

China's New Labor Contract Law and
Protection of Workers

Li Jing*

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Abstract

This Comment will discuss the labor conditions in China that prompted many provisions in the recently enacted Labor Contract Law, and how the new law responds to deficiencies of China's Labor Law to address various labor problems. Part I of this Comment contains a brief presentation of the historical and economic background of the emergence of migrant workers. Part I also examines the causes of the main problems faced by migrant workers, in particular the insufficiencies of China's Labor Law in protecting migrant workers. Part II looks into the legislation's background and specific provisions of China's new Labor Contract Law that supplement the Labor Law and stress the protection of laborers. Many provisions of the new law specifically address labor abuses faced by migrant workers. Finally, Part III discusses the insufficiencies and likely effects of the new Labor Contract Law.

COMMENT

CHINA'S NEW LABOR CONTRACT LAW AND PROTECTION OF WORKERS

*Li Jing**

INTRODUCTION

China currently has approximately 200 million migrant workers.¹ It is well documented that migrant workers in China encounter various difficulties and labor abuses such as low wages, unsafe work conditions, overtime work with little or no compensation, wage arrears and nonpayment, and lack of social security.² As migrant workers have become a major labor force in China's industrial development, China has gradually recognized the critical importance of safeguarding their rights and in-

* Associate at the law firm Genova, Burns & Vernoia; J.D., 2008, Fordham University School of Law; Ph.D., Philosophy, 2005, Marquette University; M.A., 1999, Nanjing University (China). The author is grateful to the Feerick Center for Social Justice and Dispute Resolution at Fordham University School of Law for sponsoring this research in China in 2007. The author *also* wants to thank Annie Chen and other editors of this law journal for their great help.

1. See General Report Drafting Team, *General Report of Research on Problems of China's Migrant Workers*, in PROJECT TEAM OF THE RESEARCH OFFICE OF THE STATE COUNCIL, ZHONGGUO NONGMINGONG DIAOYAN BAOGAO [SURVEY AND RESEARCH REPORT ON CHINA'S RURAL WORKERS] 1, 4 (2006) (stating that China currently has 200 million migrant workers); see also Zheng Gongcheng & Huangli Ruolian, *The Issue and Social Protection of Chinese Migrant Workers: Theoretical Judgment and Policy Thinking*, in ZHONGGUO NONGMINGONG WENTI YU SHEHUI BAOHU [RURAL-URBAN MIGRANT WORKERS IN CHINA: ISSUES AND SOCIAL PROTECTION] 3, 9 (Zheng Gongcheng & Huangli Ruolian, eds., 2007) (estimating the population of migrant workers to be around 210 million). All translations in this Comment are transliterated in the Pinyin system. Unless otherwise indicated, all translations from Chinese sources are the author's. Titles of Chinese books, newspapers, and periodicals are transliterated and translated; titles of articles in books, periodicals, and newspapers are only translated.

2. See JIANG YUE, ET AL., ZHONGGUO NONGMINGONG LAODONG QUANLI BAOHU YANJIU [STUDY ON PROTECTION OF RIGHTS OF LABOR OF PEASANT WORKERS IN CHINA] 87-121 (2006) (discussing the main problems faced by migrant workers); see also Sean Cooney, *Making The Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China*, 30 FORDHAM INT'L L.J. 1050, 1050, 1053-54 (2007) (summarizing various forms of labor abuse in China and noting that migrant workers are regularly accorded treatment inferior to their urban counterparts and they bear the brunt of labor abuses); SHEN LIREN, ZHONGGUO NONGMINGONG [CHINESE MIGRANT WORKERS] 119-38 (2005) (discussing the problems faced by migrant workers such as employment discrimination, lack of social security, low wage and wage arrear, etc.).

terests.³ Since 2000, China's national government, and subsequently its local governments, have made a series of serious efforts to improve the conditions of migrant workers, by repealing discriminatory regulations and taking protective measures.⁴ Migrant workers also have attracted enormous scholarly attention and won widespread public sympathy and media support.⁵

In June 2007, China passed its first Labor Contract Law (or Employment Contract Law) that manifestly leans toward protection of labor rights.⁶ Drafts of this law drew an unusual amount of public attention and were highly debated.⁷ Some view this

3. See General Report Drafting Team, *supra* note 1, at 7 (recognizing migrant workers as an important component of China's industrial labor force); *id.* at 18 (stating that Chinese government's understanding of the issue of migrant workers has gradually progressed and that proper resolution of this issue is of key strategic importance); see also HAN CHANGBIN, *ZHONGGUO NONGMINGONG DE FAZHAN HE ZHONGJIE* [THE DEVELOPMENT AND END OF CHINESE MIGRANT WORKERS] 129 (2007) (describing the transformation of migrant workers into industrial workers as a historic transformation and asserting the need to assign to migrant workers a just social economic position).

4. See JIANG ET AL., *supra* note 2, at 43-45, 50-53. The national government on various occasions requires, *inter alia*, that migrant workers be treated equally as urban residents with respect to employment, child education and workers compensation, that various fees imposed on migrant workers be abolished, that migrant workers receive no less than minimum wage. Many local governments adopt similar measures aiming at alleviating the burdens and restrictions placed upon migrant workers. See generally *infra* notes 33-38 and accompanying text (discussing the positive shift in China's policy towards migrant workers since 2001).

5. See SHEN, *supra* note 2, at 2 (pointing out that migrant workers have become a hot public topic and have been the subject of scholarly discussions); see also Wang Fenyu and Zhao Yandong, *The Obtaining of Economic Status by Migrating Rural Workers and the Determinative Factors*, in *NONGMINGONG: ZHONGGUO JINCHENG NONGMINGONG DE JINGJI SHEHUI FENXI* [RURAL WORKERS: SOCIAL ECONOMIC ANALYSIS OF CHINA'S RURAL WORKERS IN CITIES] 134, 135 (Li Peilin ed., 2003) (observing that the wave of migrant workers has attracted scholars' serious attention and referring to studies on migrant workers).

6. See *Zhonghua Renmin Gongheguo Laodong Hetong Fa* [Labor Contract Law of the P.R.C.] (promulgated by the Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) http://www.molss.gov.cn/gb/news/2007-06/30/content_184630.htm [hereinafter Labor Contract Law] (P.R.C.). The English translation in this Comment's text is generally the author's own, but direct quotations of Labor Contract Law provisions in this Comment's footnotes are from the law firm Baker & McKenzie's translation. See Law Of The People's Republic Of China On Employment Contracts, http://www.amcham-shanghai.org/NR/rdonlyres/DE724602-2608-4FF5-94E2-DDD2805521C3/4470/EmploymentContractLaw_BakerMcKenzie.pdf (last visited Feb. 3, 2009); see generally Associated Press, *China's Legislature Approves New Labor Law*, INT'L HERALD TRIB., June 29, 2007 (referring to China's Labor Contract Law as new labor law), available at <http://www.iht.com/articles/ap/2007/06/29/business/AS-FIN-China-Labor-Law.php>.

7. See *China's Legislature Approves New Labor Law*, *supra* note 6, ¶ 6 (reporting that China's government received more than 190,000 comments on the draft law from the public and companies); see also Ting-I Tsai, *China's Labor Law A Last Straw For Taiwanese*,

new Labor Contract Law, effective on January 1, 2008,⁸ as a milestone in the protection of labor rights in China,⁹ while others see insufficiencies in this law and remain cautious as to its real effects.¹⁰

This Comment will discuss the labor conditions in China that prompted many provisions in the recently enacted Labor Contract Law, and how the new law responds to deficiencies of China's Labor Law to address various labor problems. Part I of this Comment contains a brief presentation of the historical and economic background of the emergence of migrant workers. Part I also examines the causes of the main problems faced by migrant workers, in particular the insufficiencies of China's Labor Law in protecting migrant workers. Part II looks into the legislation's background and specific provisions of China's new Labor Contract Law that supplement the Labor Law and stress the protection of laborers. Many provisions of the new law specifically address labor abuses faced by migrant workers. Finally, Part III discusses the insufficiencies and likely effects of the new Labor Contract Law.

ASIAN TIMES, Dec. 14, 2007, ¶ 8, available at http://www.atimes.com/atimes/China_Business/IL14Cb02.html (reporting that the Standing Committee of the National People's Congress of China received 191,800 separate comments on the draft Labor Contract Law).

8. See Tsai, *supra* note 7, ¶ 3 (reporting that Labor Contract Law is scheduled to become effective on January 1, 2008); see also Lyle Morris, *An Uncertain Victory for China's Workers*, YALEGLOBAL ONLINE, June 24, 2008, ¶ 3, <http://yaleglobal.yale.edu/display.article?id=10983> (observing that Labor Contract Law went effective on January 1, 2008).

9. See Morris, *supra* note 8, ¶ 1 (observing that the passage of Labor Contract Law has been heralded as a breakthrough for improving labor rights in China); see also Ariana Eunjung Cha, *New Law Gives Chinese Workers Power, Gives Businesses Nightmares*, WASHINGTON POST FOREIGN SERVICE, Apr. 14, 2008, ¶¶ 3, 4, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/13/AR2008041302214.html> (referring to Labor Contract Law as a landmark law and a major victory for Chinese workers).

10. Morris, *supra* note 8, ¶¶ 17, 18 (reporting that critics point out that Labor Contract Law's goal of reducing worker-abuse cases might be difficult to achieve, depending on local labor bureaus' enforcement of and companies' compliance with the law); see also Jude Blanchette, *Key Issue for China's New Labor Law: Enforcement*, THE CHRISTIAN SCIENCE MONITOR, July 2, 2007, ¶ 3, available at <http://www.csmonitor.com/2007/0702/p11s02-woap.html> (citing concern that Labor Contract Law's impact lies in how the government interprets and enforces it); Cha, *supra* note 9, ¶ 9 (citing concerns that Labor Contract Law, being too harsh on companies, protects the lazy); *id.* ¶ 12 (citing a survey showing that a fifth of companies with foreign ownership or investment have concrete plans to move some or all operations out of China).

I. MIGRANT WORKERS: HISTORY, POLICY, CONDITIONS, AND CAUSES

A. *Historical Overview: China's Household Registration System, Economic Reforms and Implications for Migrant Workers*

People in China call migrant workers *Nongmingong*, the literal translation of which is “peasant workers.”¹¹ “Peasant” indicates their household registration status as rural residents, while “workers” refers to their occupation as workers in cities.¹²

To appreciate some of the special problems faced by China's migrant workers today, one needs to understand China's unique Household Registration System—the so called *Hukou* system—that has been in place since 1958.¹³ Under the so-called Urban-Rural Dual System,¹⁴ people living in rural areas are registered with “agricultural” household status, while people in the cities are registered with “non-agricultural” or “urban” household status.¹⁵ Classification in the Household Registration System had a life-changing economic consequence. In the era of the planned economy, the government assigned a job to every-

11. See JIANG ET AL., *supra* note 2, at 1 (stating that *Nongmingong* is the most commonly used term in referring to migrant workers and explaining the origin of other names used for migrant workers).

12. See *id.* (explaining that “peasant” indicates migrant workers' identity under the household registration system and “worker” refers to their occupation); See also Sun Liping, *New Urban-Rural Dual Structure and Migration of Rural Workers*, in *NONGMINGONG: ZHONGGUO JINCHENG NONGMINGONG DE JINGJI SHEHUI FENXI* [RURAL WORKERS: SOCIAL ECONOMIC ANALYSIS OF CHINA'S RURAL WORKERS IN CITIES] *supra* note 5, at 149, 149-52 (asserting that “peasant” indicates migrant workers' social identity and “worker” refers to their occupation). Following customary usages, in this Comment “migrant workers” and “rural workers” are used interchangeably to refer to “peasant workers.”

13. See Hayden Windrow & Anik Guha, *The Hukou System, Migrant Workers, and State Power in the People's Republic of China*, 3 *NW. J. INT'L HUM. RTS.* 3, 4-14 (2005) (explaining the development of China's *Hukou* system); see also Li Ling, *Towards A More Civil Society: Mingong and Expanding Social Space in Reform-Era China*, 33 *COLUM. HUM. RTS. L. REV.* 149, 155-58 (2001) (discussing the *Hukou* system and its effects on urban residents, peasants, and migrant workers).

14. See Sun, *supra* note 12, at 149-52 (discussing China's urban-rural dual structure that is based on the Household Registration System under planned economy in 1950s-1990s); see also LI QIANG, *ZHONGGUO NONGMINGONG YU SHEHUI FENCENG* [URBAN MIGRANT WORKERS AND SOCIAL STRATIFICATION IN CHINA] 32 (2004) (explaining briefly the Urban-Rural Dual System).

15. See Sun, *supra* note 12, at 151 (stating that the household registration system divides rural and urban residents into two different social identities); see also LI, *supra* note 14, at 32 (observing that distinction between “agricultural” and “urban” household registration statuses is to prevent rural residents from migrating into cities).

one in cities.¹⁶ As city residents had life-long job security and enjoyed various benefits provided by state-owned or collectively owned enterprises and city governments,¹⁷ they possessed what was called an "iron rice bowl," meaning a secure and tenured job.¹⁸ An "iron rice bowl" was very valuable because it provided urban residents with a high standard of living compared to their rural counterparts.¹⁹ China's priority in building a modern industrial system in urban areas was largely responsible for the economic inequality between urban and rural areas.²⁰ Given the wide economic gap between the cities and the countryside, rural residents had a strong incentive to move into the cities.²¹ It is China's strict household registration system that prevented the relocation of rural residents to cities.²²

16. See Sun, *supra* note 12, at 151 (stating that the state considered it its responsibility to find employment for the non-agricultural population in cities); see also Windrow & Guha, *supra* note 13, at 13 (stating that China's policies allocated urban employment, among other benefits, to holders of urban Hukou registration).

17. See JIANG ET AL., *supra* note 2, at 123 (enumerating a variety of social welfare benefits provided for urban employees, such as food, dining, housing, bathing, transportation, and child education, etc.); see also Windrow & Guha, *supra* note 13, at 13 (stating that China's policies allocated "free compulsory education, urban employment, public housing, free medical services, and retirement benefits" to holders of urban Hukou registration).

18. See Li, *supra* note 14, at 97 (referring to "iron rice bowl" as government-assigned lifetime employment); see also Lucy A. Williams & Margaret Y.K. Woo, *The Worthy Unemployed: Societal Stratification and Unemployment Insurance Programs in China and the United States*, 33 COLUM. J. TRANSNAT'L L. 457, 461-64 (1995) (discussing the benefits of an "iron rice bowl" to an employee).

19. See Sun, *supra* note 12, at 151-52 (discussing that government spending in cities has been a lot more than that in rural areas, that city residents enjoy enormously more benefits than rural residents, and that the government's social security expenditure per capita in cities was twenty-nine times that in countryside in 1999).

20. See Windrow & Guha, *supra* note 13, at 4 (mentioning Beijing's plan to extract China's agricultural economic surplus to fuel urban industrialization); see also HAN, *supra* note 3, at 16 (observing that China's strategic priority in developing heavy industries sacrificed the interests of peasants).

21. See Li, *supra* note 14, at 47 (concluding that the enormous economic gap between urban and rural areas drove peasants to move into cities); see also SHEN, *supra* note 2, at 81 (contending that the urban-rural income gap is the driving force behind peasant workers' migration to cities).

22. See JIANG ET AL., *supra* note 2, at 33-39 (explaining that state-owned enterprises could occasionally recruit limited numbers of temporary workers from the countryside, but these rural workers were not given urban household registration status and had to return home when employment ended. Without employment, rural residents were not allowed to live in cities; were detained and sent back to the rural area); see also LI, *supra* note 14, at 31 (observing that the government relied on the Household Registration System to stop rural residents from migrating into cities); Liu Jingming, *Study on Chinese Peasants' Job Migration in the Context of Modernization*, in NONGMINGONG: ZHONGGUO

A large population of migrant workers started to emerge after China began economic reforms in the late 1970s.²³ With the development of the economy and the private sector, China now allows rural residents to find employment in cities.²⁴ Consequently, the population of rural workers in cities increased from less than two million in the early 1980s to eighty million in 1995.²⁵ However, these migrant workers, without an urban household registration status, were not eligible for benefits and public services provided by city governments.²⁶

The wave of migrant workers flowing into and between cities burdened city governments and caused social problems.²⁷ The government and public media gave it a derogatory name, "blind flow."²⁸ National and city governments also began to im-

JINCHENG NONGMINGONG DE JINGJI SHEHUI FENXI [RURAL WORKERS: SOCIAL ECONOMIC ANALYSIS OF CHINA'S RURAL WORKERS IN CITIES] *supra* note 5, at 74-76 (discussing the restrictive effect of the Household Registration System on rural residents' migration to cities).

