



世民律師事務所 SHIMIN LAW OFFICES

## NEWSLETTER

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### Notice of Solicitation of Public Opinions on the "Provisions of Labor Dispatching (Draft)"

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In order to implement the Decision on the Amendment of the PRC Employment Contract Law by the Standing Committee of the National People's Congress and to regulate labor dispatching, this Ministry drafted the Provisions of Labor Dispatching (Draft), and now open the draft to the public for discussion. The public can provide feedback through the following methods:

(1) By visiting the China Legislative Information Network (URL: <http://www.chinalaw.gov.cn>), and going to "comments to the draft of laws and regulations" on the left side of the homepage.

(2) By E-mailing: [lifachu@mohrss.gov.cn](mailto:lifachu@mohrss.gov.cn)

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*For further information and discussion on the matters covered in this letter, please contact us at the addresses set following :*

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(3) By mailing a letter to the Ministry of Human Resources and Social Security (Address: 3 East He Ping Li Street, Dongcheng District, Beijing 100013). The mailing envelopes should contain the phrase "Comments on Provisions of Labor Dispatching."

The deadline for comments is September 7, 2013.

Ministry of Human Resources and Social Security

August 7, 2013

Provisions of Labor Dispatching  
(Draft for Public Opinions)

Chapter I General Provisions

Article 1. [Basis of Legislation] The following provisions are enacted to regulate and safeguard the legitimate rights and interests of workers and to promote harmonious and stable relationships between employment parties, according to "The People's Republic of China Employment Contract Law" (hereinafter referred to as the "Employment Contract Law" ), the Decision on the Amendment of the PRC Employment Contract Law by the Standing Committee of the National People's Congress (hereinafter as "Amendatory Decision" ), and Regulations on the Implementation of the PRC Employment Contract Law (hereinafter as the "Regulations" ) and other laws and regulations.

Article 2 [Definitions] “Dispatching” means a form of employment that the businesses of the dispatching entities are to recruit and dispatch workers to work for other entities, and the receiving entities manage the dispatched workers directly in the working process.

An employer that awards the business to contractors, but is engaged in the management of workers directly in the process of the contract work, it is considered labor dispatching.

Article 3 [Exclusion] The assignment of workers to a receiving entity or its subsidiaries is not considered labor dispatching if the dispatching entity is fully or partially owned by the receiving entity or its subsidiaries.

## Chapter2: Scope of Labor Dispatching

Article 4, [Three Characteristics positions] Employment through employment contracts is the basic employment form in our nation. Labor dispatching is a supplemental form, and can only be used in temperate, auxiliary or substitute positions.

Temporary Positions refer to positions with working periods not exceeding six months.

Auxiliary Positions refer to non-core business positions providing supports to the positions of core businesses. The receiving entities may request the auxiliary positions based on characteristics of the industry and business, provide an employment dispatching list proposed for auxiliary jobs, then negotiate with the Unions or the Workers' Congress to decide the positions on the list, and place a notice at the working entities for publicity and supervision.

Substitute Positions refer to the temporary positions which replace the original employees who cannot work for a certain period of time due to full-time study, vacations and other reasons.

Article 5, [Employment ratio]: Employers shall strictly control the number of dispatched employees. The dispatched employees working on the assistive positions in any entity shall not exceed 10% of the Total Number of Employees.



The Total Number of Employees refers to the sum of the number of employment contracts, plus the number of assistive dispatching positions.

The Entity Calculating the Ratio of Dispatched Positions is defined as the receiving entities that are able to sign employment contracts in accordance with the Employment Law and the Regulations.

Article 6, [Situations Not Restricted by Three-Characteristic Positions] Foreign diplomatic representative offices, representative offices of the United Nations organizations, representatives of foreign news agencies, representative offices of foreign enterprises and resident representative offices of foreign financial institutions are not subject to the employment ratio limitation of using dispatched employees who are in the temporary, auxiliary, substitutive positions.

### CHAPTER Three: Signing and Implementing Employment Contracts

Article 7: [Signing employment contracts]: the dispatching entity shall sign written employment contracts with the dispatched employees, and clearly inform the employees of the nature of labor dispatching.

