

# Analysis of Labor Placement System in China<sup>1</sup>

## REGARDS PROSPECTIFS SUR LE SYSTÈME DE TRAVAIL DÉTACHÉ

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**Abstract:** The labor placement system settled by “Employment Contracts Law” of china is obviously deficient in many aspects, it doesn’t clarify the definition and characteristic of labor placement, doesn’t establish legal liability system in accordance with obligations of stuffing firms and accepting units, doesn’t pay adequate attention to liability capacity of stuffing firms as employers. This causes a great number of abuses conducted by employers, damages essential rights and interests of employees, and effects the ordinary operation of labor placement. In order to remedy deficiencies mentioned above, the law shall conduct series of improvement measures to clarify the definition of labor placement, specify the range of labor control of stuffing firms and accepting units, establish legal liability system in accordance with labor protection obligations, restrict the situations, in which accepting units could use employees placed, improve the supervision measure toward stuffing units, establish a legal system for labor placement to work effectively.

**Key words:** “Employment Contracts Law”, labor placement, labor control, employer’s liability

**Résumé:** Les défauts existent évidemment dans le système légal du travail détaché du 《loi du travail》 chinois, il ne précise pas la notion et les particularité du travail détaché, il n’ établit pas un système de la responsabilité qui coordonne l’ obligation de l’ unité détachée avec l’ unité acceptée, et il ne fait attention pas à l’ aptitude responsable de l’ employeur. Cela engendre des actes d’ abus de l’ employeur , entraîne les préjudices directs de l’ employé, embarrasse le fonctionnement du travail détaché. Afin de résoudre les problèmes ci-dessus, la loi devrait prendre ses mesures pour le rendre plus équipé, il faut préciser sa notion, stipuler la limite du contrôle du travail, et établir le système de la responsabilité qui s’accorde avec l’ obligation de la protection du travail.

**Mots-Clés:** 《Loi du Travail》 , le travail détaché, contrôle du travail, la responsabilité de l’ employeur .

“LAW OF THE PEOPLE’S REPUBLIC OF CHINA ON EMPLOYMENT CONTRACTS” has established the placement system in the form of law for the first time. But right before the law’s coming into effectiveness, it was found that the placement system

mentioned above could not regulate the actions of placement of employers effectively, in contrary, the placement system would become the major even the only method for enterprises to elude the application of “Employment Contracts Law”. The present placement

<sup>1</sup> Labor Placement mentioned in the title of this paper is also called Temporary Agency Work in EU, the definition of which is one whereby the temporary agency worker is employed by the temporary work agency and is then ,via a commercial contract, hired out to perform work assignments at the user firm; among the three parties of labor placement relationship, <sup>1</sup> stuffing firm is also called temporary work agency, accepting unit is also called the user firm, and employee to be placed is also called temporary agency worker.

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system has very obvious shortages, which don't clarify the definition and characteristics of placement, establish the legal liability system in accordance with the obligations of staffing firms and accepting units, and show adequate attention to the employers' liability capacity of staffing firms. The purpose of this paper is to analyze the shortages of the present placement system, and propose advices for improvement.

## PART ONE: DEFINITION OF PLACEMENT

The definition of placement is the basis of the whole placement system, and also the premise for "Employment Contracts Law" to regulate the placement relationships. There are different manners, by which laws of different countries describe the definition of placement. We should clarify the definition of placement, differences between placement and similar arrangements especially outsourcing services.<sup>3</sup> The definition of placement has two aspects, the first one is the legal status of the employee to be placed, and the second one is the range of rights, with which staffing firms and accepting units can control the employee. It is formulated by laws of almost every country (except for UK) that labor to be placed has the status as employee,<sup>4</sup> they also clarify the range of controlling of staffing firms and accepting units, staffing firms have rights of personnel managing, make decisions about hire and dismissal of employees, the basic working conditions such as payments and social insurance, etc. accepting units have rights of work designation, make decisions about positions contents and manners of work. The two aspects mentioned above are differences between placement and similar arrangements.

