Chinese Labor and Employment Law
Reading Materials

Chinese Law Taught in English (CLTE)

1st Semester of 2013-2014 Academic Year
(2013 Intake)

Lecturer: Prof. Hao Qian
Labor and Employment Law

Course Duration: One semester (36 hrs)

Credit Units: 2

Language of Instruction: English

Course Description
This course aims to provide an overview of the existing labor & employment law environment in China and its legal requirements, with a focus on the fast growing labor issues and practices/solutions in light of the laws that have been designed to address them. The course is conducted in a lecture style to guide students through the exploration of various issues. At the end of the course, the students are expected to submit a paper of at least 2,500 English words or 4,000 Chinese characters.

Expected Outcome for the Course

Upon successful completion of the course, students are expected to be able to:

- understand the economic, social and political context in which China’s labor/employment law operates, as well as the role labor/employment law plays in the overall legal system in China;
- identify the key issues in China’s on-going labor reform and the legal mechanisms that have been designed to address them;
- critically evaluate the gap between legal provisions and their implementation, and offer insights into the underlying causes thereof;
- conduct independent research on the various issues covered in the course and related topics, especially from a comparative perspective.

Syllabus

Class 1 - Introduction: Labor market and economic development; labor reform in the Chinese context.

- General Introduction: Industrial relations, labor and employment law
- Labor reform in China – from labor allocation to labor contract
  - Labor system under central planning
  - Putting into context: economic reform and globalization
  - The emerging labor contract system
- China’s labor and employment law in transition
  - The various stakeholders
  - Challenges and issues

Readings:
Class 2 - Overview of China’s labor/employment laws and administration; understanding China’s regulation of the workplace; basics of labor contract law.

- Labor law in China’s legal system
- Sources of labor law
- Labor administration
- Different enterprises and their relationships with the labor administration
- Labor contract law: legislative history, overview of contents and practical implications

Readings:

Class 3 - Employment relationships and hiring practices.

- Defining “employment relationships” under Chinese law
  - What do NOT constitute “employment relationships”?
    - Public sector; service contract v. labor contract; ineligible employers/employees
- Special employment:
  - retired workers; transferred workers; “double” employment etc.
- Hiring practices

Readings:
- Cases I-II

Class 4 - Individual labor contract – formation and content.

- Formalities of the conclusion of a labor contract
- Probationary period
- Different types of labor contracts: fixed-term; open-term; project contracts
- Content of contract

Readings:
- Case III

Class 5 - Individual labor contract – termination.

- Ending or expiration of a labor contract v. termination: the distinction
- Termination of a labor contract by mutual agreement
- Termination by employer: conditions, restrictions, severance pay and compensation
- Termination by employee

Reading:
— Cases IV-V

**Class 6** – Collective contracts and collective negotiations.
● Labor unions in China: organization, structure and roles
● Collective contract under the law
● Collective negotiations in practice
Readings:

**Class 7** - Working conditions, injury compensation, wages and hours.
● Safety and health protection
● Injuries in the workplace and compensation
● Wages and working hours
Readings:

**Class 8** - Employment anti-discrimination laws
● An overview – antidiscrimination under employment law
  Discrimination and Law.
  Antidiscrimination and employment law
● Protections and challenges in China
  Gender
  Migrant Workers
  Health/Disability
  Age
  Other
Readings:

**Class 9** - Employee loyalty and employer’s protectable interests.
● Employer’s protected interests under the labor law
● Service time period
● Confidentiality
● Non-compete agreement
Readings:

**Class 10** – Labor dispatch
- Employment structure of labor dispatch
- Growth and widespread use of labor dispatch in China
- Legal issues and the need to reform

Reading:
— Cases VI

**Class 11** - Labor dispute resolution
- Mediation
- Arbitration
- Litigation

Readings:
— Ronald C. Brown, Understanding Labor and Employment Law in China: 168-183. **

**Class 12** - Welfare state and social security.
- Understanding social insurance
  - The need for social insurance
  - Two versions of welfare state
- Old age security (public pension system) in China as an example
  - Historical review of old age support in China
  - International experience: various models & recent development
  - Reform measures and the resulting problems

Reading:
— Chinese government white paper, China’s Social Security and Its Policy, 2004. **

**Only electronic versions are provided.**

**Readings and References**

Labor Law of the People’s Republic of China
Labor Contract Law of the People’s Republic of China
Regulation on the Implementation of the Labor Contract Law of the People’s Republic of China
Law of the People’s Republic of China on Labor Dispute Mediation and Arbitration
Employment Promotion Law of the People’s Republic of China
Labor Reform in the Workers' State: The Chinese Experience

Hilary K. Josephs

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INTRODUCTION

Labor law in many countries is an amalgamation of both private and public law. [FN1] According to the private law model, which is closely associated with freedom of contract and laissez-faire capitalism, the state's role is largely confined to providing a stable basis for the development of private economic relations. Under the public law model, which is relevant to an understanding of both modern capitalist and socialist countries, the state plays an active, interventionist role in shaping economic relations. In the labor area, it supplies the content of the employment relationship through statute and administrative regulation, e.g., regarding minimum wages and maximum hours of employment.

In contemporary China, the public law aspect of labor law has been virtually exclusive. From the late 1950's until just recently, the Chinese government has unilaterally determined the obligations and entitlements of the work force, [FN2] particularly with respect to those individuals employed in state industrial enterprises. [FN3] However, in recent years, through a series of regulations governing employment in state industrial enterprises, the Chinese government has acknowledged a need for private law in the field of labor relations. Within certain important boundaries, the parties in an employment relationship are now free to negotiate the terms of employment. In this context, the state's primary role is to serve as a referee, intervening only if called upon to settle disputes.

The growth of private law in the labor area is consistent with recent changes in China's economic and legal systems which are designed to overcome the deficiencies of a bureaucratic planned economy. During the past decade, the central government, disappointed with the performance of large economic units, has encouraged the entrepreneurial efforts of individuals, families, and small business entities in an attempt to invigorate the economy. [FN4]

*204 The recent labor reforms, [FN5] which infuse greater free choice into various aspects of the employment
relationship, currently affect only a small proportion of the work force, but raise questions about China's commitment
to economic progress and the repercussions of such a commitment on political values. Although China is not the first
socialist country to retreat from centralized planning or to legitimize private ownership of productive assets, China's
promotion of economic activities normally associated with capitalist societies has occasioned admiration from West-
ern observers. In China, however, the labor reforms have provoked a controversy as to whether or not these reforms
are too fundamental a departure from socialist principles. [FN6]

While no socialist country provides an unconditional guarantee of employment by law, job security for some part
of the work force has been a distinctive feature of socialist systems. The Chinese central government, however, has
openly stated that the contract employment regulations are intended to assault job security [FN7] which is believed to
cause the stagnation of productivity and efficiency.

Regardless of the question of whether job security is a necessary underpinning of socialist society, an important
and separate issue is whether a given labor reform is likely to achieve its goal of promoting economic efficiency. Can
economic efficiency be realized if reforms occur incrementally, or must all necessary changes occur at once? While
experimental regulations were promulgated at the local level, [FN8] it was six years before the central government
promulgated even "provisional" national regulations. [FN9] This period of experimentation *205 indicates that the
central government has proceeded cautiously in the area of labor reform. For example, although current labor regula-
tions give workers an expanded right to choose their employment, wages and fringe benefits are still determined by
the central government. Although the government seems to recognize that labor may not be put to its highest and best
use in a system of fixed wages, there is no sign that wages will ultimately be set by supply and demand.

Critical studies of the Chinese economy have noted the difficulty in developing local support for the central lead-
ership's plan. Strict enforcement of the labor reforms is frustrated by collusion among lower-level government ad-
ministration, enterprise management, and the work force. [FN10] Local labor officials and enterprise administrators
appear to be reluctant to promote changes which will result in increased labor turnover, unemployment, [FN11] or
social unrest. [FN12] Local labor officials' reluctance to make changes which might disturb the status quo and un-
willingness to force enterprises to adopt reforms are reflected both in the language of local regulations [FN13] and in
various enforcement measures. [FN14] Local resistance to reforms helps explain why the uniform application of the
reforms is effectively undermined.

Despite the revival of the Chinese legal system in the late 1970's, the recent labor reforms illustrate that the de-
velopment of mechanisms for the implementation and interpretation of the law has lagged behind the promulgation
of the law itself. For example, national regulations governing a system of labor arbitration designed to resolve con-
troversies arising out of private contracting were issued a year after the regulations promoting contract employment
were issued. [FN15] *206 The tension between the central government's commitment to a policy of reform and local
opposition to this policy highlights the need for establishing effective enforcement mechanisms. The central govern-
ment can ensure progress only when such local enforcement mechanisms are in place.

The difficulties experienced by China in orienting itself to new priorities and in using law as an instrument for
change need not come as a surprise. For the outside observer, they provide a fascinating insight into the dynamics of
the legal process in the world's most populous country. While no prediction should be made as to the eventual out-
come of legal reforms, current attempts to reform China's labor laws will no doubt influence the future development
of the Chinese labor system. [FN16] Through an analysis of regulations issued by the State Council and its subordin-
ate Ministry of Labor and Personnel, this article intends to examine closely the goals of the new contract employment
system and related reforms. The practical difficulties of reform will be discussed through an analysis of the experi-
ences of various locales in China where reforms have been implemented on an experimental basis.

I. THE CONTEXT OF THE LABOR REFORMS

A. The Catalyst for Change: Economic Development

Since 1977 when the Four Modernizations program was officially launched, the chief concern of the Chinese government has been to promote economic development and greater participation in the global economy. [FN17] In order to spur productivity in both the agricultural and industrial sectors, the government has encouraged the development of a "socialist commodity economy." [FN18] The role of central *207 planning has decreased, as the economy is increasingly being driven by a new market sector in which economic units can sell output produced after fulfilling their requirements under the state plan. [FN19]

The trend away from central planning has extended to the area of labor allocation. Before the recent labor reforms, labor in urban areas was allocated by administrative assignment. One major reason for the central government's disenchantment with this administrative allocation of labor was the practical inability to ensure employment for all eligible job-seekers. [FN20] Since the early 1980's, the government has officially retreated from a commitment of guaranteed work for all and now approves alternative forms of employment, including self-employment. [FN21]

Since the successful implementation of the dual planned-market system in the agricultural sector, the government turned its attention to reform of the urban industrial economy, particularly state enterprises. [FN22] A recurring theme in policy statements has been the need to overcome a lack of "vitality" in state industries. [FN23] Although the industrial output of state enterprises has continued to increase, these gains, when compared to the success of reforms in the largely rural economy, have not satisfied government expectations. [FN24] Because state enterprises generate such a large share of industrial output, significant gains in this sector are necessary if China is to achieve its goal of quadrupling annual industrial and agricultural output value by the end of the century. [FN25]

The central government has blamed the current lack of vitality in *208 industrial enterprises on the "excessive and rigid control" of government planners and on the interference of Communist Party officials in production decisions at the factory level. [FN26] Local labor bureau officials in charge of labor allocation, [FN27] faced with high unemployment among urban middle school graduates have pressured enterprises to hire additional workers regardless of actual needs. [FN28] This overstaffing has led to a decline in labor productivity.

Another factor that has resulted in low productivity has been the disassociation of skill and effort from reward. National wage increases since 1977 have raised individual income levels after two decades of wage stagnation, but most workers have gained proportional increases regardless of the quality or amount of work they contributed. [FN29] Since 1949, the link between performance and reward has never been direct, due partly to an ideological bias against material incentives and partly to the leveling effects of work group behavior. [FN30] The connection between performance and reward virtually ceased to exist during the Cultural Revolution (1966-76) when a serious breakdown in work discipline occurred. Since then, while the more flagrant forms of misconduct such as absenteeism, have been brought under control, wages are still based less on the quality of performance than on the seniority of the worker. [FN31]

The current irrational price system shows the limits of individual effort, with or without job security, and adds to the difficulty of obtaining a meaningful measure of an enterprise's profitability or of worker productivity. Official prices for goods and services which are established under the state plan reflect neither costs of production nor scarcities, yet these prices inevitably affect the prices charged within the market economy. [FN32] As a result, when compared to international standards, energy and raw materials are underpriced while manufactured goods are overpriced. Thus, the pricing system systematically *209 overrewards certain sectors and penalizes others. [FN33]

Even while the important task of price reform remains uncompleted, the central government instituted the contract employment system in 1986 in order to help revitalize industry. [FN34] In contrast to the prior system of bureaucratic allocation, whereby urban middle school graduates were assigned to state enterprise jobs essentially for
life, the contract employment system attempts to give both employers and employees a wider range of choices. Since the employment relationship is for the duration specified in the contract, either party may discontinue the relationship, either once the contract expires, without being penalized, or during the contract term with an obligation to pay damages. In principle, this system should allow labor to gravitate to those sectors where demand for labor exists, thereby relieving enterprises of the burden of supporting unnecessary workers. In addition, by allowing workers to change jobs the contract employment system promotes diffusion of technical knowledge, [FN35] reduces overspecialization, and responds to changes in individual attitudes towards work. [FN36]

B. The Problems and Limited Attempts at Correction

1. Rewards Based on Status Rather than Performance

While China does not yet have a labor code, [FN37] there is a customary presumption in favor of indefinite, or permanent, employment. [FN38] This presumption, which may be overcome by an agreement between the parties, [FN39] may be implied from various administrative regulations [FN40] which deal with fixed term employment or which restrict the *210 employer’s power to dismiss "permanent” workers. [FN41]

Although life tenure has been the basic pattern of employment in state enterprises, it has by no means been the exclusive form of employment. Historically, the labor force of state enterprises has been divided into two basic groups: the permanent work force and the temporary work force. [FN42] Generally, a worker's status as either permanent or temporary is fixed at the time of his initial employment and will not change thereafter, although a small number of temporary workers with special skills or good work records may be able to gain permanent status. [FN43] The employees who have permanent status, whether through initial assignment or through a change in status, are recorded on the official employment register of the enterprise and receive their wages from a wage fund supplied by the state. Such workers and their families enjoy the full range of fringe benefits provided by the employer, such as subsidized medical care, housing, and educational facilities. [FN44] Permanent workers enjoy immunity from dismissal, except in cases of egregious misconduct such as chronic absenteeism, criminal behavior, or political offenses. [FN45] Even if their employer partially or totally ceases operations, permanent workers are usually assured of full wages or relocation by the state to other *211 permanent jobs. [FN46] Such workers can expect an increase in income over their working lives and a pension upon retirement. [FN47]

In comparison to permanent workers, temporary workers are relatively unprivileged. These workers tend to be engaged in occupations such as construction, hauling, and cleaning, which are disdained by permanent workers. [FN48] Although they may be employed in regular production jobs alongside permanent workers, they are not included in the official employment register. [FN49] Consequently, their wages, which are usually lower than those of the average permanent worker, [FN50] are paid out of other budget items, sometimes on a clandestine basis. [FN51] Furthermore, temporary workers do not enjoy the same range of fringe benefits, such as a pension upon retirement. [FN52] Although they may in fact be employed by the same enterprise for many years, they do not have the same claim to job security as do permanent workers. [FN53] The state does not recognize an obligation to subsidize the wages of temporary workers or to find alternative employment for these workers if their employer runs into economic difficulty. [FN54]

Although there are no studies or statistics to prove that temporary workers are more diligent than permanent workers, the view that a shift away from permanent employment will increase productivity seems to be generally accepted. [FN55] Nevertheless, the proportion of temporary workers in the state enterprise work force, at least in the last decade or so, has remained small, approximating ten percent of the total state enterprise work force. [FN56] Since temporary workers tend to perform certain types of unskilled or manual work, it is not certain that employees hired under the contract employment system will be more suitable than permanent employees in a wide range of jobs.

2. Mismatch of Skills to Job Requirements
Beginning in the late 1950s, job vacancies in state enterprises were filled through administrative assignment by the government's labor and education bureaus. [FN57] Neither the employer nor the potential employee had much formal control over the process. Although the Chinese Government had long perceived deficiencies in this system of job allocation, [FN58] the system of administrative assignment did serve two important government goals. One was to control the growth of the urban population and maintain urban living standards by limiting permanent state sector employment to those with urban household registration. The other was to allocate jobs between industries, geographic areas, and occupations. [FN59]

Under the urban household registration system, which until recently served as an effective deterrent to clandestine migration from the countryside, [FN60] a person could not move into a city legally and obtain urban household registration unless he already had a job in that city. [FN61] Conversely, the labor and education bureaus would not assign an individual a job unless he had urban household registration. [FN62] Besides helping to control the growth of the urban population, administrative assignment, rather than wages, [FN63] was used as a means of effecting job allocation between industries, geographic areas, and occupations. [FN64] During the 1950's, a period when the remaking of social and cultural attitudes was stressed, the relatively objective and impersonal nature of bureaucratic decision-making restrained the use of family and personal connections to obtain jobs, which was prevalent in "feudal" Chinese society before 1949. [FN65]

The disadvantages of job assignment for both the individual and the employer have been discussed in the Chinese media for several years. [FN66] Job assignments were often made without regard to the individual's interests, aptitude, or training, a particular problem in the case of professionals. [FN67] Since only one state sector assignment would be made, a person generally could not quit and find another state sector job. Moreover, it was impossible for the enterprise to dismiss a worker on the ground that the worker was unsuitable for the job. [FN68]

In addition to the problematic effects of administrative assignment, state enterprises were plagued with difficulties arising out of the so-called "substitution system". Under this system, a retiree from a permanent job in a state enterprise could designate one of his children to succeed him as a permanent employee in the same enterprise, although not necessarily in the same position as that held by the parent. [FN69]

The substitution system was prone to abuse because it gave even less consideration to qualifications than did the system of administrative assignment. That parents chose as successors the least competent among their children was implied by relaxed hiring criteria applied to substitutes. [FN70] Parents would frequently select children who were physically unfit to take over their production jobs. For example, knowing that the management of a coal mine would not readily send women into the pits, miners would designate their daughters to substitute for them. [FN71] Even if the child appointed by substitution could not fill the position which was being vacated by the parent, enterprises were obligated to hire the child. As a result, the substitution system aggravated overstaffing practices and resulted in internal imbalances between supply and demand of labor. The substitution system also produced outflows of experienced workers and inflows of untrained workers. [FN72]

Due to restraint on productivity caused by administrative assignment and the substitution system, the central government has recently instituted a number of policies to restore merit selection and to restrict operation of both of these practices in the allocation of state sector industrial jobs. In 1980, local labor bureaus abandoned the system of unilateral assignment and adopted a system of "introduction" of candidates. [FN73] Under this latter system, a state enterprise which intends to hire additional workers is still required to submit a hiring plan for approval by its supervisory organization (zhuguan bumen) and the local labor bureau. [FN74] However, in contrast to the earlier practice, once the hiring plan is approved, the enterprise may now prepare notices describing the number of job vacancies, the nature of the vacant positions, the requirements for each position, the wages and fringe benefits, and the job locations. These notices are then posted at the labor offices of local street committees. [FN75]

In order to promote the open merit recruitment system, some cities, such as Beijing, [FN76] require applicants...
for state sector jobs to take a city-wide standardized written examination. [FN77] Based on their score, applicants may indicate preferences among the jobs advertised, although formal assignments are made by a committee of labor administrators. [FN78] Applicants may also be required to undergo character and physical fitness [FN79] examinations. Although assignments are made by a committee of government labor administrators, they are subject to the final approval of the enterprise. Therefore, if, for example, a job applicant does not pass a physical examination, the enterprise may be entitled to reject such applicant. [FN80]

Even with the adoption of open merit recruitment, significant constraints on both applicants and employers persist. Enterprises still may not engage in formal hiring without official approval. Moreover, ordinarily they must hire from among those individuals with urban *217 household registration. [FN81] Furthermore, in some cities, the labor bureau limits a given firm's ability to hire qualified personnel by allowing it to hire individuals only from a particular geographical area within the city. [FN82]

With respect to the substitution system, a State Council regulation was issued in 1983 to control early retirement, [FN83] and to require examination of substitutes on their intellectual, moral, and physical qualifications. This regulation, however, was not fairly implemented. [FN84] These issues, however, have become largely academic with the abolition of the substitution system in 1986. [FN85]

3. Imbalances of Labor Supply and Demand

In general, the Chinese labor force, both in urban and rural areas, is characterized by an oversupply of unskilled labor and an undersupply of skilled labor and professional manpower. It has been estimated that by 1990, there will be one-hundred million excess laborers in the countryside and ten million in the cities. [FN86] In the late 1970's and early 1980's, government authorities faced a formidable task in dealing with the problem of youth unemployment which resulted from a combination of individuals who graduated from middle school during this period and who did not continue on to higher education [FN87] and of individuals who had graduated before this time period but had been assigned to the countryside during the Cultural Revolution and had later returned to the cities. [FN88] At that time, a *218 number of strategies were utilized to absorb these individuals into the work force, including outright overstaffing of state enterprises, [FN89] use of the substitution system, [FN90] expansion of employment in the collective sector, [FN91] and removal of the ban on self-employment. [FN92]

The problem of urban youth unemployment has abated considerably in recent years causing a shortage of recruits for certain industrial jobs in cities such as Beijing and Shanghai. [FN93] Even when the unemployment rate is high, however, the unwillingness of unemployed urban youth to take certain jobs is implied from the fact that urban enterprises had to hire peasants for certain manual jobs which are particularly strenuous, dirty, or monotonous. [FN94] For this reason, enterprises often hire peasants to do work of a temporary or seasonal nature, [FN95] to do heavy manual work such as construction and hauling, [FN96] and to fill jobs, such as mining, which may have long-term adverse health effects. [FN97] With the shrinkage of the urban labor pool, industries which had not previously experienced difficulty in hiring, such as the textile industry, are now looking to the rural population for workers. [FN98]

The employment of rural peasants in urban industry presents two potential sources of difficulty. First, it negates government efforts to control the size of urban populations especially since many of these workers are not officially registered with the public security apparatus. *219 FN99] Second, to the extent that urban youth unemployment exists, peasant contract workers may be hired to do jobs which urban residents who would be willing to work at such positions could otherwise fill. For example, hiring peasant workers has aggravated the problem of youth unemployment in the provinces of Henan and Shandong. [FN100]

II. THE CONTRACT EMPLOYMENT SYSTEM AS INTRODUCED IN 1983

With his attacks on the lifetime employment system, colloquially referred to as the "iron rice bowl," in the 1950's, [FN101] Liu Shaoqi, then a member of the top leadership, seems to have foreseen the labor problems, such as the re-
ward of status rather than performance, the mismatch of skills to job requirements, and the imbalance of labor supply and demand, that would besiege Chinese society in the 1970s and 1980s. Steps to solve some of these problems, such as the application of material incentive systems and other "practical" means, and the curtailment of Maoist techniques such as exhortation and voluntarism, were taken only after the implementation of the Four Modernizations plan brought China's labor problems clearly into focus. The contract employment system is the first major structural change in the labor system to respond to these problems.

The February 1983 Notice of the Ministry of Labor and Personnel on Active Trial Implementation of the Contract Employment System (the "Ministry Notice"), [FN102] is the first significant attempt to use the legal system to solve the problems in the labor system, [FN103] and has resulted in the nationwide implementation of the contract employment system. [FN104] The Ministry Notice represents a consensus developed out of experimentation with the contract employment system at the local level beginning in 1980. Given its general and hortatory language and the fact that it does not provide sanctions for noncompliance, [FN105] the Ministry Notice has the effect of a policy statement which outlines general goals, rather than an administrative regulation which sets forth objectives for immediate implementation.

The Ministry Notice blames job security and the relatively egalitarian system of reward distribution for the low levels of productivity. [FN106] The primary objective of the contract employment system promoted by the Ministry Notice is to change the basic pattern of employment in state enterprises, where the vast majority of workers enjoy life tenure. Various wage reforms have been adopted to forge a closer link between material reward and individual achievement. [FN107] If wage reform is the positive incentive used to inspire the work force to produce a greater amount of output, then undermining the pattern of life tenure is the negative incentive.

In addition to undermining job security and reforming the wage system, the contract employment system aims to create a controlled free market in labor by granting both enterprises and job-seekers greater autonomy to form employment relationships. [FN108] As the Ministry Notice states, contract workers must be selected on the basis of merit, and the employment relationship must be founded on "equality and mutual benefit." [FN109] In addition, the contract employment system aims to balance the supply and demand of labor, with a special emphasis on urban middle school graduates. [FN110]

A. Contract Employment: An Attempt at Definition

The paradigm of contract employment differs in substantial respects from that of permanent employment. It contemplates that the employment relationship comes into existence through a formal written agreement between the worker and the enterprise, rather than in response to a unilateral directive issued by an administrative department. The duration of the employment relationship is fixed by an express agreement between the parties, not by the customary presumption that the employment relationship will continue indefinitely. The parties to the contract each enjoy greater freedom to terminate the employment relationship than previously allowed by law. In addition, conflicts arising out of the employment relationship may be resolved through a formal system of third party dispute resolution.

Numerous official statements and scholarly articles have taken pains to distinguish contract employment from temporary employment. [FN111] The Ministry Notice states that enterprises may continue to hire temporary workers for temporary positions, although it does not define "temporary." [FN112] However, despite this failure to provide a definition of what constitutes temporary work, the Ministry Notice seems to illustrate a shift in conceptual meaning, with the term "contract employment" being used to describe the recent reform of the employment system as a whole and the term "temporary employment" being used to describe the older forms of casual hiring.

In contrast with temporary workers as traditionally defined, contract workers are on the official roster of the enterprise and are paid out of the regular wage fund, the same state wage fund used to pay permanent employees. They are to be treated equally with permanent workers with respect to fringe benefits, admission to the Communist Party,
Party, Communist Youth League, or trade union, [FN113] and participation in political studies, technical education, and professional training. [FN114]

Although contract workers are to be treated on par with permanent workers, a fundamental inequality between the two types of workers exists with respect to the degree of job security enjoyed. In the case of the permanent worker, the issue of unemployment hardly ever arises, and his retirement pension is paid as a current expense by the enterprise from which he retires. [FN115] The same is not true of the contract worker; he has to worry about what will happen if his contract is not renewed. [FN116] In order to equalize treatment of contract workers, it would be necessary to ensure economic protection for the contract worker who is no longer employed due either to periods of unemployment or to his retirement from the work force.

The pension system for contract workers outlined in the Ministry Notice is administered by local governments rather than by each specific enterprise. [FN117] Enterprises which have employed contract workers, individual workers, and local finance organs contribute to the local pension fund. [FN118] Under this system, if a contract worker is employed by several enterprises over his working life, the amount each enterprise contributes to the pension fund is proportional to the number of years the worker is employed in that enterprise.

In addition to the differing pension systems for permanent and contract workers, institutional responsibility for income substitution during periods of unemployment, retraining and reemployment also *223 differs. In the case of the permanent worker, a single employer is responsible for virtually every aspect of an employee's daily routine throughout his life. [FN119] This employer control over a worker's life is not true for contract workers. The Ministry Notice stipulates that once the labor contract of an employee who holds urban household registration has been terminated, or merely not renewed, the "labor service company," [FN120] takes responsibility for the worker. Labor service companies provide training and employment primarily for middle school graduates. [FN121] Labor service companies have been given the responsibility to provide job training, job placement, interim employment in shops or factories run by the labor service companies themselves, payment of unemployment compensation, and administration of pension funds for contract workers holding urban household registration. [FN122] According to the Ministry Notice, unemployed contract workers with rural household registration, however, should return to their "communes, brigades and teams." [FN123] It is clear that an urban labor service company has no responsibility to support, train or locate jobs for people without urban household registration.

B. Contract Form and Content

The Ministry Notice lays down guidelines for both the form and the content of a labor contract. In terms of form, the Ministry Notice merely requires that the contract be in writing. [FN124] Although the Ministry Notice does not explain why a written contract is required, the reasons for the Statute of Frauds requirement of a writing in American contract law most likely support the Ministry Notice's requirement. [FN125] First, a writing serves an evidentiary function in the event of *224 a dispute. Second, the parties to the contract take their respective rights and obligations more seriously if these rights and obligations are memorialized in a writing. [FN126] Signing a contract may further the goals of the contract employment system by making workers more conscious of their obligations under the contract. [FN127]

In terms of content, the Ministry Notice requires the inclusion of provisions covering production or work tasks, the contract period, the term of probation or apprenticeship, the wage rate, insurance and welfare benefits, labor protection, terms for cancellation or modification of the contract, liability for breach of contract, and any other applicable rights and obligations of the parties. [FN128] The Ministry Notice, however, does not explain why certain terms must be included in the contract and why other terms need not be included. One reason why certain terms are mandatory may be that a court or other institution in charge of dispute resolution cannot fashion a remedy if the contract is silent or vague on an essential term. What constitutes an essential term, however may be a function of the court's willingness to look beyond the written document to the process of negotiation and other parol evidence in order to
determine what the parties actually agreed. As in other legal systems, a Chinese court may imply terms of a contract from various sources, such as statutes, judicial decisions, administrative regulations, collective bargaining agreements, and the custom of the industry and/or workplace. [FN129]

Although China does not as yet have a labor code, [FN130] many *225 aspects of the employment relationship are covered by administrative regulation. For example, wage scales, [FN131] for various occupational categories were established by administrative regulation in the 1950's. [FN132] The regulations prescribe procedures for determining assignment to a given wage grade on a particular wage scale, [FN133] and promotions in wage grade are regulated by national wage readjustments. [FN134] Moreover, while labor discipline is said to be a necessary element of the contract, it too is covered by national regulations [FN135] and is no more a subject of mutual negotiation than are wage grades. Thus, in China as elsewhere, much of the content of a labor relationship is determined by sources of law [FN136] which the parties are powerless to change by contract.

C. Theoretical Problems

The development of a socialist commodity economy in China has been accompanied by the growth of supporting legal institutions and the search for an appropriate ideological framework. Recently enacted laws and regulations, such as the 1982 Constitution and its 1988 revisions, [FN137] the Economic Contract Law, [FN138] and the General Principles of Civil Law, [FN139] all have in common an acknowledgment of *226 the individual as an independent legal actor with the right to undertake economic activities and reap the benefits from them. However, the recognition of such rights in a still small number of individual businessmen who operate outside the state sector carries different political implications and practical consequences than does the recognition of such rights in the vastly larger state enterprise work force. [FN140]

Generally speaking, the introduction of the contract employment system is consistent with evolving concepts of individual economic and property rights. [FN141] In order for an employment contract, which entails a bilateral exchange of values, to have legal substance, the worker must have something to exchange, i.e., rights in his own labor power. However, a legal and political system which legitimizes individual ownership of labor power is perilously close to the system of capitalist exploitation condemned by Karl Marx. [FN142] Given Marx's denunciation of "freedom of contract", it is remarkable that the Chinese labor reforms have adopted contract employment as a fundamental policy. Not surprisingly, Chinese political economists take pains to distinguish freedom of contract under capitalism from contract employment under socialism. [FN143]

*227 According to the Marxist view of capitalism, the worker owns only his own labor power, which he must sell on unfavorable terms to the capitalist, who monopolizes ownership of the means of production. [FN144] Under socialism, on the other hand, the state owns the means of production, including the assets of all state enterprises, on behalf of the working class. [FN145] In order to eliminate the theoretical possibility of the state's playing the capitalist role by exploiting the worker, some Chinese political economists view the worker as an owner of his own labor power and a co-owner of an undivided interest in the means of production. [FN146] These theorists believe that a state enterprise worker, as a co-owner, cannot be exploited as a wage earner in that enterprise. [FN147]

Consistent with the foregoing theory, the worker's ownership interest in the means of production does not result from his own personal efforts but is, rather, a gift of the socialist revolution, an inviolable right he enjoys as a member of the working class. [FN148] The value of his ownership interest is determined through China's continued economic development and the accumulation of productive wealth, which benefit the nation as a whole. On the other hand, the worker's entitlement to receive a wage is derived ultimately from a constitutional right and obligation to work. [FN149] His compensation is supposedly calculated on the basis on his individual contribution, and therefore, is within his direct and immediate control. Differentials in compensation are justified as reflecting variations in contribution. In a socialist system, just as in a capitalist one, an employment contract concerns the exchange of labor power for appropriate compensation. [FN150] The worker has a property interest in his own labor power and is free
to alienate this labor power, subject only to such restrictions as are necessary to protect his welfare or the welfare of others. [FN151]

*228 The views discussed above would find the contract employment system, even if eventually expanded to the entire state enterprise work force, to be fundamentally compatible with socialism. Other political economists and government officials, however, find the contract employment system too similar to the system of "wage labor" criticized by Marx. [FN152] An outspoken opponent of the contract employment system, at least in a universalized form, is the influential political economist Jiang Yiwei. [FN153]

Jiang's opinions, as officially published, are expressed in general and oblique language which leaves much to implication. [FN154] Nonetheless, he finds the very notion of an employment contract under socialist conditions to be ideologically infirm: if the worker is a co-owner of the nation's productive assets, he cannot be also a mere employee of the state. [FN155] Jiang does not separate, as do other political economists, the worker's ownership interest in productive assets from that in his own labor power. However, Jiang does see merit in employment reforms which purport to motivate workers to greater productivity.

In an effort to justify differentials in reward among workers, he seems compelled to accept the practical reality of labor force segmentation as a basic premise. In his view, the three distinct groups of workers--permanent, contract, and temporary--have differing rights and responsibilities vis-a-vis the enterprise. He believes that permanent workers form the core of the work force, are entitled to the fullest rights of participation in management, including voting rights, and should benefit, or suffer, most directly from the enterprise's performance. If the enterprise performs poorly, a permanent worker should suffer not only a loss of bonus but also a deduction from his basic wage. Jiang's thesis, that greater rights should carry with them greater responsibilities, is fully consistent with the central government's *229 commitment to link contribution with reward. But Jiang does not appear to recognize that workers with permanent employment are insulated from the worst consequences of enterprise performance, the loss of their jobs. While considering permanent employment to be a superior, distinguishing feature of socialism, he is reconciled to the existence of class divisions within the worker population. [FN156]

III. THE 1986 AND 1987 REGULATIONS

A. Introduction

On July 12, 1986, the State Council promulgated the following four sets of regulations which were designed to consolidate ongoing reforms of the employment system with respect to hiring and dismissal: (1) Provisional Regulations on the Implementation of the Contract Employment System in State Enterprises (Guoying Qiye Shixing Laodong Hetongzhi Zanxing Guiding) (hereinafter "Contract Employment Regulations"), [FN157] (2) Provisional Regulations on the Hiring of Workers in State Enterprises (Guoying Qiye Zhaoyong Gongren Zanxing Guiding) (hereinafter "Hiring Regulations"), [FN158] (3) Provisional Regulations on the Dismissal of Workers and Staff for Work Violations in State Enterprises (Guoying Qiye Citui Weiji Zhigong Zanxing Guiding) (hereinafter "Dismissal Regulations"), [FN159] and (4) Provisional Regulations on Unemployment Insurance for Workers and Staff in State Enterprises (Guoying Qiye Zhigong Daiye Baoxian Zanxing Guiding) (hereinafter "Unemployment Insurance Regulations"). [FN160] A fifth set of regulations, the Provisional Regulations on the Resolution of Labor Disputes in State Enterprises (Guoying Qiye *230 Laodong Zhengyi Chuli Zanxing Guiding) (hereinafter "Labor Dispute Regulations"), [FN161] was promulgated in July 1987 to create a grievance mechanism for employment contract disputes and dismissals for cause. [FN162]

The regulations issued in 1986 consolidate reforms which have been implemented to some degree for several years. For example, the experiment with contract employment, which has been complemented by the adoption of open merit recruitment and the establishment of an unemployment compensation scheme, [FN163] began in 1980. Furthermore, the 1986 regulations have precursors in regulations issued since 1983 by the State Council and the Min-
istry of Labor and Personnel, which were further implemented by regulations issued at the provincial and municipal levels. [FN164] All of the 1986 regulations focus on improving the permanent employment system. [FN165] Taken as a whole, they aim to raise the quality of recruits to the work force and to relax standards for dismissing workers who are seriously insubordinate or who are redundant. [FN166]

*231 B. The Contract Employment Regulations

The Contract Employment Regulations are the most important of the recently promulgated regulations because they potentially affect all hiring of unskilled labor by state enterprises. After their effective date, [FN167] the Contract Employment Regulations purport to cover all hiring of workers for regular production jobs in state enterprises (except as otherwise provided by law) [FN168] as well as hiring of workers for jobs of a temporary or seasonal nature. They include provisions on hiring, employment contract formation, wages, and fringe benefits. However, the core provisions which deal with compensation, unemployment benefits, and retirement benefits do not apply to certain categories of contract workers: those with rural household registration who are employed in mining, construction, loading, and transportation, [FN169] and those with urban household registration who are engaged *232 in temporary or seasonal work. [FN170] These excluded categories of contract workers are covered by separate regulations. [FN171]

1. Categories of Workers

The regulations draw a distinction, albeit not a clear one, between regular and temporary contract employment in terms of the duration of employment. Temporary work lasts for less than one year, whereas regular employment lasts for one year or longer. [FN172] Regular contract employees are divided between short-term or rotation contract workers [FN173] who are employed for a period of one to five years, and long-term contract workers who are employed for five or more years. [FN174] However, the regulations do not address the case where a temporary labor contract is renewed, perhaps repeatedly. This omission is noteworthy because the duration of the contract is otherwise the controlling factor in determining whether core provisions of the regulations apply. [FN175] Evidence [FN176] suggests that labor bureaus, the primary enforcement authority of labor laws and regulations in China, have not looked beyond the label of temporary employment to the nature of the work being performed or to the continuity of employment in cases where enterprises hired nominally temporary workers to avoid having to pay social insurance contributions. [FN177]

The Contract Employment Regulations state as a general rule that contract workers are to be treated equally with permanent workers regarding work, [FN178] training, participation in democratic management, political honors, and material incentives. [FN179] However, the scheme established by the regulations creates inequalities between permanent and contract workers because the latter, by definition, do *233 not have the same claim to job security as the former. In addition, contract workers receive less favorable treatment than permanent workers with respect to various benefits such as health insurance coverage for non-work-related illness or injury. Furthermore, the regulations are silent as to whether contract workers must be accorded certain vital fringe benefits normally provided to permanent workers, such as housing, health insurance for dependents, and schooling for dependents.

2. Hiring Procedures

The 1986 regulations do not give an enterprise the autonomy to determine its quota of new hires or to hire those who apply directly to the enterprise for a job. According to the regulations, contract workers are to be hired through a system of open competition administered by the local labor bureau. [FN180] Although competitive examinations for state sector jobs had been offered for several years and insider hiring had been officially discouraged before the 1986 regulations were promulgated, enterprises were still permitted to fill vacancies through the substitution system until the substitution system was abolished in 1986. [FN181] This new system of open competition is intended to prevent individuals from being hired through the substitution system and generally to ensure that qualified people are hired.
Despite the new freer methods for hiring workers, administrative regulations still leave little room for negotiation as to the terms of the employment contract. The Contract Employment Regulations require that each worker serve a three to six month apprenticeship. [FN182] In addition, where the contract employment system has been implemented on an experimental basis, the form of the contract has frequently been predetermined by the local labor bureau; the enterprise, not to mention the worker, has little choice but to accept the contract "as is". [FN183] Therefore, the contract may serve only to remind the worker of regulations of which he may not otherwise be aware [FN184], but *234 in any event may be powerless to change. Whether the dispute resolution process [FN185] will consider these employment agreements to be adhesion contracts and thereby accord special protection to the worker remains to be seen.

3. Contractual Requirements

Under the Contract Employment Regulations, every labor contract must cover production or work responsibilities, the period of apprenticeship, the term of the contract, working conditions, compensation, labor insurance and fringe benefits, labor discipline, liability for breach, and other matters deemed essential by the parties. [FN186] The regulations require that the employment contract be consistent with national policies and laws. It must also embody principles of "equality and voluntariness" and "unanimity reached through consultation". [FN187]

Despite the basic requirements for labor contracts stipulated in the national regulations, many contracts are not reduced to writing, are contrary to laws or policies, or are concluded without free and equal bargaining. [FN188] Existing enforcement mechanisms do not yet adequately address these issues, nor do the regulations address the legal validity of "three-sided" contracts between worker, enterprise, and labor intermediary. [FN189] Furthermore, the regulations do not refer *235 to collective contracts negotiated by the trade union on behalf of workers in a plant or industry. [FN190]

It is not clear why the State Council deemed certain provisions to be essential to the Contract Employment Regulations, while other subjects were omitted. Labor Minister Zhao Dongwan's press statement, which accompanied publication of the regulations in People's Daily does not explain the drafting history. [FN191] It may be that the provisions required by the regulations are customarily included in labor contracts in China so that the regulations codify existing practice, or that the labor laws of other countries (particularly socialist ones) were consulted and that these laws included the same provisions. [FN192]

4. Termination

There has been much discussion in the media about the extent of power to terminate an employee which the 1986 regulations grant to enterprises. [FN193] In fact, the power to modify or terminate a labor contract [FN194] prior to expiration is severely circumscribed, and the enterprise has less flexibility than it previously had in some places under preexisting local regulations. [FN195] The enterprise can seek modification *236 of the contract only if the enterprise has been authorized to change its production line or if there is a "comparable change in circumstances." [FN196]

Under the Contract Employment Regulations, the enterprise may terminate the contract in only four situations: [FN197] (1) if the worker proves unsatisfactory during the apprenticeship period, (2) if the worker exhausts his official sick leave for nonwork-related illness or injury, and still is unable to return to work, (3) if the worker should be dismissed for cause pursuant to the Dismissal Regulations, [FN198] or (4) if the enterprise has been officially notified of impending bankruptcy or has been declared bankrupt. [FN199] As a standard feature of local regulations, the contract automatically terminates without further action by the enterprise if the worker has been expelled for disciplinary violations, expunged for excessive absenteeism, sent for labor reeducation, or convicted of a crime. [FN200]

The regulations add little to the power of enterprises to terminate an employment contract under previously existing national regulations which already allowed dismissal for cause. [FN201] The Contract *237 Employment Reg-
ulations authorize dismissal only when the contract has become impossible to perform or for worker misconduct. \[FN202\] An enterprise does not have the power to terminate workers who are redundant, unless the enterprise is threatened by bankruptcy. \[FN203\]

The Contract Employment Regulations set forth circumstances where termination by the enterprise is expressly prohibited. These include: (1) where the contract term has not yet expired, unless specific grounds for termination exist, (2) where the worker has been certified as suffering from a work-related illness or injury, (3) where the worker is on official sick leave for nonwork-related illness or injury, (4) where a female worker is pregnant, on maternity leave, or nursing a child, or (5) under circumstances as otherwise provided by law. \[FN204\]

The Contract Employment Regulations also constrain the contract worker from terminating the contract. Each contract worker is required to have a "labor handbook" (laodong shouce), a personnel record in standard form issued by the Ministry of Labor and Personnel. \[FN205\] The labor handbook is supposed to contain a complete record of an individual's employment history, including reasons for job changes. Thus, a contract worker normally requires the current employer's cooperation in changing to another job. \[FN206\]

Under the regulations, a worker may terminate the contract prior to expiration without penalty only for specified reasons. These reasons include: (1) where working conditions have been officially certified as unsafe or unhealthy, (2) where the enterprise is unable to pay wages as specified in the contract, (3) where the worker undertakes higher education with the enterprise's approval, (4) where the enterprise fails to carry out the terms of the contract, or (5) where the enterprise has violated law or policy, and has injured the worker's rights. \[FN207\] A worker may also terminate the contract to take a job with an enterprise in another jurisdiction if the new enterprise has demonstrated a need for someone of his qualifications and the local labor bureau where he is currently employed approves of the worker's act of termination, or as national regulations otherwise permit. \[FN208\] The regulations do not sanction job-switching in order to increase one's income or better utilize one's talents, despite numerous policy statements urging the exercise of personal initiative and stressing the importance of maximizing individual ability. \[FN209\]

Regardless of which party terminates the contract, a month's advance notice is required. \[FN211\] In the event of breach, the aggrieved party may maintain a cause of action for damages. \[FN212\] If the enterprise terminates the contract, it must "solicit the opinion" of the trade union and report its action to its supervisory organization and the local labor authorities. \[FN213\] Although the enterprise's supervisory organization and the local labor bureau are not required to approve contract termination, in practice, they often exert pressure on enterprises to retract dismissal decisions. \[FN214\]

5. Compensation and Benefits

The Contract Employment Regulations state that contract workers are to be treated equally with permanent workers with respect to all matters concerning compensation and fringe benefits. \[FN215\] The regulations nonetheless provide that contract workers may receive a wage supplement of fifteen percent of their basic wage to offset any inequalities. \[FN216\] In some places where the contract employment system has already been implemented, contract workers have been entitled to a special allowance because their employment is deemed to be less secure than that of permanent workers. \[FN217\]

Contract workers are to be treated on par with permanent workers with respect to benefits such as job-related illness or injury, pregnancy and childbirth, funeral expenses, survivors' benefits, hardship allowances, official holidays, and personal leave with pay. \[FN218\] In addition, contract workers are to receive comparable subsidies covering, inter alia, commuting expenses, winter heating costs, and food purchases. \[FN219\] However, the regulations treat contract workers differently from permanent workers with respect to benefits for non-work-related injury or illness. \[FN220\] Depending upon accumulated seniority, a permanent worker is entitled to receive sixty to one-hundred per-

cent of his salary as sick leave pay for up to six consecutive months. To receive full pay, a permanent worker only needs eight years' seniority. After six months, the permanent worker may receive forty to sixty percent of his salary, the amount depending upon seniority, until he returns to work, is certified disabled, or dies. There is no limit on the period of time he may collect reduced sick leave pay. [FN221]

In contrast to a permanent worker, a contract worker is normally entitled to three months to a year of paid sick leave, depending upon accumulated seniority, on the same terms as permanent workers (i.e., sixty to one-hundred percent of his salary for the first six months with reduced benefits thereafter). [FN222] However, if he cannot return to work after one year, the enterprise has grounds to terminate the contract. [FN223] In that event, the enterprise must pay the worker a special allowance equal to three to six months' basic wages. Contract workers with more than twenty years' accumulated seniority may receive sick leave pay for more than one year, apparently at the enterprise's discretion. [FN224] The regulations do not explicitly address the issue of benefits, such as housing, health coverage for dependents, and schooling for the children of married contract workers. In areas where the contract employment system has already been implemented, the question of housing is a serious obstacle to the realization of the goal of equal treatment for all workers. [FN225]

6. Social Labor Insurance

Although long term contract workers have apparently received pensions in the past, [FN226] the contract employment system extends this practice to all qualifying workers (except peasant contract workers and urban temporaries who are excluded from coverage by the regulations). The regulations stipulate that the enterprise must contribute fifteen percent of total wage expenses for contract workers [FN227] to a "social labor insurance fund" for such workers; the workers themselves are to contribute no more than three percent of their standard wages. [FN228] The social labor insurance fund, created by the regulations, is to be managed by a special office of the local labor bureau. [FN229]

The social labor insurance fund covers pensions, post-retirement health insurance, funeral expenses, dependents' benefits, and hardship allowances. The amount of an individual's pension depends upon the length of time contributions have been made on his behalf, the amount of money credited to his account, and his average wage during a base period. [FN230] Under local regulations, contract workers were in fact treated less favorably than permanent workers: contract workers were required to work for more years than permanent workers in order to qualify for a pension and/or the percentage of pre-retirement salary to be paid to contract workers was lower than the percentage paid to permanent workers. [FN231]

Since most contract workers are new entrants to the work force, financial security during periods of unemployment constitutes a basic concern. The Contract Employment Regulations provide severance payments from the enterprise to workers who have been dismissed or whose contracts have not been renewed. [FN232] Under the regulations, a worker is entitled to one month's wages [FN233] for every year of service, up to a maximum of twelve, if his contract is not renewed, if he is dismissed on account of disability, or if he resigns for bona fide reasons such as dangerous or unhealthy working conditions or the enterprise's failure to pay wages. [FN234] He is not eligible for severance pay if he is dismissed for cause or if the contract terminates automatically, as it does, for example upon criminal conviction. [FN235]

7. Implementation and Dispute Resolution

The Contract Employment Regulations grant the local labor bureau the power to supervise and investigate implementation of employment contracts, as well as the authority to direct the recruitment process, [FN236] receive notification of dismissals, [FN237] and administer the social labor insurance fund for contract workers. [FN238] However, despite the powers given by law, in practice, local labor bureaus have not uniformly applied their extensive administrative powers to all aspects of implementation. While they have often prescribed the form of the contract and
closely supervised the recruitment of workers with urban household registration, they have not scrutinized the hiring of peasant “temporary” contract workers even though they may be aware that such hiring has circumvented regulations. [FN239] Thus far, employers who have been reprimanded for hiring such workers without authorization have merely been forced to dismiss the workers without further penalties. [FN240] In addition, the local labor bureaus have not rigorously enforced the payment of social insurance contributions on behalf of regular contract workers. [FN241]

If a dispute arises between parties to a labor contract and they are unable to resolve their differences through “mutual consultation,” the dispute may be submitted to the bureau’s labor arbitration committee. [FN242] The arbitrators’ decision is not binding, however, and the dissatisfied party may then bring suit in the courts. This three-step process of dispute resolution—mutual consultation (or mediation), arbitration, litigation—has been the norm under local regulations as well. [FN243]

C. The Hiring Regulations

The Hiring Regulations open the recruitment process to competitive selection and abolish practices such as the substitution system, which favor workers’ children. The substitution system, which allows a worker to retire and designate one of his children to succeed him, [FN244] took root very quickly after the founding of the PRC in 1949. Despite efforts by the government to displace the traditional family structure because it is deemed to be a remnant of feudalism, the substitution system has persisted for various practical and economic reasons. Generally, it has allowed families to expand, or at least maintain, their total income. [FN245] During the Cultural Revolution, it permitted young people to enter the urban work force, thereby avoiding assignment to the countryside. [FN246] In a deteriorating job market, particularly in the late seventies and early eighties, the substitution system was one of few avenues to a regular job in the state sector. Even now, although an open recruitment system has been promoted for some years under both national and local regulations, and the substitution system has been abolished, there have been reports that family connections are still used to obtain employment in state enterprises. [FN247]

A limited substitution system is still allowed pursuant to an exception not expressly referred to in the Hiring Regulations. By national regulation, [FN248] workers who were originally from the countryside and entered the work force before 1958 may continue to designate one child with rural household registration as a substitute. [FN249] However, this exception to the general abolition of the substitution system will not help peasant workers who moved to urban areas after 1958 and who may have gained permanent status. In addition to the special class protected by national regulation, various exceptions may exist under local rules with tacit approval by the central government. [FN250]

The Hiring Regulations expressly require that enterprises hire women where "appropriate." [FN251] However, in the last several years, *244 enterprises have exercised their growing autonomy by hiring fewer women. [FN252] Enterprise administrators have stated that they hire as few women as possible, for a variety of reasons. One reason given is that women are less capable of heavy manual labor and are therefore less versatile than men. Another reason given is that protective regulations allowing time off for maternity leave and child care impose an economic cost on the enterprise. In addition, the fewer the number of female employees, the fewer number of places necessary in enterprise nurseries and schools. Lastly, women are considered unable to work efficiently because of household and child care responsibilities. [FN253] The new regulations demonstrate a concern for the problem of gender discrimination in employment, but additional enforcement mechanisms are necessary to effectuate these provisions. The fact that the regulations require employment of women only where “appropriate” creates an opportunity for enterprises to define job requirements in ways that discriminate against women.

The Hiring Regulations include a provision which covers the consequences of noncompliance, a provision which is unique among the four regulations issued in 1986. [FN254] Any hiring in contravention of the regulations is null and void, and those enterprises responsible for such illegal hiring are subject to administrative discipline. [FN255]
This may suggest that the likelihood of bribery and corruption is much greater *245 in the area of hiring than in the case of other employment practices examined in this study.

D. The Dismissal Regulations

The Dismissal Regulations reiterate the authority of an enterprise to dismiss a worker for cause. [FN256] These regulations generally add little to an enterprise's powers which exist under the 1982 Regulations on Rewards and Punishments for Enterprise Staff and Workers. [FN257] However, one notable addition in the regulations is the grant of authority to enterprises to take disciplinary measures against service and retail trade workers who frequently argue with customers or who *246 otherwise act in a manner detrimental to the consuming public. [FN258]

Before dismissing a worker, an enterprise must report the matter to its supervisory organization and the local labor bureau, as well as solicit the opinion of the enterprise's trade union. [FN259] As under the Contract Employment Regulations, an aggrieved worker may take his case to the labor arbitration committee. [FN260] The committee's decision may then be contested in a de novo proceeding before the local people's court.

Since the contract employment system applies only to new recruits, the burden of proving grounds for dismissal in the case of the vast majority of workers who were previously hired still rests on the enterprise. In the case of contract workers, an enterprise can avoid the complications of the dismissal process by simply refusing to renew the contract of a worker who has committed disciplinary violations. Nonrenewal does not require justification; [FN261] therefore, the passage of time will afford the enterprise an opportunity to release an unsatisfactory contract worker without demonstrating cause.

Because of the state enterprise worker's dependence upon his work unit for a wide variety of goods and services, [FN262] the consequences of a worker's dismissal in China entail much more than the mere loss of a job. Even though suitable grounds exist in many individual cases, factory management generally avoids such a draconian measure. [FN263] This hesitation arises partly out of management's conviction that it is unconscionable to leave anyone without employment. In addition, factory management fears harassment and assault by *247 desperate workers. [FN264] In the past, a factory manager could not be confident that he would receive personal protection from the public security bureau, or even from the factory's own security department. Although the 1986 Dismissal Regulations underscore the power of the public security authorities to discipline a worker for retaliatory behavior, [FN265] factory managers may be exposed to considerable physical risk by dismissing workers. [FN266]

Not surprisingly, enterprises do invoke their powers to dismiss workers in cases involving criminal misconduct or chronic absenteeism. [FN267] In these situations, the grounds for dismissal are relatively clearcut and easily substantiated. Moreover, a worker who runs afoul of the criminal law becomes a ward of the criminal justice system. [FN268] Likewise, a worker who voluntarily absents himself from work cannot accuse the enterprise of depriving him of his livelihood and most likely has an alternative source of income. [FN269]

The frequency of formal applications of disciplinary measures, although still small, nonetheless appears to be increasing. [FN270] However, the use of dismissal as a means of weeding out unproductive *248 workers is as yet unsupported by either law or custom. [FN271]

E. The Unemployment Insurance Regulations

While hardship allowances have long been available to assist those citizens whose incomes fall below subsistence levels, unemployment compensation per se apparently has not been paid since the early 1950s. [FN272] Under the new Unemployment Insurance Regulations, permanent and contract workers who have been dismissed, workers whose employers have been declared bankrupt, workers who have been made redundant by an enterprise facing bankruptcy, and contract workers whose contracts are not renewed may all make claims for unemployment compensation. [FN273] Even workers who are dismissed for cause are nonetheless eligible to receive unemployment com-
pensation under these regulations. [FN274]

The unemployment insurance reserve is funded primarily by a tax of one percent of the enterprise payroll, deposited in an interest-bearing account. [FN275] Each province or equivalent administrative unit has its own reserve and local finance authorities make up any shortfall. The reserve makes disbursements for unemployment compensation, medical insurance, retirement pensions, funeral expenses, dependents’ benefits, and hardship allowances for the former employees of bankrupt enterprises and those facing bankruptcy. It pays unemployment compensation and medical insurance for dismissed workers and unemployed contract workers, and covers training programs and self-help activities for the unemployed. [FN276]

Unemployment compensation, regardless of the reason for which the employee becomes unemployed, is calculated as a percentage of the worker's average basic wage [FN277] during the last two years of *249 employment. Those with five or more years of service may receive benefits for a maximum of twenty-four months, at the rate of sixty to seventy-five percent for the first twelve months, and at the rate of fifty percent thereafter. [FN278] Those with less than five years of service are eligible for twelve months of benefits at the rate of sixty to seventy-five percent. [FN279] Severance payments to a contract worker, also known as a "livelihood allowance," are counted against the amount of unemployment compensation to which the worker is entitled. [FN278]

This formula for calculating unemployment benefits, which is essentially the same for all workers, seems unfair to contract workers who have become unemployed through no fault of their own. In any case, a worker becomes ineligible for unemployment compensation once he accepts a new job, including self-employment, unjustifiably refuses on two occasions to accept employment opportunities provided by the labor authorities, is sent for labor re-education or is convicted of a crime. [FN281]

The labor service company, [FN282] which is under the jurisdiction of the local labor bureau, is responsible both for managing the unemployment insurance system and for directing the unemployed into new jobs. [FN283] Typically, it not only provides training and information on available jobs but also engages in economic activities which create jobs, such as running factories of its own. Previously, the primary area of responsibility of government labor service companies was the training and employment of middle school graduates. [FN284] Now these companies are also involved in finding employment for redundant workers or unemployed contract workers. [FN285]

*250 F. The Labor Dispute Regulations

Since the 1950's, when industry was socialized, until recently, state enterprises did not maintain a formal grievance mechanism which placed the binding resolution of disputes in the hands of a neutral third party, such as a labor arbitrator or labor tribunal. [FN286] Factory administration gave considerable autonomy over the dispensation of rewards and punishments to the workshop director and the party branch secretary of the workshop. [FN287] In part, because of the near total absence of labor mobility, it was in the interest of both workers and their shop directors to resolve differences without "external" intervention.

