Comments on the Second Deliberated Draft Labor Contract Law of the PRC
对《中华人民共和国劳动合同法》草案第二次审议稿的意见和建议

The American Chamber of Commerce in the People's Republic of China and the American Chamber of Commerce in Shanghai respectfully submit the following comments and suggestions on the Second Deliberated Draft Labor Contract Law of the PRC (the "Second Draft"), as submitted by the Law Committee of the National People's Congress ("NPC"). We fully applaud the NPC's solicitation of public comments on the First Draft of the Labor Contract Law and the high attention paid to these comments as reflected to varying extent in the changes made in the Second Draft. We appreciate this opportunity to share our views on the Second Draft.

中国美国商会和上海美国商会谨向全国人民代表大会(下称"全国人大")法律委员会，就 2006 年 12 月提交的《中华人民共和国劳动合同法草案》(第二次审议稿)(下称"第二次审议稿")呈交如下意见和建议。我们非常赞赏全国人大就《劳动合同法草案》(第一次审议稿)征求公众意见并予以高度关注的举措，且这些意见在第二次审议稿的修改中均得到不同程度的采纳。同时，我们也非常感谢贵委的信任，让我们就第二次审议稿表达自己的看法。

Many American companies have been among the leaders in the implementation of workplace safety and employment practices designed to empower, inform, and protect their employees in China We fully support the Chinese government's goals of enacting this law, namely clarifying the legal rights and responsibilities of employers, employees, and labor unions and of strengthening the legal mechanisms for uniform protection of employees' rights. We recognize that it is necessary to modify the laws and regulations protecting the rights of employees due to the development of China's economy. At the same time, we believe that such efforts should be accompanied by increased efforts by the authorities to enforce existing rights of employees in both local and foreign-invested enterprises. Even well-drafted and well-intended new measures may not effectively assist the most vulnerable employees without additional resources and commitments to ensure consistent and predictable enforcement of China's existing labor laws as well as the new Labor Contract Law.

美国公司在实行安全生产和聘用实践方面处于领先地位，旨在对其在华雇员赋予权力、提供信息并提供保护。所以,我们完全支持中国政府制定这一法律的目标：即明确用人单位、劳动者和工会的合法权利和责任，并强化法律机制，对劳动者权利予以统一保护。 我们认识到, 鉴于中国经济的发展，调整保护劳动者权利的法律法规是十分必要的。与此同时，我们认为在进行如上调整中，政府机关也应加大力度在国内和外资企业中落实劳动者权利。如果不投入更多资源并做出更多承诺，以确

保统一而有预期性的实行中国现行劳动法律及新的劳动合同法，即使新的规则起草得再完善，意图再良好，也不会对最易受到侵害的劳动者提供有效帮助。

We understand fully that the Second Draft reflects consideration of diverse opinions and has to confront difficult choices. We respectfully provide the following comments and suggestions focusing on provisions which merit further clarification, for the reference of the Law Committee of NPC.

第二次审议稿反映出多种多样的意见,同时又必须面对各种艰难的选择, 对于这一点我们也充分理解。以下我们谨对某些尚需进一步明确的规定提出建议，供法工委参考。

Phase-In Period
宽限期

Once the Labor Contract Law is finalized and promulgated, it will be necessary for Chinese and foreign enterprises to review carefully all signed and planned employment agreements in order to comply with the requirements of the new law. Accordingly, we recommend a phase-in period of at least 6 months between the promulgation date and the effective date of the law.

《劳动合同法》一旦确定并颁布实施，中外企业就必须要认真审阅所有已签订和即将签订的劳动合同，以便符合新法的要求。因此，我们建议在该法的颁布日和生效日之间，应留有至少 6 个月的宽限期。

Narrow Exemption for Certain "Highly-Compensated Employees"
“高薪职员”的狭义排除

Under Article 2, except for civil servants and other personnel who are managed under the Civil Servants Law, all employment relationships established in China are governed by the Labor Contract Law. Most provisions of the law are designed to promote stable work positions and income for the vast majority of employees in China who may be in weak bargaining positions with their employers.

