

# CHINA LEGAL BRIEFING\* 229

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## Amendments of the Labor Contract Law regarding Labor Dispatch

### 中华人民共和国劳动合同法有关劳动派遣的修改

- 【Issued by】** the Standing Committee of the National People's Congress
- 【Subject】** Labor Law
- 【Promulgated on】** December 28, 2012
- 【Effective from】** July 01, 2013
- 【Source】** [http://www.npc.gov.cn/huiyi/cwh/1130/2012-12/29/content\\_1749758.htm](http://www.npc.gov.cn/huiyi/cwh/1130/2012-12/29/content_1749758.htm)

On 1 July 2013, the Decision on Amending the Labor Contract Law of the People's Republic of China (the "Decision") released by the Standing Committee of the National People's Congress will become effective.

The Decision focuses on the labor dispatching system and makes amendment as follows:

1. Increase the requirement of registered capital of enterprises that provide labor dispatching services from RMB 500 thousand to RMB 2 million.

Article 57 of the Labor Contract Law will be amended as:

*A party who intends to provide labor dispatch services shall meet the following requirements:*

- 1) *Having a registered capital of at least RMB 2 million;*
- 2) *Possess fixed business premises and facilities enabling the provision of such services;*
- 3) *Adopt a labor dispatch management system that is in compliance with the relevant laws and regulations; and*
- 4) *Other requirements as provided by the relevant laws and regulations.*

*An eligible party which is to provide labor dispatch services shall file an application with the labor authority for a license and, upon receipt of such license, duly completes the specific company registration. No entity or individual is allowed to provide labor dispatch services without a valid license.*

2. Specify the principle of "Equal Pay for Equal Work".

The dispatched employees are entitled to receive equal pay to that of the employer's employees for the same work. An employer shall comply with the principle of "Equal Pay for Equal Work" and pay dispatched workers equal salary with that of employees in the same position.

Article 63 of the Labor Contract Law will be amended as:

*A dispatched laborer shall be entitled to the same remuneration as that offered to staff in the same position hired by the dispatch service user. The dispatch service user shall determine the remuneration for the dispatched laborer in the same manner as for staff in the same position hired by the dispatch service user. Where the dispatch service user does not hire any staff in the same position, the remuneration for the dispatched laborer shall be determined with reference to that for employees in the same or similar position in the location of the dispatch service user.*

*The remuneration offered to the dispatched laborer specified or agreed in the employment contract between the dispatch service provider and dispatched laborer as well as the dispatch service agreement between the dispatch service provider and dispatch service user shall meet the requirements provided in the preceding paragraph.*

3. Define the “Temporary, Auxiliary and Alternative Positions” in order to correct the abuse of labor dispatching in practice.

*Article 66 of the Labor Contract Law will be amended as:*

*Use of employment contracts to create employment relationships is the general requirement for enterprises in this country. Labor dispatch services shall be used as supportive measures only for temporary, auxiliary or substitute positions.*

*For the purpose of the preceding paragraph, a temporary position is a position that is open for not more than six months; an auxiliary position is a position that is not involved in the core business but supports other positions in the core business; a substitute position is a position taken by a substitute laborer in the period of time that the original holder of this position takes leave for study, holiday or other reasons.*

*Labor dispatch service users shall strictly control the number of their dispatch laborers that does not exceed a specific percentage of their total employees. The said specific percentage shall be determined by the labor department of the State Council.*

4. Sanctions for the violation of the above-mentioned clauses.

Article 92 of the Labor Contract Law will be amended as:

*Where a party is in breach of this Law by providing labor dispatch services without permission, the competent labor authority shall order such party to cease the alleged illegal acts, return the income from such illegal acts and pay a fine of between one to five times such incomes. The party in breach which has not earned any income from such illegal acts shall be liable to a maximum fine of RMB 50,000.*

*Where a labor dispatch service provider or labor dispatch user is in breach of the provisions governing labor dispatch services under this Law, the competent labor authority shall order such service provider or user to take corrective actions within a specific period of time. Failure to do so shall be subject to a fine of between RMB 5,000 and RMB 10,000, and the license of the service provider in breach shall be revoked. Where the labor dispatch*

*service user has caused damage to the dispatched laborer, both the service provider and user shall have joint and several liabilities to damages.*

The employment contracts and labor dispatch service agreements that were lawfully executed before the announcement of this Decision may continue to be effective until they expire. In the event that there are any provisions in such contracts and agreements that do not meet the requirement of remuneration determined in line with the same position same pay principle, such provisions shall be amended in accordance with this Decision. The parties who have engaged in labor dispatch services before the enforcement of this Decision shall duly obtain the necessary licenses and alter their company registrations accordingly within one year after the enforcement of this Decision.