Those individuals with work-related or other complaints have been able to seek assistance from various ombudsman's offices (xinfangchu, literally, "letter and visit offices") which are commonly attached to government departments and levels of the Party hierarchy. [FN288] Work-related complaints are usually directed to the ombudsmen of the labor bureau, the All China Federation of Trade Unions ("ACFTU"), or the Ministry of Labor and Personnel. According to press reports, it is possible for both government and party ombudsmen (and within the government, ombudsmen from different departments) to handle a particular case. [FN289] However, an ombudsman may use its powers only to investigate and persuade; it *251 has no authority to issue binding orders to an enterprise or its supervisory organization or to apply for judicial intervention. This lack of binding authority is true even for complaints which are filed with the ombudsman of the labor bureau and which require the bureau's interpretation of its own regulations. [FN290]
As part of the scheme of local implementation of the contract employment system during the early and mid-1980s, labor arbitration committees attached to local labor departments were specially established in various places. \[FN291\] Their activities seem to have been quite limited, particularly in comparison with those of the ombudsman's office. \[FN292\] The 1986 Contract Employment Regulations include only one general provision on the subject of dispute resolution, which provides that a dispute must proceed through the steps of mutual consultation, arbitration, and as a last resort, litigation. \[FN293\]

\*252 It was not until the Labor Dispute Regulations were issued in 1987 that details on such important questions as jurisdiction, appointment of arbitrators, and arbitration procedures were provided. \[FN294\] The Labor Dispute Regulations apply obligatorily to all cases arising out of employment contracts and all dismissals for cause. \[FN295\] Whether the regulations are to be applied to other types of labor disputes involving permanent workers is a matter within the discretion of provincial authorities. \[FN296\]

The Labor Dispute Regulations do not require a grievant to exhaust internal remedies to resolve either contract disputes or dismissal decisions. \[FN297\] Only in contract disputes does a grievant have the option of bringing his complaint before an enterprise mediation committee. \[FN298\] Members of this committee are appointed by the representatives' *253 congress, enterprise management, and the enterprise trade union. \[FN299\] If mediation fails, a grievant may bring the matter before the city (or county) arbitration committee, which is made up of members from the labor bureau, the trade union organization, and the organization with supervisory jurisdiction over the employing enterprise. Provincial governments may establish arbitration panels at that level, presumably to handle cases which cross jurisdictional lines. \[FN300\]

The arbitration committee may decline to exercise jurisdiction, but is required to explain its reasons for doing so. \[FN301\] The regulations do not elucidate the circumstances under which the arbitration committee may decline jurisdiction, but its decision to do so is not appealable. As under the rules of civil procedure applicable to court proceedings, \[FN302\] if it accepts a case, the arbitration committee must initially try to resolve the dispute through mediation. Any settlement achieved thereby is legally binding and may be enforced by court order. The same is true for the imposed solution of the arbitrators' decision. Nonetheless, either party, if dissatisfied with the outcome of arbitration, may bring a court action de novo. \[FN303\]

The new system of labor arbitration confronts several obstacles to meaningful implementation. First, it represents a break with the customs of the last thirty years, which confined virtually all personnel problems not merely to the factory but to individual workshops within the factory. Due to the limited resources devoted to public administration of labor disputes, the effects of the prior tradition may remain, especially since members of the labor arbitration committee serve in a part-time capacity. As a result, although the law does not require contract workers to exhaust internal remedies, \[FN304\] which would be a sensible means of discouraging frivolous complaints, contract workers may be expected to do so in practice in order to reduce the number of cases submitted to the arbitration committee. Given the highly authoritarian system of power relations in the factory, the stifling of worker grievances is likely to result.

Another factor operating against the worker is that membership of both the enterprise mediation committee and the local arbitration committee is drawn from groups representative of management interests *254 or which have traditionally been subservient to management. However, at the same time, managers are somewhat reluctant to dismiss workers for fear that arbitration committees will simply overturn the dismissal decision and restore workers to their jobs. \[FN305\] It will be interesting to see whether arbitration committees will develop either a pro-worker or a pro-management bias depending upon the nature of the dispute being arbitrated. For example, an arbitration committee might side with workers in dismissal cases but with management in cases where the stakes are lower.

In cases involving labor disputes, the amount of money in controversy is likely to be quite small. \[FN306\] For this reason, courts might find indirect means of discouraging such lawsuits. Since most workers are judgment-proof,
there is little to be gained by the employer in initiating arbitration. [FN307]

A final obstacle to the successful resolution of labor disputes through arbitration is that a system which is limited to the relatively small number of cases arising out of employment contracts and dismissals for cause [FN308] fails to address adequately permanent workers' grievances, which if left unresolved, may cause such workers to be dismissed or may result in other serious consequences. [FN309] However, if provincial governments take up the challenge to expand coverage of the regulations to all labor disputes, [FN310] as authorized by the regulations, this problem should diminish in importance.

IV. EXPERIENCE WITH IMPLEMENTATION OF THE CONTRACT EMPLOYMENT SYSTEM

Over the last several years, the number of contract workers employed in state enterprises has grown, both in absolute terms and as a percentage of the state enterprise work force. For example, in the three months between September 1986 (just before the 1986 regulations *255 went into effect) and December 1986, the number of contract workers increased from 3.65 million to 5.17 million, or from 4 to 5.6 percent of the state enterprise work force. [FN311] During the same period, the number of permanent workers in state enterprises increased slightly from 74.88 to 74.93 million, but the percentage rate declined from 82 to 80 percent of the work force. [FN312] Despite this percentage decline in the permanent work force, contract workers remain a small group within the total state enterprise work force. [FN313]

Official statistics do not account for a group of approximately 13 million people, or about 13.5 percent of the total work force. [FN314] This "shadow" group most likely consists of temporary workers in the traditional sense. Temporary employment has remained largely unaffected by the implementation of the contract employment system and is continuing to grow, albeit more slowly, than contract employment. [FN315] Rather than displace the permanent employment system or eradicate the segmentation of the labor force, the contract employment system may merely be adding to China's labor force hierarchy a layer between the permanent work force and the temporary work force. Many of those individuals recently hired as contract workers would most likely have been hired as permanent workers in earlier years. There is some evidence that the contract employment system is *256 providing upward mobility for temporary workers who are promoted to contract worker [FN316] and, to a lesser extent, downward mobility for permanent workers who are demoted to contract worker status. [FN317]

Little information on contract employment is available by industry or economic sector. Published figures are normally aggregated and unrevealing. For example, while it is known that at the end of 1985 workers constituted 4.5 percent of approximately 3.3 million in the metallurgical industry's work force, [FN318] the respective percentages employed in industry sectors such as iron and steel production, mining, and construction, are not indicated by this source. As a second example, although there was a total of 566,000 contract workers engaged in commerce at the end of 1985, or about one out of every six contract workers, how these workers were distributed among the various occupational categories within commerce, such as sales, purchasing, and rural supply and marketing cooperatives, is unknown. [FN319] Moreover, published figures do not indicate contract employment by form of ownership; in other words, those individuals employed in state enterprises are not distinguished from those employed by collectives.

According to an official spokesman of the central government, contract workers are earning more than permanent workers engaged in the same kind of work. [FN320] This phenomenon is a result of official wage scale manipulation: setting contract workers at a higher wage grade for the same job, paying contract workers more than permanent workers at the same wage grade, or shortening the probationary period during which a relatively low wage is paid. [FN321] Whether contract workers are better remunerated because of their status or because of their employers' difficulty in attracting recruits is unclear. Some reports praise the higher productivity of contract workers, usually measured in terms of higher attendance rates. [FN322] Whether or not *257 economic justification exists for paying contract workers more, this practice has created morale problems among the permanent work force. [FN323]
Before contract employment became legally enforced, enterprises demonstrated a lack of enthusiasm for hiring contract workers, rather than "outside of plan" temporary workers, largely because of the enterprise's ensuing obligation to make social insurance contributions. Since social insurance contributions are generally calculated as a percentage of the contract worker's basic wage, the enterprise's financial burden increases in direct proportion to the number of contract workers employed. Thus the amount contributed to the social labor insurance fund for contract workers decreases the amount of the enterprise's profits which can be spent on bonuses or invested in social amenities such as company housing. For these reasons, although the contract employment system provides enterprises with greater flexibility in recruitment, dismissal, and nonrenewal, this increased flexibility does not come without cost to the enterprise. In places such as Beijing and Shanghai, where a centralized pension system has recently been established to cover both permanent and contract workers, the pension system no longer serves as a disincentive to hiring contract workers as it did before the centralized system was implemented. Rather, enterprises now have a greater incentive to hire contract workers.

While the contract employment system carries with it a promise of autonomy in the area of personnel decisions, an individual enterprise may not independently decide to hire only permanent workers or only contract workers. The present law mandates hiring of contract workers for regular positions, even though an enterprise may have bona fide reasons for hiring permanent workers. Conversely, an enterprise may be forced to hire permanent workers. For example, a factory in Shanghai which had employed contract workers for several years and was generally satisfied with their performance experienced great difficulty absorbing a group of permanent workers its supervisory organization required it to hire after a nearby factory was closed. The relocated workers on the whole were neither competent nor diligent, but the factory had no choice but to accept them. Whether an enterprise is required to hire permanent or contract workers, in either case, the enterprise is prevented from making a choice in its own self-interest.

Besides the possible lack of autonomy over hiring, another source of enterprise dissatisfaction with the contract employment system is the fact that contract workers are less stable than permanent workers and display a greater tendency to change jobs without undergoing the proper administrative formalities. Such behavior often disrupts production schedules, compels management to devote time to hire replacements, and causes company property, such as tools and uniforms, to be misappropriated. While complete statistics on turnover among both permanent and contract workers are not readily available, it is generally accepted that voluntary job-switching among permanent workers in state enterprises rarely occurs. When a worker does change jobs, however, the worker is usually young and has not yet assumed heavy family and financial responsibilities. Based on fragmentary evidence, a turnover rate of five percent among contract workers seems "high", when compared to the near total absence of turnover among permanent workers.

Factory management is often unwilling to invest in training for contract workers because they are considered to be uncommitted to the workplace. This apprehension becomes a self-fulfilling prophecy because contract workers see no opportunity for advancement. It appears that those hired under the contract employment system have looked upon their jobs as a temporary position to be given up if a permanent job or the prospect of one materializes, either by substituting for a retiring parent or by pursuing higher education.

Factory management fears, in particular, that the contract employment system promotes increased mobility for technical and skilled workers. Because managers do not have the discretionary authority to provide special incentives to particularly valued employees, they have relied on disincentives to changing jobs such as lifetime contracts. The Contract Employment Regulations do not expressly prohibit lifetime contracts; in fact, long-term contracts of five or more years are permitted. Under local regulations in Beijing and Shanghai, lifetime contracts or contracts of indefinite duration have been authorized for several years. While the Contract Employment Regulations allow a party to an employment contract of any duration to change jobs so long as he compensates his employer for the damages caused thereby, lifetime contracts seem to be designed to emulate the permanent employment system. It is unlikely that courts will find lifetime contracts to be void on the grounds of il-
legality or duress and thereby strike them down per se due to their failure to embody "equality and voluntariness." [FN342] Such a decision undoubtedly would bring the courts into direct conflict with labor authorities who have approved lifetime contracts.

A worker's increased mobility directly conflicts with his need for permanent housing. From the contract worker's perspective, housing for married workers is likely to be a more pressing issue than matters such as pensions or unemployment compensation. Enterprises typically allocate housing on the basis of seniority within the enterprise. Unless the rules change, a contract worker who changes jobs frequently will not accumulate the necessary seniority to be allocated housing. If housing were available at reasonable prices on the open market or if mortgage financing were available, contract workers would possibly be able to resolve the housing problem on their own, but such a housing market is only now beginning to develop. [FN343]

In addition to housing, another source of concern for the contract worker arises from the provision of the Contract Employment Regulations dealing with wage seniority. A contract worker who changes jobs but continues to perform the same kind of work is entitled to receive appropriate credit for years of experience in the setting of his wage grade. However, proper adjustment in the wage grade depends upon factors historically absent from the Chinese industrial system: enterprise ability to define and accurately measure job requirements and enterprise willingness to reward achievement over seniority. [FN344] State enterprise organization in China has been characterized neither by precise job classifications nor by close links between *262 jobs performed, skill levels, and pay. [FN345]

CONCLUSION

China's officially published evaluations of the contract employment system and other employment reforms tend to stress the intractability of certain problems. [FN346] Commentators note that the continued segmentation of the state enterprise work force into high and low status groups perpetuates an atmosphere of jealousy and conflict, and therefore is likely to affect productivity adversely. In addition, labor shortages in occupations disdained even by unemployed urban residents have been overcome only by relaxing the laws against rural-to-urban migration and by allowing the hiring of peasant workers. Finally, contract employment does not help solve the considerable problem of redundancy among permanent workers who are maintained in employment at great cost to the national budget.

One way to interpret current developments is to say that reform has been directed at a system which has been extremely inflexible and that time is needed to produce positive results. In contrast to the leadership under Mao Zedong, which often forced rapid change on an unwilling or unprepared population and caused disastrous consequences, the present leadership has wisely chosen a more gradual approach, emphasizing law rather than political mobilization. Institutional measures which originally applied only to contract workers, such as government-managed pension administration, are being extended to permanent workers. Although the extent of the central leadership's commitment to eliminate large-scale redundancy is unknown, a system of unemployment benefits has been implemented and could well be expanded to provide a safety net for increasing numbers of unemployed permanent workers.

It is not surprising that progress in developing a constituency for reform has been slow. The contract employment system reduces the labor bureau's power over job allocation while threatening to increase the number of unemployed, imposes additional expenditures and administrative complexity on the enterprise, and jeopardizes workers' actual and potential job security. In addition, the contract employment system affects an accommodation of interests between government administration and the enterprise, and in turn between the *263 enterprise and its workers. The present leadership, like its predecessors, must ultimately convince those affected by its policies that the sacrifices of the moment will be rewarded by a more efficient and productive economy in the future.

*264 APPENDICES
While settling into my seat at 35,000 feet as the second leg of my flight left Japan for China, a passenger next to me asked if this was my first trip there. I replied it wasn’t and that I had been involved in China’s legal developments over the years. He said he was going there to explore investing in China, but he had heard that the labor laws had come to undercut the advantages of operating in China and asked if that were true. That, I replied, depends on how well you understand China, its Chinese characteristics, and the variables affecting its workers. Some workplaces are sterile laboratories with highly trained and well-paid technicians, and others can be grimy, dangerous factories that use migrant labor and have no concern for labor standards: the significance of the labor laws depends on the size of these sectors in a country with more than 800,000,000 workers! Though I may have detected a faint glazing in his eyes, he said he needed to understand how the workplace is regulated and urged me to continue and to provide him with some insights and guidelines into China’s new legal environment and approaches in regulating the workplace. So, I began.

Balancing Economic Development and Labor Reforms
The story of how labor and employment issues are dealt with on an everyday basis begins with an understanding of China and insight into its system of legal regulation. The Chinese workplace is a reflection of the diverse impacts of phenomenal economic development, tightening regulations, and an evolving safety net in the workplace. It is set in urban and rural areas; in manufacturing, construction, and heavy and light industries; and in white-collar jobs. In many sectors, there is a more stable and slowly evolving skilled workforce that has come to expect and demand better labor standards and protections. Add to
this the ebb and flow of more than 150 million migrant workers into the urban areas and the absence of traditions of labor laws and law enforcement, and the image of China’s workplaces comes into clearer focus. It is the story of how those workplaces accommodate to China’s labor and employment laws and make them work.

Relatively low wages and labor standards for workers in China are usually initially credited for its continuing economic development and its sustained annual growth in the double digits. In recent years, with the transition to a market economy and privatization, these same low labor standards have evoked international and domestic pressures; in response, China’s leaders have introduced labor reforms. These reforms attempt to meet worker needs while at the same time maintaining economic development and economic competitiveness. Since the issuance of the Labor Law in 1994, there has been a steady growth in labor legislation seeking to find that balance, provide a worker safety net, promote social and political stability, and address the often disparate effects of the economic miracle.

Labor reforms, like economic reforms, have had an uneven impact on China’s 800 million workers. Rural workers too often fall outside the protection of the labor laws; and better wages and working conditions are more likely available in the urban areas that have benefitted from economic development, particularly the eastern coastal regions and cities. This concentration of workplace opportunities has worked like a magnet to attract the migration of nearly 150 million rural workers to urban areas. These migrant laborers are concentrated in manufacturing and construction and are often the victims of unpaid wages and substandard working conditions.

The great diversity of China’s workplaces continues to hinder the focused application and enforcement of the newly emerging labor laws. State-owned enterprises (SOEs), former SOEs, private enterprises, foreign-invested enterprises (FIEs), and large and small enterprises all present varied challenges to local governments seeking to regulate the workplace. Employers are also mindful that they risk the loss of competitiveness if they comply with labor standards while their competitors do not.

1. Use of Laws to Regulate the Workplace

China’s new legal system was developed since the Four Modernizations in the late 1970s. Centuries of traditions and China’s more recent socialist and civil law heritage have blended together to create its present legal system, laden with Chinese characteristics. Although legislatures and government agencies serve as sources of law, as in the West, in China other legal institutions, such
as the Supreme People’s Court that issues interpretations guiding the courts in their application of the laws, serve that purpose as well.

China’s recent explosion of new labor laws, implemented in 2008, ranging from the Labor Contract Law (LCL), the Employment Promotion Law (EPL), and the Labor Dispute Mediation and Arbitration Law (LMA), as well as laws dealing with related topics of mergers and acquisitions and bankruptcy, must be understood in the context of China’s burgeoning economy and concern for social stability. Chinese legal regulations, based on legal traditions in civil law and of course with “Chinese characteristics,” may appear somewhat similar to Western laws. However, under China’s political-legal system, the lawmaking organs and the enforcement mechanisms often function differently from those in the West. The National People’s Congress (NPC) and its Standing Committee enact legislation, the State Council issues regulations, and the Ministries formulate rules; their local government counterparts also issue laws and regulations. The legal system operates under a “rule-by-law” approach (with legislative supremacy), and the enforcement processes are distributed differently from Western law, involving numerous layers of government and legal institutions.¹

How Chinese laws operate is surprising to many in the West. The relationship between central and local governments and their relative authority in legislation and enforcement form a practical reality that must be dealt with. Although China is a former socialist state, it generally has a decentralized government. Central government laws (such as the 1994 Labor Law) are often merely general guidelines that thereafter depend on consistent “local implementing regulations,” legislated and enforced by appropriate local authorities. For that reason, it has taken some time to provide meaningful labor protections to its workers. Labor disputes are channeled through familiar routes of alternative dispute resolution machinery, though they play out somewhat differently than in the West.

Labor laws are generally administered by the various divisions of the local labor bureaus, which are under the central ministry but, in large part, are horizontally (locally) financed and staffed. Likewise, enforcement is generally handled at the local level. In recent years there has been a growth in the number of specialized administrative agencies that, with their local labor bureau counterparts, administer and supervise specific labor law programs. One of the constant criticisms of China’s labor laws is the lack of consistent enforcement by the government. However, labor disputes in China are resolved mostly by individual workers through local governmental mediation

¹ See Randall Peerenboom, China’s Long March toward Rule of Law (2002).
and arbitration. The number of these cases has risen dramatically every year as new laws are passed and an increased awareness of labor rights takes hold in the workforce. In the heavy manufacturing area of Guangzhou in 2008 there was a more than 200 percent increase in the number of labor disputes after the new Labor Contract Law took effect. Courts are available to enforce or review many of these labor arbitrations. Recently, the courts have been authorized to directly determine certain wage claims without the prior requirement of undergoing the labor arbitration process.

2. Disparate Economic Impacts in the Workplace

China’s economic development began in earnest after Deng Xiaoping began his “Four Modernizations” in 1979. Since that time many economic and legal reforms have taken place. This economic development has been uneven, causing regional and urban/rural disparities that, in turn, have brought about an influx of millions of rural workers into the cities for better work opportunities, though not necessarily better treatment or working conditions. Many of the significant labor and employment laws are applied only in the urban areas, with some additional laws applying to certain aspects of employment in the rural areas.

With the transition from the “iron rice bowl system” to labor contracts, China has moved from a socialist planned economy using SOEs to a socialist market economy. Privatization, layoffs, and new management strategies emphasizing profits and competition have produced both a “wage consciousness” and feelings of unfairness among workers because of regional wage disparities, occupational wage gaps, unequal job opportunities, and sagging labor and security safety nets.

Economic growth has produced a 100 to 150 million person “floating population” (predominantly underpaid migrant workers) seeking to earn their share of the pie. It also has produced national scandals in which employers refuse to pay the wages of migrant workers, presently an underclass in China. Coal miners are dying by the thousands each year because of unsafe working conditions. Consequently, the issue of better enforcement of the labor protections provided in the labor laws is part of the labor reform agenda.

China is at a crossroads. On the one hand, it has the necessary resources to make its labor law system work much better than it does. On the other

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2 Labor arbitration cases soaring, english.people.com.cn/90001/6551417.html.
3 For a discussion of workers in SOEs, see William Hurst, The Chinese Worker After Socialism (2009).
hand, labor relations have seemed to come second to the forces of economic development, and China seems unsure whether, if it makes the choice to better enforce its labor laws, it will be placed at a competitive disadvantage internationally. Employers who might otherwise follow the labor laws are in a quandary; why spend the money to follow these laws if they are not enforced?  

To understand the nuances of current employment relations in China, one must put them into the context of China’s fast-moving economic transition. When the scope of economic transition broadened from policies establishing special economic development zones into policies transforming all of China’s economy from a socialist planned economy to a socialist market economy, social and economic changes were both expected and indeed occurred. With a market economy came competition, the need for more flexible management, and the quest for profits – which required cutting costs. For China’s labor-intensive industrial economy, this usually meant keeping labor costs low. Privatization and competitive measures brought layoffs (especially in the already overstaffed SOEs) and kept wages and benefits to bare minimums. With individual control waning, conditions fostered efforts to achieve workers’ economic improvement through collective negotiations. 

Wage concerns of workers came to have increasing importance as widening gaps occurred in the annual growth of real wages versus GNP, with great numbers of workers feeling left out. China’s impressive economic growth in GNP for more than two decades was not matched by the real wage growth of workers, which has roughly kept pace with rates of inflation. The lawful minimum wage in China varies by locales according to local economic factors, reflecting the national mandate under China’s Regulations on Minimum Wage. According to those regulations, China seeks to accommodate an international labor standard that sets local minimum wages within the range of

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4 Simon Clark, Chang-Hee Lee and Qi Li, Collective Consultation and Industrial Relations in China, British Journal of Industrial Relations, June 2004, at 248.

5 The comparison of ILO official statistics (ILO LABORSTA database) to the rate of inflation shows that there was at least a relative wage decline among Chinese manufacturing workers. See Anita Chan, A Race to the Bottom, 46 CHINA PERSPECTIVES 41, 42 (2003). According to the ILO LABORSTA database, in 1993 the average wage at all economic enterprises was about 281 yuan/month and in 2006 it was 1750 yuan/month. Not surprisingly, the lowest average in 2006, 786 yuan/month, was in the agricultural services area, whereas the highest was in the financial sector (3273 yuan/month). In manufacturing, the average was 1997 yuan/month. See ILO LABORSTA, Table 5A Wages, by Economic Activity, available at http://laborsta.ilo.org/ (last visited Aug. 2, 2008).

40 percent to 60 percent of the average wage standard in the locality.\(^7\) One source states that in 1993 China’s average minimum wages met or exceeded the 40 percent minimum, but by the late 1990s there had been a steady and consistent erosion below that minimum.\(^8\) (The old interim measure to regulate FIE wages was abolished in 2004.)

Some Chinese citizens were able to realize Deng Xiaoping’s famous slogan, “to get rich is glorious,” much faster than others, and with economic reforms came great wage diversity between regions, between urban and rural areas, and between management and labor. In 2007, average income ranged from 3,432 yuan per month in Shanghai to 1,601 yuan per month in Chonqing.\(^9\) Minimum wage variations between local governments ranged from 850 yuan per month in Nanjing to 730 yuan per month in Beijing.\(^10\)

Observations by former World Bank President James Wolfensohn about China’s wage gaps have raised alarms; he stated that their likely consequence is social unrest.\(^11\) According to the World Bank, China in the past twenty years has achieved great progress in reducing the number of people in poverty (insufficient food and clothing) from 200 million people to 29 million, but

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\(^7\) Reg. Minim. Wage, Attachment Section 2. Calculations Methods of Minimum Wage Standard. The 40%–60% range is the international standard used when calculating the minimum wage.


\(^9\) 2007 *China Statistical Yearbook*, Table 5-23.


Wolfensohn pointed out that China still has 400 million people living on less than US$2/day. Incomes are rising, but the rate of increase in the urban areas is two times that in rural areas. President Wolfensohn estimated that the wage gap in ten years would be one of the highest in the world, and he noted that in 2003 ten million citizens engaged in protests, not only regarding labor issues (such as layoffs and wages) but also regarding rising rural taxes and forced relocation in urban areas.\textsuperscript{12}

Another wage gap exists between workers and managers. A recent survey by the State Council found that 61 percent of managers of Chinese enterprises were paid salaries that were three to fifteen times higher than those of employees, whereas 21 percent were paid salaries that were fifteen to fifty times higher and 15 percent of the managers at FIEs were paid wages that were fifty times more.\textsuperscript{13}

A large number of low-wage workers are not even paid. A December 2003 government survey in China found that 72 percent of China’s millions of migrant workers were owed back pay. The Construction Ministry estimated that workers in 2003 were owed more than $12 billion in wages by their employers even though the law requires that wages be paid at least monthly; the unpaid debts to migrants were estimated to be one-third of the value of production in construction and real estate industries.\textsuperscript{14} Those involved say most of the workers do not have formal labor contracts, as the law requires. The Beijing municipal government in the first six months of 2004 helped 110,000 migrant workers recover 290 million yuan (US$35 million) of unpaid wages, resulting in the first decline in labor disputes in Beijing since 2000.\textsuperscript{15}


\textsuperscript{14} Anthony Kuhn, A High Price to Pay for a Job, FAR E. ECON. REV., Jan. 22, 2004, at 30-32.

When adding up some of the negative side effects of economic reforms – slow-rising wages, widening wage gaps, and unpaid wages of migrant workers (who make up the “floating population” of 150 million Chinese citizens) – with each affected employee seeking to find his or her share of the new economic growth, one can understand why a top priority of the central government is to put a social security safety net in place with accompanying labor law protections. This effort brought into existence the 1994 Labor Law, which broadly outlined labor standards requirements. By 2004, many of the standards had been more formally enacted into specific laws and regulations, including those for minimum wage and hours. Notwithstanding the progress in legislation, employees have continued to demand that the laws be made to work, and some collective protests have demanded improved benefits.

Beginning in late 2008, after passage of the new labor laws and the onset of the global economic downturn, two effects were felt. First, some employers felt the burdens of the new laws, especially the new Labor Contract Law, impacted too heavily, causing some closures; second, the impact of the global downturn, with its declining demand for exports, caused layoffs and bankruptcies. Some employers evaded the requirements of the new labor reforms, which in turn caused many more labor arbitrations (now easier with new Labor Mediation and Arbitration Law) and even more worker protests.16

Meanwhile, declining global demand for China’s textile and apparel products affects the employers of the 20 million workers in that industry, which in 2008 accounted for more than one-half of its $300 billion trade surplus17; wage


defaults by employers continue; and some reported that 23 million migrant laborers are unemployed.

These impacts have also brought about some local legislative modifications, some of which lower the standards set by the recent labor law reforms. Today, employers in China face choices: comply with the labor and employment laws, go bankrupt, or seek to evade the laws. All these factors make understanding

For example, in response to the economic downturn, the central government recently issued a series of employment-related policies: 1. The Notice as to Lighten Enterprises' Burden and Stabilize the Employment Situation (MOHRSS, Ministry of Finance, and the State Administration of Taxation (December 20, 2008) [postpone payment of social security fees for 6 months, lower rates for employees' medical, work-related injury, and child-birth insurance for a period of 12 months; use unemployment insurance funds to pay a social insurance subsidy if they minimize the number of layoffs]; 2. The Opinion on stabilizing Labor Relationship under Current Economic Situation (MOHRSS, ACFTU, and the China Enterprise Association (January 23, 2009) [promotes coordination of layoffs, cost-cutting measures, and use of collective consultation mechanisms]; 3. The Guidance to Improve Employment under Current Economic Situation State Council (February 3, 2009) [promotes creation of more employment opportunities, sets preferential policies of hiring unemployed workers new college graduates, and migrant workers, directs employers in layoffs of more than 20 employees or 10 percent of the workforce to seek consultation with the union 30 days in advance and then report the layoff plans to the labor bureau]; 4. The Circular about Extending Tax Incentives for Re-Employment of Laid-Off Workers (Ministry of Finance and State Administration of Taxation) [allows employers of qualifying employees, hired for additional positions, labor contracts longer than one year to receive tax preferences]. It was reported in Shenzhen in the last three months of 2008, there were 48 companies that closed without paying workers’ wages; and overall in 2008, some 370 companies in Shenzhen defaulted on wage payments of 30 million yuan to 39,200 workers. Shenzhen has set up an employer-contributed fund to deal with wage defaults. Kelly Chan, Wage defaults for fourth quarter hit 30 million yuan in Shenzhen, South China Morning Post, February 24, 2009, http://www.scmp.com/portal/site/SCMP/menuitem. 2af02ecb320d3d7733492d9253a0a0a0?vgnextoid=d1eadf5354af10VgnVCM100000360a0a0a RCRD.


Modifications at the local levels include, for example, Shandong and Hubei provinces are reported to mandate government approval for layoffs of more than 40 workers (though the new Labor Contract Law (LCL) requires layoffs in excess of 20 only to be reported to the government; Guangdong has delayed implementation of the LCL’s Implementing Regulations; and, Beijing has allowed employers to lower their contributions to worker social security programs and frozen minimum wage increases. Legal Briefs, China Law & Practice, December 2008/January 2009, at 3.

According to one source, the Dagongzhe Migrant Workers Rights Center in Shenzhen, “pervasive tricks” used by employers to circumvent the new laws include “reduced overtime pay and using doctored contracts that were either blank, incomplete or written in English to confuse and limit possible legal liabilities.” It reported that in a survey of 320 workers by
and successfully navigating China’s new labor and employment laws even more necessary than before.

In sum, China’s labor laws that regulate its diverse workplaces form a mosaic composed of many variables. Insight into these variables helps explain how and how well the labor laws work, and these insights then allow a clearer understanding of the substantive aspects of labor laws. It is with the intention to provide those insights that this book is written.

Dagongzhe, nearly a quarter said factory bosses had hiked both food prices and penalties for minor mistakes on production lines. About 26 percent of workers never signed any contracts, especially in smaller factories, whereas 28 percent said they were paid less than the legal minimum wage. Chinese labor laws buckle as economy darkens, Reuters, January 29, 2009, www.reuters.com/article/lifestyleMolt/idUSTRE58R0D820090128.
At the central government level under the State Council, the Ministry of Human Resources and Social Security (MOHRSS) administers labor and employment policies. In March 2008, this ministry took over the functions of the Ministry of Labor and Social Security (MOLSS) (see Table 2.1) and the Ministry of Personnel (MOP). It maintains vertical supervision at the local level through local labor bureaus, which are at the same time also greatly controlled by local governments through their funding and appointments power.

The MOHRSS is one of China’s newly designated “super ministries.” Since 1998 its predecessor, MOLSS, has been responsible for social security management and development of policies and legislation for urban, rural, and government workers. Before its 2008 reorganization, it was organized into the following departments: legal affairs, planning and finance, training and employment, labor and wages, pension insurance, unemployment insurance, medical insurance, work-related injury insurance, rural social insurance, social insurance fund supervision, international cooperation, and personnel and education. With the reorganization in 2008, it assumed the functions of the former MOP, with the exception of its civil service department, which is now part of the State Public Servants Bureau.

The reorganized ministry has twenty-three departments, including several new ones (see Table 2.2).¹

TABLE 2.1. Administration of labor and employment policies

<table>
<thead>
<tr>
<th>部</th>
<th>劳动和社会保障部</th>
</tr>
</thead>
<tbody>
<tr>
<td>中文</td>
<td>Ministry of Labor and Social Security</td>
</tr>
<tr>
<td>省级劳动保障机构 (31个)</td>
<td>Labor and Social Security Bureaus in Provinces, Autonomous Regions, and Municipalities Directly under the Central Government</td>
</tr>
<tr>
<td>市级劳动保障机构 (333个)</td>
<td>Prefectural (municipal) Labor and Social Security Bureaus</td>
</tr>
<tr>
<td>县级劳动保障机构 (2862个)</td>
<td>County Labor Bureaus</td>
</tr>
<tr>
<td>乡镇、街道劳动保障机构 (约16000个)</td>
<td>Labor and Social Security Offices in Towns, Neighborhoods</td>
</tr>
<tr>
<td>社区劳动保障平台 (约100000个)</td>
<td>Community Labor Service Centers</td>
</tr>
</tbody>
</table>


1. Responsibilities and Functions of the MOHRSS

The MOHRSS, through its departments and subordinate institutions (unchanged from MOLSS, see Table 2.3), is responsible for formulating and implementing policies in the following areas. It drafts laws and regulations that promote employment and labor market development and exercises supervision and inspection functions over programs and local labor agencies. In vocational training, it drafts national standards for occupational classifications and skills, training, and certification. In labor relations, it formulates the principles for labor relations adjustment, enforcement of regulations and labor contracts, dispute settlement, and labor arbitration, and it works out policies on labor standards and protections. In wage regulation, it drafts macro-level policies and measures concerning wage guidelines and regulatory policies. The ministry formulates policies and standards on social insurance and manages the funding, implementation, supervision, and inspection of government programs on old age, unemployment, medical, work-related injury, and maternity benefits. The MOHRSS also is in charge of compiling and disseminating statistical information concerning national labor and social insurance and forecasting trends. It organizes and engages in scientific research in the fields of labor and social insurance. Lastly, it is responsible for international exchanges and cooperation, including participation in international organizations such as the International Labor Organization (ILO) and technical projects.
<table>
<thead>
<tr>
<th>Department</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Office</td>
<td></td>
</tr>
<tr>
<td>部办公厅</td>
<td></td>
</tr>
<tr>
<td>Department of Policy &amp; Research*</td>
<td></td>
</tr>
<tr>
<td>政策研究司</td>
<td></td>
</tr>
<tr>
<td>Department of Legal Affairs</td>
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<tr>
<td>法规司</td>
<td></td>
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<tr>
<td>Department of Planning and Finance</td>
<td></td>
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<tr>
<td>规划财务司</td>
<td></td>
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<tr>
<td>Department of Employment Promotion*</td>
<td></td>
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<tr>
<td>就业促进司</td>
<td></td>
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<tr>
<td>Department of Human Resource Market</td>
<td></td>
</tr>
<tr>
<td>人力资源市场司</td>
<td></td>
</tr>
<tr>
<td>Department of Job Placement for Demobilized Military Officers</td>
<td></td>
</tr>
<tr>
<td>军官转业安置司</td>
<td></td>
</tr>
<tr>
<td>Department of Professional Capacity-Building*</td>
<td></td>
</tr>
<tr>
<td>职业能力建设司</td>
<td></td>
</tr>
<tr>
<td>Department of Professional and Technical Personnel Management</td>
<td></td>
</tr>
<tr>
<td>专业技术人员管理司</td>
<td></td>
</tr>
<tr>
<td>Department of Personnel Management for Institutions</td>
<td></td>
</tr>
<tr>
<td>事业单位人事管理司</td>
<td></td>
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<tr>
<td>Department of Service for Migrant Workers*</td>
<td></td>
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<tr>
<td>农民工工作司</td>
<td></td>
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<tr>
<td>Department of Labor Relations*</td>
<td></td>
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<tr>
<td>劳动关系司</td>
<td></td>
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<tr>
<td>Department of Wage and Benefits*</td>
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<tr>
<td>工资福利司</td>
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<tr>
<td>Department of Pension Insurance</td>
<td></td>
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<tr>
<td>养老保险司</td>
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<tr>
<td>Department of Unemployment Insurance</td>
<td></td>
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<tr>
<td>失业保险司</td>
<td></td>
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<tr>
<td>Department of Medical Insurance</td>
<td></td>
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<tr>
<td>医疗保险司</td>
<td></td>
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<tr>
<td>Department of Work-Related Injury Insurance</td>
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<tr>
<td>工伤保险司</td>
<td></td>
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<tr>
<td>Department of Rural Social Insurance</td>
<td></td>
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<tr>
<td>农村社会保险司</td>
<td></td>
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<tr>
<td>Department of Social Insurance Fund Supervision</td>
<td></td>
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<tr>
<td>社会保险基金监督司</td>
<td></td>
</tr>
<tr>
<td>Department of Labor Dispute Mediation and Arbitration Management*</td>
<td></td>
</tr>
<tr>
<td>调节仲裁管理司</td>
<td></td>
</tr>
<tr>
<td>Department of Labor Inspection*</td>
<td></td>
</tr>
<tr>
<td>劳动监察司</td>
<td></td>
</tr>
<tr>
<td>Department of International Cooperation</td>
<td></td>
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<tr>
<td>国际合作司</td>
<td></td>
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<tr>
<td>Department of Personnel</td>
<td></td>
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<tr>
<td>人事司</td>
<td></td>
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<tr>
<td>Department of Medical Insurance</td>
<td></td>
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<tr>
<td>农村社会保险司</td>
<td></td>
</tr>
<tr>
<td>Department of Social Insurance Fund Supervision</td>
<td></td>
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<tr>
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<td>Department of Labor Dispute Mediation and Arbitration Management*</td>
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<tr>
<td>调节仲裁管理司</td>
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<tr>
<td>Department of Labor Inspection*</td>
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<tr>
<td>劳动监察司</td>
<td></td>
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<tr>
<td>Department of International Cooperation</td>
<td></td>
</tr>
<tr>
<td>国际合作司</td>
<td></td>
</tr>
<tr>
<td>Department of Personnel</td>
<td></td>
</tr>
<tr>
<td>人事司</td>
<td></td>
</tr>
</tbody>
</table>

* New or reorganized departments.
**2. Administration of Labor and Employment Laws**

The primary labor law is the 1994 Labor Law, with many more recent labor and employment laws deriving from it. These laws cover hiring, working conditions and benefits (including social security, medical, work-related injuries, unemployment, and maternity insurance), discipline and termination, and even post-termination restrictive covenants. Often several agencies are involved in implementing these laws; for example, laws relating to occupational health labor and employment issues.\(^2\) Laws passed in 2007 and implemented in 2008

\(^2\) The Ministry of Health (MOH) is in charge of drafting occupational health statutes and regulations; setting up occupational health criteria; standardizing the prevention, health care, and oversight of the medical treatment of occupational diseases; and overseeing qualification certification for occupational health service agencies, occupational health assessment, and poisonous chemical assessments. The State Administration of Work Safety (SAWS), as a nonministry agency directly under the State Council, is in charge of the overall supervision and regulation of work safety, issuing occupational health and safety permits and investigating work accidents and relevant violations of work safety rules. See http://www.moh.gov.cn/publicfiles/business/htmlfiles/zwgkzt/pjggk/200804/621.htm (in Chinese). The MOHRSS is in charge of policy
include the Labor Contract Law (LCL), the Employment Promotion Law (EPL), and the Law on Labor Mediation and Arbitration (LMA).

3. Goals and Expectations

With China’s workforce expected to reach 840 million by 2010 based on an annual projected 50 million new entrants, the MOHRSS plans to further strengthen its promotion and regulation of employment. As stated in its eleventh Five-Year Plan (2006–2010), its priorities include expanding and improving jobs, improving social security, creating a more effective inspection and law enforcement network, stabilizing labor relations, and improving legal education for employers and workers.

Those goals and expectations are built on its discernible progress made under the tenth Five-Year Plan (2001–2005). Employment increased in urban and rural areas by more than 40 million workers (including 21 million workers in small businesses). Nearly 15 million workers were helped to find new jobs after being unemployed (the urban rate of unemployment was 4.2 percent at the end of 2005, with some 9 million people registered as unemployed). Vocational training produced 500,000 new skilled technicians. Social security funding and coverage were expanded. By the end of 2005, 175,000,000 people were covered for old-age insurance (an increase of 39 million from 2000), and 1,587.6 billion yuan were paid out to pensioners from 2000 to 2005 (an increase of 803 billion yuan since 2000). Multiple financing sources were set up, with contributions from the employers and workers and subsidies from the government. The government also promoted enterprise annuity schemes, which some 24,000 enterprises established, covering 9 million workers.

By the end of 2005, the financing and coverage of other government insurance schemes had expanded as well: unemployment (33.3 billion yuan; covering 107 million workers with 6.8 million receiving benefits), health insurance (138 billion yuan; covering 138 million workers), maternity insurance (4.4 billion yuan; covering 54 million female workers with 620,000 receiving benefits), work injury insurance (9.3 billion yuan; covering 84.8 million with 650,000 receiving benefits), and social insurance in rural areas


3 MOLSS, LABOR AND SOCIAL SECURITY IN CHINA, 2 (2007).
4 Id. at 3.
5 Id.
6 Id. at 6.
7 Id.
(2.1 billion yuan; covering 54.4 million farmers with 3 million participating farmers receiving pensions.8

Social security coverage continues to expand in urban areas. In the first half of 2008, the following increases were reported: urban pension coverage increased from 201.37 to 210.29 million people, with payouts up 33.9 percent to $54.52 billion; health insurance, from 223.11 million to 249.07 million people; unemployment insurance, from 116.45 to 120.1 million people; work injury insurance, from 8.52 million to 130.25 million workers; and maternity insurance, rose 6.77 million to 84.52 million workers.9 The social security funds likewise continue to grow; by mid-2008, compared with same time the year before, the pension fund was up 30.5 percent to 440 billion yuan; basic medical insurance increased 34.2 percent to 129.6 billion yuan; the unemployment insurance fund increased 26 percent to 25.8 billion yuan; work security insurance rose 35.3 percent to 9.7 billion yuan; and the maternity insurance fund “soared” 44.4 percent to 5.1 billion yuan.10

In protecting the rights and interests of the labor force, the government reported that it had devoted increased efforts to labor enforcement and inspection. Between 2000 and 2005, several important laws and regulations on the coverage of occupational diseases, worker safety, and trade unions were passed and issued. These laws targeted the issue of delayed wage payments to migrant workers and promoted collective negotiations for collective contracts (more than 604,000 collective contracts covering 90 million workers by the end of 2005).11 An increased focus on mediation and labor dispute arbitration produced an ever-increasing use of this process, culminating in 2008 with a new Labor Mediation and Arbitration Law, which has further fostered arbitration. More than 3,200 labor and social security inspection agencies in China in all levels of government, employing more than 50,000 inspectors, have corrected labor abuses and employer failures to pay contributions to social security.12

The MOHRSS reportedly has announced a new three-year agenda focusing on drafting a new law on social insurance; regulations on enterprise wages and employment contracts; issuing new rules on labor arbitration commissions’ handling of cases and on implementing the Regulations on Paid Annual

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8 Id. at 7–8.
10 Id.
11 Id. at 10.
12 Id.
Leave for Employees; and considering revisions of regulations on work-related insurance, unemployment insurance, and the labor protection of female staff and workers.13

Employment Relationships

1. Introduction

a. Workforce Profile

Labor force demographics show dramatic distinctions among workers in China based on many factors, including location (urban/rural and region), occupation and skills, and employers (domestic/foreign/SOEs; see Table 3.1).

b. Employment Relationships

In China, defining “employer” and “employee” and their employment relationship for the purposes of delineating legal rights and duties has become more important in recent years. The 1994 Labor Law sought inclusive language for “employees/workers,” but workplace realities produced many categories, including “dispatch” workers; independent contractors; managers and supervisors; and migrant, temporary, part-time, and de facto workers. An issue facing China’s drafters of new labor laws was how each subsequent labor law would be applied (or not applied) to these categories. Likewise, employer designations under the labor laws produced some uncertainties, as they too came in a variety of forms.

Defining the employment relationship for purposes of coverage under China’s legal system often requires a two-step examination of the national and local laws to determine the proper “operating law” at the level of application. This is due to China’s decentralized system, in which the central government passes broad, general legislation and leaves to the local governments the

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1 There is some discussion of workforce profile by age and gender in Qinwen Xu and Farooq Pasha, People’s Republic of China, Statistical Profile No. 5 (November, 2008), agingandwork.bc.edu/documents/CP05_Workforce_China_2008-11-13.pdf.
Table 3.1. Employment profile, 2007

<table>
<thead>
<tr>
<th>Category</th>
<th>Number (in thousands)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economically active population</td>
<td>786,450</td>
</tr>
<tr>
<td>Total number of employed persons</td>
<td>769,900</td>
</tr>
<tr>
<td>Primary industry</td>
<td>314,440 (40.8%)</td>
</tr>
<tr>
<td>Secondary industry</td>
<td>206,290 (26.8%)</td>
</tr>
<tr>
<td>Tertiary industry</td>
<td>249,170 (32.4%)</td>
</tr>
<tr>
<td>Urban employed persons</td>
<td>293,500</td>
</tr>
<tr>
<td>State-owned units</td>
<td>64,240</td>
</tr>
<tr>
<td>Urban collective-owned units</td>
<td>7,180</td>
</tr>
<tr>
<td>Cooperative units</td>
<td>1,700</td>
</tr>
<tr>
<td>Joint ownership units</td>
<td>430</td>
</tr>
<tr>
<td>Limited liability corporations</td>
<td>20,750</td>
</tr>
<tr>
<td>Shareholding corporations</td>
<td>7,880</td>
</tr>
<tr>
<td>Private enterprises</td>
<td>45,810</td>
</tr>
<tr>
<td>Units with funds from Hong Kong, Macao, and Taiwan</td>
<td>6,800</td>
</tr>
<tr>
<td>Foreign funded units</td>
<td>9,030</td>
</tr>
<tr>
<td>Self-employed individuals</td>
<td>33,100</td>
</tr>
<tr>
<td>Rural employed persons</td>
<td>476,400</td>
</tr>
<tr>
<td>Township and village enterprises</td>
<td>150,900</td>
</tr>
<tr>
<td>Private enterprises</td>
<td>26,720</td>
</tr>
<tr>
<td>Self-employed individuals</td>
<td>21,870</td>
</tr>
<tr>
<td>Number of staff and workers</td>
<td>114,270</td>
</tr>
<tr>
<td>State-owned units</td>
<td>61,480</td>
</tr>
<tr>
<td>Urban collective-owned units</td>
<td>6,840</td>
</tr>
<tr>
<td>Units of other types of ownership</td>
<td>45,950</td>
</tr>
<tr>
<td>Number of registered unemployed persons in urban areas</td>
<td>8,300</td>
</tr>
<tr>
<td>Registered unemployment rate in urban areas</td>
<td>4.0%</td>
</tr>
</tbody>
</table>


Responsibility of promulgating “detailed implementing regulations” to apply the national laws. Coverage by the labor laws may also be determined on a geographical basis rather than by the employment relationship. That is, the distinction between urban and rural may be determinative. Additionally, until recent legislative clarification, the large number of migrant workers raised interesting questions of coverage.

China’s continuing economic and social transition has transformed state workers, staff, and cadres of the “iron rice bowl era” to modern-day employees under individual and collective labor contracts. These employment relationships are regulated by new labor laws and regulations largely originating from the 1994 Labor Law.

Article 2 of the Labor Law specifies that the law is applied to laborers who form a “labor/employment relationship” or have a “labor contract.” Many
interpretations over the years have attempted to clarify this language. The latest attempt came in 2008 with the Labor Contract Law, which confirmed the relationship and again required a written contract.  

Yet, even without a written contract, a de facto employment relationship can arise. In addition to illegal employment relationships, the usual (though not the only) situation giving rise to a de facto employment relationship occurs when a previous labor contract expires, the employee continues to work, and the employer does not object. In 1996, early guidance on the application of the 1994 Labor Law provided that within the territory of the People’s Republic of China (PRC), as long as the employment relationship (including de facto) exists, the Labor Law applies. The key elements are that the worker (1) provides physical or mental labor for compensation and (2) becomes a member of the enterprise or entity.  

Even without a contract, a worker is a de facto employee if he or she is a member and is paid for labor.  

This de facto employment relationship also provides the right to access arbitration, litigation, and worker’s compensation.

2. The Employer

Under the 1994 Labor Law, the “employing unit” is called by a variety of terms, such as enterprises; individual economic organizations, and state organs, institutions, and public organizations. The Chinese terms for “employer” also require explanation.

“Enterprise” (qi-ye), although not precisely defined, has acquired a common meaning to include employing units that are engaged in production, distribution, and servicing and are under all kinds of ownership, such as

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2 Lao dong he tong fa [Labor Contract Law] (promulgated by the 28th Standing Comm. of the Tenth Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008), art. 10, 11, (PRC) [hereinafter LCL]. Implementing regulations were issued by the State Council on September 18, 2008.

3 Id. art. 11, 82.


6 Id. art. 1.

factories, farms, corporations, etc. That is, it refers to any profit-making undertaking in any kind of organizational form.\textsuperscript{8}

The term “individual economic organization” is defined as an individual industrial and commercial business that employs fewer than seven employees but has undergone the industrial and commercial registration process.\textsuperscript{9}

Because the private economy was not the norm until the late 1990s, this term as used in early laws seemed to have a connotation of business activities in the private economy.

The term “state organs” refers to governments and government agencies at all levels. “Institutions” refers to nonprofit organizations that are normally initiated and financed by the government, such as schools and hospitals. However, as China has made the transition to a socialist market economy, government finances and controls are changing, with some institutions still reflecting the traditional model, whereas others are becoming enterprises and may be referred to as “private institutions.” Moreover, private institutions, such as schools and hospitals, because they are not typical enterprises, are called “private nonenterprise units” or “nonenterprise private units.”

The term “public organizations” covers nonprofit societies acting on behalf of certain groups of people, usually organized and financed by the government. For example, the All China Federation of Trade Unions (ACFTU) and the All China Women’s Federation (ACWF) are typical public organizations.

More recent legislation uses a variety of these terms in defining what is an employer:

- **Minimum Wage (2004):** “enterprises, nonenterprise private units”; “individual and industrial commercial households with employees”; and “state organs, public undertaking units and social organizations”\textsuperscript{10}
- **Work-Related Injuries (2004):** “enterprises and individual industrial and commercial households hiring employees”\textsuperscript{11}
- **Work Safety (2002):** “units that engage in production and operation”\textsuperscript{12}

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\textsuperscript{9} 1995 Labor Law Implementing Opinion, art. 1.


\textsuperscript{11} Gong shang bao xian tiao li [Regulation on Work-Related Injury Insurance] (promulgated by State Council, April 27, 2003, effective Jan. 1, 2004), art. 2.

• Unemployment Insurance (1999): “urban enterprises,” including SOEs, collectively owned FIEs, privately owned within urban area, and other enterprises within urban areas

• Collective Contract (2004): “enterprises,” “public institutions,” and “state organs”

• Labor Contract Law (2007): “enterprises,” “individual economic organizations,” “private nonenterprise entities,” or “other organizations”

Therefore, although there has been an attempt to use broad, inclusive definitions of the term “employer,” still each labor law must be examined to determine whether coverage exists for traditional and newly emerging economic, nonprofit, and other employment relations. During China’s transition to a market economy, questions continue to arise involving new applications. For example, unregistered enterprises; branch or representative offices; enterprises formed after mergers, acquisitions, or bankruptcy; and enterprises using dispatch workers all require legal answers to coverage issues.

Illegal employers – because of the failure to meet required registration or obtain a license or those who have been deregistered or have lost their license – typically remain an employer under labor laws. For example, an employee disabled at work is still entitled to compensation from the illegal employer under the Work-Related Injury Insurance program.

Other practical variations test the employer designation and the question of which employer is the responsible employer in the employment relationship. In China, these issues are raised by the usual processes of enterprise restructuring, including mergers, successors, and failed enterprises, as well as by use of dispatch employees. For example, for employers of merged enterprises, the law holds the surviving entity liable for existing labor contracts, and new modifications or replacements of these contracts will be treated as amendments to existing labor contracts, thus not triggering the severance provisions.

13 Shi ye bao xian tiao li [Regulations on Unemployment Insurance] (promulgated by State Council, Jan. 20, 1999), art. 2.

14 Ji ti he tong gui ding [Regulations on Collective Contract] (promulgated by Ministry of Labor and Social Security, May 1, 2004), art. 3. Some definitions of “state organ, institution, and public organizations” are discussed in an analysis of the LCL at http://www.laodonghetong.org/540a.html.

15 LCL, art. 2.

16 Fei fa yong gong dan wei shang wang ren yuan yi ci xing pei chang ban fa [Measures for Compensation in A Lump Sum to the Disabled or Deceased Employees of An Illegal Employing Unit] (promulgated by MOLSS, Sep. 18, 2003, effective Jan. 1, 2004).

17 LCL, art. 34, but see discussion infra on LCL, art. 41 re: impacts on labor contracts justifying reduction of workforce.
under the LCL. This differs from an asset transfer in which severance pay would be required.

Employers’ use of dispatch or temporary workers sent from a placement agency, sometimes referred to as “in-sourcing,” raises the issue of who is the employer. In the United States, some employers use contracted employees to exclude themselves from liabilities under the labor laws while substituting the supplying entity as the statutory “employer,” which is liable under the labor laws because the employees are still on its payroll. Thus, the employer, using the contracted employees, may not be responsible as the “employer” under the labor laws because the workers were not its “employees.” However, in the United States, often the employing unit that controls the worker is found to be responsible through the “joint liability” doctrine.

In China, the 2008 LCL addressed this issue by in effect making the supplier of the contracted employees (dispatch workers) the employer and limiting the liability of the entity using the supplied employees, although this can be modified contractually. Under the law, the supplier-employer must hire its dispatch workers for regular full-time employment for at least two years, with wages no lower than the minimum wage level and at the same level as those of the other employees. The entity using the dispatched workers may not use these workers to displace its regular workforce and is limited to using dispatched workers for temporary positions. It likewise must make contractual arrangements with the supplying employer regarding labor law obligations.

Employers acting as “representative offices” of foreign companies raise an emerging issue. Although FIEs can hire employees and are clearly subject to China’s labor laws, presently a foreign representative office is not by itself allowed to hire PRC citizens as employees because it is not permitted to be registered as a foreign-invested employer engaged in direct business activities.

18 1995 Labor Law Implementing Opinion, art. 13, 37. Under article 34 and article 35 of the LCL, the modification or replacement of the labor contracts must be based on mutual agreement between employers and employees.
21 LCL, art. 58, 92.
22 LCL, art. 58, 63.
23 LCL, art. 66 (“The worker dispatch services shall normally be used for temporary, auxiliary, or substituting positions”).
24 LCL, art. 59.
Foreign representative offices must hire employees through a local labor service agency under labor service contracts; however, even so, the 2008 LCL appears to cover this arrangement and obligates the employer to follow its relevant provisions on using staffing firms. Foreign employees, complying with formal requirements, may also be employed in China by Chinese employers and FIEs (including representative offices). WTO conditions call for the legalization of “branch offices” of foreign companies, but as of yet they are not allowed and issues still remain.

3. The Employee

Employees/workers were not explicitly defined in the 1994 Labor Law. “Employees” were subsequently referenced in the 2001 amendments to the Trade Union Law as “individuals who perform physical or mental work in enterprises, institutions and government authorities within the Chinese territory and who earn their living primarily from wages or salaries.” Under China’s transition to a market economy, iron rice bowl terms, such as worker, staff, and cadre, seem to have given way to the newer terms of employee and even to such designations as blue collar, white collar, and “golden” collar (young professionals in high demand).

Under the 1994 Labor Law, “employment relationship” is intended as an inclusive term in covering employees/workers. The 2003 Work-Related Injury Insurance Regulation defines it as “laborers who keep a labor relation with the...
employing entity in all forms of employment and within all forms of employment period.”

Documented foreign employees legally working in China generally are covered under the Labor Law.

Whether “contingent” workers are employees covered by the labor laws was resolved in 1996 by the then-Ministry of Labor. It formally abolished any legal distinction between contingent or temporary workers and formal employees; and they are to enjoy the same rights, unless provided otherwise.

Under most labor service contracts (laowu hetong), independent contractors lack a legal “employment relationship” with the “employer” in question. Typically, therefore, the daily performance by these workers is not under the direct control of the employer and there is no right of control. This distinction is significant in that many employer duties under the labor laws apply only to employees rather than to independent contractors, whose breaches are dealt with under the Contract Law, not the LCL and LMA. These workers may have labor protections with their employing entity that has contracted to provide the services.

Part-time workers, as defined in the 2008 LCL, are limited to work an average of not more than four hours per day or twenty-four hours per week for the same employer. They must be paid at least the local minimum wage, are terminable at will, and have no rights to a written contract or severance pay. These regulations replace the earlier MOLSS interpretations that had defined part-time as working no more than thirty hours per week, five hours per day, and had provided more employee rights.

Migrant workers, under new laws and regulations, have the right to labor contracts, to participate in worker’s compensation, and to have medical insurance. The 2008 Employment Promotion Law (EPL) clearly states, “[R]ural workers who go to cities in search of employment shall enjoy labor rights equal to those of urban workers. It is prohibited to set discriminatory

29 Regulation on Work-Related Injury Insurance, art. 61.
30 2001 Prov. on Adm. of Est. of Sino-foreign Job Intermediary Inst., art. 6; see 1996 Reg. for the Administration of the Employment of Foreigners.
32 Zhonghua Renmin Gongheguo he tong fa [PRC Contract Law] (promulgated by the 2nd session of the Ninth Nat’l People’s Cong., Mar. 15, 1999, effective Oct. 1, 1999). This is similar in approach to the U.S. labor laws exclusion of independent contractors.
33 LCL, art. 68.
34 LCL, art. 71.
restrictions against rural workers seeking employment in cities.”

Prior to this law, there were some limited protections for migrant workers, including prohibiting discrimination based on workers’ residence (hudou), prohibiting delays in payment of wages, and paying workplace injury insurance benefits.

Some local governments had implemented migrant worker rights through local regulations, although some had questionable restrictions (e.g., part-time migrant workers were excluded, in a possible contradiction with the MOLSS 2003 Interpretations on Part-Time Workers.

Foreign employees employed in China, with proper documentation, may work in China for Chinese employers or FIEs (including representative offices).

