the questions should be staged in such a way that allows the candidate to give evidence of context, action, and results (CAR).

Finally, remember to use in case you had elaborated them previously when working on the scoring key (See 6.1 in this chapter), the positive/negative points (i.e., positive: uses effective strategies; negative: tries unsuccessfully to fix the situation by himself/herself).

Stage 4. Closing

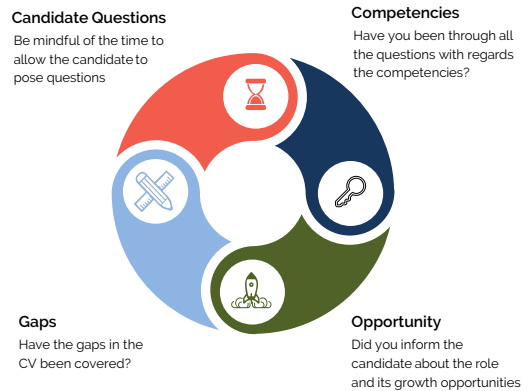
Besides the fact that you should have been keeping track of time, you can close the interview effectively once you have gathered the information you had previously established as necessary. Did you tell the candidate about the role and its growth opportunities? Are the gaps in the candidate's CV accounted for? Have you been through all the questions with regards to the competencies? It is ok to backtrack a bit if you realize that you missed something.¹⁰

If you have it all covered it is now the time to allow the candidate to ask questions. These questions are a helpful complement to the information you gathered at the beginning regarding the candidate's motivation.

The type of questions the candidate asks will indicate interest. If the questions revolve around the number of days of paid leave, compensation or overtime, then it sends a different signal than if they are about the company's mission, the team background or the projected growth of the business.

Many Chinese candidates are observed to have high expectations, as many see their peers quickly move up the corporate ladder and expect that the same should happen to them. Despite current signs of an economic slowdown in China, Chinese employees' salary growth expectations rank among the highest in the world. The biggest concerns of candidates are salary, benefits and career development. Now is a good

Figure 6.3.2
CLOSING THE INTERVIEW



Source: Direct HR Group

opportunity to manage candidate expectations.

It is advisable that you inquire about the availability of the candidate. When can the candidate start? Or ask if the candidate sees this role as the next step in his/her career. Both questions invite for answers that will show to what extent the candidate is interested.

Another (potential) benefit from taking questions from the candidates is that it might uncover concerns or highlight positives with regards to the job that were not considered when designing the job communication materials, thus giving very valuable insights on how to remodel those.

Finally, inform the candidate what happens next: when will the candidate hear back from you, and if there are going to be other interviews. Give the candidate your business card, to reach out to you if needed. Finish the interview on a positive note but be mindful not to raise any expectations.

Stage 5. Follow Up

Both the candidate and you have invested a sizable amount of time in the process. Whether the candidate receives an offer for the job or not - and especially if the candidate does not - you want to leave a good impression of yourself and your company.

First, think about the long-term impact on your employer branding if you handle rejections properly: a rejected candidate sure will appreciate a proper follow-up, and you will be lowering the risk of the candidate criticizing you or your organization - something relatively easy to do with the vast array of media platforms currently available. If your company does not have a well-established employer brand, not following up stacks up against the path to building one. And even if your organization is a well-established player, not handling carefully the candidate's experience in a systematic way might tarnish the company's reputation.¹¹

Second, no matter if you are an in-house or an external recruiter, the candidate is a potential referral source, and he/she might be the right profile for a future opening. It is recommended to give all rejected candidates a phone call to clarify why he/she did not get the job: be as truthful and honest as possible. In this respect, beware of comments that could be discriminatory (i.e., "we have decided to only consider

When can the candidate start?
Does the candidate see the role as the next career step?
Answers to such questions will show to what extent the candidate is interested.

male candidates for this job role”). You might want to check with HR and Legal, so you don’t leave yourself exposed. Avoid mentioning the experience and qualifications of other applicants.

It is also recommended to send an email to every candidate, informing the candidate formally of the rejection. Keep the email short - don’t elaborate too much - and stick to the same provisions we mentioned for the phone call. Most applicant tracking systems (ATS) have rejection templates, so this will not take too much time to set up, but make sure you adapt them for each candidate, so the email feels personal (here you can make good use of your interview notes).

Finally, to nurture the relationship for future job openings or other opportunities keep in regular contact with the candidate (once every six months should suffice).

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Background Checks in China



7.1 INTRODUCTION

As competition for jobs in China gets tougher along the lines of slower growth in the economy, there is an incentive for job applicants to beautify or magnify some of their past credentials and professional achievements in their resumes. It is therefore recommended to put an emphasis on confirming a candidate's credentials and other relevant information.

You can do that with background checks. In this last chapter we review the elements you should be checking for, while remaining compliant with China's regulations around personal data.

