

# 瀚一律師事務所

## HAN YI LAW OFFICES

*www.hanyilaw.com*

### Shanghai Office

Suite 4103, II Grand Gateway  
3 Hongqiao Road  
Shanghai 200030, China  
Tel: (86-21) 6448-5600  
Fax: (86-21) 6448-5611

### Beijing Office

Suite 311, Tower E1  
Oriental Plaza  
Beijing 100738, China  
Tel: (86-10) 8518-5580  
Fax: (86-10) 8515-3818

June 3, 2009

Memorandum to: Our Clients and Friends

### **Re: Certain Legal Issues Related to Expatriate Employment in China**

With its fast growing and dynamic economy, China has emerged as an increasingly popular destination not only for foreign investors, but also for management and technical talents from foreign countries as well as Taiwan, Hong Kong and Macau (“THM”). Accordingly, the expatriate employment-related legal issues have become the growing concerns for many employers (especially the foreign invested enterprises in China and their overseas parent companies) as well as foreigners<sup>1</sup> and THM residents intending to land a job in China. Based on our practical experience and for your general reference purpose only, we have prepared this memorandum to briefly summarize some of the major legal issues that are frequently encountered by various employers and expatriate employees. (*Solely for the purpose of this memorandum, “China” or the “PRC” means the People’s Republic of China, excluding Hong Kong SAR, Macau SAR and Taiwan, unless otherwise expressly specified herein.*)

#### **1. Modes of Expatriate Employment**

In order to legally work in China, foreigners and THM residents can either enter into labor contracts with the Chinese employers, or conclude employment contract with oversea employers and be seconded to its Chinese operation. However, in the case where an expat employee will work for a representative office (a “Rep Office”), secondment should be deemed the only viable option due to the non-legal-person status of a Rep Office.

#### **2. Procedures and Government Approvals**

##### *2.1 General Procedures Applicable to Foreign Employees*

A foreign employee is generally required to obtain the following certificates through procedures as follow:

##### (a) Employment Permit

Any expatriate employment should first be approved by the provincial level (*or lower level if duly authorized by the provincial level*) offices of

---

<sup>1</sup> Unless otherwise specified, the term “foreigners” used herein refers to persons without Chinese nationality as set forth in the *PRC Nationality Law*.

the Ministry of Human Resources and Social Security (the “MHRSS”). Upon approval, the PRC *Alien Employment Permit* (the “Employment Permit”) will be issued by the MHRSS office.

Please note, however, such Employment Permit is not required for representatives of a Rep Office.

(b) Visa Notification Letter

The PRC employer should, after obtaining the Employment Permit, apply to the competent office of the PRC Ministry of Commerce or the foreign affair office for the Visa Notification Letter which should be sent together with the Employment Permit to the foreign employee for handling of visa and other relevant matters. A Rep Office’s representatives including the chief representative may apply for the Visa Notification Letter with the Rep Office’s constitutive documents released by the PRC government and the Representative’s Cards issued by the local office of the State Administration for Industry and Commerce.

(c) Work Visa

Before entering China, foreign employees need to apply for work visa to the Chinese embassy or consulate located in their home countries. Foreign employees that will work in China for more than one year also need to submit health certificate as required.

If foreigners entering China with other types of visas (such as visitor visa or travel visa) intend to work in China, theoretically speaking, they will need to return to their home countries for application of the work visa.

(d) Employment Certificate

The PRC employer should, within 15 days after the foreign employee enters into China, apply for the *Alien Employment Certificate* (the “Employment Certificate”) to the MHRSS office originally issuing the Employment Permit.

(e) Residence Permit

Foreign employees are required to apply for the Residence Permit to the competent PRC public security administration within 30 days after their arrival in China. The validity period of the Residence Permit should be consistent with the term of the Employment Certificate.