4. Exclusions

Exclusions from applicable legal obligations developed as the laws sought a balance between promoting economic development and labor protections. Exclusions are found explicitly and implicitly under definitions of “employer” and “employee,” as well as in specific provisions excluding and exempting employee categories, such as independent contractors (not employees), civil servants (excluded), and managers (exempted from overtime).

Examples of explicit exclusions can be found in local regulations such as in Shanghai, which expressly exclude “non-urban enterprises or rural...
enterprises.” Likewise, in 2004, Beijing excluded certain migrant and domestic workers and migrant farmers from receiving some forms of social insurance.

Implicit exclusions can arise from omissions under the labor laws. For example, the 1999 Regulations on Unemployment Insurance cover only “urban” enterprises (SOEs, collective owned, FIEs, privately owned, and other enterprises in the area), thus implicitly excluding rural enterprises. In addition, implicitly excluded (unless affirmatively included) are nonprofit social institutions, privately owned nonenterprises, and urban individual economic entities, for which local governments are authorized to expand coverage to include them, if so desired.

Subsequent interpretation of an omission may clarify coverage issues. For example, in 1995, the MOLSS interpreted the 1994 Labor Law as inapplicable to civil servants. Although excluded civil servants are covered by other regulations, non–civil-service workers employed by “state organs, institutions, and public organizations” who form labor contract relations are covered by the 1994 Labor Law and the various labor laws.

Interpretations of “outsourced” individual subcontractors or their workers may determine they are not “employees” and are therefore excluded, or they may be explicitly excluded from coverage, as for example, in the Interpretation of the Shanghai Wage Regulation that expressly excludes independent contractors. It identifies independent contractors as including those who have entered into a general service agreement, a lease agreement for equipment, or a construction service agreement.


41 Beijing Temp. Measures for Migrant Workers.

42 Unemployment Insurance Regulations, art. 2.

43 Unemployment Insurance Regulations, art. 32.

44 1995 Labor Law Implementing Opinion, art. 4. Likewise, the LCL is inapplicable to civil servants. See analyses of LCL, http://www.laodonghetong.org/540a.html.


Chinese workers who work outside China are subject to special regulations. If a foreign employer recruits Chinese workers through an intermediary agency to work overseas, the intermediary agency shall be governed by the Regulations on Overseas Employment Agency (MOLLSS, 2002). These agencies must meet licensing requirements of the government, and they have an affirmative duty to instruct employees to sign a labor contract with the employer. They must also verify that the labor contract covers hours, wages, condition protections, room and board, liquidated damages, terminations, and other important items. The actual implementation of these labor contracts is left to the parties and does not appear to be subject to China’s labor laws, as they involve Chinese citizens working outside China for a foreign employer. It appears there is no guarantor provision in the regulations.

5. Exemptions

Outside China, executive, administrative, and professional employees are often partially exempted from specific labor law obligations such as overtime pay. Employer classification of these employees determines the applicability or exemption of labor law obligations, such as overtime pay. It can also lead to illegal misclassifications in an effort to save labor costs. When the salary of these exempt workers is lower than the total costs of wages and overtime pay for nonexempt employees, employers are not limited in scheduling them to work long hours, saving employers added costs. This incentive causes many employees who are actually entitled to overtime pay, to be incorrectly classified as managers and supervisors to fit into exempt categories of employees. In 2008 in Japan, a McDonald’s store was found to have misclassified its employee as a manager even though he appeared to have much authority over many employees, causing the employer to be liable for years of overdue overtime pay. The implications of this widespread employment practice did not go unnoticed by other employers throughout Japan, and very quickly Seven-Eleven and other large enterprises changed many of their classifications to conform to the law’s application. In China, lawyers immediately began advising employers about

48 Id. art. 3.
49 Id. art. 10(2).
this Japanese case, as it also had been a common practice in China to classify employees as managers and avoid overtime pay, usually without too much concern about enforcement.51

In China, managers are not explicitly exempted in legislation from overtime obligations. However, certain categories such as “senior managers of the enterprise, field staff, sales personnel, guards and other employees” appear to be exempted from overtime payment requirements, as they fall under the “irregular working time arrangement” because “their work cannot be measured according to normal hours of work.”52 The irregular working time arrangements are available to employees as follows: (1) senior managers of the enterprise, field staff, sales personnel, guards, and other employees whose work cannot be measured according to normal hours of work; (2) transport personnel of the enterprise, taxi drivers, loaders, stevedores, warehouse workers, and other employees whose job requires great flexibility; and (3) other employees who are more suited for variable hours of work because of the nature of their production activity, work, or function.53 However, some argue there is a question of whether they are entitled to time off in lieu of overtime pay.54

There is an application process for companies to obtain approval for certain categories of employees to qualify for the irregular working hour system, which is the closest thing to “exempt” that the PRC has.55 Approval requirements vary depending on the jurisdiction and district. In some districts the application form may require approval of the labor union or Workers Congress. Some local regulations require exceptions for work performed on national holidays. Which employees are “senior managers” – only the general manager or line manager – also varies by locality.56

51 Guan yu qi ye xing bu ding shi gong zuo zhi he zong he ji suan gong shi gong zuo zhi de shen pi ban fa [Regulations on the Approval of Variable Hours of Work and Consolidated Hours of Work in Enterprises] (promulgated by Ministry of Labor, Dec. 14, 1994, effective Jan. 1, 1995), art. 3–4, http://www.ilo.org/dyn/natlex/docs/SERIAL/44577/63616/F1419578998/CHN44577.PDF. In a rare case, a hotel manager in Qingdao won his case against his employer for overtime payment and was awarded more than 30,000 RMB. See http://news.sina.com.cn/s/2005-12-12/0950768614s.shtml.
52 Id. art. 3.
53 Id. art. 4.
55 Supra, note 50.
Students, as employees, make up another category for which employers can obtain exemption from overtime obligations. A student older than sixteen years of age may be employed, but “exempted” from otherwise applicable, overtime regulations, if he or she works in a work/study program and meets certain requirements.\(^{57}\) For example, in Beijing and Jiangsu, regulations authorize such an “exemption” where the student is an intern or a participant in a work/study program in a college (excluding vocational colleges) pursuant to an agreement between the enterprise and the college.\(^{58}\) Hours of work are limited to thirty per week or six hours per day.\(^{59}\) For work/study students, working hours should not exceed four hours per day, and compensation should not be below the local minimum wage standard.\(^{60}\) There are also child protection and child labor laws protecting children.\(^{61}\)

\(^{57}\) 1995 Labor Law Implementing Opinion, art. 12.


\(^{59}\) Id., art. 3.

\(^{60}\) Id., art. 5.

1. Employment Promotion and Labor Market Management

Because of China’s huge and growing population, the labor force is expanding faster than jobs can be created. The government has initiated education and training programs to upgrade the skills of workers and has an active plan of employment promotion under the 2008 Employment Promotion Law. This law seeks to protect workers by creating employment opportunities and prohibiting job discrimination. It promotes employment in specified industries and enterprises by providing assistance to employers. It also establishes public employment service organizations to assist workers in securing job opportunities, both in rural and urban areas. However, some view this law as merely a policy statement, as it provides few penalties and enforcement mechanisms.

The Employment Promotion Law (EPL), effective January 1, 2008, puts into place broad “proactive labor policies” to promote employment in the private sector, ease burdens on the unemployed, and promote equal employment in the workplace. It is guided by the “principles of workers selecting their own jobs, the market regulating employment and the government promoting employment, and increasing employment through multiple avenues.” Responsibility is placed on the governments at the county level and above to “create employment conditions and expand employment through development of the economy and through such measures as adjusting the industrial structure, regulating the human resource market, improving employment services, strengthening vocational education and training, providing employment assistance, etc.”

2 EPL, art. 5. Local governments have enacted local implementing regulations; for example, see, Guangxi province: http://gx.people.com.cn/GB/channel3/200901/09/1359532.html; Jiangsu
The law’s nine chapters create policies and rights covering employment and fair treatment through the use and regulation of government employment services and assistance, private employment agencies, and vocational education and training. Responsibility for supervision and inspection of mandated employment funds is placed with auditing organizations and public finance departments, whereas the labor administration authorities oversee implementation of the law through reporting systems.³

Under the law, the State Council establishes, with the MOHRSS, a coordinating mechanism for promoting employment.⁴ Policies are promoted through a variety of channels, including labor-intensive businesses, the service sector, small and medium-sized enterprises, construction projects, and an enhanced unemployment system.⁵ Governments above the county level are to establish exclusive, dedicated funds for employment promotion,⁶ provide preferential tax treatment for enterprises that hire laid-off or disabled employees,⁷ and increase loans to small and medium-sized enterprises.⁸

Part of the focus of employment promotion is on rural workers who have moved to the urban sector – and have become “the main constituent part of the industrial workforce.”⁹ The government is faced with the pressing need to create more employment opportunities and at the same time upgrade its skilled workforce. In that quest, some concern has been raised regarding whether too much emphasis on job creation may diminish attention to job quality (including labor standards and job protections, security, and benefits).¹⁰

While the EPL sought to promote employment, earlier regulations dealt specifically with labor markets. In 2000, the Ministry of Labor and Social Security (MOLSS) sought to regularize and bring more order to labor market management by issuing Regulations on Labor Market Management (hereinafter Labor Market Regulations).¹¹ These regulations’ stated purpose is to protect the legal interests of employees and employers, to develop and standardize the province: http://www.xinhuanet.com/chinanews/2009-01/07/content_15385599.htm; Tianjin: http://news.sohu.com/20090109/n261655083.shtml.

³ EPL, art. 7.
⁴ EPL, art. 6.
⁵ EPL, arts. 12–16.
⁶ EPL, art. 15.
⁷ EPL, art. 17.
⁸ EPL, art. 19.
¹⁰ Id. 196–7.
labor market, and to promote employment.\textsuperscript{12} The Labor Market Regulations apply to the employee’s job application and work, the employer’s recruiting process, and to the “career introduction activities” of job centers.\textsuperscript{13} They are administered by the Labor Bureaus above the county level.\textsuperscript{14}

The regulations relating to recruitment\textsuperscript{15} provide for “public and fair competition”\textsuperscript{16} and state that employers can acquire employees in numerous ways, including through the use of job centers and advertising in the mass media.\textsuperscript{17} Interestingly, Article 9 requires employers who place ads for vacancies in the mass media to first obtain the approval of the local labor security administrative authorities.\textsuperscript{18} The regulations also prohibit a number of well-documented employer abuses, including charging the hired person a deposit fee or holding worker documents, such as identity papers.\textsuperscript{19} The 2008 LCL, Article 9, also provides that an employer, when hiring an employee, may not retain the employee’s residence ID card or other papers or require him or her to provide security or property under some other guise.

The most significant provision in the Labor Market Regulations is Article 11, which bans employment discrimination in recruitment. It reads, “[W]hile hiring a person, the employer shall not refuse to hire or enhance the hiring standard on the basis of gender, nationality, race, or religion, except those provided by state laws concerning unsuitable types of work or positions.”\textsuperscript{20}

The Labor Market Regulations also cover “career recommendation organs,” or employment services and agencies, both nonprofit and for-profit.\textsuperscript{21} Article 21 is of significance, as it prohibits career recommendation agencies from certain activities including “recommending jobs prevented by laws and regulations.”\textsuperscript{22} This provision would seem to ban recommendation of a job advertised by an employer as “for men only” where there is no legal basis for a sex-specific limitation.\textsuperscript{23}

\textsuperscript{12} Id. art. 1.
\textsuperscript{13} Id. art. 2.
\textsuperscript{14} Id. art. 4. The hired person also must register with the Labor Bureau within thirty days of being hired.
\textsuperscript{15} Id. arts. 7–14.
\textsuperscript{16} Id. art. 7.
\textsuperscript{17} Id. art. 8. These ways include (1) using a job center, (2) participating in labor exchange activities, (3) publishing advertisements for employers in mass media, (4) recruiting on the Internet, and (5) other means stipulated by laws and regulations. Id.
\textsuperscript{18} Id. art. 9.
\textsuperscript{19} Id. art. 10(4)–(5).
\textsuperscript{20} Id. art. 11.
\textsuperscript{21} Id. arts. 15–25.
\textsuperscript{22} Id. art. 21. This is further codified in EPL, art. 26 and arts. 39–41.
\textsuperscript{23} See Zhonghua renmin gongheguo guang gao fa [Advertisements Law] art. 7(7) (promulgated by the Standing Comm. of the Nat’l People’s Cong., Oct. 27, 1994, effective Feb. 1, 1995),
Sanctions for violations of these regulations provide for general fines of 1,000 yuan (for violations of Article 10 or 14) and fines ranging from 10,000 yuan to 30,000 yuan for a violation of several enumerated articles, including Article 21.\(^{24}\) Penalties may also include revocation of the employer’s business license.\(^ {25}\) Of greatest significance, however, is the absence of sanctions for violations of Article 11 prohibitions on employment discrimination.

In 2001, the Ministry of Personnel and the State Administration for Industry and Commerce issued the Rules on the Administration of Human Resources Markets (hereinafter Rules on HRM).\(^ {26}\) These rules apply to the administration of labor agency services, including the general hiring activities of employers and the treatment of individual job applications.\(^ {27}\) Article 3 mandates that “human resource market activities must abide by the laws, regulations, and policies of this country, persist in the principles of openness, equality, competition, and selection of the best.\(^ {28}\) Employment agencies are required to have the “capacity to independently bear civil liabilities, and sanctions are provided for violations, ranging from 10,000 yuan to 30,000 yuan.\(^ {29}\) Of greatest significance is Article 39, which provides,

Any employing unit that, in violation of these Rules, refuses to recruit talents or heightens the qualifications for these talents by such reason as nationality, sex, and religion or recruits personnel who should not be recruited . . . shall be ordered to make corrections by the administrative department in charge of personnel of the people’s government . . . . If the circumstances are serious, there shall be imposed a fine of less than ¥10,000.\(^ {30}\)

The 2008 Employment Promotion Law further underscores the requirements for fair treatment of employees in the implementation of its quest to expand and improve the labor market and employment opportunities. Chapter 8 addresses the requirements of employment agencies to be licensed and operate properly in accordance with the law. In the case of the employer, it

\(^{24}\) Regulations on Labor Market Management, supra note 21, at arts. 34–8. Article 10 prohibits false information etc., and article 14 requires registration of employees. Id. arts. 10, 14.

\(^{25}\) Id. art. 37.


\(^{27}\) Id. art. 2.

\(^{28}\) Id. art. 3.

\(^{29}\) Id. arts. 6(4) and 35.

\(^{30}\) Id. art. 39 (emphasis added).
specifically prohibits providing false employment information, retaining resident ID cards or similar documentation of workers, charging workers a deposit, or failing to properly allocate or appropriate employee education funds. Civil and criminal liabilities are provided for violations.

In sum, the Chinese government is seeking to regularize and standardize HRM practices in China through labor market regulation. Nonetheless, the government continues to struggle to respond to persistent claims of inequality and inadequate legislative remedies.

2. Recruitment, Selection, and HRM

Since the mid-1980s, limitations on employers’ recruitment and selection activities have eased, and beginning in the 1990s, HRM became of interest in the universities, with materials and curriculum developed and taught. At the same time, employers began taking more serious interest in using principles of HRM more systematically in their employment policies to meet the challenges of recruitment and retention of skilled and technical employees, as well as of migrant workers who tend to migrate en masse during holiday periods. With enterprise autonomy ever increasing, there has come to be an increasing use of HRM practices by some Chinese firms, ranging from planning, recruitment, training, and promotion to discipline and dismissal. Challenges to the HRM systems in China are the need to professionalize and establish professional networks and to adapt HRM principles to Chinese characteristics.

The current hiring route is multifaceted and usually involves advertising for positions (rather than earlier practices of having labor supplied through Labor Bureaus), word of mouth, use of labor supply brokers (including Labor Bureaus and employment agencies), and posting notices on walls and the Internet. Recruitment practices do not usually require testing, with the exception of civil service jobs and those needing certain proficiencies. Employment and

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31 Cooke, supra note 9, at 172–93, 201, 204.
32 Id. at 174.
working conditions are mostly governed by the employer and its rules, with the employer authorized to make evaluative decisions.\(^{35}\) Both recruitment and conditions, however, are limited somewhat by labor laws, labor contracts, and collective contracts.\(^{36}\) Dismissals and other labor disputes are regulated by statutes and generally are resolved within the enterprise by mediation or by resort to government labor arbitration commissions and tribunals, with review provided by the courts.\(^{37}\)

The U.S.-China Business Council reports that, for multinational corporations (MNCs) and Chinese companies, “acquiring talented employees is more than ever, one of their greatest challenges in China.”\(^{38}\) The turnover rate from 2001 to 2005 rose from 9 to 14 percent; the salary rates increased by nearly double digits; and of the estimated 15.7 million college graduates, “only 1.2 million are suitable for employment in the large MNCs because they lack the necessary mix of skills and experience.”\(^{39}\) With such conditions, it is foreseeable that some employers may seek to hire employees who are already employed by another employer. That practice of corporate raiding, sometimes referred to as “poaching,” is proscribed by the LCL, Article 91, which provides that, if an employer hires an employee whose contract is not yet terminated or ended, which causes damage, it is jointly and severally liable with the employee for damages.\(^{40}\) It is especially important for employers to understand the recruitment provisions of the LCL, which place limits and penalties on the employer for unilateral termination and for severance pay requirements. Likewise, limits on poaching are important in cases involving trade secrets and other types of confidential information that could be carried away by the recruited employee.

Employers are understandably focused on how and where to find the appropriately qualified candidates to hire. Workers and recent college graduates, however, report that they must surmount many hurdles to find a job. Currently, they may have to respond to newspaper ads, employment agencies, job fairs, hiring contractors, posted notices, and word of mouth opportunities to gain

\(^{35}\) Lao dong he tong fa [Labor Contract Law] (promulgated by the 28th Standing Comm. of the Tenth Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008), art. 4 (PRC), [hereinafter LCL].

\(^{36}\) LCL, Art. 80.

\(^{37}\) See Zhonghua renmin gongheguo lao dong zheng yi tiao jie zhong cai fa [Law on Labor Dispute Mediation and Arbitration of the PRC] (promulgated by the 31st session of the Standing Comm. of the Tenth NPC, Dec. 29, 2007, effective May 1, 2008); LCL.


\(^{39}\) Id.

\(^{40}\) Labor Law, art. 99.

\(^{41}\) LCL, Art. 50 requires employers to provide proof of termination.
Sophisticated hiring and screening processes, involving testing, structured interviews, or even background checks, are relatively rare except in a few industries and occupations. However, many employers require physical exams, and there seems to be some evidence suggesting use of at least initial interviews.

The hiring of dispatched employees from secondary employers (also called “staffing firms”) is regulated under the LCL, which places an “employer’s obligation” on the staffing firm, requiring adherence to the labor laws. In 2003, new provisions were issued regulating the management of intermediary employment agencies that service FIEs. These provisions require any FIE using intermediary services to conduct its “activities through a specialized job intermediary agency jointly established with a Chinese company, enterprise or other economic organization for offering job intermediary services.” These agencies are authorized to collect data about the employment market; provide job recommendations; conduct recruitment activities, job testing, and appraising of applicants; and provide training courses. They must abide by “the principles of voluntary participation, equity and good faith.” Enterprises needing temporary employees (also called “accepting or host firms”) often contract their needs to an employment or staffing agency. For example, in July 2007, Humanpool Human Resources Co. Ltd., reportedly one of the largest labor suppliers, supplied 6,000 workers per month to more than 200 companies in the Yantze River Delta, a manufacturing area. Pay for the services was about 80 yuan per month per employee. Many of those employees were reported to have been subsequently hired by the employing enterprise.


Brown, supra note 34, at 361, 399. However, testing may be used by international companies in the recruitment of Chinese tradespeople; see Resourcenet International Group at http://www.chinalabour.com/index.html.

See Cooke, supra note 9, at 158.

LCL, arts. 57–67.

LCL, arts. 58, 62.


Id. art. 3. Wholly foreign-owned job intermediary agencies are prohibited. Id.

Id. art. 11.

Id. art. 12.

Hiring foreign workers also requires meeting certain legal procedures and receiving proper government permissions.\(^{52}\) These requirements apply to FIEs\(^ {53}\) and Representative offices as well. Individuals hired from Taiwan, Hong Kong, and Macau are subject to separate regulations,\(^ {54}\) although all employees, Chinese and foreign, who work in China are covered by the labor laws, except as stipulated by law.\(^ {55}\)

3. Privacy and Defamation Limits

There are few limits placed on employers in the recruitment and hiring stages. Not many employers use sophisticated screening devices, but occasionally there are applicant background investigations and the use of medical records, which can raise issues of privacy and defamation. Occasionally, work rules or corporate codes of conduct exist that may in some way address these employee rights, but usually they lack meaningful enforcement provisions.\(^ {56}\)

For many years, personnel files for cadres and “floating” personnel have been kept exclusively by the government and the CCP, even when these employees moved between jobs.\(^ {57}\) However, the files of regular employees working at enterprises are kept with their employers.\(^ {58}\)


\(^{53}\) These include China-foreign joint equity ventures, China-foreign cooperative ventures, wholly foreign-owned enterprises, and China-foreign joint-stock limited companies. 2008 Update to Guide to Establishing a Subsidiary in China (Company Overview), Mondaq Business Briefing, Jan 11, 2008, goliath.ecnext.com/coms2/summary_0199-7575323_ITM.

\(^{54}\) Taiwan Xianggang Aomen ju min zai nei di jiu ye guan li gui ding [Regulations for the Administration of the Employment in Mainland China of Taiwan, Hong Kong, and Macau Residents] (promulgated by the Ministry of Labor and Social Security, June 14, 2005, effective Oct. 1, 2005).

\(^{55}\) E.g., LCL, arts. 2 and 57–67. An issue may exist whether certain foreign seconded employees have the requisite employment relationship for LCL coverage or are engaged in a labor service contract. By stipulating in their contract to use home-country law, they may be subject to the LCL or PRC Contract Law and foreign laws. A highly publicized case was the Microsoft v. Google lawsuit in the United States, which raised the issue of whether Microsoft’s employee breached the no-compete provision by accepting work in China for Google. See Gates’ Microsoft and Google Settle Employee Row, www.forbes.com/2005/12/23/gates-microsoft-google-ex_cn_autofacescan02.html.


\(^{57}\) LCL, art. 50.

\(^{58}\) Qi ye zhi gong dang an guan li gong zuo gui ding [Regulations Concerning the Administration of Personnel Files of Enterprise Workers] (promulgated by the Ministry of Labor and State Archives Administration, June 9, 1992), art. 5; Wais hang tou zi qi ye dang an guan li zan xing
of employees were codified in 2007 when new regulations required employers to keep employees’ personal information confidential. These regulations require the employee’s consent to disclose personal information or to use technology or intellectual achievements of employees, and they impose monetary fines for requiring an employee to take certain medical tests (e.g., hepatitis B). However, there are no penalties for employers who fail to obtain the employee’s consent.

Interestingly, and perhaps paradoxically, there are legal protections prohibiting third parties from listening to telephone calls without the employee’s consent. E-mail and Internet use by employees also have some, but less, protection because other laws more closely regulate them, as they may affect China’s “security” interests. However, employers often adopt policies and rules providing disclosure and obtain “consent” of their employees to monitor e-mail, Internet, and telephone use.

In 2003, 5,596 defamation cases were heard in court. Most of these cases involved suing the media rather than employment disputes. The law of defamation emanates from the 1987 General Principles of the Civil Law, which protect the reputation and personal dignity of individuals and authorize redress, including compensation. In 1998, an Interpretation of the Supreme People’s Court added that release of information regarding certain health
conditions (e.g., gonorrhea, syphilis, leprosy, AIDS, etc.) can be the basis of a claim of defamation.\(^{68}\)

Defamation cases in employment are not easily identified, but illustrative cases have arisen. In an employment dispute against Yahoo, a former employee alleged that misinformation about the employee (that he engaged in “unethical business practices”) circulated by the employer, constituted defamation.\(^{69}\) In 1998 in Guangzhou, an employee sued his employer, Proctor & Gamble, for defamation and invasion of privacy, claiming that it disclosed private and personal information when it publicized the contents of his computer after taking it into possession on the employee’s announcement that he was leaving to take another job.\(^{70}\)

\(^{68}\) Zuigao renmin fayuan guan yu shen li ming yu an jian ruo gan wen ti de jie shi [Interpretation of SPC Regarding Some Questions in the Adjudication of Cases involving the Right of Reputation], art. 2 (Sept. 15, 1998).


\(^{70}\) Zhan, Local Employee Sues P&G in Privacy Case, CHINA DAILY (June 11, 1998).
Case I

Facts:

S, born in January 1989, was a full time student at a vocational school, expected to graduate in the summer of 2009. He submitted application for a job to a drugstore in early October 2008. After interviews with the HR manager and the general manager, he was accepted to work at the store. Then, on October 30, 2008, S and the drugstore signed a three-year labor contract.

In July 2009, upon S’ graduation, the drugstore informed him that no employment relationship existed between them. Shortly afterwards, the drugstore brought the matter to the local Labor Dispute Arbitration Committee (“Committee”).

In August 2009, the Committee issued a ruling that, as a full-time student, S was not eligible to sign any labor contract. Therefore, the dispute between the two sides was not one covered by labor law.

S sued in court and claimed that his contract with the drugstore was a labor contract and that it was valid and enforceable.

During the trial, the drugstore argued that at the time of entering into the contract with the store, S was still attending school full-time. In accordance with the Opinion on Several Issues of Implementing PRC Labor Law by Ministry of Labor (Ministry of Labor, Aug. 4, 1995), full-time students were not eligible to be a party of an employment relationship. Although the contract signed had the name of “labor contract”, it was in fact a traineeship agreement, to which the labor law should not apply.

S argued that on October 26, 2008 he made it clear to the drugstore that he was seeking employment. In the registration form submitted to the store, he also disclosed that he was to graduate in 2009, and the year 2008 would be counted as his probation period. The drugstore had full knowledge of his status when both sides reached an agreement on his employment, position, wage and benefits. He insisted that the contract was not a traineeship agreement, but a legally enforceable labor contract.

Questions:

1. Was S eligible to sign a labor contract?
2. Was the contract signed by both sides a labor contract or traineeship agreement? Why?
3. Would the following fact make any difference: it was found out that the drugstore’s license had expired in September 2008, and a new one was not issued until March 2009?
Case II

Facts:

W was an employee of a construction company ("Company A"), with which he had a non-fixed-term labor contract. In 2002 he agreed to accept informal retirement (nei tui, 内退). Under such arrangement, afterwards W remained on the payroll of Company A and received a monthly allowance from the company. Company A continued to pay contributions for his old-age social security insurance, unemployment insurance, medical insurance, work-related injury insurance, maternity insurance and housing public fund.


After he was released from the hospital, W applied for work-related injury benefits. As Company B denied that W was an employee of the company, W brought the matter for arbitration. In June 2008, an arbitration ruling was delivered that a de facto employment relationship existed between Company B and W.

Company B brought a lawsuit in the district court and claimed that there was no employment relationship between the two parties. It argued that W remained an employee of Company A, which still paid wages and social insurance contributions for W. Before the car incident, W did provide facility maintenance service to Company B on several occasions. But each time W was paid off at the end of the service. W had not been asked to provide maintenance service since the accident happened.

W argued that since his informal retirement in 2002, he no longer performed any work for Company A and only received a minimum-level allowance from Company A. He had to work for Company B because the income from Company A was hardly enough to cover his living expenses.

The district court ruled that normally an employee could not be a party of more than one employment relationship. Because W remained an employee of Company A, based on a valid labor contract and the fact that the company continued to pay W an allowance and pay social insurance contributions for him, there could be no de facto employment relationship between Company B and W.

W appealed to the Intermediate Court. He argued that “no dual employment relationship” was not well-founded. On the contrary, provisions in the Labor Contract
Law and the Work-related Injury Insurance Regulations provided legal basis for “double employment relationships”.

Questions:

1. Was there an employment relationship between W and Company A, Company B respectively?
2. Are the so-called “dual employment relationship” allowed under the current law?
3. In this case, what difference would it make if W reached statutory retirement age in 2005?
Individual Labor Contracts

Formation and Content

The passage of the Labor Contract Law (LCL) in 2007 was preceded by much public comment and hue and cry from foreign employers. Although some employers argued that the law would increase costs, others countered, saying that the law was aimed only at preventing illegal conduct. Before the law took effect on January 1, 2008, some employers tried to avoid its effects by prompting the resignations of employees and then rehiring many of the same employees, thereby avoiding the new law’s grant of “open-ended” labor contracts for employees working for an employer for a consecutive period of not fewer than ten years. The Huawei Technologies of Shenzhen offered redundancy packages of $134 million to its employees, 7,000 of whom resigned but were subsequently rehired so as to “restart” the counting of their years of service. However, because of the public outcry and pressure from the press and the ACFTU, Huawei suspended its program. This “loophole” arguably was inapplicable, as many of the employees reportedly never lost a day of work, resigning one day and working the next under a new contract. Employees seem to be embracing the rights provided in the Labor Contract Law, as there are reports of sharp increases in labor dispute cases. The number of labor disputes heard by the courts in 2008 rose 94 percent in 2007, with the number nearly tripling in some coastal cities. Figures from the 2009 Supreme

1 Ronald C. Brown, China’s New Labor Contract Law, 3 China Law Reporter 4 (2007); Brandon Kirk, Putting China’s Labor Contract Law into Practice, China Law & Practice 15–18 (March 2008).
2 LCL, art. 14(1).
People’s Court Work Report showed a 59 percent increase during the prior year for the first 3 months. The types of disputes have expanded to include back pay for social insurance and pensions and the processes related to signing or terminating labor contracts.

1. Contract Formation

Individual labor contracts have become more comprehensive and formal following the 2008 implementation of the LCL. Employers’ refusals to provide contracts to workers, particularly to members of vulnerable groups, such as migrant workers, have been addressed and labor rights strengthened. The new law uses a tripartite mechanism, at the county level and above, to study and resolve major issues arising from employment relationships.5

Many statutory provisions existing before the new law remain in force, but clarifications and strengthened sanctions have been added. For example, all employment contracts, except for part-timers, must be written,6 and if not concluded and signed within thirty days, the employer must pay double wages for the period of the violation. The law established shorter probationary time limits, depending on the length of the contract, with maximum periods of one month for contracts between three months and one year; two months for contracts of one to three years; and six months for contracts of three years or longer or open-ended contracts.7 When first hired, a new employee must be informed of the working and safety conditions.8

Three types of contract are prescribed – fixed term, open-ended term, and project contracts.9 Workers employed for longer than ten years may be entitled to an open-ended contract10; workers whose second consecutive term expires will be entitled to have an open-ended contract, if they so demand,11 as will workers without a written contract after one year.12 An illustrative court case under the LCL upheld a labor arbitration award that an employee was entitled to an open-ended labor contract where the facts evidenced she had worked the requisite number of years.13 A minimum-term-of-service-contract may be

5 LCL, art. 5.
6 LCL, art. 10.
7 LCL, art. 19.
8 LCL, art. 8.
9 LCL, arts. 12–15.
10 LCL, art. 14(1).
11 LCL, art. 14(3).
12 LCL, art. 14.
used for employees who are provided with professional technical training under a special training fund; in those situations, a liquidated damage provision is permitted, to be paid by the breaching employee.\textsuperscript{14}

The law highlights and prohibits many forms of employer misconduct in the formation of employment contracts. There is a long list of “don’ts.” Article 26 invalidates an employment contract secured by a contractual party’s deception, coercion, and taking advantage of the other’s difficulties, and an employer cannot refuse to give a written contract.\textsuperscript{15} Furthermore, an employer cannot keep a worker’s ID card or require a security payment by a worker;\textsuperscript{16} employment agencies cannot require a fee to be paid by the worker;\textsuperscript{17} the employer cannot “disguise” overtime;\textsuperscript{18} and most worker-liquidated damage provisions are prohibited.\textsuperscript{19} Also prohibited are acts of violence, threats, or unlawful restriction of personal freedom to compel a worker to work.\textsuperscript{20}

\textbf{2. Content of Contracts}

\textit{a. Formalities, Application, and Required Content}

Formalities and required substantive terms, in the tradition of civil law legal systems, are provided in the law and generally replicate the content requirements of the 1994 Labor Law, though additional information is required in the labor contract.\textsuperscript{21} It must specify duration, job descriptions, working hours, leaves and benefits, labor protections, and the like. Provisions of the law deal with performance, termination, severance pay, collective contracts, and dispute resolution. Additionally, some attention is given to dispatch workers, part-time labor, inspections, and remedies and damages for violations.

The LCL authorizes protection of confidential information, trade secrets, and intellectual property, and a competition restriction may also be included in the contract, though limited to certain senior management and technical personnel.\textsuperscript{22} The limit on competition requires postemployment compensation, paid in monthly installments, and is limited to two years. Liquidated damage provisions are permitted for violations by those personnel,\textsuperscript{23} but for

\begin{itemize}
  \item \textsuperscript{14} LCL, art. 22.
  \item \textsuperscript{15} LCL, art. 11.
  \item \textsuperscript{16} LCL, art. 9.
  \item \textsuperscript{17} LCL, art. 60.
  \item \textsuperscript{18} LCL, art. 31.
  \item \textsuperscript{19} LCL, art. 25.
  \item \textsuperscript{20} LCL, art. 38.
  \item \textsuperscript{21} LCL, art. 17; Labor Law, art. 19. Illustrative if not model contracts are provided in Chapter 16.
  \item \textsuperscript{22} LCL, art. 23.
  \item \textsuperscript{23} LCL, arts. 23–24.
\end{itemize}
Individual Labor Contracts

no other reason\textsuperscript{24} except to recoup certain professional technical training costs.\textsuperscript{25}

The LCL adds several categories of labor contract coverage. For example, early drafts dealing with the dispatch worker issue were very controversial. The new law, which appears to reduce employers’ wide use of “agency” workers from staffing firms, reached accommodation on the controversial issues as follows: Staffing firms now must be established under the Company Law, are liable as an “employer,” must have fixed term contracts of not fewer than two years with their workers, and must pay minimum wage compensation when there is no work assignment for the worker.\textsuperscript{26} The placement must be based on “actual” requirements of the job position, and the parties may not conclude several short-term placement agreements to cover a continuous term of labor use.\textsuperscript{27} Therefore, these temporary assignments should be limited to temporary, auxiliary, or substitute openings, and wages paid must be equal to those of the regular workers at the accepting unit.\textsuperscript{28} Additionally, the staffing firm is prohibited from “pocketing” any of the compensation paid by the accepting unit for the workers or from charging fees to the workers placed.\textsuperscript{29} Finally, these temporary workers are accorded the right to join or organize a labor union of either the staffing firm or the accepting unit.\textsuperscript{30}

Obligations of the accepting unit also include implementing government labor standards, working conditions, and labor protection; paying overtime and performance bonuses, as well as normal wage adjustments; and providing training necessary for the job position.\textsuperscript{31} Termination is to be done by the staffing firm,\textsuperscript{32} and accepting units are prohibited from setting up their own staffing firms.\textsuperscript{33}

Part-time workers are limited to an “average” of not more than four hours per day or twenty-four hours per week for the “same” employer,\textsuperscript{34} but if there is a second employer, the subsequently concluded contract cannot prejudice the performance of the first.\textsuperscript{35} Wages are usually paid on an hourly basis and must meet local minimum wage standards.\textsuperscript{36} The contract may be oral

\textsuperscript{24} LCL, art. 25.
\textsuperscript{25} LCL, art. 22.
\textsuperscript{26} LCL, arts. 57–58.
\textsuperscript{27} LCL, art. 59.
\textsuperscript{28} LCL, art. 63.
\textsuperscript{29} LCL, art. 60.
\textsuperscript{30} LCL, art. 64.
\textsuperscript{31} LCL, art. 62.
\textsuperscript{32} LCL, art. 65.
\textsuperscript{33} LCL, art. 67.
\textsuperscript{34} LCL, art. 68.
\textsuperscript{35} LCL, art. 69.
\textsuperscript{36} LCL, art. 72.
and terminated “at will,” there is no severance pay, and there cannot be a probationary period.\footnote{LCL, arts. 69–71.}

Some questions have arisen regarding employment of students not as “regular” workers, but as interns or participants in work/study programs. Pursuant to an MOLSS interpretation, this relationship falls outside the 1994 Labor Law, and subminimal compensation is often paid, as confirmed in the recent cases in China involving McDonald’s and KFC.\footnote{McDonald’s and KFC Seeking to Resolve Chinese Minimum Wage Issue, April 5, 2007, http://www.iht.com/articles/2007/04/05/news/labor.php (last visited Sept. 5, 2008); Olivia Chung, China’s Part-Time McDonald Workers Exploited, April 20, 2007, http://www.atimes.com/atimes/China_Business/ID20Cb02.html (last visited Sept. 7, 2008).}

\textit{b. Performance}

Performance requirements are located in six provisions in LCL; some are old and some new. Article 30 reiterates the employer’s obligation to pay wages on time and in full, with possible further damages if there is a failure to do so.\footnote{LCL, art. 85.} Interestingly, Article 30 allows the unpaid worker, “in accordance with the law,” to apply to the court for an order to pay; presumably, this “labor dispute” would still need to be preceded by labor arbitration except in exceptional circumstances.\footnote{Discussed \textit{infra} in Part V; for example, in one recent case, an employee did recover past due wages in a claim directly with the court. \textit{China Employment Law Update}, Baker & McKenzie, April 2008, at 3.} Article 31 provides that an employer may not compel overtime; this is a clearer mandate than the prior law’s right to negotiate same. Again, if enforced, this worker’s “right” could provide an obstacle to termination under Article 39 for its exercise. Finally, without breaching their employment contracts, workers may withhold their services rather than perform certain dangerous operations.\footnote{LCL, art. 32.}

Mergers and acquisitions, a growing phenomenon in China and covered by new legislation, are addressed by Articles 33 and 34, respectively, which clarify the continuing validity of incumbent workers’ employment contracts, absent a proper termination or amendment of their employment contracts.

\textit{c. Termination}

Termination and ending employment contracts, discussed later in Part VI, are covered in fifteen provisions of Chapter 4 of the LCL and its implementing...
regulations, which clarify and create some new rights and obligations. Severance pay (with caps) may be required on expiration of a nonrenewed fixed-term labor contract and termination in a variety of circumstances.\(^42\)

\textit{d. Legal Liabilities}

Other aspects of the LCL involve monitoring, inspections, and enhanced legal liabilities. The administration and monitoring provisions add few, if any, changes, but may trigger liabilities. The law emphasizes the authority of the inspectors by stating that they have the authority to review employment contracts and conduct on-the-spot inspections of the work premises.\(^43\) Workers whose rights are infringed have the right to “request” government action or to apply for arbitration or sue in court, as may be permitted by law.\(^44\) Labor unions are permitted to complain about violations, file for arbitration,\(^45\) and assist workers if they arbitrate or go to court.\(^46\)

Remedies and damages for violations of the aforesaid legal liabilities are contained in fifteen articles of Chapter 7. For example, failure to provide a written employment contract in the first year requires the employer to pay twice the wages for the period in violation;\(^47\) failure to pay owed compensation can render the employer liable for damages at 50 to 100 percent of the amount owed;\(^48\) and if an employer unlawfully terminates or ends a contract, it must pay damages to the worker at twice the rate of severance pay due.\(^49\) In April 2008, a labor arbitration decision held that the employer failed to provide a labor contract to a worker, as required by the LCL, and ordered the employer to pay double the wages from one month after the effective date of the LCL.\(^50\) Other miscellaneous provisions include employer liability for (1) “raiding” another worker who is still employed and (2) violation of the employment contract law by an “individual” who is an employer’s “contractor” (jointly and severally liable).\(^52\) Lastly, there is a provision for sanctions (including

\(^{42}\) LCL, art. 46–47. Implementing regulations were issued on September 18, 2008, linked in Manfred Elfstrom, \textit{Implementing Guidelines for China’s Labor Contract Released}, http://laborrightsblog.typepad.com/international_labor_right/2008/09/implementing-gu.html.

\(^{43}\) LCL, art. 75.

\(^{44}\) LCL, art. 77.

\(^{45}\) LCL, art. 56.

\(^{46}\) LCL, art. 78.

\(^{47}\) LCL, art. 82.

\(^{48}\) LCL, art. 85.

\(^{49}\) LCL, art. 87.


\(^{51}\) LCL, art. 91.

\(^{52}\) LCL, art. 94.
damages) against the government as labor-contract enforcers (including the labor agency, other offices, or “a member of its working personnel”) that act negligently or fail to perform their duties and cause harm to a worker or the employer.\(^{53}\) Transitions from employment contracts existing at the time of the LCL’s implementation are dealt with in Article 97, with an employee’s existing contract continuing, but with its renewal counted as a first renewal of a fixed-term contract under Article 14.

\[e. \text{Collective Negotiations}\]

The LCL also brings changes and new emphasis to collective negotiations (bargaining) and the role of unions.\(^{54}\) It expands the concept that collective bargaining can occur at the county level or below across an industrial or regional sector in industries such as construction, mining, and catering services.\(^{55}\) The law confirms and enhances the role of the labor union by providing it the authority to consult on employer rules, bargain collectively, and provide opinions on mass reductions in force and terminations.\(^{56}\) These provisions come a year after the Company Law was amended to require greater participation by employee representatives (often the union) to serve on the supervising boards of companies.\(^{57}\)

\[f. \text{Employer Rules and Codes of Conduct}\]

Other possible employer liabilities may arise from contractual obligations found in at least two sources: employer rules and regulations and employer codes of conduct. Article 4 of the LCL allows the employer to establish work rules (including conduct) that, if violated, can provide a basis for discipline or termination.\(^{58}\) Under the LCL, consultation with the employees (or their representative congress) must precede the implementation of enumerated workplace issues.\(^{59}\) These rules, as long as they are legal,\(^{60}\) are incorporated into the labor contract and are part of the enforceable obligations; however,

\(^{53}\) LCL, art. 95.
\(^{54}\) Collective contracts and collective negotiations are discussed in Chapter 5.
\(^{55}\) LCL, art. 53.
\(^{56}\) LCL, arts. 4, 51, 41, 43.
\(^{57}\) Gong si fa [Company Law] (promulgated by the 18th session of the Standing Comm. of the Tenth NPC, Jan. 1, 2006), art. 118 (PRC).
\(^{58}\) Discussed infra in section 12.
\(^{59}\) Id.
\(^{60}\) LCL, art. 80.
unlike other labor contract provisions, they can be changed unilaterally (after consultation).  

By contrast, external corporate codes of conduct come in many varieties, often from industry standards and are separate from the labor contract. Rights provided to employees, if any, to enforce these labor code standards are typically dealt with through internal procedures (not the labor arbitration process), with the employer being the ultimate decision maker. Although these external standards could be expressly or implicitly incorporated by reference into existing labor contracts, thus becoming the subject of a labor dispute for labor arbitration, most employers would likely be disinclined to expressly incorporate these standards. Because employees are not parties to the codes, any civil contract enforcement would be difficult, at best.

61 LCL, art. 35 (The law requires written agreement to amend the labor contract).
Case III

Facts:

Chang began to work in Company A in July 1992. In 2002, Company A was acquired by Company B. According to the Merger Agreement between the two parties, Company B agreed to assume responsibilities for all active and retired workers of Company A.

Chang continued to work in the company but did not sign any written contract with Company B. On October 31, 2008, Chang received a notice from Company B that he must sign a 3-year labor contract on that day, otherwise he could no longer work for the company effective from the next day on November 1. Chang requested to sign a non-fixed-term labor contract but was rejected by the company. On November 5, from a public announcement issued by the company Chang found out that he had been fired.

Chang brought the matter to the local Labor Dispute Arbitration Committee, which made a decision on June 22, 2009. According to the ruling, Company B should reverse its decision to fire Chang, sign a non-fixed-term labor contract with Chang, and pay him a sum that was twice his wage for the period from November 2008 to June 2009.

Company B sued in the local court. According to Company B, after the merger the company offered to sign a new labor contract with Chang but Chang refused. The company later agreed to accept the original labor contract between Company A and Chang. As that contract had a term that was due to expire on October 31, 2008, the company asked Chang to sign a new contract in early October 2008, which Chang refused. The Company argued that although Company B acquired Company A, they were two separate entities before the merger and therefore should not be considered as one employer. Chang’s employment with Company B started in 2002 and lasted less than 10 years when the dispute arose in 2008. As a result, Chang was not entitled to a non-fixed-term labor contract with the company.

Chang argued that according to the Merger Agreement, Company B took over all personnel and employment responsibilities from Company A. Later the employees were allowed to choose between (i) to terminate their labor contracts and take severance pay from Company B for all the years they had worked for Company A; or (ii) to stay in the company. Chang chose to continue to work and therefore his employment began in 1992 rather than 2002. Chang claimed he had worked for a total of 17 years in one employment relationship, and had the right to a non-fixed-term labor contract with Company B.
Questions:

1. Did Chang have the right to a non-fixed-term labor contract with Company B?
2. Should the court affirm the Arbitration Committee’s ruling that Company B pay Chang twice his wage for the period from November 2008 to June 2009?
1. Employer Work Rules and Discipline

The Labor Law and Labor Contract Law require employers to establish labor rules and regulations to ensure that workers enjoy their rights and perform their labor obligations; the LCL further requires the employer to have certain “consultations” with employees about those rules.\(^1\) Under the LCL, the employer first has a duty of “discussion” with the worker’s Congress or all of the employees when it “formulates, revises or decides on rules and regulations or material matters that have a direct bearing on the immediate interests of its workers.”\(^2\) These topics include “labor compensation, work hours, rest, leave, work safety and hygiene, insurance benefits, employee training, work discipline, or work quota management.”\(^3\) The Congress or employee group shall put forward a “proposal and comments,” whereupon the matter shall be determined by “consultations” between the employer and the labor union or the employee representatives. If there is disagreement on the rules’ appropriateness, the employer is to seek to improve the rules by amendments. Interestingly, the law does not explicitly require consent before the rules are implemented.\(^4\) Handbook rules and regulations on the above topics that are in conflict with the law are invalid.\(^5\)

Employers’ work rules on conduct typically lay out conduct standards with consequences for violations, including warnings, suspensions, terminations, loss of pay, and demotions. They also provide a basis for employers and arbitrators in evaluating the performance of employees, and they offer justifications

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1. Labor Law, art. 4; LCL, art. 4.
2. LCL, art. 4.
3. Id.
4. Id. The rules should be made public or communicated to the workers.
5. LCL, art. 80.
for personnel decisions other than discipline, such as granting leaves and bonuses. An example of an employer’s disciplinary rules with fines for their violation is as follows. An employer making toys in the Pearl River Delta had rules with the following penalties: for “warnings” (e.g., “failure to meet quality requirements,” RMB 10–30); for “minor mistakes” (e.g., “reckless work and concealing defective items,” RMB 30–90); and for “major mistakes” (e.g., ignoring quality control guidelines, leading to “defective products,” RMB 90–170). For these employees, who earned an average of RMB 500–800 per month, the amount of the fine was significant. Issues will arise when an employer rule seems to violate existing laws (e.g., coercing work by intimidation) or is unreasonable. In addition, after implementation of the LCL, an employer’s failure to properly incorporate these rules into the labor contract and otherwise follow the required procedures of consultation can render them invalid and unenforceable as illegal rules.

The following illustrative language (though not necessarily model language) has been used to incorporate employer rules into a labor contract:

**Labor Discipline**

1. Party B shall strictly comply with the various Rules and Regulations prepared by Party A in accordance with law.
2. In the event that Party B has complied with rules and regulations in an exemplary manner or in the event that Party B has violated such rules and regulations, Party A shall reward or discipline Party B, as the case may be.

Before the LCL, the rules and their enforcement were typically left to the discretion of the employer. Abuses by some employers, as illustrated by the following rules, which were put in operation prior to the LCL, helped hasten the LCL reforms that require some employee participation in the rule making.

Worker rules at one factory included the following: “If a worker is injured either through his own fault or by mistake, no medical leave is permitted.” In the section on rules pertaining to safety, employees were told, “No chatting is allowed during work hours, no matter whether workers are engaged in single-machine production or line work.” Employees were also instructed how to line up to enter the premises to start work, how to line up in the cafeteria, how to pick up their food, and how to spend their downtime in the dormitory (no fighting, no gambling, no chess or poker, no smoking, no unauthorized lights, etc.).

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7 Id. at 317–19. It may also raise issues of meeting minimum wage obligations.
At Mattel’s Number Two Toy Factory in Chang’an, management reserved the right to fire workers for what was termed “a physical problem” (which included work-related injuries and illnesses) and to keep their pay. In addition, workers had to pay for electricity and water used in the dormitory and a factory ID card; make a deposit on the equipment provided by management that they used to perform job tasks; and contribute to a medical fund, even though company-paid medical care could be denied if it was found that the workers were negligent or their injury or illness was the result of a “mistake.” New employees also had to pay for the eleven-chapter, ninety-three-page employee handbook.

Many of these rules, even had they been imposed following the LCL-required procedures of consultation, would be deemed unenforceable as illegal rules. Others, however, could provide the basis for discipline or termination if materially violated. In a case in Hangzhou, an employee was terminated following a quarrel with a supervisor because it violated an employer rule that an employee should never “publicly contradict a supervisor.” The discharge was upheld by the labor arbitration tribunal and the court on appeal. These standards then, can determine rights and duties, such as entitlement to severance pay, continuing employment, and damages.

Failure to have “authorized” rules to deal with certain employment situations also could foreclose an employer from acting unilaterally against an employee, as any unincorporated and unauthorized rules would be unenforceable. A 2007 case in Beijing found that the employer, absent any authority in the contract (not in conflict with the law), acted in violation of its employee’s labor contract when it unilaterally lowered his pay and demoted him. Although this action took place during a reorganization, it would appear analogous and applicable to a disciplinary case on the issue of employer authority. The court enforced the arbitration remedy of reinstatement and restoration of position and pay. A similar holding in a Shanghai court found that the employer

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10 Frost, *supra* note 6, at 319.


12 LCL, art. 39(2).


14 Id.
violated the labor contract by unilaterally reducing the salary of an employee without the employee’s consent or other authorization.\textsuperscript{15} In addition, some local government regulations place limitations on the amounts of economic punishments used by employers.\textsuperscript{16}

2. Termination under Labor Contracts

\textit{a. When a Labor Contract Ends versus Terminates}

Some labor contracts automatically end (\textit{zhongzhi}) at a certain time (e.g., when fixed-term or project contracts expire) or when a condition occurs (e.g., the employee dies), as opposed to there being a termination (\textit{jiechu}) by mutual agreement or by dismissal.\textsuperscript{17} The significance of this distinction – under the Labor Law, severance pay is not required on expiration of a fixed-term contract – has been diminished under the LCL, as it requires severance pay at the end of any fixed-term labor contract unless the employee refuses to extend the contract under the same or better terms.\textsuperscript{18} The prohibitions on terminating employees under Article 42 of the LCL, discussed in the next section, mandate the extension of a term contract “until the relevant circumstance ceases to exist,” at which point the contract ends, except for work-related injuries, which are covered by separate legislation.\textsuperscript{19}

\textit{b. Termination by Employer without Notice or Severance Pay}

Termination of an employee by the employer may or may not require notice and the payment of severance pay. Summary termination by an employer

\textsuperscript{15} Reinstatement was awarded under regulations protecting pregnant women and must be at former wages, not at a lower level; therefore, any employer rules on rehiring to the contrary would be illegal. \textit{Pregnant Employee Wins Reinstatement after Having Agreed to Terminate Employment}, Baker & McKenzie, \textit{China Employment Law Update} (June 2008), at 6; see also \textit{Jie yue hou fang zhi huai yun, su qing che xiao jie yue he tong} [Learning about Pregnancy after Termination of Labor Contract, Employee Sued for Reinstatement], April 23, 2008, http://sh.xinmin.cn/shehui/2008/04/23/1251529.html.

\textsuperscript{16} The amount of each individual fine or cumulative fines in a month may not exceed 30 percent of the monthly wage of the worker punished. Also, the same violation may not be punished more than once. \textit{Shenzhen jing ji te qu he xie lao dong guan xi cu jin tiao li} [\textit{Regulations for the Promotion of Harmonious Labor Relations in the Shenzhen Special Economic Zone (SEZ)}] (promulgated by the Shenzhen Municipal Peoples’ Cong., Oct. 6, 2008, effective November 1, 2008), art. 16, http://www.npc.gov.cn/npc/xinwen/dfrd/guangdong/2008-10/08/content_1452415.htm.

\textsuperscript{17} LCL, art. 44(1–6).

\textsuperscript{18} LCL, art. 46(5).

\textsuperscript{19} LCL, arts. 45, 42(2).
without severance pay (or prior notice) is allowed by statute in six instances: (1) during the probationary period; (2) for material or serious breach of employer rules and regulations; (3) for a serious dereliction of duty or graft causing substantial damage to the employer; (4) where there is an employment relationship with another employer that materially affects the employee’s duties, which the employee will not rectify on the employer’s request; (5) the party’s use of deception or coercion to induce the making of a labor contract; (6) the employee’s criminal liability is being pursued.\(^\text{20}\)

_Probationary employees_, those not satisfying the “conditions of employment,” may be terminated without severance pay. To prove that there exists an employment relationship more than an “at-will” relationship, the employer would need to produce evidence, such as job advertisements and a job description, that the employee’s performance was measured and found wanting.

_Material breaches_ of employer rules and regulations center around two issues – whether the rules are valid and whether the breach was “material.” The issue of materiality may ultimately need to be decided in each case by the labor arbitration process. In a recent case in which materiality was found, an employee was dismissed for making excessive phone calls at work in violation of employer rules.\(^\text{21}\) The rule limited personal phone calls to one hour per week, but the employee was proven to have made more than twenty hours of such phone calls during a two-week period.\(^\text{22}\) In another case, a court in Ningbo, Zhejiang, held that the employer’s rules, first posted on a bulletin board in 2003, were invalid because the recently enacted LCL consultation procedures were not followed.\(^\text{23}\) Therefore, terminating the employee for excessive absences under the old rules was invalid.\(^\text{24}\)

A serious dereliction of duty or graft causing substantial harm to the employer can justify a summary termination without severance pay.\(^\text{25}\) Again, “serious dereliction” will be determined on a case-by-case basis in the labor arbitration process. But there is some guidance that suggests that a finding of “substantial harm caused to the employer” will generally be resolved in the employer’s favor, as legal rules state that determination is left to the employer and its

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\(^{20}\)_LCL, art. 39(1–6); items 1, 2, 3, and 6 are also contained in Labor Law, art. 25(1–4).


\(^{22}\)_Id.


\(^{24}\)_Id.; _LCL, art. 4_.

\(^{25}\)_LCL, art. 39(3).
internal rules. An illustration of the difficulty of determining issues under this section of the law is presented by a widely publicized Beijing case in which a management employee who was also a union leader was terminated for a “serious” violation; the employee caused the employer sufficient “harm” by failing to obtain a drinking water supply qualification, resulting in the employer having to pay a modest fine. The employee ultimately prevailed in labor arbitration, and the Beijing Shuiyi District Court upheld the arbitration, finding the employer had failed to meet its burden of proof on sufficient harm. Employee graft cases also fall under this provision or the above section on material breach of employer rules, and rulings will likely turn on intent and the amounts involved in the graft.

An employment relationship with more than one employer is not prohibited unless it adversely affects performance or is contractually limited, such as by a covenant not to compete, moonlighting prohibition, etc. This statutory provision could serve as an explicit duty of loyalty even on noncompetitive outside work done during the term of the labor contract, without the employer having to obtain agreement to it and pay for it.

The LCL prohibits the use of deception or coercion by an employee to induce the making of a labor contract. A recent illustration is the ruling in a case of an employee who was fired for resume fraud. In November 2007 the Beijing Chongwen District Court upheld the firing of a Japanese national who had falsified his resume. The court reportedly cited Article 18 of the Labor Law – the same provisions as those in LCL Article 39(5) – to rule that the

28 Id.
29 LCL, art. 39(3).
30 LCL, arts. 23, 24 (The covenant not to compete must be negotiated and paid for).
31 An action was found to lie in contract and tort; see Interesting Case on Non-Competition Clauses in Employment Contracts, http://lawprofessors.typepad.com/china_law_prof_blog/2008/06/interesting-cas.html.
32 LCL, art. 39(5).
34 Id.
Employer Work Rules, Discipline, and Termination

employee’s labor contract was invalid because the employee had committed fraud to enter into the contract. Because the contract was invalid as of the date of execution, the employer in this case arguably would not have been required to comply with statutory termination requirements, such as notifying the union of the termination. In another resume fraud case, Tsinghua University fired an assistant dean after discovering misrepresentations on his resume about his academic publications.35

Summary termination without severance pay is permitted where an employee’s criminal liability is being pursued.36 The implementing regulations further provide that the worker shall pay to the employer the liquidated damages stipulated in the employment contract if the worker has criminal liability pursued in accordance with the law.37 An illustrative case under the current law arose in March 2008; an employer’s summary termination was upheld at the labor arbitration level because the employee had been prosecuted and convicted for assault, but no criminal penalty had been imposed because of his crime’s minor nature.38 The court on appeal affirmed the arbitration decision, specifically citing LCL Article 39(6) as the basis for its decision.39

c. Termination by Employer with Notice and Severance Pay

Article 40 of the LCL authorizes the employer to terminate the employee on three grounds with thirty-day notice or with one month’s wages in lieu of notice. Article 46(3) requires severance pay in these three instances. Article 41 provides a fourth ground that allows termination with severance pay for qualifying mass terminations40 and requires thirty-day notice.41

The first ground allows termination (1) at the end of the set period of medical care for an illness or non–work-related injury, and (2) if the employee is unable to work at the original or employer-arranged work, which the employee is required to first attempt.42 Reimbursement for the costs of medical care

35 Vivian Wu, University Fires Fibbing Professor, SOUTH CHINA MORNING POST (March 28, 2006).
36 LCL, art. 39(6).
37 Lao dong he tong fa shi xi ze [Implementing Regulations for the Labor Contract Law] (promulgated by the State Council, Sept. 18, 2008), arts. 25, 26(5) (PRC).
39 Id. Note, LCL, art. 43 requires advance notice to the union as to the reason for the unilateral termination.
40 LCL, art. 46(5).
41 LCL, art. 41(1–4).
42 LCL, art. 40(1).
is available for three to twenty-four months, depending on the length of employment.43

The second ground that requires notice and severance pay is when an employee is determined to be incompetent even after training or adjustment of his or her position.44 There likely needs to be some factual basis for that determination, such as deficiencies in measured performance in view of announced job expectations, as well as evidence of attempts to retrain or reassign the employee.