23. See Randall Peerenboom, *Out of the Pan and Into the Fire: Well-Intended But Misguided Recommendations to Eliminate All Forms of Administrative Detention in China*, 98 NW. U. L. REV. 991, 1003 (2004) (noting that post-Mao economic reforms have led to a massive influx of poor and poorly-educated migrant workers into cities looking for jobs); see also Windrow & Guha, *supra* note 13, at 16 (noting the renewed migration of millions of rural Chinese to urban areas in search of greater prosperity following China's economic reforms).

24. See Li Lulu, *Migration to Cities: An Irreversible Process*, in NONGMINGONG: ZHONGGUO JINCHENG NONGMINGONG DE JINGJI SHEHUI FENXI [RURAL WORKERS: SOCIAL ECONOMIC ANALYSIS OF CHINA'S RURAL WORKERS IN CITIES] *supra* note 5, at 116 (stating that development of non-state-owned economy in cities provided many new jobs for rural workers); see also JIANG ET AL., *supra* note 2, at 37-38 (noting that as new jobs were created, state-owned enterprises in mining, construction, and transportation industries were allowed to recruit rural residents as temporary contract workers).

25. See General Report Drafting Team, *supra* note 1, at 3 (estimating that the population of migrant workers was thirty million in 1989 and sixty-two million in 1993).

26. See Li Lulu, *supra* note 24, at 118 (acknowledging that rural workers are denied many public services because they do not have urban household registration); see also HAN, *supra* note 3, at 143 (explaining that even if migrant workers have lived in cities for many years, they are not viewed as city residents and are denied a variety of public services).

27. See LI, *supra* note 14, at 223 (acknowledging the problems resulting from large scale population migration into cities, such as pressure on urban housing, transportation, utility supplies, sanitation, and public safety); see also Li Lulu, *supra* note 24, at 117 (noting government worries that the migrant population may cause a series of problems in cities, such as pressure of employment, poverty, conflicts between migrant population and local residents, and challenges to city management).

28. See JIANG ET AL., *supra* note 2, at 38-41 (discussing a series of national government notices and policy documents aiming at curbing the "blind flow"); see also LI, *supra* note 14, at 87 (stating that many people call the migration of rural workers "blind flow" because they view the migration as unorganized, out of order, and chaotic); SHEN,

pose strict restrictions on rural workers to constrain this flow.²⁹ In 1994, China enacted its first Labor Law that required employment contracts for all workers, including urban residents.³⁰ Subsequently, the “iron rice bowl” became breakable when state-owned enterprises with economic hardships laid off numerous urban workers.³¹ To reserve jobs for the laid-off urban citizens, the government imposed even stricter restrictions on migrant workers.³²

supra note 2, at 63 (explaining that the government called the rural workers' migration “blind flow” because it is not in order with the planned economy).

29. See JIANG ET AL., *supra* note 2, at 39 (mentioning that in 1989 nearly one million rural residents without employment in cities were detained and sent back home); see also, LI, *supra* note 14, at 246, 254 (stating that in 1999 Beijing detained and sent back nearly 150,000 rural residents, that across the country bullying and beating of detainees were not uncommon, and that in 2003 China officially ended its detention-repatriation practice against unwanted rural residents in cities); Li Ling, *supra* note 13, at 158 (discussing China's regulations on migrant workers in 1990s); Peerenboom, *supra* note 23, at 1003-04 (discussing briefly the rise and fall of China's detention-repatriation practice and its bearing on rural migrant workers).

30. See Zhonghua Renmin Gongheguo Laodong Fa [The Labor Law of the P.R.C.] (promulgated by the Nat'l People's Cong., July 5, 1994, effective May 1, 1995) http://www.molss.gov.cn/gb/ywzn/2006-03/02/content_108641.htm (P.R.C.) [hereinafter Labor Law]. The translation of Labor Law in this Comment's text is the author's own, but direct quotations of Labor Law provisions in this Comment's footnotes are from an English translation. See Ministry of Commerce, <http://english.mofcom.gov.cn/article/lawsdata/chineselaw/200411/20041100311016.html> (last visited Oct. 13, 2008) (P.R.C.).

31. See Jian Xinhua & Zhang Jianwei, *Migrant Workers and the Relocation of Surplus Rural Labor Force*, in ZHONGGUO NONGMINGONG WENTI YU SHEHUI BAOHU [RURAL-URBAN MIGRANT WORKERS IN CHINA: ISSUES AND SOCIAL PROTECTION] *supra* note 1, at 269, 269-70 (observing that in the mid-1990s many Chinese city governments adopted discriminatory policies against migrant workers to protect a large number of urban workers laid off by state-owned enterprises); see also JIANG ET AL., *supra* note 2, at 40 n.13 (noting that in 1994, there were 7.8 million unemployed urban workers and that between 1998 to 2001, 25.5 million urban workers were laid off); see generally Hong Yung Lee, *Xiagang, the Chinese Style of Laying Off Workers*, 6 ASIAN SURVEY 914 (2000) (examining how the Chinese State has been handling the problem of excess workers in its state-owned enterprises).

32. See JIANG ET AL., *supra* note 2, at 41, 88, 125 (acknowledging that city governments required migrant workers to obtain various papers and certificates, such as migration certificate, work permit, employment certificate, temporary residency certificate, and reproduction certificate, etc.); see also Li Ling, *supra* note 13, at 159 (noting that Chinese government, facing pressures to keep and generate jobs for local urban residents, enacted strict rules to constrain the ability of local employers to hire migrant workers); Sun, *supra* note 12, at 154 (observing that some cities deliberately discharged migrant workers in order to employ urban workers who were laid off from other positions).

B. *Significant Positive Shift in China's Policy on Rural Workers
Since 2000*

Since the beginning of this new century, China has started to adopt protective policies toward rural workers.³³ China now perceives the protection of rural workers' rights and interests as one of its national policies.³⁴ A recent example is the approval of Several Opinions of the State Council on Resolving the Problems of Rural Workers in January 2006, during a regular meeting of the State Council (the highest national administrative body) presided over by Premier Wen Jiabao.³⁵ This is the first comprehensive national policy document on rural workers.³⁶ It addresses every aspect of all the problems affecting mi-

33. *See* Opinions on Working Well in Agriculture and Rural Areas in 2002 (issued by the State Council), available at <http://www.cq.gov.cn/zwgk/zfgb/gb2002/dierqi/200412246888.HTM> (last visited Feb. 3, 2009) (P.R.C.) (asking local governments to provide services and fair treatment to rural workers and protect their legitimate rights and interests); *see also* Notice on Working Well in the Management of and Services for Peasants Working in Cities (issued by the State Council) (Jan. 2003), available at http://www.bjld.gov.cn/tszl/swfzxc/t20030319_5955.htm (P.R.C.) (affirming migrant workers' right to equal employment, work pay, work safety, training, and child education); Opinions on Several Policies to Promote Increase in the Income of Peasants (issued by the State Council) (Jan. 2004), available at http://news.xinhuanet.com/newscenter/2004-02/08/content_1303656.htm (P.R.C.) (recognizing migrant workers as an important industrial labor force and requiring local governments to further clear discriminatory regulations and unreasonable fees on migrant workers, and include services to migrant workers in the normal fiscal budget).

34. *See* Yue Jinglun, *Rural Workers and Labor Policy, in* ZHONGGUO NONGMINGONG WENTI YU SHEHUI BAOHU [RURAL-URBAN MIGRANT WORKERS IN CHINA: ISSUES AND SOCIAL PROTECTION] *supra* note 1, at 302, 309-23 (detailing the protective policies and measures adopted by the national government in the past few years to safeguard the interests of migrant workers and concluding that the issue of migrant workers has become the subject of special attention of the national government and has entered the nation's agenda at the highest level); *see also* Willy Lam, *Stability Trumps Reform at China's Parliamentary Session*, 8 JAMESTOWN FOUNDATION CHINA BRIEF 6 (Mar. 14, 2008), available at http://www.jamestown.org/china_brief/article.php?articleid=2374035 (stating that, in his inaugural address to the First Session of the 11th National People's Congress in early April, 2008, Premier Wen Jiabao remarked that lessening the financial hardship of "under-classes" such as peasants and migrant workers has become the top priority of the new cabinet).

35. *See* Several Opinions of the State Council on Resolving the Problems of Rural Workers (issued by the State Council) (Mar. 27, 2006), available at http://www.gov.cn/jrzq/2006-03/27/content_237644.htm (P.R.C.); *see also* Xie Qiong, *Index of Policy Regulations and Important Documents on the Issue and Social Protection of Migrant Workers since the Reform and Opening-Up, in* ZHONGGUO NONGMINGONG WENTI YU SHEHUI BAOHU [RURAL-URBAN MIGRANT WORKERS IN CHINA: ISSUES AND SOCIAL PROTECTION] *supra* note 1, at 669, 687-98 (reprinting this governmental document).

36. *See* Yue, *supra* note 34, at 311 (stating that this is the central government's first comprehensive and systematic policy document on rural workers).

grant workers and has, among other things, the following objectives: resolving the problems of low wages and wage arrears, bringing labor management of rural workers in line with legal regulations, providing employment service, occupational training, social security, urban public services, and improving the safeguard mechanism that protects rural workers' rights and interests.³⁷ In accordance with the shift in China's national policy on migrant workers, the national government, along with many local governments, has taken a variety of measures to improve the conditions of rural workers.³⁸

There are several reasons for this positive policy change. People believe that the foremost reason for the policy change is that poor treatment of rural workers poses a serious threat to China's social stability.³⁹ A vast portion of the Chinese population has been left behind during China's economic reforms, creating a comparatively poor class mainly comprised of unemployed and low-income urban residents, rural workers and peasants.⁴⁰ As people perceive wealth to be unfairly distributed,

37. See Several Opinions of the State Council on Resolving the Problems of Rural Workers, *supra* note 35, §§ 3-8 (identifying the many problems faced by migrant workers and specifying the various measures the government needs to take to improve the condition of rural workers).

38. See Huangli Ruolian & Zheng Gongcheng, *The Issue and Social Protection of Chinese Migrant Workers: Current Situation, Difficulties and Solution Analysis*, in ZHONGGUO NONGMINGONG WENTI YU SHEHUI BAOHU [RURAL-URBAN MIGRANT WORKERS IN CHINA: ISSUES AND SOCIAL PROTECTION] *supra* note 1, at 30, 106-12 (documenting a number of measures taken by the national government since 2003 for the benefit of migrant workers); see also Ronald C. Brown, *China's Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?*, 16 DUKE J. COMP. & INT'L L. 35, 51 (2006) (citing a report that 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, causing the first decline in labor disputes in Beijing since 2000); JIANG ET AL., *supra* note 2, at 43 (discussing that since 2000 local governments at various levels began to gradually repeal unreasonable restrictions on migrant workers); *id.* at 73-78 (enumerating some of the measures taken by local governments in the interests of migrant workers).

39. See Brown, *supra* note 38, at 51 (asserting that when adding up some of the ill side-effects of economic reforms, such as slow-rising wages, widening wage gaps, and unpaid wages of migrant workers, one can understand why the central government has had as a high priority putting a social security safety net in place with accompanying Labor Law protections); see also Yue, *supra* note 34, at 309 (asserting that one of the main reasons for the policy change is the affect of migrant workers on China's labor relation stability and social harmony).

40. See Li Qiang, *New Trends in Current Changes in China's Societal Structure*, §§ 1-2, <http://zyzx.mca.gov.cn/article//mjzl/lq/200712/20071200009109.shtml> (discussing recent striking economic gaps between China's social classes and affects on social stability); see also Brown, *supra* note 38, at 47 (referring to migrant workers as an underclass

social tension, or even resentment, has grown to an ever worrisome level.⁴¹ China's current administration, which succeeded to power in 2003, set the goal of building a "harmonious society" by spreading the gains of economic growth to the large population at the bottom of the socioeconomic ladder.⁴² The current administration has made progress in establishing a social security system for poor urban residents, abolished the agricultural tax in 2006,⁴³ increased spending significantly in the countryside,⁴⁴ and is building a universal healthcare system and a mini-

in China); Kang Xinqiao, *Analysis of the Four Major Social Classes in China Today*, § 2, ¶¶ 6-7, <http://www.tecn.cn/data/detail.php?id=11209> (last visited Feb. 3, 2009) (categorizing peasants, migrant workers, unemployed, and low-income city residents as either poor or nearly poor).

41. See Jiang Wenran, *The Dynamics of China's Social Crisis*, 6 JAMESTOWN FOUNDATION CHINA BRIEF 2, ¶¶ 4-10 (2006), available at http://jamestown.org/images/pdf/cb_006_002.pdf (observing growing economic inequality and social unrest); see also Brown, *supra* note 38, at 50 (citing World Bank President Wolfensohn as noting that in 2003 China had 10 million citizens engaged in protests, not only over labor issues (such as layoffs and wages), but also over rising rural taxes and forced relocation in urban areas); *China's Social Stability*, VOICE OF AMERICA, Aug. 6, 2005, ¶ 3, available at <http://www.voanews.com/uspolicy/archive/2005-08/2005-08-15-voa2.cfm> (reporting that the Chinese Minister of Public Security acknowledged at a closed meeting of Chinese officials that nearly four million Chinese took part in seventy-four thousand protests in 2004).

42. See Jiang, *supra* note 41, ¶ 14 (commenting that the current Chinese leadership headed by President Hu Jintao and Premier Wen Jiabao is keenly aware of the growing disparity and its serious consequences and that the "harmonious society" Seems to have become a central pillar of the Hu-Wen approach to easing China's social tensions); see also Maureen Fan, *China's Party Leadership Declares New Priority: 'Harmonious Society'*, WASHINGTON POST FOREIGN SERVICE, Oct. 12, 2006, at A18, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101610.html> (reporting that Chinese President Hu Jintao plans to narrow the wealth gap, increase employment and improve public service); Morris, *supra* note 8, ¶ 2 (stating that Labor Contract Law signals the Chinese government taking steps to rein in the gap between economic expansion and poor condition of workers); *id.* ¶ 3 (observing that Labor Contract Law is in line with the efforts of President Hu Jintao to promote a "harmonious society").

43. See *China's Legislature Abolishes 2600-Year-Old Agricultural Tax*, PEOPLE'S DAILY ONLINE (China), Dec. 30, 2005, ¶ 1, http://english.peopledaily.com.cn/200512/30/eng20051230_231752.html (reporting that China rescinds agricultural tax as of January 1, 2006); see also Xing Qinjiao, *Agricultural Tax To Be Scrapped From 2006*, CHINA DAILY, Mar. 6, 2005, ¶ 1, http://www.chinadaily.com.cn/english/doc/2005-03/06/content_422126.htm (reporting that China rescinded agricultural tax).

44. See Edward Cody, *China Plans To Boost Spending in Rural Areas: Goal Is to Curb Growing Unrest*, WASHINGTON POST FOREIGN SERVICE, Mar. 5, 2006, at A19, ¶ 2, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/03/04/AR2006030401483_pf.html (reporting that Premier Wen Jiabao announced "plans to increase spending in rural areas during 2006 by US\$5.3 billion, bringing total funding to US\$42.5 billion, to ease the lives of the estimated 750 million Chinese whose lives are

imum living security system for rural residents and low-income city residents.⁴⁵ As a result, many view this administration as a *qinmin* government, a government that cares for the ordinary people.⁴⁶ This reputation is partly attributable to this administration's rural-worker-friendly policies.⁴⁷

C. *Current Conditions of Migrant Workers: Problems, Causes, and Proposed Solutions*

Despite the adoption of national and local policies aimed at improving the conditions of rural workers, rural workers are still subject to a variety of forms of labor abuse. The rest of Part I discusses these problems.

1. Current Labor Conditions

Most migrant workers do not have an employment contract⁴⁸ and thus do not have the benefits of labor law protec-

connected to agriculture.”); see also Fan, *supra* note 42, ¶ 12 (quoting Kenneth G. Lieberthal, a former Clinton administration official and a professor of political science at the University of Michigan, as saying that Chinese President Hu Jintao has devoted more resources to rural China).

45. See *The State Council Decides to Accelerate the Establishment of a New-Type Rural Health Care System*, JINGHUA SHIBAO [JINGHUA TIMES] (China), posted on XINLANG WANG [SINANET], Aug. 11, 2005, ¶ 2, <http://news.sina.com.cn/c/2005-08-11/01137464461.shtml> (reporting that the State Council of China plans to expand the new rural health care system to cover more rural areas); see also *Urban-Rural Low Income Security Provides a Safety Net for the Poor*, PEOPLE'S DAILY (China), Dec. 12, 2007, ¶ 10, available at <http://www.cass.net.cn/file/20071012102999.html> (reporting that the year 2007 is the tenth anniversary of China's building an urban minimum living security system and that in 2007 China started to build a rural minimum living security system).

