AMCHAM
SHANGHAI

The American Chamber of Commerce in Shanghai
上 海 美 国 商 会

On behalf of the over 1,300 corporations that are members of the American Chamber of Commerce in Shanghai, we want to thank you for this opportunity to comment on the draft labor contract law. AmCham Shanghai is an independent, non-profit, non-government industry association first established in 1915 and now one of the two largest AmChams in Asia, equal in size only to our sister organization AmCham Japan. Our membership ranges from 150 Fortune 500 companies to small American companies just entering the market in Shanghai; about half AmCham Shanghai member companies are manufacturers, while the other half are in services.

AmCham Shanghai applauds the openness with which the National People's Congress has welcomed comments on the draft labor contract law, including posting the draft on your website as well as a willingness to hear opinions of companies that operate in China. As significant employers in the Yangtze River Delta and all of China, we believe American companies are leaders in creating a safe, fair, and fulfilling workplace. AmCham Shanghai multinational corporations strive to comply with local laws wherever they operate and we take obligations to uphold the law extremely seriously.

It is precisely because of our companies' respect for Chinese law, Chinese workers, and Chinese market reforms that we are hereby submitting this detailed opinion on the draft labor contract law. While AmCham Shanghai welcomes the intent of the new draft labor contract law, our member companies have expressed reservations about the draft in its current form. Many AmCham Shanghai member companies are concerned that, as the draft stands, it is a step backwards for Chinese economic reforms -- away from global trends of flexible labor markets needed to ensure continued economic growth.

As a broad-based industry association growing by 80 new members a month, AmCham Shanghai looks forward to participating in this important dialogue with the National People's Congress on the draft labor contract law. We are honored to be part of this process and hope you will accept our submission in the spirit of cooperation and open discussion. American companies and national delegates share the same goal: ensuring continued economic prosperity of the People's Republic of China. We would be happy to help arrange a meeting between you and any of our member company to open up dialogue about matter.

Please contact James Green, AmCham Shanghai Government Relations Director, on 21.6279-7119 or james.green@amcham-shanghai.org should you wish to discuss our submission in more detail.

Respectfully,

The American Chamber of Commerce in Shanghai

致：全国人民代表大会常务委员会、法律委员会、财政经济委员会、法制工作委员会

谨代表上海美国商会 1300 余家公司会员，感谢能有此机会就劳动合同法草案提出我们的意见和建议。上海美国商会是一家独立的、非盈利的、非政府的商会组织。成立于 1915 年的上海美国商会是目前亚洲地区最大的两家美商会之一，规模与我们的姊妹组织日本美国商会相当。我们的公司会员包括 150 家财富五百强企业和刚刚进入上海的中小型美资企业。近半数的上海美商会公司会员是制造型企业，另外的半数则从事于服务类行业。

上海美国商会高度赞赏全国人大对于劳动合同法草案征询意见的开放态度和系列积极举措，包括在网站公开该草案以及主动向在华企业征求意见。我们相信美商会公司会员作为长三角以至全国范围内的重要雇用方，在创建一个安全、公平和令人满意的工作环境方面始终起到了积极的作用。上海美国商会的会员公司始终严格恪守公司经营所在地的法律法规。

正是因为我们的会员公司对于中国法律、雇员以及市场改革的高度尊重，我们在此郑重地递交我们关于劳动合同法草案的详细意见。 尽管上海美国商会理解并欢迎新劳动合同法草案的立法意图，但是我们的会员公司对于草案的当前版本持保留意见。许多上海美国商会的会员公司担心就目前的草案付诸实施的话，将是中国经济改革步伐的倒退；新草案有悖于保持灵活劳动力市场的全球发展趋势，这一要素对保障可持续经济发展至关重要。

作为一家具有广泛基础、高速成长（每月有 80 余名新会员加入）的商业协会，上海美国商会热切期盼着能参与到就劳动合同法草案与全国人大的重要对话中。我们对于能够成为这一过程的一部分而深感荣幸；并且殷切期望全国人大本着开诚布公与合作的精神，接受我们递交的意见稿。在华美资企业和广大人大代表有着共同的目标，那就是共同保障中华人民共和国的长久经济繁荣。我们非常乐意为您安排与我们任一会员公司就所提草案意见进行进一步的交流，敬请您与上海美国商会政府事务总监郭嘉明先生联系，电话 021-6279 7119 或者电子邮件：james.green@amcham-shanghai.org.

期待您的回复！

上海美国商会

关于《劳动合同法（草案)》的修改意见与建议

全国人大常委会法律委员会、财经委员会、法制工作委员会：

目前正在全国人大常委会审议的《中华人民共和国劳动合同法(草案)》(以下简称“劳动合同法草案”或“草案”)引起社会各界的关注。草案总结了我国实施劳动合同制度的经验，针对实践中的劳动合同签订率低、合同期过短、劳动者利益得不到充分保护等重大突出问题，试图对用人单位和劳动者的权利和义务作出明确的规定，以强化对劳动者权益的保护。

然而，草案也存在一些缺点，如不加以修改即予以通过，不仅将影响其操作性，而且可能给国民经济带来负面的影响。 我们出于中国企业的责任感，本着为建立和谐社会积极建言的真诚动机，对草案提出以下修改建议：

《中华人民共和国劳动法》实施十年以来，对调整用人单位和劳动者之间的劳动关系、解决劳资纠纷发挥了巨大作用，有力促进了企业规范运营、建立现代企业制度。劳动部门和各地方也根据各自工作实际，在《中华人民共和国劳动法》基础上制订了大量配套规定，有针对性的解决了法律实施中出现的各种具体问题。经过十年时间，用人单位和劳动者已经逐步适应了《中华人民共和国劳动法》及其配套规定构建的法律环境。

应当看到，目前中国劳动用工中存在的最大问题不是劳动关系法律规范对劳动者缺乏保护，而是有法不依。 正是由于有法不依、执法不力，因而造成大量企业违反最低工资规定，非法加班加点，甚至拖欠工资与社会保险缴费，劳动安全卫生条件恶劣。 要解决这些多年拖欠的问题，主要是靠建立完善的执法程序，加强执法力度,落实现有规定。而不是在企业现有的责任之上再提出超前的要求， 破坏现有的法律秩序。_否则势必加剧 “不守法的仍逍遥法外，守法的反受惩罚” 这一不正常的现象.

当然,《中华人民共和国劳动法》本身也存在着一些不足，对一些问题需要通过进一步立法予以解决。新的法律应当在《中华人民共和国劳动法》基础上有针对性的予以细化，而不是重新建立一套新的法律体系。可《中华人民共和国劳动合同法(草案)》完全改变了经过十年时间形成并逐步稳定的法律环境，对现有的劳动法律调节机制进行了彻底改变，劳动部门和各地方立法需要全部改变，我们对《劳动合同法(草案)》是否需要进行如此巨大的改动存在疑问。

就具体内容而言，草案的规定体现出对企业用工“宽进严出”、劳动者“宽进宽出”的特点，大量采用行政干预，对企业管理进行各种“僵化”限
制，这些规定可能会引发一些社会问题，其中我们最担心的是世界通行的先进人力资源管理理念无法适应草案的规定，这主要体现在：

第一，草案对劳动关系建立的规定体现了“宽进”的特点

草案对劳动关系进行了简单宽泛的规定，导致企业和个人之间即使发生偶然的商业接触也会被认定为建立了劳动关系，这对企业的招聘机制产生了全方位的影响，可能造成企业“被动招工”现象的大量出现，即企业必须招用大量从未计划招用的员工。

第二，草案对用人单位解聘员工的规定体现了“严出”的特点

草案对企业解聘员工进行了严格限制，对企业的解聘机制造成了冲击，可能造成企业无法对人力资源进行正常的优化整合，同时进一步加剧劳动合同短期化，导致按月甚至按日签订的合同大量出现，市场可提供的就业机会也大量减少。

第三，草案对员工主动离职的规定体现了“宽出”的特点

根据草案规定，接受了企业提供的特殊待遇、掌握商业秘密的员工可以随意离职，其违约成本极低甚至是零成本，这对企业留人方案和知识产权保护体系产生冲击，可能会影响企业的自主创新能力，不利于中国科技进步。

第四，草案对用人单位的管理权利进行了“僵化”规定

根据草案规定，企业对绩效不好的员工不能调整岗位或报酬，企业合理的工作安排必须员工书面同意才能实施，制订规章制度、劳动纪律的权利属于工会，这些都对企业的绩效激励制度、管理体系产生影响，可能造成企业自主灵活管理员工的权利受到限制。

当今世界，人力资源竞争空前激烈。正如胡锦涛同志在全国人才工作会议上所强调的那样，做好人才工作，落实好人才强国战略，必须从当代世界和中国深刻变化着的实际出发，根据党和国家事业发展的迫切需要，解放思想、实事求是、与时俱进，树立适应新形势新任务要求的科学人才观。而草案的规定却给人一种计划经济时代旧思维的产物的感觉,与国际通行的人力资源管理理念产生冲突，对企业正常的招聘机制、解聘机制、绩效管理体系、留人方案造成了全方位的影响。草案一旦实施，可能会对中国企业参与国际人力资源竞争造成阻碍。这与人才强国战略是背道而驰的，不利于营造人才辈出、人尽其才的社会氛围和实现“十一五”经济社会发展目标。

中国历届领导人均曾多次表示要建立现代企业制度，以积极的态度促进中国经济与世界经济体系相融合，并为此采取了大量举措,包括今年开始施行的新公司法。我们认为草案的规定不符合中国政府的一贯立场，可能会对中国的投资环境产生消极影响。

即使从单纯保护劳动者的角度出发，草案的部分规定也不具有操作性，并不能实现保护劳动者的初衷，同时会对企业的利益造成损害，不利于企业和员工建立和谐关系。在竞争激烈的全球化经济中，中国职工的福利不仅依靠劳动法的规定，同时也依赖企业的生存与健康成长。皮之不存，毛将焉附？ 本草案中存在的某些根本缺陷，如不经修改即表决通过，不仅不能解决目前劳动法实施中的问题,而且将打乱劳动力市场的有序运转，严重地削弱中国企业的竞争能力，给国家经济带来负面后果，同时也会减少就业机会，最终反而会伤害劳动者的根本利益．因此，我们希望有关部门慎重考虑其对企业正常的经营管理机制的影响冲击，对有关问题作进一步修改、完善。建议《中华人民共和国劳动合同法(草案)》应当以《中华人民共和国劳动法》为基础，在原有法律框架内进行细化规定。

本草案还有某些条款的理论根据是片面截取某些发达国家的作法，却没有发达国家相应的配套制度设计。正如人大常委会负责人指出的那样，在制定和修改法律过程中，应当坚持从国情出发；坚持实事求是，而不应按照主观愿望，急于求成。老子云，治大国如烹小鲜．历史的经验告诉我们，在中国这样一个幅员广阔,人口众多的大国里，各地区之间，各

类企业之间存在着巨大差别. 采取 “一刀切”或 “一步到位”的政策措施往往会给国民经济带来意想不到的伤害, 直接影响到人民群众的生活. 因此, 全国立法不宜规定太细, 而最好由地方根据当地具体情况作出规定. 不应仅仅根据主观愿望, 而要考虑实际效果, 考虑各种后果, 权衡利弊.

