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China Law & Practice

Labour & Employment Toolkit

Essential translations and analyses of China's employment laws

CONTENTS

PRC Employment Contract Law (Revised)

中华人民共和国劳动合同法(修订)

2200/12.12.28

(Adopted at the 30th Session of the Standing Committee of the 11th National People's Congress on December 28 2012 and effective as of July 1 2013.)
(第十一届全国人民代表大会常务委员会第三十次会议于二零一二年十二月二十八日通过，自二零一三年七月一日起施行。)

PRC President's Order (No.73 of the 11th NPC)

中华人民共和国主席令 (十一届第73号)

Part One: General provisions

Article 1: This Law has been formulated in order to improve the employment contract system, specify the rights and obligations of the parties to an employment contract, protect the lawful rights and interests of workers, and establish and develop harmonious and stable employment relationships.

第一条 为了完善劳动合同制度，明确劳动合同双方当事人的权利和义务，保护劳动者的合法权益，构建和发展和谐稳定的劳动关系，制定本法。

Article 2: This Law shall govern the establishment of employment relationships between enterprises, family proprietors, private non-enterprise work units and other such organisations (Employers), on the one hand, and workers, on the other hand, and the conclusion, performance, amendment, termination and ending of employment contracts.

第二条 中华人民共和国境内的企业、个体经济组织、民办非企业单位等组织（以下称用人单位）与劳动者建立劳动关系，订立、履行、变更、解除或者终止劳动合同，适用本法。

The conclusion, performance, amendment, termination and ending of employment contracts between state authorities, institutions and social organisations, on the one hand, and the workers with whom they have an employment relationship, on the other hand, shall be handled in accordance herewith.

国家机关、事业单位、社会团体和与其建立劳动关系的劳动者，订立、履行、变更、解除或者终止劳动合同，依照本法执行。

Article 3: When entering into an employment contract, the principles of lawfulness, fairness, equality, free will, reaching a consensus through consultations and good faith shall be adhered to.

第三条 订立劳动合同，应当遵循合法、公平、平等自愿、协商一致、诚实信用的原则。

A legally concluded employment contract shall be binding and the Employer and worker shall perform the obligations specified therein.

依法订立的劳动合同具有约束力，用人单位与劳动者应当履行劳动合同约定的义务。

Article 4: An Employer shall establish and enhance work rules and regulations in accordance with the law so as to ensure that its workers enjoy their work rights and perform their work obligations.

第四条 用人单位应当依法建立和完善劳动规章制度，保障劳动者享有劳动权利、履行劳动义务。

When an Employer formulates, amends or decides on rules and regulations or material matters that have a direct bearing on the immediate interests of workers, such as labour remuneration, working hours, rest, leave, work safety and hygiene, insurance and benefits, employee training, work discipline and labour quota management,

用人单位在制定、修改或者决定有关劳动报酬、工作时间、休息休假、劳动安全卫生、保险福利、职工培训、劳动纪律以及劳动定额管理等直接涉及劳动者切身利益的规章制度或者重大事项时，应当经职工代表大会或者全体职工讨论，提出方案和意见，与工会或者职工代表平等协商确定。

etc., the same shall be subject to deliberation by the meeting of representatives of staff and workers or all of the staff and workers, which or whom shall propose solutions and comments, and which shall be determined through bargaining on an equal footing with the labour union or representatives of staff and workers.

If, in the course of the implementation of rules or regulations, or decisions on material matters, the labour union or the staff and workers deem the same to be inappropriate, it/they shall have the right to make the same known to the Employer, and amend and improve the same through bargaining.

An Employer shall publicly post or inform its workers of rules and regulations, and decisions on material matters, that have a direct bearing on their immediate interests.

Article 5: The labour administrative department of the people's government at the county level or above together with labour unions and enterprise representatives shall establish and enhance a tripartite employment relationship coordination mechanism to jointly consider and resolve major issues relating to employment relationships.

Article 6: A labour union shall assist and guide workers in concluding and performing employment contracts with the Employer in accordance with the law and establish a collective bargaining mechanism with the Employer so as to safeguard the lawful rights and interests of the workers.

Part Two: Conclusion of employment contracts

Article 7: The employment relationship between an Employer and a worker shall be established from the date on which the Employer begins to use the worker. The Employer shall keep a register of employees for reference purposes.

Article 8: When an Employer employs a worker, it shall truthfully give him/her a description of the work and inform him/her about the work conditions, place of work, occupational hazards, work safety situation, labour remuneration as well as other matters that the worker wishes to know. The Employer has the right to know about the basic particulars of the worker that are directly relevant to his/her employment contract, and the worker shall truthfully provide the same.

Article 9: When an Employer employs a worker, it may not retain his/her resident ID card or other document, require him/her to provide security or require him/her to provide property under another guise.

Article 10: When establishing an employment relationship, a written employment contract shall be concluded.

在规章制度和重大事项决定实施过程中，工会或者职工认为不适当的，有权向用人单位提出，通过协商予以修改完善。

用人单位应当将直接涉及劳动者切身利益的规章制度和重大事项决定公示，或者告知劳动者。

第五条 县级以上人民政府劳动行政部门会同工会和企业方面代表，建立健全协调劳动关系三方机制，共同研究解决有关劳动关系的重大问题。

第六条 工会应当帮助、指导劳动者与用人单位依法订立和履行劳动合同，并与用人单位建立集体协商机制，维护劳动者的合法权益。

第二章 劳动合同的订立

第七条 用人单位自用工之日起即与劳动者建立劳动关系。用人单位应当建立职工名册备查。

第八条 用人单位招用劳动者时，应当如实告知劳动者工作内容、工作条件、工作地点、职业危害、安全生产状况、劳动报酬，以及劳动者要求了解的其他情况；用人单位有权了解劳动者与劳动合同直接相关的基本情况，劳动者应当如实说明。

第九条 用人单位招用劳动者，不得扣押劳动者的居民身份证和其他证件，不得要求劳动者提供担保或者以其他名义向劳动者收取财物。

第十条 建立劳动关系，应当订立书面劳动合同。

To view the full translation, visit:
http://www.chinalawandpractice.com/Article/3148993/Channel/9931/PRC-Employment-Contract-Law-Revised.html

How to deal with labour crises

As labour unrest increases, it is vital that companies implement the right strategies to handle the problem. Effective communication and negotiation with employees and other activists can go a long way in reducing the burden on management

Foreign companies have faced an increasing number of strikes and other forms of labour unrest in China in recent years. The causes are complex, but foremost are changes in the attitudes of individuals and labour organisations. Individuals, particularly young Chinese workers, are becoming more assertive of their labour rights. Also, labour rights groups now provide these individuals with relatively sophisticated behind-the-scenes support and guidance during their labour activism. And finally, legally-recognised labour unions, which in the past have rightly been viewed as indifferent – if not outright opposed – to workers' collective demands and actions, have in some cases signalled a desire to begin legitimately serving as real employee representatives in advocating for employee rights.

