

ARTICLES

U.S.-RUSSIA-EAST ASIA COMPARISONS OF DISPATCH (TEMPORARY) WORKER REGULATIONS

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Russia had few temporary workers in the 1990s, but after the fall of the Soviet Union and the entrance of foreign MNCs, the percent of workers on temporary contracts grew in 2014. In 2016, a new law was implemented that bans hiring temporary workers except through government-accredited agencies, but only for the purpose of substituting for employees who are temporarily absent from the workplace; to assist in the temporary expansion of production or services (for up to a maximum of nine months); and to provide temporary employment to certain approved categories of workers (i.e., full-time students, single parents, parents of multiple children, and former convicts).

This paper will compare and contrast the current labor protections of temporary dispatch workers in the U.S. and Russia, with consideration also of the recent legislative labor protections provided in the East Asian countries of China, South Korea, and Japan. Following the Introduction, the paper, in Part I discusses the phenomena of "fissurization," in employment relations and its resulting legal implications for the regulation of "dispatch (agency)" workers in the above countries. Part II compares and contrasts the regulatory approaches of the U.S. with Russia and the East Asian countries of China, Japan, and South Korea; and the Conclusion follows. Perhaps the menu of regulatory legislation provided in this paper will be useful for those looking for the tools to construct dispatch regulation in the U.S.

Keywords: labor and employment laws; dispatch workers; international and comparative laws; human resource management.

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Introduction

Russia had few temporary workers in the 1990s, but after the fall of the Soviet Union and the entrance of foreign MNCs, the percent of workers on temporary contracts grew in 2014.¹ In 2016, a new law was implemented that bans hiring

¹ According to the estimations of the Russian Ministry of Health, in the Russian Federation there are between 100,000–130,000 people working as temporary employees in the legal labor market in Russia (Feb. 20, 2017), available at <http://www.audit-it.ru/articles/personnel/a110/323705.html>. However statistical data in Russia are not precise especially regarding this category of workers whose legal status before the adoption of the law was not defined and even after remains vague. *See also*

temporary workers except through government-accredited agencies,² but only for the purpose of substituting for employees who are temporarily absent from the workplace; to assist in the temporary expansion of production or services (for up to a maximum of nine months); and to provide temporary employment to certain approved categories of workers (i.e., full-time students, single parents, parents of multiple children, and former convicts).³

China, Japan, and South Korea have also recently passed legislation that deal with the issues raised by the use of dispatch workers.

The legal issues become tangled when balancing legitimate needs of employers to use temporary replacements to fill unexpected temporary vacancies or during peak business periods. However, when employers hire temporary workers on a continuing or permanent basis (*permatemps*) and at cheaper wages or for hazardous work, and for core jobs within the company, a different set of issues arises, also affecting the job security of permanent regular employees. This is further entangled when there is the use of “independent contractors” and outsourcing or *insourcing* with “subcontractors,”⁴ further raising the issues of who is an “employee” and who is an “employer” or a “joint employer,” that is “jointly liable?”

In the U.S., permanent, full-time workers can perform the same duties side by side with a temporary employee who receives lower wages and fewer benefits and who can stay at that “temporary” job for an unlimited time. The European Union (EU) in 2008, to thwart the use of temporaries to reduce costs, mandated that temporary workers receive equal pay and working conditions as provided to permanent employees.⁵ More than half of the developed countries have addressed the issue with legislation to better protect temporary and permanent workers, including South

Delphine d'Amora, *New Law Curtails Widespread Temp Staffing*, The Moscow Times, May 6, 2014 (Feb. 20, 2017), available at <https://themoscowtimes.com/articles/new-law-curtails-widespread-temp-staffing-35152>.

² Федеральный закон от 5 мая 2014 г. № 116-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации», Собрание законодательства РФ, 2014, № 19, ст. 2321 [Federal law No. 116-FZ of May 5, 2014. On Amendments to Certain Legislative Acts of the Russian Federation, Legislation Bulletin of the Russian Federation, 2014, No. 19, Art. 2321].

³ *Id.* It also bans hiring workers to replace employees on strike or refused to work due to a violation of their labor rights, or sending them to work on hazardous facilities or in dangerous conditions; and they must be paid equally with permanent workers. Трудовой кодекс Российской Федерации от 30 декабря 2001 г. № 197-ФЗ, Собрание законодательства РФ, 2002, № 1 (ч. 1), ст. 3 [Federal law No. 197-FZ of December 30, 2001. Labor Code of the Russian Federation, Legislation Bulletin of the Russian Federation, 2002, No. 1 (Part 1), Art. 3] (with the Amendments), Art. 341.1, English version is available at https://www.wto.org/english/thewto_e/acc_e/rus_e/WTACCRUS58_LEG_363.pdf.

⁴ See discussion in Ronald C. Brown, *Korea-U.S. Labor Law Developments: Any Lessons?*, KLP Working Paper Series (Korea Legislation Research Institute, 2014), at 161–164.

⁵ Directive 2008/104/EC of the European Parliament and of the Council of November 19, 2008 on Temporary Agency Work, O.J. L 327, December 5, 2008, p. 9–14 (Feb. 20, 2017), available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008L0104>.

Korea, Japan, China, and Russia (effective 2016).⁶ Regulations vary from a Russian general ban on the use of temporary workers (“outstaffing”) to a South Korean law that converts workers to permanent status after a certain period of time in the temporary position.⁷

This paper will compare and contrast the current labor protections of temporary dispatch workers in the U.S. and Russia, with consideration also of the recent legislative labor protections provided in the East Asian countries of China, South Korea, and Japan. Following the Introduction, the paper, in Part I discusses the phenomena of “fissurization,”⁸ in employment relations and its resulting legal implications for the regulation of “dispatch (agency)” workers in the above countries. Part II compares and contrasts the regulatory approaches of the U.S. with Russia and the East Asian countries of China, Japan, and South Korea; and the Conclusion follows. Perhaps the menu of regulatory legislation provided in this paper will be useful for those looking for the tools to construct dispatch regulation in the U.S.

⁶ **South Korea:** Labor Standards Act (Act No. 5309 of March 13, 1997), amended by Act. No. 11270 of February 1, 2012, Art. 44-2 (Feb. 20, 2017), available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/46401/74081/F437818795/KOR46401%20Eng2014.pdf>.

Japan: On September 11, 2015, the “Act to Partially Amend the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Protection of Dispatched Workers” was concluded. 2015 Amendments to the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers No. 88 of 1985 (Feb. 20, 2017), available at law.e-gov.go.jp/htmlldata/S60/S60HO088.html (English translation available on website).

China: Labor Contract Law of the People’s Republic of China (Order of the President of the People’s Republic of China No. 65), Arts. 57–67 (Feb. 20, 2017), available at <http://www.lawinfochina.com/display.aspx?id=6133&lib=law>; Decision of the Standing Committee of the National People’s Congress on Amending the Employment Contract Law of the People’s Republic of China (Order of the President of the People’s Republic of China No. 73) (2012) (Feb. 20, 2017), available at http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=92672; China Interim Provisions on Labor Dispatch (2014) (Feb. 20, 2017), available at <http://www.hrone.com/article/-China-Interim-Provisions-on-Labor-Dispatch> (hereafter called Interim Provisions).

Russia: Labor Code of the Russian Federation, *supra* note 3. For a succinct summary, see *Russia: Significant Labor Law Changes for 2016 Will Alter Temporary Employee Market*, Willis Towers Watson, June 25, 2014 (Feb. 20, 2017), available at <https://www.towerswatson.com/en/Insights/Newsletters/Global/global-news-briefs/2014/06/russia-2016-labor-law-changes-will-affect-temporary-workers>.

⁷ See discussion in Brown 2014, 159, at 161–164. For a broader overview of East Asian laws see Fang L. Cooke & Ronald Brown, *The Regulation of Non-Standard Forms of Employment in China, Japan and the Republic of Korea*, Conditions of Work and Employment Series No. 64 (Geneva: ILO, 2015), available at http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_414584.pdf.

⁸ This describes the phenomena of fragmented workplaces where employers use subcontracting, outsourcing, franchising, and independent contractors for formerly core operations. See David Weil, *Enforcing Labor Standards in Fissured Workplaces – the U.S. Experience*, 22(2) Economic and Labour Relations Review 33 (2011); David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It?* (Cambridge, MA: Harvard University Press, 2014).