根据第二条，除公务员和参照公务员法管理的工作人员外，所有在中国境内建立的劳动关系均受《劳动合同法》所管辖。本法的大多数规定是为了促进中国大多数劳动者可以拥有稳定的工作及收入，因为这些劳动者在同用人机构的磋商中， 大多处于相对劣势地位。

At the same time, there are, however, certain employees (including senior executives of companies, professionals, entertainers, athletes, *etc.*) whose services already command very high salaries in the labor market. These "highly-compensated employees" have the

sophistication and bargaining power to contract freely with their employers without many of the statutory restrictions and protections under the Labor Contract Law. Chinese and foreign enterprises need the corresponding ability to hire and terminate these employees on flexible terms to be agreed to by the enterprises and the employees.

但同时，一些职员（包括企业高级管理人员、专家、娱乐界明星及运动员等）在劳动市场上已经得到很优厚的薪酬。这些“高薪职员”具有高水平的劳动技能以及在劳资市场中的有利地位，从而能够在没有很多法定限制及劳动合同法保护的情况下，自由地同雇主签订合同。中外企业需要相应的能力，以便可以根据劳资双方均可接受的灵活条款聘用或解聘职员。

Accordingly, we respectfully recommend that such "highly-compensated employees" be permitted to enter contracts with their employers which define their compensation, termination conditions, and severance benefits. While the provisions of the Labor Contract Law would provide "default" rules, "highly compensated employees" would have the freedom and flexibility to tailor their agreements with their employers.

我们建议应允许“高薪职员”与用人单位签订合同，规定其待遇、终止条件及经济补偿。同时《劳动合同法》会提供“默认”条款，“高薪职员”从而可以自由而灵活地同用人单位量身定做其雇用协议。

For these purposes, "highly-compensated employees" could be defined as individuals entering employment agreements providing for annual salaries exceeding thresholds to be set by the Chinese government. For example, Article 27 (iii) might be revised to invalidate labor contracts in which "(iii) the Employer relieves itself from any of its responsibilities or excludes any of the employee's rights, with the exception of provisions in labor employment agreements with highly-compensated employees which define compensation, conditions of termination, and severance benefits." Similarly, we respectfully urge the Chinese government to review existing restrictions on compensation, conditions of termination, and severance benefits for highly-compensated employees in other existing laws and regulations.

出此考虑，“高薪职员”可以被定义为订立规定年薪达到或超过中国政府制定标准的劳动合同的个人。例如，可以将第二十七条第三段修改为“用人单位免除自己责任、排除劳动者权利”的劳动合同无效，“但高薪职员签订的劳动雇用合同中规定待遇、终止条件及经济赔偿的条款除外”。同样，我们谨推荐中国政府审查现有其他法律法规对高薪职员待遇、终止条件及经济赔偿的规定限制。

By allowing greater flexibility in negotiating with these "highly-compensated employees," foreign-invested companies in China will have greater incentives to hire PRC national senior managers because PRC law will more closely align with the flexible systems permitted in many foreign jurisdictions. Moreover, the existing Contract Law

provides an appropriate legal basis for agreements with "highly-compensated employees."

通过允许更灵活地与“高薪职员”谈判，在华外资企业将更倾向雇用中国籍高级管理人员。因为中国法律将会向其他许多国家准许的灵活体系进一步接轨，而且，现行合同法也为与“高薪职员”签订合同提供了适当的法律依据。

Distinguishing "Short-Term" Agreements from "Fixed-Term" Agreements
区别“短期”劳动合同和“固定期限”劳动合同

We understand the Chinese government's concern to prevent the abuse of short-term contracting practices in certain industries (*e.g.*, 1 month contracts for unskilled manufacturing labor in non-seasonal industries). However, some provisions of the Second Draft discourage all fixed-term contracts—not just "short-term" contracts lasting several weeks or months.