Increasing labour unrest

Among the companies hardest hit by strikes and labour unrest, many are in manufacturing, retail and service industries that rely on large amounts of migrant labour. With China's rapid economic growth, costs of labour, land and logistics have been steadily increasing. These increasing costs have put constant pressure on the ability of these labour intensive industries to maintain profitability. Worse still, these industries are also among the hardest hit by the global economic downturn as well as China's own efforts at economic structural adjustment. As a result, many companies have enacted cost-cutting measures to stay afloat, including instituting pay freezes, eliminating bonuses and benefits, reducing their workforces, relocating to places with lower labour and land costs and selling or completely shutting down businesses. But such measures are increasingly being met by resistance from employees.

In some cases, workers on strike have over-asserted their rights. Many of their demands have either exceeded what is required under the law or have had no legal basis at all. For example, in a share acquisition of a company in which ownership changes hands, employees have no legal right to claim severance pay because their employment is not legally affected by the change in ownership. However, employees in such situations have often either not understood or simply ignored the law and demanded the employer "buy out" their prior years of service and pay them severance.

Another example frequently occurs when companies decide to close stores, business divisions or factories. Under the law, mass layoffs can be conducted in these circumstances if the labour union or employees are consulted and the competent labour bureau is notified. The law requires neither the consent of the labour union or employees nor the approval of the labour bureau to conduct the mass layoff. Despite the mass layoff procedure being legal, employers are often prevented from conducting the layoffs because of militant opposition from employees. Employees have seized control of the workplace until their demands for a large severance package are met. Moreover, many local labour authorities have sided with employees out of concern for maintaining social stability as well as for the financial burden of paying unemployment to laid-off employees. Some local labour bureaus have even set higher local requirements for mass layoffs than required by national law in order to make mass layoffs less likely or even impossible in their jurisdictions.

There is therefore a risk for employers whenever there is a merger, acquisition, relocation, business shutdown or workforce reduction. The employer faces a risk that the employees may demand severance rights not granted in law or demand a

severance package much larger than required by law (i.e., one month's salary for each year of service). If their demands are not satisfied, labour unrest could follow. While these demands that exceed the law may be viewed as legitimate expressions for a reasonable if not legally guaranteed compensation for past services and loyalty to the company, in some cases the employees are simply seizing an opportunity to demand a large lump sum payment and leave the company.

Whatever the true justification, employers must still deal with the fact that a strike in one company has the potential to lead to more strikes in other companies, as striking employees learn from other striking employees. Rumours travel quickly about employees who have won rich severance packages through work stoppages. Even if it turns out these rumours are unfounded, they spur striking employees to fight for the same if not a larger severance package.

The nature of strikes in China

Even if a company has a labour union, the employees generally initiate most strikes on their own without union involvement because the employees view official labour unions as too management friendly and unsupportive of employee interests. Smart phones, mass texting and various social media platforms make it easy for employees to independently organise a strike or demonstration without labour union support. In many cases, strike leaders have been seen using these technologies to organise and direct the strike.

However, although employees can easily organise strikes, they often have a more difficult time in effectively negotiating with management because strike leaders are usually reluctant to be elected as representatives to negotiate with the management due to fear of subsequent management reprisals. Furthermore, even if the striking employees manage to elect representatives, the employees generally have little trust in these representatives and often suspect them of accepting bribes from management. These suspicions often derail progress and lead to the collapse of negotiations.

Employers must still deal with the fact that a strike in one company has the potential to lead to more strikes in other companies, as striking employees learn from other striking employees

Jonathan Isaacs, Baker & McKenzie

In some cases, certain labour rights groups have reportedly been involved in strikes. These NGOs have experience from past strikes and some labour law knowledge. As such, they can provide valuable support and guidance to employees during a strike and negotiations with management. However, since these NGOs have no legal standing in a strike, they can only work behind-the-scenes and may not take an active role in the strike or negotiations. Moreover, since the role of NGOs in civil society is often politically sensitive and legally uncertain, many strike leaders worry significantly about becoming known to the government as having a close working relationship with NGOs. All of these factors work to limit the NGO's influence during a strike.

China has only one legally recognised labour union, the All-China Federation of Trade Unions (ACFTU). It has an awkward role to play within the Chinese labour regime. On the one hand, as a workers' organisation, it is tasked with protecting worker interests. On the other hand, it is also tasked by the trade union law with maintaining harmonious labour relations and assisting the government in preserving social stability. These conflicting duties mean that the ACFTU cannot be as aggressive on the behalf of workers when dealing with management as its union counterparts in the West. In addition, during most strikes and other forms of labour unrest, the ACFTU's ability to protect worker interests is undermined since the ACFTU – under the law and in practice – usually must assume the role of mediator between the employees and management. As mediator, the ACFTU must remain impartial and therefore cannot unequivocally fulfil its duty to protect worker interests. Rather, it must also ensure the employer's interests are also protected. This conflicted role is why employees view the ACFTU as unhelpful during collective actions by the workers.

However, ACFTU-affiliated company unions have an advantage in that their members and their union activities are protected by law, whereas employee groups unsanctioned by the ACFTU are not protected. As such, even independent employee movements sometimes pressure the sanctioned company labour union to provide representation during a labour dispute. Not

China's young workers

Compared with their parents, the young migrant workers born in the 1980s or 1990s are much more assertive of their rights. They are usually the only child or one of only two children in a family, have a strong sense of self, and have received a better education than their parents. Unlike their parents, they have no plans to return to their home towns or villages because few suitable jobs can be found there; instead, they want to live in cities with employment opportunities.

They are highly aware of labour rights due to the government's extensive labour legislation in the past several years and the media's sweeping coverage of labour (especially collective labour) disputes.

As the pool of workers shrinks in China, young workers with adequate work experience and skills have less fear of losing their jobs and little difficulty in finding replacement jobs with comparable salary and benefits. These workers are therefore more likely to challenge management if they feel they are being unfairly treated.

only does this pressure come from the employees, but the Chinese Communist Party (CCP) also pressures the sanctioned company labour unions to assist in advocating for the workers' interests to reduce social instability. Also, company union leaders who face the same fate as employees (e.g., termination in a mass layoff) will generally provide a more vigorous representation of the employee interests. All of these reasons may explain why the sanctioned company labour unions in the recent PepsiCo mass-layoff and Wal-Mart store closure were acting like real unions in advocating fiercely and determinedly for employee interests.

Employee activities can be very disruptive during labour unrest. In many instances, protesting workers have physically restrained or even taken hostage the senior managers, occupied plants, blocked entrances and exits to facilities to prevent shipments in or out, obstructed management efforts to recruit replacement workers, and coerced reluctant employees into participating in strikes. The employees sometimes deliberately target the busiest production times to launch strikes so that pressure on management is heightened.

Handling a crisis

The law is silent on work stoppage by strike. While this silence in the law means that strikes have no legal protection, it also means that involvement in a strike is not a statutory ground upon which an employee can be terminated. As a result, management cannot expressly base the termination of an employee on participation or leadership in a strike.

Instead, the employer must base the termination on behaviour that can be defined as a serious violation of company rules according to the employee handbook, such as unjustified absence from work, disobeying management's normal work instructions and disruption of production. The employee handbook must be adopted through an employee consultation procedure for its rules to be enforceable. In order to effect the termination, the company must have evidence of the employee's misconduct, such as video or audio recordings. The company should use its video surveillance system to monitor the strike. An ancillary benefit of the video surveillance is that it might deter the employees from taking particularly disruptive actions.