1. Regulating Dispatch Workers in U.S., Russia, and East Asia

1.1. Changing Landscape of Employment Relationships

1.1.1. Fissurization

"The employment relationship in a growing number of industries with large concentrations of low wage workers has become 'fissured,' where the lead firms that collectively determine the product market conditions in which wages and conditions are set have become separated from the actual employment of the workers who provide goods or services. Instead, the direct employers of low wage workers operate in far more competitive markets that create conditions for non-compliance."⁹

While fissurization may occur *horizontally* through employer links with franchises, contracted subcontractors with labor chains, etc., it also occurs *vertically* as when one employer uses temporary workers from another employer, e.g., a staffing agency who is the technical employer.¹⁰

1.1.2. Dispatch/Agency Workers as Employees

Dispatch workers are hired by an independent *sender-company* and temporarily contracted out to a *user-employer* who may use that worker for an unlimited time and have them perform functions the same as other permanent user-employer workers. As the number of temporary workers rose around the globe,¹¹ including dispatch workers, regulations appeared in many countries to protect the rights of regular employees whose jobs were being displaced by the hiring of an increasing number of "temporary or leased" employees (*permatemps*).¹² Legislation varies and addresses a number of issues: goal to protect regular employees vs. temporary employees; regulation of the sending companies (temp agencies); the scope of the limitations on the type of jobs; the duration of the temporary status; the obligations of requiring comparative wages and benefits between temporary and regular employees; and the penalties for violations.

⁹ Weil 2011, at 33.

¹⁰ *Id.*

¹¹ Jessica R. Nicholson, *Temporary Help Workers in the U.S. Labor Market*, U.S. Department of Commerce, Economics and Statistics Administration, Issue Brief #03-15 (July 1, 2015) (Feb. 20, 2017), available at <http://www.esa.doc.gov/sites/default/files/temporary-help-workers-in-the-us-labor-market.pdf>. *Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce*, GAO/HEHS-00-76, General Accounting Office (June, 2000) (Feb. 20, 2017), available at <http://www.gao.gov/assets/240/230443.pdf>. It is reported that "from 1982 to 1998, the 'temporary help supply industry' grew by 577 percent, compared with 41 percent growth in total employment." Jeff Vockrodt, *Realizing the Need for and Logic of an Equal Pay Act for Temporary Workers*, 26 Berkeley J. Emp. & Lab. L. 583-584 (2005) (Feb. 20, 2017), also available at: <http://scholarship.law.berkeley.edu/bjell/vol26/iss2/14>.

¹² *Permatemps*, Center for a Changing Workforce (Feb. 20, 2017), available at <http://www.cfcw.org/permatemps.html>.

The nature of the employment relationship often needs to be identified and sometimes distinguished from “dispatch” workers. Are independent contractors and outsourced or insourced contractors or *gig* workers included under the dispatch legislation, particularly if under the law the sender and user employers are “joint” employers of the same employee?¹³

Mistakes in classifying workers as “employees” can be costly to the offending employer.¹⁴

1.2. Special Legislation: Temporary/Dispatch/Outstaffing? U.S., Russia, China, Japan, South Korea

1.2.1. U.S.

In the U.S., there is no specific national regulation for temporary, dispatched, or leased employees, though their number is significant.¹⁵ In the U.S., it is reported that “from 1982 to 1998, the ‘temporary help supply industry’ grew by 577 percent, compared with 41 percent growth in total employment.”¹⁶ And the growth continues; according to the American Staffing website,

more than three million temporary and contract employees work for America’s staffing companies during an average week. During the course of a year, America’s staffing companies hire nearly 16 million temporary and contract employees. Most (76%) work full time, comparable to the overall workforce (82%). One-third (35%) were offered a permanent job by a client where they worked on an assignment... Individual assignments range from a few hours to several years; overall employment tenure averages just over three months.

¹³ See Ronald C. Brown, *An Employee By Any Other Name?* in *Attività transnazionali: sapere giuridico e scienza della traduzione* 107–122 (P. Sandulli, M. Faioli, eds., Roma: Nuova Cultura, 2011). Also see discussion on U.S. developments on joint liability under new case law. Scott Prange, *Managing the Workforce in the Gig Economy*, 20(6) *Hawaii Bar Journal* 4 (2016).

¹⁴ *Vizcaino v. Microsoft Corporation*, 120 F.3d. 1006 (9th Cir. 1998), cert. denied, 522 U.S. 1098 (1998). Microsoft reached a \$96.9 million settlement with a group of freelance workers who worked for Microsoft after the 9th Circuit found that the workers were in fact common law employees and not independent contractors and were entitled to participate in Microsoft’s various pension and welfare plans. And see Robert J. Bohner Jr. et al., *Beware the Legal Risks of Hiring Temps*, *Workforce*, October 17, 2002 (Feb. 20, 2017), available at <http://www.workforce.com/articles/beware-the-legal-risks-of-hiring-temps>.

¹⁵ See Rebecca Smith & Claire McKenna, *Temped Out: How the Domestic Outsourcing of Blue-Collar Jobs Harms America’s Workers* (National Employment Law Project 2014) (Feb. 20, 2017), available at <http://www.nelp.org/publication/temped-out-how-domestic-outsourcing-of-blue-collar-jobs-harms-americas-workers/>.

¹⁶ See *M. B. Sturgis, Inc.*, 331 N.L.R.B. 1298 (2000) and *Contingent Workers: Incomes and Benefits Lag Behind Those of Rest of Workforce*, supra note 11 (Feb. 20, 2017), available at <http://www.gao.gov/assets/670/669899.pdf>, and <http://www.gao.gov/products/HEHS-00-76>.

Staffing employees work in virtually all occupations in all sectors: 37% Industrial; 28% Office–Clerical and Administrative; 13% Professional–Managerial; 13% Engineering, Information Technology, and Scientific; 9% Health Care.¹⁷

With vertical fissurization, employers increasingly contract labor from another employer that supplies the labor. Under the current trend of law where workers are economically dependent on both employers or controlled by the user employer, joint employer liability is likely. These temporary employers are regularly paid lower wages and have lower or fewer benefits than the permanent employees of the user employer with whom they are working. Labor laws apply to most workers, depending on compliance with statutory definitions of “employee” and “employer.” Therefore, *minimum* labor standards and conditions must be met for covered employees though that is not to say temporary, subcontracted, or dispatched employees must receive the same wage and benefit package paid to the regular employee working beside them. The Equal Pay Act, protecting against gender discrimination, does not necessarily provide protection for dispatched temporary workers so as to provide equal pay between temporary and permanent employees.¹⁸ Corporations in the business of supplying temporary labor are regulated by individual state laws as are other businesses. The numbers of temporary and dispatched workers in the U.S. continues to climb.¹⁹

1.2.2. Russia

In Russia the fissurization of the labor market took place after the collapse of the Soviet Union (USSR). The Soviet period had been characterized by full employment on open ended contracts and the Labor Code (2001) recognized only few atypical

¹⁷ *Staffing Industry Statistics*, American Staffing Association (Feb. 20, 2017), available at <https://americanstaffing.net/staffing-research-data/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/>.

¹⁸ The EEOC that enforces the Equal Pay Act has stated that “temporary workers often do not receive compensation on par with their permanent counterparts. The Commission does not consider this practice discrimination *per se*. But it does recognize the potential for this practice to be discriminatory in application, particularly in light of data showing that women are more likely than men to work as temporary employees. Thus, the Commission’s compliance manual states that in determining whether employees’ status as temporary vs. permanent is nondiscriminatory, the following issues should be considered: 1) whether the wage differential is applied uniformly regardless of employees’ protected status (e.g., race, sex, etc.); 2) whether the differential conforms to the nature and duration of the job; and 3) whether the differential conforms with a nondiscriminatory customary practice within the industry and establishment. See EEOC Compliance Manual Section 708.5(3) (BNA) 708:0023.” *Equal Employment Opportunity*, U.S. Equal Employment Opportunity Commission (August 2000) (Feb. 20, 2017), available at https://www.eeoc.gov/eeoc/foia/letters/2000/titlevii_epa_wage.html. See also Vockrodt 2005, at 583.

¹⁹ Nicholson 2015, *supra* note 11. In the EU, since 2008 there has been a Directive that applies to the working conditions of temporary employees and entitles the temporary employees to equal treatment including: access to amenities and collective services, wages, and other protections and rights. It further recognizes temporary-work agencies as employers. Directive 2008/104/EC of the European Parliament and of the Council of November 19, 2008 on Temporary Agency Work, *supra* note 5.

forms of work, such as fixed term, part-time and apprenticeship contract.²⁰ In Russia temporary work agencies (TWA) appeared in the 1990s mainly due to the entrance of foreign MNCs into the Russian labor market. Although proposals to regulate temporary agency work were put forward earlier, it was regulated in 2014, by a law that was not effective until January, 2016.²¹ The delay in adoption of this law and its implementation is explained by the fact that the main shareholders (the trade union, State and employers associations) were still negotiating a mutually acceptable compromise. The trade union labeled TWA as an absolute evil and a worst form of worker exploitation and demanded its total ban; whereas employers and agencies actively lobbied in its favor. As a consequence, the new law represents a sort of a paradoxical compromise; on one hand the law bans most temporary workers, but on the other hand it allows accredited temporary work agencies in some cases to temporarily send workers to the third party host companies. So the same law both prohibits and allows the use of temporary workers dispatched from a TWA.

