THE US-CHINA BUSINESS COUNCIL
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US China Business Council
Comments on the Draft People's Republic of China Law on Employment Contracts (Draft of December 24, 2006)

The US-China Business Council (USCBC) fully supports a reasonable and balanced Employment Contract Law and appreciates the opportunity to provide comments on the revised draft Employment Contract Law of December 24, 2006 ("Draft Law"). We believe this opportunity to comment illustrates the PRC government's effort to provide more openness and transparency in the formulation of policy and legislation.

USCBC represents 250 US companies that are actively engaged in doing business across all industry sectors. We believe our member companies operating in China have contributed positively to the development of employment policies and practices over the past two decades. This experience has been very helpful as we formulated these comments on the Draft Law. We hope these comments will prove constructive and useful.

The revised Draft Law makes significant improvements to the previous draft and strengthens protections for both employees and employers. We respectfully submit that a few provisions may benefit from further clarification or revision to ensure that the interests and obligations of all parties are adequately balanced.

PROBATIONARY PERIODS

Article 21 of the existing 1995 Labor Law demonstrates that PRC lawmakers recognize the importance of having a probationary period of suitable length for both employee and employer to evaluate fully the suitability of the work relationship. Certain provisions in the current Draft Law will restrict the utility of the probationary period, and possibly make employers more cautious in recruiting and hiring new employees.

- Evidence Requirement – Article 22 and Article 39 Section (i) of the revised Draft Law state that employers may only terminate labor contracts during the probationary period if there is evidence proving that the employee does not meet the work requirements of the position. This effectively eliminates the purpose of the probationary period, during which time the employee and the employer can evaluate each other for the suitability of the position. We respectfully suggest permitting both employer and employee to terminate the labor contract during the probationary period at will, with at least seven days notice to the other party.

- Single Probationary Period – Article 20 states that employers may only set one probationary period with an employee. As employees may leave the employer and return at a later date, or be promoted to new and different positions with substantially different duties with the same employer, we suggest this provision be amended to "the employer shall set only one probation period with the same employee under one continuous employment contract."

- Duration – Article 20 of the revised draft stipulates that if an employment contract has a term of more than one year and less than three years, then the probationary period may not exceed two months. For employees hired for as much as three years, it is difficult for an employer to evaluate effectively the ability of an employee in only two months. We respectfully suggest adjusting the limit to probationary periods of no more than three months for fixed-term contracts of between one and three years' duration.

TRAINING
Companies around the world place great emphasis on training employees and adopt a wide variety of both formal and informal training programs to create a skilled workforce.

The current Draft Law states that employers can require an employee to work a fixed term of service after training only if the training period is for more than one month on a full-time basis. As written, this requirement would inadvertently limit the type of flexible training programs that many companies currently offer and that employees currently enjoy. Examples of such programs include certificate programs at technical schools for skilled workers and executive MBA programs for managers that are often pursued on a part-time basis.

We recommend that Article 23 in the Draft Law discussing employee repayment for employer-provided training be rewritten to reflect current practice, which allows employees and employers to sign separate training contracts suited to their actual conditions, including mutually defined terms of repayment in the event the employee terminates the labor contract.

TRADE UNION / EMPLOYEE REPRESENTATIVE ROLE
Trade unions and employee representatives can play an important role in representing the interests of workers. However, certain provisions as drafted regarding the role of trade unions and employee representatives may have an unintended impact on employees' interests and limit the ability of employers to react promptly to changes in PRC laws and regulations.

- Company Policies: Many employers provide in writing detailed handbooks, manuals, and policies to guide employees and provide clarity to rights and obligations. The Draft Law appropriately acknowledges that companies have a responsibility to establish rules and regulations governing work operations. Article 4 of the current Draft Law requires employers, when setting any rules or regulations with major bearing on the vital interests of employees, to discuss the rules with the employee representative assembly or all employees, to hear their proposals or opinions, and reach a final decision through negotiation on an equal basis with the trade union or employee representatives. The process of consultation, collecting opinions, and negotiation laid out in Article 4 appears burdensome, since, in practice, employers must regularly amend or update their handbooks, guidelines, and manuals to comply with regulatory changes at the local and national level. As employers bear final and legal responsibility for environmental, health, and safety questions, we respectfully submit that Article 4 be altered to read, "Regulations and policies of employers, which shall not be in conflict with existing laws and regulations, and have a direct bearing on the immediate interests of its workers, e.g. labor compensation, work hours, rest, leave, work safety and hygiene, insurance, benefits, employee training, work discipline or work quota management, shall be discussed on an equal basis with the labor union or employee representatives, and shall be announced to all employees internally from time to time, and such regulations and policies shall be part of the employment contract and shall be equally effective as the employment contract terms."

- Notification of Termination: Article 43 of the Draft Law, regarding the required advance notification to the trade union of termination of any labor contract, contradicts existing labor laws. Article 30 of the 1995 PRC Labor Law appropriately allows for trade unions to comment on and seek redress over a termination after the fact if the trade union deems the termination to have been improper or illegal. We suggest Article 43 be amended to require notification within a reasonable time period after termination.