"Employment Contracts Law" specifies placement relationships in a whole section,<sup>5</sup> which clarifies that the labors placed has the status as employee, but at the meanwhile which doesn't clarify the range of labor control of both stuffing firms and accepting units. The law does not formulate who should decide the payments of the employees placed, but only says "Staffing firms may not pocket part of the labor compensation that the Accepting Units pay to the Employees in accordance with the placement agreement" (Article 60), and the accepting units should "communicate the labor compensation of the Employees placed", and "in case of continuous placement, implement a normal wage

adjustment system." (Article 62) It can be inferred from the two articles above that the labor compensation of employees placed seems to be stipulated in the placement contract by staffing firms and accepting units. This not only deprives the employee's right of taking part in making decision of their own labor compensation, and also impairs the operational decision-making power of stuffing firms. About the working hours, rest and vocation of employees, our employers normally apply the corresponding stipulation of the law; If needs arise in production and operations, an employer may extend the working hours only after consulting the trade union and the workers, and of course under certain standard; If an employer has extended the hours of work in violation of the provisions of this law, the labor administrative department in charge shall issue a warning and command a correction and impose a fine concurrently. ("labor law" article 41, 90) In placement relationships, how to decide the overtime of employees, who offers them the legal rest and vocation, and how to put into effect the maternity leave of female employees? The law on the one hand stipulates that stuffing firms as employers should come into employment contracts including "working hours rest and vocation" with employees, on the other hand it also stipulates that accepting units shall perform the following obligations such as "implement state labor standards" (of course including standards of working hours, rest and vocation) and "pay overtime pay". The law stipulates whether stuffing firms, accepting units or both, should perform the obligations. However, in the real applications, accepting units not only decide the working positions, methods, hours, rest and vocation of employees placed, and also decide their labor compensation and benefits; in order to elude legal employer liabilities, some accepting units end the employment relationships with their employees, and demand them to make employment contracts with stuffing firms, and then reaccept them through the placements of stuffing firms and designate them to the same positions as before, this is the so called "reverse placement". When dealing with placement disputes, courts always tell the status of employees and the units being liable on the basis of written employment contracts, so the accepting units can maintain the right of domination while avoid the legal employer liabilities, if they authorize certain stuffing firm to conclude a employment contract with their employees.

The range of labor control of stuffing firms and accepting units is the basic characteristics of placement and the decisive element of differentiating placement and similar arrangements. And the omission existing in the present "Employment Contracts Law" would bring with it lots of abuses. First of all, there are no differences between placement and outsourcing services. Basically, the major difference between placement and outsourcing services lies in whether the accepting units have the designation right, in placement relationships accepting units perform part of the

<sup>3</sup> Zhang Rongfang. Employer Responsibility Towards Workers of Temporary Work Agencies from a Comparative. *Financial and Economic Law Review*, December 2006, NO.7., Angle Publishing CO., LTD.

<sup>4</sup> Guy Davidov: Joint Employers Status in Triangular Employment

*Relationships*, <http://www.Blackwell-synergy.com/doi/abs/11.1111/j.1467-8543.2004.00338.x>, at 8. (last visited Oct,5,2006)

<sup>5</sup> "Employment Contracts Law", article 58.

designation right to employee placed, including arranging working positions, designating and monitoring works, and performing the protection obligations at working places. Our "Employment Contracts Law" stipulates that the obligation of accepting units is that if a staffing firm violates the law and doesn't perform the obligations, which should be performed "by employers to employees", and if the employees placed suffer harm, the staffing firm and the accepting unit shall be "jointly and severally liable for damages"<sup>6</sup>. In outsourcing services relationships, the contract-issuing unit doesn't have any labor control over employees of contracting unit, and doesn't perform relative protection obligations either, in accordance with present laws of China, in principle; the contract issuing unit doesn't undertake the liabilities of contracting unit and its assistant.<sup>7</sup> Clarification of definition and characteristics of placement, and formulation of differences between placement and similar arrangements, are premises, with which placement system could be established and abuse actions of accepting units could be eliminated. This is universally agreed by international conventions and legislation of many countries.<sup>8</sup> "Employment Contracts Law" doesn't clarify the definition and characteristic of placement, but treats accepting units as units, which shall be jointly and severally liable for damages together with stuffing firms. As "economic person", accepting units would definitely elude obligations and liabilities mentioned above through other strategies, among which outsourcing services are the major one. Accepting units accept placements in the name of outsourcing services, maintain labor control over employees, and totally impute risks to stuffing firms. Second, differences between placement and employment agency are hard to tell. According to our present laws, agencies can provide, in addition to traditional information services and intermediary

