

Laws and Practice of Fixed Term Labour Contract in Taiwan

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I. Introduction

The provisions regarding fixed term labour contract are mainly found under the Civil Code and the Labour Standards Act. The provisions regarding employment contracts under the Civil Code are largely based on the principle of freedom of contract. Thus, the provisions regarding fixed term labour contracts are quite loose. However, the Labour Standards Act (promulgated in 1984) adopts a different approach, requiring that the labour contracts should be, in principle, non-fixed term contracts, except in case of special circumstances, where fixed term labour contracts would be permitted. Therefore, for employers in Taiwan, there is little room for employing fixed term contract workers.

On the other hand, since Taiwan has not yet enacted Labour Dispatch Law, at the moment, dispatched works are not regulated by law and employers can freely employ dispatched workers. Thus, employers who are subject to the strict restrictions imposed by the Labour Standards Act can easily hire dispatched workers in lieu of fixed term contract workers. As such, there exists a correlation between fixed term contract workers and dispatched workers.¹

Consequently, Taiwanese government is now pushing for the reform of the Labour Standards Act, the objective of which is twofold: (1) to loosen the current provisions on fixed term labour contracts, so as to give employers greater flexibility in employing fixed term contract workers; and, (2) to include dispatched works into the regulations, setting out the rights and obligations of employers when hiring dispatched workers.

II. Current status regarding fixed- term contract workers

Currently, Taiwanese government does not have surveys specifically focusing on fixed term contract workers. However, each year, the Directorate General of Budget, Accounting and Statistics of the Executive Yuan (“DGBAS”) would conduct surveys on part-time, temporary or dispatched workers. Since part-time, temporary or dispatched workers are mostly fixed term contract workers, therefore, from the statistics thereof, we can generally observe the actual status of fixed term contract workers in Taiwan.

¹ HUANG, Cheng-Kuan: “There is no clear employment policy in respect to issues such as how to deal with the correlation of different types of non-traditional labours based on flexible work hours (e.g. dispatched work, fixed term work, part-time work, etc.)” Please refer to “Current Status of and Difficulties in the Protection of Dispatched Workers in Taiwan (I)” by HUANG, Cheng-Kuan, *National Federation of Bank Employees Unions Newsletter*, Vol. 108, 15 December 2009.

Based on the statistics of DGBAS,² there were approximately 687,000 people engaged in part-time, temporary or dispatched work as of May 2009, which accounted for approximately 6.71% of the entire workforce. As compared to 2008, there was an increase of 37,000 people or 0.47%. In particular, there were 368,000 part-time workers, accounting for approximately 3.60% of the total workforce, increased by 57,000 people as compared to the year before, and, there were 517,000 temporary or dispatched workers, accounting for approximately 5.04% of the total workforce, increased by 19,000 people as compared to the year before.

According to the statistics based on the sex of the workers, there are 347,000 female workers engaged in part-time, temporary or dispatched works, accounting for 7.74% of the workforce in the female category, which are 340,000 people more or 5.91% higher than male workers.

In respect to the statistics based on the age of the workers, since there is a higher percentage of people between the ages of 15 and 24, who are at school, therefore, the percentage of part-time, temporary or dispatched workers among the said age group is the highest (22.81%). The percentage of part-time, temporary or dispatched workers is the lowest among the age group of 25 to 44, which accounts for only 4.67%. In terms of the level of education, there is a higher percentage for people with high school or lower education (10.17%) and there is a lower percentage for people with college degrees or above (5.6%).

With regard to the statistics based on the industry, there is a much higher rate of part-time, temporary or dispatched workers in the service industry (20.89%), followed by mining industry (16.65%). The lowest percentage is in the electricity and gas supply industry (2.14%). In terms of the occupations, there is a higher percentage among production operation personnel, i.e. 9.93%, followed by service personnel (8.74%) and the lowest among elected representatives and executive officers (0.15%).

Since the aforementioned statistics are the consolidated result of combining part-time, temporary and dispatched workers, in order to proceed with further analysis, it is necessary to clarify the number of part-time workers.³ According to the Manpower Utilization Survey conducted by DGBAS, the interviewees are asked to determine by themselves as to whether they are part-time workers. In 2007, there were 252,327 part-time workers, which account for 2.5% of the total workforce. There were 366,316 people whose work hours were less than 35 hours per week, accounting for 3.6% of the total workforce. If compared with other major countries, the ratio of part-time workers to total workforce is relatively low. However, with the development of service industries and the needs for company to employ human resources with greater flexibility, it is foreseeable that the number of part-time workers will increase in the future.⁴

As to the current status of dispatched workers, according to a survey conducted by the DGBAS in 2006,⁵ there are more than 120,000 dispatched workers being employed by the industrial and commercial sectors in Taiwan. A great number of them are employed in the

² <http://www.dgbas.gov.tw/ct.asp?xItem=25795&ctNode=3580> (Last accessed on 2009/01/18).

³ According to the "Reference Guidelines for Employing Part-Time Workers" published by the Council of Labour Affairs, Executive Yuan, in 2003, part-time workers refer to workers whose work hours, which are negotiated and agreed upon by the employer and the workers, are relatively shorter than the work hours of the full-time workers working in the said business entity.

⁴ Manpower Utilization Survey by the Directorate General of Budget, Accounting and Statistics, Executive Yuan

⁵ All data of "Industry, Commerce and Service Census of 2006" can be accessed from the following website: <http://www.dgbas.gov.tw/lp.asp?CtNode=3265&CtUnit=377&BaseDSD=7>

manufacturing industry. As of the end of 2006, there are a total of 7,676 industrial and commercial corporations employing dispatched workers, with an average number of 126,451 dispatched workers being employed per month. In particular, the manufacturing industry had the highest number of dispatched workers employed (39,103 dispatched workers). In terms of dispatched workers to employees ratio, the medical and health and social services industries have the highest ratio of 8.6%.

