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Insights & Ideas

MOHRSS Releases Draft Rules on Labor Dispatch to Solicit Public Comments (Authors: Wenyu JIN, Tracy TANG, Alan WANG)

On December 28, 2012, the Standing Committee of the National People's Congress of the People's Republic of China adopted the *Decision of the Standing Committee of the National People's Congress on Amending the Employment Contract Law of the People's Republic of China* (the “**Decision**”), to amend and regulate the current system of labor dispatch. On June 20, 2013, the PRC Ministry of Human Resources and Social Security (MOHRSS) promulgated the *Implementing Measures for Administrative Licensing for Labor Dispatch* (the “**Implementing Measures**”), to further specify the details of the administrative licensing for labor dispatch. The Decision, together with the Implementing Measures, came into effect on July 1, 2013. On August 7, 2013, MOHRSS promulgated the *Several Provisions on Labor Dispatch (Draft for Comments)* (the “**Draft**”), to seek public comments. The Draft is aimed at further regulating the labor dispatch market in the following aspects:

I. Definition of labor dispatch

The Draft clearly defines the definition of labor dispatch. Labor dispatch refers to a form of employment whereby an employer dispatches its employed laborer as the mode of business operation to another employer who directly manages the labor process of the laborer. However, where a labor dispatch entity is established, in the form of a capital contribution or partnership by an employer or the entity to which the employer belongs, and the labor dispatch entity dispatches a laborer to the employer or the entity to which the employer belongs, such business is not allowed.

At the same time, in order to distinguish between labor dispatch and labor outsourcing, it is explicitly stipulated that where an employer contracts out its operations to a contractor, but directly manages the labor process of a laborer of the contractor that engages in the operations, this employ mode shall be labor dispatch as well.

II. Use of labor dispatch and employment proportion limitations

The Draft further reiterates the use of labor dispatch, which has been earlier provided in the Decision. The execution of a labor contract directly represents the basic form of employment for an employer looking to hire, while labor dispatch should function as an alternative method of employment. Moreover, labor dispatch should only be applicable to temporary, auxiliary or substitute positions (hereinafter referred to as the “**Three Positions**”). The Draft also provides some details on the provisions: 1) an employing entity determines any auxiliary position according to the characteristics of its industry and business after putting forward a list of auxiliary positions that are to

be subject to labor dispatch employment and 2) an employing entity consults with its trade union or employees' assembly about such list, which is publicized within the employing entity for supervision.

According to the spirit of strict limits for labor dispatching stipulated in the Employment Contract Law and the Decision, the Draft further provides that, the number of the laborers dispatched to hold the auxiliary positions of an employing entity shall not exceed 10% of the total number of the laborers of such employing entity. In the preceding paragraph, the total number of laborers refers to the sum of the number of the laborers who conclude a labor contract with their employing entity and the number of the laborers who are dispatched to hold auxiliary positions of an employing entity. Literally speaking, only auxiliary positions of the Three Positions are concluded in the total number laborers of an employing entity.

To help facilitate the smooth implementation of laws and regulations, the Draft clearly states the transitional provisions for over-proportion labor dispatching. Any labor contract or labor dispatch agreement legally concluded before the Decision became effective (July 1, 2013) shall continue to be performed until the expiry of the term of the contract or agreement. The employing entity shall not return the dispatched laborer on the grounds that the provisions in the Three Positions are not satisfied, the proportion of labor dispatch employment is exceeded, or the labor dispatch entity fails to legally obtain its administrative license. In addition, the labor dispatch entity shall not rescind the labor contract of the dispatched laborer on the grounds that it failed to legally obtain an administrative license. Furthermore, before meeting the statutory requirements of proportion, the employing entity is not allowed to use any new dispatch laborer in auxiliary positions.

However, foreign diplomatic representative organizations in China, foreign news agencies, foreign enterprises' representative organizations, foreign financial institutions' representative organizations and other organizations are not subject to the limitations of the Three Positions or the proportions of labor dispatch employment.

III. Legal obligations of labor dispatch entity and employing entity

For dispatched laborers, labor dispatch entities represent their employers in legal sense. The Draft clearly states the legal obligations of labor dispatch entities, which include the following: conclude a labor contract with laborer; on time full payment of labor remuneration and social welfare; provide skills training programs; urge employing entities to improve the protection of occupational safety and health conditions; coordinate labor disputes; do the necessary work for identification of accidents and injuries as well as any relevant issues. Where an employing entity causes any damage to a dispatched laborer, the labor dispatch entity and employing entity shall bear joint and several compensation liabilities.

