



PRC Labor and Employment Law Newsflash

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Something You May Not Know about Interns

Many companies and institutions have the tradition to use students from schools of higher learning as the interns because, on the one hand, using interns is an important way to find potential employees, on the other hand, it is also a cost-effective way of employment. Despite that the topic of using intern has been widely mentioned on the market, it is a pity that a deeper reflection on its practices has rarely been tried. Hence, we would like to make a comprehensive discussion with the readers.¹

1. The Relationship between the Intern and the Employer

- Probably, one important legal ground why many employers use students from schools of higher learning as the interns is that they believe the relationship between them and the interns is not employment relationship pursuant to Article 12 of *Opinions on Issues related to the Implementation of Labor Law of the People's Republic of China* issued by Ministry of Labor in 1995: students at school who work on a work-study program by making use of spare time cannot be deemed to get a job and the employment relationship is not established and the employer may not sign employment contract with them. But regretfully, the above provision cannot be used by the employers as the reason to decline to establish employment relationship with all the interns. Many HR people, even some lawyers, have, to some degree, misread this article by neglecting the preconditions of the “not deemed to get a job”: “students at school” and “work-study program”.
- A thorough interpretation on *Administrative Measures for the Work-study Program of Students from Institutions of Higher Learning* promulgated by Ministry of Finance in 2007 will help the readers to clarify these misunderstandings.

2. The Understanding of Students at Institutions of Higher Learning

- The understanding of students from institutions of higher learning should combine Article 2 with Article 3 of the said regulation. In accordance with *Administrative Measures for the Work-study Program of Students from Institutions of Higher Learning*, institutions of higher learning refers to regular undergraduate universities, vocational colleges and specialty colleges (herein after referred to as universities and colleges) approved and established pursuant to relevant state provisions which provide full-time higher education. The students defined in the said regulation refer to undergraduates, college students and postgraduates. The undergraduates and college students include students from vocational colleges and students of second bachelor degree. Consequently, there are four elements to keep in mind to understand students from institutions of higher learning: (1) universities and colleges established complied with Chinese laws and regulations; (2) carrying out full-time education; (3) full-time learning; (4) students.

¹In practice, there are also situations where secondary vocational school students may be used as interns, but this is not the focus of this newsletter. Therefore, generally the interns in this newsletter refer to students at institutions of higher education. If the readers are interested in the secondary vocational school students, please browse *Administrative Measures for Internship of Secondary Vocational School Students* and relevant regulations.

3. The Understanding of the Work-study Program

- As for the work-study program, *Administrative Measures for the Work-study Program of Students from Institutions of Higher Learning* also has quite clear definition: the work-study program refers to social practical activity in which the students, organized by the universities and colleges, get paid legally through labor for the purpose of improving learning and living condition in their spare time. The work-study program is an important part of student funding work of universities and colleges and an effective way to improve the students' comprehensive qualities and to aid students from poor families financially.
- We see that the work-study program and taking a part-time job while studying are not exactly the same but, based on the original legislation purpose, we believe that the two shall be treated the same. Hence, there are three elements to bear in mind with regard to work-study program: (1) it should be via universities and colleges; (2) making use of spare time²; (2) having payment.

4. Intern Types

- To sum up, the relationship between the employer and the intern cannot be solved just by commenting "no employment relationship established", instead, it must be separately discussed under different scenarios.
- According to our experiences, common interns can be divided into the following groups: (1) students at Chinese universities and colleges; (2) fresh graduate students from Chinese universities and colleges; (3) Chinese students at foreign universities and colleges; (4) foreign students at Chinese universities and colleges; (5) foreign students at foreign universities and colleges.

Case Study: Students at Institutions of Higher Learning May Establish Employment Relationship with the Employer. (A Case Published on *the Bulletin of the Supreme People's Court*)

The plaintiff, Guo Yi, launched a lawsuit against the defendant Jiangsu Yifeng Chain Drugstore Limited Corporation (Hereinafter referred to as Yifeng Corporation) on the ground of labor dispute to the People's Court at Baixia District in the city of Nanjing, Jiangsu Province.