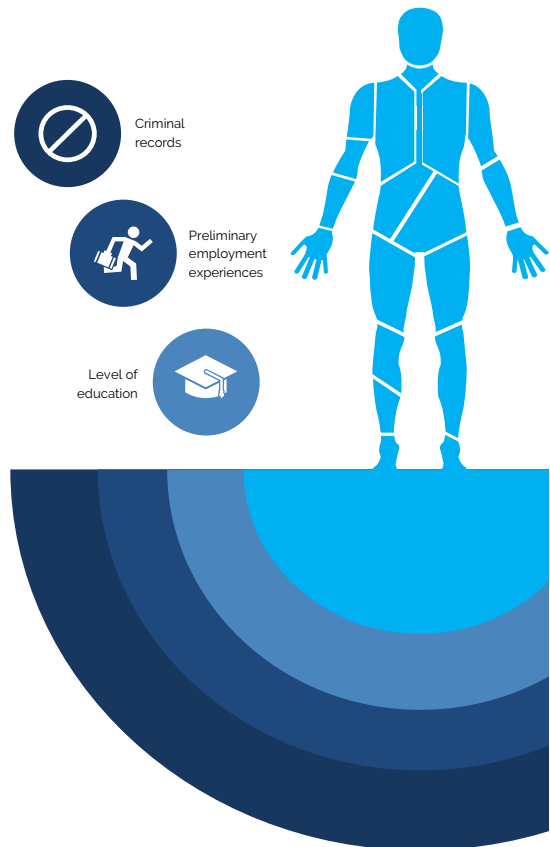
7.2 IN THE LIGHT OF WHAT WE KNOW

It is advisable to perform background screenings before making an actual employment offer. An employer should do its best to verify candidates' basic information: level of education, past work experience, and criminal record.

You should request the certificates and diplomas to verify the qualifications stated by the candidate in his/her resume. Since there is not a central public database system to check for the authenticity of those documents the employer, or a third party acting on its behalf, should connect with the specific academic institutions. And even checking directly with those institutions might not be enough. Andrew Houlbrook, former intelligence analyst at London Metropolitan police and now business intelligence and investigations at PSU and based in Beijing, told us via a phone interview about "diploma mills"¹: educational institutions that do not provide any education whatsoever, but issue diplomas and certificates in exchange for a fee.

Checks on previous professional endeavors are relatively straightforward. With the candidate's provided references and consent, you can contact previous employers. In addition to that it is useful to look a little further: "past terms of employment and employers is fine but look also at what is not in the CV, like undeclared company involvements", Mr. Houlbrook advises. And adds: "candidates may have business ties with companies that weren't declared in their CV. Sometimes these other business involvements can be easily explained, since there is no conflict of

Figure 7.1
BACKGROUND CHECKS IN CHINA
What to look for



Source: Direct HR Group

interest with the employer's business operations. Other times, clients are interested in knowing about why the candidate left: they see an early exit and want to know why is that".²

And finally, it remains checking for any criminal record. Certain jobs in China require to have a clean criminal record. These jobs are called *CNNC jobs*, with the acronym standing for Certificate of No Criminal Conviction. To check for a Chinese national criminal record, an employer can ask the candidate to present a CNNC though the law is not clear on whether a CNNC can be provided if the candidate is not applying for a CNNC job (the applicants must present, among other application documents, an introduction letter from the employer). The CNNC is produced by local security bureaus, at the request of the candidate. Because there is no standard format for the CNNC it is relatively simple to forge them. An employer cannot request directly the CNNC by itself.

In theory, it is possible for the employer to walk in together with the candidate into a local security bureau or police station to request for the CNNC. However, there are many instances in which this might not work either: what if the staff is not familiar with the certificate, or refuses to release it, what if the file is not properly stored and cannot be retrieved. As Mr. Houlbrook points out: "there is not enough consistency or clarity around these procedures."³

There are agencies that provide CNNC's on request. They claim to have access to criminal record databases of the Ministry of Public Security. However, how exactly they obtain this data is often not transparent. Mr. Houlbrook recommends "when outsourcing background checks in any capacity you must really understand your third parties and who you are working with. Understand their business model. Criminal law will come into effect if you are sourcing information using incorrect channels".⁴

The only way to get an effective glimpse on any kind of risk or record of any involvement in legal matters from a candidate is via desktop-based online research. That is also the best way to remain compliant with local regulations. "Finding information on criminal records is hard, but not impossible. It takes skills, some time and some patience. Knowing which sites to search, understanding the peculiarities of these sites, and how to research for keywords is something you learn. For example, we source information directly from

"When outsourcing background checks in any capacity you must really understand your third parties and who you are working with. Understand their business model."

open court records since this information is publicly available in China. Additionally, it is not only about the individual and search terms around that individual. If he/she was holding an executive position, you might want to look also into some financial issues with the company while that individual was employed there. You can also look at local court records and try to spot issues that came to surface when that individual was in charge”, adds Mr. Houlbrook.⁵

Despite the limitations on background screenings based on online research, the methodology can provide results within a few days.