我们希望人大常委会在审议草案的过程中,遵循吴邦国委员长在本次人大会议中提出的指导思想,统筹兼顾各方面的利益，对于意见分歧较大、法律关系比较复杂的专门问题，采取向社会公布草案全文、举行立法听证会或论证会等形式，广泛听取社会各方面(包括企业)的意见，真正做到集思广益，使制定的法律符合实际，更好地维护最广大人民的根本利益;此外, 修改后的新法正式实施前，给企业充分的时间进行准备和调整，以免影响业务和市场的有序发展。

我们非常感谢并珍惜这次全国人大法工委给予我们参与讨论国家法律的宝贵机会,并期待在今后有更多的机会为国家的立法工作献言献策。

二 00 六年四月七日

附件：

1《中华人民共和国劳动合同法(草案)》对企业运营机制的影响

2《中华人民共和国劳动合同法(草案)》若干条款存在的问题说明

附件一

《中华人民共和国劳动合同法(草案)》对企业运营机制的影响

《中华人民共和国劳动合同法(草案)》虽然有着良好的立法初衷，但具体规定与国际通行的人力资源管理理念产生冲突，对企业正常的招聘机制、解聘机制、留人方案、绩效管理体系等造成了全方位的影响。一旦实施可能会影响企业的正常运营，也不利于劳动者权益的保护。

一、草案对企业招聘机制的影响

我们研究后认为，草案对劳动者过分的“宽进”，主要体现在将事实劳动关系作为无固定期限合同处理（第 9 条）、用人单位与劳动者之间是否建立劳动关系以劳动者个人的理解为准（第 9 条）、劳动合同内容按有利于劳动者的原则解释（第 10 条）、劳动合同订立时单位有欺诈行为，合同无效，员工有欺诈行为，合同有效（第 8、18 条）、承包人用工，发包人作为用人单位（第 63 条）等规定。这些规定与现代企业的招聘机制不符合，一旦实施会使企业的招聘工作无法正常进行，被动招工现象大量出现。

例如事实劳动关系保护问题：事实劳动关系形成原因比较复杂，草案对事实劳动关系形成原因未予区分，一概按无固定期限劳动合同处理。根据此项规定，员工可以通过各种合法或非法手段造成事实劳动关系的出现，从而获得一份可以工作至退休的无固定期限劳动合同，实际上是变相鼓励员工故意不签订劳动合同。这必然导致员工主动不签劳动合同的现象大量出现，而企业的劳动合同管理工作也将全面混乱。立法应当有针对性地就事实劳动关系中的工资确定、社保缴纳和保险待遇、解雇补偿等问题予以规范。 “视同无固定期限劳动合同”这一保护方式，实际上没有保护在事实劳动关系中遭受企业不法侵害的劳动者的利益，只是保护了故意不签订劳动合同、侵害企业合法权益的员工的利益。

再如劳动关系的认定标准问题：劳动关系的认定“以有利于劳动者的理解为准”的规定，把劳动关系的认定的客观实际标准混淆为个人的主观单方理解。这种简单化的处理没有考虑单位和个人均无法举证时的责任分配，按此规定，任何个人都可以声称自己是某企业的员工且不用提供证据，而该企业由于无法提供证据则需要雇佣所有声称是该企业员工的个人。由于草案同时规定了事实劳动关系视为无固定期限劳动合同，这意味着中国的优秀企业必须时刻准备着雇佣一批从未计划雇佣但不得不雇佣到退休的员工。

又如合同欺诈问题：员工可以通过欺骗企业的手段订立劳动合同，而草案会承认此份骗取的合同的效力。诚信是员工最基本的道德素质，一个员工如果通过欺诈手段获得了一个

关键的岗位，由于不具备应有的技能水平，可能会对他人的生命安全、企业财产造成难以估量的损失。法律条款不应与公序良俗相抵触、不应低于最基本的社会道德底限。无论是企业还是社会，都无法承受欺诈泛滥带来的巨大破坏。

综上，员工招聘是企业人力资源管理的基础，如果企业使用了大量被动招用的、不诚实的而且要终身雇佣的员工，企业的经营运作必然产生混乱

二、草案对企业解聘机制的影响

我们认为，草案对用人单位过分的“严出”。主要体现在以下条款：固定期限合同不允许非过失性解除，无固定期限合同维持福利特性（第 32 条）；试用期严格控制（第 13、53 条）；劳动合同到期终止、约定终止、员工死亡终止等均仍然要支付经济补偿金（第 37、39 条）；企业裁员必须先裁新员工、再裁老员工（第 6 条）；劳务派遣限制使用且还要交备用金（第 7 条）；单位合并分立必须继续履行合同,不得约定终止（第 26 条）；单位违规解聘,员工可选择双倍赔偿（第 42 条）以及依法限制人身自由合同中止而不是解除（第 27 条）等规定。企业在经营过程中需要不断的对员工进行优胜劣汰。草案的规定与企业的解聘制度完全冲突。

例如根据草案企业不能以长期患病、不能胜任为理由解除有固定期限劳动合同，这意味着成千上万的胜任者将被拒之门外,造成企业用人机制的僵化，形成新的“大锅饭”体制。但这种用工的灵活性是企业生产、市场竞争的客观需要，此时多数企业可能将更倾向于签订短期合同，按月签订甚至按日签订的劳动合同将大量出现。

再如企业裁员中的问题：草案要求企业根据合同期限、工作时间进行数字排序，实行“先来后走”的简单原则，要求企业先裁减掌握新知识、新技术的新员工，这是对新员工的歧视性政策，也悖离企业通过裁员以适应市场竞争的初衷。

又如终止劳动合同的经济补偿问题，劳动关系随着劳动合同的到期而终止,本已在双方预期之内，草案规定给予补偿，对劳动密集型企业、大型企业，员工平均年龄较大的老企业造成重大的冲击和压力。草案规定员工死亡也要给予经济补偿金，再加上我国原有的抚恤金制度，造成企业双重给付。尤其不合理的是,如果职工在合同到期时拒绝续签，按照草案用人单位也要支付经济补偿金。

又如劳务派遣用工的规范问题，草案设定使用劳务工最多只能为 1 年的限制，限制了

用人单位的灵活用工自主权和劳动者在就业中的自愿选择权,又不利于扩大就业这个 “十一五” 期间国民经济的基本目标。”

又如关于职工试用期的问题，草案根据非技术性工作岗位、技术性工作岗位、高级技术性工作岗位设定不同的试用期，但对非技术性工作岗位、技术性工作岗位、高级技术性工作岗位都没有作出定义，为本条规定的实施带来操作上的困难。

综上，按草案的规定，企业的解聘制度将无法获得执行，企业将从追求效率的市场主体变为公益的福利机构。

三、对企业留人方案和知识产权保护体系的影响

优秀的人才是企业最宝贵的资源，为了留住人才，用人单位不惜耗费巨资采用各种特殊福利和提供培训来留住劳动者，而草案对劳动者过分的“宽出”，体现在除了保留原劳动法第 31 条的规定外，又予以进一步放宽，即员工享受企业提供的住房、汽车等特殊待遇，仍允许自由离职且不得约定违约金（第 15、36 条）、竞业限制期间全额支付工资（第 16、41 条）、劳动者单方解除的理由增加、程序简化（第 36 条）、员工可以以重大误解、显失公平、乘人之危为由请求撤销已订立的劳动合同（第 19 条）等规定上。这些规定将会对企业的留人方案和知识产权保护体系产生严重影响：

例如草案限定只有在企业提供员工 6 个月以上脱产专业技术培训的情形下，企业才可以和员工约定违约金。其实长期脱产培训不利于将技术知识应用于实际生产，且企业也不可能将一个岗位闲置 6 个月。一些不脱产的培训如 MBA 培训、海外培训等等人均费用可高达数十万甚至上百万人民币，能大大提高员工素质，但这些培训却无法约定服务期和违约金。按草案规定，即使企业在培训以外给员工提供了优厚的特殊福利如汽车、住房等，员工仍可以自由离职且不用支付违约金。企业投入巨资却无法获得相应权利，这种失衡的权利义务关系将导致企业减少对员工的培训投入和福利支出，不利于中国的劳动力素质提高，造成劳动者利益相对受损。

再如竞业限制全额支付工资问题，这一标准远远高于目前实行的各个地方性标准，超出绝大多数企业的承受程度。草案对违反竞业限制的职工所承担的违约责任规定补偿金三倍的上限，但商业秘密一旦泄露，就可能给用人单位造成无法挽回的重大损失，大大地高出补偿金额之三倍。由于中国多年来致力于知识产权保护，相关法规也逐步完善，越来越多的

跨国公司将先进技术引入中国，部分企业甚至将研发中心也搬到中国，但草案的规定不利于企业商业秘密、知识产权的保护，一旦实施，将严重损害中国企业的技术自主创新能力，也使得跨国公司不会将其掌握的先进技术引入中国，也不会让中国的员工接触和掌握其核心技术。

四、对企业绩效制度、自主管理权利的影响

企业对员工的管理是一个长期、动态的过程，面对激烈的市场竞争，需要企业及时做作出调整应对，这反映在企业管理上，就需要企业具有对员工进行自主灵活管理的权利，需要不断的对员工进行绩效考核，对部分最差的员工予以淘汰。而草案的规定将企业的管理权利进行了严格僵化的限制，如不能以不能胜任为由解除劳动合同和调整岗位（第 32、29 条）；如合同签订及任何变更必须采用书面形式（第 9、24、29 条），事实劳动关系视为无固定期劳动合同但仍然需要补签书面合同（第 9 条），规章制度必须经工会和职代会同意才能生效（第 5、51 条）。草案的规定与企业的考核制度和管理体系完全冲突。

例如在对签订固定期限合同又不能胜任员工的处理上，根据草案规定，企业不能予以提前解聘、也不能变更岗位、调整待遇，这样企业对员工进行绩效考核将失去意义。

再如根据草案规定理解，如果想在劳动合同履行期间调整员工的工作岗位或作出其他改变，企业必须在与员工协商一致的基础上采用书面确认形式予以变更。事实上一纸合同根本无法具体约定劳动关系所有内容，根据草案规定，员工随时可以以某项具体工作不属于工作内容而拒绝执行，如此将使企业的运营管理陷入混乱。企业任何单方变更合同的行为如单方决定给员工增加工资的行为也属于违法行为，而员工所多得的工资也成为不当得利，应当返还企业。草案的规定既不利于企业的经营管理，也损害了员工的利益。

又如草案规定企业规章制度应当经工会、职工大会或职工代表大会讨论通过，用人单位单方面作出规定的无效，该事项按照工会、职工大会或职工代表大会提出的相应方案执行，这实际上剥夺了企业制订规章制度权利，企业将无法正常运转，而且这也是与《中华人民共和国公司法》相抵触的。

企业的人力资源管理体系是在长期激烈的全球市场竞争中逐步形成的，有着坚实的实践基础和科学规律。立法应当了解企业的运营实际，避免对企业的正常经营机制产生消极影响。只有企业获得了良性发展，劳动者的权益才能获得根本保证。希望有关部门对以上问题慎重考虑。

附件二

对《中华人民共和国劳动合同法(草案)》若干条款存在的问题说明

草案对涉及劳动关系和劳动合同的许多问题做了全新的规定，其中有部分规定并不利于保护劳动者利益，同时也可能影响企业的正常运营机制，尤其是以下问题，需要慎重考虑。

一、关于劳务派遣用工的规范问题

草案规定，劳动者被派遣到接受单位工作满 1 年,接受单位继续使用该劳动者的,劳动力派遣单位与劳动者订立的劳动合同终止,由接受单位与劳动者订立劳动合同。接受单位不再使用该劳动者的,该劳动者所在岗位不得以劳动力派遣方式使用其他劳动者(第四十条)。

草案还规定，劳动者权益在被派遣的工作岗位受到损害的，由劳动力派遣单位和接受单位承担连带赔偿责任(第五十九条)。

我们认为,

1.企业在一个岗位上使用劳务工最多只能为 1 年的限制,不符合当前企业劳务用工的实际情况.在瞬息万变的现代经济里,企业有时需要设立一些临时性的岗位，有时需要通过使用派遣工来合理减轻人力资源管理方面的负担或培训成本.正因为有这一需要,因此才有众多的劳务派遣公司应运而生.无视这一现实,而采用一刀切的作法来禁止限制劳务派遣,这既限制了用人单位的灵活用工自主权和劳动者在就业中的自愿选择权,又不利于扩大就业这个 “十一五” 期间国民经济的基本目标。从微观上讲，派遣用工的一年限制最直接的结果就是，接受单位停止使用被派遣的劳动者，该劳动者失业。从宏观上看，在当前众多行业和企业大量使用派遣用工的方式下，上述草案条款一旦生效，必然会人为地制造出几十万失业人口，消灭了同样数量的就业机会。

应当看到，在多数情况下,劳务派遣作为一种更为灵活的用工形式，是市场经济、产业分工的产物，并不是用人单位用来规避法律、降低成本、逃避劳动风险的某种伎俩。国家应当从其积极的方面去考虑制定法律和规则以引导该种用工形式,使其符合社会主义市场经济发展的需要。同时劳务派遣关系也是整个有中国特色的社会主义市场经济中劳动力市场的一个重要组成部分，不能把它同其他用工关系割裂开来,做歧视性的区别对待，这样实际上是把从事劳务派遣服务的劳动者置于一种尴尬境地。如果说对劳务派遣服务进行限制是出于对被派遣的劳动者的一种保护措施,那么一年期限的限制并没有区别出被派遣的劳动者本人

愿意从事派遣服务的情形，对接受单位和被派遣的劳动者都进行了限制，这对劳动者是不公平的。

2.如果本条规定的出发点是鉴于实践中劳务派遣的三方主体，即派遣机构、劳动者和接受单位(实际用人单位)之间的法律关系不明确，一旦出现纠纷，派遣机构和接受单位相互推诿，致使劳动者的合法权益受到损害这一情况，这完全可以通过明确劳务派遣机构和接受单位各自的责任而得到解决。实际上，草案第五十九条已经明确规定，劳动者权利在被派遣的工作岗位受到损害的，由劳动力派遣单位和接受单位承担连带赔偿责任。这已经解决了对劳务派遣工的保护问题，第四十条的规定似显多余.