The third ground allowing termination with notice and severance pay occurs when there is a major change in “objective circumstances relied upon at the time of the conclusion of the labor contract” that renders performance unperformable (impossible, force majeure, etc.), and after consultations, the parties cannot agree on amending the contract.45 Fact-intensive issues may arise on a number of issues ranging from new government restrictions, loss of licenses, relocations, reorganizations, transfers, mergers, and acquisitions; even loss of a major customer might fall under this category.46 In mergers, the surviving entity may offer a new labor contract that, on the employee’s consent, serves as an amendment to the original.47 Legal liabilities of employers in this area, as in many others, can be adjusted by legal provisions addressing certain contingencies, such as transfer or reassignment provisions.

The fourth ground allows for workforce reductions by mass terminations and requires payment of severance pay and thirty-day notice.48 Prerequisites for using this ground require a termination of twenty employees or 10 percent of the employer’s total workforce, prior explanation to the union or all employees, consideration of their opinions, and reporting the workforce reduction plan to government authorities.49 There are four qualifying circumstances: (1) restructuring pursuant to the Enterprise Bankruptcy Law; (2) serious difficulties in production or business operations; (3) changes in production, business methods, or technological innovations and, after amendment of labor contracts,

44 LCL, art. 40(2).
45 LCL, art. 40(3).
48 LCL, art. 41(1–4).
49 LCL, art. 41.
a continued need to reduce the workforce; and (4) a major change in the objective circumstances relied on at the time of the conclusion of the labor contracts, rendering them unperformable.\textsuperscript{50}

In meeting the above grounds, employers have some guidance at the national level, but most of the detailed requirements on terms such as “seriousness,” “hardship,” “objective economic circumstances,” and “unperformable” are left for local determination. In making those decisions, local governments consider such factors as the length of an employer’s economic downturn, its ability to pay debts, and other evidentiary documentation.\textsuperscript{51}

When reducing the workforce, certain employees receive preference for retention.\textsuperscript{52} They are employees (1) with relatively long fixed-term contracts, or (2) with open-ended contracts, or (3) who are the only family member to be employed and whose families have an elderly person or a minor for whom they need to provide.\textsuperscript{53} When rehiring within six months of mass terminations, the employer must first give notice to those terminated and, if all things are equal, give these employees preference in hiring.\textsuperscript{54}

d. Limits and Prohibitions on Unilateral Termination by the Employer

Employers face certain procedural \textit{limitations} before they may terminate an employee. Article 43 of the LCL requires the employer to provide advance notice to the labor union before any unilateral termination of an employee. The labor union has the right to respond, and the employer must consider this response and provide the union with written notification of how it will deal with the matter.\textsuperscript{55}

Employers are \textit{prohibited} from unilaterally terminating employees who fall under the following categories, even including those who can be terminated with notice and severance pay under Articles 40 and 41, discussed earlier\textsuperscript{56}: (1) those exposed to occupational disease hazards and who have not undergone a predeparture occupational check-up or are suspected of having contracted an occupational disease and are being diagnosed or under medical observation;

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{50} LCL, art. 41(1–4).
\item \textsuperscript{52} LCL, art. 41.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} LCL, art. 41.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} LCL, art. 42 (notice the prohibition does not prohibit terminations under art. 39).
\end{itemize}
\end{footnotesize}
those confirmed as having lost or partially lost their capacity to work because of an occupational disease contracted or a work-related injury sustained with the employer; (3) those who have contracted an illness or sustained a non–work-related injury, and the set period of medical care has not expired; (4) those who are pregnant, confined, or nursing; (5) those working for the employer continuously for not fewer than fifteen years and are fewer than five years away from legal retirement age; and (6) those with other circumstances stipulated in laws.\textsuperscript{57}

3. Termination by the Employee

An employee’s employment relationship may come to an end in several ways. It may come by employer termination, mutual agreement, end of the labor contract, or by the employee’s unilateral termination through resignation. Under the LCL, the employee must usually give thirty-day notice to the employer before unilaterally terminating employment.\textsuperscript{58} An exception to the notice requirement occurs where the employer uses violence, threats, or unlawful restrictions of personal freedom to compel a worker to work or if a worker is ordered by the employer to perform dangerous operations that threaten his or her personal safety.\textsuperscript{59}

Grounds for an employee’s unilateral termination include failure by the employer to (1) provide the contracted labor protection and working conditions, (2) pay full compensation on time, (3) pay social insurance premiums, (4) the employer provides invalid rules, harming the employee’s rights and interests; (5) there is an invalid labor contract under Article 26 (deception, disclaimer of liability, violation of laws); and (6) other circumstances exist in which laws permit employee termination.\textsuperscript{60}

4. Liabilities: Remedies and Severance Pay

Employers’ liabilities on termination of the employment relationship, as discussed earlier, will vary for a variety of reasons. The law requires the employer to issue a proof of termination within fifteen days to effectuate the transfer of the employee’s file and social insurance account.\textsuperscript{61} For unlawful terminations,
the employer must continue the employee, if requested (in effect, reinstatement); if there is no request or it is not possible to continue the employee, the employer is liable for damages. Where the employer terminates or ends the contract in violation of the law, there is employer liability for damage of “twice the rate of the severance pay provided in Article 47.” Even without termination, the employer may be liable for damages; for example, where there is a failure to pay proper compensation for wages, overtime, or severance pay, damages must be paid to the employee “at a rate of not less than 50 percent and not more than 100 percent of the amount payable.”

Employer liability for severance pay may arise for different reasons on the ending of the employment relationship. As discussed earlier, the LCL provides for severance pay in the following circumstances: (1) per Article 38, employee termination; (2) per Article 36, mutual termination; (3) per Article 40, employer termination with notice; (4) per Article 41, first paragraph, mass reduction of the workforce; (5) per Article 44(1), fixed-term contract ending; (6) per article 44(4–5) contract ends per bankruptcy, license revocation, or early liquidation; and (7) other circumstances specified in laws.

The LCL specifies the amount of severance pay to be awarded. An employee is entitled to severance pay based on the number of years worked with the employer at the rate of one month’s wage for each full year worked, with caps placed on high-earning employees (those earning more than three times the average monthly wage of employees in the area). The monthly wage is defined as the average monthly wage for the prior twelve months; time worked between six months and one year shall be counted as one year. Some variations occur in the case of permitted terminations for injury or illness.

Employees may also be liable for damages for violations of the LCL. Under Article 90, if an employee terminates his or her labor contract in violation of the LCL and doing so causes the employer to suffer loss, the employee will

62 LCL, arts. 48, 86–9.
63 LCL, art. 87.
64 LCL, art. 85.
65 LCL, art. 46(1–7).
66 Id.
67 LCL, art. 47.
68 Id.
69 Id.
Case IV

Facts:

In November 2007, Li applied for a job with a local bank (the Bank). After interviews and a physical examination, she was accepted and signed a one-year labor contract with the Bank starting on March 1, 2008. The labor contract had a probationary period of three months.

On May 12, 2008, the Bank published a notice on its website announcing that Li had been fired on the ground that Li was found physically unfit for the job.

Li first applied for arbitration and when an arbitration award in the Bank’s favor was delivered, she brought a lawsuit in the local court.

During the trial, the Bank alleged that Li had had one kidney removed and failed to disclose this fact during interviews and the physical examination. Li’s physical examination form stated “Not Handicapped” in the column of “Past History”, “Normal” in the column of “Celiac Organs”, and “Healthy” in the column of “Examination Opinions”. However, in May someone reported to the management that Li had an operation in 2006, in which the right kidney of hers was removed. On May 6, the Bank sent Li to Hospital S to have an ultrasonic examination. The result proved that Li’s “right kidney has been removed, and left kidney is normal”.

The Bank argued that Li had failed to meet the employment standards in the “Interim Provisions on Recruiting Workers or Cadres, Accepting Persons and Transferring Probationary Employees into Full-time Ones” issued by the provincial bank (the “Interim Provisions”), which required that new employees to be “healthy, and have no serious disease or handicap”. According to Article 39 of the Labor Contract Law, if an employee is found in the probationary period to fail to meet the employment standards, the employer shall be entitled to unilaterally terminate the labor contract with the employee.

Li argued that the lack of a kidney did not seriously harm the body once the renal function was normal. The diagnosis of Hospital S proved that her renal function was normal and she could work normally. Li worked as an accountant for the Bank, and the lack of a kidney would not affect her work at all. Moreover, regarding the physical examination policies of the state, the “Physical Examination Standards for Regular Institutions of Higher Education to Recruit Students” permit anyone who lacks one kidney to take part in the examination for any major except geological majors. In view of the aforesaid reasons, Li pleaded the court to revoke the Bank’s decision on terminating the labor contract with her, and to order the Bank to continue performing the labor contract.
Questions:

1. How would you argue for Li if you were her lawyer?
2. Would the following fact make any difference: the bank’s decision had instead been based on the finding that Li had submitted in her application a fake certificate of graduation of a famous University while she had only studied for two years in a local college?

Case V

Facts:

In January 2007, Wu signed a three-year labor contract with an IT company (the Company). According to the contract, if Wu’s performance evaluation was the lowest among all the employees for two consecutive years, the Company could terminate the labor contract. Wu’s salary was set at 6000 per month.

In March 2007, the Company announced a new policy that all employees would be evaluated every quarter, and the Company could terminate the labor contract with anyone whose end-of-the-year performance evaluation was among the lowest five for two consecutive years (“末位淘汰”). This policy was soon added to the Employee Handbook.

In both 2007 and 2008, Wu’s annual performance evaluation was the lowest in the Company. During the employees’ meeting at the end of 2008, the Company decided to dismiss all workers whose performance was among the lowest five for the previous two years. In February 2009, the Company sent a written notice to Wu and informed him that his labor contract was terminated immediately.

In early March, Wu applied to the local Labor Dispute Arbitration Committee for arbitration.

Questions:

1. If Wu’s claim is the Company should continue the labor contract with him, what would be the basis for his claim? What would be your counter-arguments if you were the Company’s lawyer?
2. If Wu no longer wishes to continue to work for the Company, would he be entitled to any kind of payment from the Company?
Collective Labor Contracts and Collective Negotiations

1. Trade Unions in China

The trade union in China is the All China Federation of Trade Unions (ACFTU), and all unions must be affiliated with it. It is regulated by law, as is the process of negotiating collective contracts. It is a quasi-governmental social organization with multiple functions, one of which is to further government goals. Its policies are designed to promote economic development and enterprise interests as well as labor protections. In recent times, these policies appear to be changing, certainly from its original approaches, to be more aligned with employee interests.

Establishing a local labor union in China is a relatively straightforward process: 25 employees join the union and, with the approval of a higher-level union, initiate its establishment by making a formal request of the employer. The Trade Union Law allows an employee, in some circumstances, to retain union membership even after the original employment relationship has ended.

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1 Trade Union Law, art. 11.
3 Qi ye gong hui gong zuo tiao li (Shi xing) [Provisions on the Work of Enterprise Trade Unions (for Trial Implementation)] (promulgated by All China Federation of Trade Unions, July 6, 2006), art. 10 ("An enterprise with 25 or more trade union members shall establish a trade union committee. And an enterprise with less than 25 trade union members may separately establish a trade union committee, or may jointly establish a grass-roots trade union committee with such similar enterprises according to the region or industry"); Trade Union Law, art. 11.
4 Trade Union Law, art. 12 ("Any organization and individual shall not annul or merge trade unions randomly. When an enterprise ceases to exist and when an institution or organ is abolished, the grassroots trade union organization of that enterprise, institution, or organ shall be annulled accordingly, and the annulment shall be reported to the next higher trade union. The membership of members to trade unions that are annulled according to provisions of..."
As it seeks to find a balance between economic development and labor protection, the ACFTU has unionized foreign-owned companies, such as Wal-Mart, McDonald’s, and KFC, and it continues to seek expansion of the union’s presence, including in the Fortune Global 500 companies. Even American unions are seeking to cooperate with China’s union; in addition to meetings of international union delegations from the United States with Chinese unions, the Los Angeles County Federation of Labor, AFL-CIO, on July 5, 2007, signed an agreement with the Shanghai Trade Union Council (an affiliate of ACFTU) to provide mutual assistance, especially in organizing and bargaining with multinational companies in Shanghai. In an attempt to expand its membership, the ACFTU recently amended its Labor Union Charter to allow membership by migrant workers.

The trade union’s role is still evolving. The path was clearer in the early days of the People’s Republic of China, when “within the state socialist system, the interests of both management and the trade union were supposed to be identical and their identification was reinforced by the subordination of both to the Party-state.” Although the Chinese Communist Party (CCP) in recent years has stepped back somewhat from seeking to directly influence management’s micro-market decisions, it continues to maintain a close policy relationship with the ACFTU. Even though the union is set up as an independent and autonomous body, as is the All China Women’s Federation, it is maintained as a quasi-governmental entity.

the preceding Paragraph may be reserved and the specific administrative measures shall be formulated by ACFTU”).


8 Simon Clarke, Chang-Hee Lee and Qi Li, Collective Consultation and Industrial Relations in China, BRITISH J. INDUSTRIAL RELATIONS 241 (June 2004).

9 Trade Union Law, art. 4.
During China’s dramatic economic development in the past three decades, the ACFTU has emerged as an organization that under law plays “a dual role in the transition towards a market economy.” In that dual role of promoting both employee interests and economic reforms and social stability, there has been some internal discussion, if not struggles, between those in the union who want the ACFTU to be more active in the advocacy and representation of the employees’ interests and those in the CCP who want the union to be more responsive to the needs of society for social stability. In practice, some observers feel the ACFTU’s current predominant role in the workplace is to fulfill a management function.

Existing alongside labor unions are Worker’s Congresses, which originally were established in SOEs to provide workers with democratic management; they are not particularly common in private enterprises. When present, they can be one more player in the complex negotiations relating to the welfare of the employees and the enterprises. According to regulations promulgated in 1986, each Worker’s Congress is supposed to meet at least once a year, with its executive body, usually the trade union, implementing its functions.

These functions include review and approval or disapproval of management’s plans, appointments, and decisions. However, the Worker’s Congress’s efficacy in practical terms is suspect, and post-1979 history and rapidly changing governance structures in China seem to have reduced its usefulness. For example, the current Corporation Law has greatly weakened the power and role of Worker’s Congresses, reducing them to merely exercising “democratic management” and “democratic supervision.” The former “legal” functions of the Worker’s Congress to appraise and supervise the cadres and elect the director of the enterprise have now been assumed by a corporate board of directors and supervisory committee. Whether this will be a fatal blow to the Worker’s Congresses, at least in SOEs, remains to be seen, as China seems determined to keep the entity alive and in 2008 released new draft regulations concerning them. In addition, its role (and possibly the role of the union,

10 Clarke, supra note 8.
13 Gong si fa [Company Law] (promulgated by the 18th session of the Standing Comm. of the Tenth NPC, Jan. 1, 2006), art. 16 (PRC).
14 Id. art. 16, 55.
15 Taylor et al., supra note 11.
16 Draft regulations on Employee Representative Congresses (ERCs) were released by the ACFTU on September 10, 2008, which will be sent to the State Council for consideration
which is often connected closely to the Worker’s Congress) was enhanced by the Company Law, which authorized participation by employee representatives on supervisory boards.\textsuperscript{17} The 2008 Labor Contract Law empowers an “employee representative congress” and a labor union in the company to deal with the employer on employee interests, such as the formulation of employer rules.\textsuperscript{18}

The process and results of collective negotiation vary widely. In 2006, the ACFTU reported it had negotiated more than 862,000 collective agreements covering 112.5 million workers.\textsuperscript{19} Because of policy changes in recent years, some collective contracts embody more than the usual statutory protections and include wage increases and contractual rights and benefits. Therefore, dealing with the union is an individual endeavor for which any but general patterns are difficult to describe.

Collective contract obligations and procedures under new laws follow the 1994 Labor Law, the 2004 MOLSS Provisions on Collective Negotiations, and the 2006 ACFTU’s trial implementation of the Provisions on the Work of Enterprise Trade Unions, which call for “consultation.”\textsuperscript{20} The 2008 Labor Contract Law\textsuperscript{21} and 2008 Law on Labor Mediation and Arbitration\textsuperscript{22} have also brought changes, confirming and enhancing the role of the union in negotiation of collective contracts and particularly in the dispute resolution mechanisms. Of particular interest to employers is LCL Article 51, which states that, where there is no union, the employer shall conclude a collective


\textsuperscript{17} Company Law, art. 52.
\textsuperscript{18} LCL, art. 4.
\textsuperscript{22} Lao dong zheng yi tiao jie zhong cai fa [The Law on Labor Dispute Mediation and Arbitration] (promulgated by the 31st session of the Standing Comm. of the Tenth NPC, Dec. 29, 2007, effective May 1, 2008), arts. 4 8, 10,19 (PRC).
contract with an employee representative under the guidance of higher-level unions.

A newly developed feature is the shifting emphasis from enterprise-level negotiations to *industry-wide* or *area collective contracts* in industries such as construction, mining, catering services, etc., within areas below the county level (LCL, Art. 53). Article 54 stipulates that these contracts are binding on employers and workers in the industry or in the area in the locality concerned; this provision could allow collective contracts to cover competing employers in the same industry located in the same area. Reportedly, the ACFTU is allowing companies with branch offices to establish head office unions, with the power to represent all employees in the company – in effect creating a nationwide union for that company.\(^\text{23}\)

The 2008 Labor Contract Law arguably has enhanced the union’s dominant status as the representative of the workers in collective negotiations, in arbitration, and in the policing and enforcing of this new law. However, some observe there is nothing new in this rhetoric and that this law brings little change to labor relations, arguing, for example, that Wal-Mart and others took little risk when they embraced the labor union. Others argue there are signs that unions at Wal-Mart and in China may be more than hollow shells and may be having a real effect in the workplace.\(^\text{24}\)

**a. Role of the Union**

In fact, Chinese labor law requires the ACFTU to serve two masters. In addition to representing “the legitimate rights and interests of the workers,”\(^\text{25}\) it must also assist the government and the CCP in “upholding the overall rights and

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\(^{25}\) Trade Union Law, art. 2.
interests of the whole nation.” LCL Article 56 explicitly states that the union may take a labor dispute to arbitration or the court and otherwise act as an advocate in termination cases (LCL, Art. 43) and other disputes.

As to the union’s advocacy role on behalf of the employees, the ACFTU is to provide guidance and assistance to workers on obtaining individual labor and collective contracts and to advance workers’ interests by securing employers’ compliance with a variety of health, safety, and labor laws. In the event of a work stoppage or slowdown, the ACFTU’s responsibility is both to represent the employees’ interests and to assist the employer in properly dealing with the matter to restore the normal order of production; thus, in effect, mediating solutions to the dispute. The union maintains this bifurcated loyalty by serving on intra-enterprise mediation committees and the tripartite Labor Arbitration Commissions, both of which seek to resolve disputes over employees’ labor rights. While conducting its work “independently,” the ACFTU is admonished to “concentrate on the focus of economic construction, adhere to the socialist road,” and, as its basic responsibility, “safeguard the rights and interests of workers.” Additionally, Article 7 of the Trade Union Law requires that “trade unions should mobilize and organize employees to participate in the economic construction positively, to complete production duties and working duties with great efforts. Trade unions shall educate employees to build disciplined employee groups.”

2. Historic Obstacles to Collective Negotiations

As China moves forward in implementing labor reforms, including engaging in collective contract negotiations, it also carries with it the Chinese characteristics of the past. This section focuses on the period before the passage of the 2004 Collective Contract MOLSS Provisions. A study conducted by Clarke and colleagues of the collective negotiation process in SOEs, private enterprises, and FIEs pointed out some of its more persistent deficiencies, some of which have been addressed by the 2004 Provisions. First, with regard to process, the Clarke study observed that, although the system of collective consultation is a means for the state to intervene in enterprises, it does not

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26 Id. art. 6; Provisions on the Work of Enterprise Trade Unions (for Trial Implementation), art. 18(1–10).
27 Trade Union Law, arts. 20–25;
28 Id. art. 27.
29 Labor Law, arts. 80–81; Law on Labor Dispute Mediation and Arbitration, arts. 10, 19.
30 Trade Union Law, art. 4.
31 Id. art. 6.
32 Id. art. 7.
provide the framework for a new industrial relations system. It continues to be essentially an “anachronistic system of ‘workers’ participation in management’ and a (rather ineffective) adjunct to the juridical regulation of labor relations, providing a means to remind employers and trade union officers of their legal obligations . . .”

With regard to content of the collective contracts, the Clarke study concluded,

> employers remain reluctant to incorporate any substantive detail in the collective contract, so that the contract adds little or nothing to the existing legal regulation of the terms and conditions of employment. At best, the collective contract provides a means of reminding employers of their legal obligations and monitoring the implementation of labor legislation in the workplace.

Typically, there are three categories of clauses in collective contracts in SOEs: The first deals with principles and formalities, such as who are the parties, the second includes the clauses to be implemented by the parties, and the third category deals with commitments of the parties and their duration.

One study showed that the second category of clauses took up an average of about 70 percent of the total number of clauses, with more than 60 percent of these clauses defined by the Labor Law (usually a duplication), 20 to 30 percent made in reference to that law (e.g., time schedule for implementing certain required female medical examinations), and about 10 percent dealing with subjects relating to improvement of employee benefits.

Lastly, the role of the trade union in China has drawn much attention. The Clarke study argues that it does not serve as a real advocate for employee interests, noting that “the predominant functions of the trade union at the workplace still tend to be management functions.” Clarke’s study describes its function as follows:

> “take economic development as its central task,” encouraging workers to increase productivity, enforcing labor discipline and conducting extensive propaganda on behalf of management. “Protecting the rights and interests of employees” is at best interpreted as monitoring managerial practice to ensure that it conforms to all the relevant laws and regulations, and implementing the social and welfare policy of the enterprise – visiting sick workers, dealing with personal problems, distributing benefits, organizing picnics and arranging celebrations.

33 Clarke, supra note 8, at 251.
34 Id. at 250.
35 Taylor, supra note 11, at 193–4.
36 Id.
37 Clarke, supra note 8, at 242.
38 Id.
Part of the explanation why trade unions serve management functions is provided by who typically serves as a trade union official:

Trade union officers are drawn largely from the ranks of management. A full-time trade union president is paid by the employer and normally enjoys the status (and salary) of a deputy general director of the company; the personal careers of union leaders revolve around the positions of party cadre, union leader and enterprise manager; they are usually members of the Board of Directors and/or the Supervisory Board of the company; and they (rightly) regard themselves as members of the senior management team. Whether or not there is a formal election of the trade union chair, the latter was normally appointed by management [until new limitations were issued by the ACFTU in 2008].

In prior years, the CCP would have played a more direct and active role in ensuring that the employer and union worked “harmoniously,” but in recent years the CCP has been working more indirectly, usually through the trade union. In that respect, the Clarke study shows that “at least five of the 12 trade union presidents also held the post of party secretary or deputy party secretary.”

This ambiguity of who is the employer and who is the union (though not necessarily who is the boss) is further complicated by China’s legacy of SOEs being units of larger, integrated bureaucracies in the planned economy, the periodic use of Worker’s Congresses, and the absence of unions in many enterprises across China. The traditional SOEs used “employers” and trade unions as agents for controlling bureaucratic entities of an economic plan. With economic reforms and new laws, legal responsibility is increasingly fixed on the “employing unit” – the employer. However, at the enterprise level, there is little meaningful influence to prevent the union and the employer from wearing each other’s hats and in the process basically becoming the same voice.

Another emerging feature of collective negotiations is the introduction and, since the 2008 LCL, the institutionalization of industrial unions. The many small to medium-sized FIEs, privately owned enterprises (POEs), and town and village enterprises (TVEs) in the new socialist market economy employ a large number of workers coming from rural or less industrialized areas of China, and as is well documented, their labor rights are exploited all too often. The unionization rate in these enterprises is very low, and there is

39 Id. at 242–3. The ACFTU issued measures in 2008 limiting human resource managers, other senior management officials, foreign nationals, and close relatives from being union president; candidates must be approved by the upper level labor union, which can also nominate a nonemployee candidate. The Trial Measures for Election of Enterprise Labor Union Chairman (ACFTU August 1, 2008).
40 Id. at 243.
41 Id. at 248.
little expectation of labor law enforcement, let alone negotiation of collective contracts. It has been suggested that these largely overseas-funded enterprises do not necessarily resist collective negotiations; rather, they see unions and negotiations as irrelevant and the government and the CCP as either reluctant or impotent to induce the enterprises to sign labor agreements.\(^\text{42}\) The ACFTU has taken notice of this perception, and as early as 1996 in a document issued jointly by the then-Ministry of Labor, the ACFTU, the SETC, and the China Enterprise Confederation, approval was given for the use of “professional or industrial unions” of the primary trade union to negotiate collective contracts on behalf of the employees at these various enterprises.\(^\text{43}\) This was further confirmed in the LCL, Article 53.

Pursuant to this policy of using industrial unions, the ACFTU has reportedly established these types of local trade union organizations in twenty-five provinces since 1996.\(^\text{44}\) The agreements made by these industrial unions cover all of the private enterprises in one district or industrial sector. The union signs the agreements with the “employers’ associations” at the same levels. These associations are described as “established under the relevant government departments rather than genuine employers’ organizations.”\(^\text{45}\) Clarke’s study, written before the 2004 Provisions, indicates that in at least one area, Chengdu (where there were some thirty agreements), there has been an increase in union membership following the agreements.\(^\text{46}\) An added bonus for workers in Chengdu is that the city-level ACFTU had “successfully been taking cases to the City Arbitration Committee when the employers had failed to abide by the agreement.”\(^\text{47}\) A downside noted was that this effort worked because of government intervention (as employers’ associations were local government

\(^{42}\) Id. The new LCL and the strengthened labor arbitration system will likely have employers paying closer attention to legal requirements, as the penalties for violation have certainly become meaningful.

\(^{43}\) Taylor, supra note 11, at 196. The Trade Union law states, “[E]nterprises of some industries or industries of similar nature may set up national or regional industrial unions as circumstances require.” Trade Union Law, art. 10.


\(^{45}\) Clarke, supra note 8, at 249.

\(^{46}\) Id.

\(^{47}\) Id.
authorities supervising local private enterprises) rather than because of voluntary regulation of collective negotiations by private employers.48

Some positive aspects were observed in the pre-2004 collective negotiation process. The “existing system provides an effective method of soliciting the reactions of employees to management proposals”; however, because of the great amount of discretion a union has, the ability of employees to have an effective channel to articulate their own aspirations was more limited.49 In some cases involving large FIEs who wished to be “good citizens,” such as Beijing Jeep Ltd., Babcock & Wilcox Company, and Shanghai Volkswagen Automotive Company Ltd., comprehensive collective contracts were negotiated, though they were not necessarily prompted by the laws.50 Willing unions also demonstrated their abilities “to design sophisticated negotiation strategies involving high, medium and bottom lines for their wage negotiation.”51

The 2001 Trade Union Law protects the union and the employees against improper interference with the rights granted under this law, including the rights of employees and trade unions to engage in lawful union activity.52 It also provides remedies for certain violations, discussed in the law on the fair treatment of employees.53 The 1994 Labor Law obligates the trade unions at various levels to “safeguard the legitimate rights and interests of the workers and exercise supervision over the employers with regard to the implementation of labor discipline and the laws and regulations.”54 The 2006 Trial Regulation on the Work of Enterprise Trade Unions reiterates the grant of collective negotiation rights to the union, and this grant, combined with the procedural rights and duties for negotiation outlined in the 2004 regulations in the next section and the express permission to engage in industry-wide negotiations provide in the 2008 Labor Contract Law, strongly defines the intended future role of the ACFTU.55

3. Current Law on Collective Negotiations

The fifty-seven new provisions of the 2004 Collective Contract MOLSSSS Provisions, as divided into eight chapters and building on the 1994 Labor Law,

48 Id.
49 Id. at 245.
50 Taylor, supra note 11, at 202–3.
51 Id. at 203.
52 Trade Union Law, art. 3.
53 Id. arts. 50–3.
54 Labor Law, art. 88.
55 Provisions on the Work of Enterprise Trade Unions (for Trial Implementation), art. 31; LCL, arts. 51, 56, 78.
and as confirmed in the 2008 LCL in articles 51–56, provide the current legal framework on the growing development of collective negotiations:

**a. Coverage and Purposes**

The Provisions are enacted in accordance with the Labor Law and the Trade Union Law. Article 56 emphasizes the union’s authority by subjecting employers to the relevant laws and regulations if they refuse to engage in collective negotiation requirements. These requirements include “regulating the behavior of collective negotiation,” “signing of the collective contract,” and “protecting legal rights and interests of laborers and employing units.” All “enterprises and public institutions that practice commercialized management within the P.R.C” are covered by the Provisions. This broad coverage parallels the coverage of employers and employees under China’s individual labor contract system, but the collective contract supersedes the individual contract if inconsistencies arise.

**b. Negotiating Representatives**

There shall be legal negotiating representatives of equal numbers (at least three) on each side and each with one chief representative. The representative in the “employee party” shall be selected by the trade union of the unit (or, if none, then by democratic recommendations as agreed on by one-half of the staff in that unit). The chief representative is the chair of the trade union unless that chair by written delegation selects an alternative (or, if a union does not exist, the chief representative shall be elected from the negotiating representatives through democratic means).

In a significant change from past practice, Article 24 of the 2004 Provisions stipulates that “negotiation representatives of the employing unit and those of

57 See id. art. 56.
58 Id. art. 1.
59 Id. art. 2.
60 Labor Law, arts. 2, 16–32; LCL, art. 2. Regarding inconsistencies, see Labor Law, art. 35; LCL, art. 55.
62 Id. art. 20. The original text says that the representative shall be appointed by the existing union of the unit. It does not appear that the appointed representative has to pass the simple majority vote. The employer has a duty to recognize the existence of such a bargaining unit by making an affirmative response to any negotiation request. Id. art. 32. See also Trade Union Law, art. 10.
the staff shall not act as each other’s representatives.” This would appear to foreclose an employer designating a trade union official as a negotiating representative of an employer, even where that official is a managerial employee of the employer, a scenario all too familiar under earlier practices. The employer otherwise is free to select its own negotiating representatives.

An interesting provision, Article 23, permits both sides to select “professional personnel” (Zhuanye Renyuan) to act as the negotiation representative. However, the number of such professional personnel may not exceed one-third of each side’s representatives, and no person outside one’s own unit can act as chief representative.

Certain traditional responsibilities and functions, such as participation and sharing information, are assigned to the negotiating representatives. Additionally, they are called on to “safeguard the normal order of work and production and shall not adopt any action of threatening, buying popular support and deception.”

Employee representatives’ terms of service are determined by the represented party, and their employment tenure is protected during that term against the employer’s retaliation by terminating the representative’s labor contract. If the representative’s labor contract were to expire during the representative’s tenure, Article 28 automatically extends the contract up to the completion of his or her representative obligation. Exceptions exist where the representative seriously violates employer rules or other employment-related duties or has been investigated for criminal violations.

c. Scope of Negotiable Subjects

References to the delineated subjects for negotiation are found in Article 33 of the Labor Law and Articles 3 and 8 to 18 of the 2004 Provisions. Article 3 of the Provisions describes the content of the collective contract as follows:

[W]ritten agreement signed through collective negotiation . . . concerning labor remuneration, working time, rest and holiday, labor, security and sanitation, professional training, and insurance and welfare in accordance with the stipulation of

64 See id. art. 24.  
65 ld. art. 21.  
66 ld. art. 23.  
67 ld. LCL, art. 51.  
68 ld. art. 25.  
69 ld. art. 26.  
70 ld. art. 22.  
71 Provisions on Collective Contract, art. 28.  
72 ld.
laws, regulations and rules; the special collective contract as set forth refers to the special written agreement signed between the employing unit and employees of that unit, in accordance with laws, regulations and rules, concerning the content of collective negotiation.\textsuperscript{73}

Article 8 includes the scope of negotiable subjects that can be covered in the collective contract, listing some fifteen \textit{categories} relating to employment.\textsuperscript{74} Articles 9 to 18 then list examples under each category.\textsuperscript{75}

d. Labor Bureau Supervision of Collective Negotiations

General provisions in Chapter 1 provide the principles and supervision for the conduct of negotiations. Article 4 states that negotiation shall mainly adopt the form of a consultation “conference.”\textsuperscript{76} Conduct during negotiations shall observe the following principles: act legally, respectfully, honestly, and fairly; consult, cooperate, and collaborate equally and in consideration of legal rights; and finally, “no drastic behavior is allowed.”\textsuperscript{77}

Responsibility for supervising the collective negotiation process and the “signing, reviewing and performing” of the signed collective contracts or special collective contracts shall be with the Labor Bureaus above the county level.\textsuperscript{78} Under the \textit{2008 LCL}, Article 54, a completed contract should be submitted to the Labor Bureau and, unless it is objected to within fifteen days, it shall become effective. For any unresolved disputes that occur during the collective negotiations but prior to the contract signing, either or both parties may submit a written application to the Labor Bureau requesting resolution.\textsuperscript{79} The Labor Bureau may also initiate resolution procedures, such as mediation, on its own as necessary. The procedures in most cases should be ended within thirty days of acceptance of the case by the Labor Bureau.\textsuperscript{80}

\textsuperscript{73} \textit{Id.} art. 3 (emphasis added). A “special agreement” usually refers to a wage agreement or other agreement on a specific topic. \textit{LCL}, art. 52 stipulates the topics can include “work safety and hygiene, protection of the rights and interests of female employees, the wage adjustments mechanism, etc.” Article 4 again distinguishes between signing the “collective contract or special contract,” and Article 6 states both are legally binding on the employer and employees. \textit{Id.} arts. 4, 6.

\textsuperscript{74} Provisions on Collective Contract, art. 8. \textit{LCL}, art. 51 lists “labor compensation, working hours, rest, leave, work safety and hygiene, insurance, benefits, etc.” as the subjects for collective negotiations.

\textsuperscript{75} \textit{Id.} arts. 9–18. \textit{LCL}, art. 51.

\textsuperscript{76} \textit{Id.} art. 4.

\textsuperscript{77} Provisions on Collective Contract, art. 5.

\textsuperscript{78} \textit{Id.} art. 7; \textit{see also} \textit{id.} arts. 42–8.

\textsuperscript{79} \textit{Id.} art. 49.

\textsuperscript{80} \textit{Id.} art. 52.
Bureau, at the conclusion of its process, formulates an Agreement on Dispute Resolution. \(^{81}\) Thereafter, the Labor Bureau and the parties must sign, indicating their agreement to be bound by that document before it is effective. \(^{82}\) Items in the agreement for which there was no unanimous resolution shall be carried on with continuous consultation.

Separate dispute resolution provisions protect the rights of individual employees who are also negotiating representatives against improper termination \(^{83}\) and modification of their normal work status. \(^{84}\) Such disputes are to be resolved by the local labor arbitration commission. \(^{85}\) The same forum is used to resolve any rights disputes that arise out of the performance of the concluded collective contract. \(^{86}\)

e. Collective Negotiation Procedures

Within the general rules of convening a conference, wherein the meetings take place following prescribed rules of conduct conducive to negotiation, the Provisions specify certain other procedures. To initiate the process, Article 32 states that a party to the collective negotiation may make written request of the other party, and a written response must be given within twenty days; this request to negotiate may not be refused without proper reason. \(^{87}\) The “preparation phrase” then calls on parties to familiarize themselves with the laws and regulations concerning collective negotiations and with collective recommendations from the employer and employees and to identify topics for discussion during negotiation. \(^{88}\) After a location, time, and recorder are chosen, the parties are prepared to begin. \(^{89}\)

The collective negotiation process begins with each chief representative in turn addressing the agenda and procedures of the meeting. Thereafter, each puts forward concrete proposals to which the other side responds, and discussion ensues regarding the proposals. \(^{90}\) During the negotiations, the chief representatives shall make summaries of the recommendations. Those unanimously

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\(^{81}\) *Id.* art. 53.

\(^{82}\) *Id.* art. 54. Thus, the Dispute Resolution Agreement appears to remain entirely voluntary.

\(^{83}\) *Id.* art. 28.

\(^{84}\) *Id.* art. 27.

\(^{85}\) *Id.* art. 29.

\(^{86}\) *Id.* art. 55.

\(^{87}\) See Provisions on Collective Contract, art. 32.

\(^{88}\) *Id.* art. 33.

\(^{89}\) *Id.*

\(^{90}\) *Id.* art. 34.
agreed on shall be incorporated into the collective contract or special collective contract and signed by the chief representatives of both parties. In case there is no agreement on issues, the negotiation may be suspended, and the parties shall negotiate the next meeting place and content.

To conclude the collective contract, the agreed-on draft is presented to the employees for discussion. Thereafter, a two-thirds quorum must be present, and the draft must be approved by a majority of the Worker’s Congress representatives or a majority of all the employees (if a Worker’s Congress has not been established). Thereafter, the chief representatives of each side sign the contract, which is usually of one to three years in duration but can be extended by request and agreement of the parties. The contract, though binding on the parties, may be modified by the parties or altered or terminated by certain conditions that cause an inability to perform, such as bankruptcy, force majeure, or conditions in the agreement.

The final step is to submit (register) the concluded collective contract to the Labor Bureau for review and examination. It is examined to ensure compliance with legal requirements. If there is an objection by the Labor Bureau, the parties are notified and the contract is referred back to them; then they can renegotiate or re-sign it, absent those portions. In practice, there seems to be little or no referral back to the parties. In the case of no objection by the Labor Bureau, the contract is effective within fifteen days of receipt of the document. The law requires the contract to be promulgated “by the negotiation representative” to all employees on the day it becomes effective.

f. Duties of Proper Conduct for Collective Negotiations

The regulatory framework of collective negotiations is set up to be monitored by a government agency – the Labor Bureau and its division – with responsibility

91 Id. art. 34(4).
92 Id. art. 35.
93 Id. art. 36.
95 Id. arts. 39–41.
96 Id. art. 42.
97 Id. art. 44.
98 Id. art. 46.
99 Clarke, supra note 8, at 246.
100 Provisions on Collective Contract, art. 47.
101 Id. art. 48.
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to supervise and to resolve disputes.\textsuperscript{102} The principles of conduct can be organized into three categories.

1. \textit{Fair and consultative representation:} The negotiating representatives must “participate” in the negotiations\textsuperscript{103} after having consulted with employees regarding negotiating topics\textsuperscript{104} and must accept inquires from their constituency, publicize the status of negotiations, collect employees’ opinions,\textsuperscript{105} and provide information concerning collective negotiations.\textsuperscript{106}

2. \textit{Negotiating duty:} The negotiating representative must be legally authorized\textsuperscript{107} to conduct negotiations on behalf of the represented party’s interests, must “not refuse” to respond to requests to engage in collective negotiations,\textsuperscript{108} and must “participate.”\textsuperscript{109} He or she must also provide “information” concerning collective negotiations\textsuperscript{110} and determine the time and place for negotiations.\textsuperscript{111} The employer is prohibited from refusing to abide by the collective negotiations requirements without “proper reason,”\textsuperscript{112} and a violation of said provision is expressly subject to the Trade Union Law, which confirms in Article 53(4) that “[r]ejecting consultation on an equal footing without justifiable reasons” is a violation.\textsuperscript{113} Subjective measures of the conduct during negotiating include “honesty,” “keeping promises,” “fair collaboration,” and “consideration of legal rights and interests for cooperation.”\textsuperscript{114}

The Provisions are based on and incorporate those parts of the Labor Law and the Trade Union Law that also set forth standards on negotiating conduct as well as the fair treatment of employees.\textsuperscript{115} Furthermore, Article 25(6) of the Provisions obligates the negotiating representatives to those other obligations stipulated by laws, regulations, and rules.\textsuperscript{116}

\textsuperscript{102} \textit{Id.} art. 7.
\textsuperscript{103} \textit{Id.} art. 25(1).
\textsuperscript{104} \textit{Id.} art. 33(2).
\textsuperscript{105} Provisions on Collective Contract, art. 25(2).
\textsuperscript{106} \textit{Id.} art. 25(3).
\textsuperscript{107} \textit{Id.} art. 19.
\textsuperscript{108} \textit{Id.} art. 32.
\textsuperscript{109} \textit{Id.} art. 25(1).
\textsuperscript{110} \textit{Id.} art. 25(3).
\textsuperscript{111} \textit{Id.} art. 33(4).
\textsuperscript{112} \textit{Id.} art. 56.
\textsuperscript{113} Trade Union Law, art. 53(4).
\textsuperscript{114} Provisions on Collective Contract, art. 5.
\textsuperscript{115} \textit{Id.} art. 1.
\textsuperscript{116} \textit{Id.} art. 25(6).
3. **Fair treatment of employees**: Although the 2004 Provisions do not directly regulate the fair treatment of employees, said Provisions do incorporate the Trade Union Law stipulations on the subject, including employees’ right to organize and join a union. Article 3 of the 2001 Trade Union Law provides in pertinent part the following basic guarantee:

[Employees] who rely on wages . . . regardless of their nationality, race, sex, occupation, religious beliefs or educational background, have the right to organize and join trade unions according to law. No organizations or individuals shall obstruct or restrict them.\(^{117}\)

Article 11 provides,

[T]rade union organizations at higher levels may dispatch their members to assist and guide the workers and staff members of enterprises to set up their trade unions, no units or individuals may obstruct their effort.\(^{118}\)

Article 50 instructs that if anyone violates Article 3 or 11 by obstructing employees in joining trade union organizations or obstructing higher level trade unions in assisting and guiding employees in preparation for establishing trade unions, then the violation shall be ordered to be corrected by the “administrative department for labor” (Labor Bureau), with appeals to appropriate government offices.\(^{119}\) There is also possible criminal violation if there is violence or intimidation.\(^{120}\)

Article 51 prohibits anyone from retaliating against any staff member of a trade union by modifying that employee’s job.\(^{121}\) Said provision also prohibits insults, slander, or personal injury to any staff member of a trade union who performs his or her duties “according to law.” Punishment for violations includes criminal prosecution or administrative sanctions by the public security (the police).\(^{122}\) Article 52 provides that any employee or staff member of the union who has his or her labor contract cancelled because of joining the trade union is entitled to reinstatement with retroactive pay or an order by the Labor Bureau to pay “two times the amount of his annual income.”\(^{123}\)

Article 53 prohibits obstructing the trade union in performing its work to organize employees to exert “(1) democratic rights through the congress of the workers and staff members and other forms”; (2) unlawfully “dissolving

\(^{117}\) Trade Union Law, art. 3.
\(^{118}\) Id. art. 11.
\(^{119}\) Id. art. 50.
\(^{120}\) Id.
\(^{121}\) Id. art. 51.
\(^{122}\) Trade Union Law, art. 51.
\(^{123}\) Id. art. 52.
or merging trade union organizations”; and “(3) preventing a trade union from participating in the investigation into and solution of an accident causing job-related injuries or death to workers or staff members or other infringements upon the legitimate rights and interests of the workers and staff members.”

Employees who are negotiating representatives are protected by the 2004 Provisions from retaliation. For example, an employee who is a negotiating representative cannot have his or her labor contract terminated when it expires during the performance of representative obligations; instead, it must be automatically extended up to the completion of those representative obligations. Such employee can only be terminated on a sufficient showing by the employer of the serious violation of duty or employer rules. Similarly, an employer shall not adjust or remove an employee’s working position without proper reason, and the employee shall be regarded as performing normal work when participating in collective negotiations. Moreover, provisions of the Trade Union Law likewise provide protections for trade union funds and proscribe improper conduct by trade union staff members against employees or the trade union.

The negotiating representative also has two affirmative obligations under Article 26 of the Provisions. The representative has a duty to “safeguard the normal order of work and production and shall not adopt any action of threatening, buying popular support and deception.” The first part appears to obligate the union representative to act affirmatively to avoid or end any employee disruption of services, whereas the second part seems to place an obligation of proper conduct on both employee and employer representatives as leaders in negotiations. The second affirmative obligation is to maintain secrecy of any commercial secrets of the employer acquired during the collective negotiations.

Disputes relating to “proper conduct” regarding the objective and subjective aspects of the negotiations, including disagreements or impasses on proposals, are to be resolved by the Labor Bureau. Other disputes
that relate to retaliation against an employee representative’s rights, as well as those under Articles 27 and 28, are to be resolved by the local labor arbitration commission.\textsuperscript{134}

Collective contract regulations are also issued at the local levels. For example, Shanghai issued new regulations in August\textsuperscript{135} 2007 that require employers to bargain whenever establishing or changing any “aspects directly related to the personal interests of employees,” including salaries, etc.\textsuperscript{135} It is well established that all laws and regulations require that employees cannot be paid less than the legal rates or the standards set forth in the collective contract.\textsuperscript{136}

 Strikes are not outlawed and do occur.\textsuperscript{137} The union by law is directed to assist in the resolution of labor disputes resulting in a work stoppage.\textsuperscript{138} In addition, a safety law does permit workers to stop work where there is imminent danger of harm.\textsuperscript{139} A new regulation in Shenzhen provides for a “cooling off” period of thirty days for workers in certain public sectors to avoid work stoppages.\textsuperscript{140}

\textsuperscript{134}Provisions on Collective Contract, art. 29; LCL, art. 56.
\textsuperscript{136}Labor Law, art. 35; LCL, art. 55.
\textsuperscript{138}Trade Union Law, art. 27.
\textsuperscript{140}Shenzhen jing ji te qu he xie lao dong guan xi cu jin tiao li [Regulations for the Promotion of Harmonious Labor Relations in the Shenzhen Special Economic Zone] (promulgated by Standing Comm. of Shenzhen Municipal People’s Cong., Oct. 6, 2008, effective Nov. 1, 2008), art. 53, http://www.npc.gov.cn/npc/xinwen/dfrid/guangdong/2008-10/08/content_1452415.htm. Article 53 provides, in the event that a collective work stoppage, go-slow, or lockout due to labor dispute in an employing unit in the water, electricity and gas utilities, and public transport sectors has resulted in or could result in consequences of the serious impairment of public interest, such as endangering public security and upsetting normal socioeconomic order and people’s everyday life, the city and SEZ governments may issue an order demanding the employing unit or workers to stop the action and restore normal order. The period within thirty days of the issuance of this order is called the “cooling off period,” during which time the employing unit and workers may not take actions to aggravate the situation.
Safety and Health Protection

1. Workplace Environment

a. Safety

Protecting workplace safety and health by laws and labor standards that seek to prevent accidents, deaths, and occupational diseases is an increasing priority as the number of workplace-related deaths and accidents continues to remain unacceptably high. The State Administration of Work Safety (SAWS) reported that there were 88,923 work-related fatalities and 457,000 accidents in the first eleven months of 2007.¹ More than 60 percent of fatal and severe accidents in the chemical industries are reported to be associated with unsafe work practices and the lack of safety awareness.²

The government, in further implementing the 1994 Labor Law, passed the *Law on Prevention and Treatment of Occupational Disease* in 2001, which requires certain preventive medical procedures and replacement of dangerous technology and materials.³ In 2002 the *Work Safety Law* was added, which requires worker education and training before beginning a job for which proper protective equipment is provided. Special legislative mandates deal with safety

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² Youxin Liang, Quanyong Xiang, *Occupational Health Services in PR China*, 198 *Toxicology* 45, 49 (2004). The LCL addresses this by requiring employers to inform employees at the time of hire of hazards and safety conditions. Art. 8.

in the mining and construction industries and with the safety and health of female workers who are pregnant, nursing, or menstruating. Employees and the union have a role in their enforcement. In 2008, State Council’s Decree No. 516 repealed several administrative laws, a number of which had governed labor and work safety, in order to further clarify and streamline legal obligations.

China has been called the “world’s factory floor,” as its continually expanding economy sends its products throughout the world, securing huge percentages of the world markets and, often, trade surpluses. But there is a cost in human terms. In 2007, 101,480 workers died in workplace accidents (10% fewer than in 2006). Government sources estimate that the cost of occupational illnesses and work-related injuries is between $12 to $25 billion annually. In particular, predominant causation is attributed to small and medium-sized enterprises that take few or no preventive measures to protect their workers; and the high number of migrant workers who are concentrated in hazardous industries, such as mining, construction, and manufacturing, are especially lacking in protection.

The coal industry is particularly dangerous. In China, the death toll for every million of tons is 2.041, which is more than fifty times that of the United States, the number-two coal producer in the world after China. In 2004

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9 Id.
it was reported that, of the total deaths in coal mine accidents worldwide, 80 percent occurred in China.\textsuperscript{11} Since 2000, China’s coal consumption has increased more than 10 percent annually.\textsuperscript{12} More than half of the 5.5 million coal miners are migrant laborers.\textsuperscript{13} Small private mines produce about one-quarter of China’s coal but two-thirds of its mining accidents.\textsuperscript{14} In recent years, there appears to be some improvement in worker safety, with the number of coal mine accidents declining.\textsuperscript{15}

In general, the International Labor Organization estimates that China’s 2001 workplace fatality rate was 11.1 per 100,000 workers, compared with a rate of 4.4 per 100,000 workers in the United States. Industrial accidents rose 27 percent between 2000 and 2001, whereas occupational diseases rose by 13 percent in the same period, according to government statistics.\textsuperscript{16}

Although the extent of duties imposed and who bears the costs have not been resolved, there is at the same time an increased demand, particularly from the foreign firms, for the purchase of personal protection equipment in China in response to the safety laws and increased worker awareness.\textsuperscript{17} The Chinese government reported that across all industries it spends more than US$3.6 billion annually on safety equipment and services in its effort to reduce workplace accidents and occupational diseases.\textsuperscript{18}

**b. Health**

Although China has made considerable progress in improving health standards and the quality of work life over the past several decades, it was not until


\textsuperscript{12} Id.


\textsuperscript{14} Id.


2001 that it initiated comprehensive protective legislation with the aim of preventing occupational diseases, as had been promised in the 1994 Labor Law.\textsuperscript{19} Chinese government statistics show that migrant workers are at the greatest risk of contracting occupational diseases, with more than 90 percent of those suffering from diseases relating to the workplace being migrant workers.\textsuperscript{20} In China, the leading cause of occupational disease is pneumoconiosis, a lung disease prevalent among workers in industries where there is silica dust, such as mining and construction. It has been estimated that more than 12 million workers have been exposed, resulting in 10,000 to 15,000 new cases annually,\textsuperscript{21} which is about 75 percent of the total reported cases of occupational diseases.\textsuperscript{22} In 2002, 52.7 percent of these cases occurred in the coal mining industry.\textsuperscript{23} That same year, 2,343 workers died from pneumoconiosis, representing 82.6 percent of all deaths from occupational diseases.\textsuperscript{24} Other occupational diseases include poisonings, caused most often by toxic and asphyxiating atmospheres (carbon monoxide, hydrogen sulfide, and ammonia) in confined workspaces.\textsuperscript{25}

The size and ownership of enterprises affect working conditions. Larger employers typically have more resources to establish and maintain decent workplace safety and health. Many state-owned enterprises (SOEs) certainly have had the resources and staff to do the job, but some have yielded to the pressures of a market economy to keep low costs to remain competitive. Those enterprises are often characterized by a failure to implement health and safety measures, negligence, and violations, as well as the reluctance to properly compensate victims according to the law.\textsuperscript{26} Too often, health and safety conditions in the workplace reflect the level of government inspection and enforcement. In 2002, the Chinese government reported

\textsuperscript{19} Liang & Xiang, supra note 2; Labor Law, arts. 52–4.
\textsuperscript{21} Zhong Y, Li D. Potential Years of Life Lost and Work Tenure Lost When Silicosis is Compared with Other Pneumoconioses, 21 SCAND. J. WORK ENVIRON. HEALTH (Suppl. 2) 91 (1995); Xiaorong Wang & David C. Christiani, Occupational Lung Disease in China, 9 INT. J. OCCUP. ENVIRON. HEALTH 320 (2003).
\textsuperscript{22} Liang & Xiang, supra note, at 46.
\textsuperscript{23} Id.
\textsuperscript{24} Id. at 47. In 2007, the Ministry of Health reported 10,963 cases of pneumoconiosis among the 14,296 cases of occupational diseases. Reported in China Records 14,296 Cases of Occupational Illness, XINHUA NEWS AGENCY, May 20, 2008, http://www.chinadaily.com.cn/china/2008-05/02/content_6657365.htm.
\textsuperscript{25} Id. at 48.
\textsuperscript{26} Garrett D. Brown, China’s Factory Floors: An Industrial Hygienist’s View, 9 INT. J. OCCUP. ENVIRON. HEALTH 326, 328 (2003).
that 60 percent of the 20 million TVEs had “minimal industrial safety measures.”

2. Legal Regulation

As described earlier, the 1994 Labor Law’s original requirements and its promise of improved regulation of worker safety and control of occupational diseases were implemented in 2002 in two major laws. The first, the Work Safety Law, requires employers to meet safety standards and to undertake safety management through (1) appointing personnel committees charged with the task, (2) providing education and training, (3) establishing safety rules, and (4) following reporting requirements. Regulations cover a variety of workplace health and safety concerns, including women workers, coal safety, chemicals, radioisotopes, and pneumoconiosis. In addition, the Labor Contract Law requires that provisions on work safety and the measures taken to prevent occupational hazards be included in the labor contract. It also requires the employer to inform employees as to working conditions, occupational hazards, and production safety conditions.

a. Safety Rights and Obligations

The Work Safety Law provides that the principal manager shall be responsible for workplace safety, whereas unions or other employee organizations have a right to supervise safety matters. Safety inspections by a local safety board are also mandated, and authority is given to order corrective measures for safety deficiencies or even a cessation of business activities pending those corrections.

The government appears to give these remedies a higher profile than it does violations of some other labor and employment laws. Safety specialists are required for mining, construction, and other dangerous industries, and

27 Su Z, Wang S., & Levine S.P., Occupational Health Hazards Facing China’s Workers and Possible Remedies, 37 World Bank Transition Newsletter 37 (2002); For more recent data, see China Records, supra note 24.
28 Work Safety Law, supra note 4.
29 Id.
31 LCL, art. 17.
32 LCL, art. 8.
33 Work Safety Law, art. 5.
34 Id. art. 7.
35 Id. art. 56.
most enterprises are required to designate safety control personnel. The employer has a duty to report any safety accidents, and local governments have a duty to disclose work safety accident statistics. Government and other personnel withholding or concealing safety accidents or conducting fraudulent inspections could face criminal penalties. Employees engaged in conduct causing a serious accident also can be criminally liable. Other remedies include civil penalties for the failure to comply with safety regulations and tort damages for safety-related accidents.

Certain rights are accorded employees, such as a right to receive work safety education and training and to learn of hazards, the right to be provided and trained with “articles for labor protection that meet national standards,” the right to report any safety violations without retaliation by the employer, and the right to refuse to perform any dangerous task without protection. In addition, employees “who are suffering injuries due to work safety accidents shall not only enjoy the occupational insurance and social insurance in accordance with the law, but also have the right to claim for compensation from the employing units if they have the right to obtain compensation in accordance with the appropriate civil law.”

Administration and enforcement of the Work Safety Law is undertaken by SAWS. Enforcement is now receiving increasing attention, and fines and penalties provided in the law are being used more readily to redress violations. In China there is also the availability of criminal penalties for safety violations. Likewise, employees may initiate the enforcement mechanism and may even refuse to work in operations that place them in harm. The law provides that it is illegal for an employer to seek to exculpate itself from liability under this law by prior contractual agreements. Trade unions also have the

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36 Id. art. 19.
37 Id. art. 70.
38 Id. art. 76.
39 Id. art. 79.
40 Id. art. 92.
41 Id. art. 90.
42 Id. arts. 82–5.
43 Id. art. 48.
44 Id. arts. 45, 50.
45 Id. art. 37.
46 Id. arts. 46, 51.
47 Id. art. 47.
48 Id. art. 48.
50 Work Safety Law, arts. 45, 46.
51 Id. art. 44.
right to supervise the employer’s workplace safety operations, and employees and the union have a role in enforcement. Article 48 of the Work Safety Law also preserves the right of an injured employee to sue in tort for safety accidents, notwithstanding the worker’s compensation that is otherwise available.

**b. Occupational Health Rights and Obligations**

The 2001 Law on the Prevention and Treatment of Occupational Diseases (1) requires employers to protect the health of employees through preventive measures and by providing accident insurance; (2) provides for the rights of employees to information, education, and training; and (3) authorizes their participation in monitoring. It specifically mandates the employer to “provide equipment to individual workers to guard against such diseases” and in many cases to provide employees’ physical exams. It also places responsibilities on the trade union and the government at all levels to prevent and protect against occupational diseases.

Occupational diseases are defined to include exposure of employees to industrial dusts, radioactive substances, and other harmful substances in the workplace. Many more specific regulations have been promulgated to further enumerate the risks and the standards for compliance.

Overall administration and enforcement are the responsibility of the State Council’s Work Safety Commission, whose working body is the SAWS. Its function is to supervise and manage safety nationwide, including supervision of coal mine safety and the State Administration of Coal Mine Safety. It must also “oversee and inspect industrial hygiene at the workplace of industrial, mining and commercial operations . . . and to be in charge of the management of issuance of occupational safety and health licenses; to oversee the monitoring, control and correction of major sources of hazards and to investigate and penalize those . . . that are not equipped with proper conditions for safe production.”