46. See GuanMing Wang [Brightness Net] (China), *China's Reform Under Hu-Wen System*, posted on NEWS.IFENG.COM (China), Oct. 15, 2007, ¶ 2, http://news.ifeng.com/special/16jie5nian/fxpl/200710/1015_2055_259272.shtml (asserting that China's current administration favors the poor and the disadvantaged sectors); see also Liu Xiaobo, *Bad System and "Good Prime Minister,"* http://news.bbc.co.uk/chinese/simp/hi/newsid_7260000/newsid_7262900/7262968.stm (last visited Feb. 3, 2009) (commenting on Chinese President Hu Jintao and Premier Wen Jiabao's public image of favoring the disadvantaged and the poor and asserting that that image is far from adequate to solve China's problems).

47. See *supra* notes 33-38 and accompanying text (documenting the tremendous efforts taken by the government in the past few years to promote the interests of migrant workers who constitute a significant part of China's under-class).

48. See Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC, *Inspection Report on the Implementation of the Labor Law* (presented to the nineteenth meeting of the Standing Committee of NPC on Dec. 28, 2005) § 2, ¶ 2, available at <http://www.lawbook.com.cn/fzdt/newshtml/22/20060320232745.htm> (P.R.C.) (acknowledging that fewer than twenty percent of medium and

tion.⁴⁹ They work long hours⁵⁰ with low wages,⁵¹ which are significantly less than what average urban workers earn.⁵² In addi-

small size enterprises signed labor contracts with their employees and that with respect to mini-size enterprises or rural workers the situation is worse); see also Survey Report Team of All-China Federation of Trade Unions, *Survey Report on Protection of the Rights and Interests of Migrant Workers*, in PROJECT TEAM OF THE RESEARCH OFFICE OF THE STATE COUNCIL, ZHONGGUO NONGMINGONG DIAOYAN BAOGAO [SURVEY AND RESEARCH REPORT ON CHINA'S RURAL WORKERS] *supra* note 1, at 178, 182 (stating that a 2004 survey by the Ministry of Labor and Social Security ("MOLSS") showed that only 12.5% of migrant workers had a written labor contract and many contracts were not properly executed); *Reporter's Beijing Survey: Less Than Ten Percent of Rural Workers Have Labor Contracts*, ¶ 9, http://news.xinhuanet.com/local/2007-06/05/content_6199825.htm (last visited Feb. 3, 2009) (reporting that since its opening on September 8, 2005 and up to March 15, 2007, Beijing Legal Aid for Rural Workers handled 152 work injury cases, of which only 9.2% had written labor contracts); Brown, *supra* note 38, at 50-51 (citing that most construction workers do not have formal labor contracts as the law requires).

49. See Ji Shao, *Rural Workers and the Issue of Rural Area, Agriculture and Peasants*, in ZHONGGUO NONGMINGONG WENTI YU SHEHUI BAOHU [RURAL-URBAN MIGRANT WORKERS IN CHINA: ISSUES AND SOCIAL PROTECTION] *supra* note 1, at 534, 537 (observing that lack of labor contracts, as well as invalid contracts, often renders migrant workers' rights and interests unprotected under labor laws); see also Judge Guo Wenlong, *Labor Contract Legislation should Avoid the Faults in the Legislation of the Labor Law*, 12 ZHONGGUO LAODONG [CHINA LABOR] (China) 14, 15 (2005) (criticizing that under Labor Law employers can deny the existence of a *de facto* employment relationship and refuse to pay compensation to workers if the employment contract is invalid under Labor Law); Huangli & Zheng, *supra* note 38, at 57 (recognizing signing labor contracts as a preventative measure for migrant workers to protect their rights and interest).

50. See Survey Report Team of MOLSS, *Research Report on Rural Workers' Wages and Problems of Labor Protection*, in PROJECT TEAM OF THE RESEARCH OFFICE OF THE STATE COUNCIL, ZHONGGUO NONGMINGONG DIAOYAN BAOGAO [SURVEY AND RESEARCH REPORT ON CHINA'S RURAL WORKERS] *supra* note 1, at 201, 203 (noting that a 2004 survey by National Statistics Bureau indicated that migrant workers on average worked over sixty hours a week); see also Qiao Qingmei, *Migrant Workers and Work Injury Insurance*, in ZHONGGUO NONGMINGONG WENTI YU SHEHUI BAOHU [RURAL-URBAN MIGRANT WORKERS IN CHINA: ISSUES AND SOCIAL PROTECTION] *supra* note 1, at 386, 393 (citing that in Zhujiang Delta 46% of migrant workers worked twelve to fourteen hours a day and 47% did not have a rest day).

51. See Tao Huaiying, *Suggestions on Resolving the Wage Problems of Migrant Workers*, in PROJECT TEAM OF THE RESEARCH OFFICE OF THE STATE COUNCIL, ZHONGGUO NONGMINGONG DIAOYAN BAOGAO [SURVEY AND RESEARCH REPORT ON CHINA'S RURAL WORKERS] *supra* note 1, at 213, 213-14 (stating that a 2004 survey showed that migrant workers earned 500-800 Yuan (approximately US\$62-US\$97 back then) per month); see also Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, § 2, ¶ 2 (discussing the severe problem of low wages faced by migrant workers).

52. See Tao, *supra* note 51, at 213-14 (noting that migrant workers in the provinces of Hunan, Sichuang, and Henan earned less than sixty percent of urban workers' average wages, and that as migrant workers worked a lot more hours than urban workers, the actual hourly wage of migrant workers was merely one quarter that of urban workers); see also Chen Yiner, *Migrant Workers and Employment Barriers*, in ZHONGGUO NONGMINGONG WENTI YU SHEHUI BAOHU [RURAL-URBAN MIGRANT WORKERS IN CHINA: ISSUES

tion, migrant workers' wages do not increase much when the economy develops at a fast pace.⁵³ Today many migrant workers are still subject to wage arrears⁵⁴ even after the national and local governments have made a series of efforts to solve the problem since 2004.⁵⁵ Most migrant workers do not have health insurance and pensions.⁵⁶ Many employers of migrant workers do not provide safety instruments.⁵⁷ Consequently, migrant workers constitute the vast majority of work injury victims.⁵⁸ To make it worse, most migrant workers do not have work injury insur-

AND SOCIAL PROTECTION] *supra* note 1, at 279, 281 (noting that migrant workers receive lower wages even though they do the same work as workers with urban household registration status).

53. See Brown, *supra* note 38, at 48 (observing that China's impressive economic growth in GNP for over a decade is not matched in the real wage growth of workers, which roughly keeps pace with rates of inflation); see also Survey Report Team of MOLSS, *supra* note 50, at 204 (stating that the Zhujiang Delta, which surrounds Hong Kong, Shenzhen, and Guangzhou, had an annual Gross Domestic Production growth rate of over 20% in a twelve-year period, while the average monthly wage of migrant workers in that region saw virtually no increase in the same period).

54. See Tao, *supra* note 51, at 214 (affirming that a Beijing survey shows that in 2004 each of the 700,000 migrant construction workers in Beijing was on average subject to wage arrears in the amount of over 4000 Yuan, which equaled their wages of four or five months); see also Luo Zhixian, *Migrant Workers and Right to Social Security*, in ZHONGGUO NONGMINGONG WENTI YU SHEHUI BAOHU [RURAL-URBAN MIGRANT WORKERS IN CHINA: ISSUES AND SOCIAL PROTECTION] *supra* note 1, at 315, 317 (recognizing wage arrears as a pervasive and serious problem).

55. See Xie, *supra* note 35, at 680-82 (showing that from 2003 to 2006, the State Council and the Ministries below issued thirteen Notices requiring a solution to the problem of wage arrears); see also Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, § 1, ¶ 4 (reporting that many local governments have taken measures to address the problem of wage arrears).

56. See General Report Drafting Team, *supra* note 1, at 13 (noting that a survey by MOLSS shows that only 10% of rural workers had health insurance and 15% had pension); see also Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, § 2, ¶ 4 (acknowledging that it is difficult for most migrant workers to participate in social security and pension plans).

57. See Survey Report Team of MOLSS, *supra* note 50, at 205 (mentioning that in the construction industry only 39% of employers provide labor safety instruments to migrant workers); see also Qiao, *supra* note 50, at 396 (stating that many enterprises do not observe legal requirements to provide labor safety equipments to workers).

58. See Survey Report Team of MOLSS, *supra* note 50, at 205 (stating that a survey by the Trade Union of Guangdong province shows that more than 80% of work injury victims in private enterprises are migrant workers); see also Survey Report Team of All-China Federation of Trade Unions, *supra* note 48, at 182 (pointing out that the National Safe Production Supervision General Bureau's incomplete statistics indicates that every year nearly 700,000 workers are handicapped, the vast majority of them migrant workers).

ance.⁵⁹

2. Causes of the Problems and Proposed Solutions

Multiple factors are responsible for the prevalent violation of the labor rights of migrant workers. Defects and loopholes in the Labor Law make it difficult to provide full protection.⁶⁰ Where existing laws do provide protection, non-compliance by employers, and sometimes even regional governments, remains fairly common.⁶¹ At the same time, labor regulations often provide insufficient remedies for violations of labor rights and enforcement of labor regulations is notoriously weak.⁶²

a. Remaining Discriminatory Policies and Regulations

Based on the household registration system, urban citizens continue to enjoy social benefits and public services not offered to migrant workers.⁶³ Many city governments and residents are used to, and comfortable with the lesser treatment of rural workers.⁶⁴ There is no law prohibiting employment discrimination

59. See Huangli & Zheng, *supra* note 38, at 66 (noting that a 2005 survey of four major cities shows that 29.1% of migrant workers had work injury insurance and among the four cities the figure in Beijing was 13.1%); see also General Report Drafting Team, *supra* note 1, at 13 (emphasizing that a national survey by Ministry of Agriculture revealed that only 12.9% of migrant workers had work injury insurance in 2005).

60. See JIANG ET AL., *supra* note 2, at 126-36 (discussing the many inadequacies of various labor regulations); see also Luo, *supra* note 54, at 318-19 (discussing the inadequacies of social security regulations with respect to migrant workers).

61. See Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, § 2 (summarizing the various ways in which enterprises, and sometimes local governments, fail to comply with labor regulations); see also Gu Yikang, *Thoughts on Questions Regarding Migrant Workers*, in PROJECT TEAM OF THE RESEARCH OFFICE OF THE STATE COUNCIL, *ZHONGGUO NONGMINGONG DIAOYAN BAOCAO* [SURVEY AND RESEARCH REPORT ON CHINA'S RURAL WORKERS] *supra* note 1, at 493, 500 (criticizing some local officials for downplaying the protection of the rights and interest of migrant labors).

62. See JIANG ET AL., *supra* note 2, at 126-38 (discussing the insufficiencies of China's labor inspection and arbitration regulations and the weaknesses in the enforcement of labor regulations); see also Survey Report Team of MOLSS, *supra* note 50, at 206 (acknowledging labor security regulations fail to provide special protection for powerless social groups such as migrant workers, that existing regulations do not provide sufficient compensation for wage arrears and wage reductions, and that the enforcement of labor regulations is unsatisfying).

63. See *supra* note 26 and accompanying text (indicating that city governments provide many social security benefits and public services exclusively to residents with urban household registration status).

64. See Zheng & Huangli, *supra* note 1, at 20 (asserting that discriminations and biases on the part of city governments and residents towards rural residents contribute,

based upon household registration status.⁶⁵ Even the Labor Law does not purport to include rural workers under its protection.⁶⁶ Even though the Ministry of Labor⁶⁷ in 1995 interpreted the Labor Law as applicable to migrant workers,⁶⁸ government organs and local governments were not prepared to extend equal treatment to rural workers.⁶⁹ For example, even though Article 3 of the Labor Law provides that laborers enjoy equal employment rights,⁷⁰ national governments and regional governments have

to a large degree, to the unfair treatment of migrant workers); *see also* Survey Research Team of MOLSS, *supra* note 50, at 205-06 (pointing out that some government employees and urban residents still believe that migrant workers should not enjoy equal rights as urban workers).

65. *See* JIANG ET AL., *supra* note 2, at 126 (asserting that China lacks regulations prohibiting discrimination on the ground of household registration status); *see generally* XIAN FA (1982) (P.R.C.).

Even though Article 33 of the Constitution states that “[a]ll citizens of the People’s Republic of China are equal before the law,” Article 33, along with some other articles of the Constitution, such as articles on citizens’ freedom of speech, of the press, of assembly, of association, of procession, of demonstration and of religious belief, are not fully implemented, which is another example of the gap between the law on paper and the law in practice in China. *Id.* art. 33.

66. *See* Yue, *supra* note 34, at 306 (contending that Labor Law does not explicitly define migrant workers as laborers); *see also* Wen Qinghong, *Study of The Labor Law and Protection of Rural Workers’ Rights and Interests: Comments on Relevant Provisions of Draft Labor Contract Law*, WUHAN DAXUE XUEBAO (ZHIXUE SHEHUIXUE BAN) [JOURNAL OF WUHAN UNIVERSITY (PHILOSOPHY & SOCIAL SCIENCES)] 625 (2006) (observing that Labor Law does not explicitly include migrant workers under its protection, but neither does it exclude migrant workers). *But see* Cooney, *supra* note 2, at 1054 n.20.

67. The Ministry of Labor was renamed MOLSS, and was again renamed Ministry of Human Resources and Social Security. *See* Ministry of Human Resources and Social Security, <http://www.mohrss.gov.cn/mohrss/index.html> (last visited Nov. 4, 2008).

68. *See* Opinions on Several Questions Concerning the Implementation of The Labor Law, Article 1, (issued by Ministry of Labor, Aug. 4, 1995, *available at* <http://www.cdldbz.gov.cn/PD0603020466/WD0603083197.asp> (P.R.C.) (stating that Labor Law shall apply to migrant workers).

69. *See* Zheng & Huangli, *supra* note 1, at 20 (pointing out that some government regulations, especially local policies, continue to discriminate against migrant workers); *see also* Luo, *supra* note 54, at 319-20 (asserting that China’s social security regulations were mainly aimed at workers with urban household status and there were almost no corresponding regulations covering rural residents or migrant workers).

70. Labor Law, *supra* note 30, art. 3.

Providing that:

Laborers shall have the right to be employed on an equal basis, choose occupations, obtain remuneration for their labor, take rest, have holidays and leaves, obtain protection of occupational safety and health, receive training in vocational skills, enjoy social insurance and welfare, and submit applications for settlement of labor disputes, and other rights relating to labor as stipulated by law.

Id.

since promulgated many regulations restricting the employment of rural workers.⁷¹ Even the Regulations on Unemployment Insurance promulgated by the State Council in 1999 has virtually only urban workers in mind and provides merely marginal benefits for migrant workers.⁷² Even as recently as 2006, the Ministry of Labor and Social Security (“MOLSS”) still felt the need to call upon city governments to further reduce discriminatory regulations on migrant workers.⁷³

In light of inadequate legislative protection to migrant

71. See JIANG ET AL., *supra* note 2, at 40-43 (discussing national and local measures adopted from 1993-99 aimed at restraining the migration and employment of rural workers); see also General Report Team, *supra* note 1, at 13 (noting that some cities set employment barriers against migrant workers).

72. See Shiye Baoxian Tiaoli [Regulations on Unemployment Insurance] (promulgated by State Council Order No. 258, Jan. 22, 1999, effective Jan. 22, 1999.), <http://www.henan.gov.cn/bsfw/system/2006/08/04/010000642.shtml> (P.R.C.).

The Regulations on Unemployment Insurance have mainly urban workers in mind, mentioning on-contract rural workers only twice (Article 6 and Article 21) and ignoring the vast majority of migrant workers who do not have employment contracts. *Id.* arts. 6, 21.

Article 6 provides that on-contract rural workers, unlike urban workers, not pay unemployment insurance premium. *Id.* art. 6.

However, Article 14 makes paying unemployment insurance premium a prerequisite of receiving unemployment insurance benefits, effectively excluding even on-contract rural workers from unemployment insurance coverage. *Id.* art. 14.

Article 21 requires social security agencies to pay a one-time stipend to on-contract rural workers who lose their jobs after having worked continuously for more than one year, and delegates the power to local governments to determine the method and the amount of payment of the one-time stipend in contrast to the national standards of unemployment insurance benefits for urban workers. *Id.* art. 21; see also JIANG ET AL., *supra* note 2, at 50 (commenting that, under the Regulations on Unemployment Insurance, on-contract rural workers who lose their jobs after continuous employment for more than one year can receive one-time stipends from social security agencies but are not eligible for unemployment insurance benefits provided for urban workers).

