PRC Labor and Employment Law Newsflash
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How to Identify the Employment Relation of an "Enterprise to be Established"?

Enterprises, being the main part of market economy, are not established overnight but in a certain period, long or short. In this process, all work related to the establishment and all activities to business commencement should be completed with specific employment. Thus, it would inevitably come down to the nature of employment relation between the "enterprise to be established" and its hired persons. Here are my opinions from exploration of the nature and accountability for such employment, which hopefully would be reference for you.

I. Nature of Employment of "Enterprise to be Established"

Based on the definition of the one recruiting and using work force in the *Employment Contract Law*, "enterprise to be established" is obviously not employer under such law since it is not qualified for lawful operation. However, in practice, the workers are under the management, direction and supervision of the "enterprise to be established", the services provided by the workers are a part of the business conducted by the "enterprise to be established" during its establishment, and the "enterprise to be established" pays them for services. For the employment form, there are all essential elements, other than who recruits and uses work force, which constitute employment relation. If we directly assert that there is no employment relation purely on the ground that the "entity to be established" is not an employer under the above law, it will be against the workers' interests, and in turn the workers' interests will be trampled. Therefore, in judicial practice, we tend to identify the nature of employment of the "enterprise to be established" based on whether it is successfully established at the occurrence of a dispute:

(I) If the enterprise is established successfully at the occurrence of a dispute, the worker should be deemed having formed an employment relation with the enterprise since his entry, and the legal relation between them applies to relevant provisions of the employment laws. Such identification references the theory of the *Company Law*: the liability of a "company to be established" shall be undertaken by the founders or investors responsible for the establishment and preparation, and once the company is established the behaviors of the founders or investors during the establishment shall be ratified as the company's behaviors. The "enterprise to be established" hires someone for the purpose of maintaining its operation, which is a pre-behavior of the established enterprise's business, and the relation between them

will certainly be transformed to employment relation upon establishment automatically. In addition, such transform is retroactive, so that the employment relation should be deemed having been established since the date of entry, and the seniority of the worker in the enterprise should be calculated from that date.

(II) If the enterprise fails to be established or is not successfully established at the occurrence of a dispute, since it is not qualified for employing under the Employment Law, it should be deemed forming a service contract relation with the founders or investors, instead of employment relation.

However, the above determination of the nature of employment will certainly cause damages to the workers' interests and might prompt enterprises to damage the workers' interests in such form of employment. After all the laws applicable to employment relation are entirely different from those applicable to service contract relation. Therefore, to offer more right protection to workers and prevent relevant entities from escaping responsibility for the reason of not meeting the qualifications of employer, and in the judicial practice in China, some disputes under such circumstances are included in labor disputes so as to protect workers to the maximum extent:

1. Any dispute arising in connection to the compensation for the occupational disease or injury due to an accident suffered at work by the worker hired by an enterprise without legal operation qualification should be deemed as a labor dispute. According to Article 66 of the *Work-Related Injury Insurance Regulation*, Where a worker of an entity without business license or not registered or put on record according to law, or of an entity whose business license is revoked according to law, or of an entity whose registration or record is cancelled according to law, is injured due to a work-related accident or afflicted with any occupational disease, or where an entity uses child labor and the employed child becomes disabled or dies, if a dispute over the amount of compensation arises, the dispute shall be subject to the relevant provisions on labor dispute settlement. And it was further defined in the *Measures for the One-Off Compensation for Injured or Diseased Workers of Illegal Employers* effective as of January 1, 2011.

2. The liability for payment of labor remuneration, financial compensation and damages should be subject to labor dispute settlement. Article 93 of the *Employment Contract Law* specifies that "An employer without lawful operation qualifications shall, in accordance with law, be investigated for legal liability for its illegal or criminal acts; If the employee has done his work, the employer or its investor(s) shall pay him labor remuneration, financial compensation and damages in accordance with relevant provisions of this Law; If losses are caused to the employee, the employer shall be liable for compensation". That is to say, with respect to this employment form, the worker's claim for labor remuneration, financial compensation and damages based on the services provided by him should be subject to labor dispute settlement.