我们理解,，中国政府十分关注某些行业中滥用特定短期合同的做法(例如在非季节性行业中，与非熟练劳动力所签定的为期一个月的合同)。但是，第二次审议稿中的一些规定限制的是所有固定期限劳动合同，而不只是仅仅为期几个星期或几个月的“短期”合同。

In most cases, fixed-term labor contracts, in which it is easier to know and control the specific compensation for specific services exchanged over a set period of time, enable Chinese and foreign businesses to plan strategically and to budget accurately their labor costs. Discouraging the use of *all* fixed-term contracts (not just contracts with extremely short terms) increases the costs of each new hiring decision and may result in Chinese and foreign companies hiring fewer new employees and reducing entrepreneurial projects which might result in "open ended" employment commitments. The effort to promote non-fixed term contracts may, in the end, result in fewer employment opportunities.

在大多数情况下，签定固定期限劳动合同，使中外企业能够对人工成本进行战略性规划并进行准确预算，因为对限定期间内提供明确服务，并由此得到具体的报酬比较容易了解和掌握。限制运用*所有*固定期限合同(而不仅仅是期限极短的合同)，增加了每一招聘决策的成本，还可能致使中外企业减少招聘新员工，减少可能导致雇用承诺落空的创业项目。促成无固定期限劳动合同的努力可能最终会造成就业机会的减少。

Accordingly, we recommend that Article 14 (iii) be limited only to situations involving consecutive short-term agreements with terms of six months or less. This modification would help achieve the government's goals of preventing the abuse of short-term contracts and stabilizing labor relationships while preserving the rights of employees and employers to enter into multiple fixed-term contracts with longer terms.

因此，我们建议第十四条第(三)款应仅限于连续签定的短期合同(为期六个月或更短的合同)。这种调整既可以帮助政府实现防止滥用短期合同，从而稳定劳动关系的目的，又为劳动者和用人单位保留了签订长期固定期限劳动合同的权利。

Successive Fixed-Term Agreements
连续固定期限劳动合同

Article 14 of the Second Draft provides that "if an employee claims renewal of his/her labor contract" under certain conditions, then a non-fixed term labor contract shall be signed. Pursuant to Article 14 (iii), this rule also applies when "a fixed term contract is to be renewed after being signed consecutively two times."

第二次审议稿第十四条规定：在一定的情形下，“如果劳动者提出续签劳动合同的”，应当签订无固定期限劳动合同。根据第十四条第(三)款，该规定也适用于“连续签订两次固定期限劳动合同后续签的”情形。

The text appears ambiguous. Under one interpretation, at the end of the second consecutive fixed term, if the employer decides that the contract "is to be renewed" (under Article 14 (iii)) then a non-fixed term labor contract must be entered if the employee also requests a non-fixed term labor contract. Under the second interpretation, the employee has the unilateral right to decide whether to "claim renewal" through a non-fixed term contract at the end of the second contract term. In this case, an employer must decide at the end of the first fixed-term contract period whether or not to grant the employee the option of entering non-fixed term agreement at the end of the second term. To allow employers and employees to make informed decisions, Article 14 (iii) should be clarified to eliminate this ambiguity.

条文看上去不够明确。可以有一种解释，即在所签定的第二个固定期限结束时，如果用人单位决定“续签”合同(根据第十四条第(三)款)，同时劳动者也要求签订无固定期限劳动合同，则必须签订无固定期限劳动合同。另外还有一种解释，即在固定期限合同第二次期满时，劳动者拥有单方面的权利来决定是否“提出续签”无固定期限劳动合同。在这种情况下，用人单位就必须在第一个固定期限劳动合同结束时，决定是否给予劳动者在第二次期满时订立无固定期限劳动合同的选择权。为使用人单位和劳动者做出明智的抉择，应澄清第十四条第(三)款的规定，消除歧义。

For example, Article (iii) may be revised to apply in instances where both the employer and the employee agree to continue an employment relationship after the expiration of the second consecutive fixed-term employment agreement.

例如，第三款可以修改适用于在连续签订的第二个固定期限合同到期后，用人单位和劳动者均同意继续雇用关系时的情形。

Similarly, Article 14 (iii) should be revised to apply only where a fixed-term contract has been previously renewed at least once *after the effective date* of the Labor Contract Law. Many existing fixed-term contracts have already been renewed by both employers and employees with the clear understanding and implementation practices of current law. If Article 14 (iii) is applied to such existing contracts, many companies may be unable to support the unforeseeable conversion of all fixed-term contract employees to non-fixed term contracts. This destabilizing result may be avoided by carefully phasing in Article 14 (iii).