3.此外，第五十**九**条对“劳动者权利在被派遣的工作岗位受到损害”的规定不够明确具体，操作上有一定的困难。例如，劳动力派遣单位没有按照派遣合同向劳动者支付工资或者提供社会保险，是否属于“劳动者权利在被派遣的工作岗位受到损害”？此外，劳动力派遣单位是与职工签订劳动合同的一方，应由其承担第一位的法律责任. 接受单位只应承担第二位的法律责任，即只有当职工无法从劳动力派遣单位得到应得的赔偿，接受单位才须承担连带赔偿责任.

建议：

据此，建议取消本条中对劳务费派遣岗位设置在年限上的限制。

第五十**九**条则应修改为：“劳动者权利在被派遣的工作岗位受到损害的，因接受单位违反劳动法规定所造成损害的部分，由接受单位承担赔偿责任；因劳动力派遣单位违反劳动法规定所造成损害的部分，由劳动力派遣单位承担赔偿责任；不能区分接受单位与劳动力派遣单位责任的，由接受单位与劳动力派遣单位承担连带赔偿责任. 应由接受单位与劳动力派遣单位承担连带赔偿责任的，劳动力派遣单位应承担第一位的法律责任，即如果职工无法从劳动力派遣单位得到应得的赔偿，接受单位须承担连带赔偿责任.”

二、关于公司规章制度的制定

草案规定，用人单位的规章制度直接涉及劳动者切身利益的，应当经工会，职工大会，或职工代表大会讨论通过，或者通过平等协商作出规定（第五条 2 款）；依照本法应当经工会，职工大会，或职工代表大会讨论通过，或者通过平等协商作出规定的事项，用人单位单方面作出规定的无效，该事项按照工会，职工大会，或职工代表大会提出的相应方案执行（第五十一条 1 款）。

我们认为：

1.制定规章制度是《劳动法》、《公司法》赋予企业的一项重要权利。这项权利能否全面有效的实现是一家企业生存的基础以及成功和发展的重要保证。当前对这项权利的制约主要有：工会在制度制订过程中的建议权和执行中的监督权，劳动行政部门对制度草案的审查备案权以及执行中监督、纠正和处罚权，人民法院对制度合法性的司法最终裁判权。这是一整套的监督制约机制，可以有效的保障企业劳动者的整体权益，又能够使企业在保证员工合法权益的前提下充分享有用工自主权。草案中的上述条款改变了这一制约机制，使劳动者团体或组织在“涉及劳动者切身利益”的公司制度的制定上享有了“否决权”，甚至于成为“劳动者单方的决定权”：“ 用人单位单方面作出规定的无效,该事项按照工会,职工大会,或职工代表大会提出的相应方案执行”。该条款实际上将造成在双方协商不成的情况下，用人单位只能接受劳动者团体的意志，否则就不能制定有效的规章制度。在劳资关系中引入民主管理机制固然是必要的，但是草案的上述条款由于不能清楚的表述“直接涉及劳动者切身利益的用人单位的规章制度”，而在民主协商机制中是不能被实际执行的，不能体现民主协商的本质。另外，劳动关系是一种利益关系，矛盾是永远客观存在的，在劳动过程中用人单位是主动的，劳动者是被动的。如果赋予劳动者在制定公司规章制度方面的决定权，必然造成该协商机制的失衡，制造更多的争议。此外，在现实生活中,如果企业制订的规章制度一定都要经过职工同意才能生效，当双方不能达成一致时就会使企业管理出现无规可循的混乱状态。最后,草案对于什么构成“劳动者的切身利益”也没有作出明确界定，使本条在实践中很难操作.

2. 本法为工会,职工代表大会,职工大会提供了绝对的否决权,但没有为其规定任何制约机制.那么,如何防止工会滥用其否决权?

3. 当然,在制订企业规章制度过程中征求工会或职工(代表)大会的意见,并进行公示,以加强职工对企业的民主监督，是合理且必要的.但如果剥夺了企业制订规章制度权利，企业将无法正常运转。而且这也是与《中华人民共和国公司法》相抵触的。

三、关于以“无过失”理由解除有固定期限劳动合同的权利

草案规定，有下列情形之一的，用人单位在提前 30 日以书面形式通知劳动者本人或者额外支付劳动者 1 个月工资后,可以解除无固定期限劳动合同：

（一）劳动者患病或者非因工负伤，在规定的医疗期满后，不能从事原工作,且未能就变更劳动合同与用人单位协商一致的；

（二）劳动者不能胜任工作，经过培训或者调整工作岗位，仍不能胜任工作的；

（三)劳动合同订立时所依据的客观情况发生重大变化,致使原劳动合同无法履行，

经用人单位与劳动者协商，未能就变更劳动合同内容或者中止劳动合同达成协议的（第三十二条）。

我们研究后认为:

1.根据劳动法第二十六条的规定,本条所列举的理由适用于所有劳动合同,既包括无固定期限的劳动合同,也包括有固定期限的劳动合同。

2.鉴于目前企业签订的劳动合同大多为有固定期限合同,本条规定实际上剥夺了企业在职工因慢性病不能继续从事工作、不能胜任工作等情况下解除劳动合同的合理权利。如果企业希望保持这方面的权利，按照本条规定就必须与职工签定无固定期限的劳动合同. 这是对企业用工合理权利的强行干预.如果本条规定的本意是鼓励企业与劳动者建立无固定期限的劳动合同关系，保证社会劳动关系的稳定性，那么其施行的结果必将会适得其反.多数企业可能将更倾向于签订短期合同，以满足用工灵活性的需要，按月签订甚至按日签订的劳动合同将大量出现。这是因为,这种用工的灵活性满足于企业生产、市场竞争的需要，是一种客观存在。

3.此外，本条规定未能充分考虑劳动市场上供过于求,社会上存在大量求职者的现实;企业中的工作岗位是有限的，不淘汰不胜任者,就意味着成千上万的胜任者将被拒之门外,这就必然造成企业用人机制的僵化，形成新的“大锅饭”体制。优胜劣汰是任何事物生存发展的基本规律，草案的规定恰恰违反了这一基本规律，结果是不能淘汰不胜任员工的企业必将被市场竞争淘汰。

所以，草案的现行规定一旦实施，不仅不能提高我国的整体经济社会效益,而且将打乱劳动力市场的有序运转。

四、关于竞业限制补偿金的问题

草案规定，用人单位与劳动者有竞业限制约定的，应当同时与劳动者约定在劳动合同终止或者解除时向劳动者支付的竞业限制经济补偿,其数额不得少于劳动者在该用人单位的年工资收入。劳动者违反竞业限制约定的，应当向用人单位支付违约金，其数额不得超过用人单位向劳动者支付的竞业限制经济补偿的3倍(第十六条)。

我们研究后认为:

1. 在竞争激烈、科技发展日新月异的当今社会，企业为了保护自己的商业秘密又不得不与许多技术骨干签订竞业限制协议。对这类协议的法律保护对企业自主创新具有推动作用.但是,本条规定用人单位向劳动者支付的竞业限制经济补偿以年工资百分之百为作底数,标准太高，甚至高于退休金,其实际后果将是鼓励那些应企业要求而签订竞业限制协议的职

工离职后不去积极寻找不违反竞业限制约定的工作,而坐享百分之百的年工资, 这将迫使企业尽可能少签竞业限制协议,不利于企业创新。

2. 从目前散落于各个地方性规定中的竞业限制补偿标准来看，草案中的标准远远高于其中的任一标准，这说明了草案的标准在很大程度上不符合各个地方的实际情况，没有经过调查和论证，对很多企业来讲，基本上否定了竞业限制制度的可行性。并不是只有那些付得起补偿的企业才需要保护知识产权和商业秘密，竞业限制制度应当考虑绝大多数企业的承受程度。

3.此外,为违反协议的职工所必须承担的违约责任硬性规定补偿金三倍的上限对企业很不公平。商业秘密具有较高的经济价值和商业价值, 一旦为他人知悉，就可能给用人单位造成无法挽回的重大损失,往往大大地高出离职员工个人因违反竞业限制协议而应得到的补偿金额之三倍。由于中国多年来致力于知识产权保护，相关法规也逐步完善，越来越多的跨国公司将先进技术引入中国，部分企业甚至将研发中心也搬到中国，但草案的规定不利于企业商业秘密、知识产权的保护，一旦实施，将严重损害中国企业的技术自主创新能力，也使得跨国公司不会将其掌握的先进技术引入中国,也不会让中国的员工接触和掌握其核心技术。

4. 实践中存在着企业通过不正当手段招揽其竞争对手劳员工的现象，草案对此也应有所规范。

五、事实劳动关系保护问题

草案规定：已存在劳动关系，但是用人单位与劳动者未以书面形式订立劳动合同的，除劳动者有其他意思表示外，视为用人单位与劳动者已订立无固定期限劳动合同，并应当及时补办订立书面劳动合同的手续。(第九条)

我们研究后认为,

1、根据企业的日常工作实际来看，事实劳动关系形成原因比较复杂，主要包括四类：第一，企业故意不签合同；第二，企业由于工作疏忽未及时与员工签订或续签合同；第三，员工故意不签订劳动合同；第四，企业经营活动中与个人进行交易的行为符合劳动关系外在特征而被确认为事实劳动关系。

草案对事实劳动关系形成原因未予区分，一概按无固定期限劳动合同处理，实际上是变相鼓励员工故意不签订劳动合同。根据此项规定，员工可以通过各种合法或非法手段造成事实劳动关系的出现，从而获得一份可以工作至退休的无固定期限劳动合同，这必然导致员工主动不签劳动合同的现象大量出现，而企业的劳动合同管理工作也将全面混乱。

2、事实劳动关系对员工的损害主要为：工资数额没有明确约定容易发生争议、社会保险少缴不缴、员工遭到随意解聘等，对此，立法应当有针对性地就事实劳动关系中的工资

确定、社保缴纳和保险待遇、解雇补偿等问题予以规范。 “视同无固定期限劳动合同”这一保护方式，草案此项规定，实际上没有保护在事实劳动关系中遭受企业不法侵害的劳动者的利益，只是保护了故意不签订劳动合同、侵害企业合法权益的员工的利益。

建议:

事实劳动关系需要法律予以保护，但应有针对性且在合理限度。建议取消事实劳动关系“视为用人单位与劳动者已订立无固定期限劳动合同”这一规定，对事实劳动关系中劳动者劳动报酬确认方式、社会保险的处理方式、解雇方式和补偿标准等问题予以规范。

六、终止劳动合同的经济补偿问题

草案规定，有下列情形之一的,用人单位应当…向劳动者支付经济补偿:

(三)依照本法第三十七条第一款第(一)项、第(三)项、第(四)项、第(五)项、第(六)项的规定终止劳动合同的。(第三十九条)

草案第三十七条第一款规定，有下列情形之一的,劳动合同终止:

(一) 劳动合同期满,或者劳动合同约定的终止条件出现的. (第三十七条)