Article 8, [Contract period]: the dispatching entities shall sign fixed-term employment contracts with an employment period of more than two years with the dispatched employees. By mutual agreements, the two parties may sign non-fixed term employment contracts.

Article 9, [Term Independent of Assignments or Projects]. The dispatching entities shall not make the duration of employment contracts for dispatched workers dependent on the completion of any specific assignments or projects. The dispatching entities, however, may arrange for dispatched employees to participate in project- or assignment-specific jobs.

Article 10, [Full-time employment]: the dispatching entities shall not hire dispatched employees as non-full-time employees, but may assign the dispatched employees to part-time work.

Article 11, [Probation]: the dispatching entities may adopt probation periods in accordance with the laws. Dispatching entities may only impose one probation period on each dispatched employee.

The probation periods agreed upon by the dispatching entity and the receiving entity are not considered probation periods under the Employment Contract Law.

Article 12, [Contents of Employment Contracts]: The dispatching entities should sign employment contracts with the dispatched employees. In addition to the items described in Article 17 of the Employment Contract Law, the contracts shall also indicate the receiving entities, dispatching period, positions, and provisions of equal pay to the dispatched employees clearly.

Article 13, [Equal Pay]: The dispatched employees have the rights to receive equal pay as wages of the same positions. The dispatching entity shall pay dispatched workers in accordance with the wages received by same or similar positions. If there are no same positions in the dispatched entities, the wages can be with reference to the positions nearby or similar positions.

The employment contracts between the dispatching entities and the dispatched employees, and the employment dispatching agreements between dispatching entities and receiving entities, shall clearly indicate the agreed wages and benefits in according to Article 13.

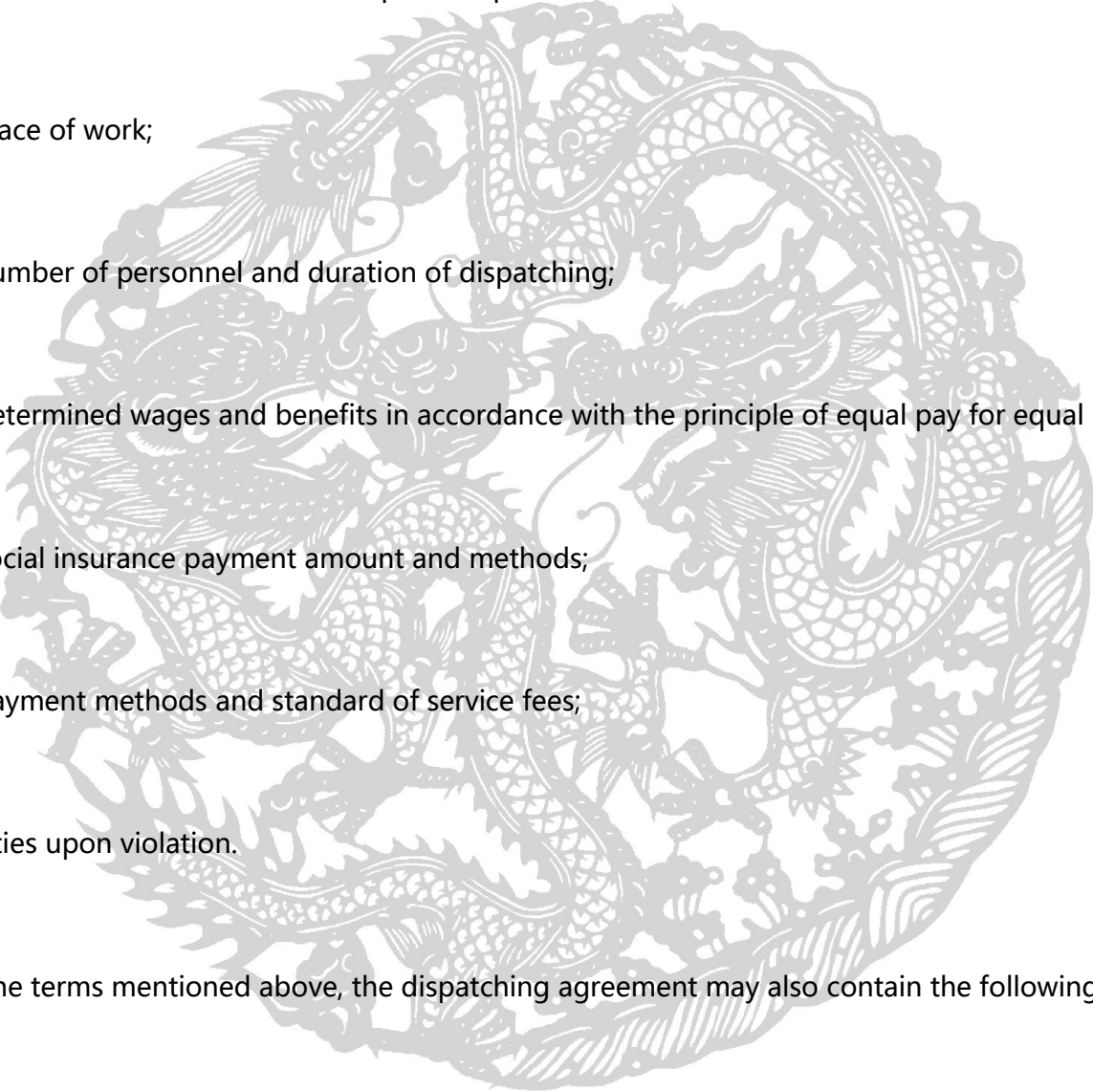
Article 14, [Verifying the Validity of Employment Contracts]: The dispatching entities shall provide proofs of employment contracts with the dispatched employees to the receiving entities in advance.