同样，应对第十四条第(三)款进行修改，使其适用范围应仅限于在《劳动合同法》*生效*后，固定期限劳动合同续签至少一次的情形。按照对现行法律的理解和具体执行，用人单位和劳动者已经多次续签了固定期限劳动合同。若第十四条第(三)款适用于这些已签订的合同，那麼许多公司可能无法承受所有固定期限合同转变成非固定期限合同产生的难以预计的负担。如果以审慎方式引入第十四条第(三)款的规定，可能会避免这种不稳定局面的发生。

Probationary Periods
试用期

Article 20 of the Second Draft sets maximum probationary periods of 1 month for labor contracts with terms less than 1 year, of 2 months for labor contracts with terms between 1 and 3 years, and of 6 months for labor contracts with terms of 3 years or more.

第二次审议稿第二十条规定，劳动合同期限不足一年的，试用期最多不得超过一个月；劳动合同期限一年以上三年以下的，试用期不得超过二个月；三年以上固定期限和无固定期限的劳动合同试用期不得超过六个月。

We understand that probationary periods are often used by unscrupulous employers to take advantage of unskilled laborers. While brief probationary periods for unskilled workers are still important, longer probationary periods are critical for evaluating the abilities of skilled workers in technical or managerial positions. We recognize that it is difficult to differentiate between skilled and unskilled workers in a clearly defined and fair manner; however, it may be necessary to explore options that would permit longer probationary periods, while still protecting vulnerable workers.

我们了解试用期经常被不道德的用人单位用以对非熟练劳动者的利用。当然对非熟练劳动者而言，短暂的试用期很重要；对于在技术和管理相关的工作岗位上的熟练劳动者，相对较长期限的试用期对其能力的评估也十分关键。我们意识到, 明确

且公平的界定熟练劳动者与非熟练劳动者的区别是十分困难的，但是，若能在保护弱势劳动者的同时，探寻试用期期限的相对延长，也还是有必要的。

The probation periods stated in Article 20 are insufficient for employees to demonstrate their skills and capabilities and for employers to evaluate the performance of new employees in many situations. We respectfully recommend that the current maximum probation period of 6 months for labor contracts of 2 years or longer be preserved; we further recommend that the maximum probationary periods be 3 months for labor contracts with terms between 1 and 2 years.

在第二十条所规定的试用期内，劳动者不能充分展示其技能，用人单位也无法全面评估新职员的表现。我们谨建议保留现行有关试用期的规定，即劳动合同期限在两年的以上的，试用期不得超过六个月；同时，我们还建议劳动合同期限在一年以上两年以下的，试用期不得超过三个月。

Additionally, Article 22 requires that in order to terminate an employee during a probation period, an employer must provide evidence that the employee has failed to meet the employment conditions. We are concerned by the lack of clear standards and procedures for determining the sufficiency of evidence. This may make termination difficult during a period which is intended to give both employers and employees the right to assess each other.

另外，第二十二条规定在试用期间解除劳动合同，用人单位必须提供证据以证明劳动者不符合录用条件。我们关注缺少判断证据是否充分的标准与程序。这可能会使解除劳动合同复杂化，而实行试用期的初衷是赋予用人单位和劳动者进行相互评估的权利。

Training Costs
培训费用

Article 23 of the Second Draft permits employers to recover training costs from employees who fail to complete contracted service periods after receiving training provided by the Employer. We are concerned that Article 23 only allows recovery of costs by employers for full-time training lasting more than one month. However, in reality, many valuable training programs provided by employers to their employees (such as executive MBA programs, language instruction, or technical training) proceed on a part-time basis. By restraining employers and employees from agreeing to the repayment of training costs by employees who resign before the end of their service periods, Article 23 dramatically reduces the incentives for employers to invest in the personal education of their employees. Accordingly, we recommend the elimination of the "full-time" requirement in Article 23.

