

Amendments to the Labour Contract Law of the People's Republic of China (Draft): Comments and Recommendations

China Labour Bulletin

Three and a half years after the implementation of the Labour Contract Law, the Standing Committee of the National People's Congress (NPC) has drafted amendments concerning the use of employment agency labour in China. We note that the amendments are directed at resolving the problems arising from a rapid expansion in the use of agency labour in China. We believe that these amendments to the Labour Contract Law by the NPC Standing Committee are a positive development for China's millions of agency workers. The amended Labour Contract Law now has clear provisions regarding agency labour, which is of great significance in regulating the labour employment system and protecting the rights and interests of workers.

China Labour Bulletin is a workers' rights organisation registered in Hong Kong. Since our establishment in 1994, and have consistently striven to promote and protect the basic rights of workers in Mainland China. And since 2003, we have provided workers with legal assistance, encouraging them to use labour laws and regulations to protect their own interests throughout the labour dispute resolution process. A significant number of the cases we have assisted in are related to the use of agency labour. While providing legal assistance to the workers, we have also researched and analysed some of the cases, accumulating experience, and forming opinions regarding the deficiencies of current laws and regulations. It is within this context, that we are using the opportunity provided by the NPC Standing Committee's solicitation of comments from all sectors of society on the draft amendments to the Labour Contract Law, to offer the following observations and recommendations.

We support the proposed amendments to the Labour Contract Law and believe that, in addition to those changes, other content needs to be modified or added.

1. Add two more conditions regarding the establishment of employment agencies to the draft amendments to the Labour Contract Law.

First recommendation: In Article 57, add the clause, "employment agencies shall make the supply of labour their sole business, and shall not have any affiliated companies."

Rationale: Adding this clause is intended to prevent employment agencies from engaging in other commercial activities. This will help government regulators monitor and supervise

them. It may also put an end to the practice of employment agencies using their affiliated or related companies to engage in illegal business activities under “the cloak of legitimacy.”

Second recommendation: In Chapter VII (Legal Liability), add a liability clause for violating Article 57; for example, any individual or entity operating an employment agency without a licence should pay a fine and assume administrative liability.

2. Amend Article 58, Paragraph 2 of the Labour Contract Law, which reads, “Employment agencies shall enter into fixed-term labour contracts of two years or more with agency workers, and pay the workers on a monthly basis. During periods in which agency workers have no work, the agency shall pay them the statutory monthly minimum wage in their location.”

Recommended modification (see bold text): “Employment agencies shall enter into fixed-term labour contracts of two years or more with agency workers, and pay the workers on a monthly basis. During periods in which agency workers have no work, the agency shall pay them the statutory monthly minimum wage in their location **and pay their social insurance premiums in accordance with the law.**”

Rationale: Our research indicates that some employment agencies, in order to reduce their costs, do not pay social insurance premiums for their workers, or only pay part of the premiums. To address this, the proposed amendment should clearly state the employment agency’s obligation to pay social insurance premiums.

3. Amend Article 61 of the Labour Contract Law, which reads, “When employment agencies send workers to different locations, the workers’ remuneration and working conditions shall be in accordance with the standards in the employer’s location.”

Recommended modification (see bold text): When employment agencies send workers to different locations, the workers’ remuneration, **social insurance benefits** and working conditions shall be in accordance with the standards in the employer’s location.

Rationale: Our research indicates that some employment agencies, in an attempt to reduce the costs of sending workers to more developed regions, only pay the lower social insurance premiums mandated in the agency’s location. A specific provision should be introduced to address this issue.

4. Amend Article 62 of the Labour Contract Law

Recommendation: Delete Obligation (5), which reads, “For those continually employed, a normal wage adjustment mechanism shall be implemented.”

Rationale: Article 66 of the amended law already provides that agency workers can only be employed in “temporary,” “auxiliary,” or “substitute” positions. In this context, if an employer continuously uses agency workers, it should sign labour contracts with them and establish a labour relationship.

5. Revise the amendment to Article 66, which reads, “Substitution refers to employees who are unable to work in their positions for a certain period of time due to being on leave for such reasons as study or vacation, and who have been substituted by agency workers.”

Recommendation: Revise to, “Substitution refers to employees who are unable to work in their positions for a certain period of time due to being on leave for such reasons as study or vacation, and who have been substituted by agency workers. In general, the substitution period should not exceed six months. Moreover, employers cannot use agency workers as substitutes for workers who are not at work because of a work stoppage caused by a collective labour dispute.”

Rationale: Similar to the rationale for a time limit on using agency labour in temporary positions, the amendment should also provide a clear time limit for substitute work. In addition, in order to maintain stable labour relations and resolve collective labour disputes in a timely manner without escalating the conflict, employers should be prohibited from using agency workers as substitutes when a labour disputes leads to a work stoppage.

6. Add a clause limiting the proportion of agency labour in any one enterprise

Recommendation: Add the clause, “The proportion of agency workers to be used by an employer shall not exceed five percent of the employer’s total number of employees.”

