China: Strict limits and cap on labour dispatch arrangements

From 1 March 2014, strict limits and a 10% cap will apply to the use of labour dispatch arrangements within the PRC. Significantly, if 10% or more of an employer’s workforce is engaged via labour dispatch, it is prohibited from engaging new labour dispatch employees. An employer which exceeds the cap as at 1 March 2014 is required to rectify the situation within 2 years and to file an adjustment plan with the labour authorities. All companies should review their employment arrangements now to ensure that they comply with these rules.

This alert will be of special interest to any entities which currently use labour dispatch arrangements, as well as in-house legal/compliance and human resources professionals.

Background

Labour dispatch is an alternative means to engage staff from direct employment and has been a common feature of the Chinese labour market. It is essentially a tripartite arrangement whereby a staff member is employed by a labour dispatch agency (e.g. CIIC, FESCO) but is dispatched to work for the actual employer who in turn has entered into a labour dispatch service arrangement with the agency. Over the years, there have been calls for reform of the system of labour dispatch as it affords less protection for employees.

The amendments to the PRC Labour Contract Law issued on 28 December 2012 introduced general restrictions on the use of labour dispatch arrangements but with details to be set out in implementing regulations (please refer to our previous alert). Draft regulations were subsequently released for public consultation eight months later on 7 August 2013 (please refer to our previous alert). However, it was only on 24 January 2014 that the finalised version of these regulations were issued, with substantial changes from the initial draft.

Highlights of the final regulations include:

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No definition of labour dispatch

The final regulations remove the definition of “labour dispatch” which was previously introduced in the draft regulations and it therefore still remains unclear if intra-group secondments and certain forms of outsourcing or sub-contracting arrangements constitute a labour dispatch arrangement. Although the final regulations expressly deem “sham” outsourcing or sub-contracting arrangements to be treated as labour dispatch, without a clear definition, it is uncertain what types of outsourcing or sub-contracting arrangements will be caught.

Restrictions on use of labour dispatch

Reiteration of the restrictions on use of labour dispatch. The final rules reiterate that labour dispatch is limited to “temporary”, “auxiliary” or “substitute” positions.

- “Temporary” position means a position for a period of not more than six months.
- “Substitute” position means a position where the original staff in that position is absent for a period for study, leave or similar reasons.
- “Auxiliary” position means a non-primary business position that provides support or services to the primary business.

Consultation required to determine “auxiliary” positions. As the definition of “auxiliary” position is vague and may differ in different industries or businesses, the final regulations require the actual employer to carry out a consultation process with its employee representatives congress, or all its employees, and then negotiate on an “equal basis” with its union or employee representatives to agree on which positions are “auxiliary” positions. The agreed list of “auxiliary” positions must be published within the employer’s organisation. If these requirements are not met, the labour authorities will order that the situation be rectified and issue a warning to the actual employer. The actual employer is also liable for any loss suffered by employees as a result of any non-compliance.

10% cap on labour dispatch and adjustment plan. The final regulations cap the percentage of labour dispatch employees to 10% of the total workforce of an employer (i.e. the sum of its employees with a direct employment contract and its labour dispatch staff). If on 1 March 2014 an employer exceeds the 10% cap, it must formulate an adjustment plan to reduce by 29 February 2016, the number of dispatched employees to meet the 10% cap and file this plan with the local labour authorities. Until an employer meets the cap, it should not enter into any new labour dispatch arrangements.

Representative offices exempt. Given that representative offices of foreign enterprises and representative offices of foreign financial institutions are legally required to engage Chinese nationals through labour dispatch arrangements, they are exempt from the above restrictions and the cap.
New compulsory terms in dispatch agreement

There are a number of new terms and conditions that must be specified in the labour dispatch agreement. We understand that these are intended to further regulate the labour dispatch industry in general and to protect the rights of employees. These include terms governing:

- working hours and rest and leave matters;
- dispatched employees benefits during any absence for work-related injury, maternity or sickness;
- labour protection and work safety and training matters;
- fees relating to severance pay;
- the term of the labour dispatch agreement;
- the payment method and fee rates for the labour dispatch service fee; and
- liability for breach of the labour dispatch agreement.