Under the law, temporary agency work is put under strict control and accredited private employment agencies (PEAs) must satisfy special accreditation requisites.²² PEAs must supervise the actual use of posted employees' labor by the receiving party with regard to their employment function, as well as monitoring the receiving party's compliance with labor laws. In addition, joint responsibility (subsidiary responsibility) is assigned in relation to the employment contracts with workers under the staff secondment agreement (payment of wages, annual leave and so on).²³ As of January 1, 2016 the law also contemplates the possibility of workers dispatch by other legal entities (including foreign ones with their affiliates) that comply with the requirements prescribed by law (the presence of an affiliation or a shareholder agreement with a legal entity receiving posted staff).²⁴

²⁰ Labor Code of the Russian Federation, *supra* note 3.

²¹ *Id.*

²² These include: minimum capital of at least one million rubles; lack of indebtedness to the Russian budget. The forms of such reports are regulated by the Order of the Ministry of Labor and Social Protection of the Russian Federation No. 265n from May 30, 2016 [Приказ Министерства труда и социальной защиты РФ от 30 мая 2016 г. № 265н] (Feb. 20, 2017), available at http://www.rostrud.ru/rostrud/devyatelnost/?CAT_ID=6261. Labor Code of the Russian Federation, *supra* note 3. The accreditation rules are established in the Order of the Government of the Russian Federation No. 1165 from October 29, 2015, Legislation Bulletin of the Russian Federation, 2015, No. 45, Art. 6255 [Постановление Правительства РФ от 29 октября 2015 г. № 1165 «Об утверждении Правил аккредитации частных агентств занятости на право осуществления деятельности по предоставлению труда работников (персонала)», Собрание законодательства РФ, 2015, № 45, ст. 6255], according to which PEA must send annual reports to the special accreditation bodies.

²³ Labor Code of the Russian Federation, Art. 341.1(5), *supra* note 3. See also Jon Hellevig et al., *Awara Russian Labor Law Guide 2014*, Awara Group (2014), at 27 (Feb. 20, 2017), available at www.awaragroup.com/wp-content/uploads/2015/05/awara-labor-law-guide.pdf.

²⁴ Art 18.1(2) of the Federal law No. 36-FZ from April 20, 1996 on the employment in the Russian Federation, Legislation Bulletin of the Russian Federation, 1996, No. 17, Art. 1915 [Федеральный

Temporary agency work is defined as work performed by an employee at the request of the employer in the interest and under the control and supervision of a natural person or legal person that is not the employee's actual employer.²⁵ Under the law, temporary agency work is put under strict control and employees dispatch is allowed for the purpose of substituting for employees who are temporarily absent from the workplace; to assist in the temporary expansion of production or services (for up to a maximum of nine months); and the law exempts certain categories of workers (i.e., full-time students, single parents, parents of multiple children, and former convicts).²⁶

Other restrictions on the dispatch workers are similar to those generally adopted in other countries and include the prohibition of replacement of employees engaged in industrial action; performance of work during idle time or during a bankruptcy procedure or with the purpose of avoiding collective redundancies or replacement of employees who refuse to perform work in cases established by labor law (for instance, in cases in which workers temporarily suspend work because of a delay in the payment of wages exceeding 15 days) and fines may be imposed for violations of the Dispatch Law.²⁷ It also banned hiring workers to replace employees who refused to work due to a violation of their labor rights, or sending them to work on hazardous facilities or in dangerous conditions.²⁸ So the same law both prohibits and allows some use of temporary workers dispatched from a TWA.

The law permits staff posting by PEAs to certain activities such as providing housekeeping support for an individual who is not a self-employed entrepreneur; temporary performance of duties of an absent employee with a right to return to the job; cases when it is possible under the law to conclude fixed-term contract, cases of performance of work related to a temporary (up to nine months) expansion of

закон от 20 апреля 1996 г. № 36-ФЗ «О внесении изменений и дополнений в Закон Российской Федерации «О занятости населения в Российской Федерации», Собрание законодательства РФ, 1996, № 17, ст. 1915], as amended by the Federal law No. 116-FZ of May 5, 2014; see also *Agency Labour Law: Legal Regulation of Staff Secondment in Russia*, Flash Report: Russia Issue No. 21(92), May 2014 (Feb. 20, 2017), available at https://www.pwc.ru/en/legal-services/news/assets/agency_labour.pdf. Labor Code of the Russian Federation (with the Amendments), *supra* note 3.

²⁵ Law of the Russian Federation No. 1032-I from April 19, 1991 on employment of population in the Russian Federation (as amended on March 9, 2016), Gazette of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1991, No. 18, Art. 566 [Закон РФ от 19 апреля 1991 г. № 1032-I «О занятости населения в Российской Федерации», Ведомости Съезда народных депутатов Российской Федерации и Верховного Совета Российской Федерации, 1991, № 18, ст. 566], Art. 18.1 (Feb. 20, 2017), available at <http://base.garant.ru/10164333/>.

²⁶ Labor Code of the Russian Federation, Art. 341.2, *supra* note 3.

²⁷ Labor Code of the Russian Federation, Art. 142, *supra* note 3. For penalties, see the full text of the Code of Administrative Offences of the Russian Federation No. 195-FZ from December 30, 2001 as amended October 3, 2016 [Кодекс Российской Федерации об административных правонарушениях от 30 декабря 2001 г. № 195-ФЗ], Arts. 5.27 and 5.27.1 (Feb. 20, 2017), available only in Russian at http://www.consultant.ru/document/cons_doc_LAW_34661/.

²⁸ d'Amora 2014, *supra* note 1.

manufacturing capacity or scope of services provided. In this later case if the quota of temporary workers exceeds 10 percent of the number of workers of the receiving party, the opinion of the primary trade union should be taken into account.²⁹

As for the employment conditions and the anti-discrimination principle, the law establishes it only to remuneration by stating that the wages of the dispatch employees should not be worse if compared to those of employees of the user-enterprise with the same qualifications and performing the same functions.³⁰ Insurance contributions for the posted employees must be paid on the basis of an insurance tariff determined in accordance with the type of business operations performed by the user enterprise which is obliged to provide the agency with all the necessary information in this regard.³¹

1.2.3. East Asia: China, Japan, South Korea

1.2.3.1. China

In *China*, there is recent legislation³² regulating the use of dispatch workers. As of 2014, dispatched workers can be used only in temporary positions (defined as 6 months or less), auxiliary positions, or in substitute positions,³³ and provided workers must not comprise more than 10 percent of a company's total workforce.³⁴

In 2008, after the Labor Contract Law (LCL) and the Labour Disputes Mediation and Arbitration Law (LDMAL) took effect, the number of mediations and arbitrations rose dramatically, spurring greater enforcement and award of remedies.³⁵ Therefore, using irregular employees left employers with some flexibility; and while *probationary* and *part-time* workers gave employers some measure of discretion, it was the *dispatch* workers that provided the most. Dispatch workers were largely excluded from the

²⁹ Art. 18.1(2) of the Federal law No. 36-FZ from April 20, 1996 as amended by the Federal law No. 116-FZ of May 5, 2014, *supra* note 24.

³⁰ Labor Code of the Russian Federation, Art. 341.1, *supra* note 3. See also d'Amora 2014, *supra* note 1.

³¹ Art. 22 of the Federal law No. 125-FZ from July 24, 1998 on the compulsory social insurance from accidents at work and professional diseases, Legislation Bulletin of the Russian Federation, 1998, No. 31, Art. 3803 [Федеральный закон от 24 июля 1998 г. № 125-ФЗ «Об обязательном социальном страховании от несчастных случаев на производстве и профессиональных заболеваний», Собрание законодательства РФ, 1998, № 31, ст. 3803], as amended by the Federal law No. 116-FZ of May 5, 2014.

³² Labor Contract Law, Arts. 57–67, *supra* note 6; Decision of the Standing Committee of the National People's Congress, *supra* note 6; Interim Provisions, *supra* note 6.

³³ Interim Provisions, *supra* note 6. Portions first presented in Cooke & Brown 2015, *supra* note 7.

³⁴ Interim Provisions, Arts. 4 & 28, *supra* note 6. See also *China: Strict Limits and Cap on Labour Dispatch Arrangements*, Linklaters (February 2014) (Feb. 20, 2017), available at www.linklaters.com/pdfs/mkt/shanghai/A17733169.pdf.