The plaintiff claimed that he was a fresh graduate from Nanjing Mochou Vocational High School in the year of 2008. In October 2007, the plaintiff applied for a job at the defendant, and after verified by the HR department and the general manger of the defendant, the plaintiff was granted to work on probation. The plaintiff and the defendant sign the employment contract on October 30th, 2007 with the employment period from the said date to December 30th, 2010. In July, 2008, Yifeng Corporation applied for arbitration at the arbitration commission at the Baixia district, requiting the commission to deem that there was no employment relationship between the plaintiff and the defendant. The commission made the arbitration award on august 19th, 2008, holding that the plaintiff was a student at school, unqualified for obtaining employment, namely unqualified for the subject requirement to establish employment relationship. Therefore, the dispute between the two parties was not within the scope of labor disputes, so the commission ceased the arbitration procedures.

The plaintiff was not satisfied with the award, holding the view that the employment contract signed by the two parties was real, legitimate and effective, thus suing at the court to require it to rule that the employment contract between the two parties was effective.

² Sure enough, the teaching practices and internships using the lecture time will not be deemed as employment relationship, either, but the ground has nothing to do with the work-study program.

The People's Court at Baixia District in the city of Nanjing made the judgment on November 18th, 2008 that: pursuant to the Article 17 and Article 18 of *the Labor Law of People's Republic of China*, the employment contract signed by the plaintiff and defendant Yifeng Corporation was valid.

Yifeng Corporation appealed to the Intermediate People's Court of Nanjing on the ground that: 1. the appellee was a student at school. During his probation period, the corporation cannot apply social insurance for him and the relationship did not belong to the jurisdiction of *the Labor Law of People's Republic of China*. Therefore, the appellee did not have the subject qualification of employment relationship. 2. The judgment of the first trial which confirmed the existence of employment relationship was obviously unjust. Because of the appellee's student identity, the labor security department did not handle the social insurance issue

Consequently, the appellant would bear relevant legal liabilities and huge risks. The appellee debated that the facts were clearly ascertained and the law was correctly applied in the original judgment, which shall be affirmed.

The Intermediate People's Court of Nanjing, after the second trial, affirmed the facts found out in the first trial and upheld the verdict.

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中国劳动法资讯速递 二零一二年十一月刊

那些你可能不知道的关于实习生的事

很多公司或者机构都有使用高等学校学生作为实习生的“传统”，这一方面是由于使用实习生是发掘新人的重要手段；另一方面则是因为某种程度上实习生似乎能够成为一种高性价比的用工选择。遗憾的是，尽管关于实习生使用的话题在市面上多有涉及，但对于其实际操作的深层考量则鲜有人尝试。就此，我们愿与读者做一次较为全面的讨论。¹

1. 实习生与用人单位之间的关系

- 大概，相当多的用人单位使用高等学校学生作为实习生的一个重要法律基础在于，其认为其与实习生之间并非劳动关系，理由在于依原劳动部 1995 年所颁布之《关于贯彻执行〈中华人民共和国劳动法〉若干问题的意见》第十二条的相关规定，在校生利用业余时间勤工俭学，不视为就业，未建立劳动关系，可以不签订劳动合同。遗憾的是，实际上上述规定并不能作为用人单位拒绝与所有实习生建立劳动关系的理由。相当多的 HR，甚至是某些律师，对于此条规定都存在某种程度的“误读”，完全忽略了“不视为就业”的前提条件是“在校生”和“勤工俭学”。
- 对教育部及财政部于 2007 年所颁布之《高等学校学生勤工助学管理办法》的深入解读，将有助于帮助读者澄清前述误区。

2. 对在校生的理解

- 对所谓“在校生”的理解需结合上述办法的第二条及第三条综合解读。依据《高等学校学生勤工助学管理办法》，本办法所称高等学校是指根据国家有关规定批准设立、实施高等学历教育的全日制普通本科高等学校、高等职业学校和高等专科学校（以下简称学校）；本办法所称学生是指学校招收的本专科（含高职、第二学士学位）学生和研究生。故，对于“在校生”有四个要素需予以注意：（1）依中国法设立的学校；（2）实施学历教育；（3）全日制在读；及（4）学生。