## The Supreme People's Court Interpretation (I) regarding the application of the "Law on the Application of Laws to Foreign-related Civil Relations"

### 最高人民法院关于适用《中华人民共和国涉外民事关系法律适用法》若干问题的解释（一）

<b>【Issued by】</b>	The Supreme People's Court
<b>【Subject】</b>	International private Law
<b>【Promulgated on】</b>	December 28, 2012
<b>【Effective Date】</b>	7 January, 2013
<b>【Source】</b>	<a href="http://www.court.gov.cn/qwfb/sfjs/201301/t20130107_181600.htm">http://www.court.gov.cn/qwfb/sfjs/201301/t20130107_181600.htm</a>

The Supreme People's Court has issued the "Interpretation (I) on Several Issues concerning the Application of the 'Law of the People's Republic of China on the Application of Laws to Foreign-Related Civil Relations'" (fashi [2012] No. 24) (the "Interpretation"), which came into effect on January 7, 2013.

The judicial Interpretation contains provisions with respect to major issues encountered during the implementation of the "Law on the Application of Laws to Foreign-Related Civil Relations" (the "Law").

Detailed information can be found below which include:

#### 1. How to define a Foreign-Related Civil Relations

A civil relation can be defined by the Chinese People's Court as a "foreign-related civil relation" under any of the following circumstances:

- 1) Where either party or both parties are foreign citizens, foreign legal persons, or other organizations or stateless persons;
- 2) Where the habitual residence of either party or both parties is located outside the territory of the P.R.C.;

- 3) Where the dispute matter is located outside the territory of the P.R.C.;
- 4) Where the legal facts that trigger, change or terminate the civil relation take place outside the territory of the P.R.C.;
- 5) Other circumstances that may be defined as foreign-related civil relations

2. The retroactive effect of the Law

For foreign-related civil relations that occur prior to the implementation of the Law, the People's Court shall determine the applicable laws according to the relevant legislature in existence at the time when such civil relation occurs. Where there was no applicable law determinable at that time, the applicable laws may be determined with reference to the Law.

3. Choice of Law

- 1) Where the laws of P.R.C. do not explicitly allow the parties concerned to choose the applicable laws for foreign-related civil relations, but the parties choose the applicable laws themselves, such choice of law is invalid.
- 2) Where a party claims the choice of law is invalid on the grounds that the law chosen by the parties in the agreement has no actual connection with the foreign-related civil relation in dispute, such claims shall not be sustained.
- 3) Where the parties invoke an international treaty which is not yet binding on P.R.C., the People's Court may determine the rights and obligations between the parties according to the contents of the treaty. However, if the provision of the treaty violates the public interests or mandatory provisions of the laws or regulations of P.R.C., this part shall be excluded.

## The “Administrative Measures for the collection of Enterprise Income Tax of Enterprises operating Cross-Regional Business and paying Tax on a Consolidated Basis”

### 关跨地区经营汇总纳税企业所得税征收管理办法

**【Issued by】** State Administration of Taxation

**【Subject】** Tax Law

**【Promulgated on】** December 27, 2012

**【Effective Date】** 1 January, 2013

**【Source】** <http://www.chinatax.gov.cn/n8136506/n8136593/n8137537/n8138502/12186598.html>

On 27, December 2012, the State Administration of Taxation (SAT) issued Announcement No. 57 [2012] on issuing the “Administrative Measures for the Collection of Enterprise Income Tax of Enterprises Operating Cross-regional Business and Paying Tax on a Consolidated Basis”, (the “Measures”), which takes into effect as of 1 January 2013. The Measures stipulates specific provisions on the advance payment of enterprise income tax (“EIT”), EIT settlement and payment, EIT allocation among a headquarters and its branches, daily administration and other issues relevant to the EIT collection.

The Measures provide that enterprises that are subject to the consolidation-based EIT collection system shall be governed by the EIT collection administrative measures, requiring “unified calculation, hierarchical administration, local advance payment, consolidated settlement and finance treasury transfers”.

Enterprises calculate their total payable EIT on a consolidated basis and in accordance with the “Enterprise Income Tax Law”. The total payable EIT herein include the payable EIT paid in advance and the taxes which need to be paid or refunded pursuant to EIT settlement and payment. Among the total payable EIT, 50% shall be allocated among branches with corresponding payable EIT of each branch being paid into or refunded out of the local treasury according to the allocation of payable EIT; and another 50% shall be paid by a headquarters with 25% being paid into or refunded out of the local treasury and 25% being fully paid into or refunded out of the central treasury.

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