³⁵ See Ronald C. Brown, *Defusion of Labor Disputes in China: Collective Negotiations, Mediation, Arbitration, and the Courts*, 3 China-EU Law J. 117 (2014).

protections of the LCL. Inadvertently, the LCL provided employers with an incentive to replace full-time workers with dispatch workers in order to avoid the heightened restrictions of the LCL.³⁶ In 2010, the ACFTU estimated there were 60 million dispatch workers in China³⁷ and it was reported there were 26,000 labor dispatch companies.³⁸ These agency workers were often reported to be making lower wages and receiving much less social security protection than employees of the user firms.³⁹

In response to this incentive misalignment, in 2012 the Standing Committee of the National People's Congress made revisions that addressed the issue.⁴⁰ The Chinese government tightened and clarified the regulation of agency employment and the agency industry and in 2014 the Ministry of Human Resources and Social Security (MOHRSS) issued the Interim Provisions on Labor Dispatch.⁴¹ Effective in March 2014, dispatched workers must not comprise more than 10 percent of a company's total workforce.⁴² Dispatched workers can be used only in temporary positions (defined as 6 months or less), auxiliary positions and substitute positions (e.g. to cover maternity leave, long-term sick leave, and study leave).⁴³ The Interim Provisions detail obligations for both the employer and labor dispatch agency on the signing and termination of labor contracts,⁴⁴ social insurance contributions,⁴⁵ and work-related injuries, and pre-service training and safety education,⁴⁶ among other items. A tougher penalty is prescribed for violations, with a fine between 5,000 yuan and 10,000 yuan per employee.⁴⁷

³⁶ Virginia H. Ho & Huang Qiaoyan, *The Recursivity of Reform: China's Amended Labor Contract Law*, 37 *Fordham International Law Journal* 973, 982–983 (2014).

³⁷ Genghua Liu, *Private Employment Agencies and Labour Dispatch in China*, SECTOR Working Paper No. 293 (Geneva: ILO, 2014) (Feb. 20, 2017), available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_246921.pdf.

³⁸ *China Labor Dispatch Industry Indepth Research and Investment Strategy Report, 2013–2017*, QianZhan (Feb. 20, 2017), available at <http://en.qianzhan.com/report/detail/6cdf8ac1017640a3.html>, cited in Daniel S.S. Cairns, *New Formalities for Casual Labor: Addressing Unintended Consequences of China's Labor Contract Law*, 24(1) *Washington International Law Journal* 238 (2015).

³⁹ *China Amends Labor Contract Law to Eliminate Labor Dispatch Abuse*, Bryan Cave, April 18, 2013 (Feb. 20, 2017), available at <https://www.bryancave.com/images/content/1/9/v2/1949/LaborAlert4-18-13.pdf>.

⁴⁰ Decision of the Standing Committee of the National People's Congress, *supra* note 6.

⁴¹ Interim Provisions, *supra* note 6.

⁴² Interim Provisions, *supra* note 6. See also China: Strict Limits and Cap on Labour Dispatch Arrangement, *supra* note 34.

⁴³ Interim Provisions, Art. 3, *supra* note 6.

⁴⁴ *Id.* Art. 8.

⁴⁵ *Id.* Art. 8(4). The dispatch agreements shall stipulate the positions to which the workers are dispatched, the number of persons to be dispatched, the term of dispatch, the amounts and terms of payments of remunerations and social security premiums, and the liability for breach of agreement.

⁴⁶ *Id.* Art. 8.

⁴⁷ Labor Contract Law, Art. 92, per Art. 20, *supra* note 6. Interim Provisions, *id.*

Art. 66 of the LCL defines the scope of lawful labor dispatch workers to include temporary, auxiliary, and substitute positions; the amended Art. 66 also mandates that dispatch work can “only” be these three types of workers.⁴⁸ The Interim Provisions further define these terms as follows.⁴⁹ *Temporary* is now defined as work that does not exceed six months duration. *Auxiliary* is defined as a non-primary business position that supports the receiving employer’s core business. *Substitute positions*, also translated as “back-up jobs,” are defined as positions that provide temporary coverage for full-time employees that are on leave.⁵⁰ The Interim Provisions further define and regulate labor dispatch agencies⁵¹ and penalties are provided for violations.⁵²

With the enactment of the dispatch laws, the employers’ labor strategies have turned to changing non-standard positions into permanent positions, using outsourcing, part-time work, intern placement, and volunteer work. In particular, business outsourcing has been a popular strategy for large SOEs and foreign firms to cope with the new labor regulations.⁵³

But reforms may be difficult. Even since the passage of the dispatch laws, it is reported some companies continue to violate the regulatory obligations, employing dispatch workers outside the three permissible categories in core jobs, exceeding the 10 percent limit, requiring workers to pay recruitment fees, and not fully paying social security obligations.⁵⁴

1.2.3.2. Japan⁵⁵

In 2015, the Japanese Diet approved an amendment to its Worker Dispatch Law and amid some controversy removed most limitations to employ dispatch workers, though with a three year limit on their use.⁵⁶ The Dispatch Law is said to have “the aim of gaining greater employment stability and protection for dispatched workers,

⁴⁸ Labor dispatch workers are to be temporary, auxiliary or substitutive positions. Labor Contract Law, Art. 66, *supra* note 6.

⁴⁹ Interim Provisions, Art. 3, *supra* note 6.

⁵⁰ See discussion in *China Amends Labor Contract Law to Eliminate Labor Dispatch Abuse*, *supra* note 39.

⁵¹ Interim Provisions, Art. 7, *supra* note 6. Labor Contract Law, Art. 57, Amended, *id.*

⁵² Interim Regulations, Arts. 20–24, *supra* note 6, referencing Arts. 92, 48, 87, and 83 in the Labor Contract Law, *id.*

⁵³ Qiao Jian, 2014: *China Labour Relations in the Economic Structure Adjustment in 2015 Blue Book of China's Society: Society of China Analysis and Forecast* 252–271 (P.L. Li, G.J. Chen & Y. Zhang, eds., Beijing: Social Science Academy Press, 2014). As a result, from 2011 to the end of 2013, the total number of dispatched workers in the four big banks in China had reduced from 172,900 to 142,600 workers. *Id.*

⁵⁴ *Labor Dispatch Workers in China*, Fair Labor Association (March 2016) (Feb. 20, 2017), available at <http://www.fairlabor.org/sites/default/files/documents/reports/march-2016-dispatch-labor-in-china.pdf>.

⁵⁵ See Cooke & Brown 2015, *supra* note 7, at 22–24 and 40–48.

⁵⁶ 2015 Amendments to the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, *supra* note 6.

among other benefits. This would be done by setting new time limits under the rationale of making it a rule that dispatch work should be temporary and provisional in nature, and by creating schemes for improving the quality of worker dispatching undertakings, giving support for career formation including the conversion of dispatched workers to regular employees, and so on.⁵⁷

In 2014, dispatch workers were reported to constitute about 11.9 million, about 6.1 percent of all employees in Japan; and nearly 11 percent of Japanese employers retained dispatch workers.⁵⁸ Not surprisingly, the larger employers in Japan tend to have more dispatch workers than smaller employers as reflected by the fact that 80.5 percent of employers with at least 1,000 employees use dispatch workers.⁵⁹

Japan has had a Worker Dispatch law since 1985 reportedly not aimed at protecting the dispatch worker, but rather for the purpose of preventing substitution for regular employment.⁶⁰ In 2012, the law had “26 business areas” that placed no restrictions on the use and duration of employment of dispatch workers, whereas for ordinary work outside those categories there was a three year term limit. Thereafter, under the law, if the worker outside the 26 business areas was retained, he or she would have a required regular employment relationship. These 26 categories were regarded as “specialized” or as involving specific skills or knowledge—suggesting that the use of dispatched workers for these job categories did not involve substitution for regular employment.

The 2015 amended Revision eliminated the 26 business categories for dispatch workers and removed restrictions on any job category, though there is a three-year limit on the use of *specific* dispatch workers in a specific position, after which the dispatch agency must send a new worker, though the displaced worker may be employed in a different department of the employer or given permanent status. There also is a three year limitation on dispatch workers being sent to the open position of the employer, unless the union or representative of a majority of employees is “asked for its opinion” (no consent required) for a decision to “roll over” the three year limit.⁶¹

⁵⁷ Sugeno Kazuo, *Labor Situation in Japan and Its Analysis: General Overview 2015/2016*, The Japan Institute for Labour Policy and Training, at 180 (Feb. 20, 2017), available at <http://www.jil.go.jp/english/lsj/general/2015-2016/2015-2016.pdf>.

⁵⁸ Michihiro Mori, *Recent Amendments to Employment Laws in Japan*, 28th Annual LAWASIA Conference 2015, at 4 (Feb. 20, 2017), available at www.lawasia.asn.au/MORI.pdf?blobheadername1=Content...MORI.pdf.

⁵⁹ *Id.*

⁶⁰ Before 1985 the use of dispatch workers was prohibited under Art. 6 of the Labor Standards Act (“no person shall obtain profit by intervening, as a business, in the employment of others”), until the 1985 Dispatch Worker Act made an exception, beginning the path toward de-regulation. Employment Security Act (Act No. 141 of November 30, 1947, as amended) (Japan) (Feb. 20, 2017), available at <http://www.japaneselawtranslation.go.jp/law/detail?id=10&vm=04&re=01>.