第二次审议稿第二十三条规定，如果劳动者自用人单位获得培训后未能完成约定服务期，则允许用人单位从该劳动者追回培训费用。我们所关注的是，第二十三条仅仅允许用人单位追回为期至少一个月以上的脱产培训费。但实际上，用人单位向劳动者提供的许多颇有价值的培训课程(如在职工商管理硕士课程、语言辅导或技术培训)，都是在半脱产情况下进行的。第二十三条对用人单位和劳动者在劳动者服务期满之前辞职的情况下，就偿还培训费用达成约定进行了限制，大大减少了用人单位对其劳动者的个人教育进行投资的积极性。因此，我们建议删除第二十三条中有关“脱产”的规定。

Severance Pay for Fixed-Term Labor Contracts
固定期限劳动合同的经济补偿

Unlike current law, Article 46 (5) requires employers to pay statutory severance pay upon the expiration and non-renewal of a fixed-term contract. Introducing a new severance pay requirement for fixed-term contracts may harm rather than benefit many employees. The compensation stipulated under a fixed-term labor contract is, in most cases, dictated by the market value of the services to be provided by the employee during the contract term. The new requirement for severance pay will not increase the market value of an employee's services. Consequently, in response to labor market conditions, many employers might simply reduce monthly salaries to employees on fixed-term contracts in order to budget for additional severance costs. Accordingly, we suggest that Article 46(5) be deleted.

与现行法律不同，第四十六条第五款规定在固定期限劳动合同期满并不续签时，用人单位应按照法定标准向劳动者支付补偿金。对固定期限劳动合同增加经济补偿的规定，可能对许多劳动者而言弊大于利。在大多数情况下，固定期限劳动合同所规定的报酬取决于合同期间劳动者所提供服务的市场价值，而有关支付经济补偿的新规定却不会增加劳动者所提供服务的市场价值。因为根据劳务市场情况的反馈，许多用人单位可以径自削减固定期限合同劳动者的月薪，以便增加预算中的经济补偿成本。工人个人未必能够获取更多报酬；他们只得等待更长时间领取同样的收益。因此，建议删除第四十六条第五款。

In any event, we respectfully recommend that service years accumulated under fixed-term contracts before the effective date of the new Labor Contract Law should not be considered when calculating severance pay, because employers entered into these contracts on the clear understanding that no severance would be due upon the expiration and non-renewal of these contracts. Both Chinese and foreign employers have not budgeted for these additional severance benefits caused by expiration and termination of the contracts.

无论如何，我们谨建议在新的《劳动合同法》生效前，固定期限劳动合同项下所累积的服务年度不应成为计算经济补偿的依据，因为这些合同的签订，其前提是用人单位明确了解在合同到期且不续签的情况下没有任何经济补偿产生。中外企业均并没有将合同解除或终止的经济补偿编入预算。

Preferential Retention in Mass Lay-Offs
大规模裁员中的优先留用

Article 41 calls for Employers conducting mass lay-offs to prioritize retaining employees based on their tenure, the nature of their employment contract, or the number of their dependents. Unfortunately, the survival of companies facing restructuring pursuant to bankruptcy laws, "difficulties in production or management," and other challenges listed in Article 41 often depends on retaining the most capable and most qualified personnel—not necessarily the employees with the longest tenure or the heaviest family burdens. If the preferences remain in the law, we wish that these preferences only apply to "employees in comparable positions who are otherwise comparably qualified." Otherwise, distressed companies may be forced to lay off more qualified employees and employees in critical positions while retaining less essential personnel based on these preferences. This could jeopardize their ability to recover and continue to employee the remaining workers.