II. Who to be Liable for relevant Labor Dispute of the "Enterprise to be Established"

As the "enterprise to be established" has no independent legal personality, who will bear the liability for such labor disputes? It is specified in the *Opinion Letter of the Ministry of Labor and Social Security on the Issues concerning Labor Disputes between Employer's Preparatory Team and Workers* that "Where any labor dispute arises during the establishment of an employer between its preparatory team and workers, the preparatory team and the founder (as legal person) shall bear joint liability as a party to such labor dispute". It is specified in Article 4 of the *Interpretation of the Supreme People's Court on Certain Issues concerning the Application of Law in the Trial of Labor Dispute Cases (III)* that "Where a dispute arises between an employee and an employer with no business license, has had its business license revoked, or continues the operation upon expiry of its term of operation, the employer or its investor(s) shall be deemed as the parties concerned". It is thus clear that if a labor dispute arises of an enterprise to be established who is not qualified or is disqualified for legal operation its investor(s) and the worker shall be deemed as the parties concerned. However, what if the investors consist of natural person and legal entity; in this case, how to divide the responsibility? I believe the responsibility may be divided as follows:[1]

1. If the investors are enterprises complying with the Employment Contract Law, they should be responsible for employment according to labor laws and regulations.

2. If the investors are natural persons, they should be jointly and severally liable for the worker's labor remuneration, economic compensation and damages in partnering principles according the provisions of the employment laws on invalid employment contract.

3. If the investors consist of natural person(s) and enterprise(s), the investors should undertake joint liability in partnering principles, and the worker may at his discretion require the natural person(s) or enterprise(s) to bear the responsibility.

Case Study:

On January 18, 2011, Yang hired Wang to work at his family workshop, there was no employment contract between them, and Yang did not pay social insurance for Wang. On October 27, 2012, Wang was injured in a traffic accident when he rode an electric vehicle at his way to work, and the traffic police identified that Wang had no fault. Wang stopped working at the family workshop after he was injured. Later, Yang applied and obtained an individual household business license for the family workshop, with the name of XX Weaving Factory. Wang applied for labor arbitration and then brought a lawsuit before the court, claiming against Yang and the weaving factory for work-related injury compensation, double salary due to having not signed the employment contract and payment of social insurance. After the hearing, the court held that the family workshop did not obtain the business license when Wang was injured at the accident, the relation with Wang was an illegal employment relation, so the labor dispute can be settled according to Article 66 of the *Work-Related Injury Insurance Regulation*, and a lump-sum compensation should be paid to Wang. Therefore, the

[1] Trial and Analysis of Difficult Labor Disputes, edited by Beijing Labor and Social Security Law Society, China Legal Publishing House (March 2013)

court made a judgment that Yan and the weaving factory should pay the lump-sum work-related injury compensation to Wang for illegal employment, and dismissed Wang's claims for compensation of double salary due to having not signed the employment contract and payment of social insurance as Wang did not have an employment relation with the weaving factory which obtained the business license.

If you have any inquiries regarding the PRC employment law matters, please contact us at hrlaw@dachenglaw.com.

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中国劳动法资讯速递
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如何认定“设立中企业”的用工关系？

企业作为市场经济活动最重要的主体，它的设立并非一蹴而就的，都要经过或长或短的设立期。而在这个过程中，不论是开展与设立相关的工作，还是进行与开业相关的活动，都需要通过具体的用工行为来完成。这样，不可避免的就会涉及到对设立中企业与招用人员之间用工关系的定性。本文通过对此类用工性质及责任承担的探讨，为大成客户提供一定的参考。

一、“设立中企业”用工行为的定性

根据《劳动合同法》对用工主体的界定，设立中的企业因尚未取得合法经营资格而显然不是该法规定的用人单位。但在实际用工过程中，劳动者受该类企业的管理、指挥和监督，且劳动者提供的劳动也是企业设立过程中业务的组成部分，同时企业向其支付报酬。这种用工形式，除用工主体不符外，具备了构成劳动关系的其他基本要素。如果单纯以主体不符而直接认定双方一定不存在劳动关系，将不利于保护劳动者的利益，进而导致劳动者权益被任意践踏。因此，在司法实务中，往往倾向于根据发生争议时“设立中企业”设立成功与否，来认定设立中企业用工行为的性质：

（一）如发生争议时，企业已设立成功的，则认定劳动者进入企业时就与企业形成劳动关系，双方的法律关系适用劳动法的有关规定。这一认定，参照了公司法的理论，即设立中公司的责任由负责设立、筹备的发起人或出资人承担，一旦公司成立，发起人或出资人在设立过程中的行为即被追认为公司的行为。企业设立阶段招用劳动者从事工作的行为，是为了维系设立中企业的运作，也是设立后企业业务的前行为，企业设立后双方之间的关系也当然转为劳动关系。因此，设立成功的企业，其与劳动者之间应自动转为劳动关系，同时，这种转化具有溯及既往的效力，双方的劳动关系应被认定从实际用工之日起开始建立，劳动者在该企业的工龄应从实际用工之日起算。

