PRC Labor and Employment Law Newsflash

December, 2012

Does Concurrent Employment Belong to Employment Relationship?

Many HR specialists often consult whether the part-time worker establishes an employment relationship with the company, whether the company is obliged to pay social security contributions for them and whether the company can fire them at any time. After carefully analyzing the description about these workers made by a HR specialist, we find out that the so-called part-time workers should be divided into several groups. Some are retired people who have been already receiving their pensions but continue working; some are workers assisted by the government under an agreement to keep their social security benefits in consideration for working several hours per day; some are workers dispatched by staffing companies; and some are full-time employees in fact, etc.. Based on the aforesaid circumstances, we will classify the workers in concurrent employment in legal categories in order to give tips for managing them pursuant to *the Employment Contract Law of PRC* and relevant laws and regulations already in force.

1. Concurrent Employment and Part-time Workers

- **Concurrent Employment** is not a legal term. *The Employment Contract Law of PRC* only sets forth two forms of labor, full-time and part-time. Generally, people working part-time will be deemed as part-time employees.

- In accordance with *the Employment Contract Law of PRC*, a worker who engages in part-time labor should work in average not more than four hours per day and not more than 24 hours per week for the same employer. The two parties to a part-time labor relationship may conclude an oral agreement but may not stipulate a probation period. The most favorable aspect about part-time labor is that either party may terminate the relationship by notice sent to the other at any time, and that no severance pay shall be payable by the employer to the worker upon termination of such labor relationship.

- Some employers believe they do not need to comply with employment registration and social security contributions when using part-time laborers. However, this practice may face some legal risks. There is an opinion stating that part-time labor is, in essence, an employment relationship. Except for the aforesaid differences with full-time labor, part-time employment shall be treated as full-time labor including: (a) the hourly compensation rate for part-time labor shall not be lower than the minimum hourly wage rate prescribed by the People's Government of the place where the employer is located, and (b) the employer is obliged to pay social security contributions in favor of the part-time employee, except if there is another employer paying so. Of course, there is another opinion holding that, pursuant to Article 3 of the Opinions about Several Issues concerning Part-Time Labor of the Ministry of Labor issued in May, 2003, part-time employees should pay their pension and health insurances by themselves and the employers would be responsible only for the work injure insurance. Hence, according to this opinion the employers would not have to pay social security contributions for their part-time employees.

2. Concurrent Employment and Employees under Special Employment Relationships

- Some companies consider some workers as in concurrent employment whereas they are actually employees under special employment relationships. According to *the Notice of Several Questions about Special Employment Relationships of Shanghai Municipal Labor and Social Security Bureau*, employees who are under a special employment relationship include: 1) individuals with social security relationships secured by agreement; 2) internal retired people of a company; 3) workers suspended from duty without pay; 4) outsourced workers provided by staffing companies; 5) retired people; 6) out-of-town workers laboring without authorization; 7) other individuals meeting the conditions of regulation of the preceding items. [1]The notice also points out that where the special employment relationship is established between the employer and the employee, the employment rights and obligations may be negotiated by both parties except for the working hours, labor protection and minimum wage, which must be in compliance with the regulatory labor standards. This regulation is still in force and leaves much room to the employers handling special employment relationships for using the free contracting principle or autonomy of the will.

- However, *the Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in Trying Cases Involving Labor Disputes (III)*, enforced on September 14th, 2010, classifies the disposal ways of special employment relationship workers. In Article 7, where an employer files an action with the people's court concerning labor disputes between the employer and its employee who is entitled to pension insurance benefits or gets his retirement payment in accordance with the law, the people's court shall handle the lawsuit as a case involving service relationship disputes. While in Article 8, where a person is in the condition of suspension from duty without pay, retires before he reaches the statutory retirement age, gets fired or is on long-term no-paid leave due to a production suspension by his employer, if such person files an action before the people's court for any labor disputes with his new employer, the people's court shall handle the lawsuit as a case involving employment relationship disputes.

3. Concurrent Employment and Dispatched Workers

- Some workers are considered by enterprises as being in concurrent employment but actually they are dispatched employees, who perform subsidiary work for several hours per day. As the dispatched employees are workers assigned by staffing companies under a dispatching agreement to another company, the employment relationships of them are with the corresponding staffing companies. The salaries and relevant social security contributions are paid on behalf of the staffing companies but the accepting companies bear the actual labor costs.

- As for the dispatched employees, the accepting companies shall pay attention that dispatchment does not grant them the right to send the worker back to the staffing firms without bearing any responsibilities. The staffing firms will usually require the accepting companies to bear the damages of illegal termination under the dispatching agreement. As for the pleading for reinstatement made by an employee, the staffing company may require the accepting company to pay off all the salaries within the employment contract term and severance pay upon termination. Hence, the accepting company shall carefully verify the dispatching agreement and handle the returning issue cautiously.

