



PRC Labor and Employment Law Newsflash

April, 2014

Risk Control of Accepting Units in Labor Dispatch

When the rights and interests of laborers are harmed, it is a concerned question that how to allocate the subsequent legal liabilities between accepting units and labor dispatching companies. *The Amendment to the Employment Contract Law of PRC* and *the Interim Provisions on Labor Dispatch* enforced in March 2014 formulated detailed regulations on the liability distribution between accepting units and labor dispatching companies. Well, we find out that all these regulations offer a weak protection for accepting units. Hence, this newsletter will try to discuss the risk control of accepting units in labor dispatch.

1. Perfecting Labor Dispatching Agreements

- It is a civil relationship between accepting units and labor dispatching companies. Both parties sign a labor dispatching agreement to specify the rights and obligations between them. Labor dispatching companies provide qualified dispatched laborers pursuant to the requirements of accepting units and accepting units pay service fee to labor dispatching companies.
- Article one of *the Interim Provisions on Labor Dispatch* regulates that when dispatching laborers, labor dispatching companies shall conclude labor dispatching agreements with accepting units and the nature of the agreements are civil agreements. In the said labor dispatching agreements, the dispatching post, number of dispatched laborers, period, remuneration, social security, payment way and violation liability shall be available, which will be beneficial for the clarification of obligations and rights between accepting units and labor dispatching companies. Furthermore, it will avoid the situation where accepting units and labor dispatching companies shift responsibility onto others when a dispute arises, which could protect the lawful rights of accepting units and safeguard the interests of dispatched laborers as well.

2. Lawful Operation of Accepting Units

- Both *the Amendment to the Employment Contract Law of PRC* and *the Interim Provisions on Labor Dispatch* have put forwarded specific requirements regarding lawfully using the dispatched laborers such as meeting the requirement of temporary, auxiliary and substitutable post, equal benefits for equal work and ratio of dispatched laborers, etc. At the same time, there are specified and detailed regulations on the conditions of returning the dispatched laborers by accepting units to labor dispatching companies and accepting units shall abide by these regulations to avoid unnecessary legal risks.

3. Choosing Good Labor Dispatching Companies

- Once, an accepting unit finds out that the labor dispatching company mistakenly agrees on the probation period, fails to sign employment contract with the dispatched laborers or to pay the salary and social security contribution of the dispatched laborers on time, and illegally terminates the employment relationship with the dispatched laborers, etc., which leads corresponding liabilities of the accepting unit. Hence, choosing a good labor dispatching company is very critical by comprehensively assessing the qualification, brand, professional skills, management level and service consciousness.

Case Study: If Accepting Units Do Not Violate Laws or Regulations, They Shall Not Bear Joint and Several Liabilities

WANG established the employment relationship with a labor service company (hereinafter referred to as the dispatching company) on 6 August 2012, and he was dispatched to a company (hereinafter referred to as the accepting unit) as a waitress, with monthly salary of RMB 3000 paid by the dispatching company in cash. WANG did not sign an employment contract with the dispatching company or the accepting unit, but the dispatching company and the accepting unit signed a labor dispatching agreement agreeing that the dispatching company provides waitresses to the accepting unit and the accepting unit shall pay the service fee, employee salary and social security contribution. The accepting unit shall fulfill the obligation of the labor dispatching agreement.

On 13 November 2012, WANG fell over on his own time off work after drinking and was seriously hurt so that he could not come back to work. On 11 March 2013, WANG applied for a labor arbitration requesting for 1.sick leave salary between 13 November 2012 and 12 February 2013 by the dispatching company; 2.double salary for failing to sign an employment contract between 6 August 2012 and 13 February 2013 by the dispatching company; 3.damages of medical insurance for failing to pay social security by the dispatching company; 4.the accepting unit shall bear joint and several liabilities. The arbitration commission did not support WANG's requests and then WANG sued at the People's Court. After trial, the court supported the first three requests of WANG except the last one, holding that if accepting units do not violate laws or regulations, they shall not bear joint and several liabilities.

Therefore, we are in the opinion that in this case the accepting company chooses a nonstandard labor dispatching company. The reason why the accepting unit shall not bear joint and several liabilities is the existence of the dispatching agreement and the fulfillment of the obligations therein. Besides, the accepting unit does not violate laws or regulations regarding labor dispatch, or it may bear joint and several liabilities with the labor dispatching company.

