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Christopher Coyne

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ALL BARK AND NO BITE: HOW ATTORNEY FEE SHIFTING CAN SOLVE CHINA'S POOR ENFORCEMENT OF EMPLOYMENT REGULATIONS

INTRODUCTION

Starting in the late 1970s, China began a dramatic transformation of its labor system from one of guaranteed employment to one based on contract labor.¹ In response to this ongoing process of systematic change and the emergence of an enormous population of new laborers,² China has found itself in the challenging position of structuring an employment system that spurs economic growth without sacrificing employee rights and benefits. To address this issue, China has implemented a wave of employment regulations aimed at guaranteeing certain basic rights for workers. Starting with the Labor Law of 1995,³ the Labor Contract Law of 2008⁴ (“LCL”), the 2013 Amendments to the Labor Contract Law,⁵ and the proposed Draft Labor Dispatch Regulations,⁶ China has created a substantial

1. Susan Leung, *China's Labor Contract System from Planned to Market Economy*, 3 J. L. ETHICS & INTELL. PROP. 1, 1-2 (2012).

2. LOREN BRANDT & THOMAS G. RAWSKI, CHINA'S GREAT ECONOMIC TRANSFORMATION I (2008).

3. Zhonghua Renmin Gongheguo Laodong Fa (中华人民共和国劳动法) [Labor Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective Jan. 1, 1995), *translation available at* <http://www.acftu.org.cn/template/10002/file.jsp?cid=56&aid=31>.

4. Laodong Hetong Fa (劳动合同法) [Labor Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), *translation available at* <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/labor/labor-contract-law-of-the-peoples-republic-of-china.html> [hereinafter Labor Contract Law].

5. See Jeanette Yu, *Newly Amended PRC Labor Contract Law Imposing Stricter Control Over the Use of Seconded Employees*, LEXOLOGY (Jan. 14, 2013), <http://www.lexology.com/library/detail.aspx?g=eec02e59-c329-4c77-aafb-4b4c19324c95>.

6. See Jeffrey Wilson, *Comments on Draft Labor Dispatch Regulations Due by September 7*, INT'L LAB. & EMP'T L. COMM. NEWSL., Aug. 2013, *available at* http://www.americanbar.org/content/newsletter/groups/labor_law/int_newsletter/2013/aug2013/china.html.

foundation of mandated employment rights for Chinese workers.⁷

However, while the numerous adjustments to the labor contract system have dramatically increased employee rights, they have failed at enforcing such rights and ensuring these workers access to legal remedy. Due to both a lack of knowledge⁸ and insufficient funds to spend on legal counsel, Chinese workers are often unaware or unable to access their statutory rights.⁹ Therefore, a more prudent approach to the problems of Chinese workers would be to create programs to publicize employee rights and pass legislation that incentivizes Chinese attorneys to take LCL violation cases at little or no cost to the workers. To achieve these goals and provide adequate legal remedy to the Chinese workforce, China should implement both a modified attorney fee-shifting program that emphasizes merit-based awards as well as a poster notification system to increase knowledge of employment rights. The combination of these minor adjustments to China's labor contract system will increase employee knowledge of their statutory rights and create a powerful financial motivation for Chinese lawyers to represent employee plaintiffs.

This Note will address the development of the labor contract system in China as it transformed from a plan-based system to one built around labor contracts and will advocate for legislative changes to better ensure workers' access to their statutory rights. Part I will address the history of the labor contract system as well as the current problems faced by many Chinese laborers. Part II will provide background on the concept of attorney fee shifting, its use in American Civil Rights cases, and some of the problems the system has created for municipalities. Finally, Part III will suggest a modified version of attorney fee shifting and a poster notification system for use in China,

7. See Vikas Bajaj, *Chinese Workers' Rights*, N.Y. TIMES TAKING NOTE (Feb. 8, 2013, 2:19 PM), <http://takingnote.blogs.nytimes.com/2013/02/08/chinese-workers-rights>.

8. See Aaron Halegua, Note, *Getting Paid: Processing the Labor Disputes of China's Migrant Workers*, 26 BERKELEY J. INT'L L. 254, 256 (2008)

9. See Xingni Liang, *Attorney Fee-Shifting and Labor Rights in China*, LABOR IS NOT A COMMODITY (Dec. 4, 2009), http://laborrightsblog.typepad.com/international_labor_right/2009/12/attorney-fee-shifting-and-labor-rights-in-china.html.

which will provide laborers with knowledge and access to the employment rights elicited in the Labor Contract Law as well as avoid some of the major burdens attorney fee shifting has created in the United States.

