PRC Labor and Employment Law Newsflash

March, 2014

Risk Control of Transfer from Dispatchment to Direct Employment

The Interim Provisions on Labor Dispatch (hereinafter referred to as 'the Provisions') that have drawn a lot of attention were implemented on 1st March 2014, as the matched legislation of *the Amendment to the Employment Contract Law of PRC* and *the Implementing Measures for Labor Dispatching Administrative Licensing*. The Provisions define and clarify relevant issues such as posts of temporary, auxiliary and substitutable, ratio of dispatched laborers, equal benefits for equal work, equal social security, return and termination, etc. This new legislation will considerably impact the relationship between employers and employees and change employment practices. Confronted with this strict limitation on labor dispatch, accepting units shall take corresponding measures like retuning those dispatched laborers, using direct employment or transferring to outsourcing, etc., while, any of the said ways may lead to new disputes if handled improperly. This newsletter will discuss relevant issues and how to control risks in the transfer from dispatchment to direct employment.

1. Time-point to Change to Direct Employment

- Dispatchment not on posts of temporary, auxiliary and substitutable

In accordance with *the Amendment to the Employment Contract Law of PRC*, employment contracts and labor dispatching agreements lawfully entered into prior to 28th December 2012 shall continue to be performed until the expiration thereof. Hence, dispatchment even not on posts of temporary, auxiliary and substitutable can still be performed. Accepting units may choose to use direct employment or return the dispatched laborer.

As for labor dispatching agreements entered into after 28th December 2012, if not on posts of temporary, auxiliary and substitutable, the accepting units will be deemed as illegal use of labor dispatch and the labor administrative department has the right to request corrections. Where no correction is made by the prescribed deadline, the accepting units shall be given a fine of not less than RMB 5000 but not more than RMB 10,000 per dispatched laborer involved. That is to say, the accepting unit shall transfer the said laborers to direct employment or return the laborers as soon as possible after 1st July 2013.

- Labor Dispatch that Exceeds the Legal Ratio

In accordance with *the Amendment to the Employment Contract Law of PRC*, employment contracts and labor dispatching agreements lawfully entered into prior to 28th December 2012 shall continue to be performed until the expiration thereof. Hence, even exceeding the legal ratio,

the labor dispatching agreements can still be performed. Accepting units may choose to use direct employment or return the dispatched laborer.

As for labor dispatching agreements entered into after 28th December 2012, pursuant to Article 28 of the Provisions regarding the grace period, before 1st March 2016, it is still legal for accepting units to use labor dispatch which exceeds the legal ratio. At the same time, the Provisions require the accepting units to formulate a plan to adjust its employment situations, to submit the plan as formulated thereby to the local administrative department of human resources and social security for record-filing and to reduce the percentage within the required range of two years. In other words, the grace period of two years is a period to rectify and the accepting units shall rectify and reform within two years. Namely, the accepting units shall change the dispatched laborer to direct employment or return the dispatched laborers in batches within the grace period of two years from 1st March 2014 to 1st March 2016.

2. Change to direct employment need consensus between three parties.

When changing to direct employment, a signed employment contract between the accepting unit and the dispatched laborer will not validate a lawful transition of employment. Also required for a lawful transition is the legal termination or expiration of the employment contract between the dispatched laborer and the labor dispatching company; the termination or expiration of the labor dispatching agreement between the accepting unit and the labor dispatching company and the expenses settlement between them; return and enrollment and social security transfer.

If the accepting unit signs an employment contract with the dispatched laborer directly and causes damage to the labor dispatching company, before the termination or expiration of the employment contract between the dispatched laborer and the labor dispatching company, the accepting unit shall be joint and several liable.[1] Besides, the signing of an employment contract between the accepting unit and the dispatched laborer will also lead to conflicts between the accepting unit and the labor dispatching company, and the latter may cause hindering or delaying in the following matters like return, social security transfer procedures, etc. Before the completion of social security transfer and premium contribution, once an occupational injury happens, the accepting unit may face the risk of failing to obtain the compensation from the occupational insurance fund.