73. See Opinions on Several Questions Concerning the Implementation of the State Council’s Notice to Further Strengthen Employment and Re-employment, § 23 (promulgated by the Ministry of Labor and Social Security, Jan. 20, 2006), <http://www.sclcd.gov.cn/html/dispnews.asp?id=140> (P.R.C.) (requiring that local governments further clear various unreasonable administrative certifications, fees and discriminative regulations targeting migrant workers, and repeal restrictions on migrant workers’ trans-regional employment); see also Interview with Li Tao, Director, Xiezuozhe [Facilitators], in Beijing, China (July 31, 2007) (Li Tao stating that that migrant workers in Beijing, unlike Beijing residents, were denied unemployment insurance payment even though they had paid insurance premiums). Xiezuozhe is a Chinese Non Governmental Organization providing volunteer services for migrant populations, with headquarters in Beijing and a branch in Nanjing. Xiezhuzhe engages in labor empowerment, community anti-poverty and policy advocacy activities. Since its foundation in 2003 Xiezuozhe has provided services to more than 100,000 migrant workers. Xiezuozhe, <http://www.facilitator.ngo.cn> (last visited Oct. 27, 2008).

workers, some scholars proposed enacting a special law to provide focused and comprehensive protection to migrant workers.⁷⁴ Such legislation, they believe, is necessary to counter the continuing and widespread discrimination against, and poor treatment of, migrant workers.⁷⁵ Others opposed this proposal, believing that improved legislation can extend equal protection to rural workers, dispensing with the need of an *ad hoc* law for migrant workers.⁷⁶ Furthermore, some worry that since labor rights violations also happen to other laborers, special protection of migrant workers may create a new form of inequality.⁷⁷ At the present time, the Chinese government does not seem to be on track to making a specialized law for migrant workers.⁷⁸

b. Non-Compliance with Existing Laws and Regulations

Notwithstanding imperfections of Chinese labor legislation, there are laws and regulations that extend a fair amount of protection to rural workers but these laws and regulations are not

74. See Jiang et al., *supra* note 2, at 71, 168-70 (discussing arguments supporting special legislation, such as a Migrant Workers Rights and Interests Protection Act); See also Luo, *supra* note 54, at 321 (advocating the enactment of a Migrant Workers Social Security Act).

75. See JIANG ET AL., *supra* note 2, at 71 (citing the argument that the Migrant Workers Rights and Interests Protection Act is needed to legally establish migrant workers' political status, their status as industrial workers and their rights to equal treatment in all respects, and citing the suggestion that the government enhance the legislative authority of laws on migrant workers and ascertain migrant workers' status under law); see also Luo, *supra* note 54, at 321 (asserting the need to strengthen the legislation of social security laws for migrant workers in order to resolve the problem that existing social security laws on migrant workers leave some issues blank and are low in their legislative authority).

76. See generally Liu Wujun, *Protection of the Rights and Interests of Rural Workers Hinges on the Implementation of the Labor Law*, JIANCHA RIBAO [PROCURATORIAL DAILY], Jan. 4, 2004, <http://www.cnsslw.com/list.asp?unid=2602> (last visited Oct. 13, 2008) (arguing that strict enforcement of Labor Law would provide sufficient protection for migrant workers and a special law for migrant workers is a waste of legislative resources); see also JIANG ET AL., *supra* note 2, at 71, 169-72 (citing a variety of arguments why an *ad hoc* law for migrant workers is unnecessary and impractical and arguing that modifying existing laws and strengthening enforcement suffice to protect migrant workers).

77. See Interview with Li Tao, *supra* note 73 (Li Tao raising this concern to the author); see also JIANG ET AL., *supra* note 2, at 172 (expressing the same concern).

78. See Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, § 3, ¶ 7. The Law Committee of the Standing Committee of NPC recommended enacting certain laws to protect the rights and interests of laborers, which do not include a specialized law for migrant workers; see, e.g., Luo, *supra* note 54, at 321 (acknowledging that the time may not be right to enact a Migrant Workers Social Security Act).

complied with.⁷⁹ For example, since Article 16 of the Labor Law mandates a labor contract at the formation of the employment relationship,⁸⁰ in theory, there should be no lack of employment contracts. In addition, Article 36 of the Labor Law limits the average weekly work week to forty-four hours,⁸¹ Article 44 provides for overtime compensation,⁸² and Article 50 prohibits wage arrears and nonpayment.⁸³

Chapter VI of the Labor Law, as well as the Safe Production Law (P.R.C.), address work safety issues.⁸⁴ Compliance with these laws should, in theory, have eradicated many unsafe work conditions. Article 72 of the Labor Law requires employers to pay their share of social security premiums for the benefit of employees.⁸⁵ Article 73 specifies that social security covers pension, healthcare, work injury or occupational illness compensation, unemployment compensation, and reproduction benefits.⁸⁶

79. *See infra* notes 80-87 and accompanying text (discussing China's labor regulations that would have provided a fair amount of protection for migrant workers).

80. Labor Law, *supra* note 30, art. 16 (requiring that "[a] labor contract shall be concluded where a labor relationship is to be established.").

81. *Id.* art. 36 (commanding that "[t]he State shall practice a working hour system under which laborers shall work for no more than eight hours a day and no more than forty-four hours a week on the average.").

82. *Id.* art. 44.

Providing that:

The employing unit shall, according to the following standards, pay laborers remunerations higher than those for normal working hours under any of the following circumstances: (1) to pay no less than 150% of the normal wages if the extension of working hours is arranged; (2) to pay no less than 200% of the normal wages if the extended hours are arranged on days of rest and no deferred rest can be taken; and (3) to pay no less than 300% of the normal wages if the extended hours are arranged on statutory holidays.

Id.

83. *Id.* art. 50 (providing that "[w]ages shall be paid monthly to laborers themselves in cash. The wages paid to laborers shall not be deducted or delayed without justification.").

84. *Id.* ch. VI (entitled "Occupational Safety and Health"); *see also* Safe Production Law (enacted by NPC, June 29, 2002, effective Nov. 1, 2002), http://news.xinhuanet.com/legal/2003-01/22/content_701861.htm (last visited Oct. 13, 2008) (P.R.C.) (Section 2 regulates the conduct of production units, Section 3 provides for rights and obligations of employees in production units, Section 4 provides for supervision and inspection of safe production by government bodies, Section 5 deals with emergency rescue and accident investigation, and Section 6 imposes legal liabilities on various parties, including government employees and officials).

85. Labor Law, *supra* note 30, art. 72 (requiring that "[t]he employing unit and laborers must participate in social insurance and pay social insurance premiums in accordance with the law.").

86. *Id.* art. 73 (stating that "[l]aborers shall, in accordance with the law, enjoy so-

Furthermore, the Regulations on Work Injury Insurance, promulgated by the State Council in 2003, mandate that employers pay work injury insurance premiums for all employees including rural workers.⁸⁷

Commentators believe that had these laws and regulations been complied with, almost all the problems affecting migrant workers would have been solved.⁸⁸ However, it is no secret that China needs to not only make new laws to fill in gaps in legislation but also to deal with the problem of widespread noncompliance with existing laws.⁸⁹

c. Poor Labor Supervision and Enforcement

Non-compliance with existing laws and regulations on labor are coupled with a lack of supervision and enforcement on the part of the State.⁹⁰ Though the State Council passed the Regulations on Labor Security Inspection in 2004,⁹¹ this regulation is

cial insurance benefits under the following circumstances: (1) retirement; (2) illness or injury; (3) disability caused by work-related injury or occupational disease; (4) unemployment; and (5) child-bearing.”).

87. Regulations on Work Injury Insurance (promulgated by the State Council, Apr. 16, 2003, effective Jan. 1, 2004), http://www.chinacourt.org/flwk/show1.php?file_id=84996 (last visited Oct. 13, 2008) (P.R.C.) (Article 61 stresses that this Regulation covers all laborers regardless of the form and term of the employment, including laborers in a *de facto* labor relationship with an employer).

88. See Liu, *supra* note 76, ¶ 4 (arguing that strict enforcement of the Labor Law would provide sufficient protection for migrant workers and a special law for migrant workers is a waste of legislative resources); see also JIANG ET AL., *supra* note 2, at 71, 169-72 (citing a variety of arguments that strengthening enforcement of existing laws suffices to protect migrant workers).

89. See *The Development of Contemporary Chinese Legislation*, CHINA.ORG, Sept. 28, 2003, Sec. A. New Turning Point, ¶ 15, <http://www.china.org.cn/english/kuaixun/76336.htm> (last visited Oct. 28, 2008) (describing the stages in the development of China's contemporary legislation and stating that in the twenty-year period prior to 2003 China enacted about 400 laws); See also Cooney, *supra* note 2, at 1052 (noting that deficient implementation of, and compliance with, labor law (and law in general) is universal in China); GREGORY C. CHOW, CHINA'S ECONOMIC TRANSFORMATION 188 (2007) (stating that many laws in China are poorly enforced and that the main reasons are a lack of a modern legal enforcement system, the lax attitude of the Chinese people towards such laws, and the economic costs of obeying them).

90. See Cooney, *supra* note 2, at 1060-76 (examining the shortcomings of the institutions charged with securing compliance with labor regulations); see also Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, § 2, ¶ 6 (acknowledging weakness in the supervision and enforcement of Labor Law as a serious problem).

91. See Regulations on Labor Security Inspection (promulgated by the State Council, Oct. 26, 2004, effective Dec. 1, 2004), http://www.chinacourt.org/flwk/show1.php?file_id=97457 (last visited Apr. 8, 2008) (P.R.C.).

poorly implemented, partly because labor supervision bureaus are not adequately funded and staffed.⁹² For example, there were 17,000 labor supervision agents in China in 2006 with each of them having, on average, a workload of overseeing 1600 enterprises for the protection of the labor rights of 17,000 workers.⁹³ In another example, the Baoan District of Shenzhen, which had over 22,500 enterprises and three million migrant workers and should have over 300 labor security supervisors per the Regulations on Labor Security Inspection, had merely fifteen labor supervisors.⁹⁴

Another problem is that regional governments play a critical role in the implementation and enforcement of labor standards in that labor supervision bureaus rely on local governments for personnel and funding.⁹⁵ Some regional governments deliberately ignore labor right violations to lure investors.⁹⁶ Some regional governments even intervened with labor supervision in an effort to create an investment-friendly environment.⁹⁷

92. See Cooney, *supra* note 2, at 1066 (noting that the quantity of labor inspectors may well be inadequate to implement the law systematically across the country); See also Survey Report Team of MOLSS, *supra* note 50, at 206-07 (acknowledging that across China, labor supervision and inspection agencies at municipality levels are short of staff and funds).

93. See General Report Drafting Team, *supra* note 1, at 16.

94. See *id.*

95. See Cooney, *supra* note 2, at 1066 (noting that local governments provide staff and funding to local labor departments); see also Survey Report Team of MOLSS, *supra* note 50, at 206-07 (acknowledging that the local labor supervision and inspection forces are limited by the institutional organization of municipalities).

96. See *China's Legislature Approves New Labor Law*, *supra* note 6, ¶ 11 (quoting the Deputy Chairwoman of the Law Committee of the Legislature's Standing Committee that local governments have great tolerance for foreign investors in order to attract and retain investment, and that officials are hesitant to say no to investors even if investors violate the Labor Law); see also Lao Li, *New Labor Contract Law Provides Challenge in China*, CHINA DAILY, July 23, 2007, ¶ 6, http://www.chinadaily.com.cn/bizchina/2007-07/23/content_6001380.htm (stating that some regional governments openly abandoned law enforcement and trampled on workers' rights to lure investors); Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, § 2, ¶ 7 (acknowledging that some local governments sacrifice the rights and interests of laborers to attract business and investment).

97. See JIANG ET AL., *supra* note 2, at 159 (noting that a few local governments in Guangdong province denied Labor Supervision Bureaus entry into to enterprises absent approval from Investment Inducement Bureaus); see also Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, § 2, ¶ 7 (reporting that some regional governments set barriers to the enforcement of labor security laws, proscribing labor enforcement in key local enterprises and subjecting the imposition of administrative labor violation penalties to the sanction of economic bureaus).

What is more, labor supervision personnel often do not respond to labor abuse reports and claims promptly and adequately.⁹⁸

d. Inadequate Legal Remedy

Remedies under the Labor Law often prove inefficient and insufficient. Article 79 of the Labor Law provides that an employee may first seek labor dispute resolution through the Labor Dispute Mediation Committee in the employer's enterprise.⁹⁹ However, most enterprises do not have a Labor Dispute Mediation Committee because its establishment is not mandatory under the Labor Law.¹⁰⁰ Article 83 effectively requires that a laborer seek arbitration before seeking a judicial remedy,¹⁰¹ while Article 82 sets a statute of limitations for applying for arbitration of merely sixty days after the cause of action arises.¹⁰² People criticize the sixty-day statute of limitations as being too harsh on

98. See JIANG ET AL., *supra* note 2, at 117 (stating that some regional labor supervision and inspection agencies tolerate labor violations and do not take laborers' complaints seriously); Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, § 2, ¶¶ 6-7 (reporting that some labor supervision and inspection agencies fail to timely address labor disputes and some law enforcement personnel show indifference to laborers).

99. Labor Law, *supra* note 30, art. 79 (stating that "[w]here a labor dispute takes place, the parties involved may apply to the labor dispute mediation committee of their unit for mediation."). With respect to the labor dispute mediation committee, Article 80 provides that "[t]he committee shall be composed of representatives of the staff and workers, representatives of the employing unit, and representatives of the trade union. The chairman of the committee shall be held by a representative of the trade union. Agreements reached on labor disputes through mediation shall be implemented by the parties involved." *Id.* art. 80.

100. Labor Law Article 80 merely states that "[a] labor dispute mediation committee may be established inside the employing unit." *Id.* Therefore, the establishment of a labor dispute mediation committee within an enterprise is not required. *Id.*

101. Labor Law Article 83 states that "[w]here a party involved in a labor dispute is not satisfied with the adjudication, the party may bring a lawsuit to a people's court within fifteen days from the date of receiving the ruling of arbitration." *Id.* art. 83; see also JIANG ET AL., *supra* note 2, at 146 (commenting that in China parties to a labor dispute must first apply for arbitration and can litigate their dispute only if not satisfied with the arbitration decision); Jill E. Monnin, *Extending the Reach of the Chinese Labor Law: How Does the Supreme People's Court's 2006 Interpretation Transform Labor Dispute Resolution?*, 16 PAC. RIM L. & POL'Y J. 753, 757 (2007) (explaining that according to Article [83] of the Labor Law, a dispute can only come before the People's Courts if one of the parties does not accept the arbitral award, rendering arbitration a prerequisite to litigation).

102. Labor Law, *supra* note 30, art. 82 (stating that "[t]he party that requests for arbitration shall file a written application to a labor dispute arbitration committee within sixty days starting from the date of the occurrence of a labor dispute.").

workers.¹⁰³

According to Article 83, both the employee and the employer are entitled to appeal an arbitral award to local courts (and higher courts as well).¹⁰⁴ As a consequence, it would normally take more than one year for a labor claimant to go through all the procedures to obtain a final award.¹⁰⁵ Given the financial hardships experienced by most migrant workers, especially in wage arrear and work injury cases, it is hard for them to sustain themselves economically during the long waiting period.¹⁰⁶ In response, some scholars have proposed that labor dispute arbitration be optional instead of mandatory.¹⁰⁷

In this regard, China enacted the Law on Mediation and Arbitration of Labor Disputes on December 29, 2007, effective on May 1, 2008.¹⁰⁸ This law addresses, *inter alia*, the problems

103. See Survey and Research Team of Ministry of Law, in PROJECT TEAM OF THE RESEARCH OFFICE OF THE STATE COUNCIL, *ZHONGGUO NONGMINGONG DIAOYAN BAOGAO* [SURVEY AND RESEARCH REPORT ON CHINA'S RURAL WORKERS] *supra* note 1, at 190, 195, 198 (advocating extending the sixty-day period to six months because the sixty-day period is too short and many migrant workers do not understand its critical significance while some employing units beat this statutory period by pretending to engage in a negotiated solution with the laborer); see also DONG LIHUA, SHI FUMAO & WANG FANG, EDs., *SHUI DONGLE TAMEN DE QUANLI?—ZHONGGUO NONGMINGONG WEIQUAN ANLI JINGXI* [WHO INFRINGED THEIR RIGHTS?—CLOSE ANALYSIS OF RIGHT VINDICATING CASES OF CHINA'S MIGRANT WORKERS] 44 (2006) (pointing out that in reality migrant workers often cannot meet the sixty-day statute of limitations and as a result their arbitration claims are dismissed by the Labor Dispute Arbitration Committee).

104. Labor Law, *supra* note 30, art. 83 (providing that “[w]here a party involved in a labor dispute is not satisfied with the adjudication, the party may bring a lawsuit to a people’s court within fifteen days from the date of receiving the ruling of arbitration.”); see also Monnin, *supra* note 101, at 758 (noting that appeals from an arbitral award can be made to a civil court within fifteen days after the award is received).

105. See Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, § 2, ¶ 6 (reporting that it would take at least one year to complete the arbitration and litigation procedures); see also JIANG ET AL., *supra* note 2, at 209 (citing that the resolution of a labor dispute normally takes more than one year to go through one arbitration and two judicial trials).