As explained below, the provisions related to fixed term contract workers under the Labour Standards Act are very stringent and there is little flexibility for employers to enter into fixed term contracts with the workers. On the other hand, recently, it has become quite popular in the Taiwanese labour market to employ dispatched workers. Since there is no laws regulating dispatched works, employers may freely employ dispatched workers. As such, it is possible that employers will employ dispatched workers in place of fixed term contract workers.⁶

III. Laws governing fixed-term labour contracts

1. Civil Code and Factory Act

The Civil Code (promulgated in 1929) only has two provisions in respect to fixed term contract and both of these provisions are related to the termination thereof. First, Article 488 of the Civil Code provides that: “If the duration of hire of services is fixed, the contract of hire of services terminates with the end of that duration (paragraph 1). If the duration of hire of services is not fixed or cannot be fixed in accordance with the nature or purpose of services, either party may terminate the contract at any time, however, if customs is in favour of the employee, such customs shall be followed (paragraph 2).” Article 489 of the same Code further provides that: “Even though the duration of the hire of services has been agreed upon, either party may, in the event of any serious occurrence, terminate the contract before the end of such duration (paragraph 1). If the occurrence as specified in the preceding paragraph be due to the negligence of one of the parties, the other party may demand for the injury from him (paragraph 2).” Thus:

1. Fixed term employment contracts will of course be terminated when the term expires. However, in case of any serious occurrence, the employer or the worker may terminate the fixed term employment contract at any time without notice, provided that, the party for whose negligence the said serious occurrence arises shall be held liable for any damage suffered by the other party.
2. The parties may freely enter into a fixed term or non-fixed term employment contracts. If the contract entered into is a fixed term employment contract, the parties may also freely determine the period of employment without any restrictions on the maximum length of the period of employment imposed thereon.

⁶ MA, Jing-Ru, HSU, Shiou-Hau: “There is a correlation between fixed term contracts and dispatched works... Since the criteria for a fixed term contract are quite stringent (it is only permitted if the nature of the work is not continuous and if the statutory requirements regarding temporary, short-term, seasonal or specific work are satisfied), fixed term contracts are rare in practice. As a result thereof, once an employer hires a worker, the employer must hire the said worker for life by way of non-fixed term contract. In order to maintain the flexibility with regards to the costs of human resources, in practice, many employers would opt for dispatched work,” *Commercial Times*, 20 January 2010.

Prior to the promulgation of the Labour Standards Act, the Factory Act (promulgated in 1931) was the main law regulating the labour conditions of the factory workers.⁷ However, there were only two provisions regarding fixed term labour contracts under the Factory Act: Article 26, which provides that “Whenever a fixed term work contract expires, the said contract shall not be renewed unless the parties have agreed to the renewal thereof,” and Article 30, which stipulates that “Where any of the following occurs, the factory may terminate the contract even though the work contract has not yet expired, provided, however, that the factory shall provide termination notice pursuant to Article 27 of this Act: (1) Where all or part of the factory is closed down; (2) Where for reasons of force majeure, the factory has suspended its operation for more than 1 month; or, (3) Where the worker is not suitable for the work assigned to him/her.”

Before the enactment of the Labour Standards Act, the Factory Act is a special law of the Civil Code. Thus, in respect to fixed term contract workers to whom the Factory Act applies, the employer may terminate the fixed term work contract with notice pursuant to Article 30 of the abovementioned Factory Act.

2. Other Fixed Term Contracts Related Laws and Regulations

Apart from the aforementioned provisions on fixed term contracts under the Labour Standards Act, there are also other types of fixed term labour contracts, for example:

1) Workers Hired under the Governmental Plan for Expanding Employment through Public Service

In June 2003, in order to rapidly solve the unemployment issues and to provide employment opportunities with various public services, Taiwanese government promulgated and implemented the Provisional Statute for Expanding Employment through Public Service for a period of 1 year. According to Article 9 of the said Statute, the duration of the employment pursuant to this Statute shall not exceed 12 months. Article 10 of the said Statute provides that, during the period of the employment, the Labour Standards Act and the Employment Insurance Act shall not apply. The employing agency (organization) shall enter into a written contract with the employed individual according to the standards established by the central competent authority to set out terms of the employment and other matters that the employed individual should comply with. Article 11 further provides that, during the period of the employment, an employed individual shall be insured with labour insurance and national health insurance pursuant to the provisions of the laws.

2) Foreign Worker

An employer may employ foreign workers pursuant to the Employment Services Act (Promulgated in 1992).⁸ According to Article 52 of the said Act, if an employer engages a white-collar foreign worker to engage in works such as specialized or technical work or teaching, the permitted duration of the employment shall not exceed 3 years and, if it is necessary to continue to employ the said foreign worker, upon the expiration of which, the employer may apply for extension. If an employer engages a blue-collar foreign worker to engage in works such as major construction, the permitted duration of the employment shall

⁷ Article 1 of the Factory Act: “This Act shall apply to any and all factories that use machineries.”

⁸ According to the statistics compiled by the Council of Labor Affairs of the Executive Yuan, until December 2009, there are 365,060 foreign workers in Taiwan, in which 185,624 people were engaged in the manufacturing industry and 168,427 people were engaged in social works.

http://www.evta.gov.tw/content/list.asp?mfunc_id=14&func_id=57 (Last accessed on 2010/01/31)

not exceed 2 years and, upon the expiration of which, the employer may apply for extension once for a period not exceeding 1 year. If a foreign worker is employed by a company with more than 5 employees, he or she shall join the labour insurance (Article 6 Paragraph 3 of the Labour Insurance Act) but cannot join the employment insurance (Article 5 of the Employment Insurance Act).

3) Gender Equality in Employment Act

According to Article 16 Paragraph 1 of the Gender Equality in Employment Act, after being in service for 1 year, an employee may apply for parental leaves without salary payment before any of his or her children reach the age of 3 years old for a period until his or her children reaches the age of 3 years, provided, however, that such period of leave shall not exceed 2 years. According to Article 6 of the Regulation for Implementing Unpaid Parental Leave for Raising Children, during the period of the said worker's leave, the employer may engage workers on fixed term contract basis to provide services in place thereof.

4) Military Service Act

Article 44 Paragraph 1 Item 1 of the Military Service Act provides that, during the military service period, a citizen can retain his years of service, and, upon military discharge, a citizen shall have the priority right of employment. Thus, during the period where a worker is on military service leave, the employer may engage workers on fixed term contract basis to provide services in place thereof.