## 2.2 *Special Procedures Applicable to THM Resident Employees*

The procedures for employment of the THM residents are simpler than those for foreigners. The relevant PRC employers only need to apply for the *Employment Certificate for Taiwan, Hong Kong and Macau Residents* after their THM employees set foot on mainland China in a legitimate manner. After that, of course, THM residents also need to apply for applicable residence certificate with the competent public security administration.

## 3. **Individual Income Tax**

Taxation is understandably another important concern of expat employees. According to applicable PRC laws and regulations, all individuals (Chinese or

non-Chinese) that have domiciles<sup>2</sup> in China should pay individual income tax (“IIT”) for their global income. However, IIT rules for expat employees with no domiciles in China are a bit sophisticated, of which we set forth below a brief summary for your reference purpose. Note that the term “*expat employees*” used in this section will only refer to those who have no domiciles in China unless otherwise specified.

### 3.1 General Provisions

The calculation of IIT payable by an expat employee mainly depends on whether his/her salary (including bonus, subsidies, allowances, and etc.) is sourced from China or abroad, and how long he/she has resided in China. Salary obtained by the expat employee during his/her working term within China should be deemed as China-sourced income, while that obtained during his/her working term outside China should be deemed as income sourced overseas, no matter whether such salary is paid (or borne) by the PRC employer or the overseas parent company. For your easy and clear understanding, we set forth below an illustrative form to elaborate on IIT payable by expat employees under various circumstances:

Period of Residence in China	Salary Sourced from China		Salary Sourced from Abroad	
	Paid or borne by PRC employer	Paid outside China <sup>3</sup>	Paid within China	Paid outside China
No more than 90 days on a consecutive or cumulative basis in a given tax year or no more than 183 days on a consecutive or cumulative basis during the period as set forth in relevant tax treaty	Taxable	Not taxable	Not taxable	Not taxable
More than 90 days but less than one year on a consecutive or consecutive basis in a given tax year, or more than 183 days but less than one year on a consecutive or cumulative basis during the period as set forth in relevant tax treaty	Taxable	Taxable	Not taxable	Not taxable
More than one year <sup>4</sup> but less than 5 years	Taxable	Taxable	Taxable	Not taxable

<sup>2</sup> Under PRC law, anyone that habitually resides in China for family or economic reasons should be deemed to have domicile in China. The term “*habitual residence*” as used herein refers to a place where taxpayer would go back after his/her temporary absence for purpose of study, work, travel or family visit.

<sup>3</sup> In practice, where the expat employee is hired and paid by the overseas parent company at the cost of the PRC employer or other affiliates in China, the salary so received by the expat employee will still be deemed as salary sourced from China and taxable in China.

<sup>4</sup> It means 365 days of residence in China in a given tax year. When calculating the residence days, temporary exit days will not be deducted. The term “*temporary exit*” means expat employee’s exit from China for no more than 30 days on a continuous basis or 90 days on a cumulative basis.

More than 5 years, and for each year thereafter, the taxpayer has resided in China throughout the whole year <sup>5</sup>	Taxable	Taxable	Taxable	Taxable
---------------------------------------------------------------------------------------------------------------------------	---------	---------	---------	---------

### 3.2 Special Rules for Expat Employees Serving as Directors and/or Senior Management Team Members<sup>6</sup>

	Title	Special Rules
If the expat employee's home country has no tax treaty or arrangement with China	Director and/or senior management team member	During his/her term of office, (a) any salary (including director's fee) received from the PRC employer are unconditionally taxable in China; and (b) salary paid by overseas parent company should be taxed in accordance with the general provisions under section 3.1 herein.
If the expat employee's home country has any tax treaty or arrangement with China	Director only or director and senior management team member	<i>Id.</i>
	Senior management team member only	The director's fee clause should apply if so agreed under relevant tax treaty or arrangement.  If no director's fee clause is agreed to be applied under relevant tax treaty or arrangement, during his/her term of office, (a) salary paid by the PRC employer should be taxed according to the provisions on dependent personal services under the relevant tax treaty and the general provisions as set forth in section 3.1 herein; and (b) salary paid by overseas parent company should be taxed in accordance with section 3.1 herein.