The receiving entities shall verify proofs of the employment contracts between the dispatching entities and the dispatched employees.

If a receiving entity employs dispatched employees who have not signed an employment contract with the dispatching entities, an employment relationship shall be considered to have been established between the receiving entities and the dispatched employees. The receiving entities shall promptly prepare an employment contract with the starting date of the actual employment as the starting date of the contract.

Article 15, [Labor Dispatching Agreements]: Dispatching entities shall enter into labor dispatching agreements with receiving entities for the dispatched employees.

Dispatching agreements shall stipulate the following terms:

- (1) The names and characters of the dispatched positions;
  - (2) The place of work;
  - (3) The number of personnel and duration of dispatching;
  - (4) The determined wages and benefits in accordance with the principle of equal pay for equal positions;
  - (5) The social insurance payment amount and methods;
  - (6) The payment methods and standard of service fees;
  - (7) Liabilities upon violation.
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Besides the terms mentioned above, the dispatching agreement may also contain the following terms:

- (1) working hours, vocation and leave matters;
- (2) occupational safety, health, and training matters;
- (3) work-related injury or illness matters;



(4) financial compensation and other expenses;

(5) conditions for cancellation of the dispatching agreement;

(6) the provisions of laws and regulations.

Article 16, [Obligations of Dispatching Entities] :

(1) Truthfully inform the dispatched employees about the rights guarantees by Article 8 of the Employment Contract Law, and jobs characters, social insurance, employment compensation and other terms as specified in the relevant regulations and the employment contract;

(2) Establish training systems, educate employees on job skills and working safety;

(3) Sign employment contracts with employees, make payments of social insurance premiums, and perform the legal duty to assist with the employees' social insurance procedures and transfers;

(4) Pay the dispatched employees timely with full payments of employment wages and compensations in accordance with relevant provisions;

