PRC Labor and Employment Law Newsflash

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Material Impacts on Labor Dispatchment Arising from the Amendment of PRC Employment Contract Law

On December 28th, 2012, the Standing Committee of the 11th National People's Congress of the People's Republic of China promulgated the decision on the amendment of the PRC Employment Contract Law ("Employment Contract Law") at its 30th meeting. The amendment directly aims at regulating the labor dispatchment by addressing some existing "legislative gaps" since the initial promulgation of the law. For your reference, we have summarized below these new and amended articles and analyzed the main impacts which may be generated on the management and operation of the enterprises:

1. Increasing the threshold to establish a labor dispatching company: the registered capital shall be no less than RMB two million; the company shall have proper and fixed business offices and facilities accommodated to its business; the company shall also have a management system of labor dispatchment in compliance with laws and regulations; and other requirements prescribed by the laws and regulations. In the meantime, in order to run the business of labor dispatchment, it is necessary to obtain the administrative permit from the labor administrative authority. In our view, the said article considerably increases the threshold to set up a labor dispatching company, especially by adding the requirement to obtain the administrative permit. (Article 57 of the Employment Contract Law)

2. Further ensuring that employees hired through labor dispatching companies are offered the same conditions as the employees directly employed by receiving units: the dispatching employees shall have the right to receive the same payment as any regular employees of the receiving units for the same work; The receiving units shall follow the principle of equal payment to apply the same labor compensation distribution measures to the dispatching employees as any regular employees of the same working position; If a receiving unit has no employee in the same position, the labor compensation shall be determined

with reference to the labor compensation paid in the place where the receiving unit is located to employees in the same or similar position. At the same time, the labor dispatching companies shall sign employment contracts with the dispatching employees and sign labor dispatchment agreements with the receiving units to clearly stipulate or conclude that the labor compensation paid to the dispatching employees shall be in compliance with this provision. This article may prevent the purpose of the companies to reduce the employment costs through labor dispatchment. (Article 63 of the Employment Contract Law)

3. Specifying the scope of application labor dispatchment: employment through employment contracts is the basic way of employment form in China. Labor dispatching is a supplementary form, which should be arranged only for temporary, auxiliary or substitute positions. Temporary positions refer to those which last no longer than six months; auxiliary positions refer to those that provide a supportive service to the positions; and substitute positions refer to vacancies left by regular employees who leave their jobs to take vacations or study full time and replaced by other laborers during a certain period of time. Of course, the revised law only requires the dispatchment employment meeting one of the said three characters rather than all of them at the same time. The receiving units shall strictly control the number of dispatching employees according to such proportion to be specified by the labor administrative authority under the State Council. Thus, the abuse of the dispatchment employment would be curbed. (Article 66 of the Employment Contract Law)

4. Strengthening the penalties to labor dispatchment companies and receiving units: the revised article enhances the amount of the administrative penalties and thus increases the costs of violating the law for the enterprises.

Article	Previous	Current
92	If a labor dispatching company violates this Law, the labor administrative authority and other relevant competent authorities shall order it to rectify the situation. If the circumstances are serious, the said authorities shall impose a fine of no less than RMB ￥1,000 and no more than RMB ￥5,000 for each person, and the administrative	If anyone or any legal entity violates this law, running a labor dispatchment business without the corresponding permission, the labor administrative authority shall order relevant individual or entity to stop the illegal practice, confiscate the illegal gains and concurrently impose a fine of no less than one time and no more than five times of the illegal gains; if there is no illegal gain, a fine of

	department of industry and commerce shall revoke the business license. If the employee(s) dispatched suffer(s) harm, the labor dispatching company and the receiving unit shall be jointly and severally liable for the damages.	no more than ¥ 50,000 can be imposed. If a labor dispatching company or a receiving unit violates this Law, the labor administrative authority and other relevant competent authorities shall order it to rectify the situation within a certain period of time; if the situation is not rectified after the time limit expires, it shall impose a fine of no less than RMB ¥ 5,000 and no more than RMB ¥ 10,000 for each person, and the administrative permit for the dispatchment business shall be revoked. If the employee(s) dispatched suffer(s) harm, the labor dispatching company and the receiving unit shall be jointly and severally liable for the damages.

