



The China Legal Bulletin  
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# CHINA Legal Bulletin

## Summary

This issue introduces the Interim Provisions on Labor Dispatch and the legal liabilities, scope and proportion of labor dispatch and labor dispatch across-regions.



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- » Wang Jing & Co. got the Guangdong Law Firm of the Year on the 11<sup>th</sup> annual ALB China Law Awards 2014.
- » Our managing partner Mr. Wang Jing has been elected the chairman of Maritime Law Committee of All China Lawyers Association.

## Introduction of Interim Provisions on Labor Dispatch

On 20 December 2013 at the 21st executive meeting of the Ministry of Human Resources and Social Security of the People's Republic of China, the Provisions on labor dispatch of the previous *Labor Contract Law of PRC* and the existing *Amendment to Labor Contract Law of PRC*, have since been updated with an *Interim Provisions on Labor Dispatch* ("*Interim Regulations*") which were adopted and became effective on 1 March 2014.

The *Interim Regulations* set out in detail the rights and obligations of labor dispatch agencies, employers and dispatched workers, to limit and decrease the scale of labor dispatch arrangement and to ensure the legal rights and interests of dispatched workers are protected. The following are highlights to the major provisions of the *Interim Regulations*.

### Scope and Proportion of Labor Dispatch

#### 1. Scope of labor dispatch

The descriptions of temporary, ancillary or substitutive positions which a dispatch arrangement may be applied and stipulations of the *Interim Regulations* are consistent with provisions of Article 66 of the *Labor Contract Law*:

A temporary position refers to a position of a term not longer than six months, the lasting period of the position itself rather than that of the dispatch arrangement;

An ancillary position means "a position that is meant to provide a supporting role to the employer's primary business functions". Since promulgation of the Amended *Labor Contract Law*, there has been a dispute as to how to practically define "primary business functions". As it is not practical for legislature to differentiate between primary business functions and subordinate ones in various kinds of enterprises, it is also not practical for employers. The *Interim Regulations* does not specifically define the ancillary position; instead, it provides that an employer may determine an ancillary position through statutory procedures, which are as follows:

- > Negotiation on an equal basis- Once an employer decides on an ancillary position for labor dispatch, an equal negotiation between the trade union or representatives of the employees and the employer should be conducted for implementation purposes. Based on proposals and suggestions put forward by the discussion meeting of the entire employees or their representatives, the ancillary position can be confirmed.
- > Disclosure- Upon completion of the equal negotiation, the employer must internally disclose the decision in detail to the entire staff for supervision. Such procedures are in compliance with the requirements stipulated in the *Labor Contract Law* on an employer in promulgation of rules and regulations directly associated with employees' vital interests.

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# Introduction of Interim Provisions on Labor Dispatch

A substitutive position means “a position taken by a backup worker for the period of time during which a regular employee is away for full-time study, on vacation or other reasons”.

## 2. Proportion of labor dispatch

According to the Interim Regulations, the total number of dispatched employees in the employer’s company shall not exceed ten percentage of its total employment, which is expressed in the following formula:

Number of dispatched employees / (number of regular employees under labor contract + number of dispatched employees) ≤ 10%

For an enterprise having various branches, the branch may be counted as an independent employer/hosting company in the dispatched arrangement; therefore, the cap of proportion of dispatched employees may be separately applicable to each branch of an enterprise.

## Labor contract vs. labor dispatch service agreement

### 1. Term of labor contract

Despite the requirement that a labor contract concluded by and between a labor dispatch agency and its dispatched employee shall have a fixed term for over 2 years, the *Interim Regulations* does not further specify whether an open-term labor contract is applicable to the labor dispatch agency. Although the issue is disputed in practice, the *Labor Contract Law* does not preclude application by labor dispatch agencies of the provisions of open-term labor contracts set forth in Article 14. Therefore, there is no legal basis for the allegation that open-term labor contract is not applicable to a labor dispatch agency.

### 2. Probation period

Based on Article 19 of the *Labor Contract Law*, it is not permissible for the same employer to employ the same person on probation more than once. As to the issue on whether such provision is applicable to a labor dispatch agency, the *Interim Regulations* expressly provides that: it is not permissible for the same labor dispatch agency to employ any dispatched worker on probation, more than once, even if such dispatched worker is assigned to different work positions for different employers.