Case Study: the Employment Relationship of a Worker in Concurrent Employment Is Protected by the Law (the Final Trial Case of the Shanghai Municipal First Intermediate People's Court Students)

[1] Under *the Notice of Several Questions about Special Employment Relationships of Shanghai Municipal Labor and Social Security Bureau*, the special employment relationship means a labor relationship beyond the standard employment relationship under the enforced labor laws and regulations and service relationship under the civil laws and regulations. The worker in a special employment relationship engages in payable work for a certain employer and follows the directions and management policies of such employer. However, the worker has an employment relationship with another employer or is not subject to a regulatory qualification under the labor laws and regulations.

Shanghai Qingpu Customs Broker Limited Company employed Tang Meihua for doing the cleaning of the workplace. Since November 19th, 2007, Tang Meihua was in a hospital for one month because of an illness. During this period, the plaintiff Yang Yunfang claimed that Tang Meihua introduced her to do the cleaning job at the broker company. On December 1st, 2007, Yang Yunfang had a traffic accident when going back home. On May 21st, 2008, Yang Yunfang applied for arbitration to the arbitration committee of Pudong District requiring the committee to confirm the employment relationship between her and the company. The committee issued an award determining that there was an employment relationship of part-time labor. The company was unsatisfied with the award, so it sued before the people's court of first instance.

After trial, the court of first instance upheld that there was an employment relationship of part-time labor between the two parties. The company was still not satisfied with this verdict and appealed to the court of second instance on the following grounds: 1. the appellant did not know appellee Yang Yunfang. Even though she did the cleaning for the appellant for several days, it was argued that the court should deem those services as a debtor-creditor relationship other than employment relationship. 2. The reason for the company to have issued a certificate for Yang Yunfang in the first place was out of sympathy. After trial, the court of second instance held that Yang Yunfang did the cleaning for the appellant during the sickness of the third party employed by the company, namely, Tang Meihua, and her working hours were not more than four hours per day, which was evidenced by a certificate issued by the company. In conclusion, the court upheld the original verdict confirming the employment relationship of the two parties.

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

Dacheng Law Offices
24/F, Shanghai World Financial Center
100 Century Avenue, Shanghai 200120, P. R. China
3/F, 30/F, China Development Bank Tower
500 Pudong South Road, Shanghai 200120, P. R. China
Tel: 86-21-5878 5888 Direct: 86-21-3872 2417
Fax: 86-21-5878 6866 Mobile: 86-188 0176 6837
www.dachenglaw.com

中国劳动法资讯速递
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“兼职”是否属于劳动关系？

经常有企业的人事专员咨询：兼职人员与我公司有劳动关系么？需要为兼职人员缴纳四金么？公司可以随时解雇兼职人员么？在细心听取了人事专员对有关兼职人员的描述后，我们发现人事专员口中所谓的“兼职”分为多种情况，有些是退休返聘人员，有些是每天来公司上班几小时的协保人员，有些是劳务派遣公司派来的员工，有些其实就是全职员工，等等。基于以上情况，我们根据《中华人民共和国劳动合同法》及相关法律、法规，按不同情形对“兼职”人员做了法律分类，并对企业在管理兼职人员过程中需注意的事项做如下提示。

1. “兼职”与非全日制员工

- “兼职”一词并非法律上的概念，在《中华人民共和国劳动合同法》中仅规定了两种用工类型，全日制和非全日制，非全日制雇员一般被认为是兼职雇员。
- 根据《中华人民共和国劳动合同法》的规定，非全日制用工的劳动者在同一用人单位一般平均每日工作时间**不超过四小时**，每周工作时间累计**不超过二十四小时**的用工形式。非全日制用工双方当事人可以不签订书面劳动合同，但不得约定试用期。对企业最为有利的是，非全日制用工双方当事人任何一方都可以随时通知对方终止用工，且用人单位无需向劳动者支付经济补偿。
- 但有些单位误以为招聘非全日制员工无需为其办理用工登记、缴纳社会保险，这种做法可能面临一定法律风险。有观点认为，非全日制用工本质上仍属于劳动关系，除上条罗列的区别于全日制用工的特殊规定外，其余内容与全日制用工的处理方式一致，包括：非全日制用工小时计酬标准不得低于用人单位所在地人民政府规定的最低小时工资标准，而且需为员工缴纳社会保险，当然若已有单位为其缴纳社会保险的情形除外。也有观点认为，根据原劳动部 2003 年 5 月发布的《劳动部关于非全日制用工若干问题的意见》第三条，非全日制员工可自行缴纳养老保险和医疗保险，用人单位必须为其缴纳的只有工伤保险，所以用人单位没有为非全日制员工缴纳社会保险的义务。