The employing entity directly manages the labor process of dispatched laborers, besides the prior provisions of employing entities' legal obligations in the Employment Contract Law. The Draft also

stipulates the following regulations: **(a)** Where an employing entity uses a laborer in a position that is subject to a flexible working hour system or a comprehensive working hour calculation system, the employing entity shall provide the relevant authorities' approval certification to the labor dispatch entity and inform the dispatched laborer of the same; **(b)** An employing entity shall, before accepting a dispatched laborer, verify the conclusion of the labor contract between the labor dispatch entity and dispatched laborer. Where an employing entity uses a dispatched laborer who has not concluded a labor contract, it shall be deemed to have established a labor relationship with the dispatched laborer, and shall promptly conclude a labor contract which shall commence from the date of use of the labor service. Where a work-related injury occurs, the employing entity shall cooperate with the investigation and handling of the matters and bear appropriate compensation liabilities.

IV. Situations of returning dispatched laborers

As previously provided in the Employment Contract Law, where the dispatched laborer comes under the regulations of Article 39 (major fault by dispatched laborer) and Items 1 and 2 of Article 40 (exceeding the sick leave period and not qualified for the job) hereof, the employing entity may return the laborer back to the labor dispatch entity. The labor dispatch entity may dissolve the labor contract in accordance with the relevant provisions hereof.

The Draft states that the following situations of such returning is considered lawful: **(a)** Item 3 of Article 40 of the Employment Contract Law (significant changes in objective circumstances), Article 41 of the Employment Contract Law (economic lay-off); **(b)** The employing entity returns the dispatched laborer to the labor dispatch entity due to circumstances such as the legal declaration of its bankruptcy, the revocation of its business license, an order to shut-down, its cancellation, a decision on advance dissolution, and the expiry of the term of a labor dispatch agreement; and **(c)** The employing entity returns to the labor dispatch entity the dispatched laborer in the position that is not temporary, auxiliary or substitutable or the dispatched laborer employed exceed the limited proportion. However, the labor dispatch entity is not allowed to terminate the labor contract in the aforesaid situations and instead must re-dispatch the dispatched laborer.

V. Dissolution and termination of labor contract under labor dispatch

Although labor dispatch entities are special employers, their labor contracts are also subjected to the Employment Contract Law. The Draft clearly states that the conditions of dissolution and termination of labor contracts and economic compensation under labor dispatch in most situations are consistent with ordinary labor contracts.

There is a big difference between the Draft and the Employment Contract Law. For an ordinary labor contract, if a laborer is dismissed due to his/her major fault, no economic compensation shall be paid by the employer. However, under the same situation, the Draft states that the employing entity

is entitled to return him/her back, and the labor dispatch entity can terminate his/her labor contract with an economic compensation. We believe there is a conflict between the Draft and the Employment Contract Law, and will continue to monitor the formal regulation as to whether this provision will be modified or removed.

VI. Trans-regional labor dispatch and relevant standards

Where a labor dispatch entity carries out a trans-regional labor dispatch (labor dispatching from undeveloped areas to developed areas in most cases), the labor remuneration, labor conditions and social insurance of the dispatched laborer are subject to the standards of the place where the employing entity is located. Where the relevant standards of the place where the labor dispatch entity registers is higher than those of the place where the employing entity is located (labor dispatching from the developed areas to undeveloped areas), and the labor dispatch entity and the dispatched laborer agree that the relevant standards of the place where the labor dispatch entity registers applies, such agreement applies.

The Draft clearly states that labor dispatch entities shall be responsible for the payment of social insurances. Under trans-regional labor dispatch, where a labor dispatch entity establishes a branch or subsidiary company at the place where the employing entity is located, the branch or subsidiary company shall go through the formalities for social insurance contribution for the laborer, and pay premiums for basic social insurances. Where a labor dispatch entity does not establish any branch or subsidiary company at the place where the employing entity is located, the labor dispatch entity shall legally go through the formalities for social insurance contribution for the dispatched laborer at the place where the labor dispatch entity is located, and pay premiums for basic social insurances. However, no labor dispatch entity may appoint any other entity to pay social insurance for dispatched laborer.

VII. Legal liabilities of illegal labor dispatch

The Draft reiterated legal liabilities of all parties under labor dispatch, including: **(a)** Where an employing entity causes any damage to a dispatched laborer, the labor dispatch entity and the employing entity shall bear joint and several compensation liabilities and **(b)** Where a labor dispatch entity or employing entity violates the Employment Contract Law, the relevant authorities shall order it to make corrections within a specified time limit. In the event of a failure to do so within the specified time limit, the relevant authorities shall impose a fine of not less than RMB5,000 but not more than RMB10,000 on each person, and revoke its labor dispatch business license.