⁶¹ Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (Act No. 88 of 1985), Art. 40-5 (Japan) (Feb. 20, 2017), available at <http://www.cas.go.jp/jp/seisaku/hourei/data/aspo.pdf>. The bill to amend the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (the “Worker Dispatching Act”) was enacted on September 11, 2015, and came into force on September 30, 2015.

Many observers conclude, therefore, that there is no longer any meaningful three year limit and “the new legal framework will trap workers into a dispatch relationship for their entire working lives (known as *shōgai haken* – meaning “lifelong dispatch”).⁶² An earlier provision of the proposed law that provided that an employment relationship may be deemed to exist directly between the dispatch worker and the user company after three years was removed by the Diet.⁶³

All dispatching agencies are now required to obtain licenses and to take measures to secure employment opportunities for dispatch workers who finish their terms. User employers are to provide any necessary training of the new dispatch workers and user employers must “provide them with the same level of access to welfare facilities (*fukurikōsei shisetsu* – meaning dorms, cafeterias, and recreational facilities used by employees, etc.) that company employees enjoy.”⁶⁴ “With the revision of the Worker Dispatch Act in 2012, a direct employment offer shall be considered to be provided by the Client Company to the dispatch workers when there are illegal items in the worker dispatch arrangement, including breach of the term limit, which has taken effect in October 2015 (Article 40-6 of the Workers Dispatching Act).”⁶⁵

The 2015 law provides an “exemption,” to the worker dispatch period regulations in that it shall not be applicable to the following cases: “(i) the dispatched worker enters into an employment agreement with the worker dispatch business operator without a definite period: ... under the new law, depending upon the worker dispatch period, the dispatch company is obligated to provide indefinite term contracts to their employees (i.e., the dispatched workers) and if the dispatch company complies with this obligation ... an exemption will apply and thus, the new law will not apply to limit the period of dispatch to 3 years. (ii) the dispatched worker is sixty (60) years of age or older; (iii) the dispatched worker engages in project of which termination date is clear; (iv) the dispatched worker works for ten (10) days per month or half of the working days for other general workers; and (v) the dispatched worker is dispatched by reason of maternity leave, family-care leave, etc.”⁶⁶

⁶² Hifumi Okunuki, *Legal Change Will Make Temp Purgatory Permanent for Many Japanese Workers*, Zenkoku Ippan Tokyo General Union, September 29, 2015 (Feb. 20, 2017), available at <http://tokyogeneralunion.org/legal-change-will-make-temp-purgatory-permanent-for-many-japanese-workers/>.

⁶³ Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers, Art. 49, para. 1, Arts. 58–61, *supra* note 61.

⁶⁴ See Florence Cheung, *Changing Times: New Rules for Dispatch Workers in Japan*, Lexology, April 7, 2014 (Feb. 20, 2017), available at <http://www.lexology.com/library/detail.aspx?g=a1f10c74-28fb-47c5-a123-3299bf387c4d>.

⁶⁵ Trent Sutton & Aki Tanaka, *Japan: Amendment to Worker Dispatch Act*, Littler, December 8, 2015, note 5 (Feb. 20, 2017), available at <https://www.littler.com/publication-press/publication/japan-amendment-worker-dispatch-act>.

⁶⁶ Masanori Nakajima, *Summary of Amendments to the Worker Dispatch Law (Law No. 88 of 1985, as amended), Effective as of September 30, 2015*, Tozai Sogo Law Office (Feb. 20, 2017), available at <http://www.tozai-sogo.com/news-1/iff41vsd19/Summary-of-Amendments-to-the-Worker-Dispatch-Law-Law-No-88-of-1985-as-amended-Effective-as-of-September-30-2015>.

The 2015 law in order to pursue dispatched worker's employment stabilization further provides: a worker dispatch business operator is obliged to (a) request host companies to directly employ a dispatched worker following the expiration of his dispatched term; (b) provide a new host company to the dispatched worker once the dispatch period to the initial Client expires; (c) to enter into an employment agreement with the dispatched worker without a definite period; or (d) any other measures to pursue dispatched worker's employment stabilization.⁶⁷

While equal treatment for part-time and fixed-term-contract workers is mandatory in European countries,⁶⁸ equal pay of dispatched workers and directly employed workers in Japan, under the revised law, is still just something that dispatching agencies must make "efforts" to achieve.

Thus, it seems to be a fair question, whether Japan's 2015 Worker Dispatch Law Amendment, moving away from the original purpose of the law of protecting the regular workers, moves any closer to the protection of dispatch workers as workers or just provides added discretion to the employer?

1.2.3.3. South Korea⁶⁹

In *South Korea*, the Dispatched Workers Act⁷⁰ regulates the use of dispatch workers sent by a temporary work agency that is also regulated.⁷¹ This law prohibits a company from "engaging dispatched workers in direct production processes and can only engage dispatched workers in 32 specified business roles."⁷² Any employer who dispatches or uses a dispatched worker contrary to the Dispatched Workers Act may be subject to criminal sanctions.⁷³ The dispatching agency is closely regulated by the statute and must meet certain requirements.⁷⁴

The law also mandates that if a dispatched employee has worked for the company for two years, the dispatched employee may be deemed to be a company employee. Further, the law requires the employment conditions for dispatched workers should be the same that apply to the company's regular employees in the same or similar jobs.⁷⁵

⁶⁷ Nakajima, *supra* note 66.

⁶⁸ Directive 2008/104/EC of the European Parliament and of the Council of November 19, 2008 on Temporary Agency Work, Art. 5, *supra* note 5.

⁶⁹ Portions of the material first presented in Cooke & Brown 2015, *supra* note 7, at 24–28 and 49–56.

⁷⁰ Act on the Protection, etc., of Dispatched Workers (Act No. 5512 of February 20, 1998), last amended Act No. 12632 (Feb. 20, 2017), available at http://elaw.klri.re.kr/eng_service/lawView.do?hseq=25605&lang=ENG.

⁷¹ *Id.* Arts. 7 to 19.

⁷² Jeong Han Lee & Anthony Chang, *Employment and Employee Benefits in South Korea: Overview*, Practical Law (Feb. 20, 2017), available at <http://us.practicallaw.com/6-508-2342#>.

⁷³ Act on the Protection, etc., of Dispatched Workers, Arts. 42–45, *supra* note 70.

⁷⁴ *Id.* Arts. 5–19.

⁷⁵ Act on the Protection, etc., of Dispatched Workers, *supra* note 70.

The *Act on the Protection, etc., of Dispatched Workers*⁷⁶ prohibits discriminatory treatment of temporary agency or “dispatched workers” in wages and other working conditions, as compared to a directly employed worker “who performs the same work in the business of the using employer.”⁷⁷ This law defines “dispatched worker” as a worker who maintains an employment relationship with a “sending employer,” (temporary agency) and works for a “using employer” under the direction and order of the using employer and with a worker dispatch contract.⁷⁸

The *Labor Standards Act*, which limits the term of any fixed-term labor to one year, unless the term is required for the completion of a particular project, provides a further requirement on the use of dispatch workers.⁷⁹ In order to prevent the use of continuing fixed-term contracts to employ a worker in long-term non-regular status, the *Act on the Protection, etc., of Fixed-Term and Part-Time Employees* provides an employer may hire an individual as a fixed-term employee only for a period of up to two years (unless for justifiable reasons).⁸⁰ The *Act on the Protection, etc., of Dispatched Workers* also mandates that the length of an employment period for a dispatched worker may not exceed two years (unless for justifiable reasons) or else the employer is obligated to directly employ the dispatched worker.⁸¹

Effective in 2012, the amended Protection of Dispatched Workers Act, requires an employer to directly employ the dispatched worker immediately even when the term of dispatch does not exceed two years if the dispatch is deemed to be illegal, as for example, where the dispatched workers are used for jobs prohibited by the law⁸² or not included in the 32 statutorily-permitted categories.⁸³ Use of dispatched workers for “core” Company functions not on the Dispatch Law’s list of allowed jobs is a violation, as is their use for purposes specifically disallowed, such as construction, stevedoring, hazardous jobs, etc.⁸⁴

⁷⁶ Parts of the following material was first published in Brown 2014, at 159, 161–164.

⁷⁷ Act on the Protection, etc., of Dispatched Workers, Art. 21, *supra* note 70.

⁷⁸ *Id.* Art. 2.

⁷⁹ Labor Standards Act, Art. 16, *supra* note 6.

⁸⁰ Act on the Protection, etc., of Fixed-Term and Part-Time Employees (Act No. 8074 of December 21, 2006), amended by Act No. 11273 of February 1, 2012, Art. 4 (Feb. 20, 2017), available at <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/79807/85982/F-2091075080/KOR79807%20Eng%202012.pdf>.