I. BACKGROUND

a. The Iron Rice Bowl: China's Plan-Based Economic Model

In October 1949, the People's Republic of China ("PRC") inherited a nation decimated by years of war and civil strife.¹⁰ The repercussions of the Second Sino-Japanese War,¹¹ followed by the Chinese Civil War, had left China in a dire economic state and provided the newly established communist government with substantial obstacles.¹² As the PRC came into power, over 4.7 million people in urban areas were unemployed.¹³ Furthermore, inflation resulting from the Chinese government's overproduction of currency led to heightened prices and threw many rural families into severe poverty.¹⁴

In an attempt to maintain social stability and build a successful economic system out of rubble, the PRC followed the footsteps of the Soviet Union and implemented a "plan-based" economic system.¹⁵ Through this system, the PRC combined expansive state ownership of industry with central control over prices and production.¹⁶ The purpose of such a centralized plan

10. See Leung, *supra* note 1, at 2; see also BRANDT & RAWSKI, *supra* note 2, at 4.

11. *Sino-Japanese War*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/546188/Sino-Japanese-War> (last visited Mar. 31, 2014).

12. See BRANDT & RAWSKI, *supra* note 2, at 4.

13. Leung, *supra* note 1, at 2.

14. Richard Ebeling, *The Great Chinese Inflation*, FREEMAN, Dec. 2004, at 2, 3. China experienced severe inflation throughout the 1940s after China "took the country off the silver standard, made its bank notes legal tender, and placed the country on a fiat currency with government in full control of the quantity of money." *Id.*

15. See BRANDT & RAWSKI, *supra* note 2, at 4.

16. See BRANDT & RAWSKI, *supra* note 2, at 4; see also Yiwen Fei, *The Institutional Change in China after its Reform in 1979: An Institutional Analysis with a Focus on Mergers and Acquisitions* (Nov. 18, 2004) (unpublished Ph.D. thesis, Erasmus University Rotterdam), available at <http://repub.eur.nl/pub/6854/>. China's centrally-planned economy determined prices by "administrative rather than market mechanisms and [allocated

was to “raise domestic saving . . . by extracting resources from the rural sector, and . . . channel[ing] these funds toward industrial growth.”¹⁷ However, to achieve such a goal, China needed to increase employment in both urban and rural areas of the country.¹⁸ To this end, the PRC began a program of “government . . . job assignment through labor and education bureaus” in order to fill vacancies in state-owned enterprises and curb the massive unemployment rates throughout the urban sector.¹⁹

This system of employment soon became known as the “iron rice bowl,”²⁰ by which the government provided life-long employment and benefits for those assigned state-run positions.²¹ Because these state-run positions remained solely in urban areas and were restricted to urban residents,²² the PRC subsequently limited urban migration from rural areas of China through the Household Registration Regulations of 1958.²³

The PRC used these laws to divide the population of China into two groups, urban and rural, based on a person’s hometown at the time of the law’s implementation.²⁴ Mobility between the two groups was highly uncommon and extremely

resources] by central planners rather than by forces of supply and demand.” *Id.* at 29. Furthermore, China emphasized state industry development and focused on the expansion of heavy industry at the sacrifice of agricultural development. *See id.*

17. BRANDT & RAWSKI, *supra* note 2, at 4.

18. *See* Leung, *supra* note 1, at 2.

19. *See id.*

20. *See* Jia Ching Chen, *From the Iron Rice Bowl to the Steel Cafeteria Tray*, in *FACTORY TOWNS IN SOUTH CHINA* 45 (Stefan Al ed., 2012), available at http://www.academia.edu/1897603/_From_the_Iron_Rice_Bowl_to_the_Steel_Cafeteria_Tray_in_Factory_Towns_in_South_China_edited_by_S_Al_2012_Hong_Kong_Hong_Kong_University_Press.

21. *See id.*; Fei, *supra* note 16. Fear that private organizations would be unwilling to reinvest profits in future government programs eventually led to the nationalization of private banking and industrial enterprises. With these enormous enterprises under state control and a government policy emphasizing industrial development, the number of “government jobs” expanded greatly. *Id.*

22. *See* Leung, *supra* note 1, at 2.

23. *Id.*; Kam Wing Chan, *Registration System and Migrant Labor in China: Notes on a Debate*, 36 *POPULATION & DEV. REV.* 357, 357-58 (2010).

24. Leung, *supra* note 1, at 2.

difficult.²⁵ Because only urban residents were entitled to government job assignment and its life-long employment guarantee,²⁶ the PRC used the housing registration system to avoid a complete abandonment of the rural sector.²⁷

The results of the PRC's plan-based economic system were dramatic in the sectors affected²⁸ but, overall, failed to utilize the true potential of the Chinese workforce.²⁹ The PRC's economic model achieved moderate progress in the creation of human capital³⁰ and the introduction of new industries.³¹ Specifically, mortality among both children and new mothers declined, school attendance and academic achievement of students increased, and new vehicle manufacturers and power plant industries began to develop.³² However, these achievements were overshadowed by the tremendous failure to properly utilize China's massive working class.³³ A prime example of the inefficiency³⁴ and redundancy that plagued the PRC's system was the man-made famine of 1959, which killed over thirty million Chinese people.³⁵ Furthermore, the industries devel-

25. Chan, *supra* note 23, at 358 ("Hukou conversion, referring to change from the rural to the urban category, was tightly controlled and permitted only under very limited conditions, usually when needed for the state's industrialization objectives.").