3. Labour Standards Act

1) Provisions under the Current Act

Article 9 of the Labour Standards Act provides: "Labour contracts may be divided into two categories: fixed term contracts and non-fixed term contracts. A contract for temporary, short-term, seasonal or specific work may be considered as a fixed term contract and a contract for continuous work as a non-fixed term contract (paragraph 1). In any one of the following situations, a fixed term contract shall be deemed as a non-fixed term contract upon the expiration of the said fixed term contract: (1) Where an employer raises no immediate objection when a worker continues to carry out his/her work; or, (2) Where, despite the execution of a new contract, the prior contract and the new one together cover a period of more than 90 days and the period of time between expiration of the prior contract and execution of the new one does not exceed 30 days (paragraph 2). The preceding paragraph shall not apply in case of a fixed term contract for specific or seasonal work (paragraph 3)."⁹

⁹ The legislative reasoning for enacting Article 9 of the Labour Standards Act is: "1. A labour contract is a contract in which an employer and a worker set forth their rights and obligations. This Act is a public law, which specifically limits the scope of fixed term contract by statutory provisions, in order to assist the employer and the worker to coordinate their interests and to promote harmony in employer-worker relationships. 2. Upon the expiration of a fixed term contract, the said contract will be deemed as a non-fixed term contract under the following circumstances: (1) if, upon the expiration of the fixed term contract, an employer raises no immediate objection when a worker continues to carry out his/her work, the contract shall be deemed as extended for a non-fixed term; (2) if the prior contract and the new contract cover a period of more than 90 days and the period of time between the expiration of the prior contract and the execution of the new contract does not exceed 30 days, the contract shall be deemed as a non-fixed term contract, so as to prevent the employer from using fixed term contracts to hire workers to engage in long term work and to deprive the workers of their rights." However, in respect to the legislative reasoning of this Act, how the limitations on the scope of fixed term labour contract would assist the employer and the worker to coordinate their interests and to promote harmony in employer-worker relationships is truly questionable. *Compilation of Draft Laws* Vol. 73, "Draft Labour

As such, the characteristics of the provisions on fixed term labour contracts under the Labour Standards Act are:

- (1) In principle, labour contracts are non-fixed term and work of continuous nature shall be deemed as non-fixed term contracts. Breach of such provision would result in a fine of more than NT\$2,000 and not exceeding NT\$20,000 pursuant to Article 79 Paragraph 1 of the Labour Standards Act.
- (2) Fixed term labour contracts can only be entered into for temporary, short-term, seasonable and specific works.
- (3) There is a mechanism that mandatorily converts fixed term contracts for temporary and short-term works into non-fixed term contracts, so as to prevent employers from repeatedly renewing the fixed term contracts for temporary and short-term works to employ temporary and short-term workers as long term workers. However, such mechanism does not apply to specific or seasonal works.

Furthermore, as to what is meant by temporary, short-term, seasonal and specific works, Article 6 of the Enforcement Rules of the Labour Standards Act clearly provides: “The temporary, short-term, seasonal and specific work referred to in Article 9 Paragraph 1 shall have the following meaning: (1) Temporary work shall mean work of an unexpected and non-continuous nature, the duration of which shall not exceed 6 months; (2) Short-term work shall mean non-continuous work that is expected to be completed within a period of time not exceeding 6 months; (3) Seasonal work shall mean non-continuous work affected by the raw materials, source of materials or sales in the market, the duration of which shall not exceed 9 months; and, (4) Specific work shall mean non-continuous work that is expected to be completed within a specific period of time, the duration of which shall not exceed 1 year unless otherwise approved by the competent authority.”

Based on the foregoing, the restrictions imposed by the Labour Standards Act on fixed term contracts are quite stringent. It is unclear as to the reasons why the Labour Standards Act adopts non-fixed term contracts as the basic principle. Scholars believed that it may be related to the supply and demand of the labour market in Taiwan before and after the enactment of the Labour Standards Act, especially since for a period of 15 years from 1981 to 1995, the labour market in Taiwan has been in a total employment status for a long time, whereby employers are troubled by the lack of workers and high labour turnover rate. Thus, it is speculated that the enactment of Labour Standards Act preferring non-fixed term contracts would perhaps be able to decrease the turnover rate of the workers.¹⁰

2) Definition and Determination of “Continuous Work”

Article 9 of the Labour Standards Act provides that “a contract for continuous work [is considered] as a non-fixed term contract.” Therefore, whether a work is continuous or not becomes the criteria for determining whether an employer should enter into a non-fixed term labour contract.

However, in respect to the definition of “continuous work,” scholars pointed out that “it is referred to the work undertaken by the worker, which, in respect to the nature and operation of the business entity, requires continuity, and is not required only on occasion such as

Standards Act (First Volume)” at pages 362 and following, “Draft Labour Standards Act (Second Volume)” at pages 932 and following, edited and published by the Secretariat of the Legislative Yuan, May 1985.

¹⁰ WANG, Sung-Po, *Interpretation of the Labour Standards Act*, Edited by Taiwan Labour Law Association, September 2009, at page 80.

temporary, short-term or seasonal or only for specific purposes.”¹¹ However, the said criteria for determining continuous work are still not specific enough.

As the highest competent authority for labour affairs, the Council of Labour Affairs of the Executive Yuan (“CLA”) has always given strict interpretation to the term continuous work in order to protect the stability of employment of the workers. In its interpretive letter Tai-Lao-Tze-2-Zi No. 0011362 issued on 31 March 2000, which is most representative of how CLA interprets continuous work, it was held that: “As inquired, in respect to how to define the term ‘continuous work,’ according to the current provisions under the Labour Standards Act and the types of employment in the labour market, continuous work is the norm while non-continuous work is the exception. Moreover, under the Labour Standards Act, the protections given to workers engaged in continuous work and to workers engaged in non-continuous work are different. Thus, historically, the administrative agency has adopted a strict interpretation in respect to fixed term contract workers who are engaged in non-continuous work, so as to avoid employers from abusing workers. The term ‘non-continuous work’ referred to in the Act refers to the relevant positions derived from economic activities that an employer did not intend to maintain on a continuous basis. As to how to determine whether a position is non-continuous in practice, it would depend on the position as described in the relevant documents of the business entity (such as job description, etc.) or whether there are both fixed term contract workers and non-fixed term contract workers employed for the same position within the company to engage in the same tasks. If so, these factors shall be considered as evidence of reference in determining whether a work is continuous.”¹² Under the same logic, in another interpretive letter, CLA held that: “Since your company is engaged in dispatch of manpower, manpower is therefore your company's regular business. Thus, you cannot enter into fixed term contracts with the workers to satisfy the needs of your clients.”¹³

The aforementioned CLA interpretive Letter Tai-Lao-Tze-2-Zi No. 0011362 issued on 31 March 2000 looks at the subjective intention of an employer to continuously maintain economic activities as the criterion for ascertaining whether a work is continuous. Such criterion is uncertain. Moreover, although this interpretive letter did not explicitly define the term “continuous work,” rather, it only defines “non-continuous work.” However, by reversing this interpretation, it follows that, as long as an employer has the intention to maintain the economic activities on a continuous basis, any related position derived from such economic activities would qualify as continuous work. In other words, the scope of continuous work is quite broad. Furthermore, according to the latter part of this interpretive letter, as long as the work undertaken by a fixed term contract worker is also undertaken by a non-fixed term contract worker at the same time in the company, the said work should also be interpreted as continuous work and the employer cannot employ other workers on fixed term contract basis.