⁸¹ Act on the Protection, etc., of Dispatched Workers, Arts. 5(2) and 6, *supra* note 70.

⁸² *Id.* Art. 6, *supra* note 70.

⁸³ Act on the Protection, etc., of Dispatched Workers, Addenda <Presidential Decree No. 22799 of March 30, 2011 (effective July 1, 2011)> (jobs permitted for worker dispatch).

⁸⁴ *Dispatched Workers Used in Ways Contrary to Statutory Limitations Should Be Immediately Employed by Service Recipient Company Under Amended Statute*, American Bar Association Section of Labor and Employment Law (Feb. 20, 2017), available at http://www.americanbar.org/content/newsletter/groups/labor_law/int_newsletter/ilel_news20121/april2012/1204_aball_int_skorea.html. See also Global Legal Insights (Feb. 20, 2017), available at <http://www.globallegalinsights.com/practice-areas/employment/global-legal-insights---employment-and-labour-law-4th-ed./korea>.

1.3. Related Issues

In addition to regulations placing limitations on the use of dispatch workers and sometimes on wage parity, other labor issues may arise. Are workers considered independent contractors or employees under various protective labor statutes, such as health and safety laws? If the latter, are they “employees” of which employer or both? Usually the obligations are on the “employer,” whether it is the sending or host employer or as joint employers.⁸⁵ Questions may still arise in a number of related areas. Do temporary/dispatch workers have the right to join a union⁸⁶ and if they have a union, must it be separate from the employer’s regular employees?⁸⁷ Who is the employer and does the law allow for “joint employers” for this and other labor rights?⁸⁸ These issues are left for future research projects. The dispatch laws may explicitly protect ILO standards, discussed below, or these rights may be found in general labor laws outside the dispatch law.

1.4. ILO Guidance?

The ILO provides some guidance on the global labor standards relating to dispatch workers.⁸⁹ The ILO has a convention dealing with labor dispatch agencies, Private Employment Agencies Convention, 1997 (No. 181).⁹⁰ It sets forth the framework for

⁸⁵ E.g., in the U.S. see OSHA: Protecting Temporary Employees (DOL) (July 24, 2013), available at https://www.osha.gov/temp_workers/.

⁸⁶ In the U.S., temporary employees may join a union. A question has been, which union, that of sender or user? The latest position is for them to join same union in the same bargaining unit as their co-worker permanent employees of the user employer who is a *joint employer* with the sender employer. Miller & Anderson, Inc. and Tradesmen International and Sheet Metal Workers International Association, Local Union No. 19, AFL–CIO, Case 05-RC-079249, July 11, 2016 (Feb. 20, 2017), available at <https://www.nlr.gov/case/05-RC-079249>.

⁸⁷ In China, dispatch workers may join the union of either the sending or using employer. Interim Provisions; Labor Contract Law, *supra* note 6.

Article 64. Dispatched workers have the right to join the labor union of the worker dispatch service provider or of the accepting entity or to organize such unions, so as to protect their own lawful rights and interests. *Id.*

⁸⁸ In Browning-Ferris Industries of California, Inc. d/b/a BFI Newby Island Recyclery, 362 NLRB No. 186 (2015) (Browning-Ferris), the Board majority substantially expanded the circumstances when multiple entities would be deemed a joint employer of particular employees.

⁸⁹ There are a number of ILO conventions (C) and recommendations (R) that relate to the employment relationship and can relate to temporary workers, including dispatch workers. C158 – Termination of Employment Convention, 1982 (No. 158); R166 – Termination of Employment Recommendation, 1982 (No. 166); C181 – Private Employment Agencies Convention, 1997 (No. 181); R188 – Private Employment Agencies Recommendation, 1997 (No. 188); R198 – Employment Relationship Recommendation, 2006 (No. 196); C175 – Part-Time Work Convention, 1994 (No. 175); R182 – Part-Time Work Recommendation, 1994 (No. 182).

⁹⁰ C181 – Private Employment Agencies Convention, 1997 (No. 181), International Labour Organization (Feb. 20, 2017), available at http://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:C181. See also the accompanying R188 – Private Employment Agencies Recommendation, 1997 (No. 188), Part II, International Labour Organization (Feb. 20, 2017), available at http://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:55:0:NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NODE:SUPen,R188,Document.

operation of private employment agencies; employment conditions; and treatment as regards such issues as pay, social protection, leave and pensions.⁹¹ Of the countries discussed in this paper, only Japan has ratified Convention 181.

The Convention on private employment agencies provides that the agencies should protect the workers core labor rights and keep them free from discrimination; the Convention provides that a Member state should regulate the agencies and provide that the necessary measures to ensure adequate protection for the workers employed by private employment agencies in the following areas: “(a) freedom of association; (b) collective bargaining; (c) minimum wages; (d) working time and other working conditions; (e) statutory social security benefits; (f) access to training; (g) occupational safety and health; (h) compensation in case of occupational accidents or diseases; (i) compensation in case of insolvency and protection of workers claims; (j) maternity protection and benefits, and parental protection and benefits.”⁹²

Additionally, the Convention provides that a Member state shall determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies providing the above services and the user enterprises regarding a list of labor rights issues.⁹³ The Recommendation states that there should be cooperation between the public employment services and the private employment agencies.⁹⁴ It also recommends providing laws for penalties, written contracts for the workers specifying terms and conditions, prohibiting their use to replace strikers, placing them into jobs of unacceptable risk, abuse, or discrimination, and a list of other worker-protective measures.⁹⁵

2. Regulatory Approaches Compared

2.1. Comparisons

In evaluating the various dispatch laws, there are numbers of factors that could be compared. For example, a. Was the aim of the law to “protect” regular employees or dispatch employees? b. Does the law regulate the temporary agency itself?

⁹¹ *Temporary Agency Work*, International Labour Organization (Feb. 20, 2017), available at <http://ilo.org/sector/activities/topics/temporary-agency-work/lang--en/index.htm>. See also *Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement* (Geneva: ILO, 2007) (Feb. 20, 2017), available at http://www.globalmigrationgroup.org/sites/default/files/uploads/UNCT_Corner/theme2/labor-migration/guide_to_private_employment_agencies_wcms_118153.pdf.

⁹² C181 – Private Employment Agencies Convention, Arts. 3, 4, 5, and 11, *supra* note 90.

⁹³ *Id.* Art. 2: “(a) collective bargaining; (b) minimum wages; (c) working time and other working conditions; (d) statutory social security benefits; (e) access to training; (f) protection in the field of occupational safety and health; (g) compensation in case of occupational accidents or diseases; (h) compensation in case of insolvency and protection of workers claims; (i) maternity protection and benefits, and parental protection and benefits.”

⁹⁴ R188 – Private Employment Agencies Recommendation, Part II, *supra* note 90.

⁹⁵ *Id.*

c. Does the law itself protect ILO labor rights? d. What is the scope? e. Does it limit jobs and/or duration? f. Are wages and conditions non-discriminatory compared with permanent workers? g. Are there penalties for violations?

2.1.1. U.S.

Though the U.S. has no national dispatch law, it does have dispatched workers sent to user companies by staffing companies, with all “employees” generally subject to state and federal protective labor laws. So there is no legislative goal to distinguish these workers from others. Usually staffing agencies are only regulated by state laws as corporations, the same as other companies. In the U.S., by either federal or state law most “employees,” including these dispatched workers, are protected by labor laws that uphold many of the ILO core labor rights, with questions sometimes arising, who is the employer – the sender, the user, or both jointly? Wages are not circumscribed by specific laws other than the labor law standards, such as minimum wages; so there can be higher pay for regular workers. Therefore, under current law in the U.S. there can be a dispatch worker and a permanent worker performing the same work for disparate pay for unlimited duration with no limitations on the types of jobs performed, including those that are core jobs or hazardous.

2.1.2. Russia

Notwithstanding its wide use for many years, temporary agency work has been regulated only recently. For a long time this market operated without much notice, so the aim of the new law was to address the abuses that took place. On the one hand it aims to put the temporary worker agencies under control and closer scrutiny in order to diminish the number of dishonest temporary staffing agencies. It also aimed to protect temporary workers by ensuring them equal treatment from the point of view of remuneration.⁹⁶

With regard to the legislative provision that allows employers to hire temporary workers to expand their company, but limits temporary workers to 10 percent of the employer’s workforce, a shortcoming of this limit is it must be taken to the trade union for its opinion. This seems difficult in practice as the trade union is often absent from many workplaces,⁹⁷ thus leaving the employer with much discretion on the number of dispatch workers it uses. Also the choice of the legislation to exempt from the limitations such categories as full-time students, single parents, parents with a large number of children, and former convicts is a somewhat unique feature and might be questionable.