106. See Survey and Research Team of Ministry of Law, *supra* note 103, at 195 (commenting that the extended arbitration and litigation period works a great disadvantage to migrant workers); see also JIANG ET AL., *supra* note 2, at 209-10 (stating that the extended arbitration and litigation period places a huge economic burden upon grievant migrant workers).

107. See Survey and Research Team of Ministry of Law, *supra* note 103, at 198 (advocating amending the Labor Law to allow parties to a labor dispute to go straight into litigation); see also JIANG ET AL., *supra* note 2, at 210 (contending for repeal of the requirement of mandatory arbitration of a labor dispute).

108. See *Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa* [Law on Mediation and Arbitration of Labor Disputes of the People’s Republic of

discussed here in an effort to provide aggrieved laborers with expedient and adequate legal remedies.¹⁰⁹

II. THE LABOR CONTRACT LAW

China's enactment of its first Labor Contract Law in June 2007 is a major move toward regulating labor relations and protecting workers.¹¹⁰ People view the Labor Law as providing only

China], (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008), http://www.lexiscn.com/specialTopic/laborContractLaw/detail.php?se=glaw&id=229935&provider_id=1&isEnglish=Y (last visited Oct. 18, 2008) (P.R.C.); see also Xinhua News, *Official Underlines Breakthroughs in New Disputes Arbitration Law*, Jan. 2, 2008, ¶ 2, posted on China Radio International, <http://english.cri.cn/2946/2008/01/02/198@310054.htm> (reporting that the Law on Mediation and Arbitration of Labor Disputes aims at "fair and timely" settlement of labor disputes and lowers costs for workers Seeking to safeguard their rights).

109. See generally Feng Jianhua, *Workforce Watches Labor Law*, Sept. 26, 2007, BEIJING REVIEW, http://www.bjreview.com.cn/quotes/txt/2007-09/26/content_77750.htm (discussing the legislative background of China's new labor dispute mediation and arbitration law, commenting on some of the labor issues discussed in this Comment and estimating that the law could lead to better protection of worker's interests); see also Jonathan Salvadoray, *China: New Chinese Labour Arbitration Law*, <http://www.mondaq.com/article.asp?articleid=60530> (last visited Feb. 3, 2009) (summarizing the law in eight sections: "Pre-Requisite Arbitration And Voluntary Mediation," "Conditionally Final And Binding Arbitral Awards," "Extended Scope Of Arbitrable Matters," "Extended Arbitration Application Period," "Clearer Jurisdiction Of Labour Arbitration Committee," "Shorter Hearing And Award-Making Period," "Heavier Burden Of Proof On Employers," and "No Charge Of Arbitration Fees," and concluding that the new labor dispute mediation and arbitration law represents a shift towards the protection of employees); Law on Mediation and Arbitration of Labor Disputes, *supra* note 108.

Article 27 of the Law on Mediation and Arbitration of Labor Disputes extends the statute of limitations for workers to apply for labor arbitration from sixty days to one year. *Id.* art. 27.

Article 43 requires the arbitral tribunal to make an award, if any, within forty-five days and if no arbitral award is made after the time limit, the parties may initiate litigation in relation to the labor dispute to the people's court. *Id.* art. 43.

Article 43 also provides that "[w]here the arbitral tribunal makes an award to a labor dispute case and partial facts are clear, an award may be made on such parts." *Id.*

Article 44 provides that in respect of cases for the claim of labor remunerations, work injury medical expenses, economic compensation, or damages, the arbitral tribunal may make an award on advance execution and transfer to the people's court for execution if: (1) there is a clear relation of rights and obligations between the parties and (2) there is no advance execution, the living of the applicant will be seriously affected. Furthermore, where a laborer applies for advance execution, no security may be required. *Id.* art. 44.

Article 47 makes arbitral awards final in certain disputes over labor remunerations, work-related injury medical expenses, economic compensation or damages, thus sparing workers the long waiting period in obtaining a final order. *Id.* art. 47.

Article 53 waives arbitration fees, in light of laborers' limited means. *Id.* art. 53.

110. See *China's Legislature Approves New Labor Law*, *supra* note 6, ¶¶ 1-2 (reporting

basic labor principles and lacking operable specifications.¹¹¹ Scholars view the Labor Contract Law as necessary to give full effect to the Labor Law's general provisions.¹¹² For the same reason, scholars also called for the enactment of other labor-related laws, such as the Employment Promotion Law, the Safe Production Law, the Wage Law, the Social Security Law, and the Labor Supervision and Inspection Law.¹¹³

A. *Legislative Background*

The Labor Law, enacted in 1994, has proven inadequate to deal with problems arising out of the ever-more complicated labor practices in China's fast-changing society.¹¹⁴ The Labor Contract Law purports to draw upon China's twenty-year-plus experience with labor contract practices and sets out to respond to some of the manifest deficiencies of the Labor Law.¹¹⁵ The

that the labor contract law represents the biggest change in Chinese labor law in more than a decade and is meant to improve workers' rights); *see also* Xinhua News Agency, *China Issues Regulation to Clear Labor Contract Law Misunderstanding*, BEIJINGREVIEW.CN.COM, Sept. 19, 2008, ¶ 2, available at http://www.bjreview.com.cn/headline/txt/2008-09/19/content_152939.htm (stating that Labor Contract Law was hailed as a landmark step in protecting employee's rights); Morris, *supra* note 8, ¶ 7 (reporting that experts within China and labor groups abroad call Labor Contract Law the most significant labor law since China was first introduced to market forces in the 1980s).

111. *See* Guan Huai, *Labor Contract Law and Protection of Laborer's Legal Rights and Interests*, 5 LAW SCIENCE MAGAZINE 6 (2006) (stating that Labor Law, as a general law, cannot provide detailed regulations and needs to be supplemented by more operable labor laws and citing Ministry of Labor's Opinion on the Implementation of Labor Law that the fundamental principles of Labor Law need to be carried out by supplementary labor laws and regulations).

112. *See id.* (recognizing Labor Contract Law as a key component of China's to-be-built labor law system); *see also* Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, § 3, subsec. 7 (calling for the enactment of Labor Contract Law).

113. *See* Guan, *supra* note 111, at 6 (citing Ministry of Labor's Opinion that supplementary labor laws are needed to complete the labor law system); *see also* Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, § 3, subsec. 7 (recommending the enactment of supplementary labor laws).

114. *See* Brown, *supra* note 38, at 47-48 (noting that to understand the nuances of current labor relations in China, one must put it into the context of China's fast-moving economic conditions); *see also* Guan, *supra* note 111, at 7 (affirming that since the enactment of Labor Law in 1994, labor relations in China have undergone enormous changes and become diverse and complex, resulting in the Labor Law falling behind social reality).

115. *See* Li Jianfei, *Legislative Background and Innovations of Labor Contract Law*, 4 ZHONGGUO SHEHUI KEXUEYUAN YANJIUSHENG YUAN XUEBAO [JOURNAL OF GRADUATE

drafting and enactment of the Labor Contract Law received unprecedented public participation.¹¹⁶ After the Standing Committee of the National People's Congress ("NPC") announced that it was seeking public comments on the Second Draft Labor Contract Law, it received more than 190,000 comments within a month, sixty percent of which came from common workers.¹¹⁷

The first thing notable about the Labor Contract Law is that it openly and unmistakably emphasizes the protection of the rights of laborers.¹¹⁸ Article 1 states that the legislative purpose of this law is to improve the labor contract system, define and clarify the rights and obligations of parties to a labor contract, protect the legitimate rights and interests of laborers, and build and develop stable and harmonious labor relations.¹¹⁹ At the draft stage, there was a heated debate over what was called "Single Protection" and "Dual Protection."¹²⁰ Supporters of "Dual

SCHOOL OF CHINESE ACADEMY OF SOCIAL SCIENCES] 72, 73 (2006), available at http://www.fatianxia.com/paper_list.asp?id=26178 (indicating that Labor Contract Law is to address new forms of labor relationship and improve upon Labor Law); see also Guan, *supra* note 111, at 8 (explaining that Labor Contract Law targets a series of problems arising out of the implementation of Labor Law with respect to labor contracts).

116. See Yixiu, *Draft Labour Contract Law Favors Employees' Rights*, CHINA RADIO INTERNATIONAL, ¶ 5, <http://english.cri.cn/3178/2006/12/27/191@178076.htm> (last visited Feb. 3, 2009) (reporting that draft Labor Contract Law received more than 190,000 comments from the general public); see also *China's Legislature Approves New Labor Law*, *supra* note 6, ¶ 6 (reporting that draft Labor Law got more than 190,000 responses from the public and companies).

117. See Yixiu, *supra* note 116, ¶ 5 (stating that 60% of the more than 190,000 comments come from common employees).

118. See Lao, *supra* note 96 (stating that the main characteristic of Labor Contract Law is that it puts special emphasis on protecting workers' legitimate rights and interests); see also Labor Contract Law, *supra* note 6, art. 1 (stating that "[t]his Law has been formulated in order to improve the employment contract system, to specify the rights and obligations of the parties to employment contracts, to protect the lawful rights and interests of workers and to build and develop harmonious and stable employment relationships.").

119. Labor Contract Law, *supra* note 6, art. 1.

120. See generally Institute of Economics of Chinese Academy of Social Sciences, *Viewpoint Debates Engendered By The New Law*, JINGJI ZOUSHI GENZONG [THE PURSUIT OF ECONOMIC TRENDS] (2007), <http://ie.cass.cn/window/jjzs.asp?id=510> (last visited Feb. 3, 2009) (reporting on the debates over "Single Protection" and "Dual Protection" and indicating that "Single Protection" means focusing on the protection of laborers while "Dual Protection" means protecting employees and employers equally); see also Wang Quanxing, *Several Fundamental Questions That Need Clarification in the Labor Contract Law Legislation Debate*, 9 FA XUE [LAW SCIENCE] (China) 19, 19-20 (2006) (arguing for "Single Protection" while pointing out that "Single Protection" does not mean not to protect the interests of employers at all, that "Single Protection" only means stressing or leaning towards the protection of laborers); Zhang Weijie, *Labor Contract Law's Emphasis on*

Protection” argued that the Labor Contract Law should not partially protect laborers’ rights, but should provide equal protection to the rights and interests of employers as well.¹²¹ On the other hand, supporters of “Single Protection” contended that China’s enormous laborer surplus places workers in a *de facto* inferior bargaining position in relation to employers, which is the underlying cause of widespread labor abuses.¹²² Factual inequality between labor and capital, they argue, justifies an uneven or “single protection” of laborers.¹²³ Article 1 of the Labor Contract Law reflects this view.¹²⁴

It is worth noting that the American Chamber of Commerce in China, the American Chamber of Commerce in Shanghai,

the Protection of Laborers is to Correct Inequality, GONGREN RIBAO [WORKERS DAILY] (China), posted on People.com.cn, May 21, 2007, ¶¶ 2, 4, 10-11 <http://acftu.people.com.cn/GB/67588/5755004.html> (citing law professor Lin Jia’s discussion of “Single Protection” and “Dual Protection”). The debate over “Single Protection” and “Dual Protection” is related to the question of whether the Labor Contract Law should be treated as a labor law or contract law. If deemed a contract law, the Labor Contract Law shall provide equal protections to parties to a labor contract. On the other hand, if viewed as a labor law, the Labor Contract Law shall serve a public policy of protecting the weak party, namely the employees. *Id.*

121. See Institute of Economics of Chinese Academy of Social Sciences, *supra* note 120 (citing arguments against “Single Protection” that over-protections of workers may render employers vulnerable to powerful employees such as senior managers and technicians and that favoring laborers may cause China lose its competitive advantage of low labor costs); Judge Guo, *supra* note 49, at 15 (contending that some enterprises need protection against senior managers and that Labor Law and Labor Contract Law should exclude senior managers from labor protection); Wang, *supra* note 120, at 20-22 (citing arguments against “Single Protection”).

122. See Guan, *supra* note 111, at 7 (stating that due to a huge labor surplus and the resulting difficulty of finding employment, laborers in reality are not equals to employers, as indicated by frequent infringements of labor rights); see also Monnin, *supra* note 101, at 756 (observing that millions of migrant workers inundated coastal regions and cities, thereby creating a “buyer’s market for labor” and giving employers an opportunity to take advantage of abundant work forces); Wang, *supra* note 120, at 22 (asserting that in China the fact that capital is powerful and laborers are weak will last for a long period of time).

123. See Chang Kai, *On Several Fundamental Issues In Labor Contract Law Legislation*, 6 DANGDAI FAXUE [CONTEMPORARY LAW SCIENCE] (China) 31, 31-34 (contending that, on the ground of public policy and the inequality between employers and employees, Labor Contract Law should follow the principles of labor law to stress protection of laborers, rather than following the principles of contract law to provide even protection to parties to a contract); see also Guan, *supra* note 111, at 7 (explaining “Single Protection”); Wang, *supra* note 120, at 19-22 (defending “Single Protection”); Zhang, *supra* note 120, ¶¶ 7-12 (citing justifications for Labor Contract Law’s emphasis on the protection of employees).

124. See *supra* notes 118-19 and accompanying text. Article 1 of Labor Contract Law stresses the protection of workers.

and the European Union Chamber of Commerce in China also submitted comments on the Second Draft Labor Contract Law to the Standing Committee of the National People's Congress ("NPC") upon invitation.¹²⁵ These foreign bodies opposed certain provisions in the draft law as too "harsh" on employers, cautioning that those provisions would make it hard for foreign businesses to do business in China, and may lead to the negative effect of diverting foreign investment to other developing countries.¹²⁶ As a result, some labor rights groups in the West blamed multinational corporations for lobbying to block China's effort to improve labor standards.¹²⁷ Major U.S. trade unions also visited China to show their support of the draft Labor Contract Law.¹²⁸ Nevertheless, the Standing Committee of the NPC did

125. See American Chamber of Commerce in China and American Chamber of Commerce in Shanghai, Comments on the Second Deliberated Draft Labor Contract Law of the PRC, http://laborstrategies.blogs.com/global_labor_strategies/files/2nd_round_amcham_comments.pdf (last visited Oct. 21, 2008) (presenting comments and suggestions on many provisions of the second draft Labor Contract Law); see also Guan Xiaofeng & Andrew London, *Labor Law: 'No Giving in to Corporate Pressure,'* CHINA DAILY, June 12, 2007, ¶ 13 http://www.chinadaily.com.cn/china/2007-06/12/content_891903.htm (reporting that both the European Union Chamber of Commerce in China and the American Chamber of Commerce in Shanghai made submissions to the National People's Congress, China's legislature, on the proposed Labor Contract Law).

126. See Guan & London, *supra* note 125, ¶ 16 (reporting that in a letter to the NPC last year, Serge Janssens de Varebeke—then-president of the European Union Chamber of Commerce—warned the "strict" regulations could force foreign companies to "reconsider new investments or continuing their activities in China" because of a possible increase in production costs); see also *China's Legislature Approves New Labor Law*, *supra* note 6, ¶ 7 (reporting that foreign business groups expressed alarm at some portions of the draft Labor Contract Law, arguing that overly restrictive rules could raise costs and hurt business); Associated Press, *China Due To Enact New Labor Law After Heated Debate*, INT'L HERALD TRIB., June 27, 2007, ¶ 12, <http://www.iht.com/articles/ap/2007/06/27/business/AS-FEA-FIN-China-Labor-Clash.php> (reporting that foreign business groups expressed alarm at proposed restrictions on firing workers, limits on use of temporary workers, and a provision giving the All-China Federation of Trade Unions—the umbrella group for unions permitted by the communist government—a voice in staffing decisions); *id.* ¶ 13 (reporting that the U.S.—China Business Council warned that restrictions on temporary employees would be "prohibitively expensive").

127. See Foreign Policy In Focus, *Labor Rights in China*, <http://www.fpif.org/fpifxt/3824> (last visited Apr. 7, 2008) (telling a background story of the criticisms on multinational corporations for opposing provisions in China's draft Labor Contract Law); see also *China's Legislature Approves New Labor Law*, *supra* note 6 (reporting that labor activists criticized foreign business groups that expressed concern about earlier versions of the law, accusing them of trying to get Beijing to reduce protections for workers).