¹¹ HUANG, Cheng-Kuan, *Labour Law (Revised Edition)*, published by the National Open University, 2001, at page 381.

¹² Interpretive Letter Tai-Lao-Tze-2-Zi No. 002980 issued by Council of Labour Affairs, Executive Yuan on 25 January 1999 also held that whether a work is of a continuous nature has nothing to do with the budget of the entity. Rather, it should be ascertained based on the actual scope of work. For the contents of the relevant interpretive letters and detailed comparison and analysis thereof, please refer to YANG, Shu-Ting, *A Study on the Fixed Term Labour Contracts*, Master dissertation, National Chengchi University College of Law, 2004, pages 14 and following.

¹³ Interpretive Letter Tai-Lao-Tze-2-Zi No. 051472 issued by the Council of Labour Affairs, Executive Yuan, on 14 September 1998.

The effect of the aforementioned CLA interpretive Letter Tai-Lao-Tze-2-Zi No. 0011362 issued on 31 March 2000 is quite extensive. According to this interpretation, an employer has practically no room for employing fixed term contract workers. Some courts opposed to the strict interpretation approach adopted by CLA. In particular, in its judgment Su-Zi No. 616 in year 2002, the Kaohsiung Administrative High Court held that: "... (omitted) the determination of whether a work is specific should be based on the content of the work engaged in by a worker and not based on whether such work is the major economic activity of an employer, since, regardless of whether a worker employed by a company is fixed term or not, such worker would necessarily engage in works related to the company's major economic activity. Thus, if, according to the aforementioned CLA interpretive letter Tai-Lao-Tze-2-Zi No. 0011362 issued on 31 March 2000, when a worker is engaged in works related to the company's major economic activity, such works shall be continuous, then the provisions on specific work under the Labour Standards Act would be meaningless." In other words, the court clearly stated that it will not adopt the aforementioned CLA's interpretation and held that the determination of specific work should be based on the content of the work engaged in by the worker and should not be based on whether such work is the main economic activity of the employer.¹⁴

Overall, when a court is reviewing and ascertaining whether a labour contract is fixed term, the approach generally adopted is:

- (1) Whether a labour contract is a fixed term or non-fixed term contract should be assessed on the actual content and nature of the work contemplated under the said labour contract and should not be bound by the format in which the labour contract was entered into.¹⁵
- (2) If a work is continuous, or the nature of a work is not temporary, short-term, seasonal or specific, an employer can only enter into a non-fixed term contract with a worker. If the parties enter into a fixed term contract, the provisions regarding the fixed term shall be deemed invalid. In other words, the said contract shall be deemed a non-fixed term contract with the same terms and conditions.¹⁶

3) Definitions of Temporary, Short-Term, Seasonal and Specific Works

- (1) Temporary Work: According to Article 6 of the Enforcement Rules of the Labour Standards Act, "Temporary work shall mean work of an unexpected and non-continuous nature, the duration of which shall not exceed 6 months." In other words, the said work arises occasionally, not on a regular basis. Once completed, such work may or may not be required to be carried out again.¹⁷

¹⁴ Professor LIN, Geng-Scheng, agreed with the reasoning of this judgment. Please refer to his publication *Review of fixed labour contract under the German Law --- Analysis of related questions under the laws of Taiwan*, Tunghai Law Review Vol. 28, at page 40.

¹⁵ Supreme Court judgments Pan-Zi No. 944 in year 2004; High Court judgment Lao-Shang-Yi-Zi No. 57 in year 2007; High Court judgment Lao-Shang-Yi-Zi No. 13 in year 2009; Taipei District Court judgment Chung-Lao-Su-Zi No. 26 in year 2006; Taipei District Court judgment Chung-Lao-Su-Zi No. 36 in year 2006.

¹⁶ Taichung District Court judgment Lao-Jien-Shang-Zi No. 26 in year 2007.

¹⁷ LIN, Zheng-shien, *Theory and Practice of Labour Standards Act*, Jie-Tai Publishing, 2003, at pages 156 and following. In respect to further explanations regarding short-term, seasonal and specific works, please also refer to page 157 of the same publication; YANG, Shu-Ting, publication referred to in the note above at pages 25 and following.

- (2) Short-Term Work: According to Article 6 of the Enforcement Rules of the Labour Standards Act, “Short-term work shall mean non-continuous work that is expected to be completed within a period of time not exceeding 6 months.” Pursuant to the definition provided under this Article, the difference between short-term work and the aforementioned temporary work lies in the fact that short-term work is foreseeable, whereas temporary work is not.
- (3) Seasonal Work: According to Article 6 of the Enforcement Rules of the Labour Standards Act, “Seasonal work shall mean non-continuous work affected by the raw materials, source of materials or sales in the market, the duration of which shall not exceed 9 months.” For example, the production of tomatoes is seasonal. If an employer must purchase tomatoes and immediately carry out processing work between December and March every year, workers employed for such works may enter into seasonal fixed term contracts.¹⁸ However, the duration of seasonal work must be within 9 months.
- (4) Specific Work: According to Article 6 of the Enforcement Rules of the Labour Standards Act, “Specific work shall mean non-continuous work that is expected to be completed within a specific period of time.” Compared to short-term work, specific work should be of a longer period and more detailed, such as the construction of dam, power station, rail road, etc., and, once the said work is completed, the workers would not be hired again. Moreover, in respect to whether specific work requires a clear commencement and completion date, (e.g. can a contract provide that “the term of this specific work contract shall commence from the date of the commencement of work and shall end when the construction ends?”), the administrative agency and the courts have different opinions regarding thereto.¹⁹ Furthermore, if the length of specific work exceeds a period of 1 year, the approval of the competent authority must be obtained.²⁰ However, according to the Supreme Court, “approval” is not a criterion for the validity thereof. Thus, even if it is not approved by the competent authority, it does not necessarily convert such specific work from a fixed term contract into a

¹⁸ Interpretive Letter Tai-Lao-Tze-2-Zi No. 013495 issued by the Council of Labour Affairs, Executive Yuan, on 13 April 1998.