<sup>6</sup> "Employment Contracts Law", article 92.

<sup>7</sup> It is stipulated in "The Supreme People's Court's Interpretations of Certain Issues Concerning the Application of Laws in Personal Injury Cases", article 10, that if a contractor, while executing its duties, causes damages to a third party or the contractor itself, the ordering party is not liable for the damages. But if the ordering party is at fault for ordering, designating or selecting, the ordering party shall bear corresponding civil liability. Article 11 of the same Interpretation stipulates the liability, which should be born by the contract letting party while not performing legal obligations of selecting and supervising, it says "if a employee suffers from personal injury caused by safety accident while executing the work designated by employment contract, and if the contract letting party or subcontractor know or should know that the employer who enters into a contract or a subcontract doesn't have corresponding quality or safety conditions, the contract letting party or the subcontractor shall, along with the employer, jointly and severally liable for the injury of the employee".

<sup>8</sup> See Rong-Fang Zhang: Employer Responsibility Towards Workers of Temporary Work Agencies from a Comparative. *Financial and Economic Law Review*, December 2006, NO.7., Angle Publishing CO., LTD.

services, also personnel agency services (keep records, pay wages, pay social insurances etc., taking the commission of accepting units or employees), at some place placement is also included in the range of employment agency services.<sup>9</sup> In the situation, in which employment service agencies provide personnel agency services and placement services, the only difference between personnel agency services, which are traditional intermediary services, and placement services is "the labor control". In "personnel agency services", agencies have no labor control over job seeker (employees), and don't perform obligations and take liabilities as employers; stuffing firms should have the right to perform certain labor control upon employees, at meanwhile take the liabilities as employers of employees placed. "Employment Contracts Law" doesn't stipulate the range of labor control of stuffing firms, and this causes that the differences between placement and personnel agency can not be found in the law. The status of employees, who provide "personnel agency" services through intermediary agencies, are confused with that of employees placed, when bothers emerge, it's hard to tell what the intermediary agencies did was placement or traditional employment services, and that directly makes the rights and interests of employees hard to be performed. Third, there is little space left for stuffing firms to work legally. As independent bodies in the market, stuffing firms, whose obligation and liability capacity are based on the decision power in operation and management the market, are stipulated by the "employment contracts law" to perform as employers the working protection obligations, while however being deprived of the rights to negotiate with their own employees about the matters of labor compensation and working protection level to disperse risks in the markets. To accepting units, differences between employees placed and permanent employees just locate in name and body who pays the wages and social insurances, they enjoy the entire labor control while do not actually perform any working obligations to employees placed; as to stuffing firms, they are nominal "employers" of employees placed, and perform protection obligations according to law, but actually they perform no essential labor control to employees placed, they can not decide wages standard, as well as working hours, rest and overtime. This would definitely do harms to the normal work of stuffing firms.

