

Enterprise's Duty of Care to Employees

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1. Overview

Corporations, manufacturing facilities, mines and construction sites, etc. residing in China have a duty of care in relation to workplace health and safety to their employees, inside and outside the territory of People's Republic of China ("PRC"). This duty imposes general obligations on employers to do all that is reasonably practicable to ensure employees' health and safety at the workplace. It is a broad and expansive subject, governed primarily by the *PRC Law on Work Safety* (the "Work Safety Law")² and the chapter 6 of *PRC Labor Law*³. These laws are applicable to all work places in units that are engaged in production and business activities (all referred to as "Enterprises") within PRC territory.

In addition, the *Administrative Provisions for the Safety of Overseas Chinese-funded Enterprises and Personnel*⁴ (the "Provisions for Overseas Safety") extend the duty of care in relation to workplace health and safety to Chinese employees sent overseas. This duty is concurrently borne by the central and municipal governments and Chinese-funded enterprises, specifically referring to Chinese foreign investment joint ventures residing outside of PRC territory ("overseas investment PRC companies"). The *Provisions for Overseas Safety* was a legislative response to the increasing numbers of personnel working and sent to less developed parts of the world by Chinese-funded enterprises, covering the issues from the security education and training, prevention of overseas safety risks, urgent responses to overseas safety emergencies, formulation of administrative regulations in high-risk countries and regions and corresponding liabilities for failing to fulfill these responsibilities.

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² Adopted by the Standing Committee of the National People's Congress, effective as of November 1, 2002.

³ Adopted by the Standing Committee of the National People's Congress, effective as of January 1, 1995 and amended on August 27, 2009.

⁴ Adopted by the State Supervisory Administration of Work Safety, Ministry of Commerce, Ministry of Public Security, Ministry of Foreign Affairs, National Development and Reform Commission, State-owned Assets Supervision and Administration Commission of the State Council, All China Federation of Trade Unions, effective as of August 13, 2010.

The recently amended *Law of Prevention and Control of Occupational Diseases*⁵ provides further protection to workers to prevent and control work-related diseases. Other regulations, such as the *PRC Mine Safety Law*⁶, impose specific health and safety standards for employees relating to particular work activities or risks.

This article will focus on the duty of care in relation to workplace safety owed to employees of enterprises residing in China (including Chinese and non-Chinese nationals), as well as such duties owed to employees sent overseas to work by overseas Chinese-funded enterprises. The PRC laws impose strict workplace health and safety standards penalties (see details in section 2.2) for violating these legal requirements, which demonstrates the importance of ensuring compliance by implementing proper safety procedures and policies and providing employees with the necessary training, equipment and information to perform their duties safely.

2. Duties of Enterprises Residing in China towards Local Employees

2.1 Duties of Employers

Chinese employers have a number of strict workplace health and safety requirements that must be met according to the *Work Safety Law* and other relevant laws and regulations. These requirements are applicable to all employees of Enterprises residing in China.

Article 17 of the *Work Safety Law* provides a general overview of the duties of Chinese employers, requiring them to provide and maintain a safe system of work, appoint responsible persons to control and monitor the implementation of safety policies, conduct risk assessments of hazards and record potential risks and findings. Specifically, the principle leading members of an enterprise owe a duty of care to their own company to:

- a) establish and improve a responsibility system for work safety;
- b) institute and operate internal rules and regulations for work safety;
- c) guarantee effective implementation of work safety programs;
- d) provide supervision and inspections to ensure work safety and eliminate hidden dangers;
- e) arrange for the formulation and implementation of rescue plans in the event of accidents; and

⁵ Adopted by the Standing Committee of the National People's Congress, effective as of May 1, 2002 and amended on December 31, 2011.

⁶ Adopted by the Standing Committee of the National People's Congress, effective as of May 1, 1993 and amended on August 27, 2009.

f) report to higher authorities any accidents resulting from unsafe working conditions.