2. “兼职”与特殊劳动关系员工

- 有些单位所谓的“兼职”员工其实是特殊劳动关系员工。在上海，《上海市劳动和社会保障局关于特殊劳动关系有关问题的通知》（沪劳保关发[2003]24 号）中指出，形成特殊劳动关系的员工包括：1）协议保留社会保险关系人员；2）企业内部退养人员；3）停薪留职人员；4）专业劳务公司输出人员；5）退休人员；6）未经批准使用的外来从业人员；7）符合前条规定的其他人员。[1]该规定还指出，用人单位与劳动者形成特殊劳动关系的，除工作时间、劳动保护、最低工资须参照执行法定强制性的劳动标准，其余劳动权利和义务可由双方当事人协商约定有关的劳动权利义务。该规定目前仍有效，这就给用人单位处理特殊劳动关系保留了较大的意思自治的空间。

[1]《上海市劳动和社会保障局关于特殊劳动关系有关问题的通知》中指出，所称特殊劳动关系是现行劳动法律调整的标准劳动关系和民事法律调整的民事劳务关系以外的一种用工关系，其劳动者一方在用人单位从事有偿劳动、接受管理，但与另一用人单位存有劳动合同关系或不符合劳动法律规定的主体条件。

- 然而，在 2010 年 9 月 14 日实施的《最高人民法院关于审理劳动争议案件适用法律若干问题的解释（三）》中对特殊劳动关系人员做了不同处理方法的分类，其中第七条规定，用人单位与其招用的已经依法享受养老保险待遇或领取退休金的人员发生用工争议，人民法院应当按劳务关系处理；但第八条规定，企业停薪留职人员、未达到法定退休年龄的内退人员、下岗待岗人员以及企业经营性停产放长假人员，因与新的用人单位发生用工争议，人民法院应当按劳动关系处理。

3. “兼职”与劳务派遣员工

- 有些企业所称的“兼职”实为劳务派遣员工，在用工单位做一些辅助性的零碎活，每天工作几小时。鉴于劳务派遣员工是劳务派遣单位根据《劳务派遣协议》派至用工单位的员工，该类员工的劳动关系在劳务派遣单位，工资和四金名义上均由劳务派遣单位负责发放和缴纳，但实际用工成本都由用工单位承担。
- 对劳务派遣员工，用工单位需注意，并不意味着可以随意将该类员工退回到劳务派遣单位而不承担责任。劳务派遣单位一般会在《劳务派遣协议》中将有关违法解约所产生的赔偿金都约定为由用工单位承担，在员工要求恢复履行劳动合同的情况下则要求用工单位向劳务派遣单位付清剩余劳动合同期限内的全部工资和到期终止的经济补偿金，为此用工单位需仔细审查《劳务派遣协议》并谨慎处理退回劳务派遣员工事宜。

案例分析：临时兼职人员的劳动关系亦受法律保护（上海市第一中级人民法院终审案例）

上海青浦报关行有限公司聘请案外人唐美华从事办公场所的卫生保洁工作。2007 年 11 月 19 日，唐美华因病住院一个月。在此期间，原告杨云芳称唐美华介绍其至上海青浦报关行有限公司从事办公场所的卫生保洁工作。2007 年 12 月 1 日，杨云芳在下班途经中发生交通事故。杨云芳于 2008 年 5 月 21 日向上海市浦东新区劳动争议仲裁委员会申请仲裁，要求确认其与上海青浦报关行有限公司存在非全日制劳动关系。仲裁委裁决上海青浦报关行有限公司与杨云芳存在非全日制劳动关系。上海青浦报关行有限公司不服该裁决，诉至一审法院。

一审法院经审理，确认上海青浦报关行有限公司与杨云芳存在非全日制劳动关系。上海青浦报关行有限公司不服一审判决，向二审法院上诉，上诉理由是，1、上诉人根本不认识被上诉人杨云芳，即使杨云芳为上诉人打扫了几天卫生，也是债权债务关系，不是劳动关系。2、当初之所以为杨云芳开具“证明”，完全是出于对其的同情。二审法院审理后认为，杨云芳在上诉人所聘请的案外人唐美华患病期间，为上诉人从事办公场所的卫生保洁工作，且每日工作时间不超过四小时，该事实已由上诉人为杨云芳出具的“证明”所记载的内容佐证。据此确认双方存在非全日制劳动关系，维持原判。

本资讯速递系大成劳动法团队撰拟，责任编辑：孙颖、罗欣、单训平、孔琪、周军、徐智强、张根旺和杨傲霜。期待我们的资讯速递能对您有所裨益。若您有任何问题，请通过电邮 laborlaw@dachenglaw.com *联系我们团队。*

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）
上海市浦东南路 500 号国家开发银行大厦 3 层、30 层（200120）
电话：86-21-5878 5888 直线：86-21-3872 2417
传真：86-21-5878 6866 手机：86-188 0176 6837
www.dachenglaw.com