

## PRC Labor and Employment Law Newsflash January 2016

### What You Don't Know about Internship

It is a tradition that many foreign companies and institutions have foreign students as interns, because, on the one hand, using interns is an important way to discover new talent, and on the other hand, it's a "political" or "personal favor" task assigned by the management. Unfortunately, although the topic regarding the use of foreign interns has been involved in the business, discourse and comments have been rarely tried on it. Thus, I would like to have a superficial discussion with you in this article. Please correct if there is any deficiency.

Any foreign student studying in a Chinese university with a "X" visa is definitely not allowed to work in China. However, it is controversial in practice whether he/she could participate in internship at an employer.

Who have a favorable opinion believe that internship is a part of school education program and foreign students should apply internship as Chinese students do under the principle of equality; and who have a dissenting opinion argue that the boundary of internship and work is extremely vague so allowing foreign students to attend internship means, to a certain extent, allowing them to work without work permit that is contrary to the essence of the Rules for the Administration of Employment of Foreigners in China.

Ideally I agree that foreign students can participate in internship if they satisfy certain conditions, for the following reason: It is specified in Article 26 of the Rules for the Administration of Institutions of Higher Learning's Admission of Foreign Students that if an institution of higher learning organizes foreign students for education internship and social practice, it should be carried out together with the Chinese students in the institution according the education program; but the choice of internship or practice place shall be subject to relevant rules concerning foreign affairs.

However, I should also remind you that despite the foregoing some local labor administrative departments still object to use of foreign interns. Therefore, while using foreign students studying in Chinese universities, employers should cautiously get confirmation from local labor administrative departments and even public security departments so as to avoid unnecessary dispute.

It is more complicated for a domestic employer to have any foreign student studying at a foreign university as its intern. In most cases, it conflicts with the measures for administration of foreigner employment. For example, if such intern enters China with "L" visa, he/she would be involved in some acts inconsistent with the purpose of visa and may also be suspected of illegal employment and illegal residence; but applying for "Z" visa for such intern does not meet the actual needs in most cases, and meanwhile is not necessarily approved by competent administrative departments.

Therefore, I believe that applying for “F” visa is an appropriate measure for this issue. However, the invitation letter on application for “F” visa should be properly drafted, or it could be suspected of gaining a visa by fraud.

### Case Study:

Li, with agricultural residence registration in a county of Sichuan Province, was enrolled in a Shanghai secondary vocational school. In July 2013, the school arranged internship for Li at a machinery company. Li, the school and the company signed a tripartite internship agreement, specifying a one-year internship and the internship allowance of RMB 1,800-2,000 per month. Li took the night shift on November 1, 2013 (Friday) and continuously the morning shift on the next day (Saturday), while his master did not work overtime and only other masters were present on that morning. At around 11:00am, at the operation of a MC folding machine, Li forgot to turn off the power of the machine and stepped on the wrong switch when he replaced molds on his own. His right hand's first to fifth fingers were pinched off. Then Li was immediately sent to hospital for surgery and hospitalization, and he visited outpatient offices repeatedly after hospital discharge. During such period, the machinery company paid the medical and other expenses of RMB 80,000 for Li. And Li was identified to be level 9 disabled.

The court of final appeal held that first, Li was injured in the scope of risks of his work tasks, due to his general negligence instead of grave fault, so the damages could not be solely borne by him, while the machinery company should bear the primary liability because it failed to fulfill its duty of labor protection; secondly, the school as assigning party should control and prevent internship risks, and the school cannot prove it had performed the obligation of safeguarding and supervision on the company, so the school should bear partial liability; thirdly, in accordance with the Regulation on Shanghai Primary and Secondary School Student Accidents, disability compensation should be calculated according to Shanghai urban residents' per capita disposable income standard. Therefore, the court ruled the machinery company to compensate Li RMB 148,387.50 and the school to compensate Li RMB 56,781.50.

Li was likely to be identified having factual employment relation, but due to the tripartite internship agreement previously signed among Li, the school and the company, the court held at its discretion that the so-called “internship relation” is more consistent with the essence of “civil” relation, so finally this case was concluded in accordance with relevant infringement laws.