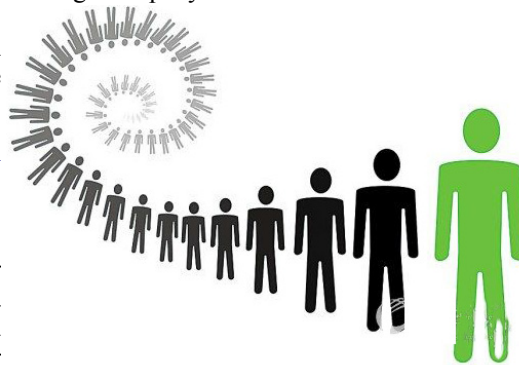
### 3. Labor dispatch service agreement

Based on Article 19 of the *Labor Contract Law*, it is not permissible for the same employer to The *Interim Regulations* lists in detail the preconditions of conclusion of a labor dispatch service agreement by and between a labor dispatch agency and the employer of dispatched worker. Compared with provisions of the *Labor Contract Law*, the *Interim Regulations* contains the following additional stipulations: name and nature of the position for dispatched worker, the amount and payment method of labor remuneration as determined in light of the principle of “equal pay for equal work”, working hours, time of rest and vacation, economic compensation and other relevant payment, the term of labor dispatch service agreement, payment methods and standards of labor dispatch agency service fee and other items required by law.

### 4. Handling of work-related injury and occupational disease

In order to urge employers to provide dispatched workers with a safe and hygienic working environment, the *Interim Regulations* stipulates that, upon occurrence of any labor-related injury to or declaration of any occupational disease by the dispatched workers, employers shall perform the following obligations:

- > Upon occurrence of any work-related injury to a dispatched worker, the labor dispatch agency is responsible for the substantial part of work in filing application for investigation and verification of the work-related injury, as assisted by the employer. In addition, when the labor dispatch agency is under the work-related injury insurance liability, specific compensation and benefits for work-related injury may be expressly stipulated by and between the agency and the employer upon execution of their labor dispatch service agreement, so as to avoid any dispute between them after occurrence of such injury.
- > Upon application for assessment on any occupational disease allegedly suffered by a dispatched worker, employers shall be substantially responsible for submitting materials required for diagnosing and assessing the occupational disease, as complemented by the labor dispatch agency’s provision of supplementary materials.



## WJNCO News

### Wang Jing & Co. Awarded “Guangdong Law Firm of the Year 2014” for the Second Consecutive Year



On 24 April 2014, the annual ALB China Law Awards 2014 were held at the Park Hyatt Beijing. This was the 11th ALB China Law Awards since its founding. More than 250 representatives from top law firms, companies and financial institutions in China and beyond attended the event, where awards were given out in 39 categories. Managing Partner Mr. Wang Jing and Client Manager Mr. Joe Rocha III attended the event on behalf our firm, accepting the award of ALB’s Guangdong Law Firm of the Year in 2014. Wang Jing & co. was also nominated for Shipping Law Firm of the Year.

Ratings for winners of ALB China Law Awards as other

awards are determined by a non basis selected panel to ensure transparency and efficiency. The honor of being consecutively awarded as ALB’s Guangdong Law Firm of the Year is a great recognition of our firm’s outstanding achievements and leading position in performing specialized legal services. The firm’s advanced partnership management, coordination and integration of various team’s ability to act China-wide, has upheld our firm’s sterling reputation and continued recognition through various awards. Through the concerted efforts of all lawyers and staff members of our firm, we look forward to continuing our highest service to our clients.

# Introduction of Interim Provisions

## on Labor Dispatch



### 5. Return of dispatched employees

#### > Circumstances under which dispatched employee can be returned

Paragraph 2 of Article 65 of the *Labor Contract Law* stipulates the circumstances under which an employer may return a dispatched employee to the staffing agent who has dispatched the worker and the supplementary provisions to such circumstances are set forth in the *Interim Regulations*, as summed up in the following table:

	Circumstances of Return of Dispatched Employees	Arrangement after Return	Legal Basis for Return
1	Where a worker dispatched is under any of the circumstances (attributable to his/her own fault) stipulated in Article 39 of the <i>Labor Contract Law</i> .	The labor dispatch agency may dissolve the labor contract with the dispatched employee	Article 65 of the <i>Labor Contract Law</i>
2	Where a worker dispatched is under any of the circumstances (not attributable to the employee's fault) as stipulated in paragraphs (1) and (2) of Article 40 of the <i>Labor Contract Law</i> .	The labor dispatch agency may dissolve the labor contract with the dispatched employee	Article 65 of the <i>Labor Contract Law</i>
3	Where an employer is under any of the circumstances (not attributable to the employee's fault) as stipulated in paragraph (3) of Article 40 of the <i>Labor Contract Law</i> .	For the period when the dispatched employee is out-of-work after being returned, the labor dispatch agency shall pay wages to him/he on a monthly basis at the minimum wage level prescribed by the government of the place where the labor dispatch agency is located.	Article 12 of the <i>Interim Regulations</i>
4	Where an employer is under any of the circumstances as stipulated in Article 41 of the <i>Labor Contract Law</i> .	For the period when the dispatched employee is out-of-work after being returned, the labor dispatch agency shall pay wages to him/he on a monthly basis at the minimum wage level prescribed by the government of the place where the labor dispatch agency is located.	Article 12 of the <i>Interim Regulations</i>
5	The employer is duly declared bankrupt, has its business license revoked, is ordered to close down or dissolve its business, or resolves to liquidate its business ahead of the schedule	For the period when the dispatched employee is out-of-work after being returned, the labor dispatch agency shall pay wages to him/he on a monthly basis at the minimum wage level prescribed by the government of the place where the labor dispatch agency is located.	Article 12 of the <i>Interim Regulations</i>
6	The dispatch service agreement expires (irrespective of whether the labor contract between the dispatched employee and the labor dispatch agency is expired)	For the period when the dispatched employee is out-of-work after being returned, the labor dispatch agency shall pay wages to him/he on a monthly basis at the minimum wage level prescribed by the government of the place where the labor dispatch agency is located.	Article 12 of the <i>Interim Regulations</i>

#### > Circumstances under which a dispatched employee is prohibited from being returned

When a dispatched employee is under any of the circumstances stipulated in Article 42 of the *Labor Contract Law*, for example, pregnancy, confinement or nursing period, or in a period of medical treatment, or loss of capacity to work, the employer cannot return him/her to the labor dispatch agency as per provisions of Item 3 and Item 4 of the above table.

When a dispatched employee is under any of the circumstances stipulated in Article 42 of the *Labor Contract Law*, according to the *Interim Regulations*, they are not prohibited from being returned to the labor dispatch agency as per provisions of Item 2 of the above table. It can be understood that the employer may return the dispatched employee to the labor dispatch agency; however, under Article 42 of the *Labor Contract Law*, the labor dispatch agency shall not dissolve the labor contract between it and the dispatched employee.

#### > Dissolution of labor contract after return of dispatched employee

Apart from circumstances under which a dispatched may be or is prohibited from being returned to the labor dispatch agency, the *Interim Regulations* sets forth provisions on arrangement after return of a dispatched employee to the labor dispatch agency in more detail as compared with the *Labor Contract Law*.

When the dispatched employee is returned to the labor dispatch agency under any of the circumstances mentioned in Item 1 or Item 2 of the table above, the labor dispatch agency may, based on provisions of the *Labor Contract Law*, dissolve the labor contract with the dispatched employee. When the dispatched employee is returned under any of the circumstances mentioned in Item 3 or Item 6 of the table above, the labor dispatch agency may rearrange the dispatch as follows:

- A. In case the labor dispatch agency offers to rearrange the dispatched employee to work for a new employer under terms and conditions which are the same as or better than those of the labor contract and the dispatched employee rejects the rearrangement, the labor dispatch agency may dissolve the labor contract between it and the dispatched employee.



### Mr. Wang Jing Elected as Chairman of All China Lawyers Association Maritime Law Committee

### WJNCO News

Wang Jing & CO. is delighted to announce that our managing partner Mr. Wang Jing has been elected the chairman of Maritime Law Committee of All China Lawyers Association. On 27 March 2014 at the thirteenth meeting of the Standing Council of the Eighth Council of the All China Lawyers Association, an election was held for the positions of Chairmen and Vice-Chairmen of the various committees. Committees such as the Criminal, Intellectual Property, Maritime, Protection of Minors, Finance, Securities and Insurance, International Services, Environment, Resources and Energies and Economic Law, had elections to determine the newest Chairmen and Vice-Chairmen of these distinguished posts.