128. See China Labor News Translations, *Mainland Coverage of A Recent Union Visit to China: "Harmony", "Dialogue" and "Cooperation,"* <http://www.ihlo.org/LRC/ACFTU/250907.html> (last visited Apr. 7, 2008) (reporting on the May 2007 visit to

take into consideration some of the comments of multinational corporations and loosened the draft Labor Contract Law's restrictions on employers' power to lay off workers and set workplace rules.¹²⁹

B. *Labor Contract Law Responds to Insufficiencies in the Labor Law and Labor Abuses*

The Labor Contract Law addresses issues left open by the Labor Law and deals with well-known abusive labor practices.¹³⁰ Notably, the Labor Contract Law addresses problems such as the non-use of labor contracts, short contract terms, probation periods, wage arrears and nonpayment of wages, compensation upon contract termination, and labor dispatch.¹³¹

1. Employers' Obligation to Sign Labor Contracts

Article 16 of the Labor Law provides that the formation of an employment relationship requires a written labor contract.¹³² Even so, many employers do not sign written labor contracts with their employees.¹³³ Absent a written labor contract, when labor

China of a high level delegation from Change to Win (including Teamsters, UNITE HERE, UFW, and SEIU)); *see also* Mitchell Landsberg, *LABOR—L.A. Delegation Seeks Brotherhood In China*, L.A. TIMES, July 4, 2007, at c-1, ¶¶ 4-12, available at <http://articles.latimes.com/2007/jul/04/business/fi-chilabor4> (reporting on U.S. unions' recent and planned visits to China).

129. *See China's Legislature Approves New Labor Law*, *supra* note 6 (noting that, after foreign business groups expressed alarm at a provision requiring approval from China's state-sanctioned unions for layoffs, arguing that overly restrictive rules could raise costs and hurt business, the legislature on the approved law made no mention of requiring union approval for layoffs); *see also* *China Due To Enact New Labor Law After Heated Debate*, *supra* note 126, ¶ 16 (reporting that comments from foreign business groups appear to have prompted Beijing to remove the most contentious provisions in the draft Labor Contract Law and the third draft of the law no longer requires approval from the official labor body to fire workers).

130. *See China's Legislature Approves New Labor Law*, *supra* note 6, ¶ 1 (reporting that the newly enacted Labor Contract Law is meant to improve workers' rights amid complaints about unpaid wages and other abuses); *see also supra* note 115 and accompanying text (pointing out that Labor Contract Law deals with labor problems that Labor Law fails to address).

131. This Comment will discuss Labor Contract Law's initiatives in handling these problems *infra*.

132. Labor Law, *supra* note 30, art. 16 (providing that "[a] labor contract is the agreement reached between a laborer and an employing unit for the establishment of the labor relationship and the definition of the rights, interests and obligations of each party. A labor contract shall be concluded where a labor relationship is to be established.").

133. *See supra* note 48 and accompanying text (acknowledging that many employ-

disputes arise it is often difficult for the worker to prove an employment relationship with the employer.¹³⁴ Failure to prove a factual employment relationship in turn deprives the worker of labor law remedies.¹³⁵ The last paragraph of Article 14 of the Labor Contract Law attempts to close this loophole by stating that if the employer does not sign a written labor contract within one year after employment begins, the employer is deemed to have signed an open-ended labor contract with the employee.¹³⁶

Multiple considerations lead employers to evade written labor contracts. In absence of a written labor contract, the employer is able to impose harsh conditions on the worker after employment starts and can terminate employment at any time for whatever reason without any legal consequences.¹³⁷ In addition, since the Labor Law requires employers to pay social security premiums for their employees, in an effort to lower costs, some employers try to hide or lower the number of employees on record by not making written labor contracts as labor contracts may reveal the number of employees.¹³⁸ At the same time, the Labor Law fails to provide sufficient deterrence to employers

ers do not sign an employment contract with migrant workers); *see also* Morris, *supra* note 8, ¶ 9 (stating that companies are notorious for not providing written contracts).

134. *See* Survey and Research Team of Ministry of Law, *supra* note 103, at 195-96 (recognizing that migrant workers are often unable to produce evidence of factual employment relationship with the employer and that co-workers are afraid to testify for the grieved migrant worker for fear of the employer's retaliation); *see also supra* note 49 and accompanying text (observing that that lack of labor contracts, as well as invalid contracts, result in migrant workers' rights and interests being unprotected under labor laws).

135. *See* Survey and Research Team of Ministry of Law, *supra* note 103, at 195-96 (pointing out that migrant workers' lack of an employment contract and inability to prove a factual employment relationship with the employer often bars legal remedies).

136. Labor Contract Law, *supra* note 6, art. 14 (providing, in the last paragraph, that "[i]f an Employer fails to conclude a written employment contract with a worker within one year from the date on which it starts using the worker, the Employer and the worker shall be deemed to have concluded an open-ended employment contract.").

137. *See* China Legal Information Resource Net, Light Analysis Of The Legal Issues In The Protection Of Migrant Workers' Labor Rights And Interests, § 1, subsec. 2(2)(5), <http://www.mzfx.gov.cn/fzjy/57/135/2007071322532.html> (last visited Feb. 3, 2009) (noting that without being bound by an employment contract, some employing units subject workers to all kinds of unreasonable treatments).

138. *See* Administrative Law Office of the Law Committee of the Standing Committee of NPC (P.R.C.), Implementation of Labor Contract System and Problems that Need Be Solved by Labor Contract Law, § 2, subsec. 1, http://www.npc.gov.cn/npc/zt/2006-03/20/content_347912.htm (last visited Feb. 3, 2009) (P.R.C.) (pointing out that some employing units, to reduce the cost of employment, choose not to execute employment contracts so as to evade the legal obligation of paying social insurance pre-

who do not make labor contracts.¹³⁹ Article 98 states merely that labor administration bureaus shall order a noncompliant employer to make up labor contracts, but fails to provide any penalty if the employer ignores the administrative order.¹⁴⁰ Nor does the Labor Law impose any punitive damages on employers who wantonly refuse to sign employment contracts.¹⁴¹

In response, Article 82 of the Labor Contract Law imposes upon employers, as opposed to employees, the obligation to make written labor contracts and provides for penalties for non-compliance.¹⁴² This allocation of obligation is justified by the fact that it is frequently the employer who seeks to avoid labor contracts and that workers, especially rural workers, often are afraid to ask for a contract because of their inferior bargaining position.¹⁴³

mium and the obligation of paying layoff costs); *see also* Interview with Li Tao, *supra* note 73 (Li Tao expressing this view during the interview).

139. *See* Administrative Law Office of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 18, § 2, subsec. 1 (noting that existing laws, including Labor Law, fail to provide adequate penalty for not executing employment contracts); *see also* JIANG ET AL., *supra* note 2, at 182 (stating that Labor Law fails to regulate employing units who delay or refuse to sign a labor contract with employees).

140. Labor Law, *supra* note 30, art. 98 (providing that “[t]he employing unit that revokes labor contracts or purposely delays the conclusion of labor contracts in violation of the conditions specified in this Law shall be ordered by the labor administrative department to make corrections and shall bear the responsibility for compensation if damages have been caused to laborers.”).

141. Labor Law, *supra* note 30, arts. 89-105 (“Ch. XII Legal Responsibility.”); *see also* JIANG ET AL., *supra* note 2, at 127 (affirming that Labor Law demands too little from employing units who deliberately decline to execute employment contracts, requiring them only to compensate employees for losses).

142. Labor Contract Law, *supra* note 6, art. 82.

Providing that:

If an Employer concludes a written employment contract with a worker more than one month but less than one year after the date on which it started using him, it shall each month pay to the worker twice his wage.

If an Employer fails, in violation of this Law, to conclude an open-ended employment contract with a worker, it shall each month pay to the worker twice his wage, starting from the date on which an open-ended employment contract should have been concluded.

Id.

143. *See* JIANG ET AL., *supra* note 2, at 127 (complaining that because of the inequality between employers and employees with respect to power, information, and resources, employees are subject to a passive and obedient position and are not able to bargain for employment contracts without a legal mandate); *see also* Yang Lixiong, *Problems of Migrant Workers and Social Protection in Chengdu*, in *ZHONGGUO NONGMINGONG WENTI YU SHEHUI BAOHU* [RURAL-URBAN MIGRANT WORKERS IN CHINA: ISSUES AND SOCIAL PROTECTION] *supra* note 1, at 201, 203 (stating that some migrant workers under the

Article 82 of the Labor Contract Law provides that if the employer takes more than one month but less than one year to execute a written labor contract with the employee, the employer must pay double wages before the contract is finally concluded.¹⁴⁴ If an employer should, but did not, sign an open-ended employment contract (employment contract with indefinite contract period) within one year of employment, the employer also must pay double wages to the employee until a contract is signed.¹⁴⁵ In addition, Article 11 supplies standards of employment compensation when the employer does not execute a labor contract with the employee.¹⁴⁶ Article 18 addresses situations when the terms of an employment contract are not clear.¹⁴⁷

2. Promoting Long-Term Employment Contracts

Observers view the prevalence of short-term contracts as causing employment insecurity and instability.¹⁴⁸ Some believe the Labor Law is partly responsible for this problem. The Labor Law does not ask employers to pay severance pay to employees upon the expiration of the employment contract, but require

pressure of finding employment are afraid to request their boss to execute a labor contract); Li Jianfei, *supra* note 115, at 76 (contending that in practice it is mainly in the employer's power to decide whether to have a written labor contract).

144. *See* Labor Contract Law, *supra* note 6, art. 82, ¶ 1.

145. *See id.* art. 82, ¶ 2.

146. *Id.* art. 11.

Providing that:

In the event that an Employer fails to conclude a written employment contract with a worker at the time its starts to use him, and it is not clear what labor compensation was agreed upon with the worker, the labor compensation of the new worker shall be decided pursuant to the rate specified in the collective contract; where there is no collective contract or the collective contract is silent on the matter, equal pay shall be given for equal work.

Id.

147. *Id.* art. 18.

Providing that:

If a dispute arises due to the fact that the rate or standards for labor compensation or working conditions, etc. are not explicitly specified in the employment contract, the Employer and the worker may renegotiate. If the negotiations are unsuccessful, the provisions of the collective contract shall apply. If there is no collective contract or the collective contract is silent on the issue of labor compensation, equal pay shall be given for equal work; if there is no collective contract or the collective contract is silent on the issue of working conditions, the relevant regulations of the state shall apply.

Id.

148. *See infra* notes 149-50 and accompanying text (explaining why Labor Law inadvertently encourages employers to use short-term employment contracts).

compensation to employees when employers terminate the contract before its expiration.¹⁴⁹ To avoid or reduce compensation payments for terminating an employment contract before its due term, many employers choose to repeatedly make short-term contracts with employees, including long-term employees.¹⁵⁰

Article 46 of the Labor Contract Law addresses this problem by taking away from employers the economic advantage of short-term employment contracts, requiring employers to pay severance pay upon expiration of even short-term employment contracts, unless it is the employee who chooses not to renew the contract on the same or better terms.¹⁵¹ In addition, in order to promote long-term employment relations, Article 14 requires the employer to offer an open-ended employment contract if the worker has been working for the employer for a consecutive pe-

149. Labor Law, *supra* note 30, art. 28 (providing that “[t]he employing unit shall make economic compensations in accordance with the relevant provisions of the State if it revokes its labor contracts according to the stipulations in Article 24, Article 26 and Article 27 of this Law.”).

150. See Administrative Law Office of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 138, § 2, subsec. 2 (recognizing that the main reason for employers to use short-term employment contract is to avoid paying compensation upon terminating an employment contract); see also Rui Neixin, *The Purpose, Background and Major Systems of Labor Contract Legislation*, 7 *ZHONGGUO LAODONG* [CHINA LABOR] 16 (2007) (stating that many employing units execute yearly short-term employment contracts rather than long-term contracts to lower the cost of employment termination).

151. Labor Contract Law, *supra* note 6, art. 46.
Providing that:

In any of the following circumstances, the Employer shall pay the worker severance pay:

- (1) the employment contract is terminated by the worker pursuant to Article 38 hereof;
- (2) the employment contract is terminated after such termination was proposed to the worker by the Employer pursuant to Article 36 hereof and the parties reached agreement thereon after consultations;
- (3) the employment contract is terminated by the Employer pursuant to Article 40 hereof;
- (4) the employment contract is terminated by the Employer pursuant to the first paragraph of Article 41 hereof;
- (5) the employment contract is a fixed-term contract that ends pursuant to item (1) of Article 44 hereof, unless the worker does not agree 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 employment contract ends pursuant to item (4) or (5) of Article 44 hereof;
- (7) other circumstances specified in laws or administrative statutes.

Id.

riod of no less than ten years, or if a fixed-term employment contract with the worker has been concluded on two consecutive occasions.¹⁵²

3. Invalid Employment Contracts and Security

Article 97 of the Labor Law states that if an employment contract is invalid because of the employer's fault and causes harm to the laborer, the employer shall be liable for damages.¹⁵³ However, this provision says nothing about the employer's obligation to pay labor compensation if the laborer has performed labor under an invalid employment contract.¹⁵⁴ In practice, when a labor dispute arises, the worker is often unable to obtain a labor compensation award under the Labor Law because the

152. Labor Contract Law, *supra* note 6, art. 14.

Providing that:

An "open-ended employment contract" is an employment contract for which the Employer and the worker have agreed not to stipulate a definite ending date.

An Employer and a worker may conclude an open-ended employment contract upon reaching a negotiated consensus. If a worker proposes or agrees to renew his employment contract or to conclude an employment contract in any of the following circumstances, an open-ended employment contract shall be concluded, unless the worker requests the conclusion of a fixed-term employment contract:

(1) the worker has been working for the Employer for a consecutive period of not less than 10 years;

(2) when his Employer introduces the employment contract system or the state owned enterprise that employs him re-concludes its employment contracts as a result of restructuring, the worker has been working for the Employer for a consecutive period of not less than 10 years and is less than 10 years away from his legal retirement age;

or

(3) prior to the renewal, a fixed-term employment contract was concluded on two consecutive occasions and the worker is not characterized by any of the circumstances set forth in Article 39 and items (1) and (2) of Article 40 hereof.

If an Employer fails to conclude a written employment contract with a worker within one year from the date on which it starts using the worker, the Employer and the worker shall be deemed to have concluded an open-ended employment contract.

Id.

153. Labor Law, *supra* note 30, art. 97 (providing that "[t]he employing unit shall bear the responsibility for compensation if the conclusion of any invalid contracts is attributed to the unit and have caused damages to laborers.").

154. *See id.*

employment contract is invalid.¹⁵⁵ For example, since the Labor Law purports to regulate workers' labor relations with lawful employers,¹⁵⁶ employment contracts with enterprises that exist and operate unlawfully are deemed invalid and workers who have performed labor for such enterprises do not have the benefit of Labor Law protection.¹⁵⁷ This result is especially disturbing considering that laborers are often ignorant of whether the employing enterprise is not following the law.¹⁵⁸ The Labor Contract Law addresses this problem. Article 28 requires the employer to pay labor compensation even if the labor contract is invalid under the law,¹⁵⁹ and Article 93 holds all employers, lawfully operating and hiring or not, liable for paying workers' labor compensation, severance pay, and damages.¹⁶⁰

155. See *supra* note 49 and accompanying text (observing that that invalid contracts result in migrant workers' rights and interests being unprotected under labor laws).

156. See Dong Baohua, *Analysis Of The Fundamental Positioning of The Draft Labor Contract Law Of The People's Republic Of China*, 3 *FASHANG YANJIU* [LAW AND BUSINESS STUDY] 46, 49 (2006), available at <http://www.cnsslw.com/list.asp?Unid=2424> (stating that Labor Law only regulates employment of lawful employees by lawful employers and may not apply if either the employer or the employee is unlawful); see also DONG, SHI & WANG, *supra* note 103, at 13-14 (criticizing then-existing labor laws for making the lawfulness of an employer determinative of the lawfulness of an employment relationship, which in turn determines the applicability of labor laws (labor laws only protect lawful employment relationships)).

157. See Dong, *supra* note 156, at 50 (criticizing draft Labor Contract Law for sharing Labor Law's mistake in that they make the lawfulness of an employment relationship dependent on the lawfulness of the employing enterprise's existence and operation, with the result that an employer's unlawfulness would cause the employment unlawful, the employment contract invalid and the employee unprotected under labor law). The final version of Labor Contract Law avoids this mistake, as indicated *infra* notes 152-53 and accompanying text; see, e.g., DONG, SHI & WANG, *supra* note 103, at 13 (reporting that because a migrant couple's employer did not have a business operation certificate and thus operated business unlawfully, a People's Court in Beijing deemed the couple's employment with the employer unlawful under labor law and denied them protection of minimum wage regulations).

158. See *More Than Ninety Percent of Migrant Workers Without Work Injury Insurance*, *ZHONGGUO QINGNIAN BAO* [CHINESE YOUTH POST], posted on China Labour Bulletin, May 27, 2007, ¶ 5, <http://www.clb.org.hk/schi/node/98895> (noting that migrant workers, when seeking employment, lack the sophistication to seek verification of the employer's lawfulness, e.g., whether the employer has the required business operation license).

159. Labor Contract Law, *supra* note 6, art. 28 (providing that "[i]f an employment contract is confirmed as invalid and the worker has already performed labor, the Employer shall pay the worker labor compensation. The amount of labor compensation shall be determined with reference to the labor compensation of workers in the same or a similar position with the Employer.").

160. *Id.* art. 93.