Clarifying the definition of placement and the range of labor control of both stuffing firms and accepting units in the statute law is the necessary condition for preventing enterprises from abusing. Normally, the range of labor control of stuffing firms mainly

<sup>9</sup> "Interpretations of Contents of Profession Intermediary (*Trial Implementation*)" enacted by Labor Bureau of Beijing stipulates that personnel agency services and labor placement (the action performed by profession intermediary enterprises, through placing labors to accepting units) are included in profession intermediary.

concludes making decisions about hire, assessment, level of wages and benefits, and dismissal of employees placed, and the range of labor control of accepting units refers to working position and method. As to matters of working hours, rest, vocation and overtime, it is better for accepting units to decide them in the present system of our country. First of all, Chinese enterprises normally implement working hours and rest system, which is stipulated by legislation, not by negotiation carried out between trade union and employer as in market economy countries, and this doesn't reflect the autonomy and interests of both parties. The key problems within the matter of working hours are overtime working and the body who perform the obligation to implement the employees' legal right of resting, these two problems mainly reflect the needs in the operation of accepting units, and have nothing to do with stuffing firms and employees placed. Second, from the perspective of interests, it is accepting units that become objects for which employees work, provide working places, perform labor control, and enjoy the results of working, considering from the principle that interests come along with risks, it is more reasonable to have accepting units ensure employees' right of rest and vocation. "Employment Contracts Law" stipulates that accepting units shall perform the obligation to "implement state labor standards", this must have included standards of working hours, rest and vocation. Third, according to article 64 of "Employment Contracts Law", placed employees have the right to lawfully join the trade union of their staffing firm or the accepting unit or to organize such unions, this also provides accepting units a systematic basis for solving "overtime" problems of employees placed.

## **PART TWO: ALLOCATION OF LEGAL OBLIGATIONS AND LIABILITIES BETWEEN STUFFING FIRMS AND ACCEPTING UNITS**

The law stipulates precisely protection obligations, which should be performed by stuffing firms and accepting units, but the legal results, which come along with the violation of obligations, are very disorderly arranged. "Employment Contracts Law" stipulates that stuffing firms are employers of employees placed, they should perform obligations of paying labor compensation and social insurance premiums, and informing employees contents of the placement agreement; the law also clarifies that the employment contracts between staffing firms and the employees to be placed shall be fixed term employment contracts with a term of not less than two years; that placed employees shall have the right to receive the same pay as that received by employees of the accepting unit for the same work, and during periods when there is no work for Employees to be placed, the staffing firm shall pay such employees compensation on a monthly basis at

the minimum wage rate prescribed by the People's Government of the place where the staffing firm is located.<sup>10</sup> Obligations of accepting units mainly refer to labor protection to employees at working places, including following obligations: implement state labor standards and provide the corresponding working conditions and labor protection; pay overtime pay and performance bonuses and provide benefits appropriate for the job positions; provide the placed employees who are on the job with the training necessary for their job positions, etc.(article 62). As to "liabilities", which should be taken by stuffing firms and accepting units when they violate the legal obligations, they are only stipulated in article 92, that is if a stuffing firm violates the law, it shall be charged with administrative liabilities alone; if the employee(s) placed suffer(s) harm, the staffing firm and the accepting unit shall be jointly and severally liable for damages. Obviously, there are no separate civil liabilities settled for stuffing units and accepting units.

There are some problems can be listed about this article, first, stuffing firms and accepting units are independent bodies in the market. This article will definitely cause a situation, in which stuffing firms don't pay adequate attention to the performances of their own legal obligations. Second, the law has not established a basis, on which accepting units shall be "jointly and severally liable for damages" along with stuffing firms. Two or more parties shall be jointly and severally liable for damages only when they perform obligations jointly and severally or when they perform infringement together. "Employment Contracts Law" are precisely allocated protection obligations between stuffing firms and accepting units, so if one party doesn't perform its own obligation, the other shall have no obligation to be jointly and severally liable for damages. From the perspective of tort law, accepting units don't have to be jointly and severally liable for damages, since they can not perform infringement together with stuffing firms. According to article 130 of "GENERAL PRINCIPLES OF THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA", if two or more persons jointly infringe upon another person's rights and cause him damage, they shall bear joint liability. According to 《GENERAL PRINCIPLES OF THE CIVIL LAW OF THE PEOPLE'S REPUBLIC OF CHINA》Opinion", article 148, and "The Supreme People's Court's Interpretations of Certain Issues Concerning the Application of Laws in Personal Injury Cases", article 4, in addition to joint infringement in narrow sense, can also joint jeopardy, performances of abetment and assistance make persons who jointly infringe upon another person's rights to bear joint liability. Joint infringement is constructed of two elements, the infringement conducted jointly by two or more persons, and the mind connection among these persons.<sup>11</sup> Stuffing firm and accepting unit are separate

<sup>10</sup>"Employment Contracts Law". article 58, 60, 63.