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## 中国劳动法资讯速递 二零一六年一月刊

### 关于实习生你不知道的事

很多外资公司或者机构都有使用外国学生作为实习生的“传统”，这一方面是由于使用实习生是发掘新人的重要途径；另一方面则是“管理层”安排下来的“政治”或“人情”任务。遗憾的是，关于实习生使用的话题在市面上虽多有涉及，但对于外国实习生使用的论述却鲜有人尝试。就此，笔者愿与读者诸君做一次粗浅的探讨。当然，如有不足，亦欢迎各位大方批评指正。

对于在中国高校就读的外国学生，其持有的系“X”签证，是绝对不可以在华工作的。但对其是否可以在用人单位开展实习活动，实践当中存有争议。

持赞同意见的同仁认为，实习是有关学校教育计划的一环，既然中国学生可以实习，考虑到平等原则，对外国同学也应该适用；持反对意见的同仁则认为，实习与工作的界限极其模糊，如允许外国留学生实习，等于某种程度允许其在未获得工作签证的情况下工作，有违外国人就业管理规定的精神。

笔者个人从理念上是赞同外国留学生在符合条件的情况下开展“实习”活动的，理由如下：依照《高等学校接受外国留学生管理规定》第二十六条的相关规定，高等学校组织外国留学生进行教学实习和社会实践，应当按教学计划与在校的中国学生一起进行；但在选择实习或实践地点时，应当遵守有关涉外规定。

但笔者同样需提请读者注意的是，尽管有前述规定，但某些地方劳动行政部门仍然是对使用外国实习生持排斥态度的。就此，有关用人单位在使用在中国高校就读的外国学生时，需审慎与当地劳动行政部门，甚至是公安部门确认，以免引起不必要的争议。

使用外国高校在读的外国学生作为境内用人单位的实习生的问题则更加复杂，其多数情况下与外国人就业的管理措施存在交叉。例如，如果此类实习生使用“L”签证入境，则将牵涉到从事与签证目的不符的行为的问题，可能同时涉嫌非法就业与非法居留；但为此类实习生办理“Z”签证，在多数情况下又不符合实际需要，同时也不一定获得有关行政部门的批准。

故，在此问题上，笔者认为相对妥当的措施系申办“F”签证。但，申办“F”签证的邀请函则必须妥善起草，否则有可能存在“骗取”签证行为之嫌。

## 案例分析：

李某系四川省某县的农业户籍人员，在上海某中等职业学校就读。2013 年 7 月，学校将李某安排到一机械公司实习，李某、学校、公司三方签订了实习协议，约定了一年实习期，实习津贴每月 1800 元至 2000 元。2013 年 11 月 1 日（周五）晚李某上了晚班，次日（周六）一早又连着上早班，但周六上早班时他的带教师傅未加班，现场只有其他师傅在。中午 11 时许，李某在操作数控折边机时，忘了关闭电源的他在自行更换模具时误踩开关，右手第 2 至 5 指被夹断。李某随即被送至医院手术、住院，出院后多次门诊。期间，机械公司垫付了医疗费等费用近 8 万元。经鉴定，李某构成九级伤残。

终审法院认为，第一，李某本次受伤属于所从事劳动内容的工作风险范围内，他只是一般过失，并非重大过错，不能由其自担损失。机械公司未尽到劳动保护之责，应承担主要责任。第二，学校作为实习派出学校，应控制和防范实习风险，而李某经常被安排加班并在加班中发生事故，学校未能证明其已尽到对实习单位的安全防范督促义务，故学校应承担部分责任。第三，根据《上海市中小学校学生伤害事故处理条例》，残疾赔偿金均按照上海市城镇居民人均可支配收入标准计算。据此，终审法院判决机械公司赔偿李某损失 148,387.50 元，学校赔偿李某损失 56,781.50 元。

李某实际上有被认定为事实劳动关系的可能性，但由于李某、学校及用人单位之前签订了三方实习协议，有关法院斟酌后认为所谓“实习关系”更加符合“民事”关系的实质，故最终适用相关侵权法律规定审结此案。

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