¹⁹ The administrative agency and the courts have different opinions regarding whether specific work should have a definite completion date. In its interpretive letters Tai-Lao-Tze-2-Zi No. 19365 issued on 3 August 1998 and Tai-Lao-Tze-2-Zi No. 024846 issued on 4 June 1997, the Council of Labour Affairs, Executive Yuan, held that the so-called specific work should have a definite commencement and completion dates. However, Taiwan High Court in its judgment Lao-Shang-Zi No. 40 in year 1997 held that it is not necessary for specific work to have a definite completion date. If the date on which the specific work is completed is considered as the completion date, then the completion date for the said work can be ascertained and such contract can still be deemed as a type of fixed term contract.

²⁰ According to the Interpretive Letter Tai-Lao-Tze-2-Zi No. 001585 issued by the Council of Labour Affairs, Executive Yuan, on 15 January 1999, “According to Article 6 Item 4 of the Enforcement Rules of the Labour Standards Act, the clause ‘the duration of [specific work] shall not exceed 1 year unless otherwise approved by the competent authority’ requires the competent authority to review fixed term contracts with a longer duration so as to protect the rights of the workers and to avoid an employer from avoiding its obligations by entering into a fixed term contract with its workers.”

non-fixed term contract.²¹

Although Article 6 of the Enforcement Rules of the Labour Standards Act clearly defines temporary, short-term, seasonal and specific works, however, the criteria for distinguishing the aforementioned 4 types of contracts are still quite confusing:²²

- (a) First, according to the definition of the said Article, temporary work and short-term work are distinguished on the basis of expectancy, whereby work that can be expected would be short-term work and work that cannot be expected would be temporary work. However, it is not clear as to how to determine whether a work is expected.
- (b) A work may be temporary, short-term, seasonal and specific all at the same time. For example, when an employer is required to employ workers to complete specific work at the last minute, such work would be temporary, short-term and specific in nature.

4) Mechanism that Mandatorily Convert a Fixed Term Contract into a Non-Fixed Term Contract

- (1) Statutory Renewal of Fixed Term Labour Contract: Article 9 Paragraph 2 Item 1 of the Labour Standards Act provides, upon the expiration of a fixed term contract, if an employer raises no immediate objection when a worker continues to carry out his/her work, the said fixed term contract shall be deemed as a non-fixed term contract. In such situation, the original contract is not terminated for the execution of a new contract. Rather, the combination of the fact that the worker continues to carry out his/her work and that the employer has implicitly agreed for the worker to continue to carry out his/her work results in a conversion of the original contract into a non-fixed term contract as prescribed by law.²³ However, such statutory renewal of contract does not apply to seasonal and specific works.
- (2) Consecutive Fixed Term Contract: Article 9 Paragraph 2 Item 2 of the Labour Standards Act provides, upon the expiration of a fixed term contract, despite the execution of a new contract, the prior contract and the new one together cover a period of more than 90 days and the period of time between expiration of the prior contract and execution of the new one does not exceed 30 days, the said fixed term contract shall be deemed as a non-fixed term contract. The purpose for enacting this provision is to prevent an employer from using fixed term labour contracts in lieu of non-fixed term labour contracts.²⁴ However, such statutory renewal of contract does not apply to seasonal and specific works. The legislative reasoning did not elaborate on the reasons why seasonal and specific works are excluded. The author speculates that it may be due to the fact that there would not be any work required upon the end of the season for seasonal work and upon the completion of the work for specific work.

²¹ Supreme Court judgment Tai-Shang-Zi No. 2578 in year 1998.

²² Chih-Poung Liou and Neng-Chun Wang Studies on the Fixed Term Labour Contract and Probation Period in Taiwan, Council of Labour Affairs, Executive Yuan, 30 June 2003, at pages 29-31.

²³ WANG, Sung-Po, *Supra* Note 10, at page 85.

²⁴ Please refer to the aforementioned publication by HUANG, Cheng-Kuan, at page 385. WANG, Sung-Po, *Supra* Note 10, at page 85.

5) Comparison between a Fixed Term Labour Contract and a Non-Fixed Term Labour Contract

Although labour law scholars in Taiwan argue that fixed term contract workers should be protected by the principle of equality,²⁵ however, the Labour Standards Act does not have any provision regarding the equal treatment of fixed term contract workers and non-fixed term contract workers or any provision that require an employer to assist fixed term contract workers to convert their contracts into non-fixed term contracts. Moreover, when a company is faced with economic difficulties and had to terminate the contracts for economic reasons, the court held that an employer may choose to first layoff special fixed term contract workers, i.e. foreign workers.²⁶ Furthermore, there are also collective agreements entered into by and between some companies and their labour unions which explicitly exclude the rights of fixed term contract workers from joining the labour union,²⁷ or which, although allowing fixed term contract workers to join the labour union, require that the terms of employment must comply with the provisions of the said fixed term contract and cannot be protected by the collective agreements as do the non-fixed term contract workers.²⁸ As a result, such collective agreements do not provide the same protection to fixed term contract workers as they do to non-fixed term contract workers. It is necessary to question whether such collective agreements have violated the principle of equality under Article 7 of the Constitution. It also reflects the discrimination suffered by fixed term contract workers in the labour unions of several Taiwanese corporations.

What are the differences between the legal protection given to fixed term contract workers and that given to non-fixed term contract workers? The differences are outlined below:

- (1) Termination of Contract: When an employer wishes to terminate a non-fixed term contract, there must be either an economic cause as prescribed under Article 11 of the Labour Standards Act (e.g. losses suffered by the business entity) or disciplinary cause as prescribed under Article 12 of the Labour Standards Act (e.g. material breach of labour contract or employment rules by the worker). On the other hand, when a fixed term contract expires, the said contract shall automatically be terminated. However, if events

²⁵ LIN, Geng-Scheng, takes the view that: "Since we recognize that the general principle of equality exists under the labour law, thus, unless there is a legitimate cause, an employer shall treat fixed term contract workers with equal rights." "Studies on Practical Issues of Fixed Term Labour Contract," *Taiwan Labour Law Association Journal* Vol. 7, at page 96.