### 3.3 Exempt Income

Under PRC law, certain parts of expat employee's salary are free of IIT, including, among others, (i) housing allowances, food subsidies, relocation fees and laundry fees received in China (including Hong Kong and Macau) which are non-cash or reimbursable on an out-of-pocket basis; (ii) reasonable global travel allowances (subject to the examination by tax administration); and (iii) reasonable family visit allowances, onshore language training expenses (including Hong Kong and Macau) and onshore child education allowances (including Hong Kong and Macau) as determined by the tax authority.

### 3.4 Cost Deduction

<sup>5</sup> If the expat employee has not resided in China throughout the whole year for any single year after his/her residence of 5 full years, he/she only needs to pay IIT for their salary sourced from China.

<sup>6</sup> The term "senior management team members" herein refers to a company's (general) manager or vice (general) manager, heads or directors of various functional departments, chief officers and other similar managerial positions.

As provided in the PRC tax law, all expat employees are entitled to a RMB4,800 cost deduction out of their taxable income.

#### **4. Social Insurance**

Restricted by practical factors and due to the absence of applicable PRC laws, few PRC employers pay social insurance premiums for their expat employees. Commercial insurance coverage is instead a more widely adopted alternative. In practice, however, governments of some Chinese cities (e.g., Tianjin and Suzhou) have issued on a trial basis certain local policies, allowing local employers to pay social insurance premiums for their expat employees.

#### **5. Settlement of Labor Disputes**

The *PRC Labor Contract Law* and the *PRC Labor Law* have not specifically addressed the foreign-related labor issues. Nevertheless, where the expat employee and the PRC employer have entered into a labor contract to set out their respective rights and obligations, the two parties can submit their labor disputes to the competent labor dispute arbitration committee for arbitration according to the labor contract and relevant PRC laws. The party not satisfied with the arbitration award may institute legal proceedings, unless the arbitration award is final under PRC law.

For labor related disputes arising between PRC enterprise and the expat employees seconded by the overseas parent company, there is still no clear legal basis available as to whether such disputes should be governed by PRC labor law. Practice in China also varies among different regions. It is usually suggested that if the local labor dispute arbitration committee rejects such case due to its nature, the parties may bring a lawsuit to the competent people's court for civil remedies.

\* \* \*

The above is our brief summary of the currently effective PRC laws and regulations with respect to employment of foreigners and Taiwan, Hong Kong and Macau residents. Since the laws and regulations may be interpreted and applied differently at different locations in China and the practices do vary from time to time, this memorandum is for your general reference only and shall not be relied on as any formal PRC legal opinion with respect to any matter in any respect. If there is any discrepancy between our discussions herein and any rule or official interpretation to be issued by the relevant PRC government authorities, such new rule or interpretation shall prevail.

If you have any questions about this memorandum, please do not hesitate to contact us.

©Han Yi Law Offices  
Email: [inquiry@hanyilaw.com](mailto:inquiry@hanyilaw.com)

## 外国人及台港澳居民在华就业主要法律问题简述

随着中国经济的稳定、迅速发展，有越来越多的外国和台湾、香港以及澳门（“台港澳”）投资者到中国投资。与此同时，也有越来越多的外国人<sup>1</sup>及台港澳居民到中国寻求就业机会。因此，关于外国人及台港澳居民在华就业的相关法律问题是很多投资者所关心的问题，更是很多拟来华就业的外国人及台港澳居民自身所关注的问题。本所律师特此整理了我们在实践中经常被问及的有关法律问题，以期给各位投资人和拟来华发展的外国人及台港澳居民以帮助。（仅为本备忘录之目的，除特别注明外，“中国”不包括香港特别行政区、澳门特别行政区以及台湾地区。）