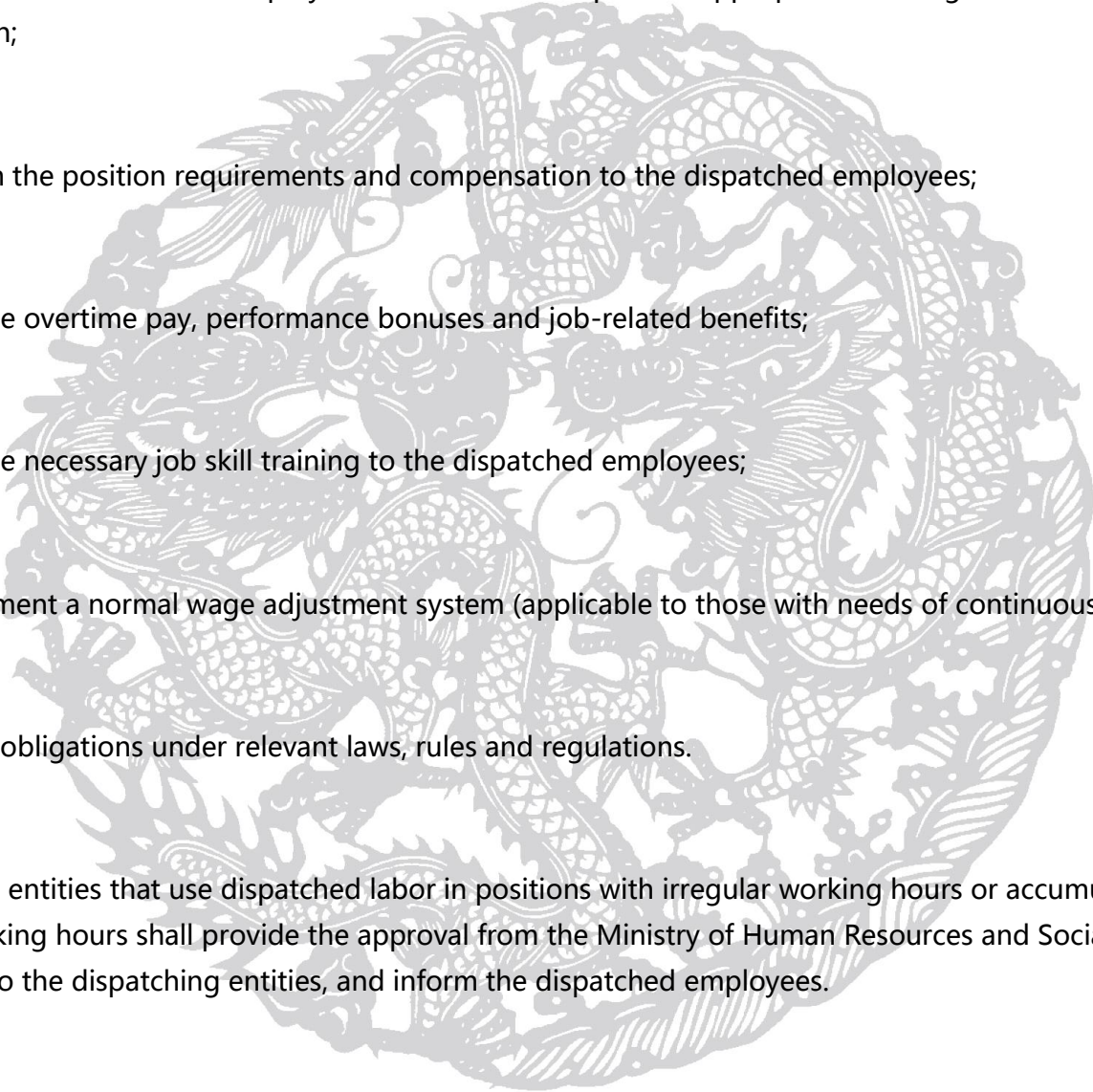
(5) Supervise receiving entities to improve work safety and health protection conditions;

(6) Issue proofs of rescission or termination of employment contract according to law;

(7) Assist in solving disputes between receiving entities and employees ;

(8) Other obligations under relevant laws, rules and regulations.

Article 17, [Obligations of the Dispatched Entities]: Dispatched entities shall fulfill the following obligations to the dispatched employees:

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- (1) Implement the national employment standards, and provide appropriate working conditions and protection;
  - (2) Inform the position requirements and compensation to the dispatched employees;
  - (3) Provide overtime pay, performance bonuses and job-related benefits;
  - (4) Provide necessary job skill training to the dispatched employees;
  - (5) Implement a normal wage adjustment system (applicable to those with needs of continuous labor);
  - (6) Other obligations under relevant laws, rules and regulations.

Receiving entities that use dispatched labor in positions with irregular working hours or accumulation of total working hours shall provide the approval from the Ministry of Human Resources and Social Security to the dispatching entities, and inform the dispatched employees.

Article 18, [Continued Implementation]: If the administrative licenses of the dispatching entities are not extended, revoked, suspended, or canceled, the dispatching entities shall continue to their duties under the employment contracts and dispatching agreements until the contracts or agreements expire.