Providing that:

It is well known that some employers seek to bind migrant workers to their current employment not by providing attractive wages or work conditions, but by retaining workers' resident identification card and papers, requiring workers to provide security, or collecting property from workers under other guises.¹⁶¹ Article 9 of the Labor Contract Law bans this practice¹⁶² and Article 84 further provides for penalties for violations of Article 9.¹⁶³

An Employer that carries on business without the legal qualifications therefor[e] will be pursued according to law for its legal liability for its illegal and criminal acts. If its workers have already performed labor, the Employer or its investor(s) shall pay them labor compensation, severance pay and damages in accordance with the relevant provisions of this Law. If the workers suffer harm as a result thereof, the said unit shall be liable for damages.

Id.

161. See Yang Weihai & Chen Fei, *Employing Units Shall Not Take Laborers' Identification Documents, File And Security*, XINHUA WANG [XINHUA NET], Aug. 30, 2006, ¶¶ 1-3 http://news.xinhuanet.com/politics/2006-08/30/content_5027681.htm (reporting that some employers retain workers' resident ID card and papers and require workers to provide security against terminating employment contract, in direct violation of explicit regulations by labor and social security administration, and that the People's Supreme Court (the highest court in China), in response, issued a judicial interpretation document on August 30, 2006, subjecting disputes arising out of this kind of abusive practices adjudication); Cooney, *supra* note 2, at 1053-54 (noting that many employers demand that workers pay a bond prior to commencing work, together with the retention of wages, in order to impose labor discipline and prevent staff turnover).

162. Labor Contract Law, *supra* note 6, art. 9 (providing that "[w]hen hiring a worker, an Employer may not retain the worker's resident ID card or other papers, nor may it require him to provide security or collect property from him under some other guise.").

163. *Id.* art. 84.

Providing that:

If an Employer violates this Law by retaining a worker's resident ID card or other papers, the labor administration authority shall order the same returned to the worker within a specified period of time and impose a penalty in accordance with the provisions of relevant laws.

If an Employer violates this Law by collection property from workers as security or under some other guise, the labor administration authority shall order the same returned to the workers within a specified period of time and impose a fine on the Employer of not less than RMB¥500 and not more than RMB¥2,000 for each person; if the workers suffered harm as a result of the said conduct on the part of the Employer, the Employer will be liable for damages.

If an Employer retains a worker's file or other article after the worker has terminated or ended his employment contract in accordance with the law, a penalty shall be imposed in accordance with the preceding paragraph.

Id.

4. Limiting the Probation Period

The Labor Contract also addresses the issue of abusive use of the probation period or “trial use” period.¹⁶⁴ Employers and workers start a probation or “trial use” period by entering into a temporary and probationary employment relationship.¹⁶⁵ During the period, they get to know each other better and decide whether they want to establish a full employment relationship.¹⁶⁶ A worker receives less pay during a probation period and each party retains the right to terminate the probation employment at will without any liabilities.¹⁶⁷

Labor Law Article 21 limits the probation period to six months.¹⁶⁸ To evade Labor Law obligations associated with full employment and to lower wage costs, some employers extensively, or even repeatedly, use a probation period.¹⁶⁹ In re-

164. See Legal Information Bureau of National Information Center, What Is Probation Period In A Labor Contract?, ¶¶ 1-2, http://www.gov.cn/banshi/2005-06/15/content_6646.htm (last visited Oct. 25, 2008) (defining probation period as a period when an employing unit evaluates a worker’s integrity, work attitude, ability, and physical conditions, etc., and asserting probation periods as beneficial to both employers and employees for giving them time to observe and examine each other while retaining the right to terminate the try-out period at will); see also *Focus on Labor Contract Law: Probation Period Is Not Free Labor Period*, MINZHU FAZHI ZHOUKAN [DEMOCRACY AND RULE OF LAW WEEKLY] (China), posted on Renmin Wang [People Net], Apr. 5, 2006, ¶ 2 <http://npc.people.com.cn/GB/14957/53050/4271923.html> (noting that employers pay less wages in a probation period and may freely terminate a probationary employment relationship without incurring any compensation costs).

165. See Legal Information Bureau of National Information Center, *supra* note 164, ¶¶ 1-2 (indicating that the employment relationship between employers and workers is temporary and probationary during the probation period); see also *Focus on Labor Contract Law: Probation Period Is Not Free Labor Period*, *supra* note 164, ¶ 2 (indicating that the employment relationship between a worker and an employer is temporary and non-binding on either party).

166. See Probation Period Should Be Included In Chinese Labor Contracts, ¶ 2, <http://www.chinacsr.com/en/2007/09/17/1688-probation-period-should-be-included-in-chinese-labor-contracts/> (last visited Oct. 25, 2008) (citing the Tianjin Municipal Labor and Social Security Department that the probationary or trial use period is for the employer and the employee to mutually understand each other and make a mutual employment decision).

167. See *Focus on Labor Contract Law: Probation Period Is Not Free Labor Period*, *supra* note 164, ¶ 2 (observing that in a probation period workers receive lower wages and each party is free to end the probationary employment relationship).

168. Labor Law, *supra* note 30, art. 21 (providing that, “A probation period may be agreed upon in a labor contract. The longest probation period shall not exceed six months.”).

169. See *Focus on Labor Contract Law: Probation Period Is Not Free Labor Period*, *supra* note 164, ¶ 2 (stating that it is a serious problem that some enterprises abusively take advantage of the probation period by extending its term, paying low wages, and arbi-

sponse, Article 19 of the Labor Contract Law provides that an employer can require only one probation period with a worker, and that agreement on the probation period shall not stand alone but must be accompanied by, and included as part of, a contract for full employment.¹⁷⁰ If the term of the employment contract is less than three months, no probation period is allowed.¹⁷¹ If the contract term is over three months but less than one year, the probation period shall not exceed one month.¹⁷² If the term is more than one year but less than three years, the probation period shall not exceed two months.¹⁷³ In no instance can a probation period exceed six months.¹⁷⁴

Article 20 further states that the wage of a worker on probation may not be lower than the lowest wage for the same job paid to a full employee, or less than eighty percent of the wage agreed upon in a full employment contract, and may not be less than the minimum wage in the place where the employer is located.¹⁷⁵ In addition, to counter employers' abusive use of pro-

trarily terminating the probationary employment); *see also* Xinhua She [Xinhua News Agency] (China), *Supplementing And Perfecting Existing Labor Contract System And Four Bright Points Of Labor Contract Law*, posted on Chinese government website, Aug. 3, 2007, § 3, ¶ 1, http://www.gov.cn/jrzg/2007-08/03/content_705670.htm (summarizing the problems with probation period practice as prolonged probation period, low wages and employers' arbitrary termination of probation employment).

170. Labor Contract Law, *supra* note 6, art. 19.

Providing that:

If an employment contract has a term of not less than three months but less than one year, the probation period may not exceed one month; if an employment contract has a term of more than one year and less than three years, the probation period may not exceed two months; and if an employment contract has a term of not less than three years or is open-ended, the probation period may not exceed six months.

An Employer may stipulate only one probation period with any given worker. No probation period may be specified in an employment contract with a term to expire upon completion of a certain job or an employment contract with a term of less than three months.

The probation period shall be included in the term of the employment contract. If an employment contract provides for a probation period only, then there is no probation period and the term concerned shall be the term of the employment contract.

Id.

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.* art. 20 (stating that "[t]he wages of a worker on probation may not be less than the lowest wage level for the same job with the Employer or less than eighty

bation periods, Article 21 prohibits employers from arbitrarily terminating probation employment, allowing termination only on enumerated grounds.¹⁷⁶

5. Collective Labor Contracts and “Labor Dispatch”

Collective employment contracts may be of special value to rural workers considering their inferior individual bargaining power.¹⁷⁷ Article 55 of the Labor Contract Law requires that the terms of individual employment contracts be no less favorable to the employee than the terms in a collective employment contract with the employer, thus providing a safeguard to individual workers against unconscionable contract terms.¹⁷⁸ It is noteworthy that Article 53 of the Labor Contract Law further provides for regional and industrial collective labor contracts.¹⁷⁹

percent of the wage agreed upon in the employment contract, and may not be less than the minimum wage rate in the place where the Employer is located.”).

176. *Id.* art. 20.

Providing that:

An Employer may not terminate an employment contract during the probation period unless the worker is characterized by any of the circumstances set forth in Article 39 and items (1) and (2) of Article 40 hereof. If an Employer terminates an employment contract during the probation period, it shall explain the reasons to the worker.

Id.

177. See Wen, *supra* note 66, at 628 (stating that because migrant workers’ individual bargaining power is weak, employing units may force unreasonable employment terms upon them, and that a collective employment contract may strengthen migrant workers’ bargaining power and prevent unreasonable employment terms); see also Li Wei, *Collective Contract: Can It Become Employees’ New Right-Vindication-Weapon?*, *JIANCHA RIBAO* [PROCURATORIAL DAILY] (China), May 23, 2005, sec. 2, ¶ 2, <http://www.jcrb.com/n1/jcrb819/ca375478.htm> (last visited Oct. 30, 2008) (citing Guo Keli, the Deputy Chief of the Labor and Social Security Bureau of Beijing, that collective contracts are to protect workers who are powerless individually compared to the enterprise); Brown, *supra* note 38, at 48 (commenting that with individual control waning, collective negotiations would improve workers’ economic conditions).

178. Labor Contract Law, *supra* note 6, art. 55.

Providing that:

The rates for labor compensation, standards for working conditions, etc. stipulated in a collective contract may not be lower than the minimum rates and standards prescribed by the local People’s Government. The rates for labor compensation, standards for working conditions, etc. stipulated in the employment contract between an Employer and a worker may not be lower than those stipulated in the collective contract.

Id.

179. Labor Contract Law, *supra* note 6, art. 53 (providing that “[i]ndustry-wide or area-wide collective contracts may be concluded between the labor union on the one hand and representatives on the side of the enterprises on the other hand in industries

The phenomenon of "labor dispatch"¹⁸⁰ has been growing quickly and is vulnerable to abuses in the absence of statutory regulations.¹⁸¹ Enterprises use dispatched laborers to lower wage costs, reduce social security payments, and avoid obligations under the Labor Law.¹⁸² Some employers even lay off workers and then re-employ them, or other workers, through the arrangement of "labor dispatch" at lower wages and with fewer labor benefits.¹⁸³ Employers can do this because dispatched laborers are not considered their own employees and thus are not entitled to full employment benefits under the Labor Law.¹⁸⁴

such as construction, mining, catering services, etc., within areas below the county level.").

180. See Li Jianfei, *Take the Vindication of Laborers' Rights in Labor Dispatch Seriously*, GONGREN RIBAO [WORKERS DAILY] (China), posted on Renmin Wang [People Net] Feb. 26, 2007, ¶ 1, <http://acftu.people.com.cn/GB/67574/5417163.html> (last visited Oct. 25, 2008) (defining labor dispatch as a form of labor service whereby labor dispatching companies provide labor services by sending their employees to work for, and under the supervision of, companies that need labor services, while the workers remain employees of the labor dispatching companies); see also BAIDU BAIKE [BAIDU ENCYCLOPEDIA], ¶ 1, <http://baike.baidu.com/view/15253.htm> (last visited Oct. 25, 2008) (explaining that labor dispatch means that the labor dispatching unit sends its employees to work for and work under the supervision of the labor receiving unit for a fee); What Is Labor Dispatch?, ¶ 1, <http://www.laodong66.com/ldanli/ldbc/225512793.html> (last visited Oct. 25, 2008) (giving similar definition).

181. See BAIDU BAIKE [BAIDU ENCYCLOPEDIA], *supra* note 180, ¶ 3 (recognizing labor dispatch as a relatively new form of labor employment in China, which has seen fast growth and is riddled with various problems); see also *Labor Dispatch Shall Not Be Left Uncontrolled by Law*, GONGREN RIBAO [WORKERS DAILY], posted on Renmin Wang [People Net], May 14, 2007, ¶ 2, <http://acftu.people.com.cn/GB/5725284.html> (noting that there are no laws regulating labor dispatch); Zhang Jinxian, *Labor Dispatch Market Will Obtain Regulations And Order*, RENMIN FAYUAN BAO [PEOPLE'S COURT POST], posted on Zhongguo Fayuan Wang [China Court Net], July 17, 2007, ¶ 1, <http://www.chinacourt.org/html/article/200707/17/256968.shtml> (stating that Labor Contract Law brings labor dispatch under the regulation of law).

182. See Li Jianfei, *Take the Vindication of Laborers' Rights in Labor Dispatch Seriously*, *supra* note 180, ¶ 8 (stating that enterprises use dispatched laborers to reduce labor costs, evade labor law obligations, and reduce payments of employee benefits as well as social insurance premiums); see also Zhang, *supra* note 181, ¶ 1 (pointing out that many enterprises, under the pretense of labor dispatch, refuse to execute employment contracts with their workers and refuse to pay social security for workers).

183. See *Labor Dispatch Shall Not Be Left Uncontrolled by Law*, *supra* note 181, ¶ 6 (noting that some employing units lay off their employees and then have them back through labor dispatch while paying them lower wages and fewer benefits, and that some employing units replace their employees with dispatched laborers to reduce labor costs); see also, Administrative Law Office of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 138 (stating that some employing units lay off their workers and have them back as dispatched laborers).

184. See *supra* notes 180-82 and accompanying text (observing that dispatched

In response, the Labor Contract Law for the first time provides focused and comprehensive regulations on “labor dispatch” to protect the interests of dispatched workers,¹⁸⁵ most of whom are migrant workers. For example, Article 58 provides that labor dispatching units shall pay monthly local minimum wages to dispatched workers at times when the workers are not dispatched for work.¹⁸⁶ Article 60 provides that labor dispatching units and labor accepting units shall not charge fees from dispatched laborers.¹⁸⁷ Article 63 states that dispatched workers are entitled to the same pay as the employer’s own employees doing the same work.¹⁸⁸ Finally, Article 66 mandates that enterprises shall not set up labor dispatching units to dispatch workers to themselves or their subsidiaries.¹⁸⁹

workers are not employees of the labor dispatch receiving units and do not receive benefits as employees).

185. Labor Contract Law, *supra* note 6, arts. 57-67; *see also* Zhang, *supra* note 181, ¶ 1 (asserting that Labor Contract Law for the first time in China provides specific regulations on labor dispatch).

186. Labor Contract Law, *supra* note 6, art. 58.

Stating that:

Staffing firms shall pay labor compensation on a monthly basis. During periods when there is no work for workers to be placed, the staffing firm shall pay such workers compensation on a monthly basis at the minimum wage rate prescribed by the People’s Government of the place where the staffing firm is located.

Id.

187. *Id.* art. 60.

Providing that:

Staffing firms shall inform the workers placed of the content of the placement agreements.

Staffing firms may not pocket part of the labor compensation that the Accepting Units pay to the workers in accordance with the placement agreement.

Staffing firms and the Accepting Units may not charge fees from the workers placed.

Id.

188. *Id.* art. 63.

Stating that:

Placed workers shall have the right to receive the same pay as that received by workers of the Accepting Unit for the same work. If an Accepting Unit has no worker in the same position, the labor compensation shall be determined with reference to the labor compensation paid in the place where the Accepting Unit is located to workers in the same or a similar position.

Id.

189. *Id.* art. 66 (providing that “[e]mployers may not establish staffing firms to place workers with themselves or their subordinate units.”).

6. Nationwide Unified Social Security Account System

As discussed above, the Labor Law requires employers to pay their share of social security premiums for the benefit of workers.¹⁹⁰ Article 100 of the Labor Law also imposes late fees on employers who ignore a labor administrative bureau's order to make up social security payments within a specified period.¹⁹¹ These provisions have had little compliance from medium and small size enterprises.¹⁹²

The Labor Contract Law includes one new solution to this problem. Article 49 states that the state will take measures to establish a nationwide unified social security account system that makes workers' social insurance accounts transferrable from one region to another.¹⁹³ The lack of transferable personal social security account is a major obstacle to providing continuous social security to migrant workers.¹⁹⁴ As social security premiums are collected and managed by regional governments,¹⁹⁵ migrant

190. See *supra* note 85 and accompanying text (showing that Labor Law requires employers to pay social security premiums for their employees).

191. Labor Law, *supra* note 30, art. 100 (providing that "[t]he employing unit that fails to pay social insurance premium without reason shall be ordered by the labor administrative department to pay within fixed period of time. If the unit still fails to make the payment beyond the time limit, an additional arrear payment may be demanded.").

192. See Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, sec. 2, subsec. 4 (reporting that many employees of privately-owned enterprises and small businesses, and most migrant workers, do not have social security coverage); see also *supra* notes 56, 59 and accompanying text (indicating that many migrant workers do not have social security coverage such as health insurance, pension, and work injury insurance).

193. Labor Contract Law, *supra* note 6, art. 49 (providing that "[t]he state will take measures to establish a comprehensive system that enables workers' social insurance accounts to be transferred from one region to another and to be continued in such other region.").