Another step employers should take in order to mitigate the impact of a potential strike is to prepare an emergency plan to guide its response to labour unrest

Bofu An, Baker & McKenzie

Management should be prudent when deciding whether to fire strike leaders because it could be viewed as a crackdown and escalate the labour unrest beyond its ability to control. In Guangdong, an interesting regulatory development may limit management's ability to fire employees during a strike. The Guangdong provincial government has recently issued a draft set of regulations in effect granting employees the right to strike if employers refused to engage in collective bargaining, and prohibiting employers from terminating any employee once the strike begins up until the collective bargaining process commences. Employers in China should monitor developments in this area to see whether the Guangdong regulations are adopted and whether other provincial and local governments eventually adopt similar regulations. This would put further pressure on companies to engage in good-faith collective bargaining with employees when the company union or other employee representatives make such demands.

In many cases, strikes are caused by employer noncompliance with the law, for instance underpaying social insurance contributions, ignoring legitimate employee grievances or failing to provide a safe workplace. The first step for employers to limit the risk of labour unrest is to ensure compliance with Chinese employment laws. In order to learn about and address any lapses in compliance or other legitimate employee grievances in a timely fashion, employers should establish effective communication channels between management and employees so that issues can be identified and addressed before they escalate and cause unrest.

Another step employers should take in order to mitigate the impact of a potential strike is to prepare an emergency plan to guide its response to labour unrest. It is vital to have such a plan in place before engaging in any action that poses a high risk for causing labour unrest like mergers and acquisitions that could result in plant closures or mass layoffs. The plan should

The role of the government

The police usually do not intervene as long as employee actions do not become violent or too disruptive and do not spill outside the company grounds. Labour bureaus, similar to the ACFTU, also play the role of mediator between employees and management. The primary motive of the labour bureaus is to broker a settlement as quickly as possible. Local governments have at times been more supportive of management so as to uphold the image of being business-friendly and maintain local economic growth. However, this local government support cannot and should not always be expected, especially when a foreign company is closing local operations.

Every year in China, there are several time periods when local governments are acutely sensitive to lapses in social stability, e.g., during March when the National People's Congress and the National People's Political Advisory Committee are in session and during the Chinese Spring Festival. Companies should avoid any business actions that might trigger labour unrest during these periods because local government support will be unpredictable during these times.

identify and establish a project team (which includes business, HR and PR managers as well labour lawyers) and a decision maker to handle the labour unrest. It should also include a communication plan outlining the handling of communication with employees in a labour unrest environment and should also identify who will be responsible for public and government relations in order to gain their support.

Private security firms should be contacted to provide security services for senior managers and to protect the company's important assets if necessary, since the police are reluctant to intervene in labour disputes unless the situation gets out of hand. Companies should not wait until a serious incident has occurred to take steps to protect their management personnel. The company's internal security and video surveillance system should also be used to monitor the labour unrest and collect evidence in case any employees later try to bring a claim against the company for disciplinary actions taken against striking workers.

Management should also be aware of the identity of potential strike leaders so that communication channels can be established as quickly as possible. Managers who have relatively good relationships with the employees should be given additional training on how to serve as liaisons to the employees during the immediate outbreak of a strike to quickly gather employee grievances and help establish official communication channels between striking employees and the project team.

If a strike occurs, the emergency plan should be initiated immediately and the project team should be sent to the location of the strike. It should be decided immediately whether management can continue to work on-site or should be moved off-site (the latter option is generally preferable).

Labour, commerce and other relevant government agencies should be contacted as soon as possible for support. Support from senior government officials is more important if obtainable. Police should be notified of the labour unrest so that they can be prepared to intervene if necessary.

Labour lawyers must analyse whether the demands of the employees are legal and reasonable, advise on settlement offers, review or prepare notices or announcements to the employees and assess whether grounds for termination exist for specific employees.

If needed, replacement workers should be brought in to meet manpower shortages, but the risk of conflict between the replacement workers and the striking workers should be assessed before doing so. Management should also consider assigning some production tasks to affiliated companies or outsourcing parts of production to external companies as a temporary emergency measure to meet market demands.

Jonathan Isaacs and Bofu An, Baker & McKenzie, Hong Kong

How to prepare for collective bargaining in Guangdong

Guangdong's collective contract rules give labour unions a more active role and prevent employers from delaying negotiations. Companies must prepare to deal with more informed employees and resolve issues efficiently and effectively

The *Enterprise Collective Contract Regulations* (Regulations), adopted by the Eleventh Session of the Standing Committee of the Twelfth People's Congress of Guangdong Province on September 25 2014 became effective on January 1 2015. The Regulations increase the labour union's involvement in the collective negotiation process, with the aim of providing employees with an effective process for addressing employment related issues with employers. The general framework at the national level has failed to provide such a process. Without an effective process, employees have taken matters into their own hands through industrial action. However, without informed guidance, employees often make demands which have no legal basis or that are unreasonable. This creates an environment that makes it difficult for the parties to resolve issues. Additionally, given the lack of an effective formal mechanism for collective bargaining and the success of employees in obtaining concessions through industrial action, conditions were created for an ever increasing cycle of industrial action. The Regulations are meant to address these structural deficiencies in the collective bargaining process in Guangdong province.

Building on the bargaining framework

The national level *Collective Contracts Provisions* (集体合同规定) (Provisions), effective May 1 2004, contain a general requirement that if either employees or a company makes a written request for a collective contract, the other party should not refuse to engage in collective negotiations without a justified reason. However, in practice, this vague legal guideline has not been sufficient to get parties to effectively engage in collective negotiations when issues arose, often resulting in labour unrest, particularly in Guangdong province. The Ministry of Human Resources and Social Security and the All-China Federation of Trade Unions (ACFTU) jointly published the *Notice on the Pushing Forward of Collective Bargaining and the Implementation of the Rainbow Plan* (推进工资协商及执行彩虹计划的通知) (Rainbow Plan) on May 5 2010. The Rainbow Plan requires labour unions to focus on collective wage negotiations in the private sector and labour intensive industries, and put in place collective contracts regarding remuneration-related issues. The Regulations are a natural progression at the Guangdong provincial level to implement the principles of the Rainbow Plan, and provide a more detailed legal framework for orderly collective bargaining by employees, with the intention to provide a channel for employees to raise and resolve issues without having to resort to industrial action.

The rise of the union

The Guangdong Province Federation of Trade Unions drafted the Regulations and they have clearly given themselves an important seat in the collective negotiation process. The Regulations indicate that if employees intend to initiate collective bargaining with their employer, they should first direct the request to the employer's labour union, which will in turn decide whether to raise the request with the employer. If over half of the employees or members of an employee representative congress make the request, then the labour union is obliged to raise the request with the employer. If the employer does not have a labour union, the employees should first direct the request to the local trade union, in which case the same parameters apply. Additionally, the Regulations state that the chief representative for the employees in these negotiations should be the leader of the company's labour union or, if there is no labour union, an employee representative elected by way of elections organised by the local ACFTU. It is obvious that there has been some pressure on the Guangdong provincial level ACFTU to take a more active role.