(二)劳动者已开始依法享受基本养老保险待遇的;

(三)劳动者死亡，或者被人民法院宣告死亡或 者宣告失踪的

(四)用人单位歇业,解散的;

(五)用人单位被依法宣告破产、被吊销营业执照或者被责令关闭的;

(六)法律、行政法规规定的其他情形。

我们研究后认为:

1、现行劳动法下关于解除劳动合同经济补偿金的规定主要考虑了三个方面的因素：用人单位单方合法解除合同是一种超出双方预期的行为，应部分承担后果；劳动者被解除劳动合同后可能在一段时间内处于失业状态，需要一定的救济；经济补偿金的数额按照该员工在该用人单位的工作年限确定，算是一种年资的补偿。但劳动关系随着劳动合同的到期而终止,这是双方预期之内的，因此劳动法没有规定补偿。

2、一些地方的法规或规章曾经对这项补偿做过有关规定，要求用人单位在劳动合同到期拒绝续签的时候向劳动者支付某种“生活补助金”,这主要是从对劳动者的救济的角度考虑制定的。但随着市场经济的发展，国家社会保障制度的建立，用人单位承担的社会救济方面的责任逐渐由社会保障机构承担了，很多地方就废除了上述的地方规定，以使企业能够解脱出来，适应市场经济的需要。草案中的上述条款，把已经废除了的不适应市场经济的旧的制度又带回来了，本来应当减轻的责任又加到企业的身上，这不符合与时俱进的原则。

3、这一条款使企业的用工成本与企业的用工人数以及员工本企业的工作年限形成了正比，会对一些劳动密集型的企业，大型企业，员工平均年龄较大的老企业造成重大的冲击

和压力。目前很多企业甚至连员工工资、退休员工的退休金还发不出来，社会保险缴费不足的情况，再加上这一重负，可能就维持不下去了。同时从成本角度出发，很多企业会尽量减少用工岗位，就业的机会就少了，失业人口就增多了。

4、尤其不合理的是,如果职工在合同到期时拒绝续签，按照本条款用人单位也要支付经济补偿金.

5、根据此条款，员工死亡也要给予经济补偿金。我国本来对在职员工死亡已经实行了抚恤金制度，现在再给予经济补偿金，造成双重给付。同时草案规定宣告死亡、宣告失踪也要给予经济补偿金,可能导致部分工龄较长、临近退休的职工故意失踪从而骗取经济补偿金。

七、关于劳动关系的认定标准问题

本法所称劳动关系，是指用人单位招用劳动者为其成员，劳动者在用人单位的管理下提供有报酬的劳动而产生的权利义务关系。(第三条)

草案规定，用人单位和劳动者对是否存在劳动关系有不同理解的，除有相反证明的以外，以有利于劳动者的理解为准。(第九条)

我们认为,

1、企业与个人之间可能产生劳动关系，也可能产生民事关系。现有草案对劳动关系仅有简单的定义，无法体现劳动关系区别于其他法律关系的特征，有必要对劳动关系的认定标准予以明确的界定。但草案对如此重要的问题采取了简单化处理，规定劳动关系的认定以有利于劳动者的理解为准，如果个人认为与单位存在劳动关系，争议处理部门就可以确认存在劳动关系，个人认为不存在劳动关系，就可以确认不存在劳动关系，把劳动关系的认定的客观实际标准混淆为个人的主观单方理解。

2、如果单位和个人就双方之间是否存在劳动关系发生争议，那么这种争议中一般不会有合同等确实可信的证据予以证明；如果单位和个人从未发生过任何关系，那么单位也不可能有任何证据证明与该个人之间有何种关系。现有草案片面强调了单位的举证责任，忽视了个人的举证责任；片面强调了单位不能举证时的责任承担，没有考虑单位和个人均无法举证时的责任分配。按此规定，任何个人都可以声称自己是某企业的员工且不用提供证据，而该企业由于无法提供证据则需要雇佣所有声称是该企业员工的个人。

3、由于草案同时规定了事实劳动关系视为无固定期限劳动合同，而是否存在劳动关系又以劳动者理解为准，如此巨大的、无成本的利益会诱惑着任何无工作或对现有工作不满的个人去声称自己与某个优秀的企业存在事实劳动关系。这意味着中国的优秀企业必须时刻准备着雇佣一批从未计划雇佣但不得不雇佣到退休的员工,这会使企业的员工招聘管理体系无法正常运转，这样的用工风险是任何企业都无法承受的。

建议:

对劳动关系予以明确规范的定义，给出可以判断的客观外部标准，取消“除有相反证明的以外，以有利于劳动者的理解为准”这一规定。

八、企业裁员中的问题

草案规定， 劳动合同订立时所依据的客观情况发生重大变化，致使劳动合同无法履行，需要裁减人员 50 人以上的，用人单位应当向本单位工会或者全体职工说明情况，并与工会或者职工代表协商一致。裁减人员时，应当优先留用在本单位工作时间较长、与本单位订立较长期限的有固定期限劳动合同以及订立无固定期限劳动合同的劳动者。(第三十三条)

我们研究后认为:

1、企业由于搬迁、转产等客观情况发生重大改变，根据对市场与自身的分析研究，为了企业的生存和发展，有时迫不得已需裁减某个部门或机构。裁员名单主要根据员工的工作岗位、工作技能确定。而草案则要求企业根据合同期限、工作时间进行数字排序，实行“先来后走”的简单原则，要求企业先裁减掌握新知识、新技术的新员工，完全悖离企业通过裁员以适应市场竞争的初衷，反而导致已经被迫裁员的企业进一步丧失市场竞争力。

2、对企业的新员工而言，他们与老员工同样为企业工作，却要首先被裁减，这是对新员工的歧视性政策。

3、裁减人员以 50 人为标准无合理性。小型企业可能只有三五人，永远不会达到裁减 50 人标准，大型企业员工人数可能有数十万，每天合同到期人数都超过百人。草案未加区分一概以 50 人为标准，既脱离实际也缺乏公平。

所以，根据草案的规定，企业无法通过裁员改善竞争力，最终只能选择破产或解散，不仅无法达到对老员工进行特别保护的目的，反而导致新员工和老员工均无法受到保护。

九、关于职工试用期的问题

草案规定，非技术性工作岗位的试用期不得超过 1 个月;技术性工作岗位的试用期不得超过 2 个月; 高级技术性工作岗位的试用期不得超过 6 个月;同一用人单位与同一劳动者只能约定一次试用期. (第十三条)

我们研究后认为:

1、本条规定的非技术性工作岗位与技术性工作岗位的试用期(1 至 2 月)过短,在许多情况下不足以为用人单位考核新职工是否称职提供充分的时间.

2、草案中对非技术性工作岗位;技术性工作岗位; 高级技术性工作岗位都没有作出定义,为本条规定的实施带来操作上的困难.

十、关于合同欺诈问题

草案规定， 有下列情形之一的，劳动合同无效：

(一)用人单位以欺诈、胁迫的手段订立劳动合同的；……（第十八条）

我们研究后认为:

1、劳动法第十八条原规定企业和员工任何一方有欺诈行为都会使劳动合同无效，而草案仅规定了用人单位欺诈会导致劳动合同无效,这意味着员工可以通过欺骗企业的手段订立劳动合同,而法律会承认此份骗取的合同的效力。我们认为诚信是员工最基本的道德素质，一个不诚信的人是不可能成为合格的员工的。法律条款不应与公序良俗相抵触、不应低于最基本的社会道德底限。

2、由于就业压力，个人在求职过程提供虚假信息的现象已经频繁出现，对此种现象，法律应当通过对欺诈行为进行惩罚的方式予以遏制，而不是加以纵容，否则不但会扰乱企业的人力资源管理，也会造成社会道德的整体滑坡。

3、现代企业对劳动者的素质要求越来越高，一个员工如果通过欺诈手段获得了一个关键的岗位，由于不具备应有的技能水平，可能会对他人的生命安全、企业财产造成难以估量的损失，无论是企业还是社会，都无法承受欺诈泛滥带来的巨大破坏。

综上，员工招聘是企业人力资源管理的基础，如果企业使用了大量被动招用的、不诚实的而且要终身雇佣的员工，企业的经营运作必然产生混乱

十一、关于服务期和违约金的问题

草案规定， 用人单位为劳动者提供培训费用，使劳动者接受 6 个月以上脱产专业技术培训的，可以与劳动者约定服务期以及劳动者违反服务期约定应当向用人单位支付的违约金。该违约金不得超过服务期尚未履行部分所应分摊的培训费用。（第十五条）

除本法第十五条和第十六条规定的情形外,用人单位不得与劳动者约定由劳动者承担的违约金。（第十七条）

我们研究后认为:

1、劳动合同有着明确的劳动合同期限约定，企业根据合同期限来制订员工的使用方案和职业规划，员工在合同期限内提前跳槽必然给企业带来一定损失。有部分企业为此在劳动合同中约定员工提前辞职需要支付违约金，有时甚至是天文数字的高额违约金。我们认为滥用违约金不利于劳动者的合理自由流动，有必要对违约金的使用做出了一定限制，但草案对违约金的限制过严。根据草案规定，只有在企业给员工提供 6 个月以上脱产专业技术培训的

情形下，企业才可以和员工约定违约金，此规定脱离了现在的社会实际。对技术人员的培训，通常需要和实际工作相结合，长期脱产培训反而不利于将技术知识应用于实际生产，而且企业也不可能将一个岗位闲置 6 个月。企业给予员工的培训具有多种形式，并不局限于脱产专业技术培训，例如 MBA 培训、海外培训等等。这些培训需要企业投入大量成本，人均费用可高达数十万甚至上百万人民币，能大大提高员工素质，但这些培训并不属于草案规定的 6 个月以上脱产专业技术培训，无法约定服务期和违约金。企业投入巨资进行员工培训却无法获得相应权利，劳动者接受了培训后却可以随意跳槽而不必承担责任，这种失衡的权利义务关系将导致企业减少对员工的培训投入，从而造成中国的劳动力素质难以提高。

2、草案规定只有在企业提供培训的情况下才可以约定服务期和违约金，按此规定，即使企业给员工提供了优厚的特殊福利如汽车、住房等，员工仍可以自由离职且不用支付违约金。这样必然导致企业不再向员工提供此类福利，从而造成劳动者利益相对受损。

十二、合同变更问题

草案规定，劳动合同文本应当载明下列事项：　……

(四)工作内容和工作地点；

(五)工作时间和休息休假；

(六)劳动报酬；　　…（第十一条　）

用人单位和劳动者应当按照劳动合同的约定，全面履行各自的义务。劳动者本人应当实际从事劳动合同约定的工作。（第二十四条）

用人单位与劳动者协商一致，可以变更劳动合同约定的内容。　变更劳动合同，应当采用书面形式记载变更的内容，经用人单位和劳动者双方签字或者盖章生效。（第二十九条）

我们研究后认为:

1、一份劳动合同的期限可能有三年五载、十年八年，甚至是一份无固定期限合同，这期间员工的工作岗位和工作内容、职务、收入都有可能发生变化，对此，草案规定任何一次变更都必须采用书面形式，其手续过为繁琐。

2、根据草案规定理解，工作内容必须在劳动合同中事先约定，对未约定的工作内容员工可以拒绝接受。实际上员工的工作内容一般包括多个方面，无法在劳动合同中具体约定，员工随时可以以某项具体工作不属于工作内容而拒绝执行，如此将使企业的运营管理陷入混乱。

3、根据草案规定理解，如果想在劳动合同履行期间调整员工的工作岗位或作出其他改变，企业必须在与员工协商一致的基础上采用书面确认形式予以变更。这样即使企业单方决定给员工增加工资的行为也属于违法行为，而员工所多得工资也成为不当得利，应当返还企业。草案的规定既不利于企业的经营管理，也损害了员工的利益。

综上所述，该草案的规定不利于企业和员工建立和谐关系，对企业正常的经营管理机制造成了全面冲击，并且有可能导致劳动合同短期化加剧，最终损害劳动者利益。建议草案应当以《中华人民共和国劳动法》为基础，根据社会生活实际，对有关问题予以细化规定。

Comments and Suggestions on Revisions to *Labor Contract Law (Draft)*

Attn: Law Committee, Financial and Economic Committee and Legislative Affairs Committee of the Standing Committee of the National People's Congress

The *Labor Contract Law of the People's Republic of China (Draft)* (hereinafter referred to as "Labor Contract Law Draft" or "Draft") currently under discussion in the Standing Committee of the National People's Congress has attracted attention of all circles of the society. The Draft summarizes experience obtained the country in carrying out labor contract system, and intends to expressly set out rights and obligations of employers and laborers for purpose of strengthening protection of laborers' rights and interests with respect to significant problems arising out in practice, for example, the execution rate of labor contracts are low, the contract terms are too short, the interests of laborers are not fully protected and etc.