194. See Survey and Research Team of MOLSS, *Research Report on Social Security Issues of Rural Workers*, in PROJECT TEAM OF THE RESEARCH OFFICE OF THE STATE COUNCIL, ZHONGGUO NONGMINGONG DIAOYAN BAOGAO [SURVEY AND RESEARCH REPORT ON CHINA'S RURAL WORKERS] *supra* note 1, at 248, 250, 252 (recognizing that the low coverage rate of social security for migrant workers is attributable to the fact that social security accounts are not transferable across regions); see also Liu Wenhui, *Commentary Analysis of Social Security Systems for Migrant Workers in Certain Regions*, in PROJECT TEAM OF THE RESEARCH OFFICE OF THE STATE COUNCIL, ZHONGGUO NONGMINGONG DIAOYAN BAOGAO [SURVEY AND RESEARCH REPORT ON CHINA'S RURAL WORKERS] *supra* note 1, at 260, 261 (observing that one of the three reasons why social security coverage rate is low with respect to migrant workers is that because social security accounts are not transferable, migrant workers' interests under social security are not guaranteed).

195. See Survey and Research Team of MOLSS, *supra* note 194, at 250 (stating that

workers cannot bring their social security benefits along when they move to other regions.¹⁹⁶ Therefore, China's localized social security system constitutes a disincentive for migrant workers to pay their share of social security premiums and many migrant workers actually opt out of pension plans.¹⁹⁷ Once the government establishes a transferable personal social security account for all workers, it will no doubt encourage migrant workers to pay their share of social security premiums for their own benefit.

7. Wage Arrears

Wage arrears is one of the most serious and challenging problems faced by migrant workers, and accounts for forty-one percent of all labor cases handled by Labor Security Supervision and Inspection Bureaus in 2004.¹⁹⁸ Labor Law Article 50 prohibits,¹⁹⁹ Article 91 provides penalty against wage arrears,²⁰⁰ and there have been a series of serious governmental efforts to solve

China's social security system is divided into more than 2000 units, at the city or county levels, that are not unified or connected).

196. See Survey and Research Team of MOLSS, *supra* note 194, at 249 (noting that migrant workers lack confidence in the social security system and suspect whether they will eventually have pension benefits even if they pay premiums for many years).

197. See Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, sec. 2, subsec. 4 (reporting that because social security accounts are administered at county or city levels and are not transferable across regions, migrant workers are not enthusiastic about participating in social security system); see also *supra* notes 194-96 and accompanying text (presenting that inability to transfer social security account across regions contributes to the low social security coverage rate of migrant workers).

198. See Legal Enforcement and Inspection Team of the Law Committee of the Standing Committee of NPC (P.R.C.), *supra* note 48, sec. 2, subsec. 2 (noting that wage arrears complaints account for forty-one percent of all labor cases handled by Labor Security Supervision and Inspection Bureaus in 2004).

199. See Labor Law, *supra* note 83, art. 50.

200. *Id.* art. 91.

Stating that:

Where an employing unit infringes in any of the following ways the legitimate rights and interests of laborers, the labor administrative department shall order it to pay laborers remuneration or to make up for economic losses, and may also order it to pay compensations: (1) to deduct wages or delay in paying wages to laborers without reason; (2) to refuse to pay laborers remuneration for the extended working hours; (3) to pay laborers wages below the local standard on minimum wages; or (4) to fail to provide laborers with economic compensations in accordance with the provisions of this Law after revocation of labor contracts.

Id.

this problem for migrant workers in the past few years.²⁰¹ All of these initiatives have merely had moderate success.²⁰² In response to this issue, the Labor Contract Law adds two protective measures. Article 30 permits workers to apply for a wage-pay order from local courts,²⁰³ bypassing the mandatory arbitration under the Labor Law and significantly reducing workers' waiting period in obtaining a final order. And Article 85 requires employers to pay additional damages for overdue labor compensations.²⁰⁴

8. Labor Supervision and Inspection Responsibilities

Lack of government supervision and inspection of the implementation of the Labor Law is to a large extent responsible for massive labor right violations.²⁰⁵ In this connection, China's legislature added Article 95 to the Labor Contract Law in rapid response to the widely publicized slave labor scandal in May and

201. See *supra* note 55 and accompanying text (showing that in the last few years Chinese national and regional governments have made serious efforts to solve the wage arrear problem for migrant workers).

202. See *supra* note 54 and accompanying text (showing that wage arrear remains a serious problem for migrant workers).

203. Labor Contract Law, *supra* note 6, art. 30.

Providing that:

Employers shall pay their workers labor compensation on time and in full in accordance with the employment contracts and state regulations.

If an Employer falls into arrears with the payment of labor compensation or fails to make payment in full, the worker may, in accordance with the law, apply to the local People's Court for an order to pay; and the People's Court shall issue such order in accordance with the law.

Id.

204. *Id.* art. 85.

Providing that:

If an Employer:

- (1) fails to pay a worker his labor compensation in full and on time as stipulated in his employment contract or prescribed by the state;
- (2) pays labor compensation below the local minimum wage rate;
- (3) arranges overtime without paying overtime pay; or
- (4) terminates or ends an employment contract without paying the worker severance pay pursuant to this Law;

then the labor administration authority shall order it to pay the labor compensation, overtime pay or severance pay within a specified period of time; if the labor compensation is lower than the local minimum wage rate, the Employer shall pay the shortfall. If payment is not made within the time limit, the Employer shall be ordered to additionally pay damages to the worker at.

Id.

205. See *supra* notes 90-98 and accompanying text (discussing that poor labor supervision and inspection contribute to the prevalence of labor right violations).

June of 2007.²⁰⁶ Article 95 subjects labor administration clerks and government officials to administrative sanctions and even criminal liabilities if their failure to perform their job causes harm to either workers or employers.²⁰⁷ This provision is similar to Article 103 of the Labor Law.²⁰⁸

There are other provisions in the Labor Contract Law that address either the insufficiencies of the Labor Law or known abusive labor practices. For example, in practice, some employers either do not make a written employment contract with the employee²⁰⁹ or do not furnish a copy of the contract to the employee.²¹⁰ When labor disputes arise, workers often find it difficult to obtain legal remedies because they are not able to prove

206. See *China's Legislature Approves New Labor Law*, *supra* note 6 (reporting that a provision added to Labor Contract Law at the last minute in response to the slavery scandal would punish officials whose negligence or misconduct harms workers' rights); see also Blanchette, *supra* note 10 (reporting that, following the exposure of the forced labor scandals, draft Labor Contract Law was amended to punish officials who ignore labor abuses with prison time or other penalties).

207. Labor Contract Law, *supra* note 6, art. 95.
Providing that:

If a labor administration authority, another competent authority or a member of its working personnel neglects its/his duties, fails to perform its/his statutory duties or exercises its/his authority in violation of the law, thereby causing harm to a worker or an Employer, liability for damages shall be borne and the leading official directly in charge and the other persons directly responsible shall be subjected to administrative penalties in accordance with the law; if a criminal offense is constituted, criminal liability shall be pursued in accordance with the law.

Id.

208. Labor Law, *supra* note 30, art. 103.
Providing that:

The functionaries of the labor administrative department or other relevant departments who abuse their functions and powers, neglect their duties, and engage in malpractices for selfish ends, shall be investigated for criminal responsibilities according to law if a crime is constituted, or shall be given an administrative sanction if the offenses do not yet constitute a crime.

Id.

209. See *supra* note 46 and accompanying text (observing that many employers do not execute a labor contract with migrant workers).

210. See Lu Quan & Qin Li, *Problems of Migrant Workers and Social Protection in Beijing*, in *ZHONGGUO NONGMINGONG WENTI YU SHEHUI BAOHU* [RURAL-URBAN MIGRANT WORKERS IN CHINA: ISSUES AND SOCIAL PROTECTION] *supra* note 1, at 119, 127 (showing that a survey in Beijing indicates that 36.1% migrant workers in Beijing have an employment contract, 66.4% employment contracts are in writing and, with respect to migrant workers under a written labor contract, only 38.3% actually possess a copy of the written contract); see also Yang, *supra* note 116, at 203 (stating that a survey in Chengdu shows that 45.5% of migrant workers do not have an employment contract and only 70.3% of migrant workers under a written labor contract hold a copy of the contract).

the existence of an employment relationship with the employer.²¹¹ Article 16 of the Labor Contract Law deals with this problem by mandating that the employee possess a copy of the written employment contract.²¹² In addition, to protect workers from unsafe working conditions, Article 32 of the Labor Contract Law grants workers the right and power to refuse unsafe work or work in unsafe conditions.²¹³

Many provisions of the Labor Contract Law deliberately address issues arising out of China's labor practice and attempt to improve upon the deficiencies of the Labor Law, the Labor Contract Law. As discussed in Part III of this Comment however, the Labor Contract Law has its insufficiencies and its real effects on labor practice in China remain to be seen.

III. INSUFFICIENCIES AND LIKELY EFFECTS OF THE LABOR CONTRACT LAW

It is understandable that the Labor Contract Law, like any remedial legislation, may not provide perfect solutions to all important issues. This Part discusses the insufficiencies of the law and its likely effects on labor protection.

A. *Employment Without a Written Contract*

As discussed above, absent a written employment contract, when labor disputes arise, it is often difficult for the worker to

211. See DONG, SHI & WANG, *supra* note 103, at 45 (commenting that a worker's inability to produce a written employment contract makes it hard to prove an employment relationship with the employer and thus may deprive him or her of legal remedies); see also *supra* note 135 and accompanying text (stating that failure to establish employment relationship with the employer results in deprivation of legal remedies on the part of workers).

212. Labor Contract Law, *supra* note 6, art. 16 (providing that "[a]n employment contract shall become effective when the Employer and the worker have reached a negotiated consensus thereon and each of them has signed or sealed the text of such contract. The Employer and the worker shall each hold one copy of the employment contract.").

213. *Id.* art. 32.

Providing that:

Workers shall not be held in breach of their employment contracts if they refuse to perform dangerous operations that are instructed in violation of regulations or preemptorily ordered by management staff of the Employer.

Workers have the right to criticize, report to the authorities or lodge accusations against their Employers in respect of working conditions that endanger their lives or health.

Id.

prove an employment relationship with her employer.²¹⁴ Failure to prove a factual labor relationship often deprives the worker of Labor Law remedies.²¹⁵ In response, Article 14 of the Labor Contract Law states that if the employer does not sign a written labor contract within one year after employment begins, the employer is deemed to have signed an open-ended labor contract with the employee.²¹⁶ By legally constructing the existence of a written employment contract, this provision seems to spare the worker the burden of proving an employment relationship when making a labor right claim against the employer. However, this alleviation is to a large extent illusive. The worker still has to prove that she has in fact worked for the employer for over one year, therefore the worker's burden of proving factual employment relations remains.²¹⁷

Another issue with Article 14 is that it constructs the existence of an open-ended employment contract, but gives no guidelines for constructing the important terms of the contract.²¹⁸ This problem may arguably be solved by looking at other provisions of the Labor Contract Law. Article 11 deals with the situation where an employment contract is not signed and the terms of labor compensation are not specified.²¹⁹ Article 18 addresses the interpretation of labor contracts with vague terms.²²⁰ Both of these Articles may be taken as indirectly providing some guidelines for making out the important terms of a legally constructed open-ended employment contract.

214. *See supra* notes 49, 134 and accompanying text (pointing out that without a written employment contract, it is often difficult for a worker to produce evidence showing that she has been employed by the employer).

215. *See supra* note 135 and accompanying text (explaining that failure to prove employment relationship with the employer deprives the worker of labor law remedies).

216. *See supra* notes 136, 152 and accompanying text (citing Labor Contract Law Article 14).

217. This may not be taken as a weakness of Labor Contract Law, as proof of factual employment relation, in absence of a written employment contract, seems both reasonable and necessary in order for a worker to claim employment benefits.

218. *See supra* note 217 and accompanying text (quoting Labor Contract Law Article 14).

219. *See supra* note 146 and accompanying text (quoting and summarizing Labor Contract Law Article 11).

220. *See supra* note 147 and accompanying text (quoting and summarizing Labor Contract Law Article 18).

B. *Wage Arrears*

In response to the severe problem of wage arrears, the Labor Contract Law adds two protective measures that do not seem sufficient. Article 30 permits workers to apply for a wage-pay order from local courts²²¹ and Article 85 requires employers to pay additional damages for overdue labor compensation.²²² However, one may very well doubt if these provisions will have any significant effect. Aside from the difficulty in obtaining a court order, one may wonder how much good a court order can do when administrative orders fail. One may also wonder how workers can expect to receive payment of additional damages when even wages are often overdue or merely partially paid.

C. *Social Security*

As discussed above, many employers, in violation of the Labor Law, do not pay their share of social security premiums for the benefit of workers.²²³ It comes as a surprise that the Labor Contract Law does not provide for any penalty for employers who do not pay social security premiums. Article 49 of the Labor Contract law states that the state will take measures to establish a nationwide unified social security account system that makes workers' social insurance accounts transferrable from one region to another.²²⁴ The establishment of a nationwide unified social security account system will no doubt alleviate migrant workers' concern that their social security payments will bring no benefits to them at all, thus providing migrant workers with incentives to pay their share of social security premiums. However, this short single-sentence provision neither specifies the measures the government shall take to set up a nationwide unified social security account system nor sets any timetable for the establishment of such a system. In addition, a nationwide unified social security account system does not provide any addi-

221. *See supra* note 203 and accompanying text (quoting and summarizing Labor Contract Law Article 30)

222. *See supra* note 204 and accompanying text (quoting and summarizing Labor Contract Law Article 85)

223. *See supra* note 192 and accompanying text (pointing out that many medium and small business employers do not pay social security premium for their employees, resulting in a low social security coverage rate of migrant workers).

224. *See supra* note 193 and accompanying text (quoting and summarizing Labor Contract Law Article 49).

tional inducement for employers to pay their share of social security premiums. Since employers often choose to evade social security payment to lower operation costs, the Labor Contract Law fails to provide an adequate measure to enhance social security coverage for migrant workers.

D. *Labor Supervision and Inspection*

Lack of government supervision and inspection of the implementation of the Labor Law is to a large extent responsible for massive labor rights violations.²²⁵ In this regard, Article 95 of the Labor Contract Law imposes penalties on labor administration clerks and government officials if their failure to perform their job causes harm to workers or employers.²²⁶ Nevertheless, this provision does not provide a promising prospect for the implementation and enforcement of the Labor Contract Law, as the Labor Law has already had a similar provision (Article 103) that has not proven very effective.²²⁷ A comparison of the two provisions shows that the only difference between them is that the Labor Contract Law, in addition, requires the labor administrative authority to pay damages if its action or inaction causes harm. It is doubtful that the addition of financial liability will provide significantly more incentives for labor administrative authorities to improve their performance. As regional governments play a critical role in the implementation and enforcement of labor standards,²²⁸ it is no less important to provide local government officials with strong incentives to enhance labor practice within their region. This may be achieved by linking the promotion of regional officials to the improvement of regional labor conditions, instead of assessing an official's performance based disproportionately on regional economic growth. Strengthening enforcement of the Labor Contract Law

225. *See supra* notes 90-98 and accompanying text (discussing that lax supervision and inspection of the implementation of labor laws contribute to the prevalence of labor right violations).

226. *See supra* note 207 and accompanying text (quoting and paraphrasing Labor Contract Law Article 95).

227. *See supra* note 208 and accompanying text (quoting Labor Law Article 103).

228. *See supra* notes 95-97 and accompanying text (noting that local governments play a critical role in the implementation and enforcement of labor laws because it is the local governments that determine personnel and funding of labor supervision bureaus; and stating that some local governments are half-hearted towards the protection of labor rights).

is of particular importance as poor implementation will defeat any progressive legislation. This is particularly so as noncompliance with laws is a serious problem in China. For this reason, the effects of the Labor Contract Law on Chinese labor protection depend on, more than anything else, implementation and enforcement.

CONCLUSION

This Comment has discussed the social and legislative background, the provisions, and the possible effects of China's newly enacted Labor Contract Law. China's Labor Contract Law draws upon China's relatively new experience with employment contracts, aims at supplementing and improving upon China's Labor Law, and sets out to address various forms of labor right violations against workers, mostly migrant workers. Given the problem of noncompliance and lack of legal enforcement in China, one cannot expect China's Labor Contract Law to effect immediate and significant changes. Besides enhancing labor supervision and legal enforcement, China needs to utilize economic incentives to induce compliance from employers.

If poor labor practice is to some extent a result of labor surplus and an under-developed economy, China has a long way to go to catch up with labor practices in the West. Although a political slogan, China's current administration's goal of building a "harmonious society" has led to unprecedented efforts to improve the conditions of the disadvantaged and the poor, which is surely good news to Chinese workers.