Employers are also required to provide their employees with adequate education and training in work safety before assigning them to new posts, as well as provide special training to workers who are specialists. Who is considered a specialist is determined by the departments responsible for the supervision and administration of safe production, together with relevant departments under the State Council. When new duties give rise to new or increased risks and workplace safety issues, updated education and training are expected to be given at appropriate time.⁷

Enterprises are required to keep safety equipment maintained, serviced, and tested regularly. In particular, they are required to sign and keep copies of maintenance, service, and test records⁸. Employers are obligated to provide employees with protective equipment that meet the state or industrial standards⁹ and also train employees in the proper use of their protective equipment. The costs of providing protective equipment and workplace safety trainings must be arranged properly and timely by employers.¹⁰ In addition to protection equipment, employers are required to pay social insurance premiums to employees in relation to work-related injuries and/or otherwise purchase commercial insurance to cover certain types of unexpected risks. The type and amount of social insurance are provided for in details in the *PRC Social Security Law*¹¹.

There are specific provisions in place to ensure workplace health and safety for construction projects involving mining or the manufacture and storage of dangerous products.¹² Such projects must undergo a safety assessment in accordance with the relevant State regulations.¹³

Chinese employers are expected to bear special responsibilities under *Work Safety Law*. That is to say, when a major accident occurs due to a neglect of work safety, the principal leading members of the Enterprise are personally responsible for making immediate arrangements for rescue operations and are forbidden from leaving their posts without permission while the accident is being

⁷ Article 21-23 of Work Safety Law.

⁸ Article 29 of Work Safety Law.

⁹ Article 37 of Work Safety Law.

¹⁰ Article 39 of Work Safety Law.

¹¹ Adopted by the Standing Committee of the National People's Congress, effective as of July 1, 2011.

¹² Articles 25–27 of Work Safety Law.

¹³ Article 27–32 of Work Safety Law

investigated or addressed.¹⁴

2.2 Penalties

The employers that fail to properly perform their workplace health and safety duties in China will face a number of statutory penalties. Article 80 of the *Work Safety Law* provides that when a decision making body of an employer, a leading member or an investor, fails to provide sufficient funding to ensure the statutory level of workplace safety, the Enterprise will be ordered to correct the deficiency within a specified time period, otherwise it will be ordered to suspend operations.

Even if sufficient funding is provided, employers may be required to rectify any negligent failure to meet their duties to ensure work safety within a prescribed time period or face suspension of operations. Failure to provide safe working conditions leading to an accident may also occasion criminal sanctions¹⁵ or fines between RMB 20,000 and RMB 200,000.¹⁶

2.3 Rights of Employees

In addition to the duties imposed on employers, the *Work Safety Law* provides an expansive set of protections and responsibilities to employees, namely providing that employees are entitled to guarantees of workplace safety, the prevention of workplace hazards, and the payment of insurance premiums for work-related injuries. The latter must be clearly indicated in employment contracts with employers. The Enterprises are not allowed to shirk these responsibilities even if an agreement of waiver is reached between both parties.¹⁷

Article 45 of Work Safety Law provides that employees are entitled to be informed of any dangers that may exist in their positions and any precautions or exigency measures put in place to eliminate these dangers. The employees may make suggestions about workplace health and safety policies to their employers and are entitled to criticize, report, and accuse their employers for any lapses in safety conditions.¹⁸

¹⁴ Article 42 of Work Safety Law.

¹⁵ Article 134 & 135 of the Criminal Law.

¹⁶ Article 81–86 of Work Safety Law.

¹⁷ Article 44 of Work Safety Law.

¹⁸ Article 46 of Work Safety Law.

Furthermore, when employees become aware of an emergency situation that is a direct threat to their personal wellbeing, they are entitled to suspend operations and evacuate from the workplace after taking possible emergency measures. Employers are prohibited from retaliating against employees who exercise their rights under the *Work Safety Law* to criticize, accuse, or inform against the work safety conditions of their employers or suspend operations or evacuate their workplace.¹⁹

2.4 Duties of Employees

Meanwhile, employees bear a number of responsibilities with respect to maintaining workplace health and safety. They must strictly obey safety rules and regulations instituted by the Enterprises and follow operation instructions of their employers. Employees are expected to cooperate with employers' supervision for the purpose of workplace safety and use protective equipment provided by the employer in the proper manner.²⁰

The work safety knowledge necessarily given is essential in general to enhance the ability to prevent and respond workplace emergencies. Thus, even though employees are entitled to obtain workplace safety education and training, they also have the duty to receive such education and training until they have mastered the required knowledge.²¹

