

## Public Comments Sought on PRC Labour Dispatch Provisions

Do you or your company use, or intend to use, dispatched workers seconded from a labour agency? If yes, then the following is something you should know.

Subsequent to the issuance of the *Implementing Measures for the Administrative Licensing of Labor Dispatch Services* (the “Measures”) on 22 June 2013 (see our last legal update, [“New Labour Dispatch Rules Take Effect”](#)), the Ministry of Human Resources and Social Security (MOHRSS) issued on 7 August 2013 another set of proposed new regulations relating to labour dispatch, the *Circular of the Ministry of Human Resources and Social Security on Seeking Public Comments on the Several Provisions on Labor Dispatch (Draft for Comments)* (the “Draft Provisions”).

Public comments are invited to be submitted by 7 September, 2013. So act fast if you don't like what you read below.

Needless to say, this is only a Public Consultation Draft and therefore its provisions have not taken legal effect yet, and the following comments assume that they will take effect in their current form when finally passed.

### Outsourced Work Personnel could be Deemed as Dispatched Workers

Do watch out if you have outsourced certain work functions because the staff of the service provider could be deemed as workers dispatched to you. The key point is control: if you maintain direct management and control over such staff, then the Draft Provisions could apply to you.

### Definition of Labour Dispatch

The Draft Provisions, for the first time, clearly define a “Labour Dispatch” as being an employment arrangement whereby an employer, as a business,

employs and second the labour dispatch staff to work for another employer, and the work process of those labour dispatch staff is directly managed by the latter employer.

### “Auxiliary” Position of Labour Dispatch Clarified

The Draft Provisions, with a view to specifying what constitutes an “auxiliary” position which qualifies for using dispatched workers, clarify that an “auxiliary” position refers to a position which involves only non-core business and provides service to core business-related positions.

Moreover, the Draft Provisions require that an entity to which a dispatched staff is dispatched (host entity) shall, based on its industry and business, put forward a list of such “auxiliary” positions for which it proposes to use “Labour Dispatch”. The said list shall be consulted with the trade union or the employees congress, and publicised within the host entity, and shall be subject to the supervision of such body.

### No Intra Group Labour Dispatch Agency Allowed

The Draft Provisions disallow any employer or its affiliated entity to invest or co-invest in setting up a labour dispatch agency which dispatches workers to such employer or affiliate entity.

### Maximum Percentage of Labour Dispatch Staff

The Draft Provisions explicitly provide that the number of dispatched staff in “auxiliary” positions shall not exceed 10 percent of the total number of the workforce. The total workforce refers to the aggregate of the direct hires and the labour dispatch staff on the “auxiliary” positions of the host entity.

In addition, the above maximum percentage rule

does not apply to the Chinese representative offices of foreign entities (including media, diplomatic and financial organisations).

## Transitional Provisions

In order that the Amendment to the PRC Labour Contract Law (the “Amendment”) is implemented smoothly and adverse impact on the employment relationship caused by the adjustment of the employment arrangement is reduced, the Draft Provisions provide that any employment contract and labour dispatch service agreement signed before the effective date of the Amendment (i.e., 1 July 2013), is permitted to remain in effect until the date of expiry thereof. The host entity is *not permitted* to return the dispatched staff on the grounds of non-compliance with the provisions in respect of (a) “temporary, auxiliary or replaceable” positions; (b) the number of dispatched staff having exceeded the prescribed maximum percentage; or (c) the labour dispatch service provider failing to obtain the administrative licence.

However, where there is any term or condition of the employment contract in the labour dispatch service agreement which is not compliant with the rule in respect of “equal work equal pay” provided in the Amendment, the appropriate modification shall be made.

Furthermore, the host entity is prohibited from using any new dispatched staff in the “auxiliary” positions even if the prescribed maximum percentage has not been reached, where the number of dispatched staff in positions other than the “temporary and replaceable” ones has already exceeded the prescribed percentage maximum prior to the effective date of the Amendment.

## Penalty for Non-compliance Detailed

The Draft Provisions further elaborate the penalty for breaching the labour dispatch restrictions (e.g., the prescribed positions and the maximum percentage). It is provided that where a host entity in violation of the labour dispatch restrictions still refuses to rectify within one month after being imposed with an administrative punishment, it will be deemed that the host entity and the dispatched staff concerned have established a *de facto* employment relationship.

## Rules related to Cross-Region Labour Dispatch

The Draft Provisions provide that in the event of a cross-region labour dispatch arrangement, the standard entitlements (i.e., labour remuneration, labour conditions and social insurance) applicable to the host entity shall generally prevail if there is any discrepancy between the entitlements applicable to the host entity and those applicable to the labour dispatch company, unless the latter is more favourable to the dispatched staff and there is an agreement between the labour dispatch company and the dispatched staff in relation to adopting the entitlements applicable to the labour dispatch company.

The Draft Provisions further provide that in the context of a cross-region labour dispatch arrangement, the branch company or subsidiary of the labour dispatch company shall be responsible to contribute the social insurance locally for the relevant dispatched staff. If the labour dispatch company does not have any branch company or subsidiary in the region where the host entity is located, such labour dispatch company itself shall be responsible for the contribution of social insurance in the region where it is located, instead of engaging any other company to do so on behalf of itself.

## Intra Group Secondments Excluded

The Draft Provisions expressly exclude from its scope workers who are appointed or dispatched from a company to work for its superior entity or related company pursuant to organisational arrangements.

## Other Matters

Apart from the above, the Draft Provisions also address some other aspects of the respective rights and obligations of the labour dispatch company and host entity as follows:

- The joint and several liability borne by the labour dispatch company and host entity on any damage caused to the dispatched staff is emphasised;
- The host entity is liable to provide the labour dispatch company with the labour authority’s approval in respect of the application of the non-standard working hours schemes (e.g., the flexible working hours scheme), and to notify the dispatch staff concerned;

- The host entity, before accepting any dispatched staff, is obliged to check if the labour dispatch company has signed a labour contract with the dispatched staff. Otherwise, it may be deemed that a de facto employment relationship exists between the host entity and the dispatched staff;
- The circumstances under which the host entity is entitled to return the dispatched staff and the payment of statutory economic compensation are further elaborated.

We note that there are a few provisions in the Draft Provisions which are not compliant with the PRC Labour Contract Law. For example, it is provided that the labour dispatch company shall be liable to pay the relevant dispatched staff the statutory economic compensation, even if the host entity has returned him or her on the ground of summary dismissal. We foresee that such provisions will likely be amended in the finalised Provisions.

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