Background screenings based on online research have their limitations, but the methodology can provide results within a few days. Mr. Houlbrook acknowledges “You cannot conduct a thorough investigation to produce hard evidence. Clients need an assessment in a matter of days, but there is enough information publicly available to be able to provide a risk indicator”.⁶

7.3 LEGAL PROVISIONS IN CHINA WITH REGARDS TO DATA PRIVACY

How to remain on the right side of the fence? In China there are no explicit legal provisions preventing an employer, or a third party acting on behalf of an employer, to conduct background checks on candidates.

However, this does not mean there are no significant legal considerations to take into account before engaging in background checks of sensitive personal information.

China’s regulatory framework for privacy protection spans through laws and regulations across civil, administrative and criminal areas.⁷ In this chapter we provide just a short review of the current framework but it should not be taken as legal advice.

The Tort Liability Law (since July 1, 2010) includes provisions that relate to the protection of personal data. Article 2 details a list of eighteen civil rights that are protected under the Law, one of them being the right of privacy. If an individual considers his/her right to privacy has been undermined, he/she may sue against the injuring party to seek for compensation.⁸

Under China’s Criminal Law (Art. 253), individuals selling or illegally providing personal information obtained from his/her employment are committing a

criminal offence. It also applies for individuals acquiring such information (by stealing or by any other means). If those individuals act on behalf of a company or any other type of organization, the entity is subject to a fine and the individuals responsible or directly involved could face imprisonment of up to three years, criminal detention and fines.⁹

The Cybersecurity Law of the PRC (CSL), effective from June 1, 2017, is perhaps the most relevant piece of regulation for the purposes of this chapter. The CSL provides a series of data protection provisions in the form of a national level legislation. It is considered a milestone towards the implementation of a national protection law. It defines personal data as information that identifies a natural person either by itself or in combination with other information. That includes a person's name, address, telephone number, date of birth, identity (ID) card number, medical records, genetic and biometric information, bank account information and transaction records, e-commerce sites account information and transaction records, and personal consumption habits.¹⁰

A detailed national (non-binding) standard known as the Personal Information Security Specification (PISS) came into effect on May 1, 2018. The PISS separates between general personal data and sensitive personal data. The latter may include, among others, personal ID card numbers, health and biometric data, bank account numbers, personal communications, and credit records. To collect sensitive personal data from an individual requires his/her express consent (in writing or via other affirmative action) only after the individual has been informed of the purpose and intent of collecting such data; for general or non-sensitive personal data, tacit consent is enough (i.e., the individual did not oppose to it).¹¹

China's Cybersecurity Law is considered a milestone in data privacy regulations at the national level.

7.4 A FINAL WORD ON BACKGROUND CHECKS IN CHINA

Based on all we have exposed, background checks in China can give the impression of requiring too much time. They may even come across as intimidating, given the legal precautions one must bear in mind. These two factors combined might deter you from performing background checks.

It is a commonplace conclusion, but one needs to balance the costs against the potential risks of not conducting background checks. It is worthwhile to perform these screenings, even for some of the most basic things stated on a CV. As mentioned in the introduction, in the current economy and labor market conditions in China, the incentives to misrepresent facts and credentials are high.

Remember that the screening of academic credentials and past employment are relatively straightforward and can be produced without necessarily having to involve a third party.

Screening for evidence of criminal conduct is more complex, though you might not need to execute it for all hires but only for positions deemed as critical within your organization. Criminal background screening can also be performed in house. As Mr. Houlbrook points out “it is not something you do in a couple of hours, but with some training and a clear workflow - specially with regards to online checks - it is feasible to have in two or three days a quite good background screening and risk indicator from openly available information”.¹²

1. Andrew Houlbrook, phone interview with Direct HR Group for ChinaHRnews.com. November 15, 2018. See also: <http://www.chinahnews.com/article/just-like-that-no-background-check/>
2. Ibid.
3. Ibid.
4. Ibid.
5. Ibid.
6. Ibid.
7. Dong, Marissa (Xiao). (2018) *The Privacy, Data Protection and Cybersecurity Law Review (5th Edition)*. The Law Reviews. Editor: Alan Charles Raul. October 2018. Page 126. Access full book here: https://thelawreviews.co.uk/digital_assets/b5f160acfb67-48da-be84-a085ee98b2f2/The-Privacy-Data-Protection-and-Cybersecurity-Edition-5.pdf
8. Ibid. Page 128
9. Ibid. Page 127
10. Ibid. Page 135
11. “Where are we now with data protection law in China?” Freshfields Bruckhaus Deringer. September 13, 2018. Full article: http://knowledge.freshfields.com/m/Global/r/3824/where_are_we_now_with_data_protection_law_in_china
12. Ibid. 1



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