As a leading expert on Maritime Law, It is Mr. Wang Jing's honor being elected

the chairman of the Maritime Law Committee and is a confirmation of our firm's continued excellence in Maritime issues. Winning this election has highlighted Mr. Wang's long-established professionalism, which has been recognized by the legal circles at home and abroad and continues the leading position gained by Wang Jing & Co., in providing maritime legal services. Wang Jing & Co. under the leadership of Mr. Wang Jing will further improve our services dealing with maritime legal affairs and provide better legal services for our clients.



# Introduction of Interim Provisions on Labor Dispatch

B. In case the labor dispatch agency offers to rearrange the dispatched employee to work for a new employer under the terms and conditions which are worse than those of the labor contract and the dispatched employee rejects the rearrangement, the labor dispatch agency may not dissolve the labor contract between it and the dispatched employee.

It is worth noting that, during the period of pending dispatch, the labor dispatch agency must pay labor remuneration to the dispatched worker at the minimum wage level prescribed by the government of the place where it is located.

Since the scope of “agreed terms and conditions of the labor contract” has not been prescribed in the *Labor Contract Law* or the Interim Regulations, considering that, except for the labor remuneration which can be quantified in a fairly easy manner, other elements such as the occupational position, place of work and employer etc. are unlikely to be quantified. Disputes will arise as to whether such other conditions are within the scope of “agreed terms and conditions of the labor contract” and what is the basis for determining whether the conditions are enhanced or lowered.



## 6. Labor dispatch agency’s liabilities to pay severance compensation

As an entity retaining dispatched employees, the labor dispatch agency shall, upon termination of the labor contract between it and the dispatched employee, make a severance payment to the dispatched employee in accordance with relevant provisions of the *Labor Contract Law*. The labor dispatch agency’s obligations to make severance payment are expressly prescribed in Article 17 of the Interim Regulations, which provides a direct legal basis for dispatched workers to require the labor dispatch agency to make severance payment.

## 7. Labor dispatch across regions

The Interim Regulations defines the following principle for a labor dispatch agency to make cross-region dispatch arrangement: to place cross-regional dispatched employees under social security coverage at the place where the labor dispatch agency is located.

Either the labor dispatch agency or the employer may be the subject to procure social security coverage for the dispatched employee. In

case the labor dispatch agency has any branch at the place where the employer’s company is located, the insurance coverage shall be procured by the branch; if it has no such branch, the insurance coverage shall be procured by the employer.

## 8. Legal liabilities

As expressly stipulated in the Interim Regulations, both the labor dispatch agency and the employer shall jointly and severally bear liabilities for any breach, by either of them, of any provisions of the labor contract involved or the Regulations on Implementation of the *Labor Contract Law of PRC*, in accordance with provisions of Article 92 of the *Labor Contract Law*.

Furthermore, the Interim Regulations specifically defines legal liabilities of an employer for breach of procedures on determining an ancillary position as follows: in case an employer breaches the statutory procedures on determining an ancillary position as prescribed in paragraph 3 of Article 3 of the Interim Regulations, the employer will be warned and ordered to make rectification by administrative authorities of human resources and social security; in case any dispatched employee is harmed due to such breach, the employer shall assume compensation liabilities pursuant to law.

The Interim Regulations does not prescribe any legal liabilities to be borne by an employer who, in violation of legal provisions, uses any dispatched employee for any occupational position other than temporary, ancillary or substitutive ones or whose labor dispatch arrangement exceeds the maximum proportion stipulated by law.

## 9. Transitional Measures

The Interim Regulations sets out transitional measures, allowing a transitional period of two years for any employer who, prior to implementation of the Interim Regulations, detained dispatched workers in a number exceeding 10 percent of its total workforce to make a transition; that is, such employer shall, within two years after the effective date of the Interim Regulations (from 1 March 2014 to 29 February 2016), reduce the number of dispatched workers to the maximum percentage allowed by law.

In the event that any labor contract or labor dispatch service agreement was executed prior to the promulgation of the Amendment to *Labor Contract Law* (i.e., before 28 December 2012) and the date of its expiry is later than two years after the effective date of the Interim Regulations, such contract or agreement may continue until its expiry.

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