

Revisions to Labour Contract Law Address Employee Dispatch Issues, Company Employment Models

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After almost five years of debate, the 2008 Labour Contract Law has been revised to address issues related to the employee dispatch model. The revisions to the law (New Revisions) were promulgated on 28 December 2012 and will take effect on 1 July 2013. The changes are significant and will substantially affect agencies that dispatch employees, dispatched employees' rights and companies that hire dispatched employees.

Key Revisions to the 2008 Labour Contract Law

Updated Requirements for Agencies that Dispatch Employees

For companies that primarily engage in the business of dispatching employees (Dispatch Agencies), there are new requirements for registered capital, the registration process and company facilities. Previously, the required registered capital for establishing a Dispatch Agency was RMB 500,000. According to the New Revisions, the minimum registered capital will be increased to RMB 2 million. In addition, the New Revisions require that a new Dispatch Agency acquire specific approval from the relevant labour authorities before it can start the company registration process. Existing Dispatch Agencies must also acquire such approval within one year of the New Revisions coming into effect. Other new requirements include that a Dispatch Agency must have a specific location and facilities in order to conduct its dispatch business, and it must have internal dispatch rules that are in compliance with the relevant laws and regulations.

Strengthened "Equal Pay for Work of Equal Value" Principle

One of primary criticisms of the previous dispatch model was that a lot of companies were paying dispatched employees less than employees who were directly hired. This practice breached the principle of "equal pay for work of equal value". In order to correct this situation, the New Revisions provide detailed rules to emphasise and enforce the principle. Under these new rules, there is an obligation for employers to pay dispatched employees and directly hired employees the same salary. In addition, the "equal pay for work of equal value" principle is required to be reflected in the remuneration-related clauses of the agreement signed between the Dispatch Agency and the dispatched employee, as well as the agreement between the employer and the Dispatch Agency.

“Three Categories” Further Clarified

Under the previous dispatch model, there was a perception of widespread “abuse” of the law through the exploitation of an ambiguity. Article 66 in the 2008 Labour Contract Law created three categories for permissible labour dispatch by stating that “Labour dispatch services are normally used for positions that are temporary, auxiliary, or substitutive” (emphasis added). The use of the word “normally” seemed to be a purposeful addition by the legislature in order to add some flexibility to the original law. However, because of this ambiguity, the practical implementation of Article 66 became one of the most disputed areas of the Labour Contract Law. The ambiguity created room for dispatched employees to be used in areas other than the three categories, and this practice became the rule instead of the exception.

As the dispatch of employees in areas other than the three categories boomed, so did criticism of the practice. There were obvious breaches of the three categories and the spirit of the law, such as when dispatched employees worked the same positions for more than 10 years (which clearly does not fall within the “temporary” category) or when more than 80 per cent of an enterprise’s work force were dispatched employees (which clearly does not seem “auxiliary” to the business). Cases of blatant misuse such as these have been cited by various authorities criticizing the law, and there have been numerous public demands to clearly define the three categories and resolve this controversial issue.

The New Revisions address those concerns by adding a significant amount of clarity as well as by narrowing the scope of the language in order to more accurately represent the intention behind the law. The word “normally” has been deleted from Article 66, which now clearly makes the three categories an exclusive list of permitted practices. The three categories have also been more precisely defined by the New Revisions. “Temporary” refers to a position that lasts less than six months, “auxiliary” refers to non-core business positions and “substitutive” refers to an employee working in place of the original employee who is absent for reasons such as leave, training or education.

In addition, the New Revisions emphasise that the dispatch model must only be a supplement to the direct hire model. To further close the door on possible abuse, the New Revisions add that the total number of dispatched employees working at a company must be no more than a certain percentage, which will be provided later by the relevant labour authorities.

Increased Penalties for Violations

Under the New Revisions, a violation of the law will result in companies incurring a penalty between RMB 5,000 to 10,000 per dispatched employee. This is a significant increase from the previous penalties ranging from RMB 1,000 to 5,000.

Legal Implications and Suggestions

Companies that engage dispatched workers should begin significant preparations to adequately transition their employment strategies in order to adjust to the New Revisions. It is time for companies that engage a lot of dispatched employees to re-evaluate their overall employment model and transfer the dispatched employees into different hiring models according to each company's business needs.

It seems likely that the most common solution for non-compliance under the New Revisions will be to

have some employees become direct hires and/or to have work outsourced to other entities. Previously, many companies did not include dispatched employees in their headcounts, so a sudden transfer to direct hires may significantly increase the headcount, which may affect different aspects of operations.

Dispatch Agencies may find it difficult to survive under the New Revisions due to the increased requirements for registered capital and an anticipated reluctance of employers to hire dispatched employees under the more restrictive new rules. It is possible that many small Dispatch Agencies may close or fail to renew their dispatch licenses after the New Revisions become effective. Companies that engage those small Dispatch Agencies and rely on them for recruitment and employment should be prepared for possible sudden closures and the labour disputes that may arise out of this rapid and dramatic change.

Finally, it is important for companies to further review their current internal rules and regulations from both a content and a procedural perspective. Companies must ensure such rules and regulations are sufficient and compatible for handling various employment matters after the possible addition of many new direct hires, and any other changes that might be necessary under the New Revisions.

This article was co-written by May Lu.

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