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China Issues Interim Provisions on Labour Dispatch

Subsequent to the issuance of 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) ("Draft Provisions") on 7 August 2013 (see our legal update, "Public Comments Sought on PRC Labour Dispatch Provisions", of 21 August 2013), the Ministry of Human Resources and Social Security (MOHRSS) issued on 24 January 2014 the finalised regulations relating to labour dispatch (namely, the Interim Provisions on Labour Dispatch), which will become effective as of 1 March 2014.

The Interim Provisions on Labour Dispatch (the "Interim Provisions") have not adopted most of the proposed provisions set out in the Draft Provisions. As one of the supporting regulations to the Amendments to the PRC Labour Contract Law (the "Amendments") (see our legal update, "Amendments to PRC Labour Contract Law Passed by NPC", of 9 January 2013), it further characterises the labour dispatch arrangement as an auxiliary mode to mainstream employment arrangements, specifies the utilisation limit of labour dispatch arrangements, elaborates on the statutory circumstances and restrictions for returning a labour dispatch staff back to the labour dispatch company, and fixes the duration of the transitional period for compliance with the statutory utilisation limit of labour dispatch arrangements. The relevant details are set out below:

I. "Auxiliary" Position of Labour Dispatch Clarified and the Statutory "Democratic Process" Required

The Interim Provisions address the definitions of "temporary", "auxiliary" and "replaceable" positions to which the labour dispatch employment arrangement can only be applied. These are exactly consistent with what the Amendment provides.

Unlike the definitions of the other two categories, *viz.* "temporary" and "replaceable" positions, the definition of "auxiliary" positions is not that straightforward and seems to be ambiguous. In the Interim Provisions, it is provided that an "auxiliary" position refers to a position which involves only non-core business and provides service to core business-related positions. Without clarifying what may constitute "core business" and "non-core business", the Interim Provisions instead require that an entity to which a dispatched staff is dispatched (i.e., the host entity), when deciding the specific "auxiliary" positions, shall put forward a relevant proposal and suggestion by discussing with the employees' congress or the entire body of employees. The said proposal shall also be discussed in consultation with the trade union or the employee representatives, and publicised within the host entity.

The aforesaid procedural requirements appear to be similar to the statutory "democratic process" provided in Article 4 of the PRC Labour Contract Law. Presumably, the consent of the employees is not necessary as long as the said statutory "democratic process" has been gone through.

II. Maximum Percentage of Labour Dispatch Staff Fixed

The Interim Provisions provide that a host entity shall strictly control the number of dispatched staff to not exceed 10 percent of the total number of the workforce. The total workforce refers to the aggregate of the direct hires who execute labour contracts with the host entity and any labour dispatch staff currently engaged by the host entity.

The above maximum percentage rule, as well as the restrictions relating to "temporary", "auxiliary" and "replaceable" positions do not apply to the Chinese representative offices of foreign entities (including financial organisations), and seamen-employing units which engage international ocean seamen by means of labour dispatch.

III. Statutory Circumstances and Restrictions on Returning Labour Dispatch Staff Back to Staffing Agency Expanded

Further to Article 65 of the PRC Labour Contract Law, the Interim Provisions specify that the host entity may also return the labour dispatch staff back to the staffing agency (i.e., the labour dispatching unit) under the circumstances set out in Article 40 (3) (i.e., major change in objective circumstances) and Article 41 (i.e., mass layoffs due to financial difficulties) of the PRC Labour Contract Law.

Furthermore, where the host entity is declared bankrupt, has its business licence revoked, or is ordered to be closed down or expunged according to the law; or where the host entity decides to dissolve or discontinue the business upon the expiry of its operation period; or where the relevant labour dispatch service agreement is expired; the host entity is entitled to return the labour dispatch staff back to the staffing agency. In such circumstances, the staffing agency will be required to pay such labour dispatch staff the monthly salary in an amount equal to or above the local statutory minimum wage.

However, the Interim Provisions explicitly introduce the same statutory restrictions on employment termination as those enjoyed by regular employees. That is, if a labour dispatch staff falls within any circumstance set out in Article 42 of the PRC Labour Contract Law, then the host entity may not return him/her back to the staffing agency, even if the dispatch term has expired.