Moreover, the Draft clearly states the situation that is deemed to be established the labor relationship with a dispatched laborer. Where an employing entity that uses a dispatched laborer in violation of the Employment Contract Law regarding the use of labor dispatch in the Three Positions or exceed the proportion refuses to make corrections within one month after being fined by relevant

authorities, the dispatched laborer in the position that is not temporary, auxiliary or substitutable or the dispatched laborer exceed he limited proportion is deemed to establish the labor relationship with the employing entity, and the employing entity shall promptly conclude a labor contract , unless the dispatched laborer expresses, in writing, his/her unwillingness to establish a labor relationship with the employing entity.

The Draft represents a major development for labor dispatch and all parties' rights and obligations, and we will continue to monitor the relevant laws and regulations. We hope the above introduction is helpful to you. If you have any questions, please feel free to contact us at any time.

Legal Updates

1. NDRC Issues Guiding Opinions to Officially Open PE Bond Issuance (Authors: Evan ZHANG, James WANG, Mengzhu LIU)

To broaden the financing channels for small and micro enterprises¹ and relieve their financing difficulties, the National Development and Reform Commission (“NDRC”) issued the *Guiding Opinions on Strengthening the Financing Services of Small and Micro Enterprises and Supporting the Development of Small and Micro Enterprises* (Fa Gai Cai Jing[2013] No. 1410) (the “**Guiding Opinions**”) on July 25, 2013, which further carries out the *Guiding Opinions on Financial Support for Economic Restructuring, Transformation and Upgrading* (Guo Ban Fa [2013] No.67) issued by the State Council General Office. The Guiding Opinions stipulate eleven measures to reduce the financing costs of small and micro enterprises and increase support for such enterprises. The main points of the Guiding Opinions are as follows:

Officially endorse the issuance of corporate bonds by PE/VCs for the first time

- (a) The Guiding Opinions support qualified venture capital enterprises, equity investment enterprises, and industrial investment funds in the issuance of corporate bonds specifically for investing in small and micro enterprises. In addition, they support qualified shareholders or limited partners of venture capital enterprises, equity investment enterprises, and industrial investment funds in the issuance of corporate bonds in order to expand the capital scale of venture capital enterprises, equity investment enterprises, and industrial investment funds.
- (b) The Guiding Opinions improve the relevant institutions of small and medium-sized enterprises’ (“SMEs”) collective bonds with the characteristics of “unified organization, unified guarantee, bundled issuance and respective liabilities”. The Guiding Opinions also point out that for issuers of collective bonds whose fund-raising scale is less than RMB 100 million, the total amount of such raised funds may be used to supplement the company’s working capital.
- (c) The Guiding Opinions expand the pilot scale of small and micro enterprises’ credit-increased collective bonds², and support qualified State-owned enterprises and local government investment and financing platforms to carry out the pilot issuance of “small and micro enterprises’ credit-increased collective bonds”. The lending of the raised funds shall be managed by commercial banks under effective supervision. The Guiding Opinions also

¹ Small and micro enterprises refer to the small and micro enterprises specified in “SME Classification Standard Provisions” (Gong Xin Bu Lian Qi Ye [2011] No.300).

² Small and micro enterprises’ credit-increased collective bonds refer to small and micro enterprises that as joint bond issuers, issue corporate bonds with debt service at maturity, which adopt the mode of “unified organization, unified guarantee, bundled issuance and respective liabilities”, to the investor under the organization of the initiators.

encourage local governments to adopt a variety of approaches such as risk-release funds and bond discounts in order to support “small and micro enterprises’ credit-increased collective bonds”. Furthermore, the Guiding Opinions improve the financing difficulties of SMEs in issuing bonds due to low credit ratings, high financing costs and other related reasons, and reduce bond issuance costs.

- (d) In respect of the specific corporate bond issuance and financing objectives, the Guiding Opinions states it: a) encourages local government investment and financing platforms to issue bonds to be used in the construction of small enterprises’ venture bases, science and technology incubators and standard factory buildings within various types of parks, the industrial agglomeration areas’ service platforms and SME public service platform network engineering, providing equipment financing and leasing business to the small and micro enterprises, b) supports SMEs in the issuance of corporate bonds to improve the capabilities of independent innovations, promote energy conservation and emission reduction, improve product quality and improve work safety conditions.

Additional policy support for financing of small and micro enterprises

In respect of the competent authorities’ requirements, the Guiding Opinions clearly state that provincial record management departments shall: i) ensure that qualified venture capital enterprises may promptly and fully enjoy preferential taxation policies, ii) encourage the establishment of venture capital guidance funds of small and micro enterprises and require established venture capital guidance funds to accelerate the introduction of incentive systems which encourage venture capital enterprises to invest in small and micro enterprises, iii) facilitate project matching between venture capital enterprises, equity investment enterprises and small and micro enterprises, and iv) perform record management work of emerging industry venture capital plan’s holding share of venture capital enterprises. Provincial development and reform departments shall formulate policies and strategies to encourage fiscally invested equity investment enterprises and industrial investment funds to support small and micro enterprises and perfect the performance appraisal system of equity investment enterprises and industrial investment funds.