### 一、 就业的方式

外国人及台港澳居民来华就业，既可以与中国境内的用人单位签订劳动合同，也可与境外投资人签订劳动合同并接受其派遣到境内用人单位工作。但是，如外国人或台港澳居民拟前往中国工作的实体是外国（地区）企业常驻中国的代表机构（“代表处”），则该外国人或台港澳居民只能与该代表处所属的外国企业签订劳动合同并接受其派遣来华就业。

### 二、 就业的程序和审批

#### 1. 外国人在华就业一般程序

中国政府对外国人在中国就业实行许可制度。外国人在中国就业的，一般需经过如下程序：

##### (1) 许可证书

为有关外国人在中国就业之目的，境内用人单位须首先到本单位所在地的省级劳动行政部门或其授权的地市级劳动行政部门办理核准手续。经核准后，相关劳动行政部门将指定专门机构向境内用人单位签发《中华人民共和国外国人就业许可证书》（“许可证书”）。但是，代表处的代表（包括首席代表）来华就业的，可免办许可证书。

##### (2) 通知签证函

境内用人单位申请并取得许可证书后，至其所在地相关商务主管部门或外事办申办通知签证函，并由该境内用人单位将通知签证函以及前述许可证书发给相关外国人，以办理签证等事宜。代表处的代表（包

---

<sup>1</sup> 除本备忘录另有说明外，“外国人”指根据《中华人民共和国国籍法》规定不具有中国国籍的人员。

括首席代表)可委托有相关资质的代理机构凭代表处批准证书及/或登记证以及该等代表的代表工作证<sup>2</sup>向所在地相关商务主管部门或外事办申办通知签证函。

### (3) 职业签证

拟来华就业的外国人凭许可证书、通知签证函及其本国有效护照或能代替护照的证件,到中国驻其所在国的使、领馆处申请职业签证,并凭该职业签证入境。外国人来华就业期限在1年以上的,在申请职业签证时,还须提交其所在国政府指定的卫生医疗部门签发的或者一般卫生医疗部门签发并经公证机关公证的健康证明书。

对于持其他签证(如访问签证、旅游签证等)入境后申请在华就业的外国人,通常情况下应在获取许可证书、通知签证函后出境赴其所在国申办职业签证,再凭职业签证重新入境,方可办理就业证等证件。

### (4) 就业证

境内用人单位应在被聘用的外国人入境后15天内,持许可证书及被聘用的外国人签订的劳动合同(如该外国人直接与境外投资人签订劳动合同并被派遣至中国工作的,应提供派遣证明,如派遣函)等材料到原核准颁发许可证书的劳动行政部门为该外国人办理《外国人就业证》(“就业证”)。外国人在取得就业证后方可在相关境内用人单位工作。

### (5) 居留证

已办理就业证的外国人,应在入境后30日内,持就业证到公安机关申请办理居留证。居留证的有效期限可根据就业证的有效期确定。

## 2. 台港澳居民在中国就业的特殊程序

与外国人在华就业所需的审批和程序相比,台港澳居民在华就业的程序较为简单。台港澳居民来华就业的,无需办理前述就业许可、通知签证函以及职业签证,仅需由境内用人单位在相关台港澳居民持《台湾居民来往大陆通行证》或《港澳同胞回乡(通行)证》入境后为其办理《台港澳人员就业证》即可。之后,台港澳居民还需持《台港澳人员就业证》到公安机关申请办理暂住证。

---

<sup>2</sup> 代表工作证一般在办理代表处设立登记的同时办理。

### 三、个人所得税

外籍员工（仅为本备忘录之目的，“外籍员工”指在境内合法就业的外国人及台港澳居民）在中国就业的另一个重要问题是税收问题。根据中国相关法律法规，在中国境内有住所<sup>3</sup>的个人（包括外籍员工）从中国境内及境外取得的所得，均需依法在中国缴纳个人所得税，故下文将主要就在中国境内无住所的外籍员工根据中国相关法律法规缴纳个人所得税的问题进行介绍。（除下文第3项“暂免缴纳个人所得税的所得”部分的论述外，本第三条“个人所得税”部分所述的“外籍员工”均指在中国境内无住所的外籍员工。）