Once the labour union, either at the employer level or local level, makes the request for collective bargaining, the employer has 30 days to respond to each point raised in the request and begin collective bargaining with the employees. Collective bargaining negotiations should be concluded within three months from the date of the notice, with a maximum extension of 60 days permitted if both parties mutually agree to the extension. The Provisions do not contain any specific requirements for concluding collective negotiations once they have begun, so this new provincial level requirement is significant. It is clearly

> **If employees intend to initiate collective bargaining with their employer, they should first direct the request to the employer's labour union**

aimed at preventing companies from delaying collective negotiations until they lose momentum and are abandoned.

Preventing labour disputes

The Regulations indicate a variety of issues that may be collectively negotiated, but they place special emphasis on remuneration-related issues, which have been the most common source of disputes. In particular, the Regulations indicate that when discussing wage issues, the following should be taken into consideration:

- labour productivity and economic performance of the employer;
- total payroll and employee's average wage level in the company in the preceding year;
- wage guidelines for companies, issued by labour authorities;
- consumer price index information issued by local authorities; and
- local minimum wage, regional and industrial average wage increase levels.

In 2010, employees at several subsidiaries of foreign companies in Guangdong province engaged in industrial action which saw them successfully obtain concessions from their employers for higher wages. At Foxconn's facility in Shenzhen, 18 employees attempted suicide in protest over working conditions, resulting in 14 deaths. As a result, Foxconn agreed to increase the salaries of most of its employees in China. In the summer of the same year, employees at a Honda subsidiary in Guangdong province went on strike demanding higher wages, with Honda eventually agreeing to increase wages. Around the same time, employees at a Toyota affiliated supplier went on strike, and again were able to negotiate an increase in compensation from their employer. According to the Guangzhou Federation of Trade Unions, more than 100 strikes occurred in 2010 alone. Most of the strikes were settled with increases in remuneration, so industrial action became an established, and effective, form of collective negotiation. With social media and mass texting, employees learn quickly about the industrial action employees take at other companies and what concessions they are able to obtain through such action. Given the government's heavy emphasis on social harmony and stability, this development caused great concern.

"With social media and mass texting, employees learn quickly about the industrial action employees take at other companies and what concessions they are able to obtain through such action

As most of the industrial action was over remuneration related issues, it is not surprising that the Regulations give particular focus to the negotiation of these issues, providing guidance as to what should be considered to give collectively agreed contractual provisions actual meaning. In the past, many companies have been able to negotiate collective contracts with vaguely worded provisions regarding remuneration, or which simply restated existing company policy. Such contracts fail to provide the intended mechanism for resolving employee grievances. The Regulations aim to provide guidance and substance to the collective negotiation process, inserting the labour union firmly in the process in an attempt to ensure employees get the most out of negotiations.

A key reason for passing the Regulations is to provide a mechanism for effective communication between employees and employers to avoid employees taking industrial action, which is disruptive to the operations of employers and to society as a whole. The Regulations specifically identify the type of activities employees are prohibited from engaging in during the collective bargaining process. Employees are prohibited from refusing to work, persuading other employees to stop work or disrupting the operations of the employer by obstructing employees or materials from entering or exiting the employer's premises or destroying company property.

A shifting paradigm

Labour unions have historically had limited power in China. They were better known for organising social activities for employees rather than protecting their rights or advocating on their behalf. There have been several reports of employees actually physically fighting with union representatives during the course of industrial action because they viewed the union as being too management friendly. The *PRC Employment Contract Law*, effective January 1 2008, and the *PRC Labour Union Law*, effective October 27 2001, contain requirements for labour unions to be notified of certain actions taken by companies and set out specific participation rights. In practice, however, this has generally not translated into meaningful representation of employee interests.

In Guangdong province there seems to be a slow shift in this dynamic in response to the labour problems of the past several years. During the wave of labour unrest in 2010, the chairman of the Guangzhou Federation of Trade Unions said the union's job was to represent employee interests and that the government, not the union, should act as a mediator. This was unusual as labour unions had historically often tried to mediate labour disputes first and protect employee interests second. The ACFTU has a delicate balancing act. It is tasked with representing employee interests, but simultaneously the *Labour Union Law* requires it to assist the government with maintaining social harmony. Now in Guangdong province, it appears that

the ACFTU is taking a stronger role in the former, in order to maintain the latter. The fear of the government that giving too much power to unions would allow an effective mechanism for employee organisation that could threaten social stability has not come to pass in Guangdong, particularly in foreign invested enterprises where the government has much less control on internal polices and employee actions. It has had the opposite effect with employees feeling that they have had no choice but to circumvent the labour union and take matters into their own hands through industrial action. The Regulations are a measure aimed at correcting what had evolved as a common practice for getting labour grievances heard and resolved in Guangdong.

Tougher negotiations

This means that employers will face a much more rigorous collective negotiation process. Labour union involvement from the outset will mean employers will face more organised and well-informed employees. Collective contracts that contain vague provisions not obligating employers to any specific annual wage increases or other remuneration related concessions will be harder to negotiate. Additionally, the specific timeline for conducting and concluding collective negotiations means that companies will not be able to delay the process once it has begun. On a positive note, if employees feel that the Regulations give them a real process for resolving labour issues, then industrial action is less likely to be taken. It will take some time to see how the Regulations are implemented and embraced (or not) by employees.

> "Employers will face a much more rigorous collective negotiation process

Kevin Jones, Faegre Baker Daniels, Shanghai

How do I handle my employees' social insurance payments?

"I have heard that underpaying social insurance is a major cause of labour unrest in China. How do I calculate employees' contribution amounts correctly and ensure all payments are made in compliance with labour and insurance laws? What is the most cost-effective way to handle this?"

The Shanghai perspective

It is true that underpaying social insurance is a major cause of workplace unrest in China. A recent example is in in Dongguan city, Guangdong province in April 2014, where more than 10,000 workers at the Yue Yuen Shoe Factory went on strike after finding out that the employer had been underpaying their social insurance contributions. The workers demanded full payment of the contributions, as well as salary increases and renegotiation of labour contracts. The strike and the related settlement reportedly cost Yue Yuen up to US$27 million. It is therefore crucial that employers fully comply with the social insurance contribution requirements.

China began to set up its social insurance programmes in the 1990s. On July 1 2011, the *PRC Social Insurance Law* (中华人民共和国社会保险法) (SIL) took effect and established a national basic social insurance framework for employees across China. The law requires that all employers in China enrol each employee in five social insurance programmes: basic pension; basic medical insurance; work-related injury insurance; unemployment compensation; and maternity insurance.

Under the SIL, both employers and employees must contribute to the five social insurance programmes at the place where the employers are located. The contribution base and rates are subject to local regulations and rules, and vary among cities. In Beijing and Shanghai, for instance, rates are set at the municipal level. In other localities, rates are set either at the provincial level or at the city level.