Therefore, in the process of a direct employment transfer, the accepting unit needs to have effective communication with the labor dispatching company and with the dispatched laborer, in order to reach an agreement.

Case Study: Labor Dispute during the Transfer from Dispatchment to Direct Employment

A famous foreign company, which will be referred to as Company A has been cooperating with the largest local labor dispatching company for many years and as a result, thousands of workers have been dispatched to Company A by their service. In the second half of the year 2013, due to compliance and employment needs, Company A decided to grant all of the dispatched workers direct employment.

[1] Article 91of *the Employment Contract Law*. If an employer hires a worker whose employment contract with another employer has not yet been terminated or ended, causing the other employer to suffer a loss, it hall be jointly and severally liable with the worker for damages.

Considering that the labor dispatching agreement with the labor dispatching company would expire on 31st December 2013, Company A sent a written notice to the labor dispatching company that read: "the labor dispatching agreement will not be renewed upon expiration." The labor dispatching company responded on 4th December 2013 requiring Company A to return the dispatched workers in order to arrange new accepting units. In the last ten days of December, Company A scanned the resignation letters signed by the dispatched laborers and made CDs to send to the labor dispatching company. The contents of the resignation letters read: "due to the expiration of the labor dispatching agreement between company A and the labor dispatching company, now upon receipt of the notice of Company A, since 1st January 2014, the workers of the former tripartite contract will become formal employees of Company A that will conclude employment contract with the worker directly. I am willing to work for Company A, so I render my resignation to the labor dispatching company."

The resignation letters were printed with the date of December 2013. Besides, Company A paid out all the agreed fees like salary, etc. of December, 2013 to the labor dispatching company, and it should pay all the dispatched laborers on 10th January 2014 via bank transfer. However, the payment was delayed. During The Spring Festival, workers employed by Company A gathered at the office of the general manager and personnel of Company A requiring salary and asking how to handle as the labor dispatching company required them to work in other companies. As a result, workers at many production lines could not focus on their work, which caused adverse impact on the overall normal business operation of company A.

From the perspective of the law, a delay of salary payment by a labor dispatching company is illegal. However, handling it according to the legal procedure as described would be time consuming and wouldn't solve the pressing issues. As long as the workers cannot get their salary, they would not work, which would impact the normal business operations of Company A for a potentially long period of time.

In order to stabilize the workers and to reduce the adverse impacts of production, the management of Company A and lawyers of our team put forward the following decisions: 1. Hold a meeting on 13th January 2014 to explain the true reason of salary delay. 2. Company A will supply transportation support to help the workers ask for salary at the dispatching company or file a complaint at the labor supervision department. 3. Arrange the worker to sign an employment contract within two days effective as of 1ST January 2014. 4 Company A should communicate with the labor dispatching company in order to negotiate the salary payment, and to resolve social security transfer matters. 5. Provide updates to relevant government departments on the matter and measures taken by Company A, in order to gain support.

On January 15th, 2014, the labor dispatching company and company A signed a memorandum which required the labor dispatching company to provide the workers with their delayed salary. The memorandum also provided procedures for resignation and social security transfer.

Our team holds the opinion that in this crisis, signing employment contracts with dispatched workers is a must to avoid a potentially undesirable situation and to stabilize and keep the workforce before the termination of employment contract with the dispatching company. But this case reminds the accepting company that in the process of direct employment transfers, consensus through negotiation with the labor dispatching company is very important and its timeframe should be well controlled. It is better to avoid signing employment contracts before the termination or expiration of the employment contract between the workers and the dispatching company in order to reduce the conflicts, disputes and legal risks with the labor dispatching company.

This newsflash is prepared by the Labor Law Team of Dacheng Law Offices. Members of the Labor Law Team: Maggie Kong, Shane Luo, Novel Sun, Susan Shan, Kent Xu, Grace Yang, Anderson Zhang and John Zhou. If you have any inquiries regarding the PRC employment law matters, please contact us at laborlaw@dachenglaw.com.