#### 1. 一般规定

根据所得来源地的不同，外籍员工的工资薪金可以分为来源于中国境内的工资薪金和来源于中国境外的工资薪金。外籍员工实际在中国境内工作期间取得的工资薪金（包括奖金、年终加薪、津贴、补贴等），不论是由中国境内用人单位还是境外投资人支付，均为“来源于中国境内的工资薪金”；而其实际在中国境外工作期间取得的工资薪金，不论是中国境内用人单位还是境外投资人支付，均为“来源于中国境外的工资薪金”。为了直观地介绍外籍员工所取得的工资薪金在中国缴纳个人所得税的问题，我们列出下述表格进行说明，供参考：

在中国境内居住的期间	来源于中国境内的工资薪金		来源于中国境外的工资薪金	
	境内支付或负担的部分	境外支付的部分 <sup>4</sup>	境内支付的部分	境外支付的部分
在一个纳税年度中在中国境内连续或累计居住不超过90日；或在税收协定规定的期间在中国境内连续或累计居住不超过183日	征	不征	不征	不征
在一个纳税年度中在中国境内连续或累计居住超过90日但不满一年，或在税	征	征	不征	不征

- <sup>3</sup> 根据相关法律法规，“在中国境内有住所”是指因家庭、经济利益关系而在中国境内习惯性居住。而“习惯性居住”，是判定纳税义务人是居民或非居民的一个法律意义上的标准，不是指实际居住或在某一个特定时期内的居住地。如因学习、工作、探亲、旅游等而在中国境外居住的，在其原因消除之后，必须回到中国境内居住的个人，则中国即为该纳税人习惯性居住地。
- <sup>4</sup> 如境外投资人在境外向外籍人员支付来源于中国境内的工资薪金后，还需要由境内用人单位或其他关联机构对该部分支出予以补偿，则该部分工资薪金应视为境内负担的部分，需要在中国缴纳所得税。



收协定规定的期间 在中国境内连续或 累计居住超过 183 日但不满一年				
在中国境内居住满 一年 <sup>5</sup> 但不超过五年	征	征	征	不征
在中国境内居住超 过五年,从第六年起 各年度均满一年 <sup>6</sup>	征	征	征	征

## 2. 外籍员工任董事或高层管理职务<sup>7</sup>的特别规定

	职务	特别规定
若所属国家或地区与中国无税收协定或安排	担任董事、高层管理职务或兼任董事及高层管理职务	在其担任该等职务期间, (a)由境内用人单位支付的工资薪金(包括董事费)均应在中国境内申报纳税, 而不论其是否在中国境外履行职务(即不论该等所得的来源地以及该等外籍员工在境内居住期间的长短); (b)由中国境外投资人支付的工资薪金, 应根据上述“一般规定”下的原则来确定其相关的纳税义务。
若所属国家或地区与中国有税收协定或安排	担任董事或兼任董事及高层管理职务	同上
	仅担任高层管理职务	若税收协定或安排中约定适用董事费条款, 则适用该条款。 若税收协定或安排中未约定适用董事费条款, 则在其担任该等职务期间, (a)由境内用人单位支付的工资薪金可按该协定或安排中有关非独立个人劳务条款和前述“一般规定”下的原则来确定其相关的纳税义务; (b)由中国境外投资人支付的工资薪金, 应根据上述“一般规定”下的原则来确定其相关的纳税义务。

## 3. 暂免缴纳个人所得税的所得

根据有关法规, 外籍员工的部分工资薪金所得可依法暂免征收个人所得税,

<sup>5</sup> 指在一个纳税年度中居住满 365 天。在具体计算时间时, 不扣除临时离境的天数。临时离境是指一次性离境不超过 30 天, 或多次离境累计不超过 90 天。