The figure below shows the current monthly contribution rates for employers (ER) and full time employees (EE) under the standard five social insurance programmes in Shanghai:

Pension		Medical		Unemployment	
ER	EE	ER	EE	ER	EE
21%	8%	11%	2%	1.5%	0.5
Maternity		**Work Comp.**		**Total**	
ER	EE	ER	EE	ER	EE
1%	0%	0.5%	0	36%	10.5%

The contribution base is an employee's average monthly salary over the last calendar year, which includes, without limitation, base salary, overtime pay, bonus and allowance, usually with an upper limit set at 300% and a lower limit at 60% of the local city average monthly salary. The contribution base and upper and lower limits vary among cities as well. The contribution base usually can only be adjusted once a year in March or April. For newcomers, the contribution base should be their first month's salary until the next adjustment date.

The contribution rates are set by the labour authorities, so cannot be changed by employers. A common mistake that some companies make is to use an employee's current base salary instead of their average salary last calendar year as the contribution base. The former usually is lower than the latter, which results in an underpayment of social insurance contributions. Some employers intentionally underreport employees' average monthly salaries in order to reduce the burden on social insurance contributions. In some cities, the local labour authorities may acquiesce in local companies' underreporting of the contribution base in order to reduce their financial burden and attract investment. But this acquiescence is fragile and will not last if workplace unrest arises due to underpayment of social insurance. Therefore, companies should not rely on local governments' acceptance of the underreporting of social insurance contributions.

Before the SIL, PRC law did not mandate that any foreigners enrol in social insurance programmes. On October 15 2011, the *Interim Measures on Participation in Social Insurance by Foreigners Working in China* (interim measures) took effect, which require that the local employers or sponsors of foreign employees enrol them in all five social insurance programmes within 30 days of their obtaining PRC work permits. All major cities in China require foreign employees to enrol in the social insurance programmes, except Shanghai, which keeps enrolment voluntary. The interim measures do provide, however, that foreign workers are exempt from enrolment in

PRC social insurance programmes if there is a bilateral social insurance treaty between the expatriate's home country and China. To date, only Germany and South Korea have concluded these treaties with China.

If a company does not have sufficient human resources professionals to handle social insurance payments, the company might hire a payroll service provider to handle these payments for them. The service fees charged are usually quite reasonable.

Gordon Feng, Paul Hastings, Shanghai

The Beijing perspective

In China, there are five types of statutory social insurance that must be paid into the state social insurance fund together by both the employer and employee. These include basic pension insurance, basic medical insurance, work-related injury insurance, unemployment insurance and maternity insurance.

PRC law requires the employer to pay the contributions of work-related injury insurance and maternity insurance in full and split the contributions of the remaining three with the employee. The contribution is calculated on a base which is generally the average amount of the employee's salaries in the last year. In most regions in China, this calculation base for each employee will be adjusted every January.

As per the state law, the employer must pay a certain percentage of the base as its contribution while the employee shall pay their percentage as well, which is deducted from the employee's pre-tax income.

Overall, there are two factors, i.e. the social insurance base (Base) and the proportion of each party's responsibility (Proportion), that together determine the contribution amounts. However, the application of these two factors varies among different regions of China due to different local standards published by local governments.

Beijing as an example

In Beijing, the Base for an individual employee is the individual's average monthly salary (pre-tax) last year from January to December, and the Base has an upper limit and a lower limit. The upper limit applies to those whose average salaries of last year exceed three times the amount of Beijing's average salary for employees in the last year (i.e. Rmb17,379). Similarly, the lower limit of the Base is 40% of the Beijing average for pension insurance and unemployment insurance, and 60% of the Beijing average for the other three types of social insurance.

The Proportion of contribution for the employer and employee, respectively, is as follows:

Type of insurance	Employer's Proportion (x% of the Base)	Employee's Proportion (x% of the Base)
Pension	20%	8%
Basic Medical	10%	2% + 3Rmb (for reimbursement of large medical expenses)
Unemployment	1%	0.2%
Maternity	0.8%	0%
Work-related Injury	0.2%-3% (differentiated between industries and determined by local labour bureau)	0%

Foreign employees

From 2011, Chinese legislation began to require employers to make social insurance contributions for non-Chinese citizens working in China. Since then, local governments have published a series of policies on the non-Chinese citizen's social insurance contribution. Employers must pay attention to their local policies so as to be compliant.

To make sure the contribution amount is calculated correctly, the employer's HR department shall consult with the local social insurance centre to confirm the calculation figures are in line with the local regulations. Alternatively, the employer can engage a professional service vendor, for example a law firm or an HR agency (such as FESCO and CIIC), to assist in handling the social insurance calculation.

Linda Liang, King & Wood Mallesons, Beijing

Provisions for Consultation and Mediation of Enterprise Labour Disputes

企业劳动争议协商调解规定

2430/11.11.30

(Promulgated by the Ministry of Human Resources and Social Security on November 30 2011 and effective as of January 1 2012.)

(人力资源和社会保障部于二零一一年十一月三十日公布，自二零一二年一月一日起施行。)

Order No.17 of the MOHRSS

人社部令第17号

Part One: General provisions

Article 1: These Provisions have been formulated pursuant to the *PRC Law on the Mediation and Arbitration of Employment Disputes* in order to regulate the consultation and mediation of enterprise employment disputes, and promote harmonious and stable employment relationships.

第一条 为规范企业劳动争议协商、调解行为，促进劳动关系和谐稳定，根据《中华人民共和国劳动争议调解仲裁法》，制定本规定。

Article 2: These Provisions shall govern the consultation and mediation of enterprise employment disputes.

第二条 企业劳动争议协商、调解，适用本规定。

Article 3: An enterprise shall implement democratic management systems such as an employees' general meeting, employee representative congress and plant affairs transparency, establish collective bargaining and collective contract systems, and maintain harmonious and stable employment relationships.

第三条 企业应当依法执行职工大会、职工代表大会、厂务公开等民主管理制度，建立集体协商、集体合同制度，维护劳动关系和谐稳定。

Article 4: An enterprise shall establish a labour and management communication and dialogue mechanism and open a channel for workers to voice their interests.

第四条 企业应当建立劳资双方沟通对话机制，畅通劳动者利益诉求表达渠道。

If workers are of the opinion that there are problems in the enterprise's performance of their employment contracts or the collective contract or in the implementation of labour protection laws and regulations or the enterprise's labour rules and regulations, they may refer the same to the enterprise's employment dispute mediation committee (the Mediation Committee). The Mediation Committee shall, in a timely manner, verify the situation and coordinate with the enterprise in rectifying the matter or explaining the matter to the workers.

劳动者认为企业在履行劳动合同、集体合同，执行劳动保障法律、法规和企业劳动规章制度等方面存在问题的，可以向企业劳动争议调解委员会（以下简称调解委员会）提出。调解委员会应当及时核实情况，协调企业进行整改或者向劳动者做出说明。

Workers may also submit other reasonable complaints to the enterprise through the Mediation Committee. The Mediation Committee shall, in a timely manner, forward the same to the enterprise and give feedback thereon to the workers.

劳动者也可以通过调解委员会向企业提出其他合理诉求。调解委员会应当及时向企业转达，并向劳动者反馈情况。

Article 5: An enterprise shall strengthen its solicitude towards its workers, take the complaints of workers to heart, show concern for

第五条 企业应当加强对劳动者的人文关怀，关心劳动者的诉求，关注劳动者的心理健康，引导劳动者理性维权，预防劳动争议发生。

their mental health, guide workers in rationally protecting their rights and prevent the occurrence of employment disputes.

