

Implement and Counter Plan of Labor Contract Law Between Labor Dispatch and Outsourcing in Liaoning Province

LA MISE EN OEUVRE ET LE PLAN DE LA LOI CONTRE LE CONTRAT DE TRAVAIL ENTRE LE TRAVAIL ET L'EXTERNALISATION D'EXPEDITION DANS LA PROVINCE DU LIAONING

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Received 23 January 2012; accepted 25 April 2012.

Abstract

The Labor Contract Law made a specific rule to labor dispatch and ended the past of it with no law to comply to. Aiming to labor abuses, no aptitude to labor dispatch, unclear duty and the problem of equal pay for equal work etc, this article made analyses and worked out the counter plans to above issues by combining related rules in Labor Contract Law to particular case in Liaoning province.

Key words: Labor dispatch; Outsourcing; Labor Contract Law

Résumé

La loi du le contrat de travail a fait une règle spécifique à l'expédition du travail et a pris fin le passé de celui-ci avec aucune loi pour se conformer à. Visant à des abus du travail, pas d'aptitude à l'expédition du travail, le devoir clair et le problème du salaire égal pour un travail égal, etc, cet article fait une analyse et élaboré des plans contre les questions ci-dessus en combinant des règles liées à la loi le contrat de travail au cas particulier dans le Liaoning province.

Mots clés: Travail d'expédition; L'externalisation; La loi du contrat de travail

LIU Ying (2012). Implement and Counter Plan of Labor Contract Law Between Labor Dispatch and Outsourcing in Liaoning Province. *Canadian Social Science*, 8(2), 165-169. Available from URL: <http://www.cscanada.net/index.php/css/article/view/j.css.1923669720120802.2940>
DOI: <http://dx.doi.org/10.3968/j.css.1923669720120802.2940>

1. DEFINITION TO LABOR DISPATCH AND OUTSOURCING

Definition to Labor Dispatch

Labor dispatch involves three sides: the unit or company of labor dispatched, unit with labor demand and labor dispatched. The realization of separation of labor owner and user gives the convenience to unit with labor used to recruit or dismiss staff according to supply and demand in labor market. The key feature to labor dispatch is the separation between labor employment and labor using. Rather than labor relation to labor user unit, labor dispatched are in the labor relation to dispatcher unit, which forms the special format of "executing labor service outside of labor relations".

Definition to Outsourcing

Enterprises would give the non core business to co-company to complete in order to gain more advanced competitions than solely exploiting resources inside. In fact, carrying out outsourcing could execute outer forces on human resource management and the whole organization; thereby the operation efficiency would be improved largely accompanying with cost reduction in personnel administration, technique resource management and service all round.

2. RELATED LAWS AND REGULATIONS IN LABOR CONTRACT LAW

Clause 57 the labor dispatch unit shall be set up according to the law of cooperation with registered capital no less than five hundreds thousands RMB.

Clause 58 the labor dispatch unit is defined as

employing unit and shall take the liability to employees. The labor contract made between labor dispatch unit and employee shall indicate, besides the clause 17 in this law, the employing unit, deadline of employing and working position description etc..

The labor dispatch unit shall make fixed term labor contract with labor dispatched and pay the payment to labor monthly. In the period of unemployment, the labor dispatch unit shall pay monthly payment to labor on the basis of minimum wage stated by local government.

Given the fact that the labor dispatch unit is employing unit in the sense of labor law, it is evident that the liability ruled by labor law, labor contract shall apply to the labor dispatch unit. Hence, the economic compensation shall be executed according to the clause 46 & 47 indicated in labor contract if there is any case of terminating the contract.

Clause 63 the dispatched labors enjoy the right of equal pay for equal work to employees in employing unit. With no same kind of job position in unit, the unit shall make the payment to labors by taking the reference of same or similar job position in other local units.

Clause 67 the employing unit shall not establish any labor dispatch units that send labors to it or its subordinate unit.

There is no provision to set the case of self-established labor dispatch unit in labor contract. This clause indicated that the employing unit or its subordinate unit or labor dispatch unit in joint venture form is not allowed to establish the dispatch unit in this labor contract. In reality, it is difficult to regulate the case of "self-established" such as setting up dispatch unit by pulling strings from behind the scenes for their purpose.

Clause 92 The labor administrative department and other related competent authorities shall order the labor dispatch unit that violate this regulation to amend; for the case of gross violation, the industrial and commercial administration shall impose fine penalties ranging from RMB1000 to RMB5000 and revoke license; the labor dispatch unit and employing unit shall bear the associated liability for labors hurt.

