

China's new exit-entry law overhauled

Description

China top legislature has passed the new law, namely, the *Law of the People's Republic of China on the Administration of Exit and Entry* on June 30, 2012 that will come into force about a year later on July 1, 2013, a good gift for the communist party birthday then, I guess.

Needless to say, this law directly affects expats in China in many aspects. I would like to single out a few points for your digestion based on my own observation and understanding in light of my own experiences of serving foreigners in Shanghai.

1. Setup of National Database of Exit and Entry Information

Article 5 of the Law requires that the state will set up and maintain a national uniform platform for administering exit and entry data, to be shared and accessible by related governmental departments.

With this centralized database, any foreigner's information in respect of his or her personal profile, exit and entry of Chinese borders will be recorded, retrieved by Chinese different authorities any time. Measures taken against foreigners in China can be more easily and uniformly executed. For instance, any Chinese court may issue a ban prohibiting any given foreigner from leaving China that can now be simultaneously imposed throughout the country.

2. Biometric Data Collected Now

Two provisions of the Law deal with the biometric data of foreigners crossing Chinese border.

Article 7 reads that Chinese Ministry of Public Security and Ministry of Foreign Affairs may, subject to consent of Chinese state cabinet, map out rules regarding the recordation and keeping of biometric identification information such as fingerprints in light of the need for administration of exit and entry of Chinese borders. Apparently, this is an authorizing provision, a prelude making the way for detailed rules in the regard to be formulated by the two mentioned departments in the future.

Meanwhile, article 30 makes it clear that foreigners applying for residence permit in China shall leave their biometric information for recordation.

So per these provisions, at the current stage, China will record and keep the biometric data of only those who intend to live in China for a while. Those who just stay in China for a short time will not be required to turn over their biometric information.

3. Onshore Visa or Port Visa Application Strengthened

Prima facie, from the wording in Article 20 of the Law, China is now strengthening or narrowing the scope of foreigners applying for visas at Chinese ports. Compared with old rules which list ten occasions where foreigners already in China may apply for China visas at those designated ports, the new Law now basically allows onshore visa application only in emergency circumstances such as

humanitarian reasons, urgent need for engineering repair.

It remains to be seen whether in practice onshore or port visa application will be restricted or weeded out in part.

On the other hand, this article expressly allows port visa application for the group tourists visa by travel agencies operating inbound travel.

Moreover, the Law also makes it clear that the period of stay under any port visa shall not be more than thirty days.

4. Prohibition from Leaving Chiina

Some of expats in China know that under the old exit and entry law, foreigners may be banned from leaving China by a court decision if he or she is caught in an unsettled civil dispute that is being tried in the court. For more information in this regard, please refer to my old post: [sorry, sir, you are banned from leaving China](#).

Now under the new Law, relevant ministry (presumably the ministry of labor) of central government and local governments at the provincial level (including municipalities directly administered by state cabinet such as Shanghai, Beijing, Tianjin and Chongqing) are now empowered to make a decision of prohibiting a foreigner from exiting China where salary is owed to employees. There are two points for understanding this new provision.

(1) Since the decision making bodies are restricted to only those high level governments or central ministry. It is not likely that such decision will be made in large number. I don't think our provincial governments care much about the grassroot people's salary issues, as are rampant phenomena throughout China. I guess only those high-profile disputes amassing wide public attention may prompt those governments to take action. Again, it remains to be seen in what circumstances our people's governments can do something nice for its people.

(2) Employment disputes are often happening between employees and corporate employers. It is not likely in any case that an employment dispute between an employee and his or her foreigner employer will reach the attention of the said provincial governments and ministry. So the next question is: in the case of employment dispute with a foreign-invested company, what kinds of foreigners in the company will be banned? It will be of no doubt that the foreigner taking up the legal representative position of the company will be banned, but any others?

5. Extention of Visas Capped

Under the old rules, a foreigner with a fresh visa can repeatedly apply to extend their visas before expiry so as to stay in China for longer period, and it is believed that this loophole has been taken advantage of by foreigners who work in China on those visas instead of proper employment arrangement.

Now the new Law has made it clear that visa holders shall apply to extend their visas seven days in advance of the expiry date, and may be granted the approval to renew their visas. However, the Law now imposes explicitly a cap on the total period of extension, *namely*, the total extended period shall

not be longer than the original period of stay on the visa.

6. Provisions related to Foreigners Working in China

(1) Article 41 reinforces the practice of employing work permit and residence permit in regulating foreigners working in China. I have pointed out in several other occasions that given the practice that work license and/or permit is obtained by the company employer, it will be unfair to foreigners who are deprived of benefits that should otherwise be available to them under Chinese labor laws because of the faults or misconducts of the employers. In other words, absence of work permit or residence permit shall not affect the legal nature of the relationship between the expat and the company. For further information in this regard, please refer to my previous posts: [A new view on the legal nature of the work permit for foreigners working in China](#), and [the dilemmas for expat employees in China](#).

(2) China will for its first time issue catalogue guiding foreigners seeking jobs in China. Article 42 authorizes the ministry of human resources and social security and foreign expert bureau to publish such catalogue taking into account of the need of social development and the situation of supply and demand of talents in the market.

(3) In response to the illegal practice by companies of helping foreigners to do paperwork to obtain work permit and residence permit, the Law has imposed penalties on such wrongdoing companies. Companies found guilty of such practice can be subject to a fine of RMB 10,000 to 50,000, confiscation of illegal gains therefrom, and assumption of departing cost, and the person-in-charge and other persons directly responsible for the wrongdoing shall be separately subject to a fine of RMB 5,000 to 10,000.

(4) Foreigners illegally working in China shall be subject to a fine of RMB 5,000 to 20,000, and in the case of serious violation, they can be subject to detention of five days to ten days as well as the aforesaid fine.

Companies illegally employing foreigners shall face a fine of RMB 10,000 for each foreigner so employed up to RMB 100,000 in total.

7. Finality of Decisions Rendered by Agencies under the Law

In Article 36, 64 and 81, the Law makes it clear that the decisions made by government agencies under the Law shall be final, ruling out the possibility of appealing to court to have such decisions revoked or declared illegal or void.

In particular, Article 64 provides that a foreigner can only appeal to the upper level agencies, if he or she is not happy with the decisions of continued investigation, detained investigation, and restriction of movement within certain areas. The decision made by such upper agencies shall be final. Bear in mind, a foreigner can be detained up to sixty days pending investigation, and the restriction of movement within certain areas can also last up to sixty days.

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