Article 6: When employment disputes are being resolved through consultations and mediation, the same shall be done based on the facts and the relevant laws and regulations, while abiding by the principles of equality, free will, lawfulness, impartiality and timeliness.

第六条 协商、调解劳动争议，应当根据事实和有关法律法规的规定，遵循平等、自愿、合法、公正、及时的原则。

Article 7: A human resources and social security department shall guide enterprises in carrying out the prevention and mediation of employment disputes and shall perform the following specific responsibilities:

第七条 人力资源和社会保障行政部门应当指导企业开展劳动争议预防调解工作，具体履行下列职责：

(1) guiding enterprises in abiding by labour protection laws, regulations and policies;

（一） 指导企业遵守劳动保障法律、法规和政策；

(2) procuring the establishment by enterprises of employment dispute prevention and forewarning mechanisms;

（二） 督促企业建立劳动争议预防预警机制；

(3) coordinating the organisation and establishment by labour unions and enterprise representatives of emergency mediation and coordination mechanisms for major collective labour disputes, and jointly promoting enterprise employment dispute prevention and mediation work; and

（三） 协调工会、企业代表组织建立企业重大集体性劳动争议应急调解协调机制，共同推动企业劳动争议预防调解工作；

(4) inspecting the organisation building, system building and team building of Mediation Committees in its jurisdiction.

（四） 检查辖区内调解委员会的组织建设、制度建设和队伍建设情况。

Part Two: Consultations

第二章 协商

Article 8: When an employment dispute arises, either party may attempt to resolve the same through consultations by meeting, discussing, etc. with the other party.

第八条 发生劳动争议，一方当事人可以通过与另一方当事人约见、面谈等方式协商解决。

Article 9: A worker may request that the labour union of his/her enterprise participate in or assist him/her in the consultations with the enterprise. The labour may also participate in the resolution of employment disputes through consultations at its own initiative to safeguard workers' lawful rights and interests.

第九条 劳动者可以要求所在企业工会参与或者协助其与企业进行协商。工会也可以主动参与劳动争议的协商处理，维护劳动者合法权益。

A worker may appoint another organisation or individual to represent him/her in the consultations.

劳动者可以委托其他组织或者个人作为其代表进行协商。

Article 10: When either party makes a request for consultations, the other party shall actively respond orally or in writing. If the other party does not respond within five days, it/he/she shall be deemed as not agreeing to enter into consultations.

第十条 一方当事人提出协商要求后，另一方当事人应当积极做出口头或者书面回应。5日内不做出回应的，视为不愿协商。

The length of the consultation period shall be determined by the parties in writing, and if no consensus is reached by the end of the agreed-upon period, the consultations shall be deemed as unsuccessful. The parties may agree in writing to extend the period.

协商的期限由当事人书面约定，在约定的期限内没有达成一致的，视为协商不成。当事人可以书面约定延长期限。

To view the full translation, visit:
http://www.chinalawandpractice.com/Article/2986919/Search/Provisions-for-Consultation-and-Mediation-of-Enterprise.html

Rethinking hiring practices

The new law is an effort to promote stable employment and discipline agencies, but enforcement remains unclear and more detail is needed on the penalties for violating threshold requirements

The *Tentative Provisions on Temporary Placement* (劳务派遣暂行规定) (Tentative Provisions), which were issued by the Ministry of Human Resources and Social Security, became effective on March 1 2014. The Tentative Provisions govern labour dispatch, which is the practice of engaging workers through third-party agents. The agents, who are the legal employers of the workers, send workers to third parties, who manage and instruct the workers. These new labour regulations are likely to result in many employers across the country reassessing and changing their hiring practices.

While these regulations have gained a substantial amount of attention, questions remain about whether local administrative agencies and courts intend to enforce the rules, and risk not only alienating business interests but also harming employment opportunities, particularly in the manufacturing industry.

Employment law history

Labour dispatch developed in the early 1980s as a means to staff representative offices of foreign companies, which did not have legal capacity to hire PRC nationals themselves. The form of employment then spread as many employers, including foreign-invested, locally-owned and state-owned companies, found that labour dispatch offered a more flexible form of employment; employers were able to return workers to agents instead of being bound by direct labour contracts. The 2008 *PRC Employment Contract Law* (中华人民共和国劳动合同法) (ECL) attempted to restrict and regulate labour dispatch practice, but, in fact, had the opposite effect with more employers adopting the staffing practice so as to avoid the ECL's new protections for directly-hired employees, in particular, limits on fixed-term labour contracts.

The government largely took a hands-off policy toward labour dispatch during the financial crisis that followed shortly after the implementation of the ECL. Preserving employment opportunities took priority over stemming the use of labour dispatch. The central government's attention last year swung back to restricting labour dispatch with amendments to the ECL (2013 ECL Amendment) and the Tentative Provisions earlier this year.

The 2013 ECL Amendment clearly stated that direct employment should be the primary form of employment, with labour dispatch to be used as only a supplementary form. What is now driving the renewed attention to restrict labour dispatch?

The Tentative Provisions refer to the goal of promoting "stable employment relationships". Moving workers from labour dispatch to direct employment would give workers direct contractual relationships with the employer that manages them. Moreover, the workers would receive full protection of the ECL as well as the possibility of open-term contracts. A so-called "harmonious relationship" may be furthered by avoiding the perception that dispatched workers are second-class employees and eliminating the fear of return at any time to an agency. An unstated goal may be to include dispatch workers within the enterprise trade unions (and the salaries of the workers in the 2% employer contribution).

Part of the aim of regulating labour dispatch is to consolidate

Restricting the use of labour dispatch

The 2013 ECL Amendments clarified that employers could use labour dispatch for only three types of positions, which were defined as:

- temporary – positions with durations of a maximum of six months. The definition is based on the duration of the position, and not the worker's length of service. Rotating dispatch workers in the same position for periods of less than six months would not be permitted.
- substitute – positions to replace other employees who cannot work for certain periods of time due to off-the-job study, leave or other reasons.
- auxiliary – positions that are not engaged in the principal business of the employer. These are typically positions that do not directly relate to the items listed in the employers' registered business scope.

the labour agency business through licensing and eliminating agents that may not have been adequately protecting workers, such as paying salaries on time or providing social insurance, though there is the possibility that many direct employers actually have worse compliance records in protecting employees than the large agencies, such as FESCO and CIIC.

Permitted positions and the 10% cap

The Tentative Provisions essentially leave up to the employer the selection of which positions are auxiliary after it follows a statutory employee consultation procedure. Following this procedure, the employer must announce which positions it considers auxiliary and then give the employees, the union and employee representatives an opportunity to comment on the list. The employer, however, retains the right to make the final determination.

> "The 2013 ECL Amendment clearly stated that direct employment should be the primary form of employment, with labour dispatch to be used as only a supplementary form"
>
> Jeffrey Wilson, Jun He Law Offices

This employer discretion is effectively limited under the Tentative Provisions with a rule that only 10% of an employer's total workforce can be filled by dispatch workers. For the many employers that use labour dispatch, the 10% figure represents a significant compliance challenge. To meet the cap, employers are given a two-year grace period (until February 29 2016). During this time, employers would not be permitted to replace dispatch workers – or even increase the number due to an urgent business need – based on a prohibition in the Tentative Provisions against hiring new dispatch workers after the 10% limit is reached.