However, the Draft has certain defects. If such Draft is approved without correcting said defects, it may not only affect the enforceability of the Draft, but also exert negative influences on the national economy. Out of our responsibilities as Chinese enterprises and based on our sincere hope to build a harmonious society by actively making suggestions, we hereby offer the following suggestions relating to revisions to the Draft:

During the decade after the *Labor Law of the People's Republic of China* took effect, the Labor Law has been brought into full play in regulating labor relationships between employers and laborers and solving labor disputes, and it has significantly promoted standardized operation of enterprises and establishment of modern enterprise system. Labor authorities and local authorities of different levels also promulgated a lot of ancillary regulations on the basis of the *Labor Law of the People's Republic of China* and according to actual situations in their respective work, through which different kinds of concrete problems arising out of the enforcement of the Labor Law and aimed at in such regulations were solved. During the past decade, Employers and laborers have gradually acclimatized to the legal environment consisting of the *Labor Law of the People's Republic of China* and its ancillary regulations.

It shall be noted that the most significant problem existing in labor issues in PRC is not the

lack of protection of laborers by labor laws and regulations, but the fact that the laws are not fully observed. It is due to the fact that the laws are not fully observed and enforced that many enterprises violate provisions on minimum remuneration, demand laborers to work overtime in breach of relevant laws and regulations, even default payment for remuneration and social insurance, or provide poor working conditions relating to safety and hygiene. Solving these long outstanding problems shall mainly depend on establishing perfect law enforcement procedures, strengthening law enforcement and putting into effect existing provisions, but not proposing unduly high requirements in addition to existing liabilities of enterprises and destroying existing legal order. Otherwise the abnormal situation that "the one who violates laws remains unpunished while the one who observes laws is punished" must be deteriorating.

Undoubtedly, the *Labor Law of the People's Republic of China* itself has certain defects. And some problems need to be solved through further legislation. The new law shall reify pertinent matters on the basis of the *Labor Law of the People's Republic of China*, but not establish a new legal system. However, the Labor Contract *Law of the People's Republic of China (Draft)* represents a changeover of the legal environment which has been gradually formed and has gradually become stable during the past decade, and a radical change of the existing labor law regulating system, due to which legislation of labor authorities and local authorities of different levels are all to be changed. Therefore, we doubt about whether it is necessary to carry out such significant changes in the *Labor Contract Law (Draft)*.

As for the contents, provisions under the Draft reflect features of "easy establishment of labor relationship and strict restrictions on termination of such" on the employer's side, and "easy establishment of labor relationship and easy termination of such" on the laborer's side. It is also shown in the Draft that quite a lot administrative intervention measures will be adopted and various "rigid" restrictions will be posed on business administration of enterprises. Such provisions may probably lead to certain social problems, among which what we concern most is that the internationally accepted advanced human resources management concept might not be adapted to the provisions under the Draft, which mainly include:

1. The feature of "easy establishment of labor relationship" is reflected in the Draft.

The definition of labor relationship is simple and broad in the Draft. Therefore, even contingent business contracts between enterprises and individuals may be considered establishment of labor relationships, which may exert influence on all aspects of enterprises' recruitment, and may lead to a lot of "passive recruitment" of enterprises, that is, enterprises have to recruit a lot of employees whom are not expected to be recruited.

2. The feature of "strict restrictions on dismissal of employees by employers" is reflected in the Draft.

The Draft poses strict restrictions on dismissal of employees by enterprises, which impacts on the dismissal system of enterprises, and may disable enterprises from optimizing and integrating human resources in a normal way. Meanwhile, it may further shorten the term of labor

contracts and cause a lot of contracts be executed by months or even by days. Thus job opportunities available on the market will be significantly decreasing.

3. The feature of "easy termination of labor relationship" in case of employee's resignation is reflected in the Draft.

Pursuant to the Draft, the employee who is treated favorably by enterprises and who possesses trade secrets may resign at his/her discretion. The cost of such breach is quite low or even there is no cost at all. This will impact on enterprises' scheme regarding retaining employees and the intellectual property protection system, and may exerct influence on enterprises' ability of carrying out innovation by themselves , which is unfavorable to the technology development of PRC.

4. "Rigid" provisions relating to employers' management rights are set out in the Draft.

Pursuant to the Draft, enterprises cannot adjust positions or remuneration of employees with poor performance. Reasonable work assignment of enterprises shall only be effective with employees' written consent. And it is the labor union which is entitled to formulate rules, policies and labor disciplines. All those will exert influence on performance-related incentive system and management system of enterprises, and may restrict enterprises' rights regarding managing employees at their own discretion and in a flexible way.

In today's world, competitions regarding human resources are highly intense. As emphasized by Chairman Hu Jintao on National Talents' Conference, to manage human resource work in a successful way and to carry out the strategy of building a powerful country by talents must be based on actual situations of the world and PRC in the present age, which are undertaking profound changes, and according to urgent needs of the development of the Communist Party and national causes. And we must free ourselves of old ideas, be practical and realistic, advance with times, and form a scientific human resource concept adaptable to new situations and new tasks. However, provisions under the Draft make people feel that it is a product of the planning economy and the old way of thinking, which conflicts with the internationally accepted human resources management concepts and impacts on all aspects of the normal recruitment, dismissal, performance management system and employees retaining scheme of enterprises. Once the Draft is put into effect, it may hinder Chinese enterprises' participation in international human resource competitions. This is opposite to the strategy of building a powerful country by talents, and is not in favor of fostering a social atmosphere which may give rise to generations of talents and bring everyone's talent into full play, and of accomplishing the economic and social development tasks of the eleventh five-year plan.

Successive leaders of China mentioned several times about establishing modern enterprise system and actively facilitating the merge of China's economy with international economic system. And a lot of measures have been taken in this regard, including enforcing the new Corporation Law earlier this year. As we understand, provisions under this Draft are not consistent with the persistent position of Chinese government, and may exert negative influence on China's

investment environment.

Even from the angle of simply for purpose of protecting laborers, some provisions under this Draft are impracticable, and will not satisfy the original intent of protecting laborers. Meanwhile, they will harm interests of enterprises, and are unfavorable to the establishment of harmonious relationships between enterprises and employees. In the global economy with intense competitions, the welfare of Chinese employees will not only depend on provisions of labor laws, but also depend on the existence and healthy development of enterprises. With the skin gone, what can the hair adhere to? This Draft has some fundamental defects. If the Draft is approved without making any revisions, problems arising out of the enforcement of current Labor Law will not be solved, and the orderly operation of labor market will be disturbed. It will also significantly impair the competitiveness of Chinese enterprises, bring about negative consequences to national economy, reduce job opportunities, and in the end it will harm fundamental interests of laborers. Therefore, we hope that relevant authorities would carefully consider influences and impacts it may exert on normal operation and management of enterprises, and further amend and perfect relevant issues. It is suggested that the Labor Contract Law of the People's Republic of China shall be based on the *Labor Law of the People's Republic of China*, and reify provisions under the original legal framework.

The theoretical basis of certain provisions under this Draft is from the cut-out of part of the practice of certain developed countries, while no corresponding ancillary system like that of developed countries is formulated. As stated by the principal of the Standing Committee of the National People's Congress, in the process of formulating and amending laws, situations of the state shall be stuck to; and people must stand by the truth, but not try to run before they could walk, as according to their desire. The ancient sage, Lao Tzu, once mentioned that governing a large country is like cooking small fishes. We have learned from the history that in a populous country with a vast territory like China does, significant difference exists between various districts and various enterprises. Hence "one-size-fits-all" or "all in one" policies or measures may probably bring about unpredictable damages to the national economy, and may directly impact on the life of people. Therefore, national legislation would better not to be too detail-oriented. And it would be better for local authorities to work out such details according to local situations. In this case, except the desire, actual effect and various consequences shall also be taken into consideration, and the advantages and disadvantages shall be weighed.

We do hope that, during the review and examination of this Draft, the Standing Committee of the National People's Congress would follow the guiding ideology proposed by Chairman Wu Bangguo at this session of National People's Congress and make overall plans and take all factors' interests into consideration. As for certain problems where there exist significant difference and complicated legal relations, the whole text of the Draft shall be made public, or a legislation hearing or panel meeting shall be held or other measures shall be taken, and comments from various circles of society (including enterprises) shall be widely listened to, so that ideas will really be pooled to formulate laws fit for actual needs and to better protect the fundamental interests of the general public. Before the amended new laws are formally put into effect, enterprises shall be given sufficient time for preparation and adjustment to avoid affecting their

business and the orderly development of the market.

We very much appreciate and cherish the valuable opportunity given by the Legislative Affairs Committee of Standing Committee of National People's Congress for us to participate in the discussion of state laws, and anticipate more opportunities to provide our comments and suggestions regarding state legislation in the future.

March, 2006

Appendices:

1. Influence Exerted by the *Labor Contract Law of the People's Republic of China (Draft)* on Enterprise Operation System
2. Explanation on Various Problems under the *Labor Contract Law of the People's Republic of China (Draft)*

Appendix I
Influence Exerted by the *Labor Contract Law of the People's Republic of China (Draft)* on Enterprise Operation System

Although the original intent of the legislation of the *Labor Contract Law of the People's Republic of China (Draft)* is good, the detailed provisions conflict with the internationally accepted advance human resources management concept, and impact on all aspects of the normal recruitment, dismissal, employees retaining scheme and performance management system of enterprises. Once the Draft is put into effect, enterprises' normal operation may be affected, and it is also unfavorable to the protection of laborers' rights and interests.

I. Impact of the Draft on Enterprise Recruitment System

Upon our research, in the Draft the excessive "easy establishment of labor relationship" with laborers is mainly reflected by factual labor relationships are handled as contracts with no fixed terms (Art. 9), whether labor relationships are established between employers and laborers is subject to laborer's understanding (Art. 9), labor contracts shall be construed according to the principle of being in favor of laborers (Art. 10), the contract is void if the employer committed fraudulent activities upon the execution of such, while the contract is effective if the employee committed fraudulent activities (Art. 8 & 18), in the event the contractor engages laborers, the develop shall be the employer (Art. 63) and other provisions. These provisions are not consistent with the recruitment system of modern enterprises. Once they are put into effect, the normal recruiting work of enterprises will not be carried out properly, and they may lead to a lot of passive recruitment.

Take the protection of factual labor relationships for example: the reasons why factual labor relationships are formed are relatively complicated, however, the Draft makes no difference of such reasons and it is stipulated that all said factual labor relationships shall be handled as labor contracts with no fixed terms. According to such provision, employees may, by various legal or illegal means, cause the emergence of factual labor relationships for purpose of obtaining labor contracts with no fixed terms, according to which they could work till their retirement. This is in fact to encourage employees to intentionally refuse to execute labor contracts, as in a disguised form. This would undoubtedly lead to the emergence of employees' refusal of executing labor contracts, and enterprises' labor contracts management would be put into total chaos. The legislation shall lay emphasis on and regulate decision regarding salaries, payment and grade of social insurance, severance payment and other issues in factual labor relationships. In fact, protection by means of "to be handled as labor contracts with no fixed terms" cannot protect laborers' interests illegally infringed by enterprises in factual labor relationships, but protect employees who intentionally refuse to execute labor contracts and infringe lawful rights of enterprises.

