



January 4, 2013

Labor Law

Summary of Major Amendments to the PRC Labor Contract Law

Kelvin Gao | Alan Wang

On December 28, 2012, the standing committee of the 11th National People's Congress has enacted *the Decision on Amendments to the PRC Labor Contract Law* (the "**Decision**") during its 30th Session, which will become effective on July 1, 2013.

The Decision mainly focuses on labor dispatch and here is a brief summary of the major amendments:

Use of Labor Dispatch

The Decision clearly provides that it is the basic form of employment for an employer that an employee should be hired by execution of a labor contract directly, while labor dispatch can just be a supplementary way for employment. Further, labor dispatch should only be applicable to temporary, auxiliary or substitute positions. Under the Decision, specific interpretation has been given to such terms (i.e., the term of "temporary position" should mean a job that will last not more than 6 months; the term of "auxiliary position" should refer to a job which provides services to positions of main business; and the term of "substitute position" should mean a job which is substituted by the dispatched workers since any employee can not work for certain period due to such reasons as full time study, taking leaves, and etc.).

Pursuant to the Decision, employers shall strictly control the number of dispatched workers used by them and the ratio of dispatched workers shall be kept under certain proportion of the total employment which will be determined by the labor administration department of the State Council later. Meanwhile, it is stated in the Decision that violation of the provisions related to labor dispatch will subject the relevant employer to the following penalties by the competent PRC labor governmental authority (i) the employer will be ordered to rectify the irregularities in a given time frame; and (ii) if the rectification has not been completed in a timely way, the employer will be imposed of a fine ranging from RMB5,000 to RMB10,000 for each dispatched workers involved.

Given the specific use of scope for labor dispatch, we understand that some adjustment may need to be made for an employer if its current way of employment is through labor dispatch (e.g., it has signed a dispatch agreement with a labor dispatch entity which will execute the labor contracts with relevant employees and then dispatch them to it) in accordance with the Decision, including, among others, termination of the underlying dispatch agreements and execution of labor contracts with the relevant employees directly.

In addition, if any employer would like to adopt the approach to terminate the dispatch agreements and sign labor contracts with its employees directly, the following may need to be considered by such employer in advance: (i) whether this approach will constitute the termination of labor contracts without causes which will lead to severance pay to be paid to relevant employees; (ii) whether this approach will affect the interests of employee (such as continuous calculation of working years); and (iii) whether any extra cost will be incurred if adopting such approach (e.g., expenses related to payment of social insurance and housing funds on its own). In this case, we would suggest that some human resource planning shall be better worked out in preparation for the Decision.

Please kindly note that so far the Decision has yet to give a clear interpretation for the term of “auxiliary position” which we understand will need to be further clarified in the future. Furthermore, the specific permitted amount of dispatched workers of an employer should also be regulated by the PRC labor administration department of the State Council.

Equal Pay for Equal Work

According to the Decision, dispatched workers of an employer should be entitled to the same pay as those of employees directly hired by such employer.

Since this has been clearly provided under the Decision, an employer should pay attention to this when using dispatched workers.

Licenses for Labor Dispatch

The Decision raises the minimum capital threshold for establishment of a labor dispatch entity from RMB500,000 to RMB2,000,000. Further, it is provided under the Decision that no entity or individual can be engaged in labor dispatch business without the labor dispatch license issued by the competent PRC labor governmental authority. In addition, the Decision intensifies the penalties against labor dispatch entities (i.e., failure of any entity engaged in labor dispatch business to obtain the permits will be ordered to stop business operation, be confiscated the illegal gains and be imposed of a fine ranging from one time to five times of the illegal gains or a fine of up to RMB50,000 if there is no illegal gains).

Given the above, an employer will need to examine and verify the relevant licenses before engaging any labor dispatch entity. In addition, a labor dispatch entity may not start its

business operation until it obtains the license.

Additionally, the Decision further provides the transitional arrangement. According to the Decision, it will not affect the labor contracts and dispatch agreements already signed on or prior to its promulgation until expiration of their terms. But the relevant provisions in the labor contracts and dispatch agreements will need to be revised in the event of existence of any provision violating the principle of “equal pay for equal work” therein. Further, an entity engaging in labor dispatch business on or prior to the effective date of the Decision should be generally allowed to obtain the labor dispatch license within one (1) year upon the effectiveness of the Decision and after that, it can continue to conduct labor dispatch business.

Hope the above has been a helpful summary to you. If you have any questions, please don't hesitate to contact us at any time.

Important Announcement

This Legal Commentary 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.

If you have any questions regarding this publication, please contact **Kelvin Gao (+86-21-6080 0920; kelvin.gao@hankunlaw.com)**.