It is quite easily for labors to get hurt in employing unit rather than other places, yet there is no legal liability to employing unit indicated in labor contract. Hence, this clause made additional provision that the labor administrative department and other related authorities shall order employing unit to amend with their violation to this clause and related dispatch regulation. For cases of gross violation, the fine of RMB1000 to RMB5000 shall be imposed for each labor hurt; the labor dispatch unit and employing unit shall bear the associated liability for labors hurt.

Clause 94 if the unit of individual contractual operation is in violation of this clause and cause harm to labor, the contractual unit and individual operator shall bear the associated liability.

3. CURRENT SITUATION OF LABOR DISPATCH AND OUTSOURCING IN LIAONING PROVINCE

The government in province conducts the enrollment work of dispatch in layers. Put the meeting set up for labor dispatch as key task and promote to set up trade unit in cities; control the system through industry and organize labor dispatched to join trade unit. The investigation in province shows that the majority of employing units are concentrate with state-owned enterprises, central enterprises and enterprise groups. To this end, provincial government launched experimental unit with pointed references to China Mobile and China Post. With the efforts over two years, 11349 dispatched employees in China Post in Liaoning have been enrolled into trade unit. Among 10758 of dispatched employees in China Post, 9521 of them have been enrolled. Enrolling rate is 88.5 per cent.

The statistics from Liaoning federation of trade unions shows that in present, with total three hundreds thirty thousands dispatched labors in Liaoning, some of two hundreds sixty thousands dispatched labors have already joined trade unit with enrolling rate of 80.7 per cent. Liaoning province has fulfilled the target of enrolling rate of 80 per cent raised by federation of trade unions ahead of schedule.

In order to solve the problems of dispatching labors in lack of standardization and unequal pay for equal work, the trade union urged that dispatch unit shall conclude and sign collective contract to labors, such as 93 collective contracts signed by 115 dispatch units in Shenyang with signing rate of 80.8 per cent. In the aspects of reward and welfare, the trade union also pushed forward to realize the equal treatment between dispatched labors and employees in employing unit, so does to the key position among dispatched labors and formal employees. In addition, some units built the special fund to assist labors, built lodging house with big investment, organize health examination for labors and select excellent labors to recuperate at regular intervals, which offers management in humanity and kinship to labors' lives.

Enterprises in Liaoning province are making remarkable improvement in service outsourcing. The turnover in outsourcing service of Neusoft groups ranks the first nationwide and the exports of outsourcing service was 280 million dollars last year with 40 per cent of year growth.. Dalian Huaxin ranks the seventh with 25 per cent of year growth. Haihui can not only become one of the R&D center in GE, also appear on the market in NASDAQ with ranking the tenth of its turnover in domestic last year. There are over 1100 businesses devoting themselves to service outsourcing which offer vacations to 140 thousands employees. Some 20 thousands employees are engaged in NEUsoft which has

the largest number employees.

4. PROBLEMS EXISTING IN EXECUTING LABOR CONTRACT LAW BETWEEN LABOR DISPATCH AND OUTSOURCING

4.1 Dispatch Problem

4.1.1 Phenomenon Severity of Unequal Pay for Equal Work

The Clause 63 in labor contract law stipulate: labor dispatched has the right to enjoy equal pay for equal work with employing unit employees. With no same kind of job position in unit, the unit shall make the payment to labors by taking the reference of same or similar job position in other local units.

In many work units in Liaoning, comparing with formal employees, the wage distinction mainly involves the following: (1) lower wage. (2) short of social security. (3) no effective guarantee to membership in trade unit. (4) Discrimination in job title appraisal, promotion etc..

4.1.2 Several Labor Dispatch Units are not Qualified to Dispatching

Liaoning talent Dispatch Company has already transacted dispatching businesses to over 320 enterprises and institutions with some over 5600 labor dispatched since founded.

In 17th November, 2010, some employees in Philips investment limited company (China) were got into the affair of "dispatching trap". The ACFTU (All China Federation of Trade Unions) and Liaoning trade union, Shenyang trade union paid a close attention to it and required labor union to solve this problem seriously.

The clause 57 in labor contract rules: The labor dispatch unit shall be set up according to the law of cooperation with registered capital no less than five hundreds thousands RMB.