Case Study: Should the employees dispatched enjoy the same right as the regular employees?

Mr. Wang was dispatched by Labor Dispatching Company A to work at Company B and he signed an employment contract with Company A. On 31st October 2011, Mr. Wang signed an agreement on mutual termination with Company A and both parties agreed to terminate the employment contract. On 25th October 2011, Company B issued a notice that due to the consecutive losses, Company B decided to stop production since 5th November 2011 and employees who signed the termination agreement with Company B would enjoy a bonus of three-month salary besides the statutory severance payment. Mr. Wang held the opinion that he was an employee of Company B and had signed the termination agreement on 31st October 2011. Therefore, Company B should pay him the severance payment and the bonus of three-month salary, meanwhile, Company A should bear jointly liabilities. He applied arbitration at the local labor dispute arbitration committee in the city of Shanghai for the said claims, but the committee made an award against him. Mr. Wang then sued at the people's court but the court also dismissed his claims.

In this case, Mr. Wang established an employment relationship with Company A which dispatched him to work at Company B. As a result, there was no employment relationship between Mr. Wang and Company B and the notice issued by Company B was for employees under the employment relationship, so Mr. Wang did not satisfy the conditions to be entitled to the bonus and the severance payment. That is the reason for the committee or the court to have not supported his claims. However, because of the amendment of the Employment Contract Law, whether the said extra bonus can be adjusted into the scope of equal payment right in general definition will remain arguable.

This newsflash is prepared by the Labor Law Team of Dacheng Law Offices. Members of the Labor Law Team: Kent Xu, Grace Yang, Anderson Zhang, John Zhou, Novel Sun, Shane Luo, Susan Shan and Maggie Kong. 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
二零一三年一月刊

《中华人民共和国劳动合同法》修改将对劳务派遣用工产生重大影响

2012 年 12 月 28 日，第十一届全国人民代表大会常务委员会第三十次会议通过了关于修改《中华人民共和国劳动合同法》（以下简称“《劳动合同法》”）的决定。有关修改明确指向对劳务派遣的规治，完成了该法立法之初就存在的某些“缺憾”。我们对其中新增、修改的条款进行了归纳，并分析了这些变化可能会对企业经营管理产生的主要影响，具体内容如下，以供参考。

1. 提高了劳务派遣单位的设立条件：注册资本不得少于人民币二百万元；有与开展业务相适应的固定的经营场所和设施；有符合法律、行政法规规定的劳务派遣管理制度；法律、行政法规规定的其他条件。同时，经营劳务派遣业务，应当向劳动行政部门依法申请行政许可。上述条款较原有的规定大幅提高了设立劳务派遣企业的门槛，尤其是增加了获得行政许可的要求。（《劳动合同法》第五十七条）

2. 进一步保障被派遣劳动者同工同酬的权利：被派遣劳动者享有与用工单位的劳动者同工同酬的权利；用工单位应当按照同工同酬原则，对被派遣劳动者与本单位同类岗位的劳动者实行相同的劳动报酬分配办法；用工单位无同类岗位劳动者的，参照用工单位所在地相同或者相近岗位劳动者的劳动报酬确定。同时，劳务派遣单位与被派遣劳动者订立的劳动合同和与用工单位订立的劳务派遣协议，载明或者约定的向被派遣劳动者支付的劳动报酬应当符合前款规定。本条对于希望通过劳务派遣降低用工成本的企业而言，恐直接使其目的落空。（《劳动合同法》第六十三条）