²⁶ According to the Supreme Court in its judgment Tai-Shang-Zi No. 2339 in year 2005, "Where an employer employs a ROC worker and a foreign worker at the same time and any event prescribed under Article 11 Item 2 of the Labour Standards Act occurs, whereby the employer may terminate the labour contract with notice, if the work for which the foreign worker was engaged can be undertaken by the ROC worker who is willing to undertake such work, in order to protect the right to work of the ROC citizens, the employer shall not terminate the employment of the ROC worker and continue to employ the foreign worker, so as to provide employment opportunities to the ROC citizens."

²⁷ In 2009, when the author was commissioned by the Council of Labour Affairs, Executive Yuan, to conduct a research on collective agreements, it was found that the collective agreement between the most representative steel company in Taiwan and its labour union forbid workers from joining the labour union of the said company.

²⁸ It was found in the research mentioned in Note 27 above that according to the collective agreement entered into by a certain public-owned sugar corporation and its labour union, although fixed term contract workers were permitted to join the labour union of the said corporation, however, it required that the terms of employment be based on the said fixed term contracts. There was an obvious differential treatment granted to non-fixed term contract workers.

prescribed under Article 11 (termination of employment due to economic cause) and Article 12 (termination of employment due to disciplinary cause) of the Labour Standards Act or under the aforementioned Article 489 (serious occurrence) of the Civil Code, an employer may still terminate the fixed term labour contract prior to the expiration thereof.

- (2) Notice of Termination: When an employer terminates a non-fixed term contract, according to Article 16 of the Labour Standards Act, the employer shall give 10-day, 20-day or 30-day prior notice depending on the years of services of the worker; Whereas, when an employer terminates a fixed term contract, the employer does not need to provide prior termination notice. However, if the employer terminates the fixed term contract prior to the expiration thereof, the employer should still provide termination notice.²⁹
- (3) Severance Payment: When an employer terminates a non-fixed term contract, according to Article 17 of the Labour Standards Act, the employer shall pay the worker a severance payment based on the years of services of the worker, which is equivalent to 1 month of the average monthly salary for every year of service.³⁰ On the other hand, when a fixed term contract expires, the employer does not have any obligation to pay for severance payment. However, according to the interpretive letter issued by CLA, if the employer terminates the contract prior to the expiration thereof, the employer shall pay for severance payment to the worker.³¹
- (4) Retirement Pension: Under the Labour Standards Act, a fixed term contract worker cannot receive retirement pension. However, upon the enactment of Labour Pension Act (promulgated in June 2004), the amounts of retirement pension received by non-fixed term contract workers and fixed term contract workers are the same. The promulgation of Labour Pension Act is a very important milestone in the protection of fixed term contract workers' retirement pension. As elaborated below, the Labour Pension Act provides a protection to the fixed term contract workers in respect to retirement pension. Such protection greatly shortens the gap in terms of employment conditions between non-fixed term contract workers and fixed term contract workers. It is also an important step by Taiwanese government in loosening the current restrictions imposed on fixed term labour contracts under the Labour Standards Act.

In respect to workers' retirement pension regime, Article 53 of the Labour Standards Act provides: "A worker may apply for voluntary retirement under either of the following conditions: (1) Where the worker attains the age of 55 and has worked for 15 years; (2) Where the worker has worked for more than 25 years; or (3) Where the worker attains the age of 60 and has worked for 10 years." Article 57 of the same Act further provides:

²⁹ LIN, Geng-Scheng, *Supra* Note 25, at page 104.

³⁰ However, according to Article 12 of the Labour Pension Act promulgated in June 2004, the calculation of severance payment has been changed and the severance payment is calculated on the basis of 1/2 of the average monthly salary for each year of service, provided that the total severance payment shall not exceed an amount equivalent to 6 months of the average monthly salary.

³¹ Interpretive Letter Lao-Tze-2-Zi No. 0920070419 issued by the Council of Labour Affairs, Executive Yuan, on 24 December 2003.

“Workers’ years of service shall be limited to years of employment by the same business entity.” From the foregoing, it is clear that, since the period of employment of a fixed term contract worker is quite short, in reality it is not possible for the said worker to continuously work for the same business entity for more than 10 years. Thus, under the Labour Standards Act, a fixed term contract worker cannot receive retirement pension.³²

The Labour Pension Act drastically reformed the aforementioned retirement pension regimen under the Labour Standards Act, changing it into a portable pension fund system. In other words, irrespective of whether it is a fixed term contract worker or a non-fixed term contract worker, even if the worker changed employer, each of the said employer shall set aside a pension reserve for each worker employed on a monthly basis, the amount of which shall not be less than 6% of the worker’s monthly salary (Article 14 Paragraph 1). When the worker reaches the age of 60 and has worked for more than 15 years, upon his/her retirement, he/she is entitled to monthly pension payments. However, if the worker retires before he/she has worked for less than 15 years, he/she shall be entitled to a lump sum pension payment (Article 24 Paragraph 1). Since the Labour Pension Act adopts a portable personal account regime, workers who have reached the age of 60, regardless of whether they are fixed term contract workers or non-fixed term contract workers, as long as their total years of services in several work place are more than 15 years, they will be entitled to monthly pension payments. If their years of services are less than 15 years, they shall still be entitled to a lump sum pension payment.

- (5) Labour Insurance: Pursuant to Article 6 of the Labour Insurance Act, employers shall procure labour insurance for workers over the age of 15 and below the age of 60 regardless of whether the workers are fixed term contract workers or non-fixed term contract workers.
- (6) National Health Insurance: Pursuant to Article 8 of the National Health Insurance Act, employees of publicly or privately owned enterprises or institutions shall join the National Health Insurance, regardless of whether the workers are fixed term contract workers or non-fixed term contract workers.
- (7) Employment Insurance: Pursuant to Article 5 of the Employment Insurance Act, a worker of ROC nationality over 15 years of age and under 60 years of age shall join the employment insurance. According to Article 10 of the same Act, the employment insurance benefits include: unemployment payment, early re-employment incentives, vocational training living allowances and national health insurance subsidies for unemployed insured.

