New Interim Provisions on Labour Dispatch Rules: Increased Clarity and a Two Year Grace Period

The PRC Ministry of Human Resources and Social Security (**MHRSS**) recently released the Interim Provisions on Labour Dispatch Rules (**Interim Provisions**). The Interim Provisions, which will come into effect on 1 March 2014, are intended to supplement and clarify the labour dispatch regime introduced by way of the PRC Labour Contract Law and its amendments which took effect on 1 July 2013 (**LCL**).

The Interim Provisions are identical in many respects to the draft *Labour Dispatch Rules* (**Draft Rules**), which were released by the MHRSS for public consultation on 7 August 2013. (An overview of the Draft Rules was provided in our newsletter issued in September 2013.) There are, however, some important differences.

This Labour Leader provides an overview of the key features of the Interim Provisions and highlights the material differences between the Interim Provisions and the earlier set of Draft Rules.

Overview of the Interim Provisions

Which user entities and workers are affected?

The Interim Provisions apply to all staffing agencies that engage in the business of labour dispatch (**labour dispatch agencies**) and enterprises that use dispatched workers (**user entities**).

The term "labour dispatch" is not defined under the LCL or the Interim Provisions. It generally refers to the situation where a staffing agency dispatches a worker it employs to work for another entity, the "user entity". Staffing agencies are required under the LCL to obtain approval from the MHRSS to engage in the business of labour dispatch.

The Draft Rules attempted to define labour dispatch, but the definition was removed from the Interim Provisions. This appears to give the authorities more flexibility to adopt a broader interpretation in the enforcement of the Interim Provisions. In fact, the Interim Provisions specifically state that where workers are hired in the name of contracting or outsourcing arrangements, but a labour dispatch arrangement in fact exists, the same rules will apply.

Unlike the Draft Rules, the Interim Provisions do not clarify whether they apply to workers being transferred or seconded between entities within the same corporate group. This again

provides more room for the authorities to interpret on a case by case basis whether it is a labour dispatch arrangement.

However, the Interim Provisions do clarify that representative offices of foreign companies or financial institutions in the PRC, and entities that use dispatched workers as sailors, are not subject to the restriction on the number of dispatched workers they may use or the work which they may perform (see below for further details). In addition, government departments and institutions which use dispatched workers are excluded from the Interim Provisions entirely; employers which dispatch workers to work overseas or to work for families or individuals are also excluded.

What are the restrictions on labour dispatch arrangements?

Under PRC law, labour dispatch is permitted only as a supplemental form of employment for temporary, auxiliary or substitute positions (aside from representative offices, which as mentioned above are not subject to restrictions on the number of dispatched workers or the work which they may perform). These positions are defined in the LCL and the Interim Provisions as follows:

- **Temporary position:** a position that exists for not longer than six months.
- **Auxiliary position**: a position which is not part of the user entity's core business but which supports the user entity's core business.
- **Substitute position:** a position that becomes vacant due to an employee taking study or other leave, and as a result a substitute worker is needed to fill the position for a certain period of time.

The Interim Provisions limit the number of dispatched workers which can be used to 10% of the user entity's total workforce (ie those entering into an employment contract with the user entity plus the dispatched workers). (This differs from the position under the Draft Rules, which capped only the number of dispatched workers in auxiliary positions, with no cap applying to other positions.)

If the user entity intends to use dispatched workers for auxiliary positions, then it is required to undergo the same consultation process under Article 4 of the LCL as it should for the implementation of new policies bearing on the vital interests of the employees. The Interim Provisions do not specify when the consultation must take place, but presumably, to the extent that a user entity intends to engage new dispatched workers into auxiliary positions, then the consultation should take place beforehand, and for those auxiliary positions which are already filled, consultation should take place before the end of the transition period (see below).

Will there be a transition period?

Helpfully for employers, the Interim Provisions provide for a transition period of two years, during which each user entity must decrease its labour dispatch ratio to comply with the new requirements. Critically, until a user entity has reduced its ratio of dispatched workers to total workforce to below 10%, the user entity may not engage any additional dispatched workers.

In addition, various requirements in the Interim Provisions (other than the requirement for equal pay for equal work) will not apply to contractual arrangements entered into before 28 December 2012 between user entities and labour dispatch agencies and dispatched workers; rather, these agreements may continue in force until their expiration.

The Interim Provisions are silent on whether user entities may return dispatched workers on the ground that: (a) the positions filled by the dispatched workers do not qualify as "temporary", "auxiliary" or "substitute" positions, or (b) the percentage of the dispatched workers exceeds the permitted cap, or (c) the labour dispatch agencies failed to obtain government approval to provide the labour dispatch services. (The Draft Rules prohibited this.) Rather, user entities that exceed the 10% ratio as of 1 March 2014 are required to formulate a transition plan to reduce the number of dispatched workers to below 10% by 1 March 2016 and file the plan with the local branch of the MHRSS. The Interim Provisions are silent with respect to when a user entity must file the plan.

Given that labour dispatch agencies generally sign fixed-term contracts of two years with dispatched workers, the newly introduced two-year transition period under the Interim Provisions will, in many cases, allow the user entities to gradually reduce the number of dispatched workers whom they engage by simply letting their contracts expire within the transition period, unless the dispatched workers agree to work directly for the user entity.

What are the obligations of the user entity?

(**Contract with labour dispatch agency**) The Interim Provisions stipulate that the labour dispatch agreement between the user entity and the labour dispatch agency must contain certain minimum content. This includes the name and nature of the positions to be filled, the place of work, the number and term of dispatched workers required, the amount and payment method for the workers, determined in accordance with the equal pay for equal work principle, the amount and payment method of social insurance contributions, the working hours and leave arrangements, benefits for dispatched workers in relation to work-related injuries, maternity or illness, provisions regarding work safety, hygiene and training, severance and

other expenses, the term of the labour dispatch agreement, the rate and payment method of the labour dispatch service fee, and provisions dealing with liability for breach of contract.

