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Labor Law

MOHRSS Releases Interim Provisions on Labor Dispatch

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On December 28, 2012, China's Standing Committee of the National People's Congress adopted the *Decision on Amending the PRC Employment Contract Law* (the "**Decision**"), to amend and regulate the current system of labor dispatch. On January 26, 2014, the Ministry of Human Resources and Social Security of the People's Republic of China (the "**MOHRSS**") promulgated the *Interim Provisions on Labor Dispatch* (the "**Interim Provisions**"), to further specify the rules of labor dispatch. The Interim Provisions shall come into effect on March 1, 2014.

I. Scope of Labor Dispatch and Employment Proportion Limitation

The Interim Provisions reiterates the applicable scope of labor dispatch provided in the Decision, i.e., labor dispatch should only be applicable to temporary, auxiliary or substitute positions (the "**Three Positions**"). The Interim Provisions further provides that if an employer intends to use dispatched workers to hold any auxiliary positions, its employees' congress or all employees shall hold discussions and provide proposals and opinions, and the employer shall negotiate with the labor union or employees' representatives on an equal basis, and shall also internally announce the decision.

The Interim Provisions further provides that, the number of the dispatched workers of an employer shall not exceed 10% of its total workforce, and the total workforce of an employer shall refer to the sum of the number of the workers who have executed labor contracts with the employer and the number of workers who are dispatched to the employer. It's worth noting that, the *Several Provisions on Labor Dispatch (Exposure Draft)*, only provided that, the number of the dispatched workers to hold auxiliary positions of an employer shall not exceed 10% of its total workforce and only the workers who have executed labor contracts and the dispatched workers who hold auxiliary positions constitute the total workforce. Thus, it is obvious that the Interim Provisions reflects the tighten restriction on the use of labor dispatch in China.

To facilitate smooth implementation, the Interim Provisions provide that any employer that uses dispatched workers exceeding the aforementioned 10% limit before the effective date of the Interim Provisions shall make a plan to adjust the current proportion of dispatched workers and submit the plan to the local human resource and social insurance authority for record. The employer shall reduce the current proportion to the required proportion within 2 years from the effective date of the Interim Provisions, and shall not use any additional dispatched workers until the proportion is reduced to 10%. However, if labor contracts or labor dispatch agreements are legally executed prior to the promulgation of the Decision (December 28, 2012) and will expire after 2 years from the effective date of the Interim Provisions, such contracts or agreements may continue to be performed until the expiration of their respective terms.

Dispatched workers used by representative offices of foreign enterprises or foreign financial institutions in China (for purposes hereof, China excludes Hong Kong, Macau and Taiwan), or international ocean seamen engaged by seamen employers in the form of labor dispatch are not subject to the limitations concerning the Three Positions or the proportion of dispatched workers used.

II. Legal Obligations of Labor Dispatch Entity and the Employer

Labor dispatch entities represent the employers of dispatched workers. The Interim Provisions explicitly provides the legal obligations of labor dispatch entities, which mainly include the following:

- conclude written labor contracts with dispatched workers for a fixed-term of at least 2 years;
- make true disclosure of the dispatched workers on matters prescribed in the labor contract, the rules and regulations to be observed and the contents of the labor dispatch agreement;
- provide training and education for the dispatched workers on job knowledge and safety;
- make full payment of labor remuneration and social insurance contributions in timely manner;
- supervise and urge employing entities to provide labor protection, occupational safety and health conditions for dispatched workers;
- issue certificates concerning the dissolution or termination of labor contracts with dispatched workers;
- coordinate with disputes between the dispatched workers and their employing entities;

- apply for determination of work-related injuries for dispatched workers who suffered from work-related injuries.

It is explicitly provided that in the event that a dispatched worker applies for the diagnosis and/or assessment of an occupational disease, the employer/employing entity shall be responsible to deal with the matters relating to the diagnosis and/or assessment of the occupational disease, and provide the materials such as the dispatched worker's occupational history, history of exposure to the occupational disease and test results of hazardous factors at workplace for the occupational diseases that are necessary for the diagnosis and/or assessment of the occupational disease in a truthful manner, and the labor dispatch entity shall provide the dispatched worker with other materials necessary for the diagnosis and/or assessment of the occupational disease.

Employers/Employing entities directly manage the labor process of dispatched workers. The Interim Provisions explicitly provides that employing entities shall provide dispatched workers with benefits in relation to their positions, and shall not discriminate against dispatched workers.

