



# China Employment Law ALERT

## Shanghai Releases New Rules for Temporary Employees

*By Leon Mao*

Clients with operations in China are familiar with the major recent changes in the laws regulating how employers can engage and use temporary employees from temporary staffing agencies (otherwise known as “labor dispatch”). These changes, introduced via an amendment to China’s Labor Contract Law and the introduction of an Interim Regulation for Labor Dispatch, have imposed significant restrictions on labor dispatch relationships and prompted the issuance of administrative orders from a number of cities/provinces in China (such as Beijing, Hebei, Zhejiang, Shaanxi, etc.) to clarify how those cities/provinces expect employers to address implementation of these changes.

On June 30, 2014, the Shanghai labor authority issued its own local administrative order (“Administrative Order”) to provide guidance to employers on how to implement the recent changes to the regulation of labor dispatch relationships. The Administrative Order is noteworthy not only because of Shanghai’s importance as a hub of foreign investment, but also because of the apparent flexibility it provides employers - when compared with other cities/provinces - to adapt to the changes in the law.

Our thoughts on some key provisions of the Administrative Order follow:

- 1. Cap on Dispatched Work Force; Filing of Plan to Reduce Excess Dispatched Staff.** The Administrative Order restates the rule that labor dispatch employees may comprise no more than 10 percent of an employer’s total workforce. Employers who have a labor dispatch population in excess of this limit must file a plan with the local labor authority to reduce the number of these workers. The Shanghai labor authority released a follow-up notice on July 7, 2014 which states the plan shall be filed no later than October 31, 2014. However, the notice is silent on the legal liabilities for failure to file the required plan on time.
- 2. Labor Administrative Authority Supervision of Certain Matters.** The Administrative Order provides that certain measures will be subject to the supervision of the labor administrative authorities, specifically (i) disputes about whether labor dispatch employees are receiving “equal pay for equal work” when compared with an employer’s regular employees working in the same or similar job; and (ii) disputes about the consultation procedures for determining what positions qualify as auxiliary positions (one of the three categories of positions for which it is permissible to engage labor dispatch employees).

This rule means that labor arbitration committees in Shanghai may no longer oversee these types of disputes, contrary to the current common practice. Compared with arbitration tribunals, labor administrative authorities are typically more flexible in implementing laws and regulations. Accordingly, this appears to be a favorable change for employers and we believe it could curtail an explosive growth of labor dispatch related cases in labor arbitration tribunals in Shanghai.

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**3. Conversion of Labor Dispatch Practices to Outsourcing.** The Administrative Order acknowledges for the first time that it is possible to convert a labor dispatch relationship into an outsourced support relationship, and provides practical guidance on how to implement this conversion. This is a topic the Interim Regulation for Labor Dispatch does not address. In essence, when converting the relationship to an outsourced support model, the recipient of the outsourced support may only engage in indirect management of the relevant staff (as opposed to the direct management involved permitted in labor dispatch) and the outsourced service provider must assume responsibility for direct management of the staff. Nonetheless, the Administrative Order still warns that sham outsourcing arrangements will lead to a conclusion that the parties are engaging in unlawful labor dispatch arrangements, and it remains to be seen how vigilant the authorities and courts will be when evaluating whether an outsourced support relationship is 'genuine'.

In summary, the Administrative Order fills certain gaps left by the introduction of the new regulations for labor dispatch relationships, and provides practical options for employers in Shanghai seeking to manage and grow their labor dispatch practices within the boundaries of the law.

If you would like further information please contact any member of our International Employment Law practice.

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