When employees recognize hidden dangers that could cause accidents or otherwise jeopardize workplace safety, employees are obligated to immediately report to the person responsible for maintaining workplace safety in the Enterprise. Specifically, employees with leadership positions are required to promptly and effectively arrange rescue operations when an emergency arises and to take proper measure in order to prevent the accident from being exacerbated. Employees must not cover-up the accident, intentionally damage the scene of the accident or destroy relevant evidence.²²

3. Duties of Chinese-Invested Enterprises towards Overseas Employees

The *Provisions for Overseas Safety* clarify the duties that overseas investment PRC companies owe to employees sent overseas to work. These provisions reflect the 1981 *International Labor Organization Conventions on Occupational Safety and Health*²³ (the "ILO Convention") that China has ratified.²⁴

¹⁹ Article 44-47 of Work Safety Law.

²⁰ Article 49 of Work Safety Law.

²¹ Article 50 of Work Safety Law.

²² Article 70 of Work Safety Law.

²³ For the 1981 Convention see:

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C155

However, the *IOL Convention* has not provided completely clear guidance with respect to governments and employers for employees who are sent to work abroad.

Albeit the international treaty fails to provide a completely lucid understanding of China's international obligations, the principles of a duty of care to ensure workplace health and safety for their employees, including overseas employees was included into Chinese regulations. A preventative responsibility is provided for in the *Provisions for Overseas Safety* with respect to both employers and the governmental authorities at different levels.

The *Provisions for Overseas Safety* do not state that they are intended to be an exhaustive list of employer responsibilities, but they require that overseas investment PRC companies sending their employees overseas must provide employees with adequate education and emergency training in relation to the protection and security before their departures.²⁵ Such education and training are effective preventative approaches that aim to rise up the prevention awareness and capability when encountering risks overseas.

Furthermore, these overseas investment PRC companies are required to institute a code of conduct for dispatched employees that help them follow laws and respect local customs. Contractors are also responsible for providing the same education and emergency training to subcontractors.²⁶

Employers with overseas employees are also required to establish mechanisms for overseas safety emergency management.²⁷ However, the regulation is structured in a way that leaves the main responsibility for safety of overseas employees largely to various government organizations, embassies, and consulates while employers' duties are being mostly fulfilled through reporting requirements.

In particular, overseas safety accidents refer to overseas events that threaten or cause personal or property injury to overseas personnel, including the traditionally foreseeable ones, such as natural disasters, disease, but also frequently happened ones in Africa in the last decade, such as kidnapping, and territory attacks. The *Provisions for Overseas Safety* require overseas investment PRC companies to inform Chinese embassies or consulates of such circumstances, and receive and follow

²⁴ 1981 ILO Convention ratified by China as of 2006.

²⁵ Article 5 of Provisions for Overseas Safety.

²⁶ Article 6 of Provisions for Overseas Safety.

²⁷ Article 8 of Provisions for Overseas Safety.

instructions from them.

In the high-risk countries and regions where overseas PRC companies have increasingly invested, operated and run businesses, the *Provisions for Overseas Safety* requires employers to engage with the professional security agencies to generate risk assessments prior to operations. Overseas investment PRC companies must institute safety protection plans and minimize overseas safety risks in accordance with the risk assessment reports.

Furthermore, employers must estimate safety costs, formulate emergency response plans and establish a complete overseas safety system and also must be well equipped with necessary safety protection facilities at their sites. They may hire local security guards or armed police to raise the level of protection provided for employees according to the local safety needs.²⁸

4. Conclusion

Arguably, the structure of the *Provisions for Overseas Safety* emphasizes government actions and a reactive approach by overseas employers to risks and emergencies. The nature of the responsibilities of employers and employees is clearer but heavier for cases that occur within PRC territory than for cases occurring outside of it. Nonetheless, these regulations explicitly state employers' obligations to overseas employees and require adequate preventative and protective measures to be taken prior to operation.

In conclusion, Chinese law imposes significant duties upon employers and employees within and out of the PRC territory. Any employers who fail to provide their employees with a safe work environment may face significant criminal and administrative penalties.

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²⁸ Article 17-24 of Provisions for Overseas Safety.