III. Situations of Returning Dispatched Workers

In accordance with Article 65 of the *Employment Contract Law*, under any circumstance as stated in Article 39 (major fault by dispatched worker), Item 1 of Article 40 (dispatched workers take sick leave for a period exceeding the statutory sick leave period) or Item 2 of Article 40 (dispatched workers are unqualified for the job) of the *Employment Contract Law*, the employer may return the workers to the labor dispatch entity. The labor dispatch entity may dissolve the labor contracts with the relevant dispatched workers.

Article 12 of the Interim Provisions further provides that under any of the following circumstance, an employer may return dispatched workers: (a) the occurrence of Item 3 of Article 40 (significant changes in objective circumstances), or Article 41 (economic lay-off) under the *Employment Contract Law*; (b) the employer is declared bankrupt, its business license is revoked, the employer is ordered to be shut down or cancelled in accordance with laws, the employer decides to dissolve in advance, or discontinues operation upon the expiration of its business term; and (c) the labor dispatch agreement is terminated upon expiration.

However, where a dispatched worker falls under the situations as stated in Article 42 of the *Employment Contract Law* (medical treatment period, a female worker who is going through pregnancy, pre-natal or lactation period, etc.), the employer shall not return the dispatched worker to the labor dispatch entity according to item (a) listed in the previous paragraph. Meanwhile, even the term for labor dispatch expires, the dispatched worker shall not be returned until the relevant abovementioned situations disappear.

During the period when a dispatched worker who is returned but has no work to do, the labor dispatch entity shall pay remuneration on a monthly basis to the dispatched worker in an amount no less than the minimum wage required by the local government.

IV. Dissolution and Termination of Labor Contract under Labor Dispatch

Although labor dispatch entities are special employers, the labor contracts they executed as employers shall also be subjected to the Employment Contract Law. However, the labor dispatch relations are different from common labor relations, the Employment Contract Law and relevant regulations have not explicitly specified the parties' rights and obligations upon the dissolution and termination of labor contract under labor dispatch. At this point, the Interim Provisions explicitly provides the conditions of dissolution and termination of labor contracts and economic compensation under labor dispatch, including:

- a) Unilateral dissolution right of dispatched workers. A dispatched worker may dissolve the labor contract by giving a written notice to the labor dispatch entity concerned 30 days in advance or 3 days in advance if within the probation period. The labor dispatch entity shall inform the employer concerned of the dissolution of the labor contract by the dispatched workers in a timely manner.
- b) A labor dispatch entity may dissolve the labor contract with a dispatched worker who is returned by an employer under Article 12 of the Interim Provisions and who then disagrees with the new labor dispatch arrangements made by the labor dispatch entity under conditions that are the same as or higher than those agreed in the labor contract. However, if the conditions are lower than those agreed in the labor contract and the dispatched worker disagrees with the new labor dispatch arrangements, the labor dispatch entity shall not dissolve the labor contract.
- c) If a labor dispatch entity is declared bankruptcy, its business license is revoked, or it is ordered to be shut down or cancelled in accordance with laws, or if it decides to dissolve in advance or discontinues operation upon the expiration of the business term, the labor contracts concluded by such labor dispatch entity shall be terminated. However, the employing entities concerned shall consult with the labor dispatch entity on the proper arrangements of dispatched workers.
- d) The payment conditions of economic compensation. The Interim Provisions explicitly provides that, besides the situations provided by Employment Contract Law, under the situation of aforesaid b) and c), the economic compensation shall also be paid to the dispatched worker.

V. Trans-regional Labor Dispatch and Relevant standards

The Interim Provisions explicitly provides that, if a labor dispatch entity dispatches a worker to work in another region, the labor dispatch entity shall pay social insurance contribution for the dispatched worker at the place where the employer is located. In the meantime, the Interim Provisions provides that, where a labor dispatch entity establishes a branch at the place where an employer is located, the branch shall complete the formalities for social insurance contribution for the dispatched worker, and pay premiums for social insurances. Where the labor dispatch entity does not have any branch at the place where the employer is located, the employer shall, on behalf of the labor dispatch entity, complete formalities for social insurance contribution for the dispatched worker, and pay premiums for social insurances.

The Interim Provisions represents a major development for labor dispatch to specify the rights and obligations of labor dispatch entities, dispatched labors and employers that accept dispatched workers.

Important Announcement

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