



China Employment Law ALERT

New Regulations on Temporary Employees (Labor Dispatch)

The Amendment to the Labor Contract Law of the People's Republic of China ("Amendment") came into effect on July 1, 2013. The Amendment made significant changes to the regulation of temporary employees ("labor dispatch") – i.e., individuals hired by a third-party staffing agency who are engaged to work at an employer. While many aspects of the Amendment were clear, several issues remained ambiguous in their practical application.

On January 27, 2014, the Ministry of Human Resources and Social Security ("MHRSS") promulgated the Interim Regulation on Labor Dispatch ("Regulation"). The purpose of the Regulation is to provide guidance about the implementation of the Amendment and clarify certain ambiguities. The Regulation will enter into force on March 1, 2014.

Seyfarth Shaw will provide a series of compliance tips in connection with the Regulation in the coming weeks.

This Alert focuses on the following issues:

1. Who is subject to the Regulation?

The Regulation imposed several requirements and obligations on staffing agencies and enterprises using labor dispatch ("employers"). It covers a wide range of entities, including companies, partnerships, foundations and other private entities. However, the following entities may be completely or partly excluded from the Regulation:

- (a) The Regulation does not apply to government agencies and semi-government agencies, such as public hospitals and public schools.
- (b) The requirements that labor dispatch be used for "auxiliary," "substitutable" and "provisional" positions, as well as the limits on the number of employees that may be engaged using labor dispatch, do not apply to representative offices of foreign enterprises and foreign financial institutions, as well as employers using international sailors via labor dispatch (the other aspects of the various labor dispatch laws continue to apply).

2. What are the procedures for engaging individuals in "auxiliary" positions?

Considering the ambiguous nature of the word "auxiliary," the Regulation requires the employer to complete certain procedures before using labor dispatch for auxiliary positions. These procedures include: discussion with an employee's representative congress or all the employees, negotiation with the trade union or employee representatives, and a general announcement. Employers may not take advantage of the ambiguous nature of the word "auxiliary" to escape the limitations set out by the Regulation and the remainder of the labor dispatch laws.

The procedural requirements mentioned above only apply to the identification of auxiliary positions. Substitutable positions and provisional positions are not subject to such requirements.

3. What is the limit on the number of employees that can be engaged using labor dispatch?

The Regulation mandates that the number of dispatched employees (including employees dispatched to auxiliary, substitutable and provisional positions) is limited to 10% of the total workforce ("the 10% quota"). The total workforce includes both dispatched employees and employees employed directly by the employer. There are several noteworthy points:

(a) The Regulation provides that any entity qualified to conclude labor contracts with employees (i.e., act as an employer) is subject to the 10% quota. This means that branch companies are subject to the 10% quota and that the head company may not distribute its 10% quota of dispatched employees disproportionately among its branch companies such that any one of them has greater than 10% of its total workforce as dispatched employees.

(b) An employer's representative offices or internal departments unqualified to conclude labor contracts still have flexibility when using labor dispatch, as long as the overall number of dispatched employees of the employer is in compliance with the 10% quota.

(c) Many employers currently have more than 10% of their workers made up of dispatched workers and the Regulation provides a grace period for these employers to reduce the number of dispatched employees. Generally, all employers must reduce the number of dispatched employees and comply with the 10% quota by March 1, 2016. However, if the dispatched employees were used before the promulgation of the Amendment (December 28, 2012) and under the agreement regulating the use of the dispatched employees, their use will not end before March 1, 2016, the employer may continue to use the labor dispatch employees until the expiry of the relevant agreement.

4. What are the consequences of violations?

Generally, employers violating the requirements under the Regulation will be ordered to make rectification and are subject to a fine up to RMB 10,000. In addition, those who fail to complete the procedures necessary for using auxiliary employees are subject to a warning by the local authority and will be responsible for any loss caused to the dispatched employee(s).

If you would like further information please contact any of the members of our International Employment Law practice:

IN CHINA



Wan Li

Direct: +86 21 2221 0688

lwani@seyfarth.com

IN THE UNITED STATES



Darren Gardner

Direct: +1 (415) 544-1018

dgardner@seyfarth.com



Dominic Hodson

Direct: +1 (415) 544-1017

dhodson@seyfarth.com



Marjorie R. Culver

Direct: +1 (212) 218-5546

mculver@seyfarth.com

IN THE UNITED KINGDOM/EUROPE



Peter Talibart

Direct: + 44 (0) 20 7763 2550

ptalibart@seyfarth.com



Ming Henderson

Direct: + 44 (0) 20 7763 2553

mihenderson@seyfarth.com

IN AUSTRALIA



Luke Edwards

Direct: +61 2 8256 0401

lueedwards@seyfarth.com



Amber Millhouse

Direct: +61 3 9631 0702

amillhouse@seyfarth.com

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