3. 规定劳务派遣用工形式的适用范围：劳动合同用工是我国企业的基本用工形式，劳务派遣用工是补充形式，只能在临时性、辅助性或者替代性的工作岗位上实施。临时性工作岗位是指存续时间不超过六个月的岗位；辅助性工作岗位是指为主营业务岗位提供服务的非主营业务岗位；替代性工作

岗位是指用工单位的劳动者因脱产学习、休假等原因无法工作的一定期间内，可以由其他劳动者替代工作的岗位。当然，修改后的法律要求劳务派遣用工具备“三性”之一即可，而不是同时具备“三性”。用工单位应当严格控制劳务派遣用工数量，不得超过其用工总量的一定比例，具体比例由国务院劳动行政部门规定。由此，企业滥用劳动派遣用工形式的现象将得到遏制。（《劳动合同法》第六十六条）

4. 增加对劳务派遣企业和用工企业的违法处罚力度：修改后的条款，提高了行政罚款的数额，加大了企业的违法成本。

条款	修改前	修改后
第九十二条	劳务派遣单位违反本法规定的，由劳动行政部门和其他有关主管部门责令改正；情节严重的，以每人一千元以上五千元以下的标准处以罚款，并由工商行政管理部门吊销营业执照；给被派遣劳动者造成损害的，劳务派遣单位与用工单位承担连带赔偿责任。	违反本法规定，未经许可，擅自经营劳务派遣业务的，由劳动行政部门责令停止违法行为，没收违法所得，并处违法所得一倍以上五倍以下的罚款；没有违法所得的，可以处五万元以下的罚款。 劳务派遣单位、用工单位违反本法有关劳务派遣规定的，由劳动行政部门责令限期改正；逾期不改正的，以每人五千元以上一万元以下的标准处以罚款，对劳务派遣单位，吊销其劳务派遣业务经营许可证。用工单位给被派遣劳动者造成损害的，劳务派遣单位与用工单位承担连带赔偿责任。

案例分析：被派遣劳动者是否应同工同权？

王某经 A 劳动服务公司派遣至 B 公司工作，且王某与 A 劳动服务公司签订劳动合同。2011 年 10 月 31 日王某与 A 劳动服务公司签订劳动合同解除协议，双方解除劳动合同。2011 年 10 月 25 日 B 公司出具《通知》，B 公司因连续亏损决定自 2011 年 11 月 5 日起停产，并且 B 公司的全体员工在 2011 年 10 月 31 日前，与 B 公司签订劳动合同解除协议的，B 公司除参照劳动合同法规定支付经济补偿金，另外奖励相当于 3 个月工资的额外奖励。王某认为自己也是 B 公司的员工，并且在 2011 年 10 月 31 日签订了劳动合同解除协议，B 公司应当支付其经济补偿金以及 3 个月工资的奖励，A 劳动服务公司承担连带责任。王某遂向上海某区劳动争议仲裁委员会申请仲裁，要求 B 公司支付解除劳动合同经济补偿金及 3 个月工资的奖励，A 劳动服务公司承担连带责任。劳动仲裁委员会作出裁决，对王某的请求未予支持。王某不服裁决，又诉至上海某区人民法院。有关法院同样驳回了王某的诉请。

本案中，王某与 A 劳动服务公司建立劳动合同关系，通过 A 劳动服务公司派遣至 B 公司工作，故王某与 B 公司不具有劳动合同关系，其并非 B 公司的员工。而 B 公司出具的《通知》，系针对与其具有劳动关系的员工，发放相当于 3 个月工资额外奖励的对象为与其签订解除劳动合同协议的员工，王某不符合享受额外奖励的条件。因此，王某的诉讼请求未能获得支持。但《劳动合同法》修订后，前述额外经济补偿能否纳入广义同工同权的范围则有待商榷。

本资讯速递系大成劳动法团队撰拟，责任编辑：徐智强、杨傲霜、张根旺、周军、孙颖、罗欣、单训平和孔琪。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