Article 19, [Job-Related Injuries]: If the dispatched employees are injured on the job, the dispatching entities shall process the applications and other matters related to the injuries; the receiving entities shall assist in the investigation process and bear the corresponding expenses.

Article 20, [No Deducted or Delayed Fees]: The dispatching entities shall not deduct, delay or arrear the wages and benefits provided by the receiving entities to the dispatched employees.

Article 21, [Re-dispatch Prohibition]: the receiving entities shall not dispatch the dispatched employees to other entities.

Article 22, [Prohibition on Seizing and Receiving Properties]: The dispatching and receiving entities shall not obtain the resident identity cards or other documents of the dispatched employees, shall not require the dispatched employees to provide guarantees or receive any other properties for the dispatched employees.

Article 23, [Situations where Termination of Employment Contracts are Not Permitted upon Returning of Dispatched Employees]: the receiving entities may return the dispatched employees in the following circumstances, and the dispatching entities shall arrange other work for the dispatched employees:

- (1) The receiving entities return the dispatched employees in according with the Articles 40-3 and 41 of the Employment Contract Law;
- (2) The receiving entities declared bankruptcy, were revoked business licenses, were ordered to close, or decide to dissolve before the dispatching agreements expired;
- (3) The receiving entities return dispatched employees that are no in the temporary, auxiliary and substitute positions or that exceed the required employment ratio of dispatched employees.

If the dispatched employees do not have work during the period of the employment dispatching contracts, the dispatching entities shall pay the employees wages at a rate that is no less than the minimum wage set by the local governments.

## Chapter Four: Cancellation and Termination of Employment Contracts

Article 24: [Cancellation by Dispatched Employees]: The dispatched employees may cancel employment contracts with the dispatching entities in according with the provisions of Article 38 of the Employment Contract Law.

The dispatched employees shall inform the dispatching entities 30 days in advance in writing to cancel the employment contracts. If the dispatched employees are in the probation period, they may cancel the contracts by notify the dispatching entities 3 days in advance.

Article 25, [Termination by Dispatching Entities]: The dispatching entities may terminate the employment contracts with dispatched employees upon mutual consent.

If the receiving entities return the dispatched employees in according with the Articles 39, 40-1, 40-2 of the Employment Contract Law to the dispatching entities, the dispatching entities may terminate the contracts in accordance with the relevant provisions of the Employment Contract Law.

Article 26, [Termination of Contracts Due to Disagreements of Employment Changes]: If the dispatching entities maintain or improve employment conditions and reassign the returned employees to new entities, the dispatching entities may terminate the employment contracts upon the dispatched employees' disagreement with the new arrangements. If the dispatching entities lower the employment conditions and reassign the returned employees to new entities, the dispatching entities may not terminate the employment contracts because of the dispatched employees' disagreement with the new arrangements.

Article 27, [Proper Resettlement of Dispatched Employees upon Termination of Employment Contracts]: If the dispatching entities are declared bankrupt, revoked business licenses, ordered to close, cancel, or dissolve the business, the original employment contracts may be terminated only after agreement with the receiving entities on the proper resettlement of the dispatched employees.

Article 28, [Financial Compensation]: Dispatching entities shall provide dispatched workers with financial compensation under the following circumstances:

- (1) The dispatched employees terminate the contracts in accordance with Article 24-1;
- (2) The dispatching entities terminate the contracts in accordance with Articles 25 and 26;
- (3) the dispatching entities terminate the contracts in accordance with Article 27.

The financial compensation is in accordance with Articles 46, 47, and 97 of the Employment Contract Law.

#### Chapter Five: Cross-regional Dispatching

Article 29, [Compensation Standards of Cross-Regional Dispatching]: If the dispatching entities assign the dispatched workers across regions, the compensation standards, working conditions, and social insurance shall be in accordance with the local standards where the receiving entities are located. If the standards of the dispatching entities are higher than that of the receiving entities, and entities have agreements to apply the standards of the dispatching entities, implementation shall be in accordance with the agreements.

Article 30: [Cross-Regional Payments of Social Insurance]: If the dispatching entities establish branches or subsidiaries at the locations of the receiving entities, the branches or subsidiaries shall proceed the insurance formalities for the dispatched employees, and pay insurance premiums for basic pension, basic medical, unemployment, work injury and maternity insurance.