<sup>11</sup>Ma Junju, Yu Yanman. *Original Theory of Civil Law* (2<sup>nd</sup>

bodies, so in case stuffing firm infringe upon employees' right, accepting unit does not take part in the performance, and has no mind connection about infringement with stuffing firm, therefore, the law can not ask accepting unit to be "jointly and severally liable" for what stuffing firm did illegally. So on the surface, article 92 enhances liabilities of accepting units and intensifies protections toward employees placed, but actually it strengthens the motive of accepting units to perform illegally, and puts threats upon protection toward employees. Third, the law stipulates that accepting units shall perform the labor protection obligations at working places, but no liability is clarified if such obligations are violated, the disjointedness of obligations and liabilities can not ensure the performance of accepting units' obligations, and would probably make security and sanitation protection system established for employees hard to work.

The allocation of labor protection made by "Employment Contracts Law" between stuffing firms and accepting units is clear. Since the relationships between stuffing firms and employees are relatively stable, it is good for employees to enjoy their rights and interests, that stuffing firms perform obligations of paying wages and social insurance premiums and so on. The law should stipulate the independent liability system, which applies to stuffing firms when they don't perform the obligations above, more clearly. According to the content of placement relationship, it is impossible for stuffing firms to perform the whole labor protection obligations all by themselves. The employees placed work at working places of accepting units, following their designation, under their monitoring, and on behalf of their interests; accepting units know about safety and healthy risks of working places and the way to control them, designate employees' daily work, and get the possibility and capability to perform those protection obligations. Therefore, accepting units can only perform labor protection obligations referring to working places. Our law has expanded the safety and healthy obligations, which should be performed by accepting units, so that these obligations must be performed in working places as a whole, asking accepting units to perform these obligations, stipulating that the general contracting unit shall be responsible for the construction site safety, even if it doesn't actually designate and monitor working of subcontracting units;<sup>12</sup> It is stipulated in the "Employment Contracts Law", article 62, paragraph 2, that one of the obligations of accepting units is to "provide the corresponding working conditions and

labor protection". In legal practice, if an employee placed suffers from work-related injury at accepting unit, the court normally asks accepting unit to compensate for losses of the employee. Responding to obligations settled, the law should establish reasonable "legal liability" system, stipulate that, as body performing safety and healthy obligation to employees placed, accepting units shall, according to the law, pay work-related injury insurance premiums for employees; and that when work-related injury happens, in addition to being paid with work-related injury insurance premiums, employees also have the legal right to claim compensation for losses in income due to missed working time, fees for living care, etc., from accepting units, and the employment relationships can also be kept. If accepting units don't pay work-related injury insurance premiums for employees placed, they shall compensate for employees' losses cause by work-related injury according to standards in "Work-related Injury Insurance Regulations".

### **PART 3: ASSURANCE OF LIABILITY CAPACITY OF STUFFING FIRM AS "EMPLOYER"**

"Employment Contracts Law" stipulates that stuffing firm, as employers of its employees to be placed in the labor law, shall perform the employer's liabilities. In order to assure the capacity of stuffing firm to perform the obligation and liability of "employer", "Employment Contracts Law" establishes guarantee in two aspects, first, it stipulates that the standard for stuffing firms to come into market is that "Staffing firms shall have registered capital of not less than RMB ¥ 500,000."<sup>13</sup> Second, it restricts the range of placement labor use, including the maximum assignment period and the assignment post, stipulates that "the placement of employees shall generally be practiced for temporary, auxiliary or substitute job positions", "an accepting unit shall decide with the staffing firm on the term of placement based on the actual requirements of the job position, and it may not conclude several short-term placement agreements to cover a continuous term of labor use" (article 59, 66). The measure for assuring the liability capacity of stuffing firms can not protect legal rights and interests of employees placed, and this can be analyzed from the following aspects. First of all, restrictive rules about the application range of placement have no binding effect. Stipulations in "Employment Contracts Law" about the maximum assignment period and the assignment post, they are just advocacies, which are not specific and haven't warranted certain authorities to specify them; the law has not referred to the sanction, which is caused by accepting units' violation of those advocacies. Actually, there isn't any restriction or bind to the use of