Rationale: The *Explanation of the Amendments to the Labour Contract Law of the People’s Republic of China (Draft)* makes it clear that it intends to “strictly regulate the use of agency workers so that agency workers do not become a primary source of labour for employers.” The Amendment should therefore include clear restrictions on the proportion of agency workers that can be used by employers. At present, the proportion of agency workers used by some enterprises exceeds 50 percent, and this clearly reinforces the need for strict limitations.

7. Add a clause on the continued use of agency labour

Recommendation: Add the clause, “If employers need to continue using agency workers after the six month cut-off point, the Labour authorities may grant the employer a one-time extension of up to six months. If the employer needs to continue using these workers after that extension, they shall sign employment contracts with them and establish a formal labour relationship.”

Rationale: Since agency labour is not to be used by employers as a primary means of employment, the legislation should require employers to sign labour contracts and establish a formal labour relationship with all long-term workers. Only in this way can agency labour revert to its basic role of filling gaps and making flexible adjustments to supply and demand in the labour market. This will also help establish long-term and harmonious labour relations within enterprises.

8. Add a clause preventing employers from converting regular employees into agency employees

Recommendation: For workers who have already signed labour contracts with their employers, the employer should not convert their employment status into that of an agency worker during the term of their contract. After the expiration of a labour contract, if the employer wishes to continue employing the worker, they shall not convert their employment status into that of an agency worker.

Rationale: Our research indicates that, in order to reduce their labour costs, a number of enterprises force current employees to cancel their labour contracts, and then resign them as agency workers. The law should prohibit this practice.

9. Add a clause restricting the use agency labour in specified industries and positions

Recommendation: Add the clause, “The use of agency labour is prohibited in the following workplaces and work environments: (i) industries and positions that require the employee to hold professional qualifications; (ii) toxic and hazardous jobs as specified under the law; and (iii) government entities, public welfare institutions, and community organizations.”

Rationale: “Industries and positions that require the employee to hold professional qualifications” are not likely to be “temporary,” “auxiliary” or “substitute” positions, and therefore cannot be filled by agency workers. Because “toxic and hazardous jobs as specified under the law” carry a certain degree of risk, the use of agency workers should be prohibited in these posts; and “government entities, public welfare institutions, and community organizations” should set an example as employers in following employment standards.

10. Add a clause establishing an administrative filing and approval system

Recommendation: Add the clause, “Labour authorities at the county level and above shall establish an administrative filing and approval system for the use of agency labour. Employers using agency workers shall file details of the positions and time periods of their agency workers with the Labour authorities in their location. If employers need to exceed the specified time period and continue using agency workers, they shall apply to the Labour authorities for approval. The authorities may only grant a one-time extension of up to six months.”

Rationale: Since agency labour is not to be used as a primary means of employment in China, any use of it by employers should be verified by the relevant government departments. Those employers using agency labour should provide the local authorities with a detailed list of all agency employees.

11. Add a clause on trade union consent

Recommendation: Employers should obtain the consent of the enterprise trade union prior to hiring agency workers.

Rationale: It is the basic duty of trade unions to protect the legitimate rights and interests of workers. To avoid employer abuse of agency labour and the negative effects that would have on the workforce, the law should give the trade union the right to guide and supervise employers in the use of agency workers.

12. Add a clause on trade union supervision

Recommendation: Add the clause, "Local trade union federations shall have the right to monitor and supervise the use of agency labour. And if an employment agency or an employer violates the provisions of the Labour Contract Law, the unions have the right to demand that the Labour authorities rectify the situation."

Rationale: We believe that, while using the law to protect workers' basic rights, we must also mobilize all forces in society to supervise the implementation of the law. Trade unions should therefore play a full and active role in the supervision of employment agencies and the use of agency labour.

13. Insert into Chapter VII a liability clause for violations of the Labour Contract Law as specified in Article 67, "Employers shall not establish employment agencies or use such agencies to provide the employer or its subsidiaries with agency labour."

Recommendation: Insert the clause, "The Labour department will close down any business that violates this provision and shall impose a fine. The Industry and Commerce department shall revoke its business licence."

Rationale: Some employers, particularly state-owned enterprises and public institutions, are currently setting up their own employment agencies in a bid to cut costs. New employees hired by those agencies are then assigned to the employer. This phenomenon should be prohibited, and violators should be held legally liable.

14. Amend Article 92 of the Labour Contract Law

Recommendation: Fines should be increased for employment agencies and employers that violate the law.

The numbers of agency workers employed in China and the types of industries they are employed in are increasing all the time. China Labour Bulletin believes that although such a system does allow for flexible employment, it also destabilises labour relations. Moreover, the complex relationship between employers and agencies harms the legitimate rights and interests of agency workers. Given these problems, we call on the NPC and the NPC Standing Committee to add to its legislative agenda the drafting of a dedicated law on employment agencies and the use of agency labour.

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