The related legal practical issues in labor dispatch unit. Labor dispatch business started latterly in our country and its institutions are developing in good and bad being intermingled. Labor dispatch units are in chaos and complexity and some unqualified units are unable to bear various risks while dispatching. Once the labor dispatch unit obtain permission to operate, its limit of registered capital would be difficult to monitor with the provision to registered capital existing in name only. Thus in fact, restraint of five hundreds thousands RMB is still a rather easy term.

For dispatch unit provided by enterprises, they are either employment agency with sole intermediary qualification, or the dispatch agency set by individual or inside of enterprise, which caused the absent position to dispatch unit in the structure of "triple sides in twofold" with dispatch invalid.

4.1.3 Difficult to Distinguish Responsibilities among Three Sides while Disputing

Some institutions are related to dispatch unit in Liaoning province, they are provincial governmental organizations and institutions, colleges and universities, financial institution, insurance company, major industry, foreign-owned enterprises, private enterprise and non local company's branch in Shenyang etc.. The dispatching business gets favorably receive from numerous companies due to the benefits of simple personal administration, lower human resource cost, flexible staffing and the avoiding of brain drain. As for individual, labor dispatched could win over lawful rights and interests and get the sense of belonging, so they would work hard in further.

The clause 92 indicates: the labor administrative department and other related competent authorities shall order the labor dispatch unit that violate this regulation to amend; for the cased of gross violation, the industrial and commercial administration shall impose fine penalties ranging from RMB1000 to RMB5000 and revoke license; the labor dispatch unit and employing unit shall bear the associated liability for labors hurt.

Once the dispute occurs, it would be difficult to distinguish the responsibilities. Which areas and types of work will be suitable for labor dispatch? What qualification is required? How to punish the undue behavior of cheating and dishonesty and withholding pay? What direct liability shall employ unit take? These are all questions received no clear answer since no normative management control system has been set up before issuing the Labor Contract Law. In particular, under the circumstance of oversupply in labor market, labor dispatch is liable to be misused and labors are often got impairment of benefit.

4.2 Outsourcing Problem

4.2.1 Might Adding Outside Business Responsibility

Due to the lack monitoring to outsourcing operation, it might increase the possibility of responsibility outside moving and thus lead to more difficulty on quality control and management.

Foreign trade board in Liaoning Province announced that the export of outsourcing service is increasing on powerful trend, with total export of 2.1 billion dollars and year growth of 30.4 per cent. In recent years, Liaoning Province has developed the outsourcing businesses as key growth point and important mean to adjust export by continuously. Provincial government spent 30 million RMB as a special fund on staff training. The series of supportive measures has attracted even more international celebrated enterprises to settle down in Liaoning with over 400 foreign funded companies among many 1100 service companies in Liaoning province.

4.2.2 Might Blow Enthusiasm

Outsourcing operation might blow employees'

enthusiasm and lead to lose their professional ethics. Some employees' interest must be contained during the process of outsourcing service. That is, if they know their work will be outsourced sooner or later, their enthusiasm and work moral level would be lower down. Less faith and losing motivation will result in sharp decrease to performance.

4.2.3 Intellectual Property

This refers to outsourcing on the area of R&D (research and development) in particular. Normally, the company and outsourcing manufacture would make an agreement on the ownership of patents, copyright on new technology rather than by legal provisions, which leaves chances to make mistake and trap.

4.2.4 Outsourcing Business' Loyalty

Benefits might drive outsourcing business shift from one company to another and lead to the situation out of control. Excessive relying on outsourcing business, however, will raise the trading cost as well in the meantime.

5. THE COUNTER PLAN TO SOLVE THE PROBLEMS OF DISPATCHING AND OUTSOURCING IN LIAONING

5.1 The Counter Plan to Solve the Problem Occurred in Labor Dispatching

5.1.1 Intensify Fairness and Conduct Appointive Employment

To complete employ system and intensify fairness is changing "assigning by identity" to "equal pay for equal work". It is important to deepen the reform of organization of shifts and promote the change from identity managing to position managing, thus so thoroughly "break iron rice bowl" and realize the appointive employment. Otherwise, distribution on the basis of labor and equal pay for equal work would be at a far distant date, and social equity and harmony would be difficult to reach.

The liabilities for both dispatch unit and employing unit shall be explicated through legislation. Intensify administration supervision to labor securing administration department, improve compensation and relieving process and set up a complete collective consulting system.