In addition, the Guiding Opinions shall support venture capital enterprises, industrial investment funds and corporate bonds in meeting the funding needs of transformation and product structure adjustment of small and micro enterprises in industries with excess production capacity. Furthermore, the Guiding Opinions specify the issue of settling basic bank service charges related to enterprises.

2. PBOC Simplifies Procedures for Cross-border RMB Business (Authors: Charles LI, Irene CAI, Xinfeng ZHANG)

In order to improve the efficiency of cross-border RMB settlements and further promote the internationalization process of RMB, the People's Bank of China (the "PBOC") issued the *Circular on Simplifying the Procedures for Cross-border RMB Business and Improving the Relevant Policies* (the "Circular") on July 5, 2013. The Circular simplifies and improves the procedures for cross-border RMB settlements of current accounts, overseas RMB lending business and overseas RMB bond issue of, and provision of RMB security to foreign entities by domestic non-financial institutions.

Open RMB funds pool overseas lending settlements

The Shanghai headquarters of the PBOC first introduced RMB funds overseas lending pilot policies in December 2012, granting cross-border RMB lending quota to qualified multinational companies. Under the pilot program, within the specified quota, a multinational company's headquarters office in China may enter into a loan agreement with its overseas parent company (or affiliated company) directly, completing cross-border lending by using its own RMB. Compared to the traditional "Entrusted Lending" model where a bank acts as an intermediary, cross-border RMB lending is much more flexible. In the cross-border RMB lending model, the lender and borrower enter into a loan agreement directly, agreeing on the interest rates and carrying out self-discipline management for its loan funds. Since the implementation of the pilot policies, 4 multinational companies have obtained approved quotas for cross-border RMB lending.

In order to further facilitate RMB lending, the Circular, for the first time in the form of an official document, provides that, the domestic non-financial institutions that are related in shareholding or finally controlled by the same parent company, and one member institution of which performs functions of the regional headquarters or investment management, may apply to domestic banks for RMB overseas lending settlement business using the RMB funds pool model. The interest rates, terms and purposes of overseas RMB lending shall be determined through negotiations by the lenders and borrowers. Domestic non-financial institutions engaging in the RMB overseas lending business shall, in accordance with *the Administrative Measures on RMB Bank Settlement Accounts* and other regulations on bank settlement accounts management, apply to banks for opening RMB special deposit accounts which will be specially used for overseas RMB lending. The overseas RMB lending must be recovered in RMB through the RMB special deposit account from which the lending was conducted.

Specify settlement procedures of funds raised from overseas RMB bond issue

The Circular explicitly stipulates that domestic non-financial institutions may, in accordance with the administrative regulations on bank settlement accounts, apply to domestic banks for opening RMB special deposit accounts. Such accounts will be specially used to deposit funds raised from overseas bond issue and approved by the PBOC to be remitted back from overseas. The deposit rate of such accounts shall follow the demand deposit interest rates published by the PBOC, and the

funds shall be used for the purposes as prescribed in the bond prospectus. Domestic agent banks will extend the financing term of the RMB accounts of overseas participating banks to one year, and the financing proportion of accounts shall not exceed 3% of the domestic agent banks' total RMB deposits balance of the previous year. For settlement needs, funds remittance and transfer may be conducted between RMB inter-bank current accounts opened by overseas participating banks with domestic agent banks and RMB accounts opened by overseas participating banks with overseas RMB business clearing banks. The funds remittance and transfer may be conducted between RMB clearing accounts opened by each overseas RMB business clearing bank within the territory of China for settlement needs.

Specify the settlement of performance of RMB security provided to foreign entities

In accordance with the Circular, domestic non-financial institutions may provide RMB-denominated security to foreign entities as stipulated under the *Real Rights Law of the People's Republic of China*, the *Security Law of the People's Republic of China* and other relevant laws and regulations. When domestic non-financial institutions use RMB funds to perform the security provided to foreign entities, domestic banks will handle the RMB settlement after examining the authenticity of the security performance. The domestic non-financial institutions may also use their own RMB funds retained overseas to pay to perform the security.

Except for the above content, the Circular also stipulates that domestic banks may carry out cross-border asset transfer business for cross-border RMB trade financing and simplifies the procedures for cross-border settlements of bankcards, RMB accounts and the RMB cross-border settlement business of enterprise import and export trades.

Important Announcement

This Newsletter has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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