（二）如发生争议时，企业设立失败或者尚未设立成功，鉴于企业不具备劳动法的用工主体资格，应认定员工与发起人或出资人形成雇佣合同关系，而非劳动关系。

然而，这一定性的结果势必导致劳动者权益受损，同时也可能促使企业通过此类用工形式损害劳动者的利益，毕竟基于劳动关系和雇佣合同关系适用的法律是截然不同的。因此，为了给予劳动者更多的权利保障，防止相关单位以主体不适格为由逃避承担责任，我国司法实践中，又将此类情形下的部分争议，归入劳动争议，以便最大限度的保护劳动者：

1．无合法经营资格的企业招用的员工在工作过程中受到事故或职业病伤害，就赔偿发生争议的，按照劳动争议处理。《工伤保险条例》第六十六条规定，无营业执照或者未经依法登记、备案的单位以及被依法吊销营业执照或者撤销登记、备案的单位的职工受到事故伤害或者患职业病的，或用人单位使用童工造成童工伤残、死亡的，双方就赔偿数额发生争议的，按照处理劳动争议的有关规定处理。同时，2011 年 1 月 1 日起实施的《非法用工单位伤亡人员一次性赔偿办法》也对此做了进一步界定。

2．劳动者就劳动报酬、经济补偿金和赔偿金给付责任，按照劳动争议处理。《劳动合同法》第九十三规定"对不具备合法经营资格的用人单位的违法犯罪行为，依法追究法律责任；劳动者已经付出劳动的，该单位或者其出资人应当依照本法有关规定向劳动者支付劳动报酬、经济补偿、赔偿金；给劳动者造成损害的，应当承担赔偿责任"。也就是说，对此类用工形式，劳动者就其已付出的劳动，追讨劳动报酬、经济补偿和赔偿金按劳动争议处理。

二、"设立中企业"相关劳动争议的责任承担

鉴于设立中的企业不具有独立主体资格，在此类劳动争议中，应当由谁来承担责任呢？原劳动与社会保障部《关于用人单位筹备组与职工发生劳动争议有关问题意见的函》规定："用人单位在组建过程中，其筹备组与职工发生劳动争议的，筹备组和发起人（法人）共同作为劳动争议主体，承担连带责任。"《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）》第四条规定"劳动者与未办理营业执照、营业执照被吊销或者营业期限届满仍继续经营的用人单位发生争议的，应当将用人单位或者其出资人列为当事人。"可见，在设立中的企业未获取或已丧失合法经营资格的情形下，发生劳动争议，由劳动者和出资人作为当事人。但关键问题是出资人既有自然人又有企业组织，如何来划分责任呢？本文认为可采取如下方式划分责任：[1]

1．当出资人是符合劳动合同法所规定的企业组织时，由该出资人按照劳动法律法规承担劳动用工责任。

2．当出资人全是自然人时，应当按照劳动法律关于无效劳动合同的规定，由出资人按照合伙原则对劳动者的劳动报酬、经济补偿、赔偿金等承担连带责任。

3．出资人既有自然人又有企业组织时，也应参照合伙原则，由出资人承担连带责任，劳动者可选择由自然人或企业组织承担责任。

案例分析：

2011 年 1 月 18 日，杨某雇佣了王某在其家庭作坊做工，双方未签订劳动合同，杨某也未为王某缴纳社会保险。2012 年 10 月 27 日，王某在下班途中骑行电瓶车发生交通事故，受到伤害，交警部门认定王某无责。王某受伤后，不再在家庭作坊做工。之后，杨某就此家庭作坊领取了个体工商户营业执照，字号：某织造厂。王某经劳动仲裁，诉至法院，要求杨某及某织造厂支付工伤赔偿，未签劳动合同双倍工资补偿及补缴社会保险。法院经审理认为，王某发生事故伤害时，家庭作坊尚未取得营业执照，与王某系非法用工关系，可适用《工伤保险条例》第 66 条按照劳动争议相关规定处理，应给予王

[1] 《劳动争议疑难案例审理与解析》，北京市劳动和社会保障法学会编写，中国法制出版社，2013 年 3 月版

某一次性赔偿，故最终判决杨某和织造厂按照非法用工标准向王某支付一次性工伤赔偿，但王某在织造厂取得营业执照以后，已不再与织造厂存在用工关系，故驳回了王某未签订劳动合同的双倍工资补偿及补缴社会保险的请求。

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 hrlaw@dachenglaw.com 联系我们。

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