5.1.2 Intensify Supervise and Dispatching in Specification

Some defects would be snagged during dispatching process as a new employing means and it should be resolved promptly by government. These defects will cover stages of completing system design, specifying operation and intensifying supervise to make it in healthy way. The first is to complete system design and specify the dispatching employment in detail. The second is limiting its admission norm. As for applying new dispatch institution, not only the registered capital need

to be increased with five hundreds thousands RMB to one million as well, also the professional qualities and strength of this institution shall be examined overall. The third one is carrying out cash deposit system. Before each time dispatching, certain amount of cash deposit shall be collected according to risk level and staff size and be bear averaged by dispatching unit and employing unit, then put this amount of deposit into market supervision institution. The fourth is integrity rating. The fifth is to specify dispatching norm.

5.1.3 Clear and Definite the Liability for Both Dispatch Unit and Employing Unit

Employing unit is the direct user of labor even there is no labor contract relations between these two sides. Hence, the labor contract law indicates that dispatch unit and employing unit shall bear associated liability for labor harmed while dispatching. In this case, employing unit is taking a legal liability of compensation rather than the liability for breach of contract. This regulation could avoid the cases of in fraud of law by some employing units through dispatching. Under the joint liability, labors dispatched could ask for compensation either to both dispatch unit and employing unit in associated way or to one of these two sides to make compensation in total.

5.2 The Counter Plan to Solve Outsourcing

5.2.1 To Set up Supervisory Mechanism in Business

The supervisory mechanism must be set up to carry out personnel outsourcing. Some companies regard management to confidential fortune for itself and others develop their personnel management to core competence. Therefore it is not allowed to reveal management secret so easily. To avoid above potential problems, it would be better to choose outsourcing suppliers with good credit standing and to sign a restrict clauses that prohibit revealing or providing any human resource information to the third party or whatsoever. In the meantime, measures of guarantee, deposit and signing binding contract or insurance can be took to minimum the cost of outsourcing.

5.2.2 Communicating with Employees and Building a Favorable Atmosphere

On the cultural diversity scale, employing unit shall make a good communication to outsourcing supplier so that they could find and solve the problem in promptly, with adopting measures to local conditions in flexibility. Also, outsourcing supplier's business culture is needed to be reviewed when choosing them. It should optimize managing flow inside for constructing smooth access for outsourcing service. Employing unit also shall establish the win-win idea by intensifying communicating, eliminating defending mind of employees etc..

5.2.3 Carry through Effective Monitoring to Contractor

The action of both company and outsourcing agency must be restrained through legal outsourcing pact contract

due to their cooperative relationship. The company and outsourcing agency could found a regular reporting system in an agreement through consulting so that they can make information feedback and good communicating, take punishing to disqualification in performance. By activating this mechanism, the company can get advices from staff inside in time and encourage enthusiasm to them as well.

5.2.4 Carry out Strict Contract Management Mechanism

The accomplishment of manpower resource outsourcing is largely depended on how the supplier could accurately handle the expectation and target to outsourcing service. So the following points must be looked out: (1) the company shall sign the contract that clearly indicates these two parties' expectation and liability through negotiation. (2) The contract shall involve the following contents for ensuring its completion: outsourcing scope; the regulation for minimum standards of various services; reserving the rights to cooperate with the third party; sub package or not; the protection and keeping confidential for the ownership of data and documents etc.. (3) the clear agreement on the requirement to personnel and technique must be identified in the contract. (4) as for the importance of outsourcing contract, the company shall apply the combining mechanism of reviewing by both lawyer external and legal adviser insider together.

CONCLUSION

The Labor Contract Law in version 2007 has stopped a gap to pervious version by specific provision to labor dispatch and ended the past of o rule to follow in the area of labor dispatch. This law has made the specification as for misusing to labor dispatched, which limited the period of labor dispatch; it clearly defined the liabilities for both labor dispatch unit and employing units as well; it provided that labors dispatched can enjoy the rights of equal pay to equal work with employees in employing unit; it stipulated that the labor dispatch unit and employing unit shall bear the associated liability when the case of labor harmed.

In order to resolve the problems occurred during

labor dispatching and outsourcing, the company shall pay a attention to the following: intensify fairness idea, take appointive employment; strengthen supervisory and specify dispatching act; clearly define the liability for both labor dispatch unit and employing unit. As for outsourcing business: setting up supervisory mechanism; well communicating with employees and building favorable atmosphere; taking effectively supervisory to contractor and carrying out strict contract management system. The operation of labor dispatching and outsourcing can become better and better only by the joint efforts of labor dispatch unit, employing unit and labors dispatched and by their insisting on abiding The Labor Contract Law and favorable atmosphere.

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