

Special Update!!!

# CHINA

## Legal Bulletin

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### New Legislation for Guangdong Province Open for Public Comments Regarding Labor Dispatch

#### Introduction



The original intention of labor dispatch legislation is for employers to hire dispatched labor to ancillary, temporary and substitute positions within a company. In practice however, many employers fail to comply with the intention of the laws. In recent years the abuse of dispatched labor by employers has increasingly attracted public attention and the media has called on new legislation for a system to protect lawful rights and interests of dispatched employees. Due to regional disparity of the country and heated controversy among parties concerned, the regulations formulated at the state level have not yet come to light until now, leading local governments to stipulate the various local regulations to regulate compliance.

On February 1, 2012, the Legislative Affairs Office of the Guangdong Provincial People's Government issued the Draft Regulations on Administration of Labor Dispatch of Guangdong Province (《广东省劳务派遣管理规定(征求意见稿)》, hereinafter referred to as "the Draft Regulation") for public comments. Before March 2, 2012 the public can freely express & forward opinions and advice to the aforesaid legislative authority. A brief introduction to the Draft Regulation and our comments will be provided for your reference in this special update of our Legal Bulletin.

#### Main Provisions of Employing Units Obligations: Imposing Restrictions of the Number of Labor Dispatch Employees and Clear Definitions of Crucial Wording

The following articles of the Draft Regulation will create substantial influence on the current labor dispatch practice of employing units or companies:

Article 12 stipulates that companies are required to report to the local labor administrative authority whenever the number of dispatched or outsourced employees is more than 20 or reaches more than 10 percent of the total number of laborers. In addition, the number of dispatched or outsourced employees accepted by the company must not exceed more than 30 percent of the total number of the companies employees. This article also stipulates that the company shall keep and report a complete list of all the names of dispatched employees.

Article 26 provides that if the number of dispatched employees working for a company is more than 30 percent of the number of both the company hired employees and the dispatched employees combined, the local administrative authority will require the responsible company to make adjustments and impose fines between RMB100 and RMB 300 per person, according to the number of dispatched employees exceeding the 30 percent.

Article 31 provides working definitions of the three types of dispatched employees:

1. Temporary positions refer to positions of which the period of existence is no more than 6 months.
2. Ancillary positions refer to positions which provide services for the major business of the employing unit.
3. Substitute positions refer to the positions which temporarily taken by dispatched employees for the reasons that the formal employees of the employing unit are unable to work due to sick leave, maternity leave, off-job training, military service, work-related treatment etc.

Article 32 further stipulates that upon the date the regulation comes into effect, if companies hire dispatched employees at positions not in a temporary, ancillary or substitute nature, the employing company shall establish a labor relationship with dispatched employees from the date when the dispatched employees start to work for it.

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## Main Provisions Concerning Obligations of Labor Dispatch Units: to Report to Relevant Authorities and the Set up Licensed Branches as Required

Article 11 provides that a labor dispatch company shall report the personal information of dispatched employees including, name of the employing company, work location, position and any other relevant information to the local organization which provides public employment services, within 30 days from the date when it sends dispatched employees working for the employing company.

Article 17 stipulates that a labor dispatch company shall set up a licensed branch in the place where the employing company is located and whenever it sends dispatched employees working outside the city where its office is registered, it must assure that dispatched employees can utilize social insurance programs at the place where the employing company is located.

Article 24 further provides that in case a labor dispatch company fails to fulfill its obligation under item one of Article 11, the local labor administrative authority will require it to make adjustments and may impose fines between RMB 100 and RMB 300 per person according to the number of dispatched employees by the defaulting labor dispatch company.

## An Important Article Concerning the Right of Dispatched Employees: to Participate in or Organize Labor Union at Employing Unit or Labor Dispatch Unit

It is important note that compared with legislation of other provinces there is an article (Article 5) regarding labor unions in the Draft Regulation. It stipulates that the labor unions at different levels shall protect the lawful rights and interests of dispatched employees according to law and shall supervise implementation of employing units and labor dispatch

companies. Dispatched employees have the right to participate in or organize a labor union at the employing unit or the labor dispatch unit, and the units shall not reject performance of such right by the dispatched employees.

## Our Comments

From the above articles of Section One, we find that the Draft Regulation not only has clear restrictions on the number of dispatched employees accepted by an employing company, it also clearly defines the crucial wording "temporary positions", "ancillary positions" and "substitute positions". Accordingly, in circumstances which employers excessively hire dispatched employees to replace formal employees and/or arrange dispatched employees to work at positions for long term will be need to remedy the situation. As a result, it is certain that if such Draft Regulation becomes effective, it will create substantial influence on the companies in which current practices are inconsistent with the original intention of labor dispatch legislation.

Secondly, articles 11 and 24 set out in Section Two will strengthen the administration of the local organization on labor dispatch issues which provides public employment services and will keep the government well informed of the updated information and data of social employment. The setting up of licensed branches required in Article 17 will urge labor dispatch companies to improve their operation and management as its business develops into new regions outside their city where its registered office is located. In addition, social insurance programs in cities where dispatched employees actually work will be favorable to protect the lawful rights and interests of dispatched employees, so that they are entitled to enjoy local social insurance benefits and services.

Thirdly, from the legal perspective, Article 5 set out in Section Three will become the legal basis for participation of dispatched employees in the labor union of employing companies and their involvement in the policy/bylaw/decision making of the employing company through its labor union, which will be favorable to protect

their lawful rights and interests and will fill in the blanks of current legislation about whether dispatched employees can participate in labor union of employing company.

Finally, in our initial view there are some clauses in the Draft Regulation which seem conflicting with the present laws and may give rise to more disputes while in practice. For example, Article 32 provides that under certain circumstances, it will be deemed that the employing company shall establish a labor relationship with dispatched employees. However, as for how to deal with the relationship between dispatched employees and the dispatch company, the Draft Regulation does not provide any specific details. It means that there are possibilities that the same employee may establish a labor relationship with the employing company and the dispatch company at the same time. Therefore, we expect that there might be further revisions to the Draft Regulation before it becomes the effective local regulations.

The Draft Regulation is merely a "draft" put forward by Guangdong Provincial government open for public comments at present. Generally speaking, the implementation process could take a considerable amount of time and will create a period of uncertainty until the formal version is completed. Due to the complexity of labor dispatch, it is difficult to anticipate whether the local government will be likely to revise and/or supplement the Draft Regulation, or even to suspend the legislation after having contemplated the opinions and comments from the public. Also, due to the important impacts on corporate practice, it is likely that the legislation may grant a transitional period to employers so that they can make preparation or rectification before the promulgation or implementation of the formal version of the regulation.

The content of this news letter is to inform and help understand the current Draft Regulation which is open for public comments in the Guangdong Province. Should you have any inquiry, please feel free to contact us.

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