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中国劳动法资讯速递
二零一四年四月刊

用工单位在劳务派遣中的风险防范

当被派遣劳动者的权益受侵害时，由此产生的法律责任如何由用工单位和劳务派遣单位来承担，是许多用工单位颇为关心的问题。业已实施的《〈劳动合同法〉修正案》和 2014 年 3 月 1 日起实施《劳务派遣暂行规定》对用工单位和劳务派遣单位的责任承担有较详细的规定，但是，我们发现这些规定对用工单位的保护稍显欠缺。因此，本期资讯尝试探讨用工单位在劳务派遣用工过程中的风险防范。

一、完善劳务派遣合同

- 劳务派遣单位与用工单位之间是民事关系，双方订立劳务派遣协议确定双方权利义务，劳务派遣单位根据用工单位的标准派遣符合要求的被派遣劳动者，用工单位根据协议向派遣单位支付报酬或管理费。
- 《劳务派遣暂行规定》第一款规定，劳务派遣单位派遣劳动者应当与用工单位订立劳务派遣协议，此协议性质上应当属于民事合同。在该劳务派遣协议中，应当明确派遣岗位和人员数量、派遣期限、劳动报酬和社会保险费的数额与支付方式以及违反协议的责任等内容。尤其是在劳务派遣协议中明确劳动报酬和社会保险费的数额与支付方式以及违反协议的责任等内容，将有利于明确劳务派遣单位与接受以劳务派遣形式用工的用工单位的权利义务，从而避免发生争议时劳务派遣单位与用工单位互相推诿现象的出现，从而保护用工单位的合法权益，也有利于维护劳务派遣员工的利益。

二、用工单位规范运作

- 《〈劳动合同法〉修正案》和《劳务派遣暂行规定》都对用工单位合法合规使用劳务派遣员工提出了具体的要求，如需满足“三性”的要求、“同工同酬”的原则、劳务派遣用工比例的要求等。同时，对于用工单位可以将劳务派遣员工退回劳务派遣单位的条件也作了明确而细致的规定，用工单位需要根据相关规定规范的运作以避免出现不必要的法律风险。

三、正确选择劳务派遣单位

- 曾经有用工单位遇到劳务派遣单位错误约定试用期、未与劳务派遣员工签订劳动合同、延迟支付劳务派遣员工工资和社保、违法解除与劳务派遣员工的劳动关系等情形，从而导致用工单位承担相应的法律责任。因此，正确选择劳务派遣单位非常关键，需要综合评估劳务派遣单位的资质、品牌实力、专业能力、管理水平和服务意识。

案例分析：用工单位不违规，无需承担连带责任

王某于 2012 年 8 月 6 日与某劳务服务公司（以下简称“派遣单位”）建立劳动关系，被派遣至某公司（以下简称“用人单位”）担任服务员，月工资 3000 元，工资每月由派遣单位以现金形式支付。王某与派遣单位和用工单位均未签订劳动合同。但是派遣单位与用工单位签订了《劳务派遣协议》，协议约定派遣单位向用工单位派遣服务员，用工单位向派遣单位支付服务费、员工工资和社会保险费。用工单位按照《劳务派遣协议》履行合同义务。2012 年 11 月 13 日，王某在非工作时间酒后摔伤，致重伤不能工作。2013 年 3 月 11 日，王某向劳动仲裁委员会申请仲裁，要求：1、劳务派遣单位支付 2012 年 11 月 13 日至 2013 年 2 月 12 日期间的病假工资；2、劳务派遣单位支付王某 2012 年 8 月 6 日至 2013 年 2 月 13 日期间未签劳动合同的双倍工资；3、劳务派遣单位未缴纳社保而导致王某住院期间无法使用医疗保险的赔偿金；4、用工单位承担连带责任。劳动仲裁未支持王某的请求，王某不服诉至法院。法院审理后支持了王某的前三项请求，第四项请求未获法院支持。法院认为用工单位不存在违反劳务派遣规定的行为，故未采纳要求用工单位承担连带责任的请求。

由此，我们认为在本案中，用工单位虽然选择的是一家不甚规范的劳务派遣单位，但是用工单位仍无需承担连带责任正是因为用工单位与劳务派遣单位签订了劳务派遣协议，并按照协议履行了自己的义务，在使用劳务派遣员工的过程中没有违反劳务派遣规定的行为，否则，用工单位将可能与劳务派遣单位一起承担连带责任了。

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