If the dispatching entities do not have branches or subsidiaries at the region of the dispatched entities, the dispatching entities shall proceed the insurance formalities for the dispatched employees, and pay the insurance premiums for basic pension, basic medical, unemployment, work injury and maternity insurance.



Dispatching entities engaging in cross-regional business may not delegate the responsibility of paying social insurance premiums to other entities.

## Chapter Six: Supervision and Management

Article 31, [Duty of Supervision]: The human resources and social security administrative departments on the county level and above have the duty of supervising and managing labor dispatching in their corresponding administrative districts.

Article 32, [Duty of Unions]: Unions have the duty to safeguard the legitimate rights and interests of the dispatched employees and supervise the fulfillment of employment contracts by the dispatching entities and the use of dispatched employees by the receiving entities.

If the receiving entities violate the requirements relating to temporary, auxiliary, substitute jobs or labor dispatching ratio, unions have the right to address the problems and demand corrections; Unions shall provide support and assistance to the dispatched workers who apply for arbitration or litigation.

Article 33: [Industrial Associations]: Regions may establish industrial associations for labor dispatching to conduct self-regulation. The associations may establish systems to evaluate the qualification and credibility of dispatching entities and release the results of their evaluations to the public.

## Chapter Seven: Legal Responsibility

Article 34 [Illegal Cancellation or Termination]: Dispatching entities will be subject to penalties under Articles 48 and 87 of the Employment Contract Law for illegally canceling or terminating employment contracts.

Article 35, [Joint and Several Liabilities]: Dispatching entities and receiving entities are jointly and severally liable for any damages caused to the dispatched workers by the receiving entities.

Article 36, [Fine]: If a dispatching or the receiving entity violates the dispatching provisions of the Employment Contract Law, the administrations of human resources and social security shall order rectification within a period of time; If the violations are not rectified within the specified time, a fine of more than 5000 yuan but less than 10,000 yuan per person shall be imposed, and the business licenses of the dispatching entity shall be revoked .

Article 37, [Deemed to Establish Employment Relationship with Dispatched Workers]: Receiving entities are subject to fines under Article 92-2 of the Employment Contract Law for violating the temporary, auxiliary, substitute position and dispatching ratio requirements. A receiving entity that fails to rectify its practice within one month of the imposition of fines under Article 92-2 is deemed to have entered into employment relationship with the dispatched workers. Unless the dispatched workers have expressed their unwillingness to enter into an employment relationship with the receiving entity, the receiving entity shall promptly prepare and sign employment contracts with the dispatched workers. The starting date of the employment contracts shall be the day after the last day of a one-month period after fines are imposed.

## Chapter Eight: Supplementary Provisions

Article 38, [Situations Not Deemed Dispatching]: The following circumstances are not considered dispatching:

- (1) Employers delegate or appoint their own employees to their parent entities or subordinate entities;
- (2) Employers delegate their own employees to work aboard;
- (3) Employers delegate their own employees to work for their families or natural human beings.

Article 39, [Continuous Implementation]: The validity of existing employment agreements entered into before the implementation of the Amendatory Decision continues after the implementation until the terms of such agreements expire. Receiving entities may not return the dispatched workers because of the incompliance with the requirements related to the temporary, auxiliary, and substitutive nature of the employment or the dispatching ratio. However, if the employment contracts and dispatching

agreements do not comply with the equal pay provisions of the Amendatory Decision, the contracts and agreements shall be modified to comply with the Amendatory Decision.

Receiving entities that used more dispatching workers, except for in temporary or substitutive capacities, than the mandated dispatching ratio shall not hire new dispatched workers for assistive positions until the dispatching ration as mandated in the Amendatory Decision has been satisfied.

Article 40, [No Cancellation during Continuous Implementation]: Dispatching entities may not use the failure to obtain administrative permits as a pretext to cancel their employment contracts with dispatched employees, if the contracts were entered into before the implementation of the Amendatory Decision and remain valid after the implementation.

Article 41, [Statistics]: Dispatched workers shall be accounted as the dispatched employees in the total work force of the receiving entity.

Article 42, [Dispute Resolution]: Disputes between dispatched workers and dispatching entities or receiving entities shall be resolved in accordance with laws governing labor disputes; Disputes between dispatching entities and receiving entities shall be resolved in accordance with laws governing civil disputes.