Edition), 1026-1028. 2005. Beijing: Law Press

<sup>12</sup>It is stipulated in "CONSTRUCTION LAW OF THE PEOPLE'S REPUBLIC OF CHINA", article 45, that the building construction enterprise shall be responsible for the construction site safety. The general contracting unit shall be responsible for the construction site safety of the project under general contract for construction. Subcontracting units shall be responsible to the general contracting unit and subordinate themselves to the management of the general contracting unit for construction site safety in production.

<sup>13</sup>"Employment Contracts Law". article 57.

employees placed acted by accepting units. Second, the admittance standard settled by law for stuffing firms to come into market can not assure liability capacity of stuffing firms. Being different from other bodies in the market, stuffing firms don't operate utilities, don't have assets response with the size of the population of employees, and what stuffing firms operate is labors, "500,000 RMB registered capital" can not actually assure that stuffing firms can perform protection obligations to employees, the population of which is unlimited. What's more, as a company, in order to come into market, a stuffing firm only has to go through the procedures for registering, but don't require administrative permission to operate and this can not assure that stuffing firms are established according to the law; as to matters whether stuffing firms work legally, whether relevant labor protection obligations have been performed after coming into market, etc., the law hasn't established corresponding supervision measure.

The present law in our country has almost not established any restriction to the job position and term by which accepting units use employees placed, and stipulates that accepting units are not employers of employees placed, so placement would probably be widely adopted by accepting units to transfer the employer liability to stuffing firms; the law stipulates that stuffing firms are employers of employees and perform the major labor protection obligations, this demonstrates that the law pays considerable attention to liability capacity of stuffing firms as employers, but at the meanwhile, the law has not established corresponding measure to assure the capacity of stuffing firms to perform the employer liability. Just like other employees, assignment workers, who work as employees placed, as well need protection to satisfy their own existence and development. On the basis of present system, on the premise that stuffing firms are undertakers of labor risks, placement legal regulations should be perfected in two aspects, first, restrict precisely the situation, in which accepting units can use employees placed, stipulates that the placement of employees shall only be practiced for temporary,

auxiliary or substitute job positions, and for stable and successional job positions can only permanent employees be used, so as to avoid the "placement" of permanent employee; second, establish delicate supervision system aiming stuffing firms, heighten the admittance standard for stuffing firms to come into market, establish permission system for stuffing firms, intensify daily supervision to the operation of stuffing firms, so as to assure that stuffing firms would operate normally and regularly and perform the employer's liability settled by law.

## CONCLUSION

There are many deficiencies existing in the present Chinese labor placement system. It doesn't clarify the definition and characteristic of placement; the allocation of employer's liability is not impartial; the concern about liability capacity of stuffing firms is so inadequate, that abuse is practiced frequently and legal rights and interests of employees are hard to protect. In order to regulate labor placement relationship reasonably, balance the needs of two interests, the labor market flexibility and of the rights and interests of employees, the law shall clarify the definition of placement, stipulate that stuffing firms have the right to hire, and fire employees, negotiate with employees about labor compensation and social welfare; accepting units determine the job positions and working methods of the employees placed. In accordance with the labor control of stuffing firm and accepting unit, on the basis of allocation of labor protection obligations between these two parties, the law shall establish liability system according to their own obligations, and assure that those obligations would be performed. In order to assure that stuffing firms have the capacity to perform employer's liability, the law, on the one hand, shall restrict situations, in which accepting units could apply labor placement, and on the other hand shall establish supervision system upon stuffing firms.

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