The Tentative Provisions also require that employers above the 10% threshold submit plans on how they will achieve compliance. Beijing became the first jurisdiction to detail the information that employers are required to submit, and other jurisdictions are expected to follow the Beijing requirements.

By August 31 2014, employers must disclose:

- Total number of employees, number of directly-hired employees, number of dispatch workers, and percentage of workforce that is dispatch labour;
- Number of dispatch workers that are categorised as holding temporary, substitute, or auxiliary positions;
- Records showing completion of employee consultation procedure for the definition of auxiliary positions;
- Information on the dispatch agencies used; and
- A proposal to reduce the percentage of labour dispatch.

The two-year grace period applies only to companies that had been using dispatch labour as of March 1 2014. An employer that began to use dispatch labour only after that date would be held to the 10% limit without the benefit of the grace period.

Exceptions

The Tentative Provisions clarify that representative offices of foreign companies, foreign financial institutions, and other entities that are legally required to use dispatch workers are not subject to the 10% cap. These offices and entities are also not subject to the limitation on the three types of positions.

Certain dispatch arrangements are also grandfathered under the Tentative Provisions. Labour contracts and labour dispatch agreements entered into before December 28 2012 with expiration dates after February 29 2016 may continue to be performed until their expiration dates.

Equal pay for equal work

Reflecting a policy to prevent discrimination against dispatch workers (as well as eliminate an incentive for employers to use dispatch labour), the ECL requires that dispatch workers be provided equal pay for equal work in comparison with directly-hired employees holding similar positions. The ECL describes this requirement in terms of remuneration, which has generally been interpreted to be limited to salary, bonuses and other forms of cash payments.

As for benefits, although the Tentative Provisions require that dispatch workers be given benefits relating to their job

> Employers would likely be permitted to offer fewer benefits to dispatch workers, particularly if their job positions are differentiated from those of direct hires

positions "without discrimination", the rules did not expressly include benefits within the scope of equal pay for equal work. As a result, employers would likely be permitted to offer fewer benefits to dispatch workers, particularly if their job positions are differentiated from those of direct hires.

Returning dispatched workers

While the Tentative Provisions generally impose greater restrictions on the use of dispatch workers, the new rules also expand the grounds when workers can be returned to agencies, which brings the practice closer in line to those applicable for directly-hired employees:

- Articles 40(3) or 41 of the ECL (i.e. change in "objective circumstances" and mass layoffs, respectively);
- Conditions affecting the employer that generally correspond to Articles 44(4) or 44(5) of the ECL (bankruptcy, revocation of business licence, being ordered to close down the business, liquidation, or discontinued operation upon expiration of operation period); and
- Expiration of the labour dispatch service agreement.

The additional ECL-related grounds, however, may be of rather limited use given that employers often have difficulty establishing relevant grounds and China's overriding policy against the unilateral termination of employees. In addition, labour agencies may be expected to challenge the return of workers on these grounds given that the agencies are required to pay the workers at least the local minimum wage if the agencies cannot find other positions for the workers that offer the same or better terms than their original positions.

Enforcement and penalties

Labour bureaus are expected to begin inspections of companies for compliance with labour dispatch requirements later this year. Sichuan province was the first jurisdiction to announce such inspections, which will reportedly occur in May and June this year. Other jurisdictions are likely to follow later in the summer.

The application of fines on employers that fail to comply with the labour dispatch rules rests with local officials, who might be hesitant to sanction a major employer and risk investment, tax revenue and employment opportunities. Smaller employers may fly under the radar screen. Moreover, labour arbitration tribunals and courts may be hesitant to accept cases filed by dispatch workers, particularly if they involve a large number of workers.

For some violations, the remedy may be simple. For example, if an employer fails to follow the employee consultation procedure when determining auxiliary positions, the labour bureau is limited to ordering the employer to complete the consultation procedure. As discussed, the procedure is relatively straightforward and gives employees no veto rights.

The law is not clear on what administrative sanction would apply if an employer violates the 10% cap on dispatch labour or if the workers are not one of the three types of permitted positions. The first step would be an order from the labour bureau to make a correction. Compliance could not be achieved by unilaterally returning the workers to their labour agencies, because violations of the 10% cap or the three permitted types of positions are not statutory grounds for returning dispatched employees. Moreover, there is no legal ground to order the employer to directly hire the workers. Further regulatory guidance is expected to confirm what steps employers must take when they are in violation.

Even if the local governments are not aggressively enforcing the labour dispatch requirements, for many multinational companies the concern to comply with the new requirements may come from global compliance codes, and also from customers, non-governmental organisations and media coverage.

Alternatives

While the intent of the Tentative Provisions is to encourage employers to transfer workers from labour dispatch to direct hires – and many employers are in fact doing so – employers remain interested in alternatives to bringing on the workers as direct hires while using labour dispatch to the greatest extent legally possible. Among the possible alternatives are project-based contracts and part-time employment, which permits at-will termination.

While the outsourcing and use of contract workers have gained substantial attention, these alternatives remain risky in the absence of clear legal definitions. The little guidance that is available, primarily from Jiangsu province, sets some basic parameters that could prevent outsourced or contract workers from being deemed dispatch labour: whether payment is being made for services or labour; whether the service provider has right to determine which workers and how many to deploy; whether the workers are located on-site of the host company; which party manages and instructs the workers; and which party provides the tools and equipment used by the workers

The drafters of the Tentative Provisions were clearly aware of the somewhat common practice of merely substituting contracts with the word "outsourcing" replacing "labour dispatch" in labour agency contracts. As a result, the Tentative Provisions state that disguised forms of contracting or outsourcing arrangements would be treated as labour dispatch.

Jeffrey Wilson, Jun He Law Offices, Shanghai

Tentative Provisions on Temporary Placement

劳务派遣暂行规定

2400/14.01.24

(Promulgated by the Ministry of Human Resources and Social Security on January 24 2014 and effective as of March 1 2014.)

(人力资源和社会保障部于二零一四年一月二十四日公布, 自二零一四年三月一日起施行。)

Order of the MOHRSS No.22

人社部令第22号

Part One: General provisions

Article 1: These Provisions have been formulated pursuant to laws and administrative regulations such as the *PRC Employment Contract Law* (the ECL) and the *Implementing Regulations for the PRC Employment Contract Law* (the Implementing Regulations) in order to regulate the placement of temporary workers, safeguard the lawful rights and interests of workers, and promote harmonious and stable employment relationships.

Article 2: These Provisions shall apply to the engagement in the business of placing temporary workers by temporary placement agencies and the use of temporary placement workers by enterprises (Service Recipients of Temporary Placement Workers).

Matters relating to the use of temporary placement workers by partnership organisations (such as accounting firms and law firms) and foundations established in accordance with the law, as well as organisations such as private non-corporate entities shall be handled in accordance herewith.