Equal treatment

Actual employers are required to treat dispatched employees equally by providing them with the same benefits (in addition to remuneration) enjoyed by direct employees in equivalent positions. This is an elaboration of the “same work; same benefit” principle introduced in the amendments to the Labour Contract Law.

Allocation of responsibilities for work-related injuries

The final regulations now clearly allocate responsibilities for work-related injuries:

- If a dispatched employee suffers from a work-related injury while working for the actual employer, the labour dispatch agency has the primary obligation to apply for certification of the work injury but the employer is required to assist in the certification or investigation process. The labour dispatch agency is responsible for the related work injury insurance but it can enter into separate arrangements with the actual employer for reimbursement or compensation.

- If a dispatched employee applies for diagnosis or certification of an occupational disease, the actual employer is responsible for managing the diagnosis or certification process and providing relevant information or materials such as occupational history, history of exposure to occupational hazards and occupational hazard factors relating to place of work. The labour dispatch agency is also responsible for providing any other information that it may have relevant to the diagnosis or certification.
New grounds to return dispatched employees

Additional grounds. The actual employer has new statutory grounds to return labour dispatch employees and terminate the dispatch arrangement:

(1) if the employment contract can no longer be performed due to major changes in the objective conditions upon which the employment contract was established and the parties cannot agree on amendments to the employment contract;

(2) if the actual employer undergoes a mass redundancy;

(3) if the actual employer is declared bankrupt; has its business licence revoked; is ordered to close its business; is closed down; decides to liquidate itself or its operating term expires; or

(4) on the expiry of the term of the labour dispatch agreement.

Protected employees. However, certain categories of employees are protected from being returned under grounds (1) and (2) above:

- a dispatched employee who is engaged in operations that expose him or her to occupational diseases who has not undergone a medical examination before leaving his or her position, or an employee who is suspected of having contracted an occupational disease who is being diagnosed or is under medical observation;

- a dispatched employee who has been confirmed to have totally or partially lost the capability to work due to occupational diseases or work-related injuries inflicted while working for the actual employer;

- a dispatched employee who is in the prescribed period of treatment for diseases or non-work related injuries;

- a female dispatched employee who is pregnant, breast-feeding or on maternity leave; and

- a dispatched employee who has been working for the actual employer for a consecutive period of at least 15 full years and is less than five years away from his or her statutory retirement age.

In addition, the term of the labour dispatch of all the above categories of protected employees is automatically extended until the circumstances no longer apply. For example, a pregnant dispatched employee’s labour dispatch term will be automatically extended until the end of the breastfeeding period.

Penalty. If the actual employer breaches the above restrictions, the labour authorities can order it to rectify the situation, failing which the labour authorities can impose a fine of between RMB5,000 to RMB10,000 for each affected staff member. The actual employer and the labour dispatch agency are jointly and severally liable to the relevant dispatched employee for any losses so caused.
Social insurance for cross-locality labour dispatch

The final rules reemphasise that where a labour dispatch agency dispatches a labour dispatch employee to an actual employer in another location, it is required to register and pay social insurance at the location of the actual employer. Its local branch or the actual employer (if there is none) may register on its behalf.
Strict limits and cap on labour dispatch arrangement

Reference: Interim Regulations on Labour Dispatch

Issuing authority: The Ministry of Human Resources and Social Security

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

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Contacts

For further information please contact:

Richard Gu
Senior Consultant
(+86) 21 28911839
richard.gu@linklaters.com

Mark Loy
Managing Associate
(+86) 21 28911849
mark.loy@linklaters.com

Wang Qi
Associate
(+86) 21 28911861
qi.wang@linklaters.com

Reference: Interim Regulations on Labour Dispatch

Issuing authority: The Ministry of Human Resources and Social Security