



I. NCP: Three Categories of Valid Chinese Residence Permit Holder May Enter China without New Visa¹

On September 23, 2020, PRC Ministry of Foreign Affairs and PRC National Immigration Administration jointly rolled out the policy:

From September 28, 2020, foreign nationals holding **valid Chinese residence permits** for

- work;
- personal matters; and
- reunion

are allowed to enter China **without applying for new visas**.

If the above three categories of residence permits held by foreign nationals expired after March 28, 2020, the holders may apply for relevant visas by presenting the expired residence permits and relevant materials to the Chinese embassies or consulates.

As always, PRC authorities will adopt strict epidemic prevention and control measures on the overseas visitors.

Asiallians will keep a close eye on the development of entering policy issued by PRC authority which is evolving rapidly currently and update you promptly.

II. Legal News: Provisions on the Protection of Trade Secrets (Draft) Released by SAMR for Public Comments

On September 4, 2020, PRC State Administration for Market Regulation (“SAMR”) rolled out Draft Provisions on the Protection of Trade Secrets (the “Draft”)² for public comments.³ The comment period will expire on October 18, 2020.

Currently, the protection over trade secret under PRC laws are spread out among various laws, including but not limited to the Anti-Unfair Competition Law (in accompany with the Supreme People’s Court judicial interpretation), the Contract Law (mainly about technology contract and contract negotiation), the Labor Contract Law (mainly about non-competition clause), the Company Law and the Criminal Law. Once the Provisions are issued and become effective, the protection over trade secrets in China will possess more legal basis.

We summarize the most catching contents worth your attention:

I. Perfecting the Definition of Trade Secret

Trade Secret is defined as information meeting all of the following conditions⁴:

1. not publicly known⁵;
2. possesses commercial value⁶;
3. subject to appropriate confidentiality measures⁷ undertaken by the right holder⁸;
4. belongs to the category of
 - a) technical information⁹,
 - b) operational information¹⁰, or
 - c) other business information¹¹

II. Refining the Infringement of Trade Secret

The main types of infringement actions listed in the Draft includes:

1. **illegal obtaining**: business operator illegal obtaining trade secrets by theft, bribery, fraud, coercion, electronic intrusion, or other improper means¹²;
2. **disclosing or using**: business operator disclosing, using, or allowing others to use the business secret illegally obtained¹³;
3. **violating confidential obligation**: business operator violating confidential obligation by disclosing or using business secret¹⁴;
4. **violating restrictive use obligation**: business operator violating restrictive use obligation by unauthorized using or disclosing¹⁵;

III. Specifying the Administrative Enforcement

Administrative Regulator	Administration for Market Regulation (the “AMR”) at and above county level are responsible for tackling and adjudicating trade secrets infringement. ¹⁶
Confidential Obligation of PRC Authorities	AMRs, other PRC authorities, and their public officers <ul style="list-style-type: none"> • <i>shall</i> keep confidential the trade secret known in the court of performing public duties; • <i>shall not</i> use or allow others to use the trade secret beyond the scope of their duties.¹⁷
Materials Submitted to launch the Process	The right holder shall submit the proof materials when report the infringement action to local AMR ¹⁸ : <ul style="list-style-type: none"> • materials showing the business information is constituted as trade secret; • materials showing the trade secret has been infringed.¹⁹
Entrusted Professional Appraisal	The right holder and suspected infringer may entrust a legally qualified appraisal institution to identify: <ul style="list-style-type: none"> • whether the business information is publicly known; • whether the business information of right holder is substantially similar to that of the suspected infringer.²⁰

The Draft lays out the other aspects around administrative enforcement, including the rule of admissibility of evidence,²¹ evidence preservation,²² suspending the administrative enforcement to launch civil litigation,²³ and judicial transfer to criminal procedure,²⁴ etc.

Here is the coordination mechanism among administrative enforcement, civil litigation, and criminal procedure provided in the Draft:

Coordination Between Administrative Enforcement and Civil Litigation	Coordination Between Administrative Enforcement and Criminal Procedure
The right holder may file civil litigation during the administrative enforcement, and AMR will suspend its enforcement once the lawsuit is filed. ²⁵	AMR shall transfer the case to judicial branch where the AMR finds out the infringement of trade secret is suspected of committing a crime and suspend its enforcement. ²⁶
The right holder may file civil litigation where AMR fails to settle the compensation by mediation. ²⁷	

IV. Strengthening the Legal Liability

Under Article 21 of PRC Anti-Unfair Competition Law, the business operator **seriously** infringing trade secret faces a **fine ranging from RMB 500, 000 to RMB 5 million**.