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Dacheng Law Offices
24/F, Shanghai World Financial Center
100 Century Avenue, Shanghai 200120, P. R. China
Tel: 86-21-5878 5888 Direct: 86-21-2028 3597
Fax: 86-21-2028 3853 Mobile: 86-188 0176 6837
www.dachenglaw.com

中国劳动法资讯速递
二零一四年三月刊

派遣用工转为直接用工的风险防控

与业已实施的《<劳动合同法>修正案》、《劳务派遣行政许可实施办法》配套，备受关注的《劳务派遣暂行规定》（以下简称“《规定》”）已于 2014 年 3 月 1 日起实施。《规定》对于“三性”岗位、派遣员工比例、同工同福利同社保、退回解雇等予以界定和限制。前述派遣新规将极大影响劳资关系，改变用工方式。面对严苛的派遣用工限制，用工单位必须采取应对举措：退回派遣员工、转为直接用工、转为业务外包等。然而，对于任何一种用工方式的转变，如果操作不当必将会引发新纠纷。本期资讯将探讨派遣用工转为直接用工过程中的相关热点问题及风险防控。

一、 转为直接用工的时点

1. 非“三性”岗位上的派遣用工

根据《<劳动合同法>修正案》的规定， 2012 年 12 月 28 日以前签订的劳动合同和劳务派遣协议继续履行至期限届满。因此，2012 年 12 月 28 日前已经订立合同的派遣用工，即使不符合“三性”，也可以“继续履行”；用工单位可以选择在合同期限届满后再转为直接用工或退回。

2012 年 12 月 28 日之后订立合同的派遣用工，若不符合“三性”，则用工单位将被认定为违法使用派遣员工，劳动行政部门有权责令限期改正；逾期不改正的，将被处以每人五千元以上一万元以下的罚款。也就是说， 2012 年 12 月 28 日之后订立合同的派遣用工，若不符合“三性”，用工单位应当在 2013 年 7 月 1 日后尽快转为直接用工或退回。

2. “超比例”派遣用工

《<劳动合同法>修正案》规定，2012 年 12 月 28 日以前签订的劳动合同和劳务派遣协议继续履行至期限届满。因此，即使存在“超比例”派遣，也可以“继续履行”；用工单位可以选择在合同期限届满后再转为直接用工或退回。

2012 年 12 月 28 日之后订立合同的派遣用工，根据《规定》第 28 条关于 2 年过渡期的规定，在 2016 年 3 月 1 日前，用工单位“超比例”派遣用工仍是合法的；同时《规定》还要求用工单位“调整用工方案”并报劳动部门备案，在 2 年过渡期内将派遣员工比例降低到 10%以内。换言之，2 年过渡期实际为“2 年整改期”，用工单位要在 2 年内整改完毕；用工单位应在 2014 年 3 月 1 日到 2016 年 3 月 1 日的 2 年过渡期内分批转为直接用工或退回。

二、 转为直接用工须三方协商一致

派遣用工转为直接用工时，不仅仅是用工单位与原派遣员工直接签署劳动合同就能完成用工方式的合法顺利转变，还涉及派遣员工与派遣公司之间劳动合同的解除或终止；用工单位与派遣公司之间派遣合作协议的解除或终止，双方之间费用结算；退工及录用，社保关系转移等。

在派遣员工与派遣公司的劳动合同被解除或终止前，用工单位直接与派遣员工签署劳动合同并给派遣公司造成损失的，用工单位应当就派遣公司（原用人单位）由此受到的损失承担连带赔偿责任[1]。此外，用工单位未与派遣公司协商一致而直接与派遣员工直接签署劳动合同的行为，也必然引发其与派遣公司之间的冲突，导致派遣公司在后续退工、社保关系转移手续办理等方面的阻挠、拖延等不配合行为。在员工社保转移、缴纳办妥前，一旦员工发生工伤，则用工单位将面临不能获得工伤保险基金赔付的风险。