And take criteria of labor relationship confirmation for example: the provisions that confirmation of labor relationship "shall be subject to the understanding favorable to laborers"

mix the actual objective standard relating to confirmation of labor relationship with unilateral subjective understanding of individuals. This simplified arrangement does not take into consideration distribution of liabilities when neither the enterprise nor the individual can assume the burden of proof. According to this provision, anybody may allege himself/herself be a employee of certain enterprise and will not be required to provide evidence, and the enterprise will be required to hire all individuals alleging to be employees of such enterprise for it inability to provide evidence. Since it is set out in this Draft that factual labor relationships will be considered as labor contracts with no fixed terms, this shall mean that outstanding Chinese enterprises must be prepared to hire employees whom they do not anticipate to hire but have to do so and whom will be hired till their retirement at any time.

And take contract fraud for example: employees may execute labor contracts by deceiving enterprises, and the effectiveness of the contract obtained in such a way will be admitted, as according to this Draft. Honesty is the very basic moral of employees. In the event an employee obtained a key position by means of fraud, since such employee is lacking in desired skills, he/she may lead to incalculable personal injuries or property losses of enterprises. Legislative provisions shall not conflict with social orders and practice, and shall not be less strict than the most fundamental social standards. Neither enterprises nor the society could bear the tremendous damages brought about by emergence of fraud.

To sum up, employees recruitment are the basis of enterprise human resources management. If the enterprises have a lot of passively recruited dishonest employees whom they have to hire till their retirement, the business and operation of such enterprises must be brought into chaos.

II. Impact of the Draft on Enterprise Dismissal System

We hold the point that the excessive “strictness” posed by the Draft on employers are mainly reflected in the following terms: contracts with fixed terms cannot be terminated for reasons other than faults, the feature of maintaining welfare for contracts with no fixed terms (Art. 32); strict control on probationary period (Art. 13 & 53); severance payments are to be made even for expiration, agreed-upon termination or termination upon employees’ death of labor contracts (Art. 37 & 39); enterprises must lay off new employees before they laying off old employees when they desire to cut down the number of employees (Art. 6); restrictions on secondment of labor and reserve funds are required (Art. 7); contracts must be continued to be performed upon enterprises’ merger or split-off, and the agree-upon termination of such will be void (Art. 26); if employers dismiss employees in violation of laws and regulations, such employees may choose to receive duplicated compensation (Art. 42) and the contracts under which personal freedom is restricted according to laws, such contracts shall be suspended, but not terminated (Art. 27) and other provisions. Enterprises shall, during their business operation, continuously apply the policy of “survival of the fittest” on employees. The provisions under this Draft fully conflict with the dismissal system of enterprises.

For example, pursuant to the Draft, enterprises cannot terminate labor contracts with fixed terms by reason of long-term illness or being incapable. This will mean that thousands of people

capable of such positions will be refused to be employed, which may lead to rigid employment system of enterprises and a new “getting the same pay as everyone else regardless of the performance in work” system. However, such flexibility in employment is the objective needs of the manufacturing of enterprises and market competitiveness. In that case, a majority of enterprises may intend to execute short-term contracts and a lot of labor contracts executed by months or even by days would emerge.

And, in the event enterprises desire to cut down the number of employees, as required by the Draft, enterprises shall line up employees according to contract terms and service terms, and shall implement the simple policy of “first come, last go”. It is required that enterprises shall first reduce new employees who grasp new knowledge and skills. This is a discriminative policy toward new employees, and is opposite to enterprises’ original intent to cut down the number of employees to adapt to market competitions.

And, as for severance payment under labor contracts, it is anticipated by both parties that labor relationships will terminate upon expiration of labor contracts. The provision under the Draft specifying that compensation shall be made will lead to significant impact and pressure on labor-intensive enterprises, large-scale enterprises and enterprises with long histories and in which employees are comparatively old in average. It is stipulated in the Draft that economic compensation shall be made upon employees’ death, which, together with the existing system of paying pension for the family of the deceased, will double the payment to be made by enterprises. It is especially unreasonable that in the event employees refuse to renew contracts upon expiration of such, employers shall also pay economic compensation, as pursuant to the Draft.

As for standardization of seconment of laborers, it is stipulated in the Draft that the maximum service term of laborers through secondment shall be 1 year, which restrict flexibility in employment of enterprises and laborers’ rights of making choices out of their own free will, and is unfavorable to the basic objective of national economy during the eleventh five-year plan, that is, to create more job opportunities.

As for probationary periods of employees, different probationary periods are stipulated under the Draft for non-technical positions, technical positions and senior technical positions. However, there are no definitions of such non-technical positions, technical positions and senior technical positions, which causes difficulties in the performance of such positions.

To sum up, pursuant to provisions under the Draft, dismissal system of enterprises will not be able to be carried out, and enterprises will shift from market subjects seeking profits to social welfare institutes for public good.

III. Impact on Enterprises Talents Retaining Scheme and Intellectual Property Protection System

Outstanding talents are the most valuable resources of enterprises. In order to retain such talents, employers would not hesitate to spend tremendous amount of money to provide various

welfare and training to retain laborers. “Easy termination of labor relationships” in favor of laborers is stipulated under the Draft. Except the retention of provisions under Article 31 of the original Labor Law, restrictions are further relaxed, that include: even if employees enjoyed specific welfare like housing, automobile and etc. provided by enterprises, they are still permitted to resign out of their own free will, and no damages shall be set out in this regard (Art. 15 & 36); remuneration shall be paid in full during non-competition period (Art. 16 & 41); there are more causes for laborers to terminate labor relationships and procedures are simpler (Art. 36); employees may request to cancel labor contracts already executed based on reasons of significant misunderstanding, obvious unfairness or somebody’s precarious position are taken advantage of. These provisions would exert serious influence on enterprises’ scheme for retaining talents and the system of intellectual property protection.

For example, it is stipulated in the Draft that enterprises may only arrange damages in the event they provide employees with off-job specific technical trainings for more than 6 months. In fact, long-term and off-job trainings would not be good for applying technical knowledge in manufacturing, and it is impossible for enterprises to leave a position vacant for 6 months. The per capita expenses for on-job trainings like MBA trainings, overseas trainings and etc. might reach RMB several hundred thousand or even several million, and would significantly improve employees’ capabilities. However, no damages can be set out for such trainings. Pursuant to the Draft, even if enterprises provide employees with favorable welfare like automobile, housing and etc. in addition to trainings, employees may still resign out of their free will, without paying damages. Enterprises make tremendous investment while no corresponding rights are obtained. Such imbalance on rights and obligations will lead to decrease of investment on employees’ training and welfare by enterprises, which will be unfavorable to the improvement of laborers’ qualifications and will cause comparative damages to laborers’ interests.

As for paying salaries in full during the non-competition period, it is far stricter than all applicable local rules, and is unbearable to a large majority of enterprises. It is stipulated in the Draft that the maximum damages from employees who are in breach of non-competition provisions shall be three times that of the compensation for non-competition. However, once trade secrets are disclosed, employers may incur incurable losses, which may far more than the amount three times the compensation. Since China has endeavors to protect the intellectual property during the past years and relevant provisions are gradually perfected, more and more multinational companies import advanced technologies into China, and some of them even move their research and development centers to China. However, provisions under the Draft are unfavorable to the protection of trade rights and intellectual property of enterprises. Once the Draft is put into effect, enterprises’ ability of carrying out innovation by themselves will be harmed, and those multinational companies will no longer import advanced technologies they possess into China, nor will they permit their Chinese employees to access and grasp their core technologies.

IV. Impact on Performance System and Management on Their Own of Enterprises

The management of employees by enterprises is a long-term and dynamic process. Facing intense market competitions, enterprises are required to make adjustment and responses in a

timely manner, which, as reflected on enterprise management, shall mean that enterprises shall have flexible management rights on employees, shall continuously carry out employees' performance evaluation, and shall eliminate the most incapable employees through competition. However, provisions under the Draft pose strict and rigid restrictions on the management rights of enterprises, which include, for example: to terminate labor contracts or adjust positions by reason of incapability is not permitted (Art. 32 & 29); contracts and any amendment thereof must be in writing (Art. 9, 24 & 29); factual labor relationships shall be considered as labor contracts with no fixed terms, and written contracts shall be executed in this regard (Art. 9); rules and policies must be approved by labor union and congress of employees (Art. 5 & 51). The provisions under Draft are fully conflict with evaluation and management systems of enterprises.

For example, pursuant to the Draft, enterprises are not permitted to dismiss employees who executed labor contracts with fixed terms but who are proved incapable of their positions, or change their positions, or adjust their remuneration. In this case, employees performance evaluation by enterprises will be meaningless.

And, as according to the Draft, if employees' positions are to be adjusted or other changes are to be made during the performance of labor contracts, such changes must be confirmed in writing after agreement are reached by enterprises and employees through their consultations. In fact, the contract would in no way specify all work under labor relationships. Pursuant to the Draft, employees may at any time refuse to perform certain kind of work by reason of it is not included in the scope of work, and thus cause disorder to the operation management of enterprises. And amendments to labor contracts unilaterally carried out by enterprises, such as unilaterally increase employees' salary, would be illegal. And the increased part of employees' salaries will become improper profits, and shall then be refunded to enterprises. Provisions under this Draft will neither be favorable to the operation and management of enterprises, nor be good to employees' interests.

It is stipulated under the Draft that rules and policies of enterprises shall be discussed by labor union, congress of employees or their representatives, and rules unilaterally formulated by employers shall become void, in which case relevant plans proposed by labor union, congress of employees or their representatives shall be followed. Enterprises' rights on formulating rules and policies are in fact deprived by such provisions, and enterprises will not be running properly. And this also conflicts with the *Corporation Law of the People's Republic of China*.

Human resources management systems of enterprises are gradually formed during the long-term and intense global market competitions, which have solid foundation of practice and are consistent with scientific law. Legislation shall be carried out on the basis of understanding actual operation of enterprises, and shall avoid exerting negative influence on normal operation system of enterprises. Only when enterprises achieve virtuous development, laborers' rights and interests would be protected in a fundamental way. We hope that relevant authorities would carefully consider the abovementioned issues.

Appendix 2

Explanation on Various Problems under the *Labor Contract Law of the People's Republic of China (Draft)*

The Draft has set out new regulations for several problems in respect of labor relationships and labor contracts, among which, certain regulations are not in favor of laborers any may probably at the same time impact the normal operation mechanism of employers. The following issues shall especially be drawn with careful consideration.

I. Ruling Issues for Secondment of Laborers

The Draft sets out that after the laborer is seconded to the receiving party for a complete year, if the receiving party continues to engage such laborer, the labor contract between the laborer and the dispatching employer shall be terminated and a new contract between the receiving party and the laborer shall be concluded. If the receiving party decides not to continue the engagement of such seconded laborer, the receiving party shall not engage other laborer in the form of labor secondment on the same position (Art. 40).

The Draft further sets out that the dispatching employer and the receiving party shall be jointly responsible for compensation for any damages incurred by the seconded laborer on the seconded position (Art. 59).

We hold the opinion that,

1. Limitation that an employer can engage the laborer for no more than one year on one position is not compliant with the facts existing in the labor secondment. In this ever changing modern economy, an enterprise may establish certain temporary positions as necessary through engaging seconded laborer, by which burden or training costs arising from human resources management can be reasonably lessened. As a response to such need, various labor secondment companies are established accordingly. Without recognizing this fact but adopting a universal mechanism to prohibit or limit labor secondment, may limit the right of both employer to use labor in a flexible way and laborer to choose job, and may be detrimental to the basic objective of national economy during the eleventh five-year plan, that is, to create more job opportunities. From a microscopic view, the most direct outcome of such one year limitation on secondment will be that the receiving party stop engaging the seconded laborer, and said laborer becomes unemployed. And from a macroscopic view, under the current circumstances that a great deal of labor secondment emerge in various industries and enterprises, once the Draft comes into effect, unemployment amounting to hundred thousands of persons will be produced deliberately while the same amount of employment opportunities will be destroyed.

