

# Arresting developments: Understanding criminal mandatory measures under PRC law

The recent arrests of four executives and as many as 30 employees of GlaxoSmithKline in China based on allegations of corruption have understandably caused great confusion and concern. Less understood are the PRC detention and arrest processes under which these individuals are being held. Acquiring such an understanding is crucial to companies facing potential investigations in industries targeted for enforcement action. This article summarises the five “mandatory measures” under the PRC Criminal Procedural Law (“**CPL**”) that would physically restrain an individual, as well as available responses to protect one’s rights under the CPL.

## What are these "mandatory measures?"

Each of the mandatory measures differs in their legal nature, the conditions under which they are imposed and to which a person is subject, the applicable time limits, and the rights to which a detainee is entitled. These mandatory measures can be applied through escalation from bail pending trial up to arrest, but they may also be applied without reference to the relatively less restrictive ones. Therefore, when the police knock on one’s door the first thing to do is to review the legal document on which the police action is based. That will determine how the arrest will develop.

### 1) **Bail pending trial**

Bail pending trial is applicable in cases where a lesser criminal penalty than imprisonment is likely; when the individual’s physical condition and lack of dangerousness justify lesser restraint; or when arrest is justified but the time limit for such arrest has expired.

Conditions imposed include requiring a guarantor or secured deposit, restrictions on movements out of the city of residence, and timely notification to the police of any changes of residence, employment or contact information. If so ordered, the detainee shall appear for interrogation, hand over passports or travel documents, and avoid designated places or people. The maximum length of bail pending trial is 1 year.

### 2) **House arrest (living under a monitor)**

House arrest (or living under a monitor in literal translation) may be imposed when arrest is not appropriate for various reasons such as the individual’s physical condition, need to provide dependent support, or expiration of the time limit for arrest.

Conditions imposed include restrictions to one's residence or other designated place (if no fixed address). In addition to the restraints imposed while on bail pending trial, house arrest also includes monitoring by the police of one's correspondence and communication with others. Although house arrest at a designated place was newly added to the CPL in 2012, it has since been used to detain senior managers of multinational companies, typically in cases of serious bribery. The maximum length of house arrest is 6 months.

3) **Compelled appearance**

The police may require an individual to appear at a designated place or his or her residence for interrogation, either voluntarily or if not, by the police with or without a written order of compelled appearance.

An individual can be detained by the police for interrogation pursuant to the order of compelled appearance for no more than 12 or 24 hours, the latter being for complicated cases involving serious circumstances where detention or arrest is necessary.

4) **Detention**

During a criminal investigation, the police may also detain an individual with an order of detention, where there is immediate evidence of his or her crime (e.g., the individual is discovered during or immediately after the crime is committed or is identified by the victim or witnesses), the individual would likely conceal or destroy evidence or escape, the individual refuses to identify himself or herself, or there is a high probability of repeated offences.

If the police determine that the individual should be arrested, he or she can be detained for 10 to 37 days before a decision on arrest is made. If the arrest application is approved, the individual is then arrested.

5) **Arrest**

An individual may be arrested if there is evidence showing commission of an offense for which the sentence may be more than 10 years of imprisonment or there is an on-going risk of further crimes, obstruction, escape or danger to the State, public security or social order.

An individual may be held under arrest for 2 to 7 months, or even longer depending on the complexity of the case. In accordance with the CPL, a further extension (without maximum limit) can be approved by the Standing Committee of the National People's Congress.

## What rights does a detainee have?

When the above mandatory measures are imposed on a detainee during criminal investigation, he or she is entitled to be notified of the right to appoint a lawyer as early as the first interrogation, upon imposition of mandatory measures, or at any time during the criminal investigation. The lawyer will be able to file petitions, apply to modify the mandatory measures, and to seek relevant information from the investigation authority.

Although detainees are permitted to meet with a lawyer in person within 48 hours, in reality, after being detained, the individual will temporarily lose contact with the outside world and it will be virtually impossible to contact a lawyer. Unless such appointment has been made prior to the detention, the detainee must rely on a close

relative to make the appointment. This would take some time during which period is it likely the detainee will be subject to the most intensive interrogation. Accordingly, this period is critical to the detainee's legal position and a lawyer's involvement would be most valuable to the detainee. Therefore, it is advisable to consult with and engage a lawyer when the criminal risks are anticipated. Moreover, keep in mind that for certain types of crime including relatively serious cases of bribery, prior approval from the police or the prosecutor is required for a lawyer to meet with the individual in custody.

In addition to the right to a lawyer, individuals are also entitled to the rights illustrated in the chart below.

Mandatory Measures	Rights	
bail pending trial	<ul style="list-style-type: none"> <li>• be presented with an order of bail pending trial.</li> </ul>	read and amend the interrogation minutes, not answer any question unrelated to the case, and have access to food and necessary rest during interrogation.
house arrest	<ul style="list-style-type: none"> <li>• be presented with an order of house arrest;</li> <li>• notification of relatives within 24 hours;</li> <li>• communicate with a lawyer through physical meetings or correspondence.</li> </ul>	
compelled appearance	<ul style="list-style-type: none"> <li>• be presented with the order of compelled appearance, or if such an order is not available, to have the oral order recorded in the interrogation minutes;</li> <li>• request the police officer who makes the oral request of compelled appearance to present police identification;</li> <li>• not be subject to consecutive compelled appearances.</li> </ul>	
detention	<ul style="list-style-type: none"> <li>• be presented with an order of detention;</li> <li>• notification of relatives within 24 hours unless the relatives are not available or the case involves State security or terrorism such that notification would obstruct the investigation.</li> </ul>	
arrest	<ul style="list-style-type: none"> <li>• be presented with an order of arrest;</li> <li>• notification of relatives within 24 hours;</li> <li>• be interrogated within 24 hours of the arrest.</li> </ul>	

## Is leaving the country an option?

An individual may be prohibited from leaving China, as a criminal suspect or a witness who must attend a criminal hearing by order of the court, police, prosecutor or the provincial National Security Bureau. Notification of such restriction may be oral or written. However, in practice, an individual may not even be notified of such an order until he or she is blocked from leaving at an airport in China. Because the customs officer may not necessarily tell the individual which department issued the order, it may take time to ascertain by whom and on what grounds the order was issued. The authority has wide discretion in issuing such an order and there are few rules on whether and how to challenge it.

## Does nationality matter in the process?

Contrary to recent news events, in general, the authorities are quite cautious in detaining non-PRC passport holders<sup>1</sup>. When it does happen, a foreign detainee is entitled to a visit by embassy or consulate officials. The embassy or consulate must be informed of the identification of the detainee and his or her location, as well as the legal grounds for the mandatory measures. Most importantly, the embassy or consulate may also appoint a lawyer for the detainee since many foreign citizens may not necessarily have close relatives in China when they are subject to such mandatory measures.

*With additional contribution from Beijing based associate, Xu Ruqing.*

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<sup>1</sup> A non-PRC passport holder does not include a Hong Kong or Taiwanese permanent resident, who are viewed as PRC citizens and thus, do not have the right to seek assistance from the Hong Kong or Taiwan embassy or consulate.

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