第四十一条要求用人单位在进行大规模裁员时，应根据劳动者的工作时间、所签定劳动合同的性质及其需要扶养的人的数量进行优先留用。但遗憾的是，当发生依照企业破产法规定进行重整的，“生产经营发生严重困难”以及第四十一条列举的其它情形时，公司的生存往往依赖留用最能干和最合格的人员，而未必是服务时间长或家庭负担最重的雇员。如果在法律上保留这种优先留用权，我们希望这种优先留用仅适用于“职位相当且其它方面的条件也相当的劳动者”之间。否则，陷入困境的公司可能被迫解雇合格的劳动者以及在关键岗位任职的劳动者，而继续留用“优先留用”规定下的次要人员。这将会影响公司重新发展和继续雇用剩余职工的能力。

Enterprise Rules
企业规章制度

The second paragraph of Article 4 appropriately requires employers to consult labor unions or employee representatives regarding company rules and policies bearing on the vital interests of the employees. Such consultations are often a constructive mechanism for developing policies benefiting employers and employees alike. Article 4 does not, however, clearly describe procedures for initiating, conducting, and concluding consultations on company rules and policies bearing on the vital interests of the employees. To avoid confusion and to clarify that it is the responsibility of employers to determine enterprise rules after consultations with the employees, we respectfully suggest that Article 4 be revised as follows: "In formulating, revising, or deciding on" the

policies covered by Article 4," an Employer shall raise the proposals on the same after discussing with the staff's representative's congress or all staffs, or consult on a equal basis with its trade union or staff's representatives, and then make a determination on the same."

第四条第二段要求用人单位在制订涉及劳动者切身利益的企业规章制度及政策时，应与工会或职工代表协商。这种协商往往是用人单位和劳动者制订双赢政策的建设性机制。但是，第四条对涉及劳动者切身利益的公司规章制度的协商，并没有清楚地陈述其提出、讨论及制定的程序。为避免混淆，并阐明**经**与劳动者协商后，应由**用人单位**负责决定企业规章制度，我们建议将第四条修改如下：“在制定、修改或决定第四条规定的政策时，用人单位应当提出草案，在与职工代表大会或全体职工讨论后，或与工会、职工代表平等协商之后，予以决定。”

Similarly, the third paragraph of Article 4 provides for a procedure for labor unions and employees to request amendment of “inappropriate” enterprise rules during their implementation. We are concerned that the types of rules affected and the amendment procedure is not sufficiently clear. We respectfully recommend clarifying the second paragraph to confirm that the employer is responsible for deciding how to respond to employee proposals after conferring with employee representatives. Significantly, we note that if an enterprise did implement a rule that violated laws or regulations, the labor unions and employees would still have recourse to change the rule with the assistance of the labor bureau pursuant to Article 79.

同样，第四条第三段为工会和劳动者提供了要求修订规章制度实施过程中“不适当”规定的程序。我们注意到其对受影响规定的类型及修改程序不够清楚。我们建议明确第二段，以确定应由用人单位在经与职工代表协商后，负责决定如何回应职工提出的建议。值得提及的是，我们注意到依据第七十九条，如果企业执行了违反法律法规的规章制度，工会和劳动者仍可在劳动行政部门的协助下改正相应的规定。

Designation of Employee Representatives
指定职工代表

Several articles refer to "employee representatives" separate from "trade unions." Although current law clearly describes the organization and operation of trade unions, we are not aware of any existing laws governing the election and recognition of employee representatives other than trade unions. It is unclear how employers should respond if different individuals purport to represent employees, or if employees disagree amongst themselves over the appropriate representatives. As a result, we recommend that specific procedures for designating and recognizing employee representatives be set forth in separate legislation.

若干条款提及独立于“工会”的“职工代表”。尽管现行法律明确介绍了工会的组织和运作，我们并不了解任何行法律规定除工会外的职工代表的选举和承认。尚不清楚如果不同人等声称代表劳动者，或者劳动者本身就适当的代表人选产生分歧时，用人单位应该如何应对。因此，我们建议在单独立法中阐明指定和承认职工代表的具体程序。

Clarifications
其他

In addition, several provisions of the law are unclear or ambiguous.
除此之外，本草案还有一些规定不清楚或不明确

Article 63 of the Second Draft allows dispatched employees to participate in or organize a trade union either within the labor service agencies or within the employer pursuant to the laws. This provision may result in confusion regarding which labor union must be notified upon termination of the employee and whether the employer must pay union fees on behalf of these employees.