⁹⁶ It is also aimed to ensure major revenues to the Fund of social insurance. Аутсорсинг персонала: запрет или легализация? [*Outsourcing of Personnel: Ban or Legalization?*], Tax Coach (Feb. 20, 2017), available at http://www.taxcoach.ru/about/news/Autsorsing_personala-_zapret_ili_legalizatsiya-/.

⁹⁷ There are only about 45 percent of workers organized in trade unions. Irina Kozina, *The Post-Soviet Unions*, 37(4) Notes of the Fatherland 94–98 (2007).

The law does not itself specify explicit sanctions for violations of the provisions, but does reference them to penalties outside the dispatch law; however, it does provide for *joint liability* and the user-company will be recognized as the subsidiary employer under the provisions of Art. 67(1) of the Labor Code stating that a person is considered to be employed by the employer by virtue of the fact that he/she started working with the awareness and consent of the latter.

Presumably these workers should not be subject to discrimination compared with their permanent employee counterparts and should be covered under the same labor law as the other workers but in light of the relatively weak enforcement of anti-discrimination laws, the practical implementation of the principle of the equal treatment of these workers also seems to be problematic.⁹⁸ Even if they are entitled to the wages not lower than the workers of the receiving company, in practice it is likely there will be some difficulty in achieving the same economic treatment. In Russia minimum wage is regulated by law and is periodically adjusted.⁹⁹ As it may happen in practice, a part of the salary is given as bonuses or informally so in case of claims TWA workers may be entitled only to the conventional quite low minimum. No specific rules are foreseen in case of dismissal so they are expected to be covered by general labor law provisions in this regard.

The practical outcome of this law is of course unclear. It may be expected that many unaccredited private agencies will disappear from the market. Moreover if the cost of TWA will be too high, employers may use alternative forms such as outsourcing, fixed-term contracts, part-time, dual job holding unpaid holidays and other ways in order reduce expenses.¹⁰⁰ Also the courts are traditionally oriented to the bilateral labor relationship and the claims and interpretation of new trilateral norms may present new challenges.

2.1.3. China, Japan, South Korea

2.1.3.1. China

China's growth in the use of dispatch workers, especially after the promulgation of the 2008 Labor Contract Law making it more difficult to easily terminate employees, was recognized as a problem and a few years later a new Labor Dispatch Worker Law was issued. One purpose or result of the law is to protect the jobs of regular

⁹⁸ Elena Sychenko, *Contradictions in the Anti-Discrimination Protection of Employees in Russia and the Influence of the European Court of Human Rights in Labour Law in Russia in Labour Law in Russia: Recent Developments and New Challenges* 289 (V. Lebedev & E. Radevich, eds., Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2014); Nikita Lyutov, *The Compliance of Russian Labour Law with International Labour Standards*, *id.* at 71.

⁹⁹ The minimum wage is periodically adjusted and from January 1, 2016 it is 6.204.00 rubles (roughly 88 euros). *Id.*

¹⁰⁰ Labor Code of the Russia Federation, Arts. 60.1 & 282–288, *supra* note 3.

employees from being replaced by dispatch workers. This is accomplished by placing a cap of 10 percent of the user employer's workforce being dispatch workers¹⁰¹ which at the same time limits an "end-run" around the law by the hiring of "insourced" independent contractors to the jobs of the regular workforce as they may be deemed dispatch workers. The law provides dispatch workers the right to unionize¹⁰² and the same wages and benefits, and coverage of work-related injuries,¹⁰³ as the permanent employees;¹⁰⁴ otherwise these workers have the same labor law protections as other employees, such as termination of dispatch is made the same as for permanent workers under this law.¹⁰⁵ There is a 6 month limit on the temporary dispatched job, with some deviation possible around the so-called "auxiliary" jobs. Commentators have expressed concerns on how the auxiliary category will be used in practice. The penalty for violations is a fine between 5,000 and 10,000 yuan per employee.¹⁰⁶

Compensation and termination provisions align incentives to discourage the long-term use of dispatch workers. The LCL clearly outlines that compensation is not limited just to salary or hourly wages, but includes all employment bonuses and benefits.¹⁰⁷ Treating a return of a dispatch worker to the sending agency as the equivalent of termination of a full-time employee further de-incentivizes the use of dispatch workers.¹⁰⁸ Traditionally dispatch workers were desirable because dispatch workers were paid less than full-time employees and they were easier to terminate; but as dispatch workers are now entitled to equal pay and can only be dismissed under a standard approaching for cause, then the user employer might be better served just hiring a full-time employee.¹⁰⁹

¹⁰¹ Interim Provisions, Art. 4, *supra* note 6.

¹⁰² Labor Contract Law, Art. 64, *supra* note 6.

¹⁰³ Interim Provisions, Art. 10, *supra* note 6.

¹⁰⁴ *Id.* Art. 9.

¹⁰⁵ Ministry of Human Resources and Social Security, Interim Provisions on Labor Dispatch [Laowu Paiqian Zanxing Guiding], issued January 26, 2014, effective March 1, 2014, Arts. 5–7, 12–17 (Feb. 20, 2017), available at <http://www.mohrss.gov.cn>.

¹⁰⁶ Labor Contract Law, Art. 92, *supra* note 6.

¹⁰⁷ Labor Contract Law, Art. 62, *supra* note 6. *China Amends Labor Contract Law to Eliminate Labor Dispatch Abuse*, *supra* note 39. *Amendments to China Labor Contract Law Will Force Employers to Re-Evaluate Their Use of Labor Outsourcing*, Benesch Attorneys at Law (February 2013) (Feb. 20, 2017), available at http://www.beneschlaw.com/files/Publication/821a47aa-285c-4461-a9b3-6da96a2586c8/Presentation/PublicationAttachment/619ad948-9bc3-45f0-b955-798891499ae5/China_Amendments%20to%20China%20Labor%20Contract%20Law.pdf.

¹⁰⁸ *China Issues Interim Provisions on Labour Dispatch*, Mayer Brown, February 11, 2014 (Feb. 20, 2017), available at <https://www.mayerbrown.com/files/Publication/129f94f0-0dbb-415a-9640-489f1150f35a/Presentation/PublicationAttachment/559cc298-f044-4ba5-a571-4b0851c6b380/140211-PRC-Employment.pdf>.

¹⁰⁹ Of course part of the calculation whether to attain the 10 percent dispatch workforce can include the cost advantages of cost-shifting of non-compensatory labor law benefits to the dispatching agency as the employer.

2.1.3.2. Japan

Japanese legislation moved from a ban on dispatch labor in 1985 through a series of amendments to a very permissive use of these workers in 2015. The purpose of the evolving law arguably went from protecting regular workers to that of authorizing open-ended use of dispatch workers for any jobs, ostensibly benefitting employers and not the regular employees. The Workers Dispatch Law regulates the Dispatching Agency and requires it to be licensed by the government to issue dispatch contracts. The law itself does not contain labor protections, which are generally available to all employees through other labor standards legislation. However, the right to pay equal to that of fulltime employees is not required at this time; rather the employer is only to use “efforts” to achieve that. The dispatcher worker is limited in the current job position to three years, but may be retained as a dispatch worker thereafter in a different department. A dispatch worker can be provided permanent status upon violations of the law.

2.1.3.3. South Korea

The original aim of the Dispatched Workers Act and its related laws to protect the regular workers in the core production jobs in the manufacturing industry in which dispatch workers cannot be employed has eroded to some extent as dispatch workers gain more protections. At the same time there is a durational limit of two years for which dispatch workers can be employed, after which if they are retained, they must be permanently hired. Of course they can be dismissed and/or replaced by other dispatch workers, creating a wheel of job insecurity. Dispatch workers must be provided equality of wages with regular employee counterparts and are accorded the same labor protections as regular employees under labor standards legislation. Penalties are enforced against violators of the law and employers that use dispatch workers for positions that are not permitted to be held by dispatched workers, or those employers that receive services from a manpower agency not duly licensed to engage in the business of dispatching workers, and in such cases must hire these dispatched workers as their regular employees regardless of the duration of the engagement of the dispatched workers.