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52 *Id.* arts. 7, 52.
53 *Id.*
54 *Id.* art. 48; *see also* Law on Prevention and Treatment of Occupational Disease, *supra* note 3, art. 52.
55 Law on Prevention and Treatment of Occupational Disease, *supra* note 3, art. 50.
56 *Id.* art. 20.
57 *Id.* arts. 32, 34, 54; Labor Law, art. 54.
59 Pringle et al., *supra* note 30, at 313.
60 *Id.*
Such large areas of responsibilities obviously leave much of the oversight and supervision at the local levels, and there are critics who claim there is an “absence of rigor and failure of implementation,” as well as widespread underenforcement. Much of this failure is said to be caused by inspections and related functions being under the authority and performed by local safety boards. Figure 8.1 shows the administrative structure of SAWS.

In protecting occupational health, the State Council, through its Safety Committee, oversees the MOHRSS, the MOH, and the ACFTU. The MOH oversees local Health Bureaus, local Institutes for Occupational Health and Poisoning Control, and the China Center of Disease Control and Prevention (CCDC), which, in regulatory coordination with the MOHRRS and ACFTU, oversee the health and safety committees in the workplaces of employers.

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63 Pringle et al., supra note 30, at 309.
65 SAWS organizational structure, see http://www.chinasafety.gov.cn/newpage/zzjg/zzjg.htm.
66 Xing Gao & Li Sun, Current Status of the Occupational Health and Safety Countermeasures in Beijing, China, 42 Industrial Health 116, 118 (2004) (Figure 1).
67 Id. The MOH is in charge of drafting occupational health statutes and regulations; setting up occupational health criteria; standardizing the prevention, health care, oversight, and
Enforcement of the Law on the Prevention and Treatment of Occupational Disease is implemented by the health departments at the county level and above, which have the responsibility to inspect and supervise the measures undertaken by employers. Violations may result in victim compensation, warnings, and orders to correct them as well as fines (up to 500,000 yuan). For “serious” violations, the health department can order partial or full cessation of operations. Finally, in 2006, enhanced criminal sanctions were added of three to seven years imprisonment for personnel directly involved in serious violations, which include forcing an employee to do risky work, providing deficient working conditions, not meeting regulations regarding dangerous materials, and failing to meet construction standards.


69 Id. at 306; Law on the Prevention and Treatment of Occupational Disease, art. 57.
70 Law on the Prevention and Treatment of Occupational Disease, art. 76 (“If the administrative department of health and its law enforcement personnel of occupational health supervisions has committed any of the acts listed in Article 60 of this Law, and caused the happening of any occupational diseases and constituted a crime, the criminal responsibilities shall be investigated into; if a crime hasn’t been constituted, the principal of the unit, the personnel-in-charge held directly responsible, and other directly responsible personnel shall be given the administrative punishment of demotion, dismissal, or discharge according to law”); Xing fa [Criminal Law] (Promulgated by the 8th Sess. Nat’l People’s Cong., Mar. 14, 1997, amended on June 29, 2006), arts. 134–137, 139 (PRC).

Article 134. Where anyone violates the provisions concerning the safety management in production or operations and thus causes any serious casualty or any other serious consequences, he shall be sentenced to fixed-term imprisonment of not more than three years or detention. If the circumstances are extremely severe, he shall be sentenced to fixed-term imprisonment of not less than 3 years but not more than 7 years.

Where anyone forces any other person to conduct risky operations by violating the relevant provisions so that any serious casualty or any other serious consequence is caused, he shall be sentenced to fixed-term imprisonment of not more than five years or detention. If the circumstances are extremely severe, he shall be sentenced to fixed-term imprisonment of five years or more.

Article 135. Where the facilities or conditions for safe work fail to meet the relevant provisions of the state so that any serious casualty or any other serious consequence is caused, the persons-in-charge who are held to be directly responsible and other directly liable persons
shall be sentenced to fixed-term imprisonment of not more than three years or detention. If the circumstances are particularly severe, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.

Where, any of the provisions concerning safety management is violated in the holding of large-scale activities of the masses so that any serious casualty or any other serious consequence is caused, the persons-in-charge who are held to be directly responsible and other directly liable persons shall be sentenced to fixed-term imprisonment of not more than three years or detention. If the circumstances are particularly severe, they shall be sentenced to fixed-term imprisonment of not less than three years but no more than seven years.

Article 136. Whoever violates the regulations on the control of articles of an explosive, combustible, radioactive, poisonous or corrosive nature, thereby giving rise to a major accident in the course of production, storage, transportation, or use and causing serious consequences, is to be sentenced to not more than three years of fixed-term imprisonment or criminal detention; when the consequences are particularly serious, the sentence is to be not less than three years and not more than seven years of fixed-term imprisonment.

Article 137. When construction, design, working, and engineering supervision units violate the state’s regulations by reducing the quality standard of the projects, thereby giving rise to a major safety accident, those who are directly responsible are to be sentenced to not more than five years of fixed-term imprisonment or criminal detention, in addition to a fine; when the consequences are particularly serious, the sentence is to be not less than five years and not more than ten years of fixed-term imprisonment, in addition to a fine.

Article 139. Where, after any safety accident occurs, the person who is obliged to report it fails to report it or makes a false report so that the rescue of the accident is affected and if the circumstances are severe, he shall be sentenced to fixed-term imprisonment of not more than three years or detention. If the circumstances are extremely severe, he shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years.
1. Injuries in the Workplace

In 2006, government statistics showed that there were 627,158 workplace injuries at a cost of US$12.5 billion in direct losses and US$25 billion in indirect losses.1 A 2007 study reported the gruesome finding that about 40,000 fingers are severed every year in the Pearl River Delta Region; about 300 clinics in Kai County, Sichuan Province, specialize in reattaching severed fingers and arms for returning migrants. Another study in the Pearl River Delta Region showed that of 259 injured workers, 210 reported finger injuries, 23 reported hand or wrist injuries, 11 reported arm injuries, and the rest had leg, foot, ankle, or other injuries. Ninety percent of all injuries were of workers’ hands or arms, with severity ranging from cuts and burns to severe nerve damage, permanent paralysis, and the loss of entire digits and limbs. The most common injuries reported were broken or severed fingers on the dominant hand.2 Reports like these have helped bring about labor reforms in the area of work-related injuries.

In 2004, China put in place its Work-Related Injury Insurance Regulations, which cover work-related injuries, disability, or death, as well as occupational diseases.3 The scope of coverage is broad, including work-related accidents occurring before, after, and during work – even covering motor vehicle

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3 Gong shang baoxian tiao li [Regulations on Work-Related Injury Insurance] (promulgated by the State Council, April 27, 2003), art. 1 (PRC) [hereinafter WIR].
accidents that occur coming to and from work. Awards can include a lump sum payment or other subsidies, a pension, or living expenses. Remedies are exclusive, but the law permits a suit in tort for employer safety violations. Employee waivers of coverage are prohibited, though negotiated settlements for injuries are permitted if not deemed unfair by the courts. The law requires employers to pay the medical expenses of employees suffering from work-related injuries as well as a disability allowance based on the seriousness of the injuries. Employers are responsible even after the employee’s labor contract expires or the employee chooses to terminate the contract; absent a settlement, the employer must still pay for the medical expenses as well as the lump sum disability allowance. The insurance is financed by employer-paid premiums, which include experience ratings. Local governments administer and determine the amount of awarded benefits, which are paid from the employee compensation fund mandated by the law.

By the end of 2004 (the first year the law was effective), 68,230,000 employees were covered by worker’s compensation and 510,000 persons had claimed benefits. Although coverage has continued to increase since then, there also is much underenforcement of the current law, as well as a great need for more employee education regarding it. The study cited earlier of injured workers in the heavily commercial area of the Pearl River Delta Region found that the most frequent causes of injuries were carelessness (perhaps related to little or no job training) and fatigue (related to working overtime and long hours). It also found that only 65 percent of the workers had labor contracts and

4 WIR, art. 14.
6 Labor Law, arts. 70, 72. See also Work Safety Law, art. 44.
7 The court found the original settlement of 3,000 yuan inequitable due to later evidence of more severe injury (level 6) and modified the settlement agreement to have the employer pay an additional 10,000 yuan. The injury occurred in December, 2007, and the court decision was April 8, 2008; http://www.nmg lawyer.com/Article/8000.html.
8 WIR, arts. 33–5 (provide for range of payments from lump sum disability subsidy or a monthly disability allowance).
9 WIR, art. 35(b); LCL, arts. 42, 45.
10 WIR, art. 10.
only 73 percent had work injury insurance, though both are required by law; in addition, only 13 percent received full pay during their hospitalization, as mandated by law.\footnote{13}

\section{Coverage}

All types of enterprises – public or private, private household economy units with employees,\footnote{14} and even those illegal enterprises without licenses or registration\footnote{15} – are covered by the Regulations on Work-Related Injury Insurance.\footnote{16} The Work Safety Law prohibits an employer from having an agreement with the employee that seeks to exclude or limit the employer’s liability for injuries or death covered by this law,\footnote{17} and the LCL and EPL further clarify the extension of equal labor rights to many of the formerly excluded categories of employees. In addition, employees in a de facto employment relationship\footnote{18} and migrant workers\footnote{19} are covered; temporary workers may be covered under some local rules. For example, under Article 50, Shanghai Workers’ Compensation Regulation (2004), non-full-time workers are not provided mandatory coverage, but can opt in with employer-provided funding.\footnote{20} Dispatched workers are also covered

\begin{thebibliography}{99}
\bibitem{13}LCL, art. 10; Labor Law, arts. 70, 72; \textit{The Long March, supra} note 2, at 4 and 7.
\bibitem{14}WIR, art. 2.
\bibitem{16}WIR, art. 2; 2003 Measure, art. 2.
\bibitem{18}WIR, art. 61 (“Workers mentioned in the present regulation shall refer to the laborers who keep a labor relation (including de facto labor relation) with the employing entity in all forms of employment and within all forms of employment period”). The test of de facto relationship is the degree of control. Guan yu que li lao dong guan xi you guan shi xiang de tong zhi [Notice on pertinent issues related to establishing labor relations] (promulgated by the MOLSS, May 25, 2005), art. 1(2), http://www.law-lib.com/law/law_view.asp?id=92395; and the burden of proof will shift to the employer. \textit{Id.} art. 2.
\bibitem{19}Guan yu nong min gong can jia gong shang bao xian you guan wen ti de tong zhi [Notice on Migrant Workers’ Rights to Participate in Work Injury Insurance] (promulgated by the MOLSS, June 1, 2004), art. 2, http://www.molss.gov.cn/gb/ywzn/2004-06/01/content_213986.htm.
\end{thebibliography}
by the national law.\textsuperscript{21} However, individuals working as independent contractors are not employees of the employer, nor are those working for independent contractors similarly engaged by the employer.\textsuperscript{22} In a recent court decision, a student intern killed in traffic en route to work was found not to be protected under WIR as an employee because of student status and a written agreement that the employer, not otherwise liable, agreed to be liable only for work-related injuries for which it was responsible.\textsuperscript{23}

The scope of work-related injuries under WIR is broad and includes several categories of injuries: (1) injuries arising from an accident occurring within the workplace and during working times, (2) injuries caused by violence within the workplace, (3) injuries sustained in motor vehicle accidents when going to or from work, and (4) occupational disease.\textsuperscript{24} The law specifically excludes from coverage an injury incurred while committing a crime, violating the public security order, or causing self-injury because of being intoxicated or committing a deliberate act, or committing suicide.\textsuperscript{25}

### 3. Administrative Requirements

Generally, as the law reads, each province shall establish its own worker’s compensation reserve fund and special account, subject to the central government’s supervision.\textsuperscript{26} It is mandatory for employers to pay the insurance

\textsuperscript{21} WIR, art. 41.
\textsuperscript{24} WIR, art. 14. “A worker shall be ascertained to have suffered from work-related injury if:

(a) he is injured from an accident within the working hours and the working place due to his work;
(b) he is injured from an accident within the working place before or after the working hours for doing preparatory or finishing work related to his job;
(c) he suffers from violence or other unexpected injury within the working hours and working place due to implementation of his duties;
(d) he suffers from an occupational disease;
(e) his whereabouts are unknown due to his injury or accident during his trip for performing his duties;
(f) he is injured from a motor vehicle accident on his way to or back from work; or
(g) other circumstances provided for in laws and administrative regulations under which work-related injuries shall be ascertained.”

\textsuperscript{25} WIR, art. 16.
\textsuperscript{26} WIR, arts. 9, 12, 13.
premium to the local taxation department. Payment of these taxes by employers helps ensure continued coverage and is enforced by the taxation department, which can bring about sanctions for payment defaults, including suspension or revocation of business licenses.

The insurance rate of all insured enterprises is based on their classification as low risk, median risk, or high risk. The base rate for each category is 0.5 percent, 1 percent, and 2 percent of total payroll expenses, respectively. The local province can adjust the base rate every one to three years. Enterprises in the low-risk category pay the fixed base rate, no matter how many injuries occur. Depending on the risk-injury data from the previous year, the local Labor Bureau can adjust the enterprise’s median- or high-risk rate downward to 50 percent and 80 percent of the base rate, or upward to 120 percent and 150 percent of the base rate, respectively.

27 WIR, art. 2.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id. Example of Shanghai, Shanghai shi gong shang bao xian fu dong fei lv guan li zan xing ban fa [Notice on Shanghai Worker’s Compensation Rate] (2005). Cost factor: total claimed benefit / total paid premium. All enterprises (except low-risk category) are placed in a floating rate system of five levels: 0.5%, 1%, 1.5%, 2%, 2.5%, and 3% of total wage expense. The fixed rate of five levels will be revised every year.

Based on the previous year’s cost factor of each insurer, the next year’s rate will be raised one level if the cost factor is greater than 200%, but no more than 400%; two levels if the cost factor is greater than 400%, but no more than 600%; three levels if the cost factor is greater than 600%, but no more than 800%; four levels if the cost factor is greater than 800%, but no more than 1,000%; and five levels if the cost factor is greater than 1,000%.
Claims by employees for work-related injury or occupational disease compensation can be made only after the degree of their disability is assessed and officially certified by the local government’s labor appraisal committee. Thereafter, the employer must file the claim with the government agency within thirty days. If the employer fails to file a claim, the employee or labor union can file within one year of the diagnosis. The claim must show the existing employment relationship and the diagnosis of the work-related injury or disease. The employer has the right to challenge any claim and also has the burden of proof. The local labor administration must investigate the claim and render its decision within sixty days of filing. This applies to claims seeking permanent disability benefits as well.

After a disability has been certified, it is graded for the purpose of determining the level of benefits. There are ten grades, with grade 1 being the most severe and grade 10 the mildest. There is a right to appeal to the provincial labor authorities within fifteen days after the initial decision, but their decision is final.

### 4. Disability Benefits

Disability benefits paid from the work-related insurance fund cover medicine, diagnosis, hospitalization, rehabilitation, permanent disability benefits, and death benefits. In cases of partial/temporary disability, the employer pays full wages for a period up to twelve months. The employer also covers the cost of travel for medical treatment and caregiving during the temporary disability period. The employer must also pay benefits to those working in illegal enterprises: at least six times the average annual wages for permanent disability benefits and ten times the average annual wages for death benefits, and all the medical and living costs.

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35 WIR, art. 17.
36 Id.
37 WIR, art. 18.
38 WIR, art. 19.
39 WIR, art. 20.
40 WIR, arts. 21–5
41 WIR, art. 22.
42 WIR, art. 28.
43 WIR, arts. 29–43.
44 WIR, art. 31.
45 WIR, art. 29.
46 WIR, art. 31.
47 2003 Measure, art. 5, supra note 15.
48 Id. arts. 6, 3.
49 Id. art. 4.
The ten grades of disability are as follows. Grades 1 to 4 are the most serious and indicate the employee no longer has any ability to work; grades 5 and 6 indicate an employee has lost most of the ability to work; and workers with grade 7 to 10 injuries are classified as partially disabled. The amount of employee compensation for work-related injuries or death is fixed in the law, as specified in the Standard Assessment of the Seriousness of Work-Related Injuries and Occupational Diseases (See Table 9.1). For coal-mine–related deaths, 200,000 yuan seems to have become a “national benchmark” for compensation payments, notwithstanding the law’s lower requirement. Negotiated settlements are possible, and where not undertaken will be enforced through mediation and arbitration procedures. Negotiated settlements are enforceable by the court, but may be modified by the courts if deemed unfair.

5. Enforcement

One avenue to deal with some disputed claims, those dealing with such topics as certification or classification of disabilities is to file an administrative appeal to require enforcement of the law against possible violators. For example, action can be taken against a recalcitrant employer who refuses to properly process a claim or accept the certified level of disability or against one who misclassifies the level of disability. This action may include administrative litigation.

51 WIR, arts. 33–7.
52 Id.
53 The 200,000 yuan compensation standard was first introduced on November, 30, 2004, by the Shanxi government in its Regulations on Enforcing Responsibility for Mine Safety to Prevent Exceptional Loss of Life in Accidents. This provincial legislation stipulated that the operator of a mine that had been the scene of a fatal accident must pay out at least 200,000 yuan in compensation for each worker killed. After their promulgation, these provisions were approved by the central government’s State Administration of Work Safety and reproduced by regional governments in other areas. Liaoning, Guizhou, Hebei, Jiangxi, Yunnan, and Shaanxi provinces all drafted similar legislation, and 200,000 yuan very quickly became the “national benchmark” for compensation payments. Compensation for Work-Related Injury and Occupational Disease in China, CHINA LABOR BULLETIN, http://www.clb.org.hk/en/node/100207.
54 Lao dong zheng yi tiao jie zhong cai fa [The Law on Labor Dispute Mediation and Arbitration] (promulgated by the 31st session of the Standing Comm. of the Tenth NPC, Dec. 29, 2007, effective May 1, 2008), arts. 4, 5 (PRC) [hereinafter LMA].
56 WIR, art. 17.
57 WIR, art. 53.
58 Id.
### The Work Disability Scale

**Grade 1:** Loss of an organ or complete or irreplaceable loss of organ function; requiring special medical care and support; complete loss or serious loss of the ability to care for oneself, e.g., severe damage to cognitive functions and intelligence, loss of sight in both eyes.

**Grade 2:** Severe damage to or deformity of an organ; serious functional deficiencies or complications; requiring special medical care and support; complete loss or serious loss of ability to care for oneself, e.g., serious damage to cognitive intelligence; loss of sight in one eye and less than or equal to eight percent of normal vision in the other.

**Grade 3:** Severe damage to or deformity of an organ; serious functional deficiencies or complications; requiring special medical care and support; partial loss of ability to care for oneself, e.g., loss of a hand, dangerous and impulsive behavior caused by psychotic disorders; serious disfiguration on the face.

**Grade 4:** Severe damage to or deformity of an organ; serious functional deficiencies or complications; requiring special medical care and support but capable of self-care, e.g., psychotic diseases leading to social skills deficiencies; medium level of facial disfiguration and scars over 70 percent or more of the body.

**Grade 5:** Major damage to or deformity of an organ; major functional deficiencies or complications; requiring general medical care but capable of self-care, e.g., complete loss of speech due to motor speech disorders; complete loss of ability to read and write (agraphia); moderate facial disfiguration, loss of thumb.

**Grade 6:** Major damage to or deformity of an organ; moderate level of functional deficiencies or complications; requiring general medical care but capable of self-care, e.g., incomplete loss of speech, serious colorization or discoloration on the face.

**Grade 7:** Major damage to or deformity of an organ; moderate functional deficiencies or complications; requiring general medical care but capable of self-care, e.g., partial damage to thumb; loss of toes, except the big toe; removal of half the small intestine.

**Grade 8:** Partial damage to or deformity of an organ; moderate functional deficiencies; requiring moderate medical care but capable of self-care, e.g., change of personality due to psychotic disorders; speech difficulties.

**Grade 9:** Partial damage to or deformity of an organ; moderate functional deficiencies that do not require medical care, e.g., damage of skull with an area of less than 25 square centimeters, no loss of function; able to eat after an esophagectomy.

**Grade 10:** Partial damage to or deformity of an organ; no functional deficiencies; not requiring medical care, and capable of self-care, e.g., damage to skull with an area of less than 9.24 square centimeters; moderate colorization or dis-colorization on the face.
The Amount of Compensation

**Disability Grades 1 to 4**
The employee shall retain their labor relationship with the employer, but retire from their position and receive:

1. A lump sum disability payment equivalent to:
   - Grade 1: 24 months’ wages;
   - Grade 2: 22 months’ wages;
   - Grade 3: 20 months’ wages;
   - Grade 4: 18 months’ wages;
2. A disability allowance paid each month and equivalent to:
   - Grade 1: 90 percent of their monthly wage;
   - Grade 2: 85 percent of their monthly wage;
   - Grade 3: 80 percent of their monthly wage;
   - Grade 4: 75 percent of their monthly wage.

**Grades 5 and 6**
The employee shall receive:
A lump sum disability payment equivalent to:
Grade 5: 16 months’ wages;
Grade 6: 14 months’ wages;
The employee’s labor relationship shall be retained and the employer shall arrange for suitable employment. If a suitable post cannot be arranged, the employer shall pay a disability allowance each month equivalent to:
Grade 5: 70 percent of the employee’s monthly wage;
Grade 6: 60 percent of the employee’s monthly wage.
If the employee wishes to terminate their labor relationship, their employer shall pay the cost of medical treatment together with the lump sum disability allowance.

**Grades 7 to 10**
The employee shall receive:
A lump sum disability payment equivalent to:
Grade 7: 12 months’ wages;
Grade 8: 10 months’ wages;
Grade 9: 8 months’ wages;
Grade 10: 6 months’ wages.

**Fatal Accidents**
In the case of a fatal accident, the employee’s relatives will be entitled to:

1. A lump sum compensation payment equivalent to between 48 and 60 months’ average salary in the region in which the fatality occurred.
2. A lump sum funeral subsidy equivalent to six months’ average salary in the region in which the fatality occurred;
3. A monthly pension for relatives who have no capability to work or who were dependent on the employee who died:
   - 40 percent of the deceased employee’s monthly wage for the spouse;
   - 30 percent of the deceased employee’s monthly wage for other relatives;
   - An additional 10 percent of the deceased employee’s monthly wage for the aged or orphaned.

The total sum of the pensions paid shall not exceed the wage of the deceased worker.
Another avenue of enforcement is in Article 52 of WIR, which provides that labor disputes over the treatment of work-related injury obligations shall be settled in the usual processes of labor dispute resolution, as provided in the 2008 Labor Mediation and Arbitration Law. This law states that the arbitration award will be final and binding in “disputes involving recovery of labor remuneration, medical bills for a work-related injury, severance pay or damages, in an amount not exceeding the equivalent of twelve months of the local minimum wage rate.” For other claims falling outside the above final and binding coverage, there may be resort to the courts after arbitration. However, according to studies by advocacy groups, practical deficiencies in implementing arbitration of work injury disputes caused by some employers’ intransigence to comply with obligations the appropriate treatment of injured workers.

59 LMA, art. 47.
60 Id.
61 The Long March, supra note 2.
Minimum wages standards and guidelines are set out in the 2004 Regulations on Minimum Wage (RMW), which follow the 1994 Labor Law. The RMW specifies required wage payments, deductions, and overtime, though some issues occasionally arise regarding exempted categories of workers, such as managers. In addition, variations in coverage and wage levels occur as implementing standards are fixed and administered at local levels. Local governments are also primarily responsible for administration and enforcement, but aggrieved workers must bring their labor dispute to arbitration to recover unpaid wages. Unfortunately, the transition to a market economy has been accompanied by underpayment and nonpayment of wages to many workers, especially to migrant workers. Likewise, studies have shown that minimum wages, originally targeted at 40 to 60 percent of the average monthly wages, often fall below the 40 percent level. For example, in 2006 in Beijing, the level was reported to be at around 20 percent, creating a gap of nearly 600 yuan per month.

4 Id.
1. Societal Disparities

In the late 1980s, the economic developments following the Four Modernizations of 1979 produced workplaces that were increasingly regulated by labor contracts, replacing the “iron rice bowl” model of earlier years. The transition to a socialist market economy in the 1990s coincided with a growing assumption of managerial control by employers. Because of market forces, employers were forced to maximize profits if they hoped to survive without the government subsidies provided in the former planned economy, and lawmakers responded by allowing greater employer autonomy. This liberalization of employee management tended to result in cutting labor costs and, all too frequently, ignoring labor laws. This trend was particularly prevalent among employers outside the state-owned enterprise (SOE) system, and the usual victims of unpaid wages were migrant workers in the urban areas, especially in the construction industry.

Yet this market transition has had both positive and negative economic consequences. One bright side has been phenomenal economic growth and development for the country as a whole; however, a dark side has been its impact on individual workers, manifested in layoffs, unemployment, and emerging wage disparities. There are dramatic wage differences between urban and rural workers as well as between regions – especially between the Special Economic Zones (SEZs) in the coastal areas and the non-SEZs in the Western inland provinces. Large wage disparities also exist, as they do in many countries, between management staff and workers. According to former World Bank

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president James Wolfenson, these wage gaps are increasing at an alarming rate, and he warns that such gaps could lead to social unrest and protests.10 Nevertheless, average monthly wages in urban areas in China have increased every year since the late 1980s, with an average salary of 2,078 yuan per month in 2007.11 However, the gap between urban and rural households has also continued to increase: urban households in 2006 had an average disposable income of 11,759 yuan versus 3,587 yuan for rural households.12 The minimum monthly wages and average monthly wages also vary widely among urban areas. For example, in 2007, minimum wage standards in urban areas were as follows: Chongqing had a low of 480; Wuhan, 460; Guangzhou, 690; Shenzhen, 700; Beijing, 730; and Shanghai, 840. In September 2008, it was reported that minimum wage standards were as follows: Chongqing had a low of 680; Guangzhou, 860; Shenzhen Inner, 1,000; Shenzhen Outer, 900; Beijing, 800; and Shanghai, 960.13 Just as wages vary, so do recent gains. Some highly

10 David Murphy, *The Dangers of Too Much Success*, 167 Far E. Econ. Rev. 28–29 (2004). The Chinese government has taken notice of the increase in mass protests. It is reported that Zhou Yongkang, the Public Security Chief and State Councilor, stated that the “rising conflicts among the people” had been triggered by domestic economic factors, the behavior of cadres, and by a lack of justice with the number of mass protests increasing from about “10,000 in 1994 to more than 74,000 last year [2004].” Shi Ting, *Acceptance of Rights Replacing Reflex Fear of Protests*, S. China Morning Post, July 7, 2005, at 1.

11 *Average Salary Increase of Urban Workers Rises to Six-Year High*, Xinhua News Agency, April 2, 2008, http://www.china.org.cn/government/central_government/2008-04/02/content_1411192.htm (According to the year’s No. 1 statement released by the National Bureau of Statistics (NBS) on Tuesday, the average annual salary increase hovered around 14 percent from 2001 to 2006. The 2007 average annual salary of urban workers was 24,932 yuan and the daily average was 99.31 yuan (14.15 U.S. dollars), up 18.72 percent over the previous year. Taking into account price rises, the average salary increase hit a six-year-high); see also *Wages in China*, supra note 3.

12 *Wages in China*, supra note 3.

industrialized areas, such as Shenzhen and Guangzhou, had 15 to 20 percent rises from the prior year.  

2. Law on Wages

The 1994 Labor Law first established a comprehensive minimum wage system for China, with local governments setting the wage levels according to enumerated factors. 15 This law also requires the employer to pay wages in cash and to pay for statutory holidays, marriage or funeral leaves, or periods of “social activities” required by law. 16 The 2008 Labor Contract Law requires that employment contracts include a term on labor compensation. 17

In 2004, the Regulations on Minimum Wages (RMW) issued by the MOLSS provided further stipulations as wages. 18 It defined the “minimum wage” standard as “the least labor remuneration paid by the employers required by law on condition that the laborers have provided normal labor during the legal working hours or working hours agreed by the labor contract.” 19 These working hours include periods during “annual vacation, home leaves, wedding leave and leave for arranging funeral, maternity leave and leave for contraceptive operation, as well as attending social activities in accordance with law within working hours.” 20 In January 2008 the MOLSS increased the number of statutory holidays from ten to eleven and issued a circular on pro rata wage calculations. 21

The method of wage distribution remains within the discretion of the employer, whereas the minimum and maximum standards are adjusted at least every two years by the government. 22 A monthly rate is to be used for

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15 Labor Law, art. 48; RMW, art. 7.
16 Labor Law, arts 50, 51.
17 LCL, art. 17.
18 RMW, supra note 1.
19 RMW, art. 3.
20 Id. Social activities include legally exercising the right to vote and the right to be voted for; representing county, distinct level on upper level government, labor union, youth union, women’s association, etc. to participate in meetings; taking the witness stand in court; taking part in workers award on excellent worker’s meeting; labor union activities allowed under the Trade Union Law, etc. Gong zi zhi fu zan xing qui ding [Interim Rules on Wage Payment] promulgated by MOL, Dec. 6, 1994, eff. Jan. 1, 1995), art. 10.
21 Guan yu zhi gong quan nian yue ping jun gong zuo xing quan gong zi he gong zi zhe suan wen ti de tong zhi [Circular on Issues Concerning the Annual Average Monthly Working Hours of Staff and Workers and the Pro Rata Calculation of Their Wages] (issued by the MOLSS, Jan. 3, 2008), available at CHINA LAW & PRACTICE 91 (Mar. 2008).
22 RMW, art. 10.
full-time employees and an hourly rate for other employees. New draft wage payment regulations, expected to be approved by the State Council in late 2009, would authorize employees and the union to have “consultations” on the wages to be paid and allow employers to give compensatory time off in lieu of overtime compensation. That part-time workers are to be paid the minimum wage is confirmed by the LCL. However, students working part-time as student interns or under institutional agreements are held not to be employees, and thus the employer is not required to pay them minimum wages.

Exclusions from wages for the purposes of calculating the minimum wage include payments from employers for social insurance, protective clothing or equipment, travel-related expenses, overtime, and subsidies related to working conditions. Deductions from wages are limited to those permitted by statute, such as income tax and social security, or by contractual provisions or employer rules that are in accordance with the law, such as employee misconduct that causes economic loss. Local regulations regarding exclusions and deductions vary widely.

3. Law on Hours

The Labor Law originally established the standard working-hour system of eight hours per day and forty-four hours per week, but that has since been

23 LCL, art. 68.
24 “Gong zi tiao li” cao an zhu ti wan cheng, gong zi zeng zhang you wang xie shang jie jue [Wage Regulations Draft Almost Finished, Consultation to be Used for Wage Increase], Mar. 9, 2008, http://news.xinhuanet.com/fortune/2008-03/09/content_7749752.htm. See also Draft Wage Regulations Emphasize Importance of Consultation, www.internationallawoffice.com/Newsletters/ (subscription); Trade Unions and Multinational Companies in China, CHINA LAW & PRACTICE (Sept. 2008) (“A recent draft for a national wage regulation issued by the Ministry of Human Resources and Social Security (MOHRSS) provides that, unless an employer engages in collective wage negotiation, the company will not be allowed to include employees’ wages as pre-tax business expenses”).
25 LCL, art. 68.
26 Where the student is an intern or a participant in a work/study program in a college (excluding vocational colleges) pursuant to an agreement between the enterprise and the college. 1995 Labor Law Implementing Opinion, art. 12. Students Not Covered by Minimum Wage Laws, www.chinaeconomicreview.com/cer/2007_05/KFC_cleared.html; Shanghai lao dong ju ren ding Mai Dang Lao Ken De Ji mei you wei yong gong wen ti [Shanghai Labor Bureau declared that McDonald’s and KFC are Not in Violation of Labor Laws], April 17, 2007, http://finance1.jrj.com.cn/news/2007-04-17/00000216061.html (regarding the issue of not paying minimum wage to student interns working at McDonald’s and KFC in Shanghai).
27 RMW, art. 12. Further discussion of social security benefits is in Chapter 11.
28 Gong zi zhi fu zan xing gui ding [Interim Regulations on Wage Payment] (promulgated by the Ministry of Labor, Jan. 1, 1995), arts. 15, 16.
amended to forty hours per week, including night work.  The LCL requires a description of the employee’s working hours in the labor contract. A day of rest during the week is mandated, and a daily rest period (excluded from work hours) is typically provided, often as the lunch break. The LCL mandates that any employer formulations, revisions, or decisions on its rules regarding hours (and other employee interests) must first be discussed with all employees or their representative congress. This is to be followed by a responsive proposal and comments that the employer must then bring to the labor union for consultations.

An alternative to the standard working-hour system is available where the employer has a “special nature of production,” such as seasonal industry workers. This “Comprehensive Working-Hour System” typically applies to transportation, telecommunications, fisheries, and seasonal industries, and it permits longer working hours during peak periods, subject to prior government approval, as long as the average number of hours worked in the prescribed period does not exceed the limit of that system. Overtime payment is required for work in excess of the system’s requirements.

4. Law on Overtime

Overtime pay generally is required for hours worked by employees in excess of the hourly limits (“extended hours”), absent exceptions, which are discussed in

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29 Labor Law, art. 34; Guo wu yuan guan yu zhi gong gong zuo shi jian de gui ding [Decision of State Council Regarding Working Hours of Staff and Workers] (issued by the State Council on Feb. 3, 1994, amended on Mar. 25, 1995, effective May 1, 1995), art. 3.
30 LCL, art. 17.
31 Labor Law, art. 3; “Guo wu yuan guan yu zhi gong gong zuo shi jian de gui ding” wen ti jie da [Question and Answers on Decision of State Council Regarding Working Hours of Staff and Workers] (issued by the Ministry of Labor, April 22, 1995), art. 1.
32 LCL, art. 4.
33 Id.
34 Labor Law, art. 39.
35 Lao dong bu guan che “guo wu yuan guan yu zhi gong gong zuo shi jian de gui ding” de shi shi ban fa [Implementing Measures for “Decision of State Council Regarding Working Hours of Staff and Workers”] (promulgated by the Ministry of Labor, Mar. 26, 1995), art. 7; Guan yu qi ye shi xing bu ding shi gong zuo zuo zhi he zong he ji suan gong shi gong zuo zhi de shen pi ban fa [Measures Concerning Examination and Approval of Implementation by Enterprises of the Flexible Working Hour System and the Comprehensive Working Hour System] (promulgated by the Ministry of Labor, Dec. 14, 1994, effective Jan. 1, 1995), arts. 4, 5; Interim Regulations on Wage Payment, supra note 28, art. 13.
36 Implementing Measures for “Decision of State Council Regarding Working Hours of Staff and Workers,” supra note 35, art. 8; Interim Regulations on Wage Payment, supra note 28, art. 13.
Wages and Hours

37 These payments are to be 150 percent for each hour of overtime worked on a normal work day, 200 percent for excess hours worked on a rest day or day off, and 300 percent for excess work on a statutory holiday. These payments are to be 150 percent for each hour of overtime worked on a normal work day, 200 percent for excess hours worked on a rest day or day off, and 300 percent for excess work on a statutory holiday. Employees working on a piece-rate basis are expected to have their wage rate set on the expectation that reasonable quotas match an amount of work that would normally be accomplished in a forty-hour work week covered by the minimum wage requirements.

Certain employees, such as high-level managerial staff, field staff, sales staff, and security staff, may not receive overtime pay if there has been prior government approval. This “Flexible Working-Hour System” excludes ("exempts") these employees from the requirements of overtime, with working hours limited only by the employer’s general obligation to protect their health. Some local regulations, such as in Beijing, vary the approval and obligation provisions, and there are distinctions among locales on how low the management rank can be and still fit the exception. In China, as in other countries, there is an economic incentive to misclassify an employee as management to avoid meeting overtime and other labor law obligations while obtaining many extended hours of work.

5. Enforcement

Local government administrations enforce the laws dealing with wages and hours, and disagreements between the employer and employee on violations

37 Labor Law, art. 44; RMW, art. 12.
38 Labor Law, art. 44; Interim Regulations on Wage Payment, supra note 28, art. 13.
39 RMW, art. 12.
40 Measures Concerning Examination and Approval of Implementation by Enterprises of the Flexible Working Hour System and the Comprehensive Working Hour System, supra note 35, art. 4.
41 Id., art. 6. See Chapter 3, Exemptions, discussion in text accompanying footnotes 48–63.
42 Beijing regulations use the same language, “high level management staff,” as the national regulations, but have a special Article 8, which provides payment for more prolonged work hours based on the Labor Law, art. 44, and there is a ceiling monthly limit of thirty-six hours. Guan yu yin fa Beijing shi qi ye shi xing zong he ji suan gong shi gong zuo zhi he bu ding shi gong zuo shi han fa de tong zhi [Notice on Beijing Measures Concerning Examination and Approval of Implementation by Enterprises of the Flexible Working Hour System and the Comprehensive Working Hour System] (issued by the Beijing Labor and Social Security Bureau, Dec. 9, 2003), art. 11, http://www.bjld.gov.cn/LDJAPP/search/fgdetail.jsp?no=1073.
43 Chinese company officials have noted that McDonald’s in Japan recently lost a court case on misclassified “managers” and began paying many of its “managers” overtime pay. McDonald’s Japan to Pay Overtime to Store Managers, uk.reuters.com/article/consumerProducts/idUKT2039620080520.
are treated as labor disputes. These disputes arise when the employer refuses to pay, and they must be resolved under the Law on Labor Mediation and Arbitration.44

The Labor Contract Law also provides for administrative penalties when the employer has violated the wage requirements or failed to pay overtime that is due.45 The statutory penalty is “damages to the worker at a rate of not less than 50 percent and not more than 100 percent of the amount payable.”46

44 See e.g., RMW, art. 14.
45 LCL, art. 85.
46 Id.
Ambivalence and Activism: Employment Discrimination in China

Timothy Webster [FNa1]

Abstract

Chinese courts have not vigorously enforced many human rights, but a recent string of employment discrimination lawsuits suggests that, given the appropriate conditions, advocacy strategies, and rights at issue, victims can vindicate constitutional and statutory rights to equality in court. Specifically, carriers of the hepatitis B virus (HBV) have used the 2007 Employment Promotion Law to ground legal challenges against employers who discriminate against them in the hiring process. Plaintiffs' relatively high success rate suggests official support for making one prevalent form of discrimination illegal. Central to these lawsuits is a broad network of lawyers, activists, and scholars who actively support plaintiffs, suggesting a limited role for civil society in the world of Chinese law. Although many problems remain with employment discrimination, China has made concrete steps toward repealing a legal edifice of discrimination that stretches back decades and reshaping policies and attitudes to eradicate a prevalent form of discrimination, targeting carriers of infectious disease.
In 2003, two young college graduates almost got jobs in China’s elite civil service. [FN1] Zhou Yichao, handsome and twenty-three years old, scored well on both the written test and the oral interview, ranking eighth of the 157 applicants. Zhang Xianzhu, twenty-five years old and bespectacled, ranked first among the thirty applicants in his hometown. Both men then took medical examinations, the final phase of the Chinese hiring process. Their medical examinations revealed that both men carried the hepatitis B virus (HBV), and according to provincial regulations on civil service examinations, this rendered them ineligible for government posts. Both were surprised by this result.

Zhou Yichao first contemplated suicide, but upon reconsideration, he bought a paring knife, went to the government office to ask about the results, and then stabbed two civil servants, killing one. Zhang Xianzhu also took an unexpected course of action. He retained a prominent discrimination lawyer and sued the government agency for viol-
ating his constitutional rights. Around these two cases—the murder trial of Zhou Yichao and the administrative litigation initiated by Zhang Xianzhu—a legal movement coalesced. China’s HBV community, which at that point consisted of a couple of online chat rooms and discussion boards, seized upon these cases to launch a multifaceted campaign to introduce antidiscrimination laws, eliminate employment discrimination, and change social attitudes more generally. Somewhat remarkably, HBV advocates have largely succeeded in the first mission, lobbying government bodies to institute legal protections. However, like discriminatory attitudes more generally, discrimination by employers remains deeply rooted in contemporary China.

Since these events unfolded in 2003, advocates have petitioned government bodies, conducted campaigns to increase public understanding of the actual health risks of HBV, and litigated dozens of discrimination lawsuits. The government’s response has been impressive. In at least three national laws (falu) and six administrative regulations (guize), Chinese government bodies have addressed the employment rights of disadvantaged Chinese, including women, ethnic minorities, the disabled, and carriers of infectious diseases (like HBV and AIDS). Central to the government’s various legislative responses has been the careful mobilization of the HBV community, which has drafted recommendations and petitions to government agencies, sent open letters to Chinese government leaders, and commented on draft legislation prepared by the national legislature. This campaign opened a discussion about the nature of discrimination in China, as well as the role that citizens play in eradicating it.

Discrimination is a prevalent but poorly understood social problem in China. The shift from a state-controlled to a market-based economy in the past thirty years has impacted virtually every aspect of Chinese society, from raging economic growth to a floating population larger than most countries. But it has also opened up new opportunities for people to assert their free will, whether by purchasing new products, enjoying new forms of leisure, or engaging in new occupations. It has also given employers, once bound by the dictat of centralized economic planning, considerable autonomy to hire, as well as to discriminate in that process. Of course, discriminatory practices and attitudes do not materialize out of thin air. One of this Article’s primary arguments is that the Chinese government—at all levels—plays a leading role in promoting discrimination. By mandating an earlier retirement age for women, as it has done since the early 1950s, the Chinese government signals to society that women are frail, merit special treatment, and cannot work as hard or as long as men. Likewise, the household registration system (hukou) stamps a person as either rural or urban and links his access to social benefits to the locality where he is registered. Given the enormous gap between rich cities and poor villages, as well as the difficulty of changing one’s hukou status, Chinese villagers face dim job prospects and a thicket of municipal restrictions on hiring out-of-towners. Official barriers also remain intact against carriers of infectious diseases. As seen above, civil service positions require applicants to be free of infectious diseases, even when the job itself presents no risk of contagion.

Facing these policies and social attitudes that reflect distrust and disfavor, advocates of various stripes—nongovernmental organizations (NGOs), public interest lawyers, concerned citizens, government-operated nongovernmental organizations (GONGOs), and others—have mobilized to challenge discrimination. In close contact with the media and online channels, these advocates have raised awareness, lobbyists legislative and administrative bodies to repeal discriminatory regulations and pass protective ones, and filed dozens of lawsuits claiming employment discrimination. This Article argues that these mobilization efforts, as well as the legislative and administrative responses by government bodies, indicate a newfound responsiveness of the Chinese government to equal employment, a core issue of human rights. More importantly, the fact that courts have routinely found for victims of discrimination suggests that the level of commitment is more than merely “discursive,” or paper on the books. Although we can, and will, rightly question the efficacy of remedies ordered by Chinese courts, it is clear that officials across various sectors of the Chinese government agree that discrimination against HBV carriers, if no one else, is worth proscribing. This Article proceeds in five parts. Because the field of employment discrimination is so vast, this Article narrows the scope by focusing on three large disadvantaged groups: women, migrant workers, and carriers of infectious diseases. Discrimination itself is a multifaceted phenomenon. Therefore, in analyzing the current status of discrimination in China and the laws that prohibit it, this Article adopts several methodologies, including interviews.
with lawyers and activists involved in discrimination issues, analysis of verdicts brought by victims of discrimination, sociological materials on social movements, and conventional methods for the excavation and interpretation of current (and annulled) Chinese law and regulation. An interdisciplinary approach permits reflection both on the nature of existing Chinese law and on the processes and people that have led to its reformulation and revision.

Part I briefly describes the historical context for the discussion and reviews competing concepts of employment discrimination as developed in the West.

Part II describes the most common--and perhaps the most serious--manifestations of employment discrimination in contemporary China. These manifestations can be overt: job advertisements openly express preferences or limitations based on gender, health status, age, height, household registration, and so on. The prevalence of discriminatory preferences in job advertisements reflects both the popularity of discriminatory attitudes and the impunity employers enjoy in screening candidates in this manner. Alternatively, more covert forms of discrimination are practiced in the selection process itself. Employers deploy a wide range of techniques to exclude women, hepatitis B carriers, and other disfavored groups (women under 5’2” or over thirty years old; men under 5’5” or over thirty-five years old). Medical examinations, photographs, CVs, written examinations, and other “objective” forms of documentation provide employers with the pretextual grist needed to weed out undesirable applicants. During the interview itself, employers may ask female candidates about their marital status and future plans for children. These processes produce distinctively discriminatory workspaces, which are reproduced and normalized in factories, stores, and offices.

Part III outlines the law of employment discrimination prior to the Employment Promotion Law. [FN3] It attends to laws that both promote and proscribe discrimination, highlighting the essentially ambivalent role that the Chinese government has played in this regard. On the one hand, China has instituted a number of discriminatory laws and practices in its sixty-year history. Women, *648 for instance, must retire before men. [FN4] a form of paternalism perhaps plausible in the 1950s, when the regulation was first passed, but no longer apposite. [FN5] Likewise, State Council regulations issued in the 1980s--and still in effect--foreclose job opportunities to infectious diseases carriers due to concerns about contagion. [FN6] These restrictions sweep broadly and do not accurately reflect the medical risk that potential workers may pose to their colleagues and customers. On the other hand, national legislation--such as the Labor Law [FN7] and the Women’s Law [FN8]--has prohibited discrimination against various disadvantaged groups since the early 1990s. But they have provided little legal protection and few remedial opportunities or mechanisms. More recent regulations have further sought to entrench the rights of migrant workers, with varying degrees of success.

Part IV explains how advocates for HBV carriers have effected legal change in the area of employment discrimination. Using sociological and political theory, this Part describes how a social movement coalesced around the issue of HBV discrimination. Spurred by the cases of Zhou Yichao and Zhang Xianzhu, HBV advocates have activated a wide range of civil society actors--carriers, public interest lawyers, concerned citizens, online discussion boards, and NGOs--to champion the rights of HBV carriers. Using media pressure and online tools to mobilize public opinion, HBV advocates adopted a multipronged strategy to challenge many forms of discrimination, including employment discrimination. By litigating cases and encouraging thwarted jobseekers to come forward and sue, they frame the struggle as one with deeply human consequences. Judges are often sympathetic to the discrimination claims of HBV carriers because employment rights are the core socioeconomic rights that China claims to privilege. Activists also petition Chinese government bodies to suggest ways to resolve problems with existing law, and they point out areas that law should cover. These various strategies have convinced several government agencies to issue regulations to protect the rights of roughly 120 million carriers.

Part V examines the 2007 Employment Promotion Law and its progeny of lawsuits. The law expands existing legal protections, but it also offers victims of employment discrimination a new tool with which to challenge discrimination: access to courts. By suing, affected jobseekers can vindicate labor rights that existed almost *649 exclusively as theory or principle for the past two decades. It is too early to decide whether litigation will meaningfully al-
ter the practices and attitudes of Chinese employers, but the threat of losing a lawsuit may deter some from discriminating against applicants. Still, a great deal of work must be done to advance this key human right. Accordingly, the end of this Part offers ways to make the law more effective.

I. Background

A. Historical Background

Throughout its short history, the People's Republic of China (PRC) has always had antidiscrimination law. The 1954 Constitution, in a nod to the recently annexed Tibet and Xinjiang, guaranteed the right to equality for all ethnic groups: “The People's Republic of China is a unified multiethnic nation. All ethnicities shall be equal. It is prohibited to discriminate against or oppress any ethnicity . . . .” [FN9] This is the sole appearance of the word “discriminate” in the 1954 Constitution, [FN10] and one of two in the current Constitution, [FN11] but it was not the only provision to address discrimination. Its close correlate, “equality,” also appeared--as it has in all four of China's constitutions--to guarantee equality between men and women in the social, political, cultural, and educational fields. [FN12] Gender equality has long been a central concern for the Chinese government, but it remains an elusive goal to achieve.

During the early years of the PRC, women gained traction in the fields of culture, education, and employment, but made less progress in social rights, and remained largely invisible in the political sphere (as they do today). [FN13] In other words, a wide gulf separates the *650 aspirations of equality enshrined in the Chinese Constitution from the promotion of equality and proscription of discrimination in everyday life. Moreover, because individuals cannot assert constitutional rights, [FN14] the Constitution, without some kind of implementing legislation, continues to inspire but not safeguard basic rights.

In the early days of the PRC, the Chinese government made concerted efforts to increase the role and visibility of women in the workplace. The central government issued administrative regulations to staff women in fields traditionally dominated by men, such as the commercial and service sectors. [FN15] Women were also encouraged to enter professions formerly monopolized by men, such as tractor drivers, railroad engineers, and pilots. [FN16] In this period, women worked in “every sector of the national economy, every industry, and every profession, revealing a huge potential labor force that had never been recognized or understood by the society or by women themselves.”

[FN17]

Under the planned economy, government personnel offices made most employment decisions, which filled quotas in line with national economic policy. [FN18] If an employee possessed little education, she usually was assigned to the same work unit as her parent. [FN19] A more educated employee could take an examination for entry into more specialized positions like teacher, scientist, or engineer. [FN20]

At the same time, China also put in place restrictions that, however well-intentioned, laid the foundation for today's discriminatory edifices, practices, and attitudes. The differential retirement age for men and women is the leading example of these unintended consequences. Aimed at shortening the time a woman had to work in acknowledgement of her role in delivering and rearing *651 children, the policy, when initially promulgated in 1957, was seen as a boon to women. [FN21] Fifty years later, the policy has come to signify something different: that women are somehow less capable or suitable than men for both labor and cadre positions. As a result, many women are let go, often forcibly, five to ten years before their male counterparts, even if they want to keep working. [FN22]

Likewise, when instituted in 1958, the household registration system (hukou) restricted the movement of all Chinese citizens, keeping urban residents in cities and rural residents in the countryside. [FN23] Since that time, the Chinese government has systematically privileged the development of urban areas over rural ones. Better funded
education, transportation, health care, social benefits, and other services have made China's cities much more attractive places to live. [FN24] However, because the government restricted travel, and made changing one's hukou status very difficult, rural residents were condemned to a lifetime of poverty, [FN25] enjoying none of the “access to economic and social opportunities, activities and benefits” that their urban compatriots enjoyed. [FN26] At present, urban residents tend to view rural residents (many of whom migrated to the cities for low-end jobs) with a mixture of contempt and hostility, while city governments have issued a raft of ordinances that privilege local (urban) residents over outside (rural) residents in employment, education, and social services. [FN27]

With the move away from central planning and the opening up of the market economy in the 1980s and 1990s, the problem of discrimination crept into employment decisions. No longer firmly fixed to their work units, Chinese citizens had greater mobility to pursue a broader range of employment opportunities. Employers, no longer bound by centralized hiring decisions, could select whom to employ with little outside input. In this newly emergent space, a host of traditional attitudes about women, outsiders, illness, and disability resurfaced. Stereotyped thinking still retains currency in the minds of *652 many Chinese and finds analogues across a wide variety of government policies and legislation.

B. Defining Discrimination

Before examining the legal edifices that promote and proscribe employment discrimination, some discussion of discrimination itself is needed. Employment discrimination is a complicated phenomenon, involving conscious decisions and unconscious assumptions about people due to qualities supposedly possessed by virtue of their sex, race, national origin, or other immutable characteristics.

In the United States, federal courts distinguish direct discrimination, also known as disparate treatment, from indirect discrimination, or disparate impact. Direct discrimination—“the most easily understood type of discrimination” [FN28]—occurs when an employer treats a person less favorably than someone else due to a protected trait, such as his or her gender, age, or race. [FN29] Indirect discrimination is somewhat harder to grasp, as it involves a facially neutral practice or policy with “a disproportionately adverse effect on minorities.” [FN30] Chinese scholars are fond of citing an 1870 ordinance from the San Francisco City Council banning the use of shoulder poles (or dan-bao). [FN31] Although facially neutral, the ordinance clearly targeted Chinese immigrants, who retained the use of the pole to transport objects in their adoptive homeland. [FN32]

Finally, systemic discrimination refers to policies or practices that have a disproportionately broad impact on a larger subpopulation (racial, geographical, professional, or otherwise). [FN33] This Article argues that the hukou system constitutes the most pernicious form of systemic discrimination in contemporary China. Systemic discrimination, though developed in the United States and other Western societies, is relevant to the structural elements of discrimination in the PRC: lopsided development, inequality of educational opportunity, and uneven access to social services. In other words, the manifestations and structural causes of discrimination travel quite well.

*653 The preceding definitions are particularly important because Chinese statutory law, like U.S. statutory law, [FN34] does not define discrimination, even as many laws proscribe it. The lack of a formal definition has not hobbled the judicial development of antidiscrimination law in the United States, where courts routinely step in to fill gaps in legislation by defining discrimination, creating judicial mechanisms such as burdens of proof by which to capture discriminatory conduct, or prescribing remedies. [FN35] But Chinese courts play a far less active role in defining and creating law and legal mechanisms. [FN36] Instead, Chinese courts play a more active role in the enforcement of existing laws than the creation or critique of law and policy. [FN37]

II. Chinese Discrimination

Chinese scholars identify many types of discrimination in China. One Chinese scholar identified over a dozen forms of discrimination in employment alone. [FN38] Some of these forms, such as age and disability, are similar to recognized forms of discrimination in U.S. federal law. [FN39] Others would not properly be considered discrimination in the United States, but rather proxies of an employee's abilities, such as academic background, CV, and work experience. [FN40] Still others reflect China's unique socio-political biases, such as region (e.g., antipathy for people from Henan province), household registry, and membership in the communist party. [FN41] Other forms of discrimination reflect concerns about the human body, such as height and appearance, or concern over the spread of disease. [FN42] To this list one must add categories already protected in Chinese national legislation, such as sex, religious belief, race, and ethnicity. [FN43]

Despite this profusion of categories, certain classifications are more pernicious than others. Discrimination based on a person's academic background, CV, and work experience may usefully identify talent, giving employers a shortcut to wade through the large number of job applicants in China's crowded job market. Yet other forms of discrimination--such as sex, health status, and household registration--serve only to disqualify persons based on outmoded thinking and irrational presumptions about the capacity to work productively.

This Part examines three types of empirical evidence of employment discrimination: job advertisements, statistical surveys, and personal narratives. Job advertisements, both in print and online, help depict the culture of job recruitment. Since these ads are often the first link in the chain of the hiring process, they are particularly valuable indicia of what is permissible and expected of applicants. Advertisements also reveal the expectations and preferences that employers bring to bear on their personnel decisions. Similarly, statistical surveys about attitudes and experiences of discrimination provide an empirical basis to understand which forms of discrimination are most widespread. Different studies arrive at divergent conclusions about which forms of discrimination are most prevalent, but such divergence may be inevitable whenever perceptions, personal experiences, and other subjective forms of knowledge are analyzed. Finally, personal narratives shed additional light on the experience of discrimination from the applicant's perspective, while illuminating the techniques used to weed out candidates. Interview questions, e-mail exchanges, requests for photographs, and other devices to smoke out “undesirable” job candidates may not be captured by statistics or other sources, but these techniques are critical to understanding the mechanics of employment discrimination in China.

*655 A. Job Advertisements

In the United States and the United Kingdom, critical assessment of job advertisements has provided important insights into the discriminatory preferences of employers. In the United States, for instance, gender and age discrimination surfaced in advertisements throughout the 1980s, even though federal law had banned such preferences since the 1960s. [FN44] In one survey, researchers found 9.5 percent of advertisements in the classified section of various Sunday newspapers to be either “questionable or blatantly illegal.” [FN45] Of these discriminatory advertisements, 90 percent discriminated based on sex, whether for men or women. [FN46] In the United Kingdom, researchers noted a decline in the number of advertisements with age preferences from 1981 to 1991, suggesting that one form of illegal discrimination was on the wane but still evident. [FN47]

More recently, it has become common for U.S. employers to counter discriminatory preferences in job advertisements. Companies and organizations now routinely state that they are “Title IX” employers, or otherwise encourage applications from women and minority candidates. [FN48] Whether this change reflects greater tolerance by employers or a heightened recognition of the value (moral, economic, or otherwise) of a diverse workforce remains an open question. Alternatively, this greater openness could simply respond “to tightened government regulation and threats of lawsuits.” [FN49] Whatever the underlying reason, a notable shift away from discriminatory job advertisements is clearly detectable in the United States and United Kingdom.
China presents a far different picture, as recent studies show. Zhihong Gao's study of online recruiting and Zhou Wei's research on print advertisement suggest that age, gender, and physical appearance remain critical criteria for employers. Other factors, such as household registration and height, appear less frequently than age and gender, instead surfacing in more specialized or exotic positions. Many advertisements contained multiple forms of discrimination--women under the age of thirty, men over 5'5"--so these categories should not be thought of in isolation.

Gao surveyed 955 white-collar job advertisements on ChinaHR.com, a leading employment website. She found that the most frequently cited discriminatory basis was age, which appeared in 24.2 percent of the ads, followed by gender (12.3 percent), and physical appearance (10.5 percent). Further deconstruction of the categories led to interesting, if predictable, results. For example, gender restrictions targeted both men (5.5 percent) and women (6.7 percent); most of the former were for managerial positions, while most of the latter were for sales and clerical positions. These advertisements reinforce the traditional power structure that subordinates women to men. Moreover, many ads for women contained other restrictions, such as age (typically under thirty) and appearance ("good looking," "having a nice image," "tall enough"). This multiplicity of restrictions suggests "a more demeaning dimension to gender discrimination" in China, namely that Chinese women "are treated . . . as sex objects . . . to please the eyes of male bosses and clients."

Other surveys of China's advertising reveal that age and gender weigh heavily on employers' minds. One study surveyed 568 firms across eight different job sectors, including goods and manufacturing, research and development, commerce and logistics, finance and public finance, and administrative and personnel. To ensure a broad snapshot of discrimination, the authors surveyed state-owned enterprises, collective enterprises, privately owned companies, foreign invested companies, and shareholding companies. Again, age was the preeminent factor, appearing in 54.4 percent of the advertisements examined. Among the more discriminatory sectors were finance, administration and personnel, and commerce and logistics; in these sectors, over half of the advertisements contained age restrictions, targeting candidates who were either eighteen to twenty years old or, somewhat more commonly, twenty-five to thirty-five years old. By contrast, few employers specifically targeted persons aged thirty-five to forty-five years old or forty-five and over.