³² The average years of service are 114 months for a male worker working for the same employer and 93 months for a female worker working for the same employer. Thus, in reality, even for non-fixed term contract workers, often they are unable to receive the retirement pension under the Labour Standards Act because their years of service did not reach the statutory retirement standards. Thus, the retirement pension scheme as prescribed under the Labour Standards Act has been widely criticized and led to the enactment of Labour Pension Act in 2004. Please refer to the Directorate General of Budget, Accounting and Statistics, Executive Yuan, for the statistics on the average years of service of workers <http://www.dgbas.gov.tw/ct.asp?xItem=25795&ctNode=3580> (Last accessed on 2010/01/20).

Article 11 of the same Act further provides that if the insured has joined the employment insurance for at least 1 year within 3 years before his/her cancellation of the insurance as a result of involuntary resignation from work³³ and if the insured is capable of working and willing to continue to work, where the said worker is unable to find work or arrange for vocational training within 14 days after he/she applied for job placement, the said worker shall be entitled to unemployment payment.

How do the abovementioned provisions apply to fixed term contract workers? Article 11 Paragraph 2 of the Employment Insurance Act provides that an insured who resigned from work due to the expiration of a fixed term contract, who was unable to find work within 1 month, and whose contract had lasted for more than 6 months within 1 year after the resignation, shall be deemed to have involuntarily resigned from work. In such case, the preceding Paragraph of the same Article shall apply *mutatis mutandis* to the said insured. In other words, where a fixed term contract worker complies with the requirements set forth under this Paragraph, he/she shall be entitled to the same employment insurance benefits as a non-fixed term contract worker.

From the foregoing explanation, the pension fund, labour insurance, health insurance and employment insurance are the same for both fixed term contract workers and non-fixed term contract workers. The main differences lie in the protection given in respect to the termination of labour contract (however, if an employer wishes to terminate a fixed term contract prior to the expiration thereof, the employer must have legitimate ground as prescribed by law and cannot terminate at will), notice of termination (when an employer wishes to terminate a non-fixed term contract, the employer must provide prior notice) and the severance payment (wishes to terminate a non-fixed term contract, the employer must pay a severance payment to the worker). Consequently, the protections given to fixed term contract workers and non-fixed term contract workers under the labour law in Taiwan are in fact quite similar.

IV. Direction of reform of laws on fixed term contracts

In view that the provisions on fixed term labour contracts under the Labour Standards Act are overly strict, CLA has begun to discuss the loosening of the provisions in the past few years³⁴ and had established a Labour Standards Act Reform Group in 2009³⁵ to conduct

³³ Article 11 Paragraph 3 of the Employment Insurance Act: The so-called involuntary resignation under this Act refers to the resignation by the insured due to the closing down, relocation, suspension of business, dissolution or bankruptcy of the entity procuring the insurance therefor or as a result of the occurrence of any one of the events prescribed under Article 11 (termination of employment due to economic cause), Proviso of Article 13 (An employer shall not terminate the employment of a worker on maternal leave or on leave for medical treatment, unless the business of the employer cannot continue to operate for reasons of natural disasters, emergency or force majeure and prior approval has been obtained from the competent authority), Article 14 (termination of employment by a worker due to the employer's breach of the labour contract) and Article 20 (termination of employment due to the restructure or change of ownership of a business entity) of the Labour Standards Act.

³⁴ For example, commissioning Chih-Poung Liou and Neng-Chun Wang in June 2003 to carry out the research mentioned in Note 22 above.

³⁵ Members of the Labour Standards Act Reform Group include professors, judges and attorneys. The author is also a member thereof.

review of the Act. On 11 January 2010, CLA announced the Draft Amendments to the Labour Standards Act (“Draft Amendments”)³⁶, soliciting comments and opinions from the public.

The main purpose of the Draft Amendments is to amend Chapter 2 of the Labour Standards Act on “Labour Contracts,” seeking to (1) loosen the current provisions on fixed term labour contracts, and (2) regulate dispatched works. The background of such policy is: On the one hand, the provisions on fixed term labour contract are too strict, as a result of which employers have basically no room to hire fixed term contract workers. On the other hand, since dispatched work is not regulated by the laws, employers can freely engage dispatched workers. As such, dispatching work has become very popular in the recent years. It can also be said that there is a close connection between fixed term labour contract and dispatched work. It is therefore necessary to enact laws to regulate dispatch work, so as to prevent employers from illegitimately employ dispatched worker. Moreover, if the current strict provisions on fixed term labour contract are loosened up, there would be greater room for employers to hire fixed term contract workers.

Article 9 of the Draft Amendments provides:

“Article 9 Labour contracts shall be non-fixed term contracts. However, in any one of the following situations, an employer may enter into a fixed term contract with the workers:

- (1) Where, in order to complete work within a specified period of time, it is required to employ additional workers and the period of employment exceeds 2 years, approval from the competent authority must be obtained.
- (2) Where it is required to hire workers for the provisional needs of business operation and the period of employment is within 1 year.
- (3) Where the salary of a worker is paid from the budget for Government Employment Programs and the relevant program clearly provides that a fixed term contract may be entered into, provided that the period of employment is within 1 year.
- (4) Where a worker is hired to replace another worker who has stopped carrying out his/her work due to statutory requirement or agreement with the employer and the period of employment exceeds 3 years, approval from the competent authority must be obtained.

A dispatching business entity shall not enter into a fixed term contract with the dispatched workers based on the grounds as prescribed in Items 1 and 2 of the preceding Paragraph.

In any one of the following situations, a fixed term contract shall be deemed as a non-fixed term contract:

- (1) Upon the expiration of the contract, where an employer raises no immediate objection when a worker continues to carry out his/her work.
- (2) Upon the expiration of the fixed term contract entered into pursuant to Paragraph 1 Item 2, where a new contract is entered into in accordance with this item and the prior contract and the new contract together cover a period of employment for more than 1 year and the period of time between

³⁶ www.cla.gov.tw/cgi-bin/Message/MM_msg_control?mode=viewnews...

the expiration of the prior contract and the execution of the new contract does not exceed 30 days.

- (3) Where the period of employment under Paragraph 1 Item 1 or the said period exceeds 2 years after the extension thereof and was not approved by the competent authority.
- (4) Where the period of employment under Paragraph 1 Items 2 and 3 exceeds 1 year.
- (5) Where the period of employment under Paragraph 1 Item 4 exceeds 3 years and was not approved by the competent authority.