第二次审议稿第六十三条允许被派遣劳动者在劳务派遣单位或用工单位依法参加或组织工会。本条规定可能会带来一些疑惑，即当劳动者解除劳动关系时，应通知哪一个工会，用工单位是否必须为劳动者支付工会会费？

Article 49 requires employers to complete the transfer of an employee's personal archives and social insurance within seven (7) days after the date of rescission or termination of their labor contract. We suggest changing the transferal period from 7 days to 30 days because the normal cycle for social insurance is monthly.

第四十九条要求用人单位自解除或终止劳动合同之日起七日内为劳动者办理档案和社会保险转移手续。由于一般社会保险的支付周期为一个月，我们建议将七天的转移时间延长到三十天。

Article 50 addresses the conclusion of collective contracts between employees and employers. In order to prevent possible confusion regarding an obligation to enter collective contracts, and to reflect existing law, we recommend that this article be amended to state that employers and employees “may” enter into collective contracts.

第五十条规定劳动者与用人单位签订集体合同。为防止对用人单位有义务缔结集体合同产生歧义，并反映现行法律规定，我们建议将本条修改为用人单位和劳动者“可以”订立集体合同。

Article 26 prohibits employers and their employees from agreeing on any penalties to be imposed on the employees except for penalties relating to non-competition and training contracts. We are concerned that this provision might impact an employer's ability to recover amounts provided to employees as signing bonuses, allowances, and other benefits if the employees do not complete the terms of their contracts. We suggest clarification in this regard.

第二十六条规定除竞业限制及培训合同外，禁止用人单位给劳动者强行约定任何形式的违约金。我们关注的是，本条可能会影响用人单位在劳动者没有完成合同期限的情况下，追回发给劳动者的签约奖金、津贴及其它补助的能力。我们建议就此予以说明。

Article 65 of the Second Draft limits the use of dispatch labor to "provisional, auxiliary, or substitutive" positions. Clarification of these terms would be useful. Moreover, current law requires representative offices of foreign enterprises to retain all employees—not just "provisional, auxiliary, or substitutive" employees—through labor service agencies. The implications of the limits on dispatch labor for representative offices warrant clarification.

第二次审议稿第六十五条规定劳务派遣限于"临时性、辅助性或替代性"的工作岗位。对以上名词的解释将会有帮助。并且，现行法律规定外国企业代表处所有雇员需通过劳务派遣单位派遣—而不是仅限于"临时性、辅助性或替代性"的雇员。由于此处的限制性解释涉及代表处劳务派遣，此处更需要进一步的澄清

Article 24 suggests that non-competition agreements may be entered with employees "under a duty to keep confidential the trade secrets" of the employer. Article 25 states that non-competition agreements may be entered into with "senior managers, senior technicians, and other persons with knowledge of trade secrets." We are concerned that distinguishing "senior" managers and technicians and other employees with access to trade secrets may prove difficult in practice, particularly since an employee's access to trade secrets may not be foreseen when the employee is hired. We are concerned that the limitation of non-competition agreements to these categories of employees may reduce employers' confidence in non-competition agreements as a means of protecting trade secrets and could even give rise to litigation.

第二十四条建议"对负有保守用人单位商业秘密义务的劳动者" 可以约定竞业禁止条款。第二十五条规定可以同"用人单位的高级管理人员、高级技术人员、和其他知悉用人单位商业秘密的人员"签订竞业禁止条款。我们关心对高级管理和技术人员以及其他可能知悉商业秘密的人员的分类在现实中可能很难实行。特别是当雇用某个雇员时，可能无法预见其可能知悉商业秘密与否。将竞业禁止条款限定于这些类别的劳动者可能会降低用人单位对竞业禁止条款作为保护商业秘密手段的信心，并可能会引起诉讼。

The second paragraph of Article 23 requires that compensation shall be increased if the term of service is "relatively long". In order to provide guidance to both employers and employees, we recommend that this period of service be defined with a specific number of years.

第二十三条第二款规定如果服务期"较长"，应提高劳动报酬。为了对用人单位和劳动者提供指导，我们建议规定上述服务期的具体年限。

In closing, once again, we sincerely appreciate this opportunity to comment on the Second Draft. Please do not hesitate to contact us with any questions or concerns.
最后，我们再一次衷心感谢有机会就第二次审议稿发表浅见。如有任何问题请随时与我们联系。

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