Table 1: Country Comparisons of Dispatch Laws

	Aim of law to “protect” regular worker (RW), dispatch worker (DW), or employer (E)?	Dispatch Agency regulated?	Dispatch law protect ILO core labor rights?	Scope of coverage?	Jobs or duration limited?	Regulate wages and anti-discrimination?	Penalties for violation?
U.S.	No law	No law	General labor laws	No law	No law	General labor laws	General labor laws

Russia	DW/RW	Yes	Some	General ban with limited exceptions	Ban on dispatch workers, except temporary, expansion (9 months and 10%, limit) and special exemptions for students, et al. Some jobs banned including for work dispute replacements and hazardous conditions	Must be same as regular workers	Fines, but not specified; general labor laws applicable Joint liability
China	RW	Yes	Some; right to join the Union	General ban; only temporary (6 mo. or less), auxiliary, and substitute positions	6 month duration for temporary workers 10% of company's total workforce	Equal pay for equal work; and discrimination prohibited	Fines Joint liability
Japan	E/DW?	Yes	No	No limit	3 year duration at same job only with several exemptions	Duty to make "efforts for equal treatment"	Fines; and instatement to permanent job for violations
South Korea	RW/DW	Yes	No	Ban on direct production process and limit 32 categories	2 years; some exclusions; automatic permanent job if retained over 2 years	No discrimination in wages or conditions	Criminal penalties; instatement permanent job

2.2. Has a Model Emerged?

Whether the above dispatch laws comply with ILO standards is discussed below, noting that only Japan has ratified ILO Convention 181. Initially, it is noted that the ILO rights and labor protections may be found outside the labor dispatch laws, for example in the general labor codes. The ILO focus is on protection of the dispatch workers, not whether they are banned or permitted to work, a matter left to national legislation. It is noteworthy that China explicitly authorizes dispatch workers to unionize, as does

the U.S. under its general labor legislation. Whether or not each country has ratified pertinent ILO Conventions, each does provide general labor law protections to some degree for many if not most of Convention 181's requirements.

The ILO Recommendation 188 states that there should be laws for penalties, written contracts for the workers specifying terms and conditions, prohibiting their use to replace strikers, placing them into jobs of unacceptable risk, abuse, or discrimination, and a list of other worker-protective measures.¹¹⁰ Illustrative provisions could provide a mosaic of a possible model law. In Japan, user employers are to provide any necessary training of the new dispatch workers and user employers must "provide them with the same level of access to welfare facilities (*fukurikōsei shisetsu* – meaning dorms, cafeterias, and recreational facilities used by employees, etc.) that company employees enjoy."¹¹¹ In South Korea, dispatch workers cannot be placed in hazardous work.¹¹² Russia, also bans hiring workers to replace employees who refused to work due to a violation of their labor rights, or sending them to work on hazardous facilities or in dangerous conditions.¹¹³

Whether or not a model has emerged, more importantly, choices are apparent for national governments on how they might regulate dispatch workers and the dispatching agencies in their jurisdiction. They range from no specific laws such as in the U.S. to a dispatch law that generally bans their use, such as in Russia which protects against abuse of dispatch workers while also preserving jobs for regular employees.

The steps toward determining appropriate regulation may begin with a national assessment of how wide-spread the use of dispatch workers is and what are the workplace rights, working conditions, and labor law protections of these workers. That is, what is the availability and level of enforcement of general labor law protections based on their employment status of either being an employee, independent contractor, short-term contract worker, casual employee, or some other temporary worker category? An interesting question is whether eliminating the use of dispatch workers better protects these workers, as opposed to allowing them, but with regulatory protections?

Dispatch legislation analyzed above begins with a legislative purpose: is the law to protect permanent employees from being replaced by cheaper temporary employees, like the goals in South Korea and China, and Japan's early dispatch law.

¹¹⁰ R188 – Private Employment Agencies Recommendation, Part II, *supra* note 90.

¹¹¹ See Cheung 2014, *supra* note 64.

¹¹² K.Y. Kim & Kim & Chang, *Dispatched Workers Used in Ways Contrary to Statutory Limitations Should Be Immediately Employed by Service Recipient Company Under Amended Statute*, American Bar Association Section of Labor and Employment Law (April 2012) (Feb. 20, 2017), available at http://www.americanbar.org/content/newsletter/groups/labor_law/int_newsletter/ile_news20121/april2012/1204_aball_int_skorea.html.

¹¹³ d'Amora 2014, *supra* note 1. See also *Russia: Significant Labor Law Changes for 2016 Will Alter Temporary Employee Market*, *supra* note 6.

If so, then the Russian general ban may be preferable. Or is it better to allow some use by employers, protect regular employees, but also provide labor protections for dispatch workers who otherwise can be taken advantage of? However, there may be a conundrum that a law to prevent substitution of permanent employment may not be consistent with protection of dispatch workers.

The easiest target to regulate is the dispatching agency itself, as directed by ILO standards. The primary reason for regulating them, as was done in Russia, is to control possible abuses by unregulated agencies. The laws may impose capital requirements as well as responsibilities for the welfare of dispatch workers at the user's place of business for the job in question, such as having employment contracts, briefings on the user's working conditions and pay issues, and including social security payments, etc.

Regulating dispatch workers can provide them specific labor rights not necessarily available under the general labor laws. If ILO guidance is followed, dispatch workers may receive benefits, such as the right to unionize (China) or the prohibition on being assigned to replace workers out on a labor dispute (Russia); or these rights may exist outside the dispatch regulation in the general labor laws. Dispatch regulations can also be used to require job training, such as in Japan, or mandate joint liability between the sender and user, such as in Russia and China.

Regulations typically limit the acceptable scope of dispatch work by providing the types of acceptable jobs and the duration in that job. For example, in Russia there is a general ban except for several areas such as temporary expansion of the business, but that is limited to 10 percent of the employer workforce. In South Korea, there is a ban on 32 job categories and for dispatch workers outside those jobs their duration is limited to two years. In Japan, there is no limit on the types of jobs, but there is a two year durational limit in that particular job. In China jobs are limited to the types of jobs and have a six month durational limit and 10 percent workforce limitation.

The dispatch regulation may explicitly require equal and/or non-discriminatory pay for dispatch workers compared with permanent employee counterparts, but sometimes those obligations may be found outside the dispatch regulations in the general labor codes. Japan, since the 2015 dispatch law, is reportedly still working to add a provision for equality. Some dispatch regulations limit discriminatory assignment to hazardous work.

Penalties for violations of dispatch laws vary from explicit Korean criminal penalties in the regulations themselves, to fines in Russia which are placed outside the dispatch law. Japan and Korea also require as penalties for violation of the dispatch law the conversion of dispatch workers to a permanent employee status.

Has a model emerged? Not likely, as the legislative goals and societal values vary among countries. Yet, workers' interests (temporary and permanent) balanced with – and not against – the needs of employers for temporary flexibility, suggest several of the above laws or parts of them, could provide a balanced approach. A general ban with limited exceptions (Russia, China, Korea) protect the jobs of regular permanent

workers, limits the exposure of dispatch workers with fewer of them, and with durational and percentage of workforce limits again balancing the interests. Those dispatch workers allowed to work can have their exposure diminished by regulation of the dispatching agencies.

Stabilizing the agencies and placing responsibilities on them for some rights of dispatch workers in the end seems to harmonize the interests of employers, workers (permanent and temporary), and responsible dispatch agencies. It is true that the needs of and for dispatched workers continue in the U.S. and other countries. Therefore, the lessons and diversity of approaches of Russia, China, Japan and South Korea may be instructive for governments searching for legislative solutions. In following the guidance of pertinent ILO Conventions and Recommendations and providing a regulated dispatch agency and certain mandatory labor rights of fairness and equality to dispatched workers, it would follow that more workplaces would provide a “decent workplace” for more workers.

Conclusion

While the U.S. has not yet directly embraced the regulation of dispatch workers on a national scale, certain labor rights are accorded to temporary employees under general labor legislation. These include many of the ILO core labor rights, minimum wages and labor standards, and penalties. However, the use of these workers, their job security, and those of the replaced permanent employees are largely at the employers’ discretion and there are reports of abuses. And moreover, as stated earlier, the U.S. lags far behind other industrialized countries in specific labor protections for temporary workers. Of 43 “developed and emerging economies” tracked by the OECD, the U.S. ranks near the bottom, at 41st, for temporary worker protections.¹¹⁴ Other nations, including Russia, China, Japan, and South Korea have provided models to consider that fit their economic and industrial relations needs.

Whether permitted or limited, the needs of dispatched temporary workers as well as those of permanent regular workers should be addressed. Taking the evaluative variables discussed above,¹¹⁵ one could fashion an appropriate response to the needs of the workers and employers.

This paper provides a menu of national legislative experiences and a “tool bag” of legal approaches and raises the question, why isn’t there legislation in America

¹¹⁴ Charlie Fanning, *The Shameful U.S. Record on Temporary Worker Protections*, AFL-CIO, February 26, 2014 (Feb. 20, 2017), available at <http://www.aflcio.org/Blog/Political-Action-Legislation/The-Shameful-U.S.-Record-on-Temporary-Worker-Protections>.

¹¹⁵ The variables discussed are: who does the law propose to benefit; are dispatch agencies regulated; does it protect labor standards set forth by the ILO; what is the scope of the law, from ban to open to ban with limits and exceptions; should it ban only certain jobs and/or place durational limits on the jobs; does it provide for equality in wages and conditions; and what are the penalties for violation?

regulating dispatch workers? There is a wealth of legislative models and experience from which to choose, some from the most unlikely sources.

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