The Draft further explain the “**serious circumstances**” includes:²⁸

- the right holder suffers the loss caused by the infringement of trade secret exceeding RMB 500,000;
- the infringer gains profits exceeding RMB 500,000 due to the infringement of trade secrets;
- the infringement causes bankruptcy of the right holder;
- the infringer refuses to compensate the loss suffered by the right holder;
- the network and computer data of the right holder’s office system are seriously damaged by the electronic intrusion;
- the infringement causes serious economic loss or huge adverse impact to the State and society;
- other circumstances may be considered as serious.

Please also be advised that companies suffering trade secret infringement may file civil litigation against alleged infringer for damages and injunctions or seek for criminal penalty imposed on infringer by reporting to PRC authorities (once public security bureau accept the right holder’s complaint or judicial transfer, it undertakes the investigation) under PRC judicial system.

Here is the brief comparison between the administrative action and civil litigation:

	Pros	Cons
Administrative Action	<ul style="list-style-type: none"> • faster process; • less challenge to meet burden of proof; • various coordination mechanism linking the administrative action to civil litigation and criminal procedure; • stronger enforcement power granted to AMRs. 	<ul style="list-style-type: none"> • exposure of trade secret to AMR and other PRC authorities • reluctance of AMR to tackle trade secret infringement case. • lack of experience and resource for foreign-invested company to seek for help from AMRs
Civil Litigation	<ul style="list-style-type: none"> • fivefold punitive damages and increasing statutory damages cap;²⁹ • strong power of PRC court in enforcing its judgement. 	<ul style="list-style-type: none"> • highly burden of proof; • unpredictability of lawsuit in China; • difficulties in dealing with cross-border litigation.

Trade secrets are cited as the primary intellectual property concern by most companies doing business in China. The Draft shows the trend that PRC authorities pay more attention to the protection over trade secrets. Foreign-invested companies may benefit from this trend by proactively engaging the protection of their trade secrets.

Should you have any inquire about the details of the Draft or any comments waiting to be heard, please contact us at asiallians@asiallians.com. As always, Asiallians remains at your service and our teams are currently mobilized in all our offices in Mainland China, in Hong Kong and in Taipei.

1. <https://www.nia.gov.cn/n741440/n741542/c1344669/content.html>

2. Please note that the Draft is administrative regulation which is inferior to law in legal force under PRC jurisdiction.

3. http://www.samr.gov.cn/hd/zjdc/202009/120200904_321386.html

4. Article 5 of the Draft.

5. Article 6 of the Draft lists the exceptions to “not publicly known”.

6. Article 7 of the Draft defines the “commercial value” and lists the prima facie evidence.

7. Article 8 of the Draft lists the qualified “appropriate confidentiality measures”.

8. Article 9 of the Draft defines the “right holder”.

9. Article 5 of the Draft defines the “technical information”.

10. Article 5 of the Draft defines the “operating information”.

11. Article 5 of the Draft defines the “other business information”.

12. Article 12 of the Draft describes several circumstances which may constitute as “improper means”.

13. Article 13 of the Draft defines the “disclosing” or “using”.

14. Article 14 of the Draft lists some circumstances stipulating “confidential obligation”.

15. Article 15 of the Draft lists some circumstances stipulating “restrictive use obligation”.

16. Article 20 of the Draft.

17. The Draft follows the Anti-Unfair Competition Law to impose confidential obligations on relevant PRC authorities. However, both of them have fatal deficiency—not providing sanctions for the violations accordingly.

18. In reality, the burden to present a fairly complete set of evidence may discourage a foreign-invested company to seek for administrative enforcement.

19. Article 21 of the Draft lists some qualified evidential materials.

20. Article 22 of the Draft.

21. Article 23 of the Draft.

22. Article 25 of the Draft.

23. Article 26 of the Draft.

24. Article 27 of the Draft.

25. Article 26 of the Draft

26. Article 27 of Draft

27. Article 29 of the Draft
According to the Draft, AMR may mediate the matter besides impose fines or other administrative penalty on infringer

28. Article 31 of the Draft

29. Article 17 of the Anti-Unfair Competition Law

Feel free to contact asiallians@asiallians.com for more information.

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