



China Employment Law ALERT

Temporary Workers: Can A U.S. Employer Operating In China Legally And Effectively Engage Them?

For many U.S. employers with operations abroad, engaging temporary workers to perform various job functions can be, from a business perspective, the most efficient and economic approach.

But the benefits of the most efficient strategies can be erased by legal non-compliance if it results in onerous penalties or—worse still—if it subjects an employer to government investigation.

So, the question becomes: How do you ensure legal compliance where an area of law is highly regulated and dynamic, like China's laws on temporary workers? Below we examine recent changes to the law and what they mean for U.S. employers with operations in China.

So, when *CAN* you engage an external workforce?

Previously in China, employers could hire workers through staffing agencies with few restrictions. The staffing agency would be the legal employer and the 'employer' would be considered a third-party recipient of the individual's services. However, changes to the Employment Contract Law, which came into effect July 1, 2013, now prohibit this practice except in very limited circumstances.

The changes to the law are general, and detailed implementation rules and administrative and judicial explanations are not available yet. For example, the national authority has not pronounced the permitted ratio of total temporary employees to total direct-hire employees in a local workplace. This makes for a confusing landscape for employers trying to do the right thing.

Let's get into the specifics of the new law. Among other things:

1. The type of work that staffing agency workers may perform for an employer is limited to work that is:

- Temporary (less than six months);
- Auxiliary (related to non-core business); or
- Substitute (temporary replacement of employees on leave) in nature.

This limits the work that can be performed for the employer by staffing agency workers.

2. Staffing agency workers are entitled to the same pay as the employer's regular employees working in the same positions.
3. The staffing agency must obtain a special license from the local bureau in order to operate a staffing agency business.
4. Staffing agencies in China will generally require the employer to bear all costs and liabilities in connection with staffing agency workers provided to the employer during the staffing agency engagement.

Length of Engagement

An employer's engagement of temporary workers is limited to six months. It is unclear if this limit also applies to auxiliary and substitute workers.

Deemed Employment

Importantly—in order to avoid claims of deemed employment—the employer and the staffing agency worker should not sign any documents that indicate there is an employment relationship between them. All compensation and benefits to workers should be provided through the staffing agency, which is the legal employer.

Termination Notification and Termination Process

The termination notification period and termination process of a staffing agency worker depends on:

- (i) The type of engagement / employment of the worker with the staffing agency; and
- (ii) The terms of the Secondment Services Contract between the employer and the staffing agency.

Ordinarily, the employer may return the worker to the staffing agency without the employment being terminated—provided that it continues to pay the staffing agency for the workers' salary at the locally prescribed minimum rate.

Termination of employment requires compliance with Labor Contract Law requirements. If the staffing agency terminates the worker's employment when the employer returns the worker to the staffing agency, then the staffing agency will generally pass the costs to the employer.

Termination-Related Payments (Other Than for Misconduct)

Payment related to termination of staffing agency workers for reasons other than misconduct include:

- (i) Notice: One month's notice or pay in lieu
- (ii) Severance: One month's average monthly salary (for services rendered after January 1, 2008, the monthly average salary is capped at three times the municipal monthly average salary for the last year of the city in which the worker is located) per each year of service and part-year of service of six months or greater (for a part-year of service less than six months, severance is one-half of the average monthly salary)
- (iii) Compensation for untaken annual leave
- (iv) Payment of any earned and unpaid remuneration and benefits
- (v) Compensation for non-compete obligation (if any)

In circumstances of misconduct only the payments in (iii), (iv) and (v) above must be made.

OK, that's a lot to keep track of. What happens if we make a mistake?

Companies engaging in staffing supply arrangements without a license will be ordered to stop their unauthorized activity by the labor administrative department. Illegal income will be confiscated, and the company will be fined one to five times the amount of the income. Those who have not received any income from the illegal activity are still liable for a fine of up to 50,000 yuan.

Authorized staffing agencies and/or host companies that violate the law must demonstrate corrections to the labor administrative department by a deadline. Late corrections are subject to a fine of 5,000 to 10,000 yuan per temporary worker, and the license of the staffing agency will be revoked.

If the temporary worker suffers damages in any way due to unlawful activity, the staffing agency and the employer will be jointly and severally liable.

Some Highlights

- Since workers can be supplied to an employer by a staffing agency only in limited circumstances, work for short periods in China is often performed under short period fixed term contracts instead. Fixed term contracts have a couple noteworthy features: they convert into non-fixed term contracts (i) after 10 years; or (ii) after two consecutive fixed terms if the employee requests (this law varies from city to city). Fixed term contracts may be a good alternative to temporary staffing in China.
- The relationship between the employer and the staffing agency worker can be deemed an employment relationship by the courts and other authorities even where there is a contractual relationship between the employer and the staffing agency. U.S. employers with operations in China should ensure the relevant documents do not suggest an employment relationship.
- The engagement by an employer of temporary staffing agency workers cannot exceed six months. It is unclear if this limit also applies to auxiliary and substitute workers. Engagement periods should be carefully monitored. As with fixed term contracts, employers should take care with re-engagement so as to not convert the worker into a non-fixed term employee (at his/her request).
- Formerly, staffing agencies would commonly require a two-year engagement; this may now be prohibited by law. The prudent approach for an employer is to not agree to engagements longer than six months.
- Employers have to be prepared for the potential increase of headcount and cost caused by the new legal limitations around staffing agencies.

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