因此，转为直接用工的过程中，用工单位需与派遣公司、派遣员工充分沟通、协商一致、互相配合，才能确保用工方式转变合法顺利完成。

案例分析：与派遣公司间的协议终止，用工单位即直接与派遣员工签署劳动合同的纠纷

某知名外企A公司与当地规模最大的一家派遣公司之间有多年的合作关系，A公司数千名员工均由该派遣公司派遣。在2013年下半年，A公司出于合规及实际用工需求的考虑，决定将全部派遣员工转为直接用工。

考虑到与派遣公司之间的派遣协议将于2013年12月31日期限届满,A公司根据派遣协议约定，提前30天书面通知派遣公司：派遣协议到期不再顺延。派遣公司于12月4日回函要求A公司将派遣员工退回以便将派遣员工派遣到新的用工单位。2013年12月下旬A公司将派遣员工签署的辞职申请书扫描刻录为光盘后寄给劳务派遣公司，辞职申请书的内容为：“由于A公司与派遣公司合作协议到期终止，现接到A公司通知，自2014年1月1日起，原三方合同员工转为公司全日制员工，A公司将和员工直接签署劳动合同。本人希望继续在A公司工作，故特向派遣公司提出辞职。”

该申请书为打印件，打印的落款日期为2013年12月。此外，按照约定，A公司已经将员工2013年12月份的工资等费用全额支付给派遣公司。派遣公司本应于2014年1月10日向派遣员工通过银行转账方式支付工资，但派遣公司却以种种理由拖延支付。春节临近，却发生了集体欠薪事件，员工纷纷集结到A公司总经理及人事总务办公室“讨说话”，追问何时发工资？派遣公司要将他们派到其他公司工作，该怎么办？由于各条生产线上的员工都不能安心工作，顿时对A公司的正常生产经营造成了不利影响。

从法律层面看，派遣公司迟延发薪的行为确属违约、也系违法，但若通过法律途径解决，显然缺乏及时性，难解燃眉之急。只要员工不拿到工资，就无法安心工作，势必持续对A公司正常生产经营造成影响。

[1] 《劳动合同法》第九十一条 【用人单位的连带赔偿责任】用人单位招用与其他用人单位尚未解除或者终止劳动合同的劳动者，给其他用人单位造成损失的，应当承担连带赔偿责任。

为稳定员工，尽可能降低对生产造成的不利影响，A 公司管理层在和本团队律师研究商议后决定：1、2014 年 1 月 13 日召开员工说明会，向员工说明欠薪的真实原因；2、公司将提供往返班车等支持，帮助员工到派遣公司讨薪，也支持员工到劳动监察部门投诉举报；3、公司将于 2 天内安排员工与公司直接签署劳动合同，劳动合同期限从 2014 年 1 月 1 日起；4、公司尽快与派遣公司约谈，争取通过谈判能够协商解决尽快发薪、办理退工及社保转移手续事宜；5、及时向政府相关部门报告事态进展及公司采取的措施，争取政府部门的支持。经各方共同努力，派遣公司与 A 公司于 2014 年 1 月 15 日签署备忘录，派遣公司于 2014 年 1 月 17 日向所有派遣员工支付了全部工资，并开始陆续办理退工及社保转移手续。

本团队律师认为：在本次危机中，为了稳定并留住员工，A 公司在派遣员工的劳动合同尚未解除时即与其签署劳动合同，也是“两害相权取其轻”的必然举措。但这个案件再次提醒用工单位：在将派遣员工转为直接用工的过程中，应充分考虑与派遣公司协商一致，还应预先考虑并把控时间节点，尽量避免在派遣员工与派遣公司之间的劳动合同尚未解除或终止的情况下直接签署劳动合同，降低由此带来的与派遣公司之间的摩擦、争议及法律风险。

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大成律师事务所
上海市世纪大道 100 号环球金融中心 24 层（200120）
电话：86-21-5878 5888 直线：86-21-2028 3597
传真：86-21-2028 3853 手机：86-188 0176 6837
www.dachenglaw.com