Gender was a less prominent factor than age, but the use of gender varied considerably across sectors. Certain sectors preferred men. Twenty-two percent of the advertisements in production required men, while only four percent required women. Research and development was similarly skewed: 14 percent required men, while only 2 percent required women. Commerce and logistics likewise favored men by a ratio of 28 percent to 6 percent. However, other sectors sought women: administrative and personnel preferred women by a ratio of 31 percent to 8 percent, and education and hygiene preferred women by a ratio of 30 percent to 6 percent. These statistics certainly support the idea that men are preferred in industries that require physical labor or scientific skills, while women are valued for administrative skills or ability to teach.

Although somewhat less prevalent than age or gender, hukou status also matters to many employers. Statistical evidence is limited, but one survey of Chongqing showed that only 7 percent of positions contained hukou restrictions, but that over 20 percent of employers restricted labor in this way. The author of the survey conducted phone interviews with twenty of the employers that included these restrictions. When asked why they discriminated against outsiders, the employers' responses included: (1) "We don't know what to make of outside laborers; we do not know if they are thieves or hooligans"; (2) "We have never hired outsiders, nor thought to hire them"; (3) outsiders require a certain period of time to acclimate to Chongqing; and (4) "Outsiders' habits are different from ours . . . We hired one before, but he was stubborn as a mule." Whether based on ignorance or limited experience, the prevailing attitudes in at least one of China's metropolitan areas suggest a deep prejudice toward outside labor.

A culture of discrimination has congealed at the first step of the Chinese hiring process, presaging a process replete with discrimination. Little wonder that workspaces in China are so clearly gendered, with men occupying posts
at the managerial levels and women suffusing the lower rungs of the service sector. [FN70] Although the evidence is more limited, negative attitudes toward “outsiders” (Chinese citizens with non-local residency status) likewise characterize many employers. If China seriously intends to be rid of employment discrimination, some effort must be made to end discriminatory advertisements, which both naturalize and reproduce artificially segregated workspaces.

B. Statistics

Statistical surveys provide another glimpse at the problem of employment discrimination. Surveys usefully reflect both reality (which groups work at what levels of society) and perceptions of reality (have you ever been discriminated against?). Both reality and its perception are critical in understanding discrimination because of the important role that perception plays in perpetuating discrimination.

In May 2006, scholars at China University of Political Science and Law interviewed 3,500 people about their attitudes and experiences with discrimination in ten large cities: Beijing, Guangzhou, Nanjing, Wuhan, Shenyang, Xi’an, Chengdu, Zhengzhou, Yinchuan, and Qingdao. [FN71] The results provide a relatively comprehensive picture of the circumstances of discrimination in today’s China.

When asked if there is discrimination in employment today, 85.5 percent responded affirmatively, while 50.8 percent of respondents believed that discrimination was “extremely severe.” [FN72] A mere 6.6 percent replied that there was no discrimination. [FN73] Similarly, a majority of respondents (54.9 percent) believed that they had personally experienced some kind of discrimination in the hiring process, [FN74] and almost one-sixth (15.7 percent) of respondents had experienced “very severe” or “relatively severe” discrimination. [FN75]

Further breakdown of the types of discrimination is also revealing. According to 62.6 percent of respondents, the most common form of discrimination is academic discrimination, meaning that the employer overemphasizes a candidate’s academic background or that the educational requirement exceeds the actual necessities of the job. [FN76] Health discrimination came in second at 47.7 percent, followed by appearance (36.7 percent), age (32.9 percent), household registration status (28.7 percent), and finally sex (21 percent). [FN77] Although this study did not find that sex discrimination is a particularly widespread strain of employment discrimination, other studies have concluded otherwise. For instance, in a survey conducted by the Women’s Federation of Jiangsu Province, 80 percent of female college students had been rejected for a position due to their gender, and over one-third of these women had multiple rejections of this sort. [FN78]

Likewise, the China Women’s Federation, together with the National Bureau of Statistics, conducted national surveys on women’s employment and social status in 1990 and 2000. [FN79] Over the course of that decade, employment rates for men and women dropped, but the decline was steeper for women. [FN80] In 1990, 90 percent of men were employed, but that number fell to 81.5 percent in 2000 (constituting a 9 percent decrease). [FN81] By comparison, 76.3 percent of women were employed in 1990, but that number fell to 63.7 percent in 2000 (representing a 16 percent decrease). [FN82] For young and middle-aged urban women, the employment rate dropped from 80 percent to 72 percent. [FN83] Women also accounted for a larger proportion of those laid off (56 percent), even though they make up a minority of the work force. [FN84]

Local surveys also indicate the relative absence of women in positions of leadership. Hebei Province, for example, conducted a survey of government employment in 1994. [FN85] The percentage of women in high-level management positions—whether in government enterprises, agencies, or institutions—was well below 1 percent. [FN86] A more recent survey found that only 4.1 percent of top leaders in government were women. [FN87]

The situation is not much better for carriers of infectious disease, especially China’s 120 million HBV carriers. Yirenping, a leading NGO that advocates on behalf of people with HBV, has recently surveyed the hiring practices of multinational corporations with offices in China. [FN88] According to a 2006 survey, 77 percent of multina-
tional corporations claimed that they would refuse applicants carrying HBV. [FN89] Two years later, the same survey found that (a) 84 percent of multinationals still require job applicants to take physical examinations and submit the results, and (b) 44 percent would still turn down applicants who tested positive. [FN90] The 33 percent decrease from 2006 to 2008 is a positive development, but the fact that 44 percent would still discriminate, even though such discrimination is now clearly illegal after the 2007 Employment Promotion Law, [FN91] is surprising. It suggests, among other things, that foreign corporations are either unaware of legal developments in Chinese labor law or unconcerned about their consequences. [FN92]

Likewise, scholars have conducted independent research on various subpopulations in China. Ye Jingyi and Shi Yuxiao surveyed carriers of the hepatitis B virus about their experiences with employment discrimination. [FN93] Over half of the respondents (52.3 percent) claimed that they had been refused a job. [FN94] Of these people, 72.3 percent claimed they were denied the job because they failed to pass a physical examination, [FN95] while only 11.7 percent believed the denial was for another reason. [FN96] Over half of respondents (56.3 percent) claimed to have experienced some form of discrimination while on the job, while almost one-third (32 percent) had been fired at one time. [FN97] In this last category, over 70 percent of respondents claimed that their employers told them the truth—that they were fired because they carried the hepatitis B virus—while 18.8 percent said their employer used an excuse to terminate them. [FN98]

Statistics offer another window into the realities of employment discrimination, illuminating the experiences of employees and applicants, as well as the attitudes and perceptions of employers and society at large. A degree of subjectivity infuses many of these surveys, reflecting the nature of discrimination itself. The experience of discrimination presumably involves subjective determinations by job applicants who feel discriminated against, particularly if the reason for their refusal is never explicitly stated, but it also presumably includes conscious and unconscious discrimination by employers, who may be unaware of their own biases. Still, the surveys make clear that discrimination (perceived and otherwise) is widespread, affecting various groups of people.

C. Personal Experiences

Although unverifiable through statistical means or numerical measures, anecdotal experience rounds out the portrait of discrimination. Personal narratives convey three related themes. First, they bring to light actual techniques used by employers to exclude qualified candidates. Second, when repeated across time and space, anecdotal experience illuminates which forms of discrimination are most prevalent. Third, and with the first two factors in mind, such narratives can guide discussions of ways to stop discrimination in the workplace. For example, if employers can pose personal questions to female job applicants during an interview—about marital status, boyfriends, plans to have children, and so on—women face a substantial barrier to securing employment. Although dozens of anecdotes portray the actualities of hiring, two in particular shed light on the techniques used to weed out women.

First, a female job applicant e-mailed her résumé to a company. [FN99] She did not indicate her sex on the application, and she did not include a photograph, a common accompaniment of many job applications in China. The employer called her the next morning, telling her that she did not include a photograph. The applicant offered to send one right away, but the employer stalled, saying they still wanted to “research other applications.” She never heard back from the company, but she believes that the company liked her résumé. Upon realizing she was female—as they could determine through the phone call—they lost interest. The authors of the study from which this anecdote is drawn suggest that this technique is commonly used to ferret out female candidates, and that it constitutes a form of sex discrimination. [FN100]

Second, a female law graduate described her classmate’s interview with a small company. [FN101] The interview centered around three questions: “Are you married?”; “Do you have a boyfriend?”; and “How much do you want for a salary?” [FN102] Interviewers frequently question women about childcare or pregnancy (planned or past), ques-
tions that would be illegal under U.S. law. [FN103] They either ask these questions directly or ask if the applicant would be willing to *move around* to different cities with the job; if the applicant is unwilling to move, the employer will ask if she has a boyfriend. [FN104]

Although this may seem like an unwelcome intrusion into the applicant's personal life, employers are not simply being nosy. Because employers typically pay for the ninety days of maternity leave required by the Labor Law, many profit-minded employers would prefer to avoid this liability altogether. [FN105] Therefore, the extirpation of discrimination against women will likely require a change in thinking about responsibilities for child care (a normative matter) and the reallocation of the costs of providing maternity leave and child care (a policy matter).

With some understanding of the manifestations of employment discrimination and a basic grasp of their underlying rationales, Part III turns to the laws that both proscribe and promote discrimination.

III. The Law of Employment Discrimination

A. Antidiscrimination Law

In the 1990s, Chinese law began to guarantee equal rights in employment. The 1990 Law to Protect Disabled Persons mandated that “[n]o discrimination shall be practiced against disabled persons in recruitment, employment, obtaining permanent status, technical or professional titles, payment,” and other areas. [FN106] The 1992 Law on the Protection of Rights and Interests of Women (Women's Law) first extended protections to women in numerous areas of employment, including hiring and firing; titles, promotions, and salaries; and marriage, pregnancy, and nursing. [FN107] Likewise, the 1994 Labor Law ensured that workers “regardless of their ethnic group, race, sex, or religious belief, shall not be discriminated against in employment.” [FN108] Despite these provisions, however, employers could discriminate with impunity against any protected class because the mechanisms to implement these laws were either weak or nonexistent. [FN109] Unlike the United States, China does not have an Equal Employment Opportunity Commission to investigate allegations of employment discrimination. Moreover, China lacks implementing regulations or judicial interpretations that tell courts how to handle employment discrimination claims or remedy successfully litigated claims. [FN110] Indeed, some courts refuse to accept employment discrimination claims on the grounds that they are not listed in the Regulation on the Causes of Action for Civil Cases, issued by the Supreme People’s Court. [FN111]

In summary, before the passage of the Employment Promotion Law (EPL) in 2007, Chinese law proscribed employment discrimination but offered very little by way of remediation. Before turning to the impact of the EPL, however, it is first necessary to examine the obverse of Chinese antidiscrimination law: laws promoting discrimination.

B. Discriminatory Laws and Their Repeal

The Chinese government, both at the central and local levels, has promulgated a number of laws, regulations, and ordinances that exclude persons from certain jobs, force women to retire early, or otherwise disadvantage certain applicants based on immutable characteristics. State-sponsored discrimination both naturalizes discriminatory practices and perpetuates the marginalization of various groups outside the power structures of Chinese society. The continued development of antidiscrimination law requires a careful review of the underlying rationales for discriminatory laws, a comparison of these rationales with contemporary realities, and a decision as to whether amendment or withdrawal may be appropriate. Many policies developed in the 1950s--when the PRC was a new country inculcating a revolutionary spirit in its people--no longer match contemporary realities. In some instances, the government has already responded with appropriate changes, often after sustained pressure from the public, petition drives, and me-
dia scrutiny. This work should continue, either through incremental revisions or by passing an all-encompassing antidis

tidiscrimination law. [FN112] This Part outlines some of the major laws and policies that promote discrimination
based on gender, hukou status, and infectious disease. It then discusses recent changes or revisions to these discrimi

natory laws and policies.

*665 1A. Gender Discrimination

A number of Chinese laws promote employment discrimination against women. The most widely cited is the differen
tial retirement age, which mandates that women must retire before men. In 1958, China's highest executive
body, the State Council, issued Temporary Guidelines Handling the Retirement of Workers and Professionals, which
initially set the differential retirement ages. [FN113] Although these “temporary” guidelines were withdrawn in
2001, other State Council Guidelines from the 1970s propagated this practice into the present. [FN114]

Differential retirement ages may have made sense in the 1950s. Under the influence of the Soviet Union, and
with a mind toward protecting women, not inhibiting gender equality, China passed a differential retirement age for
men and women. [FN115] Because women needed time for maternity leave, maternal protections, and raising chil

dren, it was “reasonable” for them to work less and retire earlier. [FN116] In the immediate post-revolutionary peri
od, traditional notions about the division of labor still prevailed, despite some revolutionary stirrings about the proper
role of women. [FN117] In practice, however, during that period women handled more of the domestic responsibilit
ies, and men provided for the family through outside work. [FN118]

*666 A generation later, in 1978, the State Council issued another set of “temporary” guidelines, both of which
mandated differential retirement ages and remain in effect: the Temporary Measures on the Retirement and Resigna
tion of Workers (Workers' Measures) and the Temporary Measures on the Proper Arrangement of the Elderly, Weak,
Infirm and Disabled Cadres (Cadres' Measures). [FN119] The Workers’ Measures provide that “Workers in state-
owned enterprises, institutional units, government or [communist] party organs, or mass organizations must retire
upon reaching any of the following conditions: (1) males reaching 60 years, and females reaching 50 years, after they
have worked continuously for ten years.” [FN120] The Cadres’ Measures, on the other hand, provide that “Cadres
working in party or government organs, mass organizations, enterprises or institutional units can retire upon reaching
any of the following conditions: (1) males reaching 60 years, and females reaching 55 years, after they have particip-
ated in revolutionary work for ten years.” [FN121] In other words, the retirement age for men is sixty whether they
are cadres or workers, whereas female cadres must retire at fifty-five and female workers at fifty. It is important to
note that private companies are not bound by either directive, although they frequently force women to retire before
men. [FN122]

By law, then, many female professionals are let go upon reaching the age of fifty-five. But many female profes
sionals have been misclassified as workers, either because they were wrongly classified when they began their jobs
in the 1980s, or because they have elevated to professional status over the course of their careers. [FN123] Doctors,
teachers, accountants, journalists, health care professionals, and many others are fired at the age of fifty. [FN124]
Moreover, when they sue in court, or pursue labor arbitration, these women face *667 insurmountable obstacles, of
ten because the decision to fire them is authorized by local government policy. [FN125]

Differential age restrictions harm women in several ways. First, for many women, their professional lives may
only begin to blossom at age fifty, particularly if they deferred professional commitments to raise children, obtain ad
vanced degrees, or both. To require women to retire at fifty-five, five years before their male counterparts, nullifies a
lifetime of toil, trouble, and deferred gratification.

Second, retirement pensions are tied directly to the number of years worked. If a woman retires five to ten years
before a man, her pension will be somewhere between 7 percent and 20 percent less than a man’s. [FN126] This en
sures that differential treatment persists long after retirement.
In addition to early retirement, Chinese law also prohibits women from engaging in certain jobs, including working in mines, felling and stacking timber, setting up scaffolding, demolishing buildings, working on electric power lines, and other jobs requiring dangerous or intense physical labor. The labor regulations establish broader protections for menstruating women, pregnant women, and nursing mothers, who are barred from working in walk-in refrigerators, cold water, or other jobs involving low temperatures. It is unclear whether this form of paternalism is any more justifiable than the concerns underlying the early retirement system. Some test of strength, stamina, or agility would better replicate a person's physical capacities than a blanket ban. Although arguably well intended, these regulations underscore the general notion that women are not fit for the workplace, or some sizable fraction of it.

Local regulations likewise discriminate against women. In 2003, Hunan published Temporary Measures for Physical Examinations of Civil Servants, which apply to civil servants and those working in state-sponsored institutions such as universities and hospitals. The Hunan guidelines require that women who work in a medical facility's gynecological department have “normally developed secondary sexual characteristics; symmetrical breasts without lumps; vulva [that is not] inflamed, ulcerous or tumorous; and uterus [that is 668 not] prolapsed.” This regulation certainly sounds like per se discrimination, at least to one trained in U.S. antidiscrimination law, because there are no corresponding anatomical specifications for male workers. As they stand, these requirements heighten the burden on women, subjecting their bodies to notions of anatomical correctness that have no bearing on their ability to perform the job. Moreover, this regulation might eliminate disabled persons and breast cancer survivors, suggesting multiple forms of discrimination.

1B. Efforts to Reform Gender Discrimination

The most significant legal reform in the area of women's rights generally, and discrimination specifically, was the 2005 revision of the Law on the Protection of Women's Rights and Interests (Revised Women's Law). This law addresses several weaknesses in China's existing legal structure, such as the underrepresentation of women in national and local politics, the fragility of women's property rights, and the prevalence of sexual harassment in the workplace. For the first time, the law explicitly states that the promotion of equality between men and women is a basic “state policy,” lending additional rhetorical support to a position that the government has long exhorted.

A group of elite scholars and officials began drafting revisions to the existing law in 2003, drawing heavily on international and comparative experience. This group included members of government-run entities like the All China Women's Federation and the Chinese Academy of Social Sciences, as well as civil society actors such as the Center for Women's Law and Legal Services at Peking University. Through workshops, conferences, and roundtables, these scholar-activists helped channel recommendations from United Nations committees and other countries' laws into the legislative process of the PRC. Although not all their suggestions made it into the law, they laid out several issues—including discrimination, domestic violence, and property rights--for future regulations and provincial implementation.

Despite various improvements made in the law, the Committee on the Elimination of All Forms of Discrimination Against Women issued a long list of concerns and recommendations in its 2006 Report. First, the Report expressed concern over China's “capacity to understand the meaning of substantive equality and non-discrimination.” Because many Chinese still do not understand the concept or problems of discrimination, the Report specifically recommended that China include “a definition of discrimination against women in its domestic law, encompassing both direct and indirect discrimination.” As we saw above in Part II, discrimination against women is quite widespread in China; one reason may be a lack of understanding as to why discrimination is a problem.

A second concern was the lack of “effective legal remedies” for violations of the Women's Convention.
as well as a lack of “awareness-raising and sensitization measures about such legal remedies against discrimination so that women can avail themselves of them.” [FN144] Indeed, the lack of effective remedies and the general failure to implement laws are constant criticisms leveled at the Chinese legal system. [FN145] As discussed in Part V, discrimination *670 against women continues in China, but no plaintiff has stepped forward to challenge it. [FN146]

A third concern was “traditional stereotypes regarding the role of women and men in society.” [FN147] In other words, the divide between men’s work and women’s work remains relatively clear in China, with men occupying higher rungs and women down below. The Report recommended a broad campaign of education and awareness raising, particularly directed at men and boys, through radio, television, and print media. [FN148] The Report also suggested the inclusion of gender sensitivity into school curriculum and textbooks. [FN149] The Report made other suggestions, but they lie beyond the scope of this Article.

Debate continues over the differential retirement age, but little forward momentum is detectable. In April 2009, one of China’s most senior female politicians, Chen Zhili, called on the city of Beijing to take the lead in equalizing the retirement age for cadres. [FN150] Noting that Beijing’s decision to do so “would have a huge influence on the rest of China,” Ms. Chen believed that leveling the retirement age would greatly advance equality between the sexes. [FN151] The mere fact that a person of Ms. Chen’s stature would make such an appeal is significant, and it indicates some level of support among Chinese government officials. Still, the fact that this proposal has not moved forward in over a year does not bode well for its implementation.

2A. Hukou Discrimination

The household registration, or hukou, system helps maintain the physical separation of urban residents from their rural brethren. Instituted in 1958, the system initially permitted the government to distribute resources and benefits more effectively, to control migration from rural areas to urban settings, and to keep closer tabs on criminal activity. [FN152] Citizens were categorized according to their place of residence, as well as whether they were rural (“agricultural”) *671 or urban (“non-agricultural”). [FN153] If a citizen had a Beijing hukou, for instance, that citizen benefited from the panoply of benefits (insurance, education, social welfare, and even food rations during the PRC’s more tumultuous periods) that Beijing provided its residents. If, on the other hand, you lived in Beijing without a Beijing hukou, you did not have access to these services. [FN154]

In recent years, the system has relaxed somewhat. [FN155] Wealthy or educated rural residents can apply to become local residents of various cities, depending upon criteria set out by the city. [FN156] The estimated 150 million migrants working in Chinese cities offer proof that people are no longer as tightly bound to their native villages as they were in the early days of the PRC. [FN157] However, this change does not mean that life has become any easier for today’s migrant workers. Typically, they toil at low-wage jobs without social security, a guaranteed wage, or access to medical care. [FN158] Equally troubling, their children are often ineligible to attend local schools, creating another generation of marginalization. [FN159]

A number of regulations reinforce the hukou system and further disadvantage migrant workers. National regulations, for instance, instruct local employers--private, public, and state organs alike--on how to hire workers who come from outside their locality. [FN160] One regulation from the Ministry of Labor provided that outside workers could be hired only if no local person was qualified to fill the position and the local labor and employment agencies approved the employer’s request for an outside hire. [FN161] In other words, local people were preferred in job recruitment, and outsiders could fill positions only when a local agency approved of the placement. Although this *672 regulation has since been withdrawn, [FN162] it set a precedent to which many cities have clung. Nanjing, for instance, still encourages employers to hire local laborers: “first urban, then rural; first this city, then other cities; first this province, then other provinces.” [FN163] By mandating “first this city, then other cities,” [FN164] this principle privileges not only Nanjing residents, but also any other urban residents. This preference represents discrimination against rural people in its purest form.

Other cities restrict migrant labor in even less nuanced ways. [FN165] Some cities, either by enacting a strict numerical target or by setting an acceptable percentage of outsiders in the total work force, impose quotas on the number of outside workers allowed to work in the city. [FN166] Other cities prohibit or severely restrict the use of migrant workers in specific positions. Shanghai, for instance, closed several positions, including shop assistants, maintenance staff, and custodians, to persons without local residency. [FN167] Although these positions are not high-status positions, they would likely appeal to the frequently less educated and underprivileged migrant class. More expansively, Beijing placed restrictions on various white-collar positions, including administrators in the financial and insurance sectors, accountants, bank tellers, and staff at “star-level” hotels. [FN168] These regulations restrict the number of positions available to migrant workers and steer them toward the most grueling jobs.

Apart from job restrictions and prohibitions, cities also levy fees on employers that hire outside workers; these fees fall under the various guises of “registration fees,” “work management fees,” “processing fees,” “administrative service fees,” and so on. [FN169] The effect is to drive up the cost of hiring outside workers and to encourage the hiring of local employees.

Finally, cities may require migrant workers to obtain work permits, residency permits, health permits, and other documentation in order to work. [FN170] The hassle of obtaining such permits, coupled with the fear that one’s status as a non-resident is automatically disqualifying, may dissuade many migrant workers from applying for this paperwork. In this way, cities can prevent migrant workers from taking up local posts and greatly restrict the number of eligible candidates. At the same time, these regulations generate revenue from people who can least afford it. [FN171]

2B. Efforts to Reform Hukou Discrimination

The new millennium has witnessed a number of reforms to the hukou system. While these reforms were percolating in the 1990s, [FN172] a wave of dissatisfaction hit the Chinese press in 2000. [FN173] In December 1999, the Beijing government published 103 additional job categories from which migrant workers would be barred. [FN174] After vigorous academic debate, and most likely with the imprimatur of high officials, Chinese newspapers ran editorials and personal pleas from migrant workers that questioned the hukou system. [FN175] One editorial acknowledged the problem of local protectionism but questioned whether senior officials had considered the national picture. [FN176] Another noted that China was “treating its precious labor resources as a burden and inhibiting the economic interests, the very livelihoods, of tens of millions of rural laborers.” [FN177] News websites *674 and Internet bulletin boards also posted criticisms of the system and calls for its reform. [FN178]

Over time, even the official state news media began to criticize the hukou system. An article from People's Daily made a number of strong claims, such as (a) that residency and migration were “basic rights” (with the implication that they should not to be violated by state or local policy); (b) that the hukou system itself was incompatible with China’s current economic development and tarnished its image of reform and openness; (c) that the system enabled corruption, as evident in the prevalence of bribes to officials and the auctioning of local residency permits by small cities; and (d) that abolishing the current system followed “the general trend of history.” [FN179] The article ambitiously predicted that the system would one day be considered a relic of the planned economy. [FN180]

As noted, the central government had already initiated modest reform efforts. In 1997, the State Council initiated an experimental program permitting migrant workers to obtain local hukou in selected small towns and cities. [FN181] If they lived in the locality for at least two years, with a stable income and a permanent residence, migrants could apply for permanent residency. [FN182] Over 540,000 migrants became full residents in 328 cities, [FN183] and this success lead the State Council to expand the experiment to cover all small towns and cities. [FN184] Nevertheless, given the episodic nature of many migrant workers’ work assignments (such as construction or infrastructure) and the seasonal rhythms of their lives (returning home to their native villages during holidays), these requirements still exclude highly transient migrants, who are arguably the most precariously positioned. Additionally, large cities
such as Beijing, Shanghai, and Shenzhen--each of which employs millions of migrant workers--were exempt from the program. [FN185]

*675 The State Council continues to issue directives that relax the hukou system and mitigate the discriminatory effects of various local regulations. In 2003, for instance, it issued a Notice on Successfully Managing Employment and Services for Migrant Workers. [FN186] The preface describes the current employment prospects for migrant workers in unusually candid terms: they “still face a number of irrational restrictions in employment; their rights and interests are not effectively protected; they are not paid their due wages; they are charged excessive fees; and they are subject to other serious phenomena.” [FN187] The Notice then calls on local governments to “abolish irrational restrictions on the employment of migrant workers,” including the abolishment of administrative approvals, professional restrictions excluding migrants, and registration requirements. [FN188] It also mandates that local governments impose the same technical qualifications and health standards on migrant workers as on local residents. [FN189] With the Notice, the central government took a first step toward peeling away the encrustation of discriminatory provisions that had piled up from the 1990s.

Subsequent regulations in 2004 and 2006 likewise target discriminatory regulations. The 2004 Notice on Further Improving the Employment Environment for Migrant Workers praises the “large-scale work” of various cities and local departments since the 2003 Notice. [FN190] But it also recognizes the manifold problems facing migrant workers, which include inadequate training services and recruitment opportunities, employment fees, numerous procedures, unpaid wages, violations of their rights and interests, and “illegal elements” who defraud migrant workers by charging recruitment fees for nonexistent jobs. [FN191] The 2004 Notice repeats, almost verbatim, the 2003 Notice’s instruction to abolish administrative approvals, professional restrictions, and registration requirements, but the 2004 Notice uses the terms “discriminatory regulations and irrational restrictions,” an acknowledgment that these regulations offend both morality and reason. [FN192]

In 2006, the State Council issued Certain Opinions on Resolving Problems of Migrant Workers. [FN193] The Opinions acknowledge the *676 “important contributions” that migrant workers have made to the development of China and articulate a series of programmatic steps to alleviate the burden of this disenfranchised subpopulation:

Migrant workers are a new labor force that has sprung up in the processes of industrialization and urbanization during China’s reform and opening up. Their residency status is rural, but they engage primarily in non-agricultural production. Some go out to do both industrial and agricultural work during the non-agricultural season, and are very mobile. Others have been employed in cities for a long time, and comprise a large proportion of industrial workers. A large number of migrants work in cities and towns, where they have made important contributions to the construction of a modern China. [FN194] Article 5 of the Opinions sets out basic principles, such as “equal treatment.” It calls on cities to “[r]espect and maintain migrant workers’ legal rights, eliminate discriminatory regulations and systemic obstacles to their working in cities, [and] permit them to enjoy equal rights and obligations in urban professional employment.” [FN195] Other provisions address now-familiar dilemmas of unpaid wages, labor contracts, employment services and training, and social protections. [FN196]

But the problem, as the title intimates, is that these are merely opinions. Although legally binding, [FN197] they do not specify the sanctions a court should impose upon finding a violation. As a result, it is unlikely that a court of law would find against a municipality for contravening these regulations. Like so much Chinese law, the Opinions propose prohibitions but not sanctions to enforce them.

Despite some changes in the residency requirements, the essential structure of the hukou system remains largely intact. By dividing citizens into “agricultural” and “non-agricultural,” then allocating resources unevenly between the city and countryside, the PRC continues to reinforce the marginalization of hundreds of millions of citizens. Although recent reform efforts aim to ameliorate some of the discriminatory burdens that cities have attached to migrant workers, the systemic discrimination remains untouched. By permitting greater mobility than it did fifty years
ago, China has *slightly blurred the division between urbanites and villagers. Yet, as one scholar concluded, “Chinese society by and large can still be divided into an ‘agricultural’ segment and a ‘non-agricultural’ one, and glaring differences remain in entitlements between the two.” [FN198]

3A. Discrimination Against Infectious Disease Carriers

With an estimated 120 million carriers of the hepatitis B virus, [FN199] 4.5 million known cases of tuberculosis, [FN200] and 700,000 carriers of HIV, [FN201] a sizeable portion of the Chinese populace faces the possibility of a different form of discrimination. Quite apart from the public health concerns raised by these diseases, the Chinese government has also had to deal with employment-related issues, such as workplace safety and discrimination. [FN202] For a long time, the government’s thumb was decidedly on the side of public health and safety. Numerous laws and regulations excluded qualified but diseased persons from a variety of positions. Recent reform efforts, however, suggest both a growing willingness to strengthen the rights of disease carriers and a clearer awareness of the actual threat that such persons pose to public safety generally and the workplace in particular. Perhaps more importantly, citizen activism has played a critical role in promoting reform; the mobilization of public opinion has signaled to the Chinese government that hepatitis B discrimination is palpable, destructive, and in certain instances deadly.

A number of national laws and regulations prevent persons who carry infectious diseases from engaging in certain lines of work. These regulations reflect the comprehensible concern that placing an infectious disease carrier in certain occupations might facilitate the spread of disease. Thus, the Food Safety Law prohibits persons with “dysentery, typhus, viral hepatitis, active pulmonary tuberculosis, or purulent or weeping skin diseases” from “working in direct contact with food for consumption.” [FN203] This provision excludes a narrow range of job possibilities for a narrowly tailored group of disease carriers. Hepatitis A, for instance, can be spread through contaminated food or water, [FN204] while tuberculosis can be spread aerially when an infected person coughs, sneezes, or even speaks. [FN205] Prohibiting carriers of these diseases from working in food production bears a rational relationship to public safety.

Unfortunately, other regulations are less defensible. The Administrative Regulations on Public Hygiene, for instance, restrict the same carriers of disease listed in the Food Safety Law from a wide range of posts, mainly involving direct contact with customers: hotels, restaurants, inns, cafes, bars, teahouses, public baths, barber shops, beauty salons, movie theatres, dance halls, concert halls, gyms, public parks, museums, libraries, and more. [FN206] Without doing a separate epidemiological study for each disease, it seems clear that this regulation sweeps too broadly.

Hepatitis B provides a good example: it can be spread by birth; sex with an infected person; sharing needles, razors, syringes, or toothbrushes with an infected person; direct contact with blood or open sores of an infected persons; or exposure to blood from sharp instruments (as used in ear-piercing or tattooing). [FN207] It seems highly improbable that a person with the hepatitis B virus would spread the disease if working at a movie theatre or a museum, for example, although one can imagine a hypothetical situation where such contact might occur. But by restricting carriers of HBV from all manner of public employment, the regulation sends a strong symbolic message, both to carriers and a public that is largely uninformed about the transmission of such diseases, that carriers pose a health risk, should not work in public places, and should avoid coming into contact with the general public.

Similarly, the 1989 Supervisory Regulations on Hygiene in Cosmetic Products ban some people from working directly in the production of cosmetics. [FN208] In addition to carriers of the diseases listed above (viral hepatitis, tuberculosis, and dysentery), persons with eczema, ringworm, and other dermatological conditions are also *prohibited. [FN209] This prohibition may be rational for ringworm, which can be spread through indirect contact if a second person touches an object that has been touched by the infected person. Eczema, however, is not contagious. [FN210] Prohibiting persons with eczema from working in cosmetic production serves no purpose except to discrim-
inate against them. By excluding people in this way, the State Council signals that their skin problem—a superficial blemish—renders them unfit for the work of “beautiful people.”

These restrictions entrench discrimination against carriers of diseases, excluding capable workers from jobs based on unfounded fears rather than genuine science. Regulators should instead determine the nexus between the spread of the disease (whether through casual contact, blood, bodily fluid, etc.) and the likelihood of contagion for a particular position. They can then specify which diseases are particularly contagious, and which positions should be off limits for medical reasons. Some comfort can be drawn from the fact that these quite sweeping regulations were issued in the 1980s, whereas more recent laws—like the 2009 Food Safety Law noted above—significantly narrow the scope to a few forbidden posts. [FN211] However, until these regulations are formally withdrawn, they remain valid law in the PRC. Moreover, because recently promulgated laws often explicitly carve out job posts proscribed by early regulations and directives passed decades ago, [FN212] these regulations continue to generate prejudice against people.

3B. Efforts to Reform Discrimination Against Infectious Disease Carriers

Not long after the Zhang and Zhou incidents, [FN213] various government bodies began revising laws and regulations. In 2005, the Ministry of Personnel issued the government's first responsive regulation, permitting some carriers of the hepatitis B virus to work *680 in civil service positions. [FN214] Applicants with “chronic or acute hepatitis” were still barred, but “antigen carriers” who had been examined could still work. [FN215]

In 2007, the Ministry of Labor and Social Security promulgated two regulations that secure the employment rights of HBV carriers. The first, Opinion on Protecting the Employment Rights of Carriers of the Hepatitis Surface Antigen, deals exclusively with carriers. [FN216] It provides, in pertinent part, that “[a]part from those jobs specifically proscribed by national laws, administrative regulations, and regulations from the Ministry of Health due to ease of contagion, employers may neither refuse to hire, nor fire, a carrier of the hepatitis B antigen because he carries the antigen.” [FN217] The regulation “strictly regulates the employer's request and use of medical examinations,” permitting them only when there is “actual need” based on the exigencies of the job. [FN218] An employer cannot force a job applicant to take a hepatitis B test unless HBV carriers are prohibited from taking the job by national laws or administrative regulations. [FN219] The regulation also calls on medical institutions to “protect the privacy rights of hepatitis antigen carriers,” suggesting that they too have a responsibility to keep this delicate information in the proper hands. [FN220] Finally, the regulation calls on local offices of the Labor Ministry, as well as labor arbitration committees, to protect the legal rights and interests of laborers in general. Specifically, the regulation calls on these actors “to prevent occurrences of the employment discrimination issue” in hiring and employing workers. [FN221] This regulation represents a targeted response to the problem of discrimination against HBV carriers. By calling on labor arbitration committees, the regulation holds out the promise of implementing antidiscrimination law.

Second, the Ministry of Labor of Social Security promulgated Regulations on Employment Services and Employment Administration, which complement the Employment Promotion Law in various ways, [FN222] including prohibitions of discrimination against *681 women, disabled persons, and carriers of infectious diseases. [FN223] Apropos of HBV, the Regulations, for the first time, prescribe a punishment for employers that discriminate against carriers. If an employer requires an HBV test for a job not prohibited to carriers by national law or administrative regulation, the employer faces a fine of up to 1,000 rmb (about $150). [FN224]

In this way, the regulation addresses a fairly common type of indirect discrimination in China, as analyzed more fully in the following section. Employers may claim that the medical examination (of which the HBV test forms a part) is a neutral policy designed to ensure the health of all applicants, but they may instead use the results to exclude HBV carriers. Although 1,000 rmb is a small sum for many Chinese employers, the Regulations are helpful in articulating a sanction, something Chinese labor law has tended to avoid.
In February 2010, the Chinese government fully scrapped HBV testing. [FN225] Three ministries issued a Notice to prohibit employers and schools from requesting HBV testing in medical examinations, requesting the results of an applicant's HBV tests, or asking the applicant if he carries the antigen. [FN226] Medical institutions are likewise banned from giving schools or employers the results of the medical examination. [FN227] The Notice also recognizes the important privacy rights that attach to this information by making it for the examinee's eyes only. [FN228] Finally, the Notice includes sanctions against employers and schools that illegally request HBV examinations. [FN229]

*682 IV. The HBV Social Movement

In 2003, the cases of Zhou Yichao and Zhang Xianzhu first raised the profile of HBV discrimination. Zhou's criminal trial and Zhang's administrative trial received national and international attention. [FN230] The trials informed government officials, among others, that employment discrimination against HBV carriers required a rapid response. But the cases also set in motion a wider chain of events—a social movement that has clamored for legal reform. Before examining the various activities and channels by which HBV advocates have fomented legal change, this Part provides a rudimentary primer to illuminate the basic concepts of social movements.

Sociologists attend to three facets of social movements to explain their emergence, evolution, and success (or failure). [FN231] First, scholars direct attention to the particular group's political opportunities and constraints, including changes in institutional structures or informal power relations. [FN232] This analysis may also include the openness of the political system, the stability of elites that support the system, and the state's capacity for repression. [FN233] In other words, one must appreciate the broader political context and the internal dynamics that permit a movement to gain traction in a particular society.

Second, and inseparable from the issue of context, scholars consider the “mobilizing structures” of a movement: the collective vehicles, networks, and organizations through which people advocate for change. [FN234] For a movement to survive and achieve success, however defined, activists must create organizational structures to sustain collective action. [FN235] The individual accomplishments of people like Martin Luther King, Jr. and Susan B. Anthony are impressive, but neither would likely have succeeded without an organization of supporters, such as the Southern Christian Leadership Conference or the National Women's Rights Convention. The context of rights-promotion for HBV carriers in China is, of course, vastly different from late nineteenth-century New England or mid-twentieth-century Georgia, but the importance of organizational *683 structures in sustaining collective action runs throughout most social movements. [FN236]

Third, a proper analysis must account for “framing processes,” the shared meanings through which advocates and affected people understand their situation. [FN237] Social movements are predicated upon the tension between shared anxieties about a particular problem and optimism that collective action can redress it. [FN238] The framing process asks: What stories do they tell to explain their particular conditions? How do they interpret events to fit within these dominant narratives? [FN239]

To sum up, any analysis of social movements needs to account for the sociopolitical context in which a movement emerges, the organizational networks that foster the desired change, and the signification processes through which agents perceive the problem and the solutions. There is room, of course, to quibble with the lines between these categories, [FN240] but they seem to constitute three vital acts of any social movement.

As noted, 2003 was “the year of antidiscrimination” for HBV carriers. [FN241] Within months of each other, the Zhou and Zhang cases showed how serious and widespread discrimination was; moreover, they showed that the government itself was an agent of discrimination. The incidents provided a useful political opportunity around which antidiscrimination advocates could raise awareness of the problem of employment discrimination, particularly discrimination against carriers of HBV. Two ambitious and accomplished young men sought to join government service, the
highest calling for aspiring youth in traditional China from the Tang Dynasty to the present. [FN242] Both passed the “substantive” portions of the challenging civil service examination, yet another proud tradition that ensures that only the most qualified enter government service. [FN243] Yet both were denied positions due to a factor that they *684 could not control, a factor that would imperil neither their ability to work nor the health of their colleagues. [FN244]

In recent years, high-profile cases such as Zhou's and Zhang's have catalyzed legal reform efforts, or at the very least symbolized larger problems that litigation aims to address. [FN245] The criminal trial of Zhou Yichao and his subsequent execution may not have aroused much public sympathy, but the affair surely captured the attention of the government. In contrast, Zhang's decision to channel his disappointment through administrative litigation served more than his own ends, coupled with extensive media coverage, ensured that hundreds of millions of people in and outside of China. [FN246] The court's highly technical decision did not vindicate Zhang, [FN247] but it did spark a debate about the human rights of one of China's largest disadvantaged groups and the function of courts in protecting those rights. At the time, Chinese courts manifested little sympathy for plaintiffs suing for discrimination and generally avoided ascribing any kind of culpability to government actors. [FN248] However routine the filing of an employment discrimination action may seem to American readers, Zhang’s decision to litigate was by no means automatic. His parents firmly opposed the decision to sue. [FN249] At that time, very few *685 people had sued for employment discrimination, and those who did had little to show for it. [FN250]

In September 2003, Zhang’s name appeared on gandan xiangzhao, an online discussion board for HBV carriers. [FN251] The site's webmaster and various posters encouraged Zhang to take legal action to protect his rights. [FN252] The site also served to connect Zhang with Professor Zhou Wei of Sichuan University in Chengdu. [FN253] In 2002, Professor Zhou made headlines by litigating one of China's first employment discrimination cases, which involved height discrimination. [FN254] He wanted to expand his work in the field of constitutional litigation, ever hoping to “marry theory and practice.” [FN255] He heard about Zhang's case through gandan xiangzhao, and he instructed a student to contact Zhang through the website. [FN256] Professor Zhou wanted “to fight for the basic survival rights of 120 million HBV carriers” and to “protect the basic rights of humanity.” [FN257] Even at this early stage, the issue of employment discrimination was framed as a basic human right to survival. [FN258]

*686 With Professor Zhou as his advocate, Zhang Xianzhu sued the Wuhu Personnel Bureau in November 2003. [FN259] At the time, there was no law on point, so Professor Zhou fashioned a number of innovative corollaries to press the case. For instance, Zhang's complaint alleged that the Bureau's conclusion not to hire him because of HBV constituted “malicious discrimination” and “did not fulfill the state's legal obligations to respect and protect human rights, and to treat citizens equally under the law.” [FN260] It was, in other words, a violation of the right to equality enshrined in Article 33(2) of the Chinese Constitution. [FN261] In subsequent filings, Professor Zhou noted that Chinese laws--such as the Law on the Prevention of Infectious Diseases and the Food Safety Law--and regulations--such as the Public Safety Hygiene Regulations A--bar HBV carriers from employment in potentially high-risk positions like medical facilities and food production plants. [FN262] He argued that these concerns were inapposite to an office job in a personnel bureau. [FN263]

The court found the hospital--not a party to the lawsuit--had erred in concluding Zhang was unfit for the position. [FN264] Anhui Province’s Provisional Implementing Regulations for the Physical Examination of National Civil Servants disqualified actively infected carriers of HBV, but it did not disqualify passive carriers like Zhang. [FN265] Moreover, the hospital exceeded its jurisdiction in ruling on Zhang’s suitability; jurisdiction properly belonged to the Personnel Bureau. [FN266] Ultimately, the court found that it could order no remedy because the recruitment cycle ended with the second-placed candidate filling the post. [FN267] Zhang won a symbolic victory on a very minute *687 point of law, and his case made headlines all over China, [FN268] but he left the courthouse as unemployed as when he entered it. [FN269]

Zhang’s lawsuit was itself an event, providing an opportunity to call attention to the larger issue of discrimination against HBV carriers. Advocates informed the media about Zhang's case, ensuring that dozens of journalists atten-
ded the hearings and reported on the announcement of the verdict. [FN270] Members of the online support group gandan xiangzhao also attended the hearings, both to show support for Zhang and to increase visibility for their cause. Press reports about a figure as sympathetic as Zhang opened up discussions and allayed people's fears about working alongside HBV carriers. [FN271]

The gandan xiangzhao website quickly gained a large following among HBV carriers and others. [FN272] An international domain name since 2001, the site had attracted 85,000 registered members by December 2004, [FN273] and it served as a sounding board for the frustration of carriers and their experiences in education, employment, housing, public services, and other fields. The ability to communicate openly, freely, and honestly about this topic brought together a large community of HBV advocates who had neither discussed the issue publicly nor publicly identified themselves as a group in need of legal protection.

The website also functioned as a collective action center. On August 13, 2003, advocates posted a proposal on the site, asking the Standing Committee of the National People's Congress (the highest legislative body of China) to review the constitutionality of the *688 provincial regulations on civil servant examinations. [FN274] Over 1,600 Chinese citizens signed the petition before sending it to the Standing Committee in November 2003. [FN275] The petition warned of “dozens, even hundreds, of Zhou Yichao” if the government did not attend to this “serious social problem.” [FN276] Invoking domestic laws and international human rights law, [FN277] the petition urged “the Chinese State and Central People's Government to honor their solemn commitment to the people of the world, and ensure the collective right to exist of 120 million people. If we improve the living conditions of 120 million people, this would be China's contribution to all of humanity.” [FN278]

The petition contained a number of proposals, some of which have since been adopted. First and foremost, the petition called on the State Council to remove HBV from the list of disqualifying diseases on the civil service examinations, [FN279] a task realized gradually by regulations issued in 2007 and 2010. [FN280] Another proposal suggested the protection of privacy rights for HBV carriers; [FN281] this proposal subsequently materialized in the 2010 Notice discussed above. [FN282] Perhaps most importantly, this petition served as a template for subsequent requests made to government bodies. Lu Jun, one of China's leading HBV advocates, has called on government bodies to pass various types of protective legislation and regulation. [FN283] HBV advocates continue to petition the National *689 People's Congress, the Supreme People's Court, and various ministries to enhance the protections of HBV carriers and disadvantaged people more generally. [FN284]

Upon the success of the gandan xiangzhao website, advocates established other websites and organizations to agitate on behalf of HBV carriers. For instance, hbver.com includes a message board, news articles about HBV, information about cirrhosis of the liver, and links to medicines and prevention methods. [FN285] Another site, ganbaobao.com, contains a special section on rights protection, with articles on the prevalence of discrimination, news about various lawsuits, and advice on how to handle rights infringements. [FN286] Another legally oriented site is fanqishi.com, which links to articles on laws and lawsuits involving various forms of discrimination. [FN287] These sites continue to play the role of informant and sounding board for HBV carriers, allowing people from all over China (and the world) to participate in the discussion. In addition, specialized organizations have sprung up to raise awareness, educate citizens, litigate cases, and petition government bodies to enhance protections. The most successful of these organizations is probably Yirenping, which litigates cases, surveys employer attitudes, publishes a bimonthly newsletter with recent developments, and submits petitions to government bodies on behalf of HBV carriers. [FN288]

In society more generally, for the first time, a wider discussion of discrimination took place online, both on hepatitis B websites and on state-run news agencies such as CCTV. They debated public safety *690 concerns, legal issues such as the rights to equal employment and privacy, and other matters related to hepatitis B. [FN289] HBV came out of the closet and onto the tongues and screens of millions of Chinese. Significant media attention helped the mobilizing structures keep the issue on the public radar.
Finally, there is the issue of signification processes. [FN290] How do HBV advocates understand their struggle? What language or discourse do they use to frame the debate between carriers and the employers who seek to avoid them? As a socialist country with a long history of state-sponsored employment, China privileges social and economic rights (such as food, education, social welfare, and employment) over civil and political ones. [FN291] In complaints to courts of law, signs brandished during demonstrations, and interviews with journalists and others, the issue is framed in socioeconomic terms. For example, advocates carry signs that state “Eliminate Hepatitis B Discrimination--Construct a Harmonious Society,” or “Eliminate Hepatitis B Discrimination--Promote Equal Employment,” or even “It Is Not Easy to Deprive 120 Million HBV Antigen Carriers of the Right to Survive.” [FN292] By framing the issue in terms used by the government—such as “harmonious society”—the movement aligns itself with government interests and avoids appearing confrontational or oppositional. Instead, they present their cause as one of necessity, equality, and the right to a job. No one is asking for charity or a politically sensitive privilege such as the right to vote. Instead, advocates insist that HBV carriers simply want to work, to contribute to society, and to live. No official could cavil about such a platform of demands. [FN293]

By raising public awareness, petitioning for legal reform, and mobilizing media support for their cause, activists have made HBV discrimination one of China's leading equality issues. Their actions have helped create a legal foundation from which they can assert rights and perhaps change employer behavior. The success of their assertion of rights is taken up in the final section.

*691 V. Employment Promotion Law

The Employment Promotion Law of 2007 would have helped HBV carriers like Zhang Xianzhu and Zhou Yichao. [FN294] Drafting began in late 2003, [FN295] perhaps spurred by the public outcry surrounding Zhang and Zhou. Initially, however, the drafters were mainly focused on irregularities in China's labor market, which they sought to rectify through training programs, regulation of employment agencies, and boosting investment in employment services. [FN296] There was particular concern about the oversaturation of labor in industries like manufacturing, as well as the lack of technical expertise in other industries, such as high-tech fields. [FN297]

Although these issues were the primary concerns of the National People's Congress (NPC), public comment on an early draft brought to light a topic not then on the agenda. The NPC's General Office of Standing Committee posted a draft of the Employment Promotion Law (EPL) on its website from March 25 to April 25, 2007, during which time the general public submitted over 11,000 opinions, 7,000 of which concerned discrimination in employment. [FN298] People recounted their personal experiences with discrimination in many forms, including sex, age, appearance, and disability discrimination. [FN299] Public opposition to discrimination against hepatitis B carriers was particularly acute. [FN300] Based on this response, the NPC's Legal Affairs Commission introduced an entirely new chapter into the law: Chapter 3, “Equal Employment,” systematized the smattering of protections interspersed throughout the earlier draft and expanded protections to five groups of disadvantaged people. [FN301]

*692 This process marked an important innovation in the drafting of Chinese law. Since 2005, the NPC has posted draft laws on the Internet to solicit feedback from concerned citizens and interest groups. [FN302] The experience with the EPL shows that public opinion—when directed at the right target and conveyed through the proper channels—can have an enormous impact on the final form that the law takes.

Since entering into effect on January 1, 2008, the EPL has generated a large number of lawsuits challenging a few types of employment discrimination. Unlike previous guarantees of equality in employment, found in such laws as the Labor Law or Women's Law, the EPL grants access to People's Courts, an invitation that many discrimination victims have taken up. [FN303] The following subparts discuss the relevant provisions, several representative lawsuits, and a number of suggestions for improving the implementation of the EPL.
A. Provisions

The third chapter of the EPL guarantees equal employment, providing the most robust set of protections against employment discrimination in Chinese law. [FN304] By granting victims of discrimination access to courts, the EPL overcomes the common critique that Chinese labor law exists solely on paper and rarely leads to meaningful implementation. [FN305]

*693 The EPL contains a general proscription of employment discrimination, mirroring language found in the Labor Law and Labor Contract Law. [FN306] More importantly, it provides specific prohibitions for five disadvantaged groups: women, ethnic minorities, disabled persons, people with infectious diseases, and rural workers. [FN307] Unlike U.S. federal law [FN308] or China's Labor Law, [FN309] which simply list bases on which it is illegal to discriminate, the EPL grants different levels of protection to each group. [FN310] This structure allows the EPL to adapt to the existing legal framework and to address problems unique to each group.

Three provisions in particular--on women, infectious disease carriers, and rural residents--are germane to the present discussion. Article 27 provides:

The state ensures that women have labor rights equal to those of men.

When an employer hires personnel, it may not refuse to employ a woman on the basis of her sex, except for jobs or positions that the state has specified as being unsuitable to women, or set standards for the employment of women that are higher than those for men. When an employer hires a female, it may not include provisions in her employment contract that place restrictions on her getting married, having children, etc. [FN311]

Although this provision appears to provide robust protections for women, scholars have criticized the Employment Promotion Law for including the exception for jobs deemed “unsuitable to women.” [FN312] This exception may encourage employers to classify jobs as “unsuitable” for women based on stereotyped or outdated notions of women's capacities, further segregating the workforce and possibly pushing women into low-paying jobs. [FN313]

*694 An additional concern involves the use of the word “hire” in section 2 (zhao yong) and “employ” (luyong) in section 3. [FN314] Women face discrimination in various phases and aspects of their jobs, from hiring to retirement, promotion, pregnancy leave, wages, and sexual harassment. By using the word “hire,” the law limits its scope to the period before the woman becomes an employee. Although the word “employ” in paragraph 3 would seem to dispense with this concern, that paragraph only covers terms that appear in the “employment contract.” [FN315] An employer is unlikely to indicate that he will sexually harass a female employee in the terms of the employment contract. In short, the law does not protect women in promotion, training, titles, termination, and other phases of employment, as similar laws do in Japan [FN316] and the United States. [FN317]

The Employment Promotion Law also safeguards the rights of carriers of infectious disease. Article 30 provides:

When hiring personnel, an employer may not refuse to employ someone on the grounds that he or she is a carrier of an infectious disease. However, a certified carrier of an infectious disease may not, until he or she has recovered, or the suspicion of infectiousness has been eliminated, engage in work prohibited by laws, administrative statutes or the State Council's health authority, due to the fact that it would facilitate the spread of the disease. [FN318] Again, one could argue that the specification of prohibited jobs may reinforce the notion that disease carriers should be excluded from the workplace. However, by requiring employers to base their judgments on a certification that the person carries a disease, the role of suspicion and misinformation, which occasionally trump sound medical reasoning, will be minimized. [FN319] As we shall see in Part V.B, this is the most actively litigated provision of the EPL.

*695 Finally, the EPL protects the rights of migrant workers [FN320] by providing that “Rural workers employed in cities shall enjoy labor rights equal to those of urban workers. No discriminatory restrictions may be set against rural workers seeking employment in cities.” [FN321] While this provision addresses a key problem discussed
above--the plethora of discriminatory restrictions that cities have imposed against migrant workers [FN322]--it is not clear how the law should be implemented. First, and unlike the above provisions on women and carriers of infectious diseases, this article says neither that “the state ensures that rural workers have labor rights equal to those of urban workers” (as it does for women in Article 27), nor that “the state safeguards the labor rights of rural workers” (as it does for the disabled in Article 29). [FN323] It thus arguably offers a lower level of protection to rural residents than it does to women and carriers of infectious diseases.

Second, if a migrant worker were to bring a lawsuit based, for instance, on a city regulation that favors hiring local residents, against whom would he file the case? The employer who did not hire him could simply point to the municipal agency that promulgated the discriminatory regulation. But the agency did not cause the harm--the employer refused to hire the plaintiff. Just as in the Zhang Xianzhu case, a court could find that the municipal agency exceeded its jurisdictional limits or the agency's actions lacked a factual basis, then deem itself powerless to devise a remedy. [FN324] Moreover, a court cannot annul a regulation passed by an administrative agency. [FN325] Of course, until a migrant worker brings a lawsuit challenging discrimination under the EPL, we will have to wait to see how a court enforces this provision.

B. Cases

The twenty-five lawsuits found and analyzed by this author took place all over China, in Beijing, Shanghai, Xinjiang, Guangxi, *696* Zhengzhou, Shenzhen, and many other places. [FN326] The widespread use of lawsuits suggests that plaintiffs trust courts to entrust them with the adjudication of cases involving basic human rights. [FN327] The overwhelming majority of suits--twenty-two of twenty-five--came from HBV carriers, a fact that signals both the strength and the limitations of the EPL. [FN328] Of the nineteen fully adjudicated cases, fifteen resulted in compensation for the plaintiff, while the court ruled for the defendant in four cases. [FN329] Many plaintiffs are young and college-educated, and the lawsuit involves their first job. [FN330]

It is important to note that, to date, no plaintiff has filed a lawsuit under the EPL for discrimination due to gender, disability, ethnicity, or rural status. In addition, the foregoing analysis is limited to lawsuits that appeared in the Chinese media and a small number of verdicts that the author obtained through contacting human rights lawyers in China. Because it is difficult to evaluate a judge's reasoning based on a small sample of media reports, the analysis is necessarily limited. Still, basic similarities across many cases offer the contours of the typical case.

HBV lawsuits follow a pattern, roughly analogous to Zhang Xianzhu's. [FN331] Plaintiff passes the written and oral examinations of his prospective employer, who then makes a job offer, possibly conditioned on a medical examination. When the applicant's medical examination reveals that he carries HBV, the employer either rejects *697* the application or rescinds the offer. After an attempt at mediation, the applicant sues in court (avoiding the sidestep of labor arbitration [FN332]) for economic damages, emotional distress damages, or breach of contract. He or she may also request an apology.

Chinese courts have some discretion in deciding whether to accept cases. Some courts refuse to accept cases of discrimination in hiring because it is not listed in the Supreme People's Court's causes of action. [FN333] Nevertheless, many judges have accepted these cases, interpreting the disputes as implicating the right to health or the right to privacy. [FN334] The first hurdle for many plaintiffs, then, is to find a judge or court willing to hear the case.