It shall be noted that, labor secondment, as a more flexible way, is the products of market economy and industrial subdivision under most circumstances, but rather a strategy to be used by the employer for purposes of shunning from laws, reducing costs and evading labor risks. The State shall promulgate laws and regulations from its positive prospect to direct this way of

engaging labor, so as to satisfy the needs of market economy of socialism. Meanwhile, relationship in the labor secondment is also the most integral part of the labor market in this China specialized social market economy, and shall not be categorized as different from other labor relationships and be discriminately treated, which will actually put the seconded laborers into an embarrassed situation. If the limitation posed on the labor secondment intends to protect the seconded laborers, the limitation of one year service term does not differentiate the situation where the seconded laborer opts to continue the secondment. It is unfair to laborers while posing limitation both on the receiving party and on the seconded laborer.

2. If this provision is derived from the concern that unclear legal relationships existing among the three parties involved in the labor secondment in practice, that is, among the dispatching employer, the laborer and the receiving party (the actual employer), may lead to damages of lawful rights of the laborer in the event that any dispute arises among three parties and both the dispatching employer and the receiving party refuse to take responsibilities, such concern can be resolved through stipulating expressly the respective responsibilities of the dispatching employer and the receiving party. In fact, Article 59 of the Draft has expressly stipulated that when rights of the laborer is infringed on the seconded position, the dispatching employer and the receiving party shall be jointly responsible for compensation. This article has sufficiently resolved the protection issue of laborers and therefore Article 40 seems redundant.

3. Furthermore, provisions under Article 59 regarding “the rights of laborers are infringed on the seconded position” have not been clearly and concretely stipulated and are hard to implement. For example, whether the failure by the dispatching employer in paying salaries or providing social insurance to the laborer according to the dispatching contract belongs to the situation where the rights of laborers are infringed on the seconded position? Additionally, the dispatching employer is the party to labor contract executed between itself and the laborer, it shall assume the responsibility in the first place, and the receiving party shall assume responsibilities at the second place, that is, only when the laborer fails to obtain receivable compensation from the dispatching employer shall the receiving party assume the joint responsibility for compensation.

Suggestions:

Subject to the above, it is suggested that limitation on the service term in this Article shall be lifted.

Article 59 shall be revised to: “Where the rights of laborers are infringed on the seconded positions, the receiving party shall be responsible for the damages incurred due to its violation of relevant stipulations in the Labor Law, and the dispatching party shall be responsible for the damages incurred due to its violation of relevant stipulations in the Labor Law. Where it is impossible to distinguish the responsibilities between the dispatching employer and the receiving party, they shall be jointly responsible for compensation and the dispatching employer shall take responsibility at the first place, that is, where the laborer fails to obtain receivable compensation from the dispatching employer, the receiving party shall assume joint responsibilities.”

II. Formulating Corporation Rules and Policies

The Draft sets out that rules and policies of employers which directly relate to the interests of the employees shall be discussed and approved by the labor union, congress of employees or their representatives, or be made after consultation on equal footing(Article 5, Item 2); according this regulation, the unilateral bylaw made by the employers is invalid if the issues shall be discussed and approved by labor union, congress of employees or their representatives, and the issues shall be solved by the resolution of the latter.(Article 51, Item 1)

We hold the opinion that,

1. To formulate rules and policies is an important right of enterprises granted by *the Labor Law of the People's Republic of China* and *the Company Law of the People's Republic of China*. The full and effective realization of the right lays foundation to the existence of enterprises and warrants the development and success of enterprises. At present the restrictions on that right are: labor union's right of making suggestions in formulating rules and its supervision right during implementation of such, the labor authority's right of censorship and filing relating to draft of rules and the right of supervision, rectification and sanction in implementing rules, the people's court's final judgment to the validity of rules. Those are a complete set of mechanism of supervision and restriction, which effectively protects all rights and interests of laborers and at the same time, ensures the corporation's utmost independence of employment under the condition of respecting employees' legal rights and interests. The abovementioned provisions change the mechanism of restriction so that the labor group or organization enjoy the veto in formulating rules "concerning the immediate interest" or even "the unilateral right of laborers": "the unilateral bylaw made by the employers is invalid and the issues shall be solved by the resolution of labor union, congress of employees or their representatives." That article in practice will put the employers in such a position that they surrender to the will of the labor group in the circumstance of failed negotiation or there would be no effective rules and policies. It is necessary to introduce democratic management mechanism into labor relationships, however, the abovementioned articles do not explicitly express "the rules and policies which directly relate to the interest of the employees" so that they cannot be put into practice of democratic consultative mechanism or materialize the essence of democratic consultation. In addition, labor relationship is a kind of interest-related relationship and contradiction exists for all time. In the process of labor, the employer is active and the employee is passive. If the decision of formulating rules and policies of the corporation is endowed to the laborers and the imbalance of the consultative mechanism and more disputes are inevitable. Besides, if in reality all rules and policies take effect after the approval of the employees, the corporation management will come into chaos and no rule is followed when the two sides cannot come to agreement. Finally, the Draft does not give clear definition for what makes up of "the immediate interest of laborer" thus this provision is hardly operative in implementation.

2. This law provides the labor union, congress of employees or their representatives with the absolute veto and no restrictive mechanism. How to prevent the labor union from abusing the absolute veto?

3. Indeed, it is reasonable and necessary to solicit the opinion of labor union or meeting of employee (representatives) in the process of formulation and publication of rules and policies. But the corporation cannot work if the right of formulating rules is deprived of, which contravene the *Corporation Law of the People's Republic of China*.

III. Rights on Terminating Labor Contracts with Fixed Terms by Reason of "No Fault"

The Draft sets out that in any of the following circumstances, the employer may terminate a labor contract with no fixed terms, but written notification shall be given to the laborer 30 days in advance:

(1) A laborer is unable to take up his original work arranged by the employer after the completion of his medical treatment for illness or injury not suffered at work; and the laborer cannot come to terms with the employer on the modification of labor contract

(2) A laborer is unqualified for his work and remains unqualified even after receiving training or reassignment to another work post; and

(3) No agreement on modification or the expiration of the labor contract can be reached through consultations by the parties involved when the objective conditions taken as the basis for the conclusion of the contract have greatly changed so that the original labor contract can no longer be carried out. (Article 32)

Upon research, we hold the opinion that:

1. According to the provision of Article 26 of the Labor Law of the People's Republic of China, the listed reasons could be applied to all labor contracts, with or without fixed terms.

2. Herein at present most of the labor contracts the enterprises conclude with the laborers are of fixed terms, this provision in fact deprive enterprises of the reasonable right of terminating the contracts with those employees that cannot take up or be competent for their work because of chronic disease. If the enterprise wants to preserve the right in this aspect, it shall sign the contract with no fixed terms, in accordance with this provision, which brutally interfere the reasonable right of employment of the enterprise. If the provision intends to encourage enterprises to build up a relationship of labor contract with no fixed terms and ensure the stability of social labor relationship, then the implement of it works just the opposite to the intention. Most of the enterprises probably tend to sign short term contract to enjoy flexible employment and labor contract signed by month or even by day would emerge in great numbers, because the flexibility of employment is an objective existence meeting the need of production and market competition.

3. In addition, this provision does not take into full consideration of the situation that supply exceeds demand in the labor market and the reality that job-hunters are in large number in the society. Job vacancy is limited in enterprises and many qualifiers are kept outside when the

unqualified are not eliminated from their position, which rigidifies the employ system. That the fittest survives is the basic principle of all creatures and the provision of the Draft runs against that principle and those enterprises that cannot eliminate the unqualified employees are doomed to be eliminated in the market competition.

Therefore, once the provisions of the Draft are put into effect, the macro economic and social situation cannot be improved, and the order of labor market would be disturbed.

IV. Non-Competition Compensation

The Draft sets out that the employer that has agreements with the employees on the competition trade restriction shall at the same time agrees to give the employees the compensation, the sum of which shall not be less than the annual income of the employee in the employer at the expiration or termination of labor contract. The employee that violate the agreement of competition shall pay the fine for breach of contract and the sum shall not be more than triple of competition restriction compensation the employer pays the employee.(Article 16)

Upon research, we hold the opinion that,

1. In the modern society where the competition is fierce and where science and technology are developing at each passing day, the enterprises have to sign the contract of non-competition with many technical elites to keep the business secrets confidential. The protection for such kind of contract will promote enterprises' innovation. But it is stipulated in this clause that payment from the non-competition to the laborers made by the enterprises shall be based on their entire annual salary. It is so high, even higher than their pensions, that many retired workers contracting with the enterprise did not try to seek jobs that violates the agreement but enjoying the annual salary without any effort. Thus, the enterprises would try not to contact such kind of agreement and it is not good for innovation.

2. According to different local non-competition agreement standards, those mentioned in the Draft are far beyond others. It proves that this Draft disagree with the local situations to a great extent. For many enterprises, without any survey and proof, it basically denies the feasibility of the non-competition system. Those enterprises which are able to pay are not the only which need protection for intellectual property rights and their commercial secret. The system shall be taken into consideration for the withstanding degree of the most enterprises.

3. Apart from this, the staff members who violate the contract shall pay three times of the stipulated payment. It is quite unfair to the enterprises. Commercial secrets are of high economic value and commercial value. Once known by others, it will bring great loss to the enterprises which may be more than three times of payment gained by the retired staff. For many years, China exerts many efforts to protection of the intellectual property rights and some related laws and regulations are consummated, so more and more multinational corporations bring advanced technology to China and some enterprises even set up their research and development center in China. But the Draft hinders protection of their commercial secrets and intellectual

property rights. If carried out, it will seriously affect the individual technology innovation of the Chinese enterprises and thus multinational corporations would not introduce their advanced technology, let alone to allow the Chinese staff members expose to and master the core technology.

4. In practice, some enterprises would employ staff from their competitors through unfair means. For this kind of phenomenon, the Draft also has some particular stipulations.

V. Protection of Factual Labor Relationships

It is stipulated in the Draft stipulates: if there is a labor relationship and the enterprise and the laborer do not signed a written contract, it is considered to be the labor contracts with no fixed terms between the enterprise and the laborer and the written form of the contract shall be made in time except that the laborer states other intensions. (Article.9)

Upon research, we hold the opinion that:

1. According to the actual daily operation of the enterprises, the reasons why actual labor relationships are formed are relatively complicated which mainly include the following four categories: first, the enterprise intentionally refuses to execute labor contracts; Secondly, the enterprise doesn't sign contract or renew it due to carelessness. Thirdly, the employees intentionally refuse to execute labor contracts. Forth, when the individual transacting act and the operating activities of the enterprises correspond to the outer characteristics, it could be defined as the factual labor relationship.

The Draft makes no difference of such reasons and it is stipulated that all said factual labor relationships shall be regarded as labor contracts with no fixed terms. According to such provisions, employees may, by various legal or illegal means, lead to the emergence of factual labor relationships for purpose of obtaining labor contracts with no fixed terms, according to which they could work till their retirement. This is in fact to encourage employees to intentionally refuse to execute labor contracts, as in a disguised form. This would undoubtedly lead to the emergence of employees' refusal of executing labor contracts, and enterprises' labor contracts management would be in disorder.

2. The harm the factual labor relationships does to the staff is that: the indefinite pay causes dispute easily, the social security insurance is less than it is required or is completely defaulted, the staff are carelessly dismissed, etc. The legislation shall lay emphasis on and regulate decision regarding salaries, payment and grade of social insurance, severance payment and other issues in factual labor relationships. In fact, protection by means of "to be handled as labor contracts with no fixed terms" cannot protect laborers' interests illegally infringed by enterprises in factual labor relationships, but protect employees who intentionally refuse to execute labor contracts and infringe lawful rights of enterprises.

Suggestions:

Factual labor relationship shall be protected with particular purpose and within reasonable degree. The means of “to be handled as labor contracts with no fixed terms” is suggested to be called off. All problems in the factual labor relationship, such as the ways of pay confirmation, the way of handling the social insurance, the method of the dismissal and the standard of compensation shall be stipulated.