3. 对勤工俭学的理解

- 对于“勤工俭学”，《高等学校学生勤工助学管理办法》也是有相对清楚的界定的。本办法所称勤工助学活动是指学生在校的组织下利用课余时间，通过劳动取得合法报酬，用于改善学习和生活条件的社会实践活动。勤工助学是学校学生资助工作的重要组成部分，是提高学生综合素质和资助家庭经济困难学生的有效途径。
- 我们明白“勤工俭学”与“勤工助学”有一字之差，但从立法本意，笔者认为基本应属一致。故，对于“勤工俭学”应有如下三个要素予以注意：（1）必须经过学校；（2）利用课余时间²；及（3）有劳动报酬。

¹ 实操中当然有使用中等职业学校学生作为实习生的例子，但这并非本文所欲澄清的重点，故本文所指之实习生一般情况下系指高等学校之学生。如读者对使用中等职业学校学生有兴趣的，可尝试参阅《中等职业学校学生实习管理办法》及其配套规定文件。

² 当然，利用课上时间组织的教学实践或实习活动在多数情况下也不会被认定为建立劳动关系，但其依据完全与勤工俭学无关。

4. 实习生的种类

- 综上，对于用人单位与实习生之间的关系，不是一句轻巧的“未建立劳动关系”可以解决的，必须分情况讨论！
- 依我们的经验，常见的实习生大体可分为如下种类：（1）中国高校在校生；（2）已毕业的应届中国高校学生；（3）国外高校在读中国学生；（4）中国高校在读外国学生；及（5）外国高校在读的外国学生。

案例分析：在校生可与用人单位建立劳动关系（最高人民法院公报案例）

原告郭懿因与被告江苏益丰大药房连锁有限公司(以下简称益丰公司)发生劳动争议纠纷，向江苏省南京市白下区人民法院提起诉讼。

原告郭懿诉称：原告系南京市莫愁职业高级中学 2008 届毕业生。2007 年 10 月原告至被告处进行求职登记，经被告人力资源部和总经理审核，同意试用。2007 年 10 月 30 日双方签订劳动合同，自 2007 年 10 月 30 日起至 2010 年 12 月 30 日止。2008 年 7 月，被告益丰公司以对原告、被告间是否存在劳动关系持有异议为由，向南京市白下区劳动争议仲裁委员会提起仲裁申请，请求确认原、被告之间的劳动关系不成立。南京市白下区劳动争议仲裁委员会于 2008 年 8 月 19 日作出仲裁决定，以原告系在校学生，不符合就业条件，不具有建立劳动关系的主体资格，原、被告间的争议不属于劳动争议处理范围为由，决定终结仲裁程序。原告对此不服，认为原、被告之间存在劳动关系，双方签订的劳动合同真实、合法、有效，请求法院判决确认原、被告之间的劳动合同有效。

南京市白下区人民法院于 2008 年 11 月 18 日判决如下：依照《中华人民共和国劳动法》第十七条、第十八条之规定，原告郭懿与被告益丰公司于 2007 年 10 月 30 日签订的劳动合同有效。

益丰公司不服一审判决，向南京市中级人民法院提起上诉，理由是：1. 被上诉人郭懿身份为在校学生，其在实习期不能办理社会保险，该关系也不属于《中华人民共和国劳动法》的调整范围，因此，被上诉人不具备劳动关系的主体资格。2. 一审判决确认双方存在劳动关系显失公平。因被上诉人为在校学生，劳动保障部门不予办理社会保险，上诉人将承担相关法律责任和巨大风险。被上诉人郭懿辩称：一审判决认定事实清楚，适用法律正确，应予维持。

南京市中级人民法院经二审，确认了一审查明的事实，并维持原判。

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