Judges also enjoy discretion in assessing damages from emotional distress. [FN335] Based on the limited number of verdicts analyzed for this Article, emotional distress seems to be the main damage for which judges order compensation. [FN336] Two cases bear this out. In the first case, the plaintiff passed the defendant employer's oral and written examinations during his final year of college, in December 2006. [FN337] He then signed an employment agreement (jiuye xieyi) and stopped his job search in reliance on that agreement. [FN338] However, in June 2007, the employer informed the plaintiff that he *698* would need to complete a liver examination, which revealed he car-
ried HBV. [FN339] The employer then refused to hire him because he carried HBV. [FN340] Indeed, during a conversation that plaintiff actually taped and produced as evidence, a member of the company's human resources department explicitly stated that the plaintiff was not hired because of the result of his HBV test. [FN341]

The plaintiff sued for breach of contract, but he also sued in tort, alleging that the company's refusal to hire him violated his right to equal employment and caused emotional distress. [FN342] The court agreed with both theories but interpreted his suit as a tort claim. [FN343] It ordered the defendant to pay 10,000 rmb (of the 50,000 rmb requested by the plaintiff) in compensation for emotional distress; the court cited, among other things, the "the economic capacity of the defendant, and the lost work time of the Plaintiff." [FN344] An appellate court upheld this ruling after the defendant appealed. [FN345]

In a second case, brought against the Dazhong News Group in Shandong, the plaintiff passed the written and oral examinations, as well as a second-round test. [FN346] The defendant then sent an e-mail with a job offer, but the job offer was conditioned on passing a medical examination. [FN347] The examination results revealed that the plaintiff carried HBV, but her liver functioned normally. [FN348] The defendant still refused to sign a contract. [FN349] The plaintiff sued for the breach of her right to equal employment, and she appended claims for emotional distress and economic damages, as well as an apology. [FN350]

The court found that the defendant's rejection "caused Plaintiff enormous psychological pressure and emotional pain. In light of such factors as the extent of Defendant's culpability, the consequences wrought by the tort, and the economic capacity for which the tortfeasor is responsible, this court comprehensively recognizes Plaintiff's demand for compensation for emotional distress." [FN351] It awarded her 15,000 of the 50,000 rmb that she sought in emotional distress damages. [FN352] She also requested half a year's wages, or 12,894 rmb, in economic damages to make up for the time lost between the defendant's refusal to hire her and her filing of the lawsuit. [FN353] The court awarded a fraction of the damages sought--1,000 rmb--in light of her "work and life circumstances." [FN354] Finally, the court ordered the defendant to issue a public apology, to be authorized by the court, within thirty days of the issuance of the judgment. [FN355]

The above cases suggest the broad contours of HBV litigation. The key to success in these lawsuits--as in discrimination cases in the United States--is the adduction of proof. Unlike American litigants, Chinese plaintiffs cannot shift the burden of proof to defendants in discrimination cases; they must produce all the necessary documentation themselves. [FN356] Luckily for carriers of HBV, there is often a long paper trail, something comparatively rare in other discrimination cases. These documents provide the evidentiary basis that judges need to determine that the defendant discriminated. [FN357] Plaintiffs may produce notices from the employer that they passed the written and oral examinations, copies of job offers (or conditional job offers), and other indicia that they qualified for the position. They may also have a copy of the employer's request to sit for a medical examination, as well as the results of that exam. Finally, a written rejection, conversation, or phone call (sometimes recorded) encapsulates the rejection. From all of this evidence, judges have a solid foundation upon which to make a finding of discrimination.

However, a long paper trail will not arise under most other kinds of discrimination. In gender discrimination cases, women can be screened out much earlier in the process. A résumé may reveal the applicant's gender, either because of her given name or the photograph that often accompanies the application packet. If there is still doubt, a phone call can ferret out female applicants, and even if a phone call fails, the employer can simply interview the female candidate and turn her down without generating any indicia of discrimination. With the exception of explicit job advertisements, [FN358] none of the discriminatory techniques discussed in this Article would produce documentation, and this lack of documentation leaves a judge to rule primarily on the plaintiff's allegations, suspicions, and interpretations. Even if the defendant made a plainly discriminatory statement during the interview, or injected discrimination obliquely by asking about boyfriends and children, the case would still hinge on hearsay: her word against his. This presents a dilemma for the presiding judge.
Therefore, it is not entirely surprising that no Chinese woman, to this author's knowledge, has filed a lawsuit based on gender discrimination in hiring. [FN359] This absence can be explained in various ways, including the lack of evidence noted above. Some women simply accept the prevalence of sex discrimination and adopt an attitude of anger, resignation, and silence, the latter perceived as the most effective of the “reasonable alternatives.” [FN360] Others are too concerned with finding a job; they lack the time and resources needed to prosecute a lawsuit. [FN361] As one interviewee put it, “Even if I won the case, what kind of result would I get? Is the employer going to hire me? If a company didn't want to hire you, but you get the job [after litigation], they are not going to make it easy for you.” [FN362] Particularly in light of the success of various hepatitis B cases, the absence of sex discrimination lawsuits calls into question the efficacy of the EPL as a tool to combat employment discrimination.

C. Problems

For all of its important advances, the Employment Promotion Law omits a few basic necessities. These gaps could be filled through subsequent legislation, provincial legislation, implementing guidelines, administrative regulations, or judicial interpretations. This section offers some suggestions to heighten the efficacy of China's anti-discrimination laws generally and the EPL in particular.

First, the EPL does not define discrimination. This may seem like a formality, but the concept of discrimination is not widely known in China, including among judges. [FN363] Consequently, formalities like a clear definition of discrimination can make a big difference to the presiding judge.

Second, the EPL does not cover a wide range of discrimination that is quite common in contemporary China. Marital status, appearance, and height are routine bases for refusing to hire someone, [FN364] even though they have almost no bearing on the ability to perform. To be sure, it is unreasonable to expect antidiscrimination law to respond perfectly to contemporary conditions ab initio, particularly given the slow and gradual development of Chinese legal reform, which prefers minor and incremental change to cataclysm. Moreover, as experience in other countries shows, protected classes tend to proliferate over time; in a few years, it is likely that a new group, currently unrecognized, may clamor for their rights more loudly or persuasively. [FN365] For example, during the drafting of the EPL, a number of public commentators pointed out the prevalence of age discrimination. [FN366] The decision not to include age discrimination may be tied to the prevalence of the differential retirement age for men and women, which has been a heated source of debate in recent years. [FN367]

*702 Third, the protections offered are not as robust as they could be. As already discussed, discriminatory job advertisements are common, and interviewers routinely ask women personal questions about marriage and childbirth plans. [FN368] Indeed, some employers still require women to forego pregnancy for many years as a condition of employment. [FN369] A legal prohibition on gender restrictions in print and online advertisements would be a good first step, followed by the proscription of personal questions in interviews.

Fourth, the law does not address the evidentiary issues that typically emerge in employment discrimination lawsuits. In the United States, plaintiffs frequently struggle to adduce evidence of discrimination, which is almost exclusively within the defendant's possession. [FN370] The Supreme Court responded to this lacuna with the McDonnell-Douglas burden-shifting mechanism: after the plaintiff makes a prima facie showing of employment discrimination, the burden shifts to the defendant to articulate a nondiscriminatory reason for its decision; if the defendant meets that burden, the burden shifts back to the plaintiff to prove why the defendant's proffered reason is pretextual. [FN371] To be sure, burden-shifting has attracted its own set of critics, [FN372] but it has leveled the evidentiary playing field between defendants, who are loath to turn over information behind their employment decisions, and plaintiffs, who must rely on stray comments or other circumstantial evidence to prove their case.

*703 Fifth, the law does not address the question of legal liability, and remedies in particular, with sufficient specificity. [FN373] Suppose that the plaintiff proves that her job application was turned down for a discriminatory reas-
on. What should her redress be? Does she get the job? Does she get the next available job? Should she receive another form of injunctive relief? And what remedial or punitive measures should courts levy against discriminating employers? Some scholars have suggested that employers should have to either withdraw discriminatory advertisements or lose the ability to advertise altogether. [FN374] As for punitive measures, these scholars recommend a number of sanctions, including civil liability, to cover economic losses and emotional distress damages to the plaintiff; administrative liability, such as a fine from the employer to the relevant enforcement agency; and even criminal liability. [FN375] These alternative forms of liability could take the form of implementing legislation from the Ministry of Labor and Social Services or a judicial interpretation by the Supreme People's Court.

The EPL could have taken a page from the 2007 Labor Contract Law, Section VII of which lays out various situations that a judge may face in presiding over a case. [FN376] Because of Section VII, a judge knows what to do if, for example, an employer fails to set out mandatory clauses in the labor contract, [FN377] retains the employee's ID card or seizes his property, [FN378] or does not certify the termination of a labor contract. [FN379] The EPL does not reach this level of specificity. As a result, additional regulations by other government organs are needed.

Sixth, a problem as widespread as employment discrimination requires the coordinated efforts of courts, labor bureaus, local people's congresses, and other official actors. The EPL tasks certain government organs with eliminating discrimination, but only in vague terms. For instance, Article 25 provides that "People's Governments at every level shall create a fair employment environment, eliminate discrimination in employment, formulate policies and take measures to support and assist the hard-to-employ." [FN380] But local governments are busy entities, more likely concerned with creating jobs than assisting those who have been refused. Given their mandate to increase GDP and economic growth, local governments may hesitate to formulate such a policy, particularly if it might antagonize employers who practice employment discrimination.

Similarly, Article 60 provides that "Labor administration authorities shall supervise and inspect the implementation of this Law, establish a reporting system, accept reports of violations of this Law and promptly verify and handle the same." [FN381] This provision is more specific, but the author is not aware of a single labor bureau that has set up a reporting system. Such a body is certainly necessary, however; like the Equal Employment Opportunity Commission in the United States, it could handle cases, monitor job advertisements, and investigate employers against whom charges have been directed. As it stands now, many forms of employment discrimination go unpunished, while job advertisements help to segregate workspaces based on age, gender, and physical appearance.

VI. Conclusion

Employment discrimination is now firmly imprinted in the national psyche of the PRC. Famous cases have captured headlines and public attention. NGOs dedicated to various causes have been formed, raising awareness, suing offenders, conducting research, and even training employers about the problems of discrimination. A consensus is forming that discrimination—though widespread—is wrong. By passing the Employment Protection Law in 2007, the national government took its largest step toward ensuring equal employment. Plaintiffs have won a handful of well-publicized cases, suggesting that courts view the law favorably, and the media has the government's blessing to report on employment discrimination. Moreover, the long-discussed implementation deficit of Chinese law is shrinking, if only slightly.

If the Chinese government continues to advance these reforms, it will first have to revise a thicket of discriminatory legislation. Most likely, this revision process will be piecemeal, reflecting recent gradualist trends, as well as the general nature of Chinese legal reform. Or it could be achieved through an all-encompassing law, such as a new antidiscrimination law. Regardless, the government will have to chart new ground, resolving the evidentiary issues that the Employment Promotion Law does not address, reviewing the publication of discriminatory advertisements, explaining what kinds of remedies are available to successful plaintiffs, and perhaps even establishing a body to monitor-
or employment discrimination. This short history of employment discrimination in China shows that proscription is always a work in progress. China has taken the first steps down the righteous path of prohibiting discrimination. Presumably, popular support for these initiatives will continue.

Finally, this Article demonstrates that Chinese citizens, with the assistance of civil society groups and online technologies, can effectuate legal change in a gradual, small-scale way. It remains to be seen how well this lesson can be applied to other areas of potential legal reform, but the EPL proves that the energies and activism of a small, committed group of people can change the law, even in democratically challenged contemporary China.

*APPENDIX - HBV Litigation (unless otherwise noted)*

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<th>Defendant</th>
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<td>1</td>
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<td>Nanhui, Shanghai</td>
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<td>Dongguan Wei Yi Da</td>
<td>Dongguan, GD</td>
<td>24k ec; D promised not to discriminate</td>
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<td>Sought 50k</td>
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<td>17k ec, 2k emo, apology</td>
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<td>8/5/08</td>
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<td>IBM Shanghai</td>
<td>Pudong LAC, SH</td>
<td>Reinstated labor K, 57k in lost wages</td>
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<td>Huizhou, GD</td>
<td>5k emo, apology</td>
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<td>Qinnan, Qin- zhou</td>
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Restrictive Covenants

Employee Loyalty and the Employer’s Protectable Interests

1. Legal Regulation

Traditionally in China, there has been no legally recognized duty of employee loyalty, though to be sure criminal limits existed, such as theft.1 With China’s entry into a market economy came the development of employee mobility and private employers’ interests in protecting confidential matters and restricting employees from moving to competitive companies; in response, by the early 1990s legislative protections for the employer began to be implemented.2 In 1994, the Labor Law authorized labor contract protections for “business secrets,” and more specific provisions followed both at the national and local levels.3 By 2006, laws clearly prohibited certain employees – “directors and senior management personnel” – from disclosing company secrets.4 In 2008, the LCL expanded on the Labor Law’s protection of business secrets to allow

more specific contractual protection of “confidentiality matters” relating to trade secrets and intellectual property and a restriction on competition for those workers who signed a confidentiality agreement.\(^5\)

However, there are limits on which employees and what interests may be legally restricted by contract. The LCL authorizes contract provisions restricting disclosure of confidential matters, such as trade secrets and intellectual property.\(^6\) Article 24 stipulates that competition restrictions may also be agreed to (compensation is required) and are limited to “senior management, senior technicians and other personnel with a confidentiality obligation.”\(^7\) Although this wording appears to limit competition restrictions to senior personnel, the LCL in Article 24 adds “and other personnel with a confidentiality obligation.” Therefore, a dual provision protecting confidentiality and restricting competition might seem to be efficient if provided to the employees actually needing the restrictive limitation; however, it may also present the employer with unexpected legal consequences and costs. It has been suggested, as a human resource management defensive strategy, to extend competition restrictions to many more employees than those who have a potential for violating confidentiality and, if valid, enforce as needed.\(^8\) A practical difficulty of a dual provision is that noncompetition agreements require compensation, whereas confidentiality agreements by themselves do not. Thus, from an employer’s point of view, a separate agreement for each, as is required, would avoid unnecessary compensation, though arguably, it may be possible for an employer to rescind the dual provision before compensation is due, especially if it is a separate agreement.

### 2. Protectable Interests: Confidentiality and Competition

The confidentiality obligation, agreed to by contractual provision, is designed to save from harm an employer’s protectable interests. The term “protectable interest” is a fluid concept and can relate to definitions of a trade secret, which can have a broad scope, encompassing technical, management, marketing and pricing strategies, customer lists, etc.\(^9\) A protectable interest, under Article 24

\(^5\) LCL, arts. 23–4.
\(^6\) LCL, art. 23.
\(^7\) LCL, art. 24.
\(^9\) Anti-Unfair Competition Law, supra note 2, art. 10 (providing broad definition); Several Regulations Concerning Prohibitions of Acts of Infringement of Business Secrets, supra note 3, arts. 2–3 (defining scope and limiting employees’ infringement).
of the LCL, also specifically includes intellectual property rights, such as patents and copyrights, which have legal definitions of their own.\(^\text{10}\)

Assuming there will be some legal coherency to the term “confidential matters,” Article 24 provides that a valid noncompetition clause is available for those with the confidentiality obligation. These noncompete provisions have legal limits on their duration and the scope of employment restricted, and possibly the geographical limits placed on the employee. The LCL, Article 24, fixes duration as not exceeding two years. It defines the scope of work restriction from the termination or the ending of the contract as working for a competing employer, or an employer that produces the same type of products, or is engaged in the same type of business as the current employer or when the employee establishes his or her own competitive business.\(^\text{11}\) The LCL-sanctioned anticompetition provision has been upheld by a recent court decision to cover the employee’s registration of a new competing business while still employed, with the court awarding the employer the contractually agreed liquidated damages amount of RMB 120,000 and requiring the employee to return compensation paid to him by the employer.\(^\text{12}\) There is no explicit geographical limitation; that term is left to the contractual negotiations of the parties.\(^\text{13}\)

There appears to be no requirement for separate compensation by the employer for the confidentiality provisions by themselves.\(^\text{14}\) These could be separate provisions in the labor contract. As described earlier, noncompetition provisions (for which post-termination compensation must be paid) are sometimes combined in the same labor contract with a confidentiality provision (no extra compensation is required). Consideration should be given to separating the two provisions, confidentiality and noncompete, in those cases where only a confidentiality provision is needed.

The amount of compensation to be paid to the employee, after termination, for inclusion of the non-competition provision has no statutory standard in

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\(^{11}\) LCL, art. 24; additionally, LCL, art. 39(4) addresses the issue of working for a second employer during the current employment.


\(^{13}\) LCL, art. 24.

\(^{14}\) LCL, art. 23.
the LCL and is fixed in the labor contract by the parties. In local practice, it has ranged from one-third to two-thirds of the total remuneration that the employee received in the prior year of employment. This compensation must be paid to the employee after the employment relationship ends and not as part of the salary while currently employed. The compensation is to be paid in monthly installments. Local governments may have varying requirements on the amount of compensation required; therefore, care should be taken to ensure the contract is valid under local laws.

Article 90 of the LCL provides for damages for an employee’s breach of either the confidentiality or the noncompetition agreement, or both. If there is a breach by the employee of the noncompetition provision, then the employee must pay an amount in liquidated damages (an amount agreed to in the contract).

3. Remedies for Breach

If there is a dispute over a breach by the employer or the employee of a provision contained within the labor contract, the dispute arguably could be resolved in arbitration as a labor dispute or possibly directly in court if it fits the exceptions to exhausting labor arbitration as a prerequisite to a court action. This raises a related issue of whether it is preferable to include restrictive covenants in an agreement separate from the labor contract. Breach of these provisions in a separate agreement should authorize the employer to proceed directly to court under the 1999 Contract Law.

In cases where a new employer hires an employee before that employee has terminated or ended his or her contract with the original employer, the
new employer is liable to the original employer for any damages suffered.\textsuperscript{23} Therefore, if a new employer were to prematurely hire an employee who had a restrictive covenant with a liquidated damage provision, thereby causing that employee to breach his or her restrictive covenant, liability could lie with the new employer. However, some employers may calculate this as an “opportunity cost” and be willing to pay the liquidated damages fee to acquire “confidential matters,” even if they have to pay extra for the employee.

Foreign employees, who are (seconded) to work in China or otherwise have an employment contract made in the sending country and using home-country law, may present an issue of whose law governs. Although it appears that either the LCL or the 1999 Contract Law will apply to the employee (or labor service contractor), the home-country contract law may also be applicable. For example, in the recent highly-publicized employment case involving a Microsoft employee hired by Google to work in China in alleged violation of a noncompetition clause, U.S. courts and law were used to settle the case.\textsuperscript{24}

Finally, criminal penalties are available against an employee whose breach of restrictive covenants involves an infringement of trade secrets that causes the employer serious losses.\textsuperscript{25} A recent criminal prosecution against an employee for disclosing trade secrets of a former employer to a new employer in violation of employer rules occurred in Sichuan, resulting in a five-year prison term and a fine of RMB 1 million.\textsuperscript{26}

\textsuperscript{23} LCL, art. 91.
\textsuperscript{25} Criminal Law, supra note 1, art. 219 (as amended June 29, 2006); a “serious” breach has a monetary threshold of RMB 500,000 for individuals and RMB 1.5 million for businesses, see Gao fa gao jian fuan yu ban li qin fan zhi shi chan quan xing shi an jian ju ti ying yong fa lv ruo gan wen ti de jie shi [Interpretations of the SPC and SPP on Several Issues Concerning the Specific Application of the Law in Handling of Criminal Cases Involving Intellectual Property Infringement] (promulgated by the SPC and SPP, Dec. 22, 2004), art. 7, http://www.china.com.cn/chinese/law/734357.htm.
Case VI

Facts:

Xu began working in Company K in 1994. In April 2004, the company circulated a notice to all of its workers, in which everyone was asked to sign a labor contract with another firm “Bridge”, who would then be responsible for paying wages and insurance costs for the workers. The notice also warned that anyone who refused to sign the contract would be fired. Shortly afterwards, Xu signed a labor contract with Bridge.

In May 2005, Xu was fired for non-compliance to operating procedures at work. On the same day, Bridge terminated its labor contract with Xu.

Xu claimed that he had worked for Company K for 11 years and was entitled to a compensatory payment in addition to all unpaid wages. Company K disagreed, insisting that Xu was an employee of Bridge, so those claims should be directed to Bridge instead.

Xu applied for arbitration. The labor dispute arbitration committee found out that during his 11 years working at Company K, the only written labor contract he had was the one signed with Bridge in 2004. The committee ruled that no evidence supported Xu’s claim that he had a de facto employment relationship with Company K, while his written labor contract with Bridge clearly showed that he was an employee of Bridge. Xu’s claims were dismissed.

Xu sued in the local district court. Company K argued that Xu was dispatched by his employer, Bridge, to provide service at Company K. Company K made payment to Bridge for such worker dispatch service. Therefore the three parties formed a worker dispatch service relationship. When Xu was discharged from further work at Company K, such worker dispatch service relationship came to an end. Should any labor dispute arose, Xu should sue Bridge, not company K.

Xu argued that he had worked for Company K for 11 years and a de facto employment relationship was formed. He should be compensated RMB 20,000 for his work during those 11 years, not for the years based on the labor contract with Bridge, which would amount to RMB 3,000.

The district court found that an employment relationship was established between Xu and Bridge. Afterwards Xu was dispatched by Bridge to service to Company K, and no de facto employment relationship with Company K was established. The court found no basis to support Xu’s claims against Company K.

Xu appealed.
Questions:

1. What were the relationships between the three parties in this case?
2. How should the appellate court rule?
3. In view of the issues involved in this case, do you think the Labor Contract Law has made progress in regulating worker dispatch services?
NEW DEVELOPMENTS IN CHINA’S LABOR DISPUTE RESOLUTION SYSTEM: BETTER PROTECTION FOR WORKERS’ RIGHTS?

Haina Lu

I. Introduction

The main legal sources of China’s Labor Dispute Resolution System (LDR system) are the 1995 Labor Law and the 1993 PRC Regulations for the Handling of Enterprise Labor Disputes (HELDR). Nevertheless, since the LDR system was established, China's labor relationship has been constantly undergoing deep changes as its economy has become increasingly market-oriented. Consequently, labor disputes are more complicated than a decade ago. Numerous administrative regulations and judicial interpretations have been issued at the national level to tackle the new problems that the Labor Law and HELDR did not expect when they were promulgated.

The latest development in this ongoing process is the issue of Interpretation II of the Supreme People's Court on Several Issues concerning the Applicable Law for the Trial of Labor Disputes Cases (Interpretation II) on August 14, 2006, which entered into force on October 1, 2006. In addition, a Labor Dispute Mediation and Arbitration Law has been on the 2007 legislative agenda of the Standing Committee of the National People's Congress and a preliminary draft was issued very recently. A Labor Dispute Mediation and Arbitration Law has been submitted to comments by the public in 2007. The first draft of the Employment Promotion Law was issued for public comments in 2006 and incited extensive academic and public debates. After substantial modifications and four drafts, the fourth draft of the Labor Contract Law was finally adopted by the Standing Committee of the National People's Congress on June 29, 2007 and will enter into force on January 1, 2008.

These new steps for solving the existing problems in labor law practices may have been long expected. Voluminous literature commenting on China's LDR system evidences dissatisfaction from workers, employers, labor law enforcement personnel, and lawyers.

China has ratified the International Covenant on Economic, Social and Cultural Rights and twenty-five ILO conventions. It is thus an international obligation for China to protect and promote workers’ rights contained in these international treaties and to provide effective remedies to violations of these rights.

This article intends, first, to give a general introduction to China’s LDR system and its procedures; second, to point out major problems in the LDR system before Interpretation II was issued; and, third, to examine to what extent Interpretation II can solve these problems and its implications for protection of workers’ rights.

II. China’s Labor Dispute Resolution System
In general, China adopts a system of “one arbitration, two trials” (yi cai er shen) as formal labor dispute resolution. [FN11] When a labor-related dispute occurs, parties involved may go through three steps to seek a resolution: mediation, arbitration, and litigation. [FN12] The corresponding institutions handling labor disputes are respectively: the enterprise mediation committee, the labor dispute arbitration commission, and the people’s court. While mediation is completely voluntary, arbitration is mandatory, as a necessary step preceding litigation.

A. Mediation

In China's LDR system, mediation is not only a voluntary independent procedure as a process preceding arbitration and litigation, but also a procedure applying as a matter of principle to the whole process of labor dispute resolution. [FN13] In other words, apart from mediation conducted by the labor-dispute mediation committee within the enterprise (so-called “Enterprise Mediation Committee,” hereafter EMC), the Labor Arbitration Commission (LAC) and the courts shall mediate first before making a decision or a judgment when a dispute is brought to them. [FN14] The following is focused on mediation conducted by the EMC as an independent procedure preceding arbitration and litigation.

Mediation conducted by the EMC is completely voluntary. It means that mediation must be based on the agreement of all parties and can be ended at any time at the will of any party involved. [FN15] One party’s seeking for arbitration automatically terminates the on-going mediation. The agreement reached by mediation is not binding for any party concerned and parties could still file a claim for arbitration. [FN16]

As regards the nature of mediation, theoretically speaking, it should be neither judicial nor administrative, but a type of self-regulation of workers and employers. This private nature can be seen from the organization of the EMC. The committee is composed of representatives of three parties: workers, the employer, and the trade union in the enterprise concerned. [FN17] In order to guarantee impartiality, the chairperson of the EMC should be the trade union representative, [FN18] who does not have a direct interest in the disputes. In terms of daily functioning, the EMC receives the guidance from the trade union at a superior level, as well as from the local labor arbitration commission. [FN19] The secretariat of the EMC is taken up by the trade union of the enterprise. [FN20]

As a form of self-regulation of workers and employers, mediation has played an important role in regulating industrial relations and still does in the public sector. Nevertheless, statistics indicate that during the past decades, the number of disputes mediated by EMCs has significantly decreased. [FN21] A number of factors may contribute to this phenomenon. First, privatization and restructuring of public enterprises largely reduced the number of EMCs. Few private enterprises have the EMC today. [FN22] Second, the enterprise may be discouraged from establishing the EMC because it must bear the costs of activities of the EMC. [FN23] Third, partly due to the notorious weakness of trade unions in China, the tripartite structure of the EMC may be currently less effective in solving increased conflicts of interests between employers and workers.

B. Arbitration

Unlike mediation, which is a voluntary procedure that labor dispute parties can omit, the labor-dispute arbitration procedure must be exhausted before parties can file a claim before a court.

Labor dispute arbitration commissions at various levels are established by the local government at the corresponding level. [FN24] LACs at different levels are independent from each other and do not have a subordinate relationship with each other. Commissions adopt a tripartite organization structure, in the sense
that they are composed of representatives of the local labor administration, the trade union at the same level, and the employers. [FN25] The chairperson should be the responsible person of the local labor administration. [FN26] The labor dispute resolution department within the local labor administration serves as the secretariat of the LAC. [FN27]

Arbitration of individual disputes is conducted by ad hoc arbitration panels, which are normally composed of three arbitrators. “Simplified procedures,” appointing one arbitrator to the case, may be used where the dispute is not complicated. [FN28] Where a collective dispute involves more than thirty workers, the panel should have more than three arbitrators. [FN29] LACs recruit both full-time and part-time arbitrators. Full-time arbitrators are normally from the local labor administration. Part-time arbitrators should be selected from professionals in a labor-related area, such as trade union officials, labor law professors, and experienced lawyers. [FN30]

Parties can be assisted by one or two lawyers or other agents who present the case and participate in the hearings. [FN31] Parties can also settle the case by themselves, at any time of the procedure. [FN32] Third parties who have an interest in the dispute can also participate in the arbitration procedure. [FN33]

It is worth noticing that the administrative nature of the LAC does not mean that its adjudication on labor disputes results in an *252 administrative decision. Clearly, the LAC is an administrative organization because of its subordinate relationship with the local administration. However, arbitration per se possesses quasi-judicial characteristics and thus cannot be considered as administrative action. [FN34] For this reason, the Administrative Litigation Law does not apply to labor dispute arbitration. If a party to a labor dispute is not satisfied with the decision of the LAC panel, it could appeal to a court, but it cannot sue the LAC for its decision on the dispute. [FN35] In other words, the court is to examine the merits of the dispute instead of the arbitration decision, and the parties to the litigation are still the employer and the worker, not the LAC.

Compared to other types of arbitration in China, labor dispute arbitration has a number of distinctive characteristics.

First, unlike other arbitration such as trade dispute arbitration which should be based on a mutual agreement between the parties, labor dispute arbitration is compulsory in the sense that once one of the parties files an application before a LAC, the procedure starts without the consent of the other party. Moreover, parties do not have the right to choose the arbitrators.

Second, labor dispute arbitration cannot lead to a final decision in the whole dispute settlement process. If any party is unsatisfied with the arbitration decision, it could bring the case to a people's court. However, at the phase of arbitration itself, the decision is final, which means that the parties involved cannot appeal to the LAC at the higher level or require a second arbitration. Nevertheless, if the arbitration panel finds an error in its decision, it can arbitrate again, on its own initiative. [FN36]

Third, before the formal arbitration starts, the arbitration panel has the obligation to conduct mediation for the parties. Unlike the mediation agreement reached by the EMC, an agreement reached by arbitral mediation is binding and enforceable in the courts. Where one of the parties involved neither appeals to the court within fifteen days nor implements the arbitration decision within the time limit, the *253 other party may apply to the court for enforcement. [FN37] It is worth noting that while an arbitration decision can be appealed to the court within fifteen days, the arbitral mediation agreement cannot be appealed against. [FN38] Recent statistics illustrate that a large percentage of disputes are settled by mediation conducted by arbitrators. [FN39] Nonetheless, according to some arbitrators, it becomes more difficult to reach an agreement through mediation. [FN40] One reason may be that privatized enterprises are more concerned about their economic interests and reluctant to make compromises.
C. Litigation

Litigation is the final step of the whole LDR procedure. Labor dispute litigations are currently considered civil lawsuits, which fall under the application of the Civil Procedure Law. Therefore, labor dispute cases are heard by a civil tribunal of the people’s court, which adopts a “two trials” system. After the first trial, an unsatisfied party can appeal to the court at the higher level. There is also a voluntary in-court mediation conducted by the presiding judge or the panel. [FN41] Settlement through mediation or conciliation is possible throughout the legal procedure. [FN42] Like the mediation agreement reached in arbitration, a binding in-court mediation agreement also forecloses an appeal. [FN43]

Although labor disputes are heard by civil courts, differences exist between labor dispute lawsuits and other civil lawsuits. First, arbitration must be exhausted prior to the judicial procedure. Second, in general civil lawsuits, the burden of proof normally rests on the applicant; in labor dispute cases, when the dispute concerns the termination of employment, reduction of payment, or determination of length of service, the burden of proof rests on the employer. [FN44]

*254 III. Deficiencies in China's LDR system

A. Problems in the Scope of Application of the LDR System

1. Personal Jurisdiction

The 1995 Labor Law is the most important legal basis of China’s LDR system. The scope of application of the LDR system is therefore the same as that of the Labor Law. Article 2 of the 1995 Labor Law reads:

This Law applies to all enterprises and individual economic entities (hereafter referred to as employing units) within the boundary of the People’s Republic of China, and to laborers who form a labor relationship therewith.

State organs, institutional organizations and social groups as well as laborers who form a labor contract relationship therewith shall follow this Law.

This provision has two implications. First, a worker, before entering an employment, is not protected by the 1995 Labor Law. As a consequence, if a worker has suffered from unfair treatment such as discrimination at the recruitment stage, he cannot seek remedies through the LDR system. [FN45] Second, there should be a labor relationship, instead of other types of relationship, in order for the LDR system to be applied. The Labor Law does not clarify what constitutes a labor relationship. According to jurisprudence and implementing regulations, the following categories of workers are excluded from China’s LDR system: public servants, permanent staff in institutional organizations (shi ye dan wei) and social groups who are treated as public servants, farmers, military personnel, and those in an informal employment situation, such as the self-employed and domestic workers. [FN46]

Self-employed workers may be one of the largest groups excluded from China’s LDR system. Chinese law distinguishes the labor relationship *255 (laodong guanxi) from the recruitment relationship (guyong guanxi) and the service relationship (laowu guanxi). [FN47] A laborer on a guyong or laowu contract is considered an independent contractor in the context of civil law and thus cannot invoke the LDR system to solve a dispute. Such distinction implies not only the existence of different procedures for seeking remedies, but also the existence of differences with respect to substance of reparation. While the dispute on a labor contract must undergo labor arbitration prior to litigation, the dispute on a guyong or laowu contract can be directly brought to the court as a civil lawsuit. As regards compensation standards, taking work injury as an
example, the worker on a labor contract is entitled to compensation both from the work injury insurance and the employer, job arrangement, pension, medical allowances, and so on. [FN48] but the worker on a guyong or laowu contract normally obtains only a lump sum civil compensation for physical damages. [FN49] As regards the termination of employment, the worker in a guyong or laowu relationship does not enjoy any substantive or procedural protection against arbitrary dismissal and is not entitled to a severance allowance.

Therefore, it is very important to determine whether a labor relationship exists between the worker and the employer. In practice, however, it is often very difficult to distinguish a labor relationship from a guyong or laowu relationship, especially when it concerns small enterprises or individual economic entities. The courts seem to rely on formal conditions of the employer rather than on the substance of the relationship between the worker and the employer. According to the Ministry of Labor, “individual economic organization” refers to an individual economic entity (geti gongshanghu) that employs less than seven workers. [FN50] In reality, an individual business entity could be a family or single natural person. The case law shows that only those individual economic organizations that have registered are considered a lawful subject to form a labor relationship. If an individual economic entity or a natural person has not registered and obtained a license, the workers working for such entity or person will be considered self-employed or an independent contractor and thus *256 excluded from labor law. [FN51] In the case Chen Weili v. Lai Guofa, the court held that the case involved a civil dispute on a guyong relationship rather than a labor relationship because the employer does not hold a license for individual economic organization. This formalist approach is also reflected in the 1994 Work Injury Insurance Regulations. In this reasoning, employers may be discouraged from acquiring a license in order to escape from all the obligations arising from a labor relationship such as paying contribution to the social security scheme and providing a severance allowance for dismissal.

A written contract could be helpful to determine the existence of a labor relationship, but it is not always clear whether a written contract is a labor contract or a civil contract. Moreover, while China's labor law requires the employer to sign a written labor contract with the worker, many employers-- especially small ones--ignore this obligation. [FN52]

A labor relationship without a written labor contract is currently recognized and protected by the Chinese labor law as a “de facto labor relationship” (shishi laodong guanxi), instead of long-term employment as in many industrialized countries. [FN53] As regards what constitutes a de facto labor relationship, the Ministry of Labor has interpreted it as one in which “the laborer has in fact become the member of an enterprise or an individual economic organization, and has provided for remunerative labor.” [FN54] This interpretation does not provide much guidance for practice. At the provincial level, the Senior People's Court of Jiangsu Province has offered more detailed standards: there is a de facto labor relationship where the laborer (1) provides the employer with labor; (2) is subject to the employer's management, instruction, and supervision; and, (3) where the employer pays the remuneration to the laborer. [FN55] These three *257 cumulative criteria are similar to those adopted by the European Court of Justice: performance of services, subordination, and remuneration. [FN56] These criteria of the Jiangsu Senior People's Court may be very useful but they do not have a nationwide effect. In practice, many workers without a written contract still lack sufficient protection. [FN57] It is worth noting that in the first draft of the Labor Contract Law, the three cumulative criteria are adopted to define a labor relationship and a de facto labor relationship is regarded as a long-term labor relationship unless the worker expresses otherwise. Moreover, if the employer and the worker have a different understanding on whether there is a labor relationship, the employer assumes the burden of proof. [FN58] However, the first draft has been criticized (especially by employers) for over-protecting workers. [FN59] In the adopted Labor Contract Law, compromise can be seen in Article 14, which provides that after one year of de facto labor relationship, the worker will be considered as being under a labor contract of indefinite term (wuguding qixian hetong) if no written contract is signed.

Public servants may bring their disputes before a personnel arbitration commission (renshi zhongcai
weiyuanhui) that can hear disputes on recruitment, position change, and implementation of the “recruitment contract” (pin ren he tong) between public agents and their employer. [FN60]

As regards personnel working in institutional organizations and social groups, the situation is more complicated. These organizations are different from each other in terms of their functions and financial resources. Permanent staff in some institutional organizations and social groups is treated as public agent, such as staff in news agencies, trade unions, women's unions, and political parties. As regards those institutional organizations that are financially supported by the government but managed like an enterprise such as some publishing houses and magazines, their staff, whether permanent or not, is *258 covered by labor law. [FN61] But for the rest of the staff in institutional organizations, their status is not that clear. For instance, the teaching staff in public schools, and the medical staff in public hospitals is covered neither by public service law nor by labor law. [FN62]

In fact, for a long while, there was no law or any competent body to deal with disputes between the above mentioned public staff and their employers. [FN63] Until 1997, when personnel arbitration commissions were established, the personnel were indeed deprived of the right to seek remedies when their rights were allegedly infringed by their employer. This phenomenon was largely due to the fact that the pre-reform employment system divided laborers into two categories: “workers” and “cadres.” While “workers” were managed by the labor administration, “cadres” were managed by the personnel administration. The reform of the labor contract system was mainly targeted at “workers” and left “cadres” to a large extent out.

In order to fill this lacuna, the Ministry of Personnel promulgated the Provisional Regulations on the Settlement of Personnel Disputes in 1997 and accordingly created personnel arbitration commissions at various levels. In 2003, the Supreme People's Court issued an Interpretation that allows the courts to accept a dispute that has been examined by a personnel arbitration commission. [FN64]

However, the establishment of a personnel arbitration commission is problematic from the perspective of legislative procedures. According to the 2000 Law on Legislation, any arbitration or litigation system shall be established by the “Law” (fa lu) promulgated by the National People's Congress or its Standing Committee. [FN65] In the absence of a “fa lu,” the State Council can be authorized by the NPC or its Standing Committee to elaborate administrative regulations (xingzheng fagui) on the issue. [FN66] But the Provisional Regulations on the Settlement of Personnel Disputes are merely a department regulation (bumen guizhang) promulgated by the Ministry of Personnel, which means that the Regulations have much lower legal effect than a “Law” or administrative regulations *259 within the Chinese legislation hierarchies. Therefore, the personnel arbitration commission lacks a solid legislative basis for its existence. [FN67] It is worth noting that China's first Law on Public Agents, which entered into force in 2006, has a whole chapter on appeal for rights violations but does not mention the personnel arbitration system. [FN68]

In addition, the Provisional Regulations on the Settlement of Personnel Disputes do not indicate which law or substantive standards should be referred to in arbitration. As a result, the decision made by a personnel arbitration commission is technically not enforceable. The 2003 Interpretation of the Supreme People's Court (SPC) is problematic for the same reason. In Chinese law, an interpretation by the SPC theoretically does not have the effect of legislation and may not exceed the scope of the existing law. [FN69] As such, the SPC has exceeded its competence in the 2003 Interpretation though its main purpose is to resolve some technical difficulties in connecting personnel arbitration and litigation.

There is a positive sign that the present legislative deficiency may be repaired by the new Labor Dispute Mediation and Arbitration Law. The very first draft of this law intends to integrate labor disputes and personnel disputes in a single dispute resolution system. [FN70] Nevertheless, at this stage of the legislative process, it is still too early to make further comments in this respect.
2. Subject Matter Jurisdiction

China’s LDR system handles a wide range of labor disputes in terms of subject matter. The HELDR lists disputes over the following subjects: (1) disciplinary dismissals, worker's resignation or leave; (2) implementation of State regulations on wages, insurance, training, and labor protection; (3) implementation of the labor contract; and, (4) other labor disputes that should apply the HELDR according to laws or regulations. [FN71] Interpretation I of the SPC has further clarified that labor disputes shall include disputes in a de facto labor relationship and disputes raised by retired workers who seek a pension, medical fees, work-injury compensation, or any other social security compensation from their former employer if the latter did not participate in the social security scheme. [FN72] The latter case is specifically targeted at the State-owned enterprise pensioners in the context of China’s reform of the social security system. [FN73]

Certain disputes related to a labor relationship are not considered as labor disputes and thus excluded from the LDR system.

First, disputes on social security compensation between the worker and public social security institutions, or disputes between the worker and the labor administration on determination whether an injury constitutes “work-injury” (gong shang), are not settled by the LDR system. Instead, the worker should file a claim for administrative litigation.

Second, disputes over disciplinary measures of the employer, except when they take the form of a dismissal, are excluded from the LDR system. [FN74] According to one of the judges of the SPC, Dr. Han Yanbin, disputes caused by employer's human resources management do not concern the implementation of the labor contract, and therefore should not be accepted by the court as labor disputes. [FN75] This reasoning is not convincing because employer's management decisions especially when they involve disciplinary measures may well affect the worker's contractual rights such as bonus or wage reduction. Obeying disciplines is either an expressed or implied contractual obligation of the workers. In fact, Article 19 of the 1995 Labor Law requires that a labor contract shall include labor disciplines as one of the mandatory terms. However, the Regulation on Awards and Sanctions of Enterprises, which was promulgated by the State Council in 1982, remains valid. [FN76] According to its Article 21, the worker who is unsatisfied with disciplinary measures shall appeal to superior administrative authorities. Although the 1993 HELDR has integrated to the LDR system disputes over disciplinary sanctions that take the form of the termination of employment (kai chu, ci tui, chu ming), it does not include disputes over other disciplinary sanctions. [FN77] As such, workers are denied access to justice when they encounter unfair disciplinary sanctions by the employer.

Third, disputes over layoffs, internal retirement (nei tui), and other issues caused by the restructuring and privatization of public enterprises (gai zhi) are excluded from the LDR system and civil litigation. [FN78] According to the vice-president of the SPC lay-offs or unpaid wages of the whole workforce is a special phenomenon that appeared during the reform of the enterprise regime and the employment system, and is not related to the implementation of the labor contract. Therefore, these disputes are not labor disputes and should not be accepted by the court. Instead, these disputes should be handled by the competent government departments in accordance with the policies concerning the gai zhi. [FN79]

In this way, many laid off workers are deprived of their right to seek remedies. This denial of access to justice may also have contributed to mass protest nationwide of laid off workers. [FN80]

3. Time limit

Given the unique nature of labor disputes, China's LDR system is designed to be speedy in order to bet-
ter protect workers. [FN81] For this purpose, the law sets a strict time limit for each procedure. As regards arbitration, the arbitration commission should normally take a decision within sixty days from the date of receiving the application. Where complicated cases are involved, the decision could be extended up to another thirty days. If a party is not satisfied with the arbitral decision, it may bring a lawsuit to a people’s court within fifteen days from the date of receiving the arbitration ruling. [FN82] As regards litigation, since labor disputes are heard in the courts as civil lawsuits, the timetable follows the civil litigation rules.

A major problem that has appeared in practice lies in the time limit for a labor dispute party to file a claim to arbitration and to the court. Article 82 of the 1995 Labor Law provides “The party that requests arbitration shall file a written application to a labor dispute arbitration commission within 60 days starting from the date on which a labor dispute occurs.” The interpretation of this provision has caused great controversy in practice and in literature. [FN83]

First of all, it is not clear what “the date on which a labor dispute occurs” exactly means. The HELDR and the Ministry of Labor borrowed the concept from civil law [FN84] and interpreted it as the “date on which the applicant is aware or should be aware of the violation of his rights.” [FN85] This interpretation is problematic in terms of its validity because it has substantially changed the original meaning of Article 82 of the 1995 Labor Law and reduced the time for the applicant to seek remedies. It is also problematic to use the civil law concept for labor disputes because for a normal civil dispute, the time limit for filing a claim is one or two years, while for a labor dispute, the applicant has only sixty days to file a claim. [FN86]

In reality, the date on which the parties actually raise the dispute could be much later than the date on which the party concerned is aware of the violation. Such interpretation is not practical and favorable for workers, who may not be able to raise the dispute in time due to their subordinate and disadvantaged position or due to lack of access to information held by the employer. In practice, before taking hostile actions, such as seeking arbitration or litigation, workers are more likely to seek solutions through consultation or conciliation with the employer. Such informal process could last longer than sixty days depending on the complexity of the dispute and the good faith of the employer. It is reported that employers often take advantage of the sixty-day time limit and deliberately delay the consultation until the expiry of the time limit for the worker to seek a formal remedy. [FN87] Although the worker may argue that such consultation constitutes “legitimate reasons” for extending the sixty-day time limit, as discussed later in this paper, there is no clear interpretation of “legitimate reasons.” Such an argument does not seem to be accepted nationwide in practice.

At the provincial level, some Senior People's Courts tried to address this problem through their own interpretations. [FN88] Among them, the Senior People's Court of Jiangsu Province took certain steps worth noting, which were later reflected in Interpretation II. According to that interpretation, where the dispute concerns unpaid wages or deducted pay, the sixty-day time limit runs from the date on which the employer expressly refuses the payment. Where the employer does not expressly refuse to pay, the time limit runs from the date on which the worker claims the payment to the employer. But if the employer has delayed the payment for more than two years, the case will be dismissed except if the employer does not object to the case being accepted. [FN89]

Second, there are debates on the question of whether the sixty-day time limit is for arbitration only or for arbitration as well as litigation. Some scholars argue that the sixty-day time limit applies to arbitration only and that the court has to apply the two-year time limit as the Civil Litigation Law provides since a labor dispute is treated as a civil lawsuit in the court. Others argue that sixty days is the time limit for both arbitration and litigation because the court has to apply labor law when hearing a labor dispute. The Supreme People's Court, by its Interpretation I, appears to support the latter position. In practice, before Interpretation I was issued in 2001, if a labor dispute was rejected by arbitration for not satisfying the admissibility
criteria, it would be rejected by the court as well. [FN90] The applicant had thus no opportunity to have the case heard by a court even if the arbitration ruling on admissibility was wrong. Article 3 of Interpretation I solved this problem by requiring the courts to accept those disputes rejected by the arbitrators for having been filed out of time and to review the admissibility issue. The same provision provides that if the court finds that the application does have exceeded the sixty-day time limit for arbitration, the case will be rejected by the court.

*264 Third, the HELDR and Interpretation I allow the sixty-day time limit to be extended for force majeure or other legitimate reasons. [FN91] But there is no further explanation on what constitute “other legitimate reasons.” Certain courts at the provincial level gave their own interpretation. For instance, the Senior People's Court of Jiangsu Province has interpreted “other legitimate reasons” including the following: (1) The laborer has suffered from serious illness that has prevented him from making a complaint; (2) the laborer has consulted the employer on the issue; (3) the laborer has requested mediation by the trade union, by the enterprise mediation committee, or by the administrative authorities concerned; and, (4) other reasonable situations recognized by the court. The burden of proof rests on the party who invokes above reasons. [FN92] The Senior People's Court of Guangdong Province has slightly different interpretation. According to that court, “other legitimate reasons” refer to: (1) unexpected situations such as the laborer having been hospitalized for medical treatment; (2) the laborer and the employer having consulted each other on the disputed issue or having reached an agreement on the issue; or, (3) other reasonable situations recognized by the court. [FN93] In Shanghai, the term “legitimate reasons” has been given a broad interpretation. Any reasons not related to the subjective fault of the applicant could be considered as legitimate. [FN94] The case law illustrates that local courts have exercised discretion to a certain extent by taking into consideration the circumstances of the dispute when deciding what constitute legitimate reasons. [FN95]

B. Problems in the Structure of the LDR System

Apart from deficiencies in the jurisdiction, the “one arbitration, two trials” structure of China's LDR system has been subject to lots of criticism. First, the lengthy process of the “one arbitration, two trials” of the LDR system increases the costs for labor dispute parties and *265 places workers in a disadvantaged position. Without choice between arbitration and litigation, labor dispute parties must in fact undergo “three trials,” which altogether take around one year, and in some cases, may take up to three years. [FN96] This fact is at odds with the principle of speediness of the LDR system and renders futile other legislative efforts following this principle such as the time limit for filing the claim and that for adjudicating the dispute. In order to avoid such time-consuming and costly process, workers are often more willing than employers to settle the dispute through arbitral mediation. In certain cases, workers may accept much lower compensation than they are entitled to. [FN97]

Second, both arbitration and litigation have their own strengths and deficiencies in terms of their functions and organization. Judges are often specialized in civil lawsuits and unfamiliar with labor law. [FN98] In contrast, arbitrators are mostly experienced professionals in industrial relations and labor law. However, the arbitration commission is an administrative organ directly subordinated to the local government, and its staff are public servants. This fact renders the independence of arbitration questionable. Relatively speaking, the courts are more independent than the labor arbitration commission; although in China, even the courts cannot be completely exempted from the influence of the government especially when sensitive cases are concerned. [FN99]

C. Problems in the Implementation

China has made great efforts to improve the implementation of labor law and the LDR system. For in-
In response to the rapidly increasing number of labor disputes, China established a great number of enterprise mediation committees and labor arbitration commissions at various levels and ran the dissemination campaign to increase the public awareness of the labor law. [FN100] Nevertheless, *266 problems are still significant in the following aspects of the implementation.

First, there is a shortage of qualified personnel. Many arbitrators and judges, especially those at the grassroots level, do not receive an adequate training in labor law. [FN101] Labor lawyers are also in shortage. Compared to lucrative commercial cases, labor disputes are much less attractive for lawyers.

Second, financial costs for workers to take legal action insufficient legal aid discourage many workers from resorting to the LDR system. Although reducing or waiving fees for arbitration or litigation is legally possible, [FN102] it is not extensively awarded in practice. [FN103] Public or private legal aid services exist in China, but their application may be limited to certain categories of workers such as local residents, [FN104] or may focus on certain types of disputes such as work injury claims. [FN105]

Third, the effectiveness of the LDR system is not only affected by technical deficiencies in the system per se but also by the deficiencies in the substantive labor law. China's labor law is poorly drafted and has diversified sources, which results in conflicting legislation and the inconsistent application of labor law. Apart from the “laws,” administrative regulations, and department regulations at the national level, local people's congress and governments issue their own regulations and legal documents addressing labor issues. In addition, the SPC and local courts give judicial interpretations to unclear labor rules. Lack of an effective legislation review mechanism makes it difficult to change this situation. [FN106] Government policies addressing issues such as restructuring and layoffs of public enterprises render the implementation of labor law even more chaotic.

Fourth, after receiving a favorable judgment through the LDR process, workers are often unable to obtain the compensation due by the employer. In fact, the difficulty of enforcement is not limited to labor disputes, but is a pervasive phenomenon deeply rooted in *267 China's judicial system as a whole. [FN107] As regards labor disputes, the problems with enforcement are mainly related to the following factors. First, when bankrupt enterprises are involved, workers may not be able to obtain all the due compensation, even though they are entitled to be compensated before any other creditors. [FN108] Second, the courts that are responsible for enforcing the judgment often lack resources to enforce their judgments. Especially at the grassroots level, many courts have financial difficulties in daily functioning. [FN109] Third, the courts do not enjoy independence as the law requires and they are often influenced by the local government. The latter often has strong interests in protecting local enterprises and thus obstructs the enforcement. Fourth, local protectionism also results in great difficulties in enforcing the judgments of other jurisdictions. [FN110] Fifth, penalties for refusing to enforce a court order are rather exceptional. According to the law, such penalties may take the forms of fine, detention, or imprisonment up to three years. [FN111] In practice, few employers have been punished for technical reasons. [FN112]

IV. Interpretation II of the Supreme People's Court and its Implications

Five years after Interpretation I was issued, China's Supreme People's Court on August 14, 2006 issued Interpretation II, which contains 18 articles.

A significant point of Interpretation II is that its first three provisions and Article 14 concern unpaid wages and wage arrears, as a response to this notorious phenomenon around China and particularly in the construction sector during the past decade. [FN113] The rest of the provisions are devoted to clarifying the subject matter jurisdiction, *268 and to deal with personal jurisdictions, time limit, preservation of property, and enforcement.
Article 1 partly clarifies the controversial concept of “the date on which a labor dispute occurs” as discussed earlier in this article. This provision contains three paragraphs respectively addressing three specific situations. First, as regards wage disputes during the employment, the sixty-day time limit starts to run at the date on which the written notice of refusal of payment by the employer is served on the worker concerned; if the employer cannot provide such evidence, the time limit starts to run at the date on which the worker claims the right. Second, as regards disputes over the termination of employment, the time limit runs from the date on which the worker claims the right if the employer cannot prove when the worker concerned received the written notice of termination. Third, concerning disputes over wages, dismissal compensation, employment benefits, and other matters after the termination of employment, the time limit starts to run at the date on which the payment should be made as promised by the employer if the worker can prove such promise; otherwise, the “date on which a labor dispute occurs” is the date when the employment terminates.

According to the SPC, since misunderstanding on the concept “the date on which a labor dispute occurs” is mainly concerned with disputes over wages, termination of contract, and dismissal compensation, Interpretation II specifically targets at these cases. In fact, statistics show that disputes over wages and benefits indeed constitute the majority of labor disputes brought to arbitration and litigation. As such, the majority of labor dispute plaintiffs would benefit from the clarification made by Interpretation II. For the rest of labor disputes, however, the question remains whether the time limit runs from the date on which the worker is aware of the violation or from the date on which he claims his rights.

The deficiencies in Article 1 are somewhat compensated by Articles 12 and 13, which add the rule of interruption (zhong zhi) and the rule of suspension (zhong duan), as applied in general civil lawsuits. Before Interpretation II, even if the worker submitted a claim to his employer or to the labor inspection had within sixty days, the time would continue to run. Article 12 now provides “Whereas the plaintiff cannot file the claim within the time limit for arbitration due to force majeure or other objective reasons, the court shall regard the time as interrupted, and the time shall continue to run after the reasons concerned have disappeared.” This rule is similar to the extension of the time limit permitted by the HELDR and Interpretation I as discussed earlier in our study. Although Interpretation II does not define what constitute “objective reasons” either, the rule of zhong zhi is, compared to the rule of extension, a more mature rule widely practiced in civil law and thus leaves less discretion to arbitrators and judges. Article 13 provides that if a party can prove that it has claimed the right from the defendant or has sought remedies from the authorities, or that the defendant has promised to implement the obligation, the time limit for arbitration shall be recounted from the date when the defendant expressly refuses to implement the obligation or when the authorities issue the decision or dismiss the claim. These two provisions have a significant meaning in protecting the workers’ right to seek effective remedies.

Article 2 specifically targets wage arrears during the employment. According to this provision, the court shall not accept the argument of the employer that the sixty day time limit has run out, except if the employer can prove that the worker concerned has received the written notice of the refusal to pay by the employer. This provision indeed extends indefinitely the time limit for workers to file a claim on wage arrears. The reason behind this provision is that wage arrears are often inevitable in reality and it would be unreasonable to expect the worker to bring such claim to arbitration every time that a delay in payment occurs.

Article 3 allows the worker to directly file a civil lawsuit before the court, without undergoing arbitration as the 1995 Labor Law requires, if the person has written proof of unpaid wages from the employer and if the claim does not involve any other disputes concerning the labor relationship. In other words, such a dispute is regarded as a labor compensation dispute and is handled as a general civil lawsuit. The objective of this interpretation is to avoid lengthy procedures, due to the application of the principle of “one arbitration, two trials.” For a civil dispute, the parties have one or two years to file a claim. Certainly,
workers may still choose arbitration for such disputes. In practice, workers may benefit from the possibility offered *270 by Interpretation II. Nevertheless, scholars have raised suspicion about its applicability especially for rural migrant workers because their employers are very unlikely to provide any written proof of unpaid wages. [FN119] Apparently, such interpretation is at odds with the requirement of the 1995 Labor Law that a labor dispute must be arbitrated first. Nevertheless, unpaid wages can be considered as affecting workers’ property rights and are therefore protected by civil law. [FN120] It is not clear whether the Supreme People’s Court has adopted such reasoning.

In Articles 4 to 8, Interpretation II clarifies the kinds of disputes to which the LDR system applies.

According to Article 5, disputes over dismissal compensation, transfer of personal files and social security rights, return of deposit after the termination of a labor relationship shall be heard by the court after arbitration. It is worth noting that transfer of personal files was not a clear obligation of the employer. In practice, many employers deliberately delay or detain the personal files of workers and thus seriously affect their opportunities to start a new employment. Disputes over this matter were often considered as administrative issues and dismissed by arbitration and litigation. [FN121] In this respect, Interpretation II plays a positive role in safeguarding the workers’ right to free choice of employment.

Article 7 clearly rules out six types of disputes from the LDR system: (1) disputes over social security payments by a social security fund; (2) disputes between a family (or an individual) and a domestic worker; (3) disputes over a public housing transfer as a result of the housing reform; (4) disputes over the determination of occupational diseases and disability degree by the relevant institutions; (5) disputes between an individual artisan and a helper or an apprentice; and, (6) disputes between rural contractors and their employees. In fact, the majority of these provisions have their predecessors scattered in voluminous legal documents issued by the Ministry of Labor. [FN122] However, these documents are not easily accessible for the public, and *271 the courts may refer to them, but are not obliged to follow them. [FN123] Practices in these disputes are not always consistent. Interpretation II now provides clearer indications to the parties and the courts.

Article 10 concerns the jurisdiction ratione personae in the case of disputes over labor assignment contracts. According to this article, the assigning employer is the defendant in such disputes. If the dispute concerns the receiving employer, both the assigning and the receiving employer will be defendants. This triangular relationship often exists between a worker, a foreign company, which does not have the right to recruit Chinese employees, and the Chinese company providing service to the foreign company. [FN124] Before Interpretation II, there were no clear rules in this respect. In the case of Chen Weihua v. Shanghai Foreign Service Corporation, Shanghai Huangpu District People’s Court supported Chen’s claims over a dismissal compensation that was clearly indicated in the contract between the assigning employer and the receiving employer, but the court did not support her claim on overtime payment, due to a lack of evidence. According to Article 13 of Interpretation I, the employer assumes the burden of proof in disputes over compensation. In the instant case, the defendant is the assigning employer who does not have information on overtime pay and cannot thus assume the burden of proof on this matter. But the receiving employer, who has the relevant information, is not the party of the lawsuit and thus has no obligation to provide evidence. The current provision provides better protection to workers in labor assignment. It is expected that the Labor Contract Law will provide more substantive protection to the rights of workers in labor assignment because the respective responsibilities of the sending and receiving employers are much more clarified by the new law. [FN125]

Article 14 allows the court to exempt or reduce guarantees provided by workers who apply for preservation of property if they have financial difficulties or if there is evidence that the employer may flee with unpaid wages. [FN126] This provision intends to reduce the financial burden of workers to seek remedies. Nevertheless, it may not have much practical meaning because the rule of preservation of property does not
apply to arbitration that must be exhausted before litigation. Consequently, it may have been too late when workers are allowed to apply for preservation of property to the court.

Article 16 provides that in the case of a conflict between the internal rules of the employer and the terms of a collective contract or an individual labor contract, the contract will prevail over the internal rules if the worker requests so. This provision is to solve the problem left by Interpretation I. Article 19 of Interpretation I allows the court to use the internal rules of the employer as the basis for labor disputes if the internal rules satisfy three cumulative conditions: establishment by democratic procedures; compliance with laws, administrative regulations, and policies; and publication to workers. Interpretation I sets qualifications to the validity of internal rules but does not clarify the relationship between internal rules and contracts. The new Labor Contract Law makes little progress compared to Interpretation I in this respect. Interpretation II answers the controversial question whether the internal rules are part of the labor contract. It can protect workers from being imposed upon unfair internal rules of the employer, as often occurs in practice.