Article 43, [Specific Implementation Measures]: The administrations of human resources and social security in each province, autonomous region and municipality may formulate implementation measures in accordance with the actual situation in individual region.

Article 44, [Effective Date]: These provisions shall become effective on XXX.

Note on the Provisions on Labor Dispatch (Draft) for Public Opinions



On December 28, 2012, the 30th meeting of the 11th National People's Congress adopted the Decision on the Amendment of the PRC Employment Contract Law by the Standing Committee of the National People's Congress (hereinafter as "Amendatory Decision" ). In order to implement the Amendatory Decision and to further regulate labor dispatching, we drafted the Provisions on Labor Dispatch (Draft) for Public Opinions (hereinafter as "Draft" ). Explanations of the main content of the Draft are as follows:

Firstly, about the definition of dispatching

The term "dispatching" refers to a form of employment that the businesses of the dispatching entities are to recruit and dispatch workers to work for other entities, and the receiving entities manage the dispatched workers directly in the working process. (Article 2).

Secondly, about temporary, auxiliary and substitutive positions

In order to enhance interoperability, the Draft has detailed provisions of the assistive positions: assistive positions refer to the non-core business positions providing services to the core business. The employment entities can place the assistive positions based on characteristics of the industry and business, provide an employment dispatching list proposed for assistive jobs, then negotiate with unions or the Workers' Congress together to decide the list, and place a notice at the receiving entity for publicity and supervision. Article 4-3).

Thirdly, about the dispatching ratio

According to the amendatory requirements, the Draft has provisions of the dispatching ratio in an entity requiring that the dispatched employees hired by the dispatched entities at the assistive positions shall not exceed 10% of Total Employees. "Total Employees" refers to the sum of the number of employment contracts plus the number of assistive dispatching positions.(Article 5). Meanwhile, the Draft has specific provisions of the temporary, auxiliary and substitutive positions at some foreign agencies. (Article 6).

Fourthly, about the signing, implementation, cancellation and termination of employment contracts.

The dispatching entities are special employers, therefore, the Draft provides provisions of employment contract duration, negotiation of signing employment contracts with terms of no-fixed periods, probationary period, equal pay, employment contract discharge, financial compensation and related obligation of the dispatching and receiving entities (Articles 7 to 28).

Fifthly, about cross-regional dispatching

In order to regulate cross-regional dispatching, the Draft has provisions of dispatching wages, working conditions and social security standards, as well as a way to participate in social insurance provided to the dispatched employees under the cross-regional circumstances (Articles 30).

Sixthly, about Regulatory Management and Legal Liabilities

In order to strengthen the supervision and management of labor dispatching, the Draft has provisions specifying the liabilities of human resources and social security administrative departments, labor unions and dispatching industrial associations (Articles 33). In order to protect workers' rights, the Draft contains provisions on joint and several liabilities if the dispatching or dispatched entities violates the Employment Contract Law; If a receiving entity violates the Employment Contract Law regarding temporary, auxiliary, substitutive requirements or exceeds the required dispatching ratio and does not correct the violation within one month after receiving the administrative penalty, the receiving entities should promptly establish employment relationships with the dispatched workers (Articles 34 and 37).

Seventhly, about exceeding dispatching ration during the transitional period

To ensure smooth implementation and reduce the negative impact on labor relationship caused by the adjustments to employment contracts, the Draft contain provisions on employment dispatching agreements and employment contracts entered into before the implementation of the Amendatory Decision. That is, employment contracts and the dispatching agreements entered into before the implementation of the Amendatory Decision continue to be valid until expired. Receiving entities may not return the dispatched workers because of the incompliance with the requirements related to the temporary, auxiliary, and substitutive nature of the employment or the dispatching ratio. However, if the

employment contracts and dispatching agreements do not comply with the equal pay provisions of the Amendatory Decision, the contracts and agreements shall be modified to comply with the Amendatory Decision.

Receiving entities that used more dispatching workers, except for in temporary or substitutive capacities, than the mandated dispatching ratio shall not hire new dispatched workers for assistive positions until the dispatching ration as mandated in the Amendatory Decision has been satisfied.



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