(**Return of dispatched workers by the user entity**) Under the LCL, dispatched workers must be engaged by the labour dispatch agency for a minimum term of two years. The Interim Provisions permit the labour dispatch agency to impose only one probation period in relation to each dispatched worker. This provision leaves open the question of whether a user entity engaging a dispatched worker for the first time may impose a probation period if the dispatched worker was previously subject to a probation period through the same labour dispatch agency but for a different user entity. If so, then user entities may find that they need to work with different labour dispatch agencies in order to ensure they can impose a probation period on a new hire.

The LCL limits the situations in which a user entity may return a dispatched worker to the labour dispatch agency and in which the labour dispatch agency may in turn terminate the employment of the dispatched worker. Helpfully for employers, the Interim Provisions added a few permitted situations in which a user entity may return a dispatched worker to the labour dispatch agency. Specifically, the new, key grounds for returning dispatched workers follow:

a. there is a material change which frustrates the engagement of the dispatched worker by the user entity or there is a mass redundancy at the user entity (except where the dispatched worker is sick, injured, pregnant, on maternity leave or in the nursing period);
b. the user entity is declared bankrupt, has its licence revoked, is ordered to close down or decides to dissolve or to discontinue its business upon the expiry of its operating period; and
c. the labour dispatch agreement expires.

In each of the above circumstances the labour dispatch agency may not terminate the employment of the dispatched worker, but must instead find the dispatched worker another assignment. During the period while no work is assigned to the returned dispatched worker, the labour dispatch agency may pay the individual the minimum wage applicable in the locality in which the labour dispatch agency is registered.

(**Social insurance**) Under the Interim Provisions the labour dispatch agency has primary responsibility for enrolling the dispatched worker in a social insurance scheme and making social insurance contributions in accordance with the regulations in the location where the dispatched worker is assigned to work. If, however, a dispatched worker is assigned to a user entity located in a region in which the labour dispatch agency does not have a presence, the responsibility for making the necessary arrangements for social insurance enrolment and contributions for the dispatched worker will fall to the user entity.

(**Work-related injuries and occupational disease**) The labour dispatch agency is primarily responsible for providing work-related injury insurance and applying for work-related injury examinations where a dispatched worker is injured at work. Under the Interim Provisions however, the user entity must assist in the investigation and verification of work-related injury examinations. Where a dispatched worker applies for a diagnosis or assessment in respect of an occupational disease, the user entity must handle the matter and provide accurate information to the assessor, for example, in relation to the employment history of the dispatched worker, his/her history of exposure to harmful materials and other risk factors in the workplace.

Likely impact?

As anticipated, the Interim Provisions expand upon and provide increased regulation of many aspects of the legal relationship between user entities, labour dispatch agencies and dispatched workers. User entities have increased responsibility to verify that the arrangements by which dispatched workers are engaged and assigned to them are compliant with the law and that their agreements with a labour dispatch agency fulfill minimum content requirements. In particular, user entities need to note that the 10% restriction on the ratio of dispatched workers now applies to all positions which a dispatched worker may fill, and not just to auxiliary positions. User entities which attempt to avoid their obligations under the labour dispatch regime by attempting to package labour dispatch arrangements as outsourcing or contractor arrangements may be subject to sanction by the MHRSS.

The Interim Provisions scaled back on some of the penalty provisions that appeared in the Draft Rules. Under the Draft Rules, one of the consequences of non-compliance by a user entity is that a direct employment relationship will be deemed to have been established between the user entity and the dispatched worker. This was removed from the Interim Provisions. Instead, the Interim Provisions simply provide that the penalties under the LCL will apply, eg where the position filled by the dispatched worker is not a temporary, auxiliary or substitute position, or the permitted cap is exceeded, the user entity may be liable to pay a fine of RMB5,000-10,000 for each dispatched worker. Notably, under the Interim Provisions, in the event that the user entity fails to follow the consultation process for the auxiliary positions as stated above, it will receive a warning from the labour authorities and be ordered to rectify the non-compliance with a specified period of time, and will also be liable for the damages caused to the dispatched workers.

Although the Interim Provisions scaled back the penalties, non-compliance with the new labour dispatch rules may result in reputational damage and undermine relations with the relevant authorities. Accordingly, all employers who use labour dispatch arrangements

should pay careful attention to the contractual arrangements in place between themselves and the labour dispatch agency as well as between the labour dispatch agency and the dispatched worker. For some, restrictions on the use of dispatched workers will require careful consideration as to future resourcing for these positions.

What happens next?

The MHRSS has issued a notice to encourage its local branches to promote the requirements under the Interim Provisions, as well as supervise and guide entities to comply with the requirements. In the meantime, employers in the PRC using labour dispatch arrangements should, if they have not done so already, start developing and implementing plans to ensure compliance with the requirements of the Interim Provisions, including a plan to consult over the use of labor dispatch to fill auxiliary positions and a plan to submit to the local MHRSS.

Submitted by Lesli Ligorner, ATTA board member and Shanghai-based partner at Simmons & Simmons LLP, and associates Johnny Choi (Beijing) and Gillian McKenzie (Hong Kong). If you have any questions regarding this or any other PRC employment issue, please contact Lesli Ligorner (lesli.ligorner@simmons-simmons.com). Further updates will be available in due course on the Simmons & Simmons website, www.elexica.com.