

Shanghai clarifies labour dispatch rules

March 24, 2015 | Written by Dr. Iris Duchetsmann and Lisa Li

To provide guidance on the application of labour dispatch related rules, on 31 December 2014, the Shanghai Municipal Human Resources and Social Insurance Bureau and Shanghai Superior People's Court jointly issued the Meeting Minutes on Application of Law on Labour Dispatch ("Meeting Minutes").



No impact on existing employment if limitations are breached

Labour dispatch is highly restricted by law. It only applies to temporary, auxiliary and substitutable positions. The maximum dispatched workforce is capped at 10% of the total headcount of the labour accepting entity. In cases where these statutory limits are breached, the Meeting Minutes specify that the non-compliance will not impact the effectiveness of the employment contract or the labour dispatch agreement. Moreover, no employment relationship shall be deemed to have been established between a dispatched employee and his/her labour accepting entity.

Jurisdiction over remuneration related claims

In general, for dispatched employees, the labour accepting entity is required to implement a remuneration distribution system for positions which are the same or similar to those previously held by dispatched employees. In case of non-compliance, the Meeting Minutes grant authority to the labour administration authorities to urge the labour accepting entity to implement the same system. The Meeting Minutes clarify that disputes over remuneration between the parties are still subject to the standard labour dispute resolution proceedings.

Return of employees to labour dispatching entity

Only under limited situations may dispatched employees be returned to the labour dispatching entity. These situations include the same causes for a dismissal under direct employment and additional particular situations for dispatch, for example the expiration of labour dispatch agreement.

Based on the existing rules, the Meeting Minutes provide the following further situations for the return:

- Expiration of the labour dispatch term;
- Termination of the labour dispatch agreement;
- Reaching a tripartite agreement on the return of a dispatched employee in advance or retrospectively between the labour dispatching entity, the labour accepting entity and the dispatched employee;
- Calling back of the dispatched employee by the labour dispatching entity due to the labour accepting entity's failure to perform its obligations;
- Reaching an agreement on returning the employee between the labour dispatching entity and the labour accepting entity before the de-registration of the to-be-closed labour accepting entity in case of closure of the labour accepting entity (e.g., due to bankruptcy, dissolution, etc.);
- The labour dispatch making rectification of its noncompliance following the administrative order.

Dispute over re-dispatch after returning the dispatched employee

Following an employee's return, the Meeting Minutes confirm that the labour dispatching entity and/or the labour accepting entity shall comply with the existing statutory rules, including re-dispatching the returned employee, paying severance where applicable, or dismissing the returned-employee if justified by law, etc.

The Meeting Minutes further clarify that if the returned employee disagrees to a reasonable re-dispatch, the labour accepting entity may handle the disagreement according to its internal rules and regulations, labour disciplines or agreement set down in the labour contract, etc. A dispute arising from this may be submitted to the labour dispute adjudication authorities, i.e., labour arbitration committees and courts.

Dispute over return of employees without sufficient basis

The Meeting Minutes provide that with reference to the Article 38 of the Labour Contract Law, the returned employee may resign without prior notice provided that the return is without sufficient basis and the labour dispatching entity does not re-dispatch the employee within a reasonable period following the return. The Meeting Minutes hold that the reasonable period will generally be considered to be one month. The employee's claim of statutory severance is also upheld by the Meeting Minutes.

Liabilities of labour dispatching entity and labour accepting entity

If the dispatched employee initiates a labour dispute against either the labour dispatching entity or the labour accepting entity, the Meeting Minutes require the other entity to be joined as co-defendant. Their liability shall generally be determined separately according to existing laws and regulations. However, where damage is caused to the dispatched employee by the labour accepting entity, the labour dispatching entity shall be held jointly liable.

Labour dispatch or service?

In practice, it is difficult to distinguish a service relationship from a labour dispatch relationship. The Meeting Minutes advise that the main points through which to distinguish the two include whether internal rules and regulations are applied to the workers and the extent of management of the workers. However, where a service recipient exercises certain management powers over the workers of the service provider, such as fire prevention, production safety, product and service quality and workplace order, the Meeting Minutes call for the labour dispute adjudication authorities to carefully assess the situation and not simply conclude that the legal relationship has changed (i.e., from a service relationship to a labour dispatch relationship).

The Meeting Minutes further guide the service recipient and the service provider to stipulate in the agreement the scope of management over the workers. As long as the agreement is not invalidated by the labour dispute resolution authorities, and provided that the service recipient's partial over-management has no determinant impact (which, however, is not further explained) on the nature of the relationship, it shall not be deemed that an employment relationship has been established between the service recipient and the workers, nor shall it be deemed that a labour dispatch has been formed. But the service recipient is required to make rectification, for example by limiting the scope of management.

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