Part Two: Scope and percentage of use of temporary placement workers

Article 3: Service Recipients of Temporary Placement Workers may use temporary placement workers only for temporary, auxiliary or substitute positions.

For the purposes of the preceding paragraph, the term "temporary position" means a position that exists for less than six months; the term "ancillary position" means a non-main business position that provides services for main business positions; and the term "substitute position" means a position in which another worker can replace a worker of the Service Recipient of Temporary Placement Workers who cannot work for a certain period of time for reasons such as taking time off work for study or leave.

第一章 总 则

第一条 为规范劳务派遣，维护劳动者的合法权益，促进劳动关系和谐稳定，依据《中华人民共和国劳动合同法》（以下简称劳动合同法）和《中华人民共和国劳动合同法实施条例》（以下简称劳动合同法实施条例）等法律、行政法规，制定本规定。

第二条 劳务派遣单位经营劳务派遣业务，企业（以下称用工单位）使用被派遣劳动者，适用本规定。

依法成立的会计师事务所、律师事务所等合伙组织和基金会以及民办非企业单位等组织使用被派遣劳动者，依照本规定执行。

第二章 用工范围和用工比例

第三条 用工单位只能在临时性、辅助性或者替代性的工作岗位上使用被派遣劳动者。

前款规定的临时性工作岗位是指存续时间不超过6个月的岗位；辅助性工作岗位是指为主营业务岗位提供服务的非主营业务岗位；替代性工作岗位是指用工单位的劳动者因脱产学习、休假等原因无法工作的一定期间内，可以由其他劳动者替代工作的岗位。

Auxiliary positions that a Service Recipient of Temporary Placement Workers decides to be filled by temporary placement workers shall be subject to discussion with the representative congress of employees and workers or all of the employees and workers, and the presentation of a plan and comments, and shall be determined through consultations with the labour union or representatives of employees and workers held on the basis of equality and the same shall be posted internally.

用工单位决定使用被派遣劳动者的辅助性岗位，应当经职工代表大会或者全体职工讨论，提出方案和意见，与工会或者职工代表平等协商确定，并在用工单位内公示。

Article 4: A Service Recipient of Temporary Placement Workers shall strictly control the number of temporary placement workers it uses, with such number not exceeding 10% of its total workforce.

第四条 用工单位应当严格控制劳务派遣用工数量，使用的被派遣劳动者数量不得超过其用工总量的10%。

For the purposes of the preceding paragraph, the term "total workforce" means the total of the number of persons with whom the Service Recipient of Temporary Placement Workers has entered into employment contracts and the number of temporary placement workers used.

前款所称用工总量是指用工单位订立劳动合同人数与使用的被派遣劳动者人数之和。

The term "Service Recipient of Temporary Placement Workers that calculates the percentage of temporary placement workers used" means an employer that can enter into employment contracts with workers pursuant to the ECL and the Implementing Regulations.

计算劳务派遣用工比例的用工单位是指依照劳动合同法和劳动合同法实施条例可以与劳动者订立劳动合同的用人单位。

Part Three: Entry into, and performance of, employment contracts and temporary placement agreements

第三章 劳动合同、劳务派遣协议的订立和履行

Article 5: A temporary placement agency shall, in accordance with the law, enter into a written fixed-term employment contract of at least two years with a temporary placement worker.

第五条 劳务派遣单位应当依法与被派遣劳动者订立2年以上的固定期限书面劳动合同。

Article 6: A temporary placement agency may specify a probation period for a temporary placement worker in accordance with the law. A temporary placement agency may specify a probation period for a temporary placement worker only once.

第六条 劳务派遣单位可以依法与被派遣劳动者约定试用期。劳务派遣单位与同一被派遣劳动者只能约定一次试用期。

Article 7: A temporary placement agreement shall specify the following information:

第七条 劳务派遣协议应当载明下列内容：

(1) the title and nature of the temporary position;

（一） 派遣的工作岗位名称和岗位性质；

(2) the place of work;

（二） 工作地点；

(3) the number of persons placed and the term of the temporary placement;

（三） 派遣人员数量和派遣期限；

(4) the amount of labour remuneration determined on the basis of the principle of the same remuneration for the same work and the method of paying the same;

（四） 按照同工同酬原则确定的劳动报酬数额和支付方式；

(5) the amount of social insurance premiums and the method of paying the same;

（五） 社会保险费的数额和支付方式；

(6) working hours, and matters relating to rest and leave;

（六） 工作时间和休息休假事项；

(7) relevant benefits of the temporary placement workers in the period of a work-related injury, maternity or illness;

(8) matters relating to labour safety and hygiene, and training;

(9) severance and other such expenses;

(10) term of the temporary placement agreement;

(11) the method of payment and rate of the temporary placement service fee;

(12) liability for breach of the temporary placement agreement; and

(13) other matters that laws, regulations and rules specify be included in a temporary placement agreement.

Article 8: A temporary placement agency shall perform the following obligations in respect of a temporary placement worker:

(1) truthfully informing the temporary placement worker of the matters set forth in Article 8 of the ECL, the rules that he/she is required to abide by and the provisions of the temporary placement agreement;

(2) establishing a training system and providing temporary placement workers with job knowledge and safety education and training;

(3) lawfully paying the temporary placement worker his/her labour remuneration and related benefits in accordance with state provisions and the temporary placement agreement;

(4) lawfully paying social insurance premiums for the temporary placement worker and carrying out the relevant social insurance procedures in accordance with state provisions and the temporary placement agreement;

(5) procuring the provision in accordance with the law of work protection and work safety and hygiene conditions to the temporary placement worker by the Service Recipient of Temporary Placement Workers;

(6) issuing an employment contract termination or ending certificate in accordance with the law;

(7) assisting in resolving disputes between the temporary placement worker and the Service Recipient of Temporary Placement Workers; and

(8) other matters as specified in laws, regulations and rules.

（七） 被派遣劳动者工伤、生育或者患病期间的相关待遇；

（八） 劳动安全卫生以及培训事项；

（九） 经济补偿等费用；

（十） 劳务派遣协议期限；

（十一）劳务派遣服务费的支付方式和标准；

（十二）违反劳务派遣协议的责任；

（十三）法律、法规、规章规定应当纳入劳务派遣协议的其他事项。

第八条 劳务派遣单位应当对被派遣劳动者履行下列义务：

（一） 如实告知被派遣劳动者劳动合同法第八条规定的事项、应遵守的规章制度以及劳务派遣协议的内容；

（二） 建立培训制度，对被派遣劳动者进行上岗知识、安全教育培训；

（三） 按照国家规定和劳务派遣协议约定，依法支付被派遣劳动者的劳动报酬和相关待遇；

（四） 按照国家规定和劳务派遣协议约定，依法为被派遣劳动者缴纳社会保险费，并办理社会保险相关手续；

（五） 督促用工单位依法为被派遣劳动者提供劳动保护和劳动安全卫生条件；

（六） 依法出具解除或者终止劳动合同的证明；

（七） 协助处理被派遣劳动者与用工单位的纠纷；

（八） 法律、法规和规章规定的其他事项。

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http://www.chinalawandpractice.com/Article/3329433/Channel/9931/Tentative-Provisions-on-Temporary-Placement.html