The above circumstances include: (i) suffering from work-related injury or occupational disease; (ii) suffering from non-work-related injury or non-occupational disease but still within the statutory medical treatment period; and (iii) female employees during the period of pregnancy, maternity leave and nursing.

IV. Social Insurance Contribution Rules Related to Cross-region Labour Dispatch

The Interim Provisions provide that in the context of a cross-region labour dispatch arrangement, the branch of the labour dispatch company shall be responsible for contributing the social insurance locally for the relevant dispatched staff. If the labour dispatch company does not have any registered branch in the region where the host entity is located, the host entity itself shall, on behalf of the labour dispatch company, be responsible for the contribution of social insurance in the region where it is located. The labour dispatch staff shall be entitled to the social insurance benefits in the region where they work.

V. Penalty for Non-compliance

Different from the Draft Provisions which provide that it may be deemed that the host entity and the dispatched staff concerned have established a *de facto* employment relationship when there is any non-compliance with the labour dispatch restrictions (e.g., the prescribed positions, the maximum percentage, returning the labour dispatch staff back), the Interim Provisions simply provide that the penalty for both the labour dispatch company and the host entity would be executed in accordance with Article 92 of the PRC Labour Contract Law.

Under Article 92 of the PRC Labour Contract Law, where any labour dispatch company or host entity breaches the law relating to labour dispatch, it may be ordered by the Labour Authority to rectify the situation within a certain time limit; if the order is not complied with, it will be fined at a rate of not less than RMB 5,000 but not more than RMB 10,000 per person dispatched. For the labour dispatch company, its administrative license may be revoked; if any loss is incurred by any dispatched employee, the labour dispatch company and the host company involved will bear joint and several liability for his/her compensation.

In terms of the penalty for the host entity in violation of the statutory "democratic process" to determine the specific "auxiliary" position of labour dispatch (see Section I above), the Interim Provisions provide that the host entity may be warned and ordered by the Labour Authority to rectify the situation within a certain time limit. If such violation causes damage to the labour dispatch staff, the host entity shall be liable for the relevant compensation.

VI. Transitional Provisions

The transitional provisions provided in the Interim Provisions are more relaxed than those in the Draft Provisions. Specifically, the Interim Provisions provide that where the number of the labour dispatch staff engaged by a host entity prior to the implementation of the Interim Provisions (i.e., 1 March 2014) exceeds 10 percent of its total

workforce, the host entity shall make a proposal for adjustment, and reduce to the statutory maximum percentage (i.e., 10 percent) within two years after the effective date of the Interim Provisions (i.e., before 1 March 2016).

However, in the event any labour contract or labour dispatch service agreement was executed prior to the promulgation of the Amendment (i.e., 28 December 2012) and the date of expiry is later than two years after the effective date of the Interim Provisions (i.e., 1 March 2016), such contract or agreement may continue until its expiry. The host entity shall submit such proposal of adjustment to the competent labour authority for filing.

Furthermore, the Interim Provisions also provide that any such host entity is prohibited from using any new dispatched staff if the number of existing dispatch staff has not yet been reduced to the maximum percentage.

VII. Unsettled Matters

Apart from the above, we note that some hot issues are addressed by the Interim Provisions but without appropriate elaboration such as the following:

- It repeats what Article 58 of the PRC Labour Contract Law provides, by emphasising that the labour dispatch company shall conclude a labour contract with a fixed term of not less than two years with the employee to be dispatched. However, it seems to intentionally avoid answering the question of whether the dispatched staff is entitled to conclude an indefinite-term labour contract with the labour dispatch company after signing two consecutive fixed-term labour contracts.
- Without elaborating on the definition of the "equal pay for equal work" principle, the Interim Provisions simply provide that the host entity shall, according to Article 62 of the PRC Labour Contract Law, pay the labour dispatch staff the relevant welfare and benefits matching their job positions, and shall not "discriminate" against the labour dispatch staff.
- The Interim Provisions exclude the circumstances where the employer seconds its employee to work abroad or for domestic individuals from the scope of "labour dispatch". The Interim Provisions also prohibit the employer from using a worker in the form of labour dispatch but under the name of independent contractor or outsourcing, etc. However, in the absence of the clear legal definition of "labour dispatch", this would give great flexibility of interpretation to the courts.

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