VI. Severance Payment upon Termination of Labor Contracts

It is stipulated in the Draft that enterprises shall pay economic compensation to the laborer when one of the following circumstances occurs:

(3) Terminating the labor contract according to Item (1), (3), (4), (5) and (6) under Article 37. (Article 39)

According to Art.37, item 1 in the Draft, the labor contract is terminated when one of the following circumstances occurs:

(1) The labor contract expires; the conditions as agreed by the parties concerned for terminating the contract occur;
(2) The labor begin to enjoy the basic insurance for the old age according to the law
(3) The laborer dies, or is announced to be dead or disappeared by the people’s court.
(4) The employing entity stops operation or is dissolved
(5) The employing entity goes bankrupt, is disallowed to operate or canceled;
(6) Other circumstances stipulated by the law or other regulations

Upon research, we hold the opinion that:

1. The current labor law takes three factors into consideration when it is referred to the economic compensation for terminating the labor contract. The employing entity unilaterally terminate the contract according to the law is out of the expectation of the both parties, so it shall be responsible some consequences; after the termination of the labor contract, the laborers may become unemployed for some time, so they need some subsidy. The amount of the economic compensation shall be settled according to the working years of the laborer in the particular enterprise. It just serves as a compensation of the working years. However, it is within the expectation that the labor relationship terminates with the experiment of the labor contract so that there is no such compensation stipulated in the labor law.

2. In some places, the laws and regulations have made some related stipulations that the enterprise shall pay certain kind of subsidy to the laborer when the labor contract is expired and the enterprise refuses to continue it. This is mainly out of the consideration of giving relief to the laborers. With the development of the market economy and the establishment of the national social security system, the social relief work is transferred from the enterprises to the social security organization. So in many places, the aforesaid stipulations are abolished, thus helping the

enterprises out of the situation and meeting the requirement of the market economy. The above articles, relapsing into old and abolished regulations inadaptable to market economy and imposing surplus responsibilities on enterprises, are contrary to the principle of "keeping pace with time".

3. The article makes enterprises' labor cost and employee numbers be in direct ration to years the employees' working for their companies, which is certain to exert tremendous impact and put great pressure on labor-intensive enterprises, large enterprises and old enterprises with relatively elder staff. Nowadays, many enterprises are incapable of paying wages and pension and handing in adequacy of social security fund. They are likely to go bankruptcy if imposed on such tremendous pressure. Meanwhile, enterprises will try every possible way to reduce posts so as to lower cost. The inevitable result will be the decreasing career opportunities, thus the unemployed population will increase.

4. It is the most unreasonable that based on the article severance payments are to be made even when employees refuse to renew after expiration.

5. Based on this article, severance payments are to be made for termination upon employees' death of labor contracts. The system of pension for bereaved family has been carried out in China. It will cause duplicate payment. Meanwhile, the Draft with provisions that severance payments are to be made for declaration of death or ascendance will bring about deceiving act among those staff with relatively long working years and close to retirement.

VII. Criteria of Labor Relationship Confirmation

The labor relationship in this law refers to right and obligation relationship formed in the process of recruitment and employees' paid work under employers. (Art. 3)

Pursuant to the Draft, when different understanding between employer and employee arises, it should be construed according to the principle of being in favor of laborers unless contrary evidence is provided. (Art. 9)

We hold the opinion that:

1. Both labor relationship and civil relationship exist between enterprises and employees. The simple definition of labor relationship in the present Draft represents no distinct features of it from other legal relationships. Therefore, it is necessary to make an explicit description of criteria of labor relationship confirmation. However, the Draft simplifies such an important question by regulating that labor relationship confirmation made by arbitration organizations shall be subject to the understanding favorable to laborers, which mixes the actual objective standard related to labor relationship confirmation with unilateral subjective understanding of individuals.

2. When disputes arise concerning whether labor relationship is established between employer and employee, the credible evidence such as labor contract is often absent. If there is no relationship existing between them, it is impossible for employer to give any evidence to

demonstrate their relationship. The present Draft excessively emphasizes the burden of proof of employer but ignores the burden of proof of employee. It extremely emphasizes the responsibility-shoulder for employer incapable of providing evidence but neglects the distribution of liabilities when neither the enterprise nor the individual can assume the burden of proof. According to this provision, anybody may allege himself/herself be a employee of certain enterprise and will not be required to provide evidence, and the enterprise will be required to hire all individuals alleging to be employees of such enterprise for it inability to provide evidence.

3. Since it is set out in this Draft that factual labor relationships will be considered as labor contracts with no fixed terms, and the confirmation of labor relationship shall be subject to the understanding favorable to laborers. Such tremendous and cost-free interest will allure any unemployed population or employee unsatisfied with present work to claim the factual labor relationship with a certain great enterprise. This means that outstanding Chinese enterprises must be prepared to hire employees whom they do not anticipate to hire but have to do so and whom will be hired till their retirement at any time. No enterprise in China can stand such a high employment risk.

Suggestions:

We should make a clarified and standardized definition of labor relationship and provide external objective criteria for judgment; we should cancel the provision that “should be construed according to the principle of being in favor of laborers unless contrary evidence is provided”.

VIII. Dismissal of Employees by Enterprises

According to the Draft, the employer has to explain to its labor union or all the staff, and negotiate with the labor union or staff representatives to reach a consensus, if it requires the dismissal of over 50 staff when the labor contract cannot be fulfilled due to dramatic changes in the objective circumstances on which the labor contract is based. Before the decision of dismissal, the employer shall keep as priority those who have worked for a long time in the enterprise, or those who has assigned for a longer term of contract, either with fixed terms of contract or with unfixed terms. (Article 33)

Upon research, we hold the opinion that:

1. Due to dramatic changes arising from objective circumstances such as removal or change of products, the enterprise has to cut off a certain section or department according to the analysis of the market and the situation of the enterprise itself, for the sake of survival and development of the enterprise. The dismissal of staff is conducted with respect to their position and working skills. However, according to the Draft the enterprise is required to make the dismissal list with reference to the term of contract and service term. It follows the simple principle of “letting earlier comers leave later”. Contrary to the original intent of adapting to market competition by means of staff dismissal, firing those with new knowledge and technology leads to the loss in market competition of the enterprise.

2. It is a discriminative policy against the new staff to fire them while they work for the enterprise as the old staff.

3. It is irrational to prescribe the standard of firing 50 staff, for some enterprises of small size will never reach the standard with the total staff number of 3 to 5. For those big enterprises with the staff number of hundreds of thousands, it is impractical and unfair to follow the standard of firing 50 staff as the Draft requires with no regards of difference, for those enterprises has hundreds of staff every day who has reached their term of contract.

Thus, requirement in the Draft cannot improve the competition of enterprises by firing staff, so that the enterprise finally has to choose bankruptcy or total disbandment. It cannot fulfill the purpose of protecting the old staff, while it fails to protect either new staff or old staff.

IX. Probationary Period of Employees

According to the Draft, the probationary period of non-technical positions shall not exceed 1 month, technical positions 2 months, and senior technical positions 6 months. The same staff member can only be required for one probationary period by the same enterprise. (Article 13)

Upon research, we hold the opinion that:

1. The probationary period of non-technical and technical positions (1-2months) as required in this term is, in most cases, not long enough to provide sufficient time for enterprises to examine new staff.

2. The Draft doesn't define non-technical, technical or senior technical positions, which leads to difficulties in practical implementation of this provision.

X. Contract Fraud

It is stipulated in the Draft that the labor contract shall be invalid where

(1) The employer establishes the labor contract by fraud and threat; (Article 18)

Upon research, we hold the opinion that

1. It was stipulated in Article 18 of the *Labor Law* that the labor contract shall be invalid when either the enterprise or the employee manipulates fraud. However, it was stipulated in the Draft that the labor contract shall be invalid when the employer manipulates fraud, which means that the employee could establish labor contract by fraud, which would be admitted valid by law. We hold that honesty is the basic morality of the employee and a dishonest person is not likely to be a qualified employee. The articles of the law shall by no means be against social order and customs or beyond the bottom line of social morality.

2. It is a common phenomenon that individual provides fake information in the process of job hunting under pressure from employment. Punishment instead of connivance shall be executed on fraud by law. Otherwise, the human resources management of enterprises would be disturbed, so would the overall social morality degrade.

3. Modern enterprises put forward more and more requirements for the quality of the employee. One who obtains a crucial position by means of fraud may bring about disastrous damages to the security of others as well as the property of the enterprise. It is impossible for the enterprise or the society to bear the great loss caused by fraud.

To sum up, employee recruitment sustains human resources management. If the enterprise engages abundant dishonest employees who have been passively recruited and are to be engaged for life, the management of the enterprise will surely be disordered.

XI. Service Term and Damages

It is stipulated in the Draft that employer who pays training fee for the employee so that the latter may receive six-month off-job professional technical training may set the service term with the employee and the amount of damages the employee shall pay in case he violates the service term. The amount of damages shall not be more than the training fee the employee shall share for the rest of the service term. (Article 15)

The employer shall not set the amount of damages the employee shall undertake other than the cases stated in Article 15 and Article 16. (Article 17)

Upon research, we hold the opinion that:

1. The labor contract has a definite time limit and the enterprise establishes the recruitment plan and professional layout according to the time limit. Employee who shifts his job before the time limit of contract will suffer some losses. Some enterprises hence set the amount of damages that the employee shall pay in case he resigns before the time limit. In some cases, the damages may be high. We hold that excessive use of damages is not good for the reasonable and free circulation of the employee. As a result, it is necessary to enforce certain restriction on the use of damages, which is over-restricted in the Draft. The stipulation in the Draft is straying away from social reality that only in the case of providing six-month or more off-job professional technical training for the employee can the employer set the amount of damages with the employee. The technical training of the staff should combine with their individual work. A long term off-job training may not be good for the application of technology to the real production. Besides, the enterprise is not likely to leave a position vacant for six months. The enterprise provides various kinds of training for the employee which is not limited to such off-job professional technical training as the training of MBA and overseas trainings and so on which requires a lot of fund input for the enterprise, on average, hundreds of thousand or even more per capita. Though these trainings may improve the qualification of staff drastically, they do not

belong to the six-month or more off-job professional technical training as stipulated in the Draft. As a result, it is impossible to set the service term and damages. The enterprise can not obtain corresponding rights regardless of the input of enormous amount of money while the employee, after receiving the training, may find a new job at will and escape all the responsibilities. Such imbalance between rights and obligations will make the enterprise decrease the training fee for the staff and make it impossible to improve the quality of labor force in China.

2. It is stipulated in the Draft only in the case that the enterprise provides training for the employee can the two parties set the service term and damages. Accordingly, even if the enterprise provides highly favorable material benefits such as cars, houses and the like, the employee may still quit the job without paying the damages. This will certainly make the enterprise stop providing such kind of material benefits for the employee, hence a loss for the employee.

XII. Revisions to Contracts

It is stipulated in the Draft that the following should be clearly stated in the labor contract ……

4) Working content and working places

5) Length of working time and breaks and vacations

6) Payment (Article 11)

Employers and employees should carry out their obligations respectively according to the labor contract. (Article 24)

The labor contract can be modified upon consensus through consultation between employers and employees. The content of the modification should be recorded in written form and be executed at the time when both parties put their signatures or affix their seals thereto. (Article 29)

Upon research, we hold the opinion that

1. The term of a labor contract varies in length during which the employees' post, task, duty and payment are subject to changes. As for this, it is stipulated in the Draft that every single alteration must take a written form, which is loaded down with trivial details.

2. According to the stipulations in the Draft, employees' tasks should be stipulated in the labor contract; therefore, employees can quarrel with the tasks which are not determined. In fact, employees' task covers such a wide range that they can be described in detail in the labor contract. Thus, employees may refuse to perform some tasks by taking this advantage and as a consequence there will be a disorder in the management of the enterprises.

3. According to the stipulations in the Draft, if employers tend to change employees' posts or make other alterations in the period when the labor contract is effective, every single alteration must take written form upon consensus through consultation between the two parties. In accordance, it is illegal for employers to increase employees' pay, and the extra money employees

get is regarded as the improper benefit which should be returned to the enterprises. For this reason, the provisions in the Draft go against the management and are disadvantageous for employees.

To sum up, the Draft is unfavorable to the relationship between employers and employees, has had impact on the entire management of the enterprises and is likely to result in more short-term labor contracts, whose victims finally are employees. It is suggested that the Draft should consist of finer and detailed provisions on the above problems, according to social reality and the *Labor Law of the Peoples' Republic of China*.