Upon entering into a fixed term contract, an employer shall notify worker in writing of the period and content of the employment.”

The key amendments to and the reasons for the said amendments can be summarized as follows:³⁷

- (1) The principle of non-fixed term labour contracts as adopted by the current Act is maintained, however, the current provision “a contract for continuous work [is considered] as a non-fixed term contract” will be deleted. The reasoning behind this amendment is that “the term ‘continuous work’ as referred to in the original provision is an uncertain legal concept. There is no equivalent concept of ‘continuous work’ under the relevant laws of countries such as Germany, Japan and Korea. Although such concept has been put to practice under our legal system, it nevertheless remains a gray area.”
- (2) The provision that divides fixed term labour contracts into four types--- temporary, short-term, seasonal and specific--- is deleted. The underlying reasoning for such deletion is that “As these four categories of work are highly similar, in practice, the nature of some works may involve several characteristics of fixed term works as listed in the original provision, as a result of which it is difficult to ascertain which category the said work belongs to and to interpret such works.”
- (3) According to the Draft Amendments, grounds for establishing fixed term labour contracts are limited to the followings:
 - i. Specific Work (where the period of employment exceeds 2 years, approval from the competent authority must be obtained). In respect thereto, the Draft Amendments maintain the provision under the current Labour Standards Act. However, the period of employment is extended from 1 year as originally prescribed to 2 years.
 - ii. Provisional Work (the period of employment is within 1 year). In respect thereto, the Draft Amendments use the concept of provisional work to cover temporary, short-term and seasonal works as prescribed under the current Labour Standards Act and extend the period of employment to 1 year.
 - iii. Workers Hired under the Government Employment Programs (the period of employment is within 1 year). As stated above, the current Labour Standards Act failed to regulate fixed term labour contracts for such type of work, a provision regarding which is explicitly included in the Draft Amendments.
 - iv. Replacement Work (where the period of employment exceeds 3 years, approval from the competent authority must be obtained). As explained above, the Labour Standards Act did not provide for unpaid parental leave for raising children as prescribed under the Gender Equality in Employment Act. If a worker gives birth

³⁷ *Supra* Note 35.

consecutively, then the maximum period of unpaid parental leave for raising children may exceed 3 years. In order to balance the nature of the work and the protection of the replacement workers' right of work, the Draft Amendments specifically provide for such situation.

- (4) A new provision is included whereby, fixed term labour contracts shall be considered as non-fixed term labour contracts if the period of employment for the aforementioned specific or replacement works is expired but the competent authority's approval has not been obtained, so as to facilitate the competent authority's supervision and monitoring thereof.
- (5) The provision on statutory renewal is maintained. In other words, upon the expiration of a fixed term labour contract, if an employer raises no immediate objection when a worker continues to carry out his/her work, the labour contract shall be deemed as a non-fixed term labour contract.
- (6) The provision on consecutive contracts is maintained: where a new contract is entered into for the provisional needs of business operation upon the expiration of a fixed term labour contract and the prior contract and the new contract together cover a period of employment for more than 1 year and the period of time between the expiration of the prior contract and the execution of the new contract does not exceed 30 days, the labour contract shall be deemed as a non-fixed term labour contract.
- (7) A dispatching business entity shall not enter into a fixed term contract with the dispatched workers for specific work or for the provisional needs of the business. The legislation reasoning is that "this provision is added in the Draft Amendments in order to maintain the employment relationship between dispatched workers and the dispatching business entities on a long term employment basis and to maintain the stability of dispatched workers' employment, so as to prevent a dispatching business entity requiring a dispatched worker to enter into a fixed term contract on the basis of the dispatching period and to avoid its obligations as prescribed in the provisions under the Labour Standards Act regarding termination of contract, severance payment and retirement pension."³⁸
- (8) In order to clarify the legal relationship, an obligation requiring employers to notify fixed term contract workers of the period of employment and scope of work in writing is added to the Draft Amendments.

The main difference between the provisions regarding fixed term labour contract under the aforementioned Draft Amendments and the provisions under the current Labour Standards Act is the removal of the requirement of "continuous work." In other words, as long as an employer can prove that a newly hired worker is "additional worker" or is hired for "provisional needs," the employer may hire the said worker on a fixed term labour contract basis. Since the threshold for fixed term labour contract has been reduced, employers will have more flexibility in hiring fixed term contract workers.

Although the aforementioned provisions are only Draft Amendments proposed by CLA and are far away from being enacted, however, after the announcement of the Draft Amendments, the labour union groups immediately opposed the proposed extension of the

³⁸ Several court judgments held, in protection of dispatched workers, that a labour contract entered into by a dispatching company and a dispatched worker is a continuous non-fixed term contract and should not be affected by the result of whether the dispatch contract between the dispatching company and its client company is fixed term or not. E.g. Kaohsiung District Court Judgment Lao-Jien-Shang No. 4 in year 2007, Kaohsiung District Court Judgment Lao-Jien No. 62 in year 2006, Kaohsiung District Court Judgment Lao-Jien No. 24 in year 2006, etc.

period of fixed term labour contracts from 1 year to 2 years. In respect to such opposition, CLA said that it will reconsider.³⁹

V. Conclusion

According to Article 9 of the Labour Standards Act, labour contracts shall be based on the principle of non-fixed term contract and the law strictly limits the room for an employer to enter into a fixed term labour contract. However, looking at the labour market in Taiwan, the turnover rate of workers are quite high and the length of time of a worker being employed by the same employer is quite short. As such, it is debatable as to whether such legislation is appropriate. In particular, since dispatched works are not regulated while the law strictly imposes restrictions on employers' choice in entering into fixed term contracts, in a way, it forces employers to employ dispatched workers as an alternative to the strict restrictions.

In order to promote the flexibility of employing fixed term contract workers in the labour market and at the same time to rectify the loophole of unregulated dispatched work, Taiwanese government announced the Draft Amendments to the Labour Standards Act in January 2010, seeking to provide greater flexibility to the labour market. Although there is still a long way to go from getting the Draft Amendments enacted, it is nevertheless worthwhile to keep our eyes open on the development of this Draft Amendments in the near future.

³⁹ *United Daily Evening News*, 8 January 2010, at page 3.