<sup>6</sup> 外籍员工在中国境内居住满五年后, 从第六年起的以后各年度中, 凡在境内居住满一年的, 应当就其来源于境内、境外的工资薪金所得申报纳税; 凡在境内居住不满一年的, 则仅就该年内来源于境内的工资薪金所得申报纳税。

<sup>7</sup> 指公司正、副(总)经理、各职能总师、总监及其他类似公司管理层的职务。

主要有：(i)以非现金形式或实报实销形式取得的境内（包括香港、澳门地区）住房补贴、伙食补贴、搬迁费、洗衣费；(ii)按合理标准<sup>8</sup>取得的境内、外出差补贴；以及(iii)按合理标准取得的探亲费、境内（包括香港、澳门地区）语言培训费、境内（包括香港、澳门地区）子女教育费等。

#### 4. 免征额（费用扣除额）

根据相关法律法规，应税个人的应税工资薪金为其取得的工资薪金减除人民币 2,000 元后的余额；而对于应税外籍员工，可在前基础上再附加减除费用人民币 2,800 元。也就是说，外籍员工的应税工资薪金的免征额为人民币 4,800 元。

### 四、社会保险

目前中国法律法规尚无要求境内用人单位须为在华就业的外籍员工在中国缴纳社会保险的强制性规定。实践中，为保障来华就业外籍员工的利益，某些地区（如天津、苏州）已出台相关规定，允许辖区内的企业为其缴纳相关社会保险。但在尚未出台相关规定的地区，境内用人单位一般也难以为其缴纳中国社会保险。实践中，更多的是由境内用人单位或境外投资人为该等外籍员工购买合适的商业保险。

### 五、劳动争议的解决

我国《劳动合同法》和《劳动法》目前都未对外籍员工在华就业所涉及的涉外劳动问题进行明确的规定，但这并不意味依法取得就业证并在中国合法就业的外籍员工无法得到中国法律的保护。对于与境内用人单位直接签订劳动合同的外籍员工，其与境内用人单位之间与劳动关系有关的事项（如保险、违约责任等）主要由双方在劳动合同中约定。当双方产生有关劳动争议时，任何一方均可向有管辖权的劳动争议仲裁委员会提起劳动仲裁，劳动争议仲裁委员会在处理劳动争议时主要按照双方约定的条款同时参照《劳动合同法》及《劳动法》进行裁决。对仲裁裁决不服的，任何一方还可依法向法院提起劳动争议诉讼（法律规定劳动仲裁为终局裁决的劳动争议除外）。

对于由境外投资人派遣至境内用人单位工作的外籍员工，由于其劳动关系是与境外投资人直接建立的，与境内用人单位未签订劳动合同，其与境内用人单位之间就其在华工作而产生的劳动争议，是否适用中国劳动法规，目前相关法律法规尚未作出明确规定，各地的规定与实践也有所不同。实践中，如当地劳动争议仲裁委员会认为该等争议不属于劳动争议范畴且不适用劳动仲裁的，境内用人单位或外籍员工可直接向法院提起诉讼，通过民事法律关系的救济途径解决该等争议。

---

<sup>8</sup> 实践中由主管税务机关根据外籍员工在纳税申报时或境内用人单位为其代扣代缴个人所得税时提供的有效凭证及证明材料进行审核。下同。

\* \* \*

以上为我们根据中国现行有效法律法规及本所律师实务经验所作, 仅供阁下作一般性参考。本备忘录不能视为我们就任何事项出具的任何意义上的正式法律意见。关于外国人及台港澳居民在中国就业的问题, 各地在不同时间或有不同的具体规定或操作实践。如本备忘录的内容与有权机关颁布的法律法规或提出的具体要求或解释有不一致之处, 请以该等法律法规或具体要求或解释为准。

如阁下对于本备忘录述及之内容有任何疑问, 敬请随时与敝所联系。

©瀚一律师事务所  
Email: [inquiry@hanyilaw.com](mailto:inquiry@hanyilaw.com)  
2009年6月3日