LAY-OFFS
We are pleased to see the Draft Law contains provisions designed to minimize the social impact and disruption of mass lay-offs, while also spurring re-employment and re-training efforts for displaced workers. Some provisions in the Draft Law, however, may have an adverse impact on the productivity and economic viability of employers, and may also increase the administrative burden of related labor supervision bureaus.

- Preferential Retention: Article 41 requires that, when making lay-offs, employers keep on a preferential basis employees who are on relatively long-term fixed contracts or open-ended contracts, who have a relatively longer term of service with the company, or whose families do not have any other employed persons, but have elderly persons and minors. While employers should consider the social impact of lay-offs, economic realities dictate that the key criteria for employment decisions must still be performance. We respectfully suggest the Article be amended to read, "When laying off employees, the Employer may consider giving, but not be required to give, preference to employees who are…"

- Reporting Thresholds: Article 41 also requires employers to report to the trade union and the local labor administrative bureau all lay-offs of "over 20 employees or 10% of total employees." This provision may create a large workload for small- and medium-sized enterprises, many of which employ fewer than 20 employees and therefore would have to report on the dismissal of even one employee. We respectfully suggest that the article be amended to exempt enterprises, including representative offices, with 20 or fewer employees from the requirement to report mass lay-offs to the relevant supervisory labor authorities.

COLLECTIVE CONTRACTS

Collective contracts can be useful in setting standards and common policies for workers. However, the Draft Law appears to be unclear as to the exact relationship between the individual labor contract, which must be signed with all employees, and the collective contract, which employers will sign with the trade union or employee representatives. Since collective contracts may not be suitable in some enterprises and labor relationships, we respectfully suggest that collective contracts be voluntary rather than mandatory, by changing the beginning of Article 50 to read, "Employers and employees may agree to sign a collective contract…"

SEVERANCE PAYMENTS AND FIXED TERM CONTRACTS

We recognize the efforts that PRC regulators have made to ensure that all employees enter into legal and appropriate contractual relationships with their employers. The current Draft Law articulates three types of labor contracts, all of which foreign companies currently use depending upon their business needs. In order to improve the clarity of the Draft Law's stipulations, USCBC respectfully recommends the following changes:

- Article 14, Section (iii) requires that an employee automatically receive an open-ended contract following the conclusion of a fixed-term contract on two consecutive occasions. As currently written**,** this provision is unclear as to whether the employee and employer engage in equal negotiations before the adoption of the open-ended contract, or if the second fixed-term contract automatically converts into an open-ended contract using the existing terms of the second fixed-term contract. We recommend that employers and employees be allowed to equally negotiate and mutually agree to an open-ended contract only if the employer wishes to continue to employ the employee after the conclusion of the second fixed term contract, and ask that this article be revised to clarify this point**.**

- Article 46, Section (v) requires employers to pay severance to an employee whose fixed-term contract expires and who is not offered a new contract with better terms. Fixed-term contracts, like contracts for specific projects, are entered into by both parties with the understanding of having a definite end. We respectfully submit that severance payments should not be applicable as the employer is not ending the labor relationship before the contract expires. We suggest that the requirement to pay severance at the conclusion of a fixed-term contract be removed from the final draft.

LABOR DISPATCH

Labor dispatch agencies play a useful role in helping to ensure full employment for China's workforce. Many companies rely upon labor dispatch agencies to fill supplementary positions that they cannot fill within their organization, such as information technology (IT) and administrative support, or to temporarily fill a position while another employee is on sick or maternity leave. As such, we recommend that current provisions in the

draft law be adjusted to reflect the important employment role that labor dispatch organizations play in the overall economy. USCBC respectfully recommends the following changes:

- Two-year Minimum: The provision in Article 57 requiring labor dispatch agencies to sign a two-year contract with any dispatched employee would make temporary staffing prohibitively expensive for agents and companies and conflicts with the short-term nature of such employment. This could have the effect of inhibiting the development and use of this type of flexible employment designed to meet short-term company needs. We suggest this provision be removed or amended to a more suitable time frame, such as six months.

- Trade Union Organization: Article 63 states that dispatched employees will have the right to form labor unions in the enterprises to which they are dispatched. As Article 65 restricts dispatched employees to supplementary, temporary and replaceable positions, we respectfully submit it would be inappropriate for employees in these positions to form a permanent organization within the enterprise such as a labor union. We suggest amending Article 63 to read, "Employees dispatched from labor dispatch agencies shall be entitled to participate in or organize to establish a trade union within the labor service agency, and also to participate in the existing trade union of the receiving employer."

- Representative Offices: Article 95 in the current Draft Law has caused confusion among foreign enterprises over the employment obligations of foreign representative offices following the passage of the law We ask for clarification of whether provisions in the Draft Law will supersede existing rules that govern how foreign representative offices may hire employees.

ACTIVE DATE AND RETROACTIVITY

Due to the substantial and widespread impact of this law on both employees and employers, we respectfully suggest that the effective date of the law be at least 6 months after promulgation, and that the law not be made retroactive to labor contracts signed before the effective date.

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