V. Conclusion

China's LDR system has inherent deficiencies, especially in terms of its limited scope of application and its structural weakness. Legislative deficiencies in substantive labor law and lack of rule of law also contribute to the rather poor implementation of the LDR system.

The new Interpretation II plays a positive role in solving certain technical problems such as the time limit to file a claim and in addressing some urgent issues such as that of wage arrears. It extends the jurisdiction of the LSD system in subject matters. It can also provide better protection to certain fundamental rights of workers such as the right to wages, compensation for work injuries, and the right to seek remedies per se.

Nevertheless, the most disadvantaged workers such as rural migrant workers and laid off workers may not be able to benefit much from the new Interpretation either because they are excluded from the jurisdiction of the LDR system or because they do not have the technical resources to utilize the LDR system to protect their rights.

Moreover, Interpretation II can do little to change the disadvantaged position of workers in the labor dispute resolution process caused by the lengthy procedure. It cannot do much either to ease difficulties in the enforcement of judgments although it has made certain efforts in this respect.

After all, one cannot expect that a judicial interpretation would solve all the problems in China's LDR system. In fact, Interpretation II does not have such ambition. According to the SPC, content overlapping with the Labor Contract Law has been deleted from Interpretation II.

Scholars have made various suggestions to improve the LDR system such as changing the existing “arbitration first, litigation afterwards” structure into an “arbitration or litigation” structure, creating specific labor dispute tribunals within or outside the civil courts, or establishing separate procedures for collective and individual labor disputes.

A positive sign is that China's legislative work is now more sophisticated and involves more public participation. It is thus expectable that the future Labor Dispute Mediation and Arbitration Law would draw lessons from practices in the past decade. But the effective protection of workers' rights requires not only technical improvements in the LDR system and substantive labor standards, but also respect for the rule of law and commitment to fundamental rights in general.
2. Labor Contract Law (of the People’s Republic of China)

Order of the President of the People’s Republic of China (No. 65)

The Labor Contract Law of the People’s Republic of China, which was adopted at the 28th Session of the Standing Committee of the Tenth National People’s Congress of the People’s Republic of China on June 29, 2007, is hereby promulgated and shall come into force as of January 1, 2008.

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Chapter I General Provisions

Article 1 This Law is formulated for the purposes of improving the labor contractual system, clarifying the rights and obligations of both parties of labor contracts, protecting the legitimate rights and interests of employees, and establishing and developing a harmonious and stable employment relationship.

Article 2 This Law shall apply to the establishment of an employment relationship between employees and enterprises, individual economic organizations, private non-enterprise entities, or other organizations (hereafter referred to as employers), and to the formation, fulfillment, change, dissolution, or termination of labor contracts.

The state organs, public institutions, social organizations, and their employees among them where there is an employment relationship shall observe this Law in the formation, fulfillment, change, dissolution, or termination of their labor contracts.

Article 3 The principles of lawfulness, fairness, equality, free will, negotiation for agreement, and good faith shall be observed in the formation of a labor contract.
A labor contract concluded according to the law shall have a binding force. The employer and the employee shall perform the obligations as stipulated in the labor contract.

Article 4 An employer shall establish a sound system of employment rules so as to ensure that its employees enjoy the labor rights and perform the employment obligations.

Where an employer formulates, amends, or decides rules or important events concerning the remuneration, working time, break, vacation, work safety and sanitation, insurance and welfare, training of employees, labor discipline, or management of production quotas which are directly related to the interests of the employees, such rules or important events shall be discussed at the meeting of employees’ representatives or the general meeting of all employees, and the employer shall also put forward proposals and opinions to the employees and negotiate with the labor union or the employees’ representatives on a equal basis to reach agreements on these rules or events.

During the process of execution of a rule or decision about an important event, if the labor union or the employees deem it improper, they may require the employer to amend or improve it through negotiations.

The employer shall make an announcement of the rules and important events that are directly related to the interests of the employees or inform the employees of these rules or events.

Article 5 The labor administrative department of the people’s government at the county level or above shall, together with the labor union and the representatives of the enterprise, establish a sound three-party mechanism to coordinate the employment relationship and shall jointly seek to solve the major problems related to employment relations.

Article 6 The labor union shall assist and direct the employees when they conclude with the employers and fulfill labor contracts and establish a collective negotiation mechanism with the employers so as to maintain the lawful rights and interests of the employees.

Chapter II  Formation of Labor Contracts

Article 7 An employer establishes an employment relationship with an employee from the date when the employer puts the employee to work. The employer shall prepare a roster of employees for inspection.

Article 8 When an employer hires an employee, it shall faithfully inform him of the work contents, conditions and location, occupational harm, work safety state, remuneration, and other information that the employee requests
to be informed of. The employer has the right to know the basic information of the employee that is directly related to the labor contract and the employee shall faithfully provide such information.

Article 9 When an employer hires an employee, it shall not detain his identity card or other certificates, nor require him to provide a guaranty or collect money or property from him under any other excuse.

Article 10 A written labor contract shall be concluded in the establishment of an employment relationship.

Where an employment relationship has already been established with an employee but no written labor contract has been entered simultaneously, a written labor contract shall be concluded within one month from the date when the employee begins to work.

Where an employer and an employee conclude a labor contract prior to the employment, the employment relationship is established from the date when the employee begins to work.

Article 11 Where an employer fails to conclude a written labor contract when the employer put his employee to work, if the remuneration stipulated between the employer and the employee is not clear, the remuneration to the new employee shall conform to the provisions of the collective contract. If there is no collective contract or if there is no such stipulation in the collective contract, the principle of equal pay for equal work shall be observed.

Article 12 Labor contracts are classified into fixed-term labor contracts, labor contracts without a fixed term, and the labor contracts that set the completion of specific tasks as the term to end contracts.

Article 13 A fixed-term labor contract refers to a labor contract in which the employer and the employee stipulate the time of termination of the contract.

The employer and the employee may conclude a fixed-term labor contract upon negotiation.

Article 14 A labor contract without a fixed term refers to a labor contract in which the employer and the employee stipulate no certain time to end the contract.

An employer and an employee may, through negotiations, conclude a labor contract without a fixed term. Under any of the following circumstances, if the employee proposes or agrees to renew or conclude a labor contract, a labor contract without a fixed term shall be concluded unless the employee proposes to conclude a fixed-term labor contract:

(1) The employee has already worked for the employer for 10 full years consecutively;
(2) When the employer initially adopts the labor contract system or when a state-owned enterprise reconcludes the labor contract due to restructuring, the employee has already worked for this employer for 10 full years consecutively and he attains the age that is less than 10 years up to the statutory retirement age; or

(3) The labor contract is to be renewed after two fixed-term labor contracts have been concluded consecutively, and the employee is not under any of the circumstances as mentioned in Article 39 and Paragraphs (1) and (2) of Article 40 of this Law.

If the employer fails to sign a written labor contract with an employee after the lapse of one full year from the date when the employee begins to work, it shall be deemed that the employer and the employee have concluded a labor contract without a fixed term.

Article 15 A labor contract that sets the completion of a specific task as the term to end the contract refers to the labor contract in which the employer and the employee stipulate that the time period of the contract shall be based on the completion of a specific task.

An employer and an employee may, upon negotiation, conclude a labor contract that sets the completion of a specific task to end the contract.

Article 16 A labor contract shall be agreed upon by the employer and the employee and shall come into effect after the employer and the employee affix their signatures or seals to the labor contract.

The employer and the employee shall each hold one copy of the labor contract.

Article 17 A labor contract shall include the following clauses:

(1) The employer’s name, domicile, legal representative, or major person-in-charge;
(2) The employee’s name, domicile, identity card number, or other valid identity certificate number;
(3) The time limit for the labor contract;
(4) The job descriptions and work locations;
(5) The work hours, break time, and leaves;
(6) The remunerations;
(7) The social security;
(8) The employment protection, work conditions, and protection against and prevention of occupational harm; and
(9) Other items that shall be included in the labor contract under any laws or regulations.
Apart from the essential clauses as prescribed in the preceding paragraph, the employer and the employee may, in the labor contract, stipulate the probation time period, training, confidentiality, supplementary insurances, welfares, benefits, and other items.

Article 18 If remunerations, work conditions, and other criteria are not expressly stipulated in a labor contract and a dispute is triggered, the employer and the employee may renegotiate the contract. If no agreement is reached through negotiations, the provisions of the collective contract shall be followed. If there is no collective contract or if there is no such stipulation about the remuneration, the principle of equal pay for equal work shall be observed. If there is no collective contract or if there is no such stipulation about the work conditions and other criteria in the collective contract, the relevant provisions of the state shall be followed.

Article 19 If the term of a labor contract is not less than 3 months but less than 1 year, the probation period shall not exceed one month. If the term of a labor contract is not less than one year but less than 3 years, the probation period shall not exceed 2 months. For a labor contract with a fixed term of 3 years or more or without a fixed term, the probation term shall not exceed 6 months.

An employer can only impose one probation time period on an employee.

For a labor contract that sets the completion of a specific task as the term to end the contract or with a fixed term of less than 3 months, no probation period may be stipulated.

The probation period shall be included in the term of a labor contract. If a labor contract only provides the term of probation, the probation shall be null and void and the term of the probation shall be treated as the term of the labor contract.

Article 20 The wage of an employee during the probation period shall not be lower than the minimum wage for the same position of the same employer or lower than 80 percent of the wage stipulated in the labor contract, nor may it be lower than the minimum wage of the locality where the employer is located.

Article 21 During the probation period, except when the employee is under any of the circumstances as described in Article 39 and Article 40 (1) and (2), the employer shall not dissolve the labor contract. If an employer dissolves a labor contract during the probation period, it shall make an explanation.

Article 22 Where an employer pays special training expenses for the special technical training of his employees, the employer may enter an agreement with his employees to specify their service time period.

If an employee violates the stipulation regarding the service time period, he shall pay the employer a penalty for breach of contract. The amount of
penalty for breach of contract shall not exceed the training fees provided by the
employer. The penalty for breach of a contract in which the employer requires
the employee to pay shall not exceed the training expenses attributable to the
service time period that is unfulfilled.

The service time period stipulated by the employer and the employee does
not affect the raising of the remuneration of the employee during the probation
period under the normal wage adjustment mechanism.

Article 23 An employer may enter into an agreement with his employees in
the labor contract to require his employees to keep the business secrets and
intellectual property of the employer confidential.

For an employee who has the obligation of keeping confidential, the
employer and the employee may stipulate noncompetition clauses in the
labor contract or in the confidentiality agreement and come to an agreement
that, when the labor contract is dissolved or terminated, the employee shall
be given economic compensations within the noncompetition period. If the
employee violates the stipulation of noncompetition, it shall pay the employer
a penalty for breaching the contract.

Article 24 The persons who should be subject to noncompetition shall be
limited to the senior managers, senior technicians, and the other employees
who have the obligation to keep secrets of employers. The scope, geographical
range, and time limit for noncompetition shall be stipulated by the employer
and the employee. The stipulation on noncompetition shall not be contrary
to any laws or regulations.

After the dissolution or termination of a labor contract, the noncompetition
period for any of the persons as mentioned in the preceding paragraph to
work for any other employer producing or engaging in products of the same
category or engaging in business of the same category as this employer shall
not exceed two years.

Article 25 Except for the circumstances as prescribed in Articles 22 and 23 of
this Law, the employer shall not stipulate with the employee that the employee
shall pay the penalty for breaching contract.

Article 26 The following labor contracts are invalid or are partially invalid
if:

(1) A party employs the means of deception or coercion or takes advantage of
the other party’s difficulties to force the other party to conclude a labor
contract or to make an amendment to a labor contract that is contrary to
his will;
(2) An employer disclaims its legal liability or denies the employee’s rights; or
(3) The mandatory provisions of laws or administrative regulations are violated.
If there is any dispute over the invalidating or partial invalidating of a labor contract, the dispute shall be settled by the labor dispute arbitration institution or by the people’s court.

Article 27 The invalidity of any part of a labor contract does not affect the validity of the other parts of the contract. The other parts shall still remain valid.

Article 28 If a labor contract has been confirmed to be invalid, the employer shall pay remunerations to his employees who have labored for the employer. The amount of remunerations shall be determined by analogy to the remuneration to the employees taking up the same or similar positions of the employer.

Chapter III Fulfillment and Change of Labor Contracts

Article 29 An employer and an employee shall, according to the stipulations of the labor contract, fully perform their respective obligations.

Article 30 An employer shall, under the contractual stipulations and the provisions of the state, timely pay its employees the full amount of remunerations.

Where an employer defers paying or fails to pay the full amount of remunerations, the employees may apply to the local people’s court for an order of payment. The people’s court shall issue an order of payment according to the law.

Article 31 An employer shall strictly execute the criterion on its production quota; it shall not force any of its employees to work overtime or make any of its employees do so in a disguised form. If an employer arranges overtime work, it shall pay its employee for the overtime work according to the relevant provisions of the state.

Article 32 If an employee refuses to perform the dangerous operations ordered by the manager of his employer, who violates the safety regulations or forces the employee to risk his life, the employee shall not be deemed to have violated the labor contract.

An employee may criticize, expose to the authorities, or make a charge against the employer if the work conditions may endanger his life and health.

Article 33 An employer’s change of its name, legal representative, key person-in-charge, or investor shall not affect the fulfillment of the labor contracts.

Article 34 In case of merger or split, the original labor contracts of the employer still remain valid. Such labor contracts shall be performed by the new employer who succeeds the rights and obligations of the aforesaid employer.

Article 35 An employer and an employee may modify the contents stipulated in the labor contract if they so agree upon in negotiations. The modifications to the labor contract shall be made in writing.
The employer and the employee shall each hold one copy of the modified labor contract.

**Chapter IV  Dissolution and Termination of Labor Contracts**

**Article 36** An employer and an employee may dissolve the labor contract if they so agree upon in negotiations.

**Article 37** An employee may dissolve the labor contract if it notifies in writing the employer 30 days in advance. During the probation period, an employee may dissolve the labor contract if it notifies the employer 3 days in advance.

**Article 38** Where an employer is under any of the following circumstances, its employees may dissolve the labor contract:

1. It fails to provide labor protection or work conditions as stipulated in the labor contract;
2. It fails to timely pay the full amount of remunerations;
3. It fails to pay social security premiums for the employees;
4. The rules and procedures set up by the employer are contrary to any law or regulation and impair the rights and interests of the employees;
5. The labor contract is invalidated due to the circumstance as mentioned in Article 26 (1) of this Law; or
6. Any other circumstances prescribed by other laws or administrative regulations that authorize employees to dissolve labor contracts.

If an employer forces any employee to work by the means of violence, threat, or illegally restraining personal freedom, or an employer violates the safety regulations to order or force any employee to perform dangerous operations that endanger the employee’s personal life, the employee may immediately dissolve the labor contract without notifying the employer in advance.

**Article 39** Where an employee is under any of the following circumstances, his employer may dissolve the labor contract:

1. It is proved that the employee does not meet the recruitment conditions during the probation period;
2. The employee seriously violates the rules and procedures set up by the employer;
3. The employee causes any severe damage to the employer because he seriously neglects his duties or seeks private benefits;
4. The employee simultaneously enters an employment relationship with other employers and thus seriously affects his completion of the tasks of
the employer, or the employee refuses to make the ratification after his employer points out the problem;

(5) The labor contract is invalidated due to the circumstance as mentioned in Item (1), paragraph 1, Article 26 of this Law; or

(6) The employee is under investigation for criminal liabilities according to law.

Article 40 Under any of the following circumstances, the employer may dissolve the labor contract if it notifies the employee in writing 30 days in advance or after it pays the employee an extra month's wages:

(1) The employee is sick or is injured for a non–work-related reason and cannot resume his original position after the expiration of the prescribed time period for medical treatment, nor can he assume any other position arranged by the employer;

(2) The employee is incompetent in his position or is still so after training or changing his position; or

(3) The objective situation, on which the conclusion of the labor contract is based, has changed considerably, the labor contract is unable to be performed, and no agreement on changing the contents of the labor contract is reached after negotiations between the employer and the employee.

Article 41 Under any of the following circumstances, if it is necessary to lay off 20 or more employees, or if it is necessary to lay off less than 20 employees but the layoff accounts for 10 percent of the total number of the employees, the employer shall, 30 days in advance, make an explanation to the labor union or to all its employees. After it has solicited the opinions from the labor union or of the employees, it may lay off the number of employees upon reporting the employee reduction plan to the labor administrative department:

(1) It is under revitalization according to the Enterprise Bankruptcy Law;

(2) It encounters serious difficulties in production and business operation;

(3) The enterprise changes products, makes important technological renovations, or adjusts the methods of its business operation, and it is still necessary to lay off the number of employees after changing the labor contract; or

(4) The objective economic situation, on which the labor contract is based, has changed considerably and the employer is unable to perform the labor contract.

The following employees shall be given priority to be kept when the employer cuts down the number of employees:
(1) Those who have concluded a fixed-term labor contract with a long time period;
(2) Those who have concluded a labor contract without fixed term; and
(3) Those whose family has no other employee and has aged or minors to support.

If the employer intends to hire new employees within 6 months after it cuts down the number of employees according to the first paragraph of this Article, it shall notify the employees cut down and shall, in the equal conditions, give a priority to the employees cut down.

Article 42 An employer shall not dissolve the labor contract under Articles 40 and 41 of this Law if any of its employees:

(1) is engaging in operations exposing him to occupational disease hazards and has not undergone an occupational health checkup before he leaves his position, or is suspected of having an occupational disease and has been diagnosed or is under medical observation;
(2) has been confirmed as having lost or partially lost his capacity to work due to an occupational disease or a work-related injury during his employment with the employer;
(3) has contracted an illness or sustained a non–work-related injury and the proscribed time period of medical treatment has not expired;
(4) is a female who is in her pregnancy, confinement, or nursing period;
(5) has been working for the employer continuously for not less than 15 years and is less than 5 years away from his legal retirement age; or
(6) finds himself in other circumstances under which an employer shall not dissolve the labor contract as proscribed in laws or administrative regulations.

Article 43 Where an employer unilaterally dissolves a labor contract, it shall notify the labor union of the reasons in advance. If the employer violates any laws, administrative regulation, or stipulations of the labor contract, the labor union has the power to require the employer to make ratification. The employer shall consider the opinions of the labor union and notify the labor union of the relevant result in writing.

Article 44 A labor contract may be terminated under any of the following circumstances:

(1) The term of a labor contract has expired;
(2) The employee has begun to enjoy the basic benefits of his pension;
(3) The employee is deceased, or is declared dead or missing by the people’s court;
(4) The employer is declared bankrupt;
(5) The employer’s business license is revoked or the employer is ordered to close down its business or to dissolve its business entity, or the employer makes a decision to liquidate its business ahead of the schedule; or
(6) Other circumstances proscribed by other laws or administrative regulations.

Article 45 If a labor contract expires and it is under any of the circumstances as described in Article 42 of this Law, the term of labor contract shall be extended until the disappearance of the relevant circumstance. However, the matters relating to the termination of the labor contract of an employee who has lost or partially lost his capacity to work as prescribed in Article 42 (2) of this Law shall be handled according to the pertinent provisions on work-related injury insurance.

Article 46 The employer shall, under any of the following circumstances, pay the employee an economic compensation:

(1) The employee dissolves the labor contract in pursuance of Article 38 of this Law;
(2) The employer proposes to dissolve the labor contract, and it reaches an agreement with the employee on the dissolution through negotiations;
(3) The employer dissolves the labor contract according to Article 40 of this Law;
(4) The employer dissolves the labor contract according to the first Paragraph of Article 41 of this Law; or
(5) The termination of a fixed-term labor contract according to Article 44 (1) of this Law unless the employee refuses to renew the contract even though the conditions offered by the employer are the same as or better than those stipulated in the current contract;
(6) The labor contract is terminated according to Article 44 (4) and (5) of this Law; or
(7) Other circumstances as proscribed in other laws and administrative regulations.

Article 47 An employee shall be given an economic compensation based on the number of years he has worked for the employer and at the rate of one month’s wage for each full year he worked. Any period of not less than six months but less than one year shall be counted as one year. The economic compensation payable to an employee for any period of less than six months shall be one-half of his monthly wages.

If the monthly wage of an employee is higher than three times the average monthly wage of employees declared by the people’s government at the level of
municipality directly under the central government or at the level of a districed
city where the employer is located, the rate for the economic compensation
to be paid to him shall be three times the average monthly wage of employees
and shall be for no more than 12 years of his work.

The term “monthly wage” mentioned in this Article refers to the employee’s
average monthly wage for the 12 months prior to the dissolution or termination
of his labor contract.

**Article 48** If an employer dissolves or terminates a labor contract in viola-
tion of this Law but the employee demands the continuous fulfillment of the
contract, the employer shall do so. If the employee does not demand the con-
tinuous fulfillment of the contract or if the continuous fulfillment of the labor
contract is impossible, the employer shall pay compensation to the employee
according to Article 87 of this Law.

**Article 49** The State shall take measures to establish and improve a compre-
hensive system to ensure that the employee’s social security relationship can be
transferred from one region to another and can be continued after the transfer.

**Article 50** At the time of dissolution or termination of a labor contract, the
employer shall issue a document to prove the dissolution or termination of the
labor contract and complete, within 15 days, the procedures for the transfer of
the employee’s personal file and social security relationship.

The employee shall complete the procedures for the handover of his work
as agreed upon between both parties. If relevant provisions of this Law require
the employer to pay an economic compensation, it shall make a payment
upon completion of the procedures for the handover of the employee’s work.

The employer shall preserve the labor contracts, which have been dissolved
or terminated, for not less than 2 years for reference purposes.

**Chapter V  Special Provisions**

**Section 1  Collective Contracts**

**Article 51** The employees of an enterprise may get together as a party to negoti-
tiate with their employer to conclude a collective contract on the matters of
remuneration, working hours, breaks, vacations, work safety and hygiene, insurance, benefits, etc. The draft of the collective contract shall be presented to the
general assembly of employees or all the employees for discussion and approval.

A collective contract may be concluded by the labor union on behalf of the
employees of an enterprise with the employer. If the enterprise does not have
a labor union yet, the contract may be concluded between the employer and
the representatives chosen by the employees under the guidance of the labor
union at the next highest level.
Article 52 The employees of an enterprise as a party may negotiate with the employer to enter specialized collective contracts regarding the issues of work safety and hygiene, protection of the rights and interests of female employees, the wage adjustment mechanism, etc.

Article 53 Industrial or regional collective contracts may be concluded between the labor unions and the representatives of enterprises in industries such as construction, mining, catering services, etc., in the regions at or below the county level.

Article 54 After a collective contract has been concluded, it shall be submitted to the labor administrative department. The collective contract shall become effective after the lapse of 15 days from the date of receipt thereof by the labor administrative department, unless said department raises any objections to the contract.

A collective contract that has been concluded according to law is binding on both the employer and the employees. An industrial or regional collective contract is binding on both the employers and employees in the local industry or the region.

Article 55 The standards for remunerations, working conditions, etc., as stipulated in a collective contract shall not be lower than the minimum criteria as prescribed by the local people’s government. The standards for remunerations, working conditions, etc. as stipulated in the labor contract between an employer and an employee shall not be lower than those as specified in the collective contract.

Article 56 If an employer’s breach of the collective contract infringes upon the labor rights and interests of the employees, the labor union may, according to law, require the employer to bear the liability. If a dispute arising from the performance of the collective contract is not resolved after negotiations, the labor union may apply for arbitration or lodge a lawsuit in pursuance of law.

Section 2 Worker Dispatch Service

Article 57 A worker dispatch service provider shall be established according to the Company Law and have a registered capital of not less than RMB 500,000 yuan.

Article 58 Worker dispatch service providers are employers as mentioned in this Law and shall perform an employer’s obligations for its employees. The labor contract between a worker dispatch service provider and a worker to be dispatched shall, in addition to the matters specified in Article 17 of this law, specify such matters as the entity to which the worker will be dispatched, the term of dispatch, positions, etc.
The labor contracts between a worker dispatch service provider and the workers to be dispatched shall be fixed-term labor contracts with a term of not less than 2 years. The worker dispatch service provider shall pay the remunerations on a monthly basis. During the time period when there is no work for the workers, the worker dispatch service provider shall compensate the workers on a monthly basis at the minimum wage prescribed by the people’s government of the place where the worker dispatch service provider is located.

Article 59 To dispatch workers, a worker dispatch service provider shall enter into dispatch agreements with the entity that accepts the workers under the dispatch arrangement (hereinafter referred to as the “accepting entity”). The dispatch agreements shall stipulate the positions to which the workers are dispatched, the number of persons to be dispatched, the term of dispatch, the amounts and terms of payments of remunerations and social security premiums, and the liability for breach of agreement.

An accepting entity shall decide with the worker service dispatch provider on the term of dispatch based on the actual requirements of the positions, and it shall not separate a continuous term of labor use into two or more short-term dispatch agreements.

Article 60 A worker dispatch service provider shall inform the workers dispatched of the content of the dispatch agreements.

No worker dispatch service provider may skimp on any remuneration that an accepting entity pays to the workers according to the dispatch agreement.

No worker dispatch service provider or accepting entity may charge any fee from any dispatched worker.

Article 61 If a worker dispatch service provider assigns a worker to an accepting entity in another region, the worker’s remuneration and work conditions shall be in line with the relevant standards of the place where the accepting entity is located.

Article 62 An accepting entity shall perform the following obligations:

(1) To implement state labor standards and provide the corresponding working conditions and labor protection;
(2) To communicate the job requirements and labor compensations for the dispatched workers;
(3) To pay overtime remunerations and performance bonuses and provide benefits relevant to the position;
(4) To provide the dispatched employees who assume the positions with required training; and
(5) To implement a normal wage adjustment system in the case of continuous dispatch.

No accepting entity may in turn dispatch the workers to any other employer.
Article 63 The workers dispatched shall have the right to receive the same pay as that received by employees of the accepting entity for the same work. If an accepting entity has no employee in the same position, the remuneration shall be determined with reference to that paid in the place where the accepting entity is located to employees at the same or a similar position.

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

Article 65 A worker dispatched may, according to Articles 36 and 38 of this Law, dissolve the labor contract between himself and the worker dispatch service provider.

Where a worker dispatched is under any of the circumstances as mentioned in Article 39 and Article 40 (1) and (2), the accepting entity may return the worker to the worker dispatch service provider, and the worker dispatch service provider may dissolve the labor contract with the worker.

Article 66 The worker dispatch services shall normally be used for temporary, auxiliary, or substitute positions.

Article 67 No accepting entity may establish any worker dispatch service to dispatch the workers to itself and to its subsidiaries.

Section 3 Part-Time Employment

Article 68 The “part-time employment” is a form of labor in which the remuneration is mainly calculated on an hourly basis, the average working hours of a worker per day shall not exceed 4 hours, and the aggregate working hours per week for the same employer shall not exceed 24 hours.

Article 69 Both parties to a part-time employment may reach an oral agreement.

A worker who engages in part-time employment may conclude a labor contract with one or more employers, but a labor contract concluded subsequently may not prejudice the performance of a labor contract previously concluded.

Article 70 No probation period may be stipulated by both parties for a part-time employment.

Article 71 Either of the parties to part-time employment may inform the other party of the termination of labor at any time. Upon the termination of a part-time employment, the employer will pay no economic compensation to the employee.

Article 72 The criteria for the calculation of part-time employment on an hourly basis shall not be lower than the minimum hourly wage prescribed by the people’s government of the place where the employer is located.
The maximum remuneration settlement and payment cycle for part-time employment shall not exceed 15 days.

**Chapter VI  Supervision and Inspection**

**Article 73** The labor administrative department of the State Council shall be responsible for the supervision and inspection of the implementation of the system of labor contracts throughout the country.

The labor administrative department of the local people’s governments at the county level and above shall be responsible for the supervision and inspection of the implementation of the system of labor contracts within their respective administrative areas.

During the supervision and inspection of the implementation of the system of labor contracts, the labor administrative departments of the people’s governments at the county level and above shall solicit the opinions of the labor unions, enterprise representatives, and relevant industrial administrative departments.

**Article 74** The labor administrative department of the local people’s government at the county level or above shall exercise supervision and inspection in respect of the implementation of the system of labor contracts:

1. The employers’ formulation of rules and regulations directly related to the interests of workers, and the implementation thereof;
2. The formation and dissolution of labor contracts by employers and workers;
3. The compliance with relevant regulations on dispatch by worker dispatch service providers and the accepting entities;
4. The employers’ compliance with provisions of the state on workers’ working hours, breaks, and vacations;
5. The employers’ payment for remuneration as specified in the labor contracts and compliance with the minimum wage criteria;
6. The employers’ participation in social security and the payment for social security premiums; and
7. Other labor supervision matters as prescribed by laws and regulations.

**Article 75** During the supervision and inspection process, the labor administrative department of the people’s government at the county level or above has the power to consult the materials relevant to the labor contracts and collective contracts and to conduct on-the-spot inspections at the workplaces. The employers and employees shall faithfully provide pertinent information and materials.
When the functionaries of the labor administrative department conduct an inspection, they shall show their badges, exercise their duties and powers pursuant to laws, and enforce the law in a well-disciplined manner.

Article 76 The relevant administrative departments of construction, health, work safety supervision and administration, etc., of the people’s governments at the county level and above shall, with the scope of their respective functions, supervise and administer the employers’ implementation of the system of labor contracts.

Article 77 For any employer whose lawful rights and interests are impaired, he may require the relevant department to deal with the case, apply for an arbitration, or lodge a lawsuit.

Article 78 A labor union shall protect the employees’ legitimate rights and interests and supervise the employer's fulfillment of the labor contracts and collective contracts. If the employer violates any law or regulation or breaches any labor contract or collective contract, the labor union may put forward its opinions and require the employer to make ratification. If the employee applies for arbitration or lodges a lawsuit, the labor union shall support and help him in pursuance of law.

Article 79 Any organization or individual may report the violations of this law. The labor administrative departments of the people’s governments at the county level and above shall timely verify and deal with such violations and shall grant awards to the meritorious persons who report the violations.

Chapter VII Legal Liabilities

Article 80 If the rules and procedures of an employer directly related to the employees' interests are contrary to any laws or regulations, the labor administration department shall order the employer to make rectification and give it a warning. If the rules and procedures cause any damage to the employees, the employer shall bear the liability for compensation.

Article 81 If the text of a labor contract provided by an employer does not include the mandatory clauses required by this Law or if an employer fails to deliver a copy of the labor contract to its employee, the labor administration department shall order the employer to make ratification. If any damage is caused to the employee, the employer shall bear the liability for compensation.

Article 82 If an employer fails to conclude a written labor contract with an employee after the lapse of more than one month but less than one year as of the day when it started using him, it shall pay to the worker his monthly wages at double amount.

If an employer fails, in violation of this Law, to conclude with an employee a labor contract without a fixed term, it shall pay to the employee his monthly
wage at double amount, starting from the date on which a labor contract without a fixed term should have been concluded.

**Article 83** If an employer stipulates the probation period with an employee to violate this Law, the labor administration department shall order the employer to make rectification. If the illegally stipulated probation has been performed, the employer shall pay compensation to the employee according to the time worked on probation beyond the statutory probation period, at the rate of the employee’s monthly wage following the completion of his probation.

**Article 84** Where an employer violates this Law by detaining the resident identity cards or other certificates of the employees, the labor administrative department shall order the employer to return the ID and certificates to the employees within a time limit and shall punish the employer according to the relevant laws.

Where an employer violates this Law by collecting money and property from employees in the name of guaranty or with any other excuses, the labor administrative department shall order the employer to return the said property to the employees within a time limit and fine the employer not less than 500 yuan but not more than 2,000 yuan for each person. If any damage is caused to the employees, the employer shall be liable for compensation.

When an employee dissolves or terminates the labor contract in pursuance of law, if the employer retains the archives or other articles of the employees, it shall be punished according to the provisions of the preceding paragraph.

**Article 85** Where an employing entity is under any of the following circumstances, the labor administrative department shall order it to pay the remunerations, overtime remunerations, or economic compensation within a time limit. If the remuneration is lower than the local minimum wage, the employer shall pay the shortfall. If payment is not made within the time limit, the employer shall be ordered to pay an extra compensation to the employee at a rate of not less than 50 percent and not more than 100 percent of the payable amount:

1. Failing to pay an employee his remunerations in full amount and on time as stipulated in the labor contract or prescribed by the state;
2. Paying an employee the wage below the local minimum wage standard;
3. Arranging overtime work without paying overtime remunerations; or
4. Dissolving or terminating a labor contract without paying the employee the economic compensation under this Law.

**Article 86** Where a labor contract is confirmed invalid under Article 26 of this Law and any damage is caused to the other party, the party at fault shall be liable for compensation.
**Article 87** If an employer violates this Law by dissolving or terminating the labor contract, it shall pay compensation to the employee at the rate of twice the economic compensations as prescribed in Article 47 of this Law.

**Article 88** Where an employer is under any of the following circumstances, it shall be given an administrative punishment. If any crime is constituted, it shall be subject to criminal liabilities. If any damage is caused to the employee, the employer shall be liable for compensation:

1. To force the employee to work by violence, threat, or illegal limitation of personal freedom;
2. To illegally command or force any employee to perform dangerous operations endangering the employee’s life;
3. To insult, corporally punish, beat, illegally search, or restrain any employee; or
4. To cause damages to the physical or mental health of employees because of poor working conditions or severely polluted environments.

**Article 89** Where an employer violates this Law by failing to issue to an employee a written certificate for the dissolution or termination of a labor contract, it shall be ordered to make a ratification by the labor administrative department. If any damage is caused to an employee, the employer shall be liable for compensation.

**Article 90** Where an employee violates this Law to dissolve the labor contract, or violates the stipulations of the labor contract about the confidentiality obligation or noncompetition, if any loss is caused to the employer, he shall be liable for compensation.

**Article 91** Where an employer hires any employee whose labor contract with another employer has not been dissolved or terminated yet, if any loss is caused to the employer mentioned later, the employer first mentioned shall bear joint and several liability of compensation.

**Article 92** Where a worker dispatch service provider violates this Law, it shall be ordered to make rectification by the labor administrative department and other relevant administrative departments. If the circumstance is severe, it shall be fined at the rate of not less than 1,000 yuan but not more than 5,000 yuan per person and have its business license revoked by the administrative department for industry and commerce. If any damage is caused to the workers dispatched, the worker dispatch service provider and the accepting entity shall bear joint and several liability of compensation.

**Article 93** Where an employer without lawful business operation qualifications commits any violation or crime, it shall be subject to legal liabilities. If the employees have already worked for the employer, the employer or its capital contributors shall, under the relevant provisions of this Law, pay the
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employees remunerations, economic compensations, or indemnities. If any damage is caused to the employee, it shall be liable for compensation.

Article 94 Where an individual as a business operation contractor hires employees in violation of this Law and causes any damage to any employee, the contracting organization and the individual business operation contractor shall be jointly and severally liable for compensation.

Article 95 If the labor administrative department, or any other relevant administrative department, or any of the functionaries thereof neglect its (his) duties, does not perform the statutory duties, or exercises its (his) duties in violation of law, it (he) shall be liable for compensation. The directly liable person-in-charge and other directly liable persons shall be given an administrative sanction. If any crime is constituted, they shall be subject to criminal liabilities.

Chapter VIII Supplementary Provisions

Article 96 For the formation, performance, modification, dissolution, or termination of a labor contract between a public institution and an employee under the system of employment, if it is otherwise provided for in any law, administrative regulation, or by the State Council, the latter shall be followed. If there is no such provision, the relevant provisions of this Law shall be observed.

Article 97 Labor contracts concluded before the implementation of this Law and that continue to exist on the implementation date of this Law shall continue to be performed. For the purposes of Item (3) of the second Paragraph of Article 14 of this Law, the number of consecutive times on which a fixed-term labor contract is concluded shall be counted from the first renewal of such contract to occur after the implementation of this Law.

If an employment relationship was established prior to the implementation of this Law without the conclusion of a written labor contract, such contract shall be concluded within one month from the date when this Law becomes effective.

If a labor contract existing on the implementation date of this Law is dissolved or terminated after the implementation of this Law and, according to Article 46 of this Law, an economic compensation is payable, the number of years for which the economic compensation is payable shall be counted from the implementation date of this Law. If, under relevant effective regulations prior to the implementation of this Law, the employee is entitled to the economic compensation from the employer in respect of a period prior to the implementation of this Law, the matters shall be handled according to the relevant effective regulations at that time.

Article 98 This Law shall come into force as of January 1, 2008.
Trade Union Law of the People's Republic of China

(Adopted at the Fifth Session of the Seventh National People's Congress on April 3, 1992 and promulgated by Order No.57 of the President of the People's Republic of China on April 3, 1992; amended in accordance with the Decision on Amending the Trade Union Law of the People's Republic of China adopted at the 24th Meeting of the Standing Committee of the Ninth National People's Congress on October 27, 2001)

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Chapter I General Provisions

Article 1 This Law is enacted in accordance with the Constitution of the People's Republic of China with a view to ensuring the status of trade unions in the political, economic and social life of the State, defining their rights and obligations and bringing into play their role in the socialist modernization drive.

Article 2 Trade unions are mass organizations of the working class formed by the workers and staff members on a voluntary basis.

The All-China Federation of Trade Unions and all the trade union organizations under it represent the interests of the workers and staff members and safeguard the legitimate rights and interests of the workers and staff members according to law.

Article 3 All manual and mental workers in enterprises, institutions and government departments within the territory of China who rely on wages or salaries as their main source of income, irrespective of their nationality, race, sex, occupation, religious
belief or educational background, have the right to organize or join trade unions according to law. No organizations or individuals shall obstruct or restrict them.

Article 4 Trade unions shall observe and safeguard the Constitution, take it as the fundamental criterion for their activities, take economic development as the central task, uphold the socialist road, the people's democratic dictatorship, leadership by the Communist Party of China, and Marxist-Leninism, Mao Zedong Thought and Deng Xiaoping Theory, persevere in reform and the open policy, and conduct their work independently in accordance with the Constitution of trade unions.

The National Congress of Trade Unions formulates or amends the Constitution of Trade Unions of the People's Republic of China, which shall not contravene the Constitution of the People's Republic of China or other laws.

The State protects the legitimate rights and interests of trade unions from violation.

Article 5 Trade unions shall organize and conduct education among workers and staff members in order that they shall, in accordance with the provisions of the Constitution of the People's Republic of China and other laws, give play to their role as masters of the country and participate in various ways and forms in the administration of State affairs, management of economic and cultural undertakings and handling of social affairs; trade unions shall assist the people's governments in their work and safeguard the socialist State power under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants.

Article 6 The basic duties and functions of trade unions are to safeguard the legitimate rights and interests of workers and staff members. While protecting the overall interests of the entire Chinese people, trade unions shall represent and safeguard the legitimate rights and interests of workers and staff members.

Trade unions shall coordinate labor relations and safeguard the rights and interests enjoyed in work by the workers and staff members of enterprises through consultation at an equal footing and the collective contract system.

Trade unions shall, in accordance with the provisions of laws and through the congresses of the workers and staff members or other forms, organize the workers and staff members to participate in democratic decision-making and management of and democratic supervision over their own work units.

Trade unions shall maintain close ties with workers and staff members, solicit and voice their opinions and demands, show concern for their everyday life, help them solve their difficulties and serve them wholeheartedly.
Article 7 Trade unions shall mobilize and organize workers and staff members to take an active part in economic development and to strive to fulfill their tasks in production and other work. Trade unions shall educate workers and staff members constantly in the need to improve their ideological, ethical, technical, professional, scientific and cultural qualities, in order to build a contingent team of well-educated and self-disciplined workers and staff members with lofty ideals and moral integrity.

Article 8 The All-China Federation of Trade Unions shall, on the principle of independence, equality, mutual respect and non-interference in each other's internal affairs, strengthen friendly and cooperative relations with trade union organizations of other countries.

Chapter II  Trade Union Organizations

Article 9 Trade union organizations at various levels shall be established according to the principle of democratic centralism.

Trade union committees at various levels shall be democratically elected at members' assemblies or members' congresses. No close relatives of the chief members of an enterprise may be candidates for members of the basic-level trade union committee of the enterprise.

Trade union committees at various levels shall be accountable, and report their work, to the members' assemblies or members' congresses at their respective levels and be subjected to their supervision as well.

Trade union members' assemblies or congresses shall have the right to remove or recall the representatives or members of trade union committees they elected.

A trade union organization at a higher level shall exercise leadership over a trade union organization at a lower level.

Article 10 A basic-level trade union committee shall be set up in an enterprise, an institution or a government department with a membership of twenty-five or more; where the membership is less than twenty-five, a basic-level trade union committee may be separately set up, or a basic-level trade union committee may be set up jointly by the members in two or more work units, or an organizer may be elected, to organize the members in various activities. Where female workers and staff members are relatively large in number, a trade union committee for female workers and staff members may be set up, which shall carry out its work under the leadership of the trade union at the corresponding level; where they are relatively small in number, there may be a member in charge of the female workers and staff members on a trade union committee.
In townships, towns or in urban neighborhoods, where workers and staff members of enterprises are relatively large in number, joint basic-level trade union federations may be set up.

Local trade union federations shall be established in places at or above the county level.

Industrial trade unions may be formed, when needed, at national or local levels for a single industry or several industries of a similar nature.

The All-China Federation of Trade Unions shall be established as the unified national organization.

Article 11 The establishment of basic-level trade union organizations, local trade union federations, and national or local industrial trade union organizations shall be submitted to the trade union organization at the next higher level for approval.

Trade union organizations at higher levels may dispatch their members to assist and guide the workers and staff members of enterprises to set up their trade unions, no units or individuals may obstruct the effort.

Article 12 No organizations or individuals may dissolve or merge trade union organizations at will.

A basic-level trade union organization shall be dissolved accordingly when the enterprise or institution or government department to which it belongs is terminated or dissolved, and the matter shall be reported to the trade union organization at the next higher level.

The membership of the members of the dissolved trade union organization specified in the provisions of the preceding paragraph may be retained, and the specific administrative measures in this regard shall be formulated by the All-China Federation of Trade Unions.

Article 13 For a trade union in an enterprise or institution with two hundred and more workers and staff members, there may be a full-time chairman. The number of the full-time functionaries of a trade union shall be determined by the trade union together with the enterprise or institution through consultation.

Article 14 The All-China Federation of Trade Unions, a local trade union federation or an industrial trade union enjoys the status of a legal person in the capacity of a public organization.
A basic-level trade union organization, which has acquired the qualifications of a legal person as prescribed in the General Principles of the Civil Law, shall, in accordance with law, be granted the status of a legal person as a public organization.

Article 15 The term of office of the basic-level trade union committee is three or five years. The term of office of the committees of the local trade union federations at different levels and of the industrial trade union organizations is five years.

Article 16 Basic-level trade union committees shall convene members' assemblies or members' congresses at regular intervals, at which major issues related to the work of trade union organizations shall be discussed and decided. Upon the proposal made by a basic-level trade union committee or over one-third of the trade union members, a provisional members' assembly or members' congress may be convened.

Article 17 No trade union chairman or vice-chairman may be arbitrarily transferred to another unit before the expiration of his tenure of office. When such a transfer is prompted by the need of work, it shall be subject to approval by the trade union committee at the corresponding level and the trade union at the next higher level.

The recall of the chairman or vice-chairman of a trade union must be discussed at the members' assembly or members' congress, and no such recall shall be made without approval by more than half of all the members at the assembly or congress.

Article 18 The term of labor contract for the full-time chairman, vice-chairman or member of a basic-level trade union shall be automatically extended from the date he assumes the office, and the term extended shall be equal to the term of office; if the term of labor contract left to be served by a chairman, vice-chairman or member is shorter than the term of office from the date he assumes the office, the term of the labor contract shall be automatically extended to the expiration of the term of office, except that he commits serious mistakes during the term of office or reaches the statutory age for retirement.

Chapter III Rights and Obligations of Trade Unions

Article 19 If an enterprise or institution acts in contravention to the system of the congress of workers and staff members or other systems of democratic management, the trade union shall have the right to demand rectification so as to ensure the workers and staff members the exercise of their right in democratic management as prescribed by law.

For matters which should be submitted to the assembly or congress of workers and staff members for deliberation, adoption or decision, as prescribed by laws and regulations, enterprises or institutions shall do so accordingly.
Article 20 Trade unions shall assist and guide workers and staff members in signing labor contracts with enterprises or institutions managed as enterprises.

Trade unions shall, on behalf of the workers and staff members, make equal consultations and sign collective contracts with enterprises or institutions under enterprise-style management. The draft collective contracts shall be submitted to the congresses of the workers and staff members or all the workers and staff members for deliberation and approval.

When trade unions sign collective contracts, trade unions at higher levels shall afford support and assistance to them.

If an enterprise infringes upon labor rights and interests of the workers and staff members in violation of the collective contract, the trade union may, according to law, demand the enterprise to assume the responsibilities for its acts; if the disputes arising from the performance of the collective contract fail to be settled through consultations, the trade union may submit them to the labor dispute arbitration bodies for arbitration; if the arbitration bodies refuse to accept the case or the trade union is not satisfied with the arbitral ruling, the trade union may bring the case before a People's Court.

Article 21 If an enterprise or institution punishes a worker or staff member in a manner that the trade union considers improper, the trade union shall have the right to advance its opinion.

Before unilaterally deciding to dissolve the labor contract with a worker or staff member, the enterprise shall inform the trade union of the reasons why; and, if the trade union considers that the enterprise violates laws, regulations or the contract in question and demands that it reconsider the matter, the enterprise shall study the opinion of the trade union, and inform the trade union of its final decision in writing.

Where a worker or staff member believes that the enterprise infringes upon his labor rights and interests and therefore applies for labor dispute arbitration or brings the case before a People's Court, the trade union shall give him support and assistance.

Article 22 If an enterprise or institution, in violation of laws and regulations on labor, infringes upon the labor rights and interests of the workers and staff members in any of the following ways, the trade union shall, on behalf of the workers and staff members, make representations to the enterprise or institution and demand that it take measures for rectification; the enterprise or institution shall review and handle the matter, and give a reply to the trade union; if the enterprise or institution refuses to make rectification, the trade union may apply to the local people's government for a decision according to law:

(1) embezzling part of the wages of the workers and staff members;
(2) failing to provide occupational safety and health conditions;

(3) arbitrarily extending working hours;

(4) infringing upon the special rights and interests of female workers and staff members as well as the minor workers; or

(5) seriously infringing upon other labor rights and interests of the workers and staff members.

Article 23 Trade unions shall, in accordance with State regulations, see to it that the working conditions and occupational safety and health facilities for enterprises under construction or expansion and for technological transformation projects are designed, built and put into operation or use simultaneously with the main parts of projects. The enterprises or the competent departments shall give serious consideration to the opinions put forth by the trade unions, and inform the trade unions of the results of their consideration in writing.

Article 24 When the trade union finds that the enterprise gives a command contrary to the established rules and compels workers to operate under unsafe conditions, or when major hidden dangers and occupational hazards are found in the course of production, the trade union shall have the right to put forward proposals for a solution, and the enterprise shall, without delay, consider the proposals and give a reply to the trade union. Where the very lives of the workers and staff members are found to be in danger, the trade union shall have the right to make a proposal to the enterprise that a withdrawal of the workers and staff members from the dangerous site be organized, and the enterprise shall make a decision promptly.

Article 25 Trade unions shall have the right to investigate into the infringements upon the legitimate rights and interests of the workers and staff members by enterprises or institutions, and the units concerned shall give them assistance.

Article 26 Trade unions shall participate in investigation into and settlement of job-related accidents causing death or injuries to workers and staff members and in investigation into and solution of other problems seriously endangering the health of workers and staff members. Trade unions shall make proposals for solutions to the departments concerned, and have the right to demand that the persons who are directly in charge and the other persons who are responsible be investigated for their liabilities. The proposals put forth by trade unions shall be considered and replies be given without delay.

Article 27 In case of work-stoppage or slow-down strike in an enterprise or institution, the trade union shall, on behalf of the workers and staff members, hold consultation
with the enterprise or institution or the parties concerned, present the opinions and
demands of the workers and staff members, and put forth proposals for solutions.
With respect to the reasonable demands made by the workers and staff members, the
enterprise or institution shall try to satisfy them. The trade union shall assist the
enterprise or institution in properly dealing with the matter so as to help restore the
normal order of production and other work as soon as possible.

Article 28 Trade unions shall participate in the conciliation of labor disputes in
enterprises.

Local labor dispute arbitration bodies shall include representatives of trade unions at
the corresponding levels.

Article 29 Trade union federations at or above the county level may provide legal
services to their affiliated trade unions and workers and staff members.

Article 30 Trade unions shall assist enterprises, institutions and government
departments in providing adequate collective welfare services to the workers and staff
members and in properly dealing with matters concerning wages, occupational safety
and health as well as social insurance.

Article 31 Trade unions shall, in conjunction with enterprises and institutions, conduct
education among the workers and staff members in the need to do their work and
protect the property of the enterprises and the State in the attitude of masters of the
country, mobilize the masses of workers and staff members in activities to make
rational proposals and technical renovations and in sparetime cultural and technical
studies and vocational training, and also in recreational and sports activities.

Article 32 Entrusted by the government, trade unions shall, together with relevant
departments, do a good job of choosing, commending, cultivating and administering
model workers and advanced producers (workers).

Article 33 When organizing people to draft or revise laws, regulations or rules directly
related to the immediate interests of workers and staff members, the government
departments shall listen to the opinions of trade unions.

When working out plans for national economic and social development, the people's
governments at or above the county level shall, where major questions related to the
interests of workers and staff members are concerned, listen to the opinions of the
trade unions at the corresponding levels.

When studying and working out policies and measures on employment, wages,
occupational safety and health, social insurance, and other questions related to the
immediate interests of workers and staff members, the people's governments at or
above the county level and their relevant departments shall invite the trade unions at the corresponding levels to take part in the study and listen to their opinions.

Article 34 The people's governments at or above the county level may, through meetings or by other appropriate ways, inform the trade unions at the corresponding levels of their important work programmes and administrative measures related to trade union work, analyse and settle the problems as reflected in the opinions and aspirations of the masses of the workers and staff members conveyed by trade unions.

Administrative departments for labor under the people's governments at various levels shall, together with the trade unions at the corresponding levels and the representatives of enterprises, establish trilateral consultation mechanisms on labor relations and jointly analyse and settle major issues regarding labor relations.

**Chapter IV Basic-level Trade Union Organizations**

Article 35 In a State-owned enterprise, the congress of the workers and staff members is the basic form of democratic management of the enterprise and the organ by which the workers and staff members exercise their right to democratic management, and discharges its functions and powers in accordance with the provisions of laws.

The trade union committee of the State-owned enterprise is the working body of the congress of the workers and staff members and takes care of the day-to-day work of the congress, checks and supervises the implementation of the resolutions adopted by the congress.

Article 36 The trade union committee of a collectively owned enterprise shall support and organize the participation of the workers and staff members in democratic management and democratic supervision, and defend their rights in electing, removing managerial personnel and deciding on major questions concerning operation and management.

Article 37 Trade union committees of enterprises or institutions other than the ones specified in Articles 35 and 36 of this Law shall, in accordance with the provisions of laws, organize the participation of the workers and staff members in democratic management of the enterprises and institutions by ways appropriate to the enterprises or institutions.

Article 38 When discussing major issues on operation, management and development, the enterprise or institution shall listen to the opinions of trade union. The trade union in an enterprise or institution shall have its representative(s) attending any meetings held by the enterprise or institution to discuss matters on wages, welfare, occupational
safety and health, social insurance and other questions related to the immediate interests of the workers and staff members.

An enterprise or institution shall support the trade union in carrying out its activities in accordance with law, and the trade union shall support the enterprise or institution in exercising its power of operation and management in accordance with law.

Article 39 Election of the representative(s) from among the workers and staff members to the board of directors or the board of supervisors of a company shall be conducted in accordance with the relevant provisions of the Company Law.

Article 40 Basic-level trade union committees shall hold meetings or organize activities for workers and staff members outside production- or work-hours; when such meetings or activities are to take up production- or work-hours, they shall seek prior consent from the enterprises or institutions.

Part-time committee members of basic-level trade unions shall receive their normal wages, and their other benefits shall remain unaffected if the meetings they attend or the trade union work they do during production- or work-hours take up not more than three working days every month.

Article 41 Full-time functionaries of trade union committees in enterprises, institutions and government departments shall have their wages, bonuses and subsidies paid by the units to which they belong. They shall enjoy the same social insurance and other welfare benefits as the other workers and staff members of their units.

Chapter V Trade Union Funds and Property

Article 42 The sources of trade union funds are as follows:

(1) membership dues paid by union members;

(2) contribution, equivalent to two percent of the monthly payroll of all the workers and staff members, allocated by the enterprise, institution or government department where the trade union is established;

(3) incomes derived from enterprises and undertakings run by trade unions;

(4) subsidies provided by the people's governments; and

(5) other incomes.
The contribution allocated by the enterprises or institutions, as specified in Subparagraph (2) of the preceding paragraph, shall be listed and allocated before tax.

Trade union funds shall mainly be used in the service of the workers and staff members and for activities sponsored by trade unions. Measures for the use of trade union funds shall be formulated by the All-China Federation of Trade Unions.

Article 43 Where an enterprise or institution delays allocating or refuses to allocate the contribution to the trade union without justifiable reasons, the basic-level trade union or the trade union at a higher level may apply to the local People's Court for an order for payment; if it refuses to obey the order, the trade union may, in accordance with law, apply to the People's Court for compulsory enforcement.

Article 44 Trade unions shall establish budgets, final accounts and auditing and supervisory systems based on the principle of financial autonomy.

For trade unions at various levels, auditing commissions shall be set up.

Trade unions at various levels shall subject their incomes and expenditures to examination by the auditing commissions at the corresponding levels, report them regularly to the members' assemblies or congresses and receive their supervision. The trade union members' assemblies or congresses shall have the right to express their opinions on the use of funds.

The use of trade union funds shall be subject to State supervision according to law.

Article 45 People's governments at various levels and enterprises, institutions and government departments shall make available such necessary material means as facilities and places for trade unions to function and conduct their activities.

Article 46 No trade unions' property, funds, or immovable property allocated by the State may be embezzled, diverted to other uses or arbitrarily disposed of, by any organization or individual.

Article 47 No enterprises or institutions run by trade unions to serve the workers and staff members may have their affiliation changed arbitrarily.

Article 48 Retired trade union functionaries at or above the county level shall enjoy the same treatment as retired functionaries of government departments do.

Chapter VI  Legal Liabilities

Article 49 Where their legitimate rights and interests are infringed upon in violation of the provisions of this Law, the trade unions shall have the right to submit the matter
to people's governments or relevant departments for solution, or to bring the case before a People's Court.

Article 50 Any organization or individual that, in violation of the provisions of Articles 3 and 11 of this Law, obstructs the workers' and staff members' from joining or organizing of trade unions in accordance with law or the effort made by trade unions at higher levels to assist and guide the workers and staff members in establishing trade unions shall be ordered to by the administrative department for labor to make rectification; if it refuses to do so, the said department may apply to the people's government at or above the county level for solution; where grave consequences are caused as a result of the use of such means as violence and threat in obstruction and thus a crime is constituted, criminal responsibility shall be investigated according to law.

Article 51 Any organization that, in violation of the provisions of this Law, retaliate the functionaries of trade unions who perform their duties and functions according to law by transferring them to other posts without justifiable reasons shall be ordered by the administrative department for labor to rectify and reinstate the functionaries; if losses are caused therefrom, compensation shall be made to them.

Anyone who humiliates, slanders or inflict injuries upon the functionaries of trade unions who perform their duties and functions according to law, which constitutes a crime, shall be investigated for criminal responsibility according to law; if the case is not serious enough to constitute a crime, he shall be punished by the public security organ in accordance with the regulations on administrative penalties for public security.

Article 52 In any of the following cases in which the provisions of this Law are violated, the administrative department for labor shall order that the victim be reinstated, his remuneration payable during the period of the termination of the labor contract be made up, or that a compensation two times the amount of his annual income be given:

(1) the labor contract of a worker or staff member is terminated due to his participation in trade union activities; or

(2) the labor contract of a trade union functionary is terminated due to the performance of his duties and functions prescribed by this Law.

Article 53 Any organization or individual that, in violation of the provisions of this Law, commits one of the following acts shall be ordered by the people's governments at or above the county level to rectify, and the said government shall handle the case according to law:
(1) preventing a trade union from mobilizing the workers and staff members to exercise, according to law, their democratic rights through the congress of the workers and staff members and other forms;

(2) illegally dissolving or merging trade union organizations;

(3) preventing a trade union from participating in the investigation into and solution of an accident causing job-related injuries or death to workers or staff members or other infringements upon the legitimate rights and interests of the workers and staff members; or

(4) rejecting consultation on an equal footing without justifiable reasons.

Article 54 Anyone who, in violation of the provisions of Article 46 of this Law, embezzles the fund or property of a trade union and refuses to return it, the trade union may bring the case before a People's Court and demand that the fund or property be returned and that the losses caused be compensated.

Article 55 Where a trade union functionary, in violation of the provisions of this Law, infringes upon the rights and interests of the workers and staff members or of the trade union, the trade union at the corresponding level or the trade union at a higher level shall order the functionary to rectify, or impose a sanction on him; if the circumstances are serious, the functionary shall be removed from office in accordance with the Constitution of Trade Unions of the People's Republic of China; if losses are caused, the liability for compensation shall be borne; if a crime is constituted, criminal responsibility shall be investigated according to law.

Chapter VII  Supplementary Provisions

Article 56 Specific measures for implementation of this Law by the trade unions in government departments shall be formulated by the All-China Federation of Trade Unions together with relevant government departments.

Article 57 This Law shall go into effect as of the date of its promulgation. The Trade Union Law of the People's Republic of China, promulgated by the Central People's Government on June 29, 1950, shall be nullified at the same time.