26. Leung, *supra* note 1, at 2.

27. *See id.*; Chan, *supra* note 23, at 358 (arguing that the registration system was intended to prevent "'undesirable' rural-to-urban migratory flows").

28. *See* BRANDT & RAWSKI, *supra* note 2, at 5.

29. *See* Fei, *supra* note 16, at 33.

30. *See* BRANDT & RAWSKI, *supra* note 2, at 5.

31. *See* Fei, *supra* note 16, at 25.

32. *See* BRANDT & RAWSKI, *supra* note 2, at 5.

33. *See id.* at 5-6.

34. *See* Fei, *supra* note 16, at 38-39. The Planned Economic System suffered primarily from two forms of inefficiency: allocative inefficiency and x-inefficiency. First, "because prices were determined in an administrative way instead of by the forces of supply and demand," consumer preferences had no influence on production. *Id.* at 38. Second, with infinite funds generated by the state, and specific production requirements, State-Owned Enterprises ("SOEs") had no fear of suffering a loss and would receive no reward for making a profit. Therefore, the SOEs held no incentive to maintain an efficient business structure. *Id.*

35. *See* BRANDT & RAWSKI, *supra* note 2, at 5; *see* Vaclav Smil, *China's Great Famine: 40 Years Later*, 319 BRIT. MED. J. 1619 (1999), available at <http://www.bmj.com/content/319/7225/1619> (identifying one of the key origins of the famine as Mao Zedong's decision to focus state-run business efforts

oped under the system were plagued with overemployment, lack of innovation, and low labor morale.³⁶ The PRC system's deficiencies were exacerbated by the PRC's almost isolationist approach to the world economy,³⁷ which removed Chinese firms from the motivation of international competition and left them with the excessive costs of inefficient labor.³⁸ The PRC's economic plan had faltered and left the Chinese people, once again, in need of change.

b. Introduction of the Labor Contract System: The 1995 Labor Law

After the death of the first Chairman of the PRC, Mao Zedong, in 1976,³⁹ it became widely accepted that a systematic change of China's economy was necessary.⁴⁰ In an attempt to "restore the link between effort and reward" and jumpstart the stagnant and unmotivated Chinese workforce, China began to experiment with a labor contract system for small sectors of state-run enterprises and at the same time increased the nation's presence within the international market.⁴¹ Beginning in 1978, labor contracts "were first tried out on joint ventures in Shenzhen and were given statutory recognition by the Provi-

heavily in steel production instead of food production). The "Great Leap Forward," Mao Zedong's economic model to quickly establish China as an industrialized and internationally competitive state, mobilized Chinese workers around the primary goal of industrialization leading to severe neglect of Chinese agriculture and the food supply. William Harms, *China's Great Leap Forward*, UNIV. CHI. CHRON. (Mar. 14, 1996), <http://chronicle.uchicago.edu/960314/china.shtml>. Many Chinese peasants were pressured to build "backyard furnaces for iron and steel" and were often recruited away from their farms to work on government building projects. *Id.* This excessive emphasis on industrialization continued to the point where grain harvests were left in the fields to rot and millions of people began to die of starvation. *Id.*

36. See Leung, *supra* note 1, at 2; see BRANDT & RAWSKI, *supra* note 2, at 5-6.

37. See BRANDT & RAWSKI, *supra* note 2, at 6, 12.

38. See *id.* at 6.

39. *China Celebrates 120 Years Since Mao Zedong's Birth*, DEUTSCHE WELLE (Dec. 26, 2013), <http://dw.de/p/1Ah3S>.

40. See BRANDT & RAWSKI, *supra* note 2, at 8.

41. *Id.* at 9, 11.

sions for Labor Management in Sino-Foreign Joint Ventures of 1980.”⁴²

The success of these labor contract programs and the expansion into the international economy led to further implementation throughout the coastal regions of China⁴³ and eventually a national presence in the Labor Law of 1995. The Labor Law of 1995 was used to nationalize the labor contract approach and end the lingering socialist distinction between state-owned enterprises (“SOEs”) and foreign-invested enterprises (“FIEs”).⁴⁴

The Labor Law of 1995 implemented contract law principles to all SOEs and FIEs demanding that all employers form labor contracts with their employees that explicitly spell out terms and conditions for employment and termination.⁴⁵ The Labor Law of 1995 was an innovative attempt to both motivate the Chinese workforce and guarantee certain employee rights.⁴⁶ The law emphasized new protections prohibiting discrimination and child labor, and guaranteed equal pay for equal work.⁴⁷ Additionally, labor contracts were required to contain descriptions of work duties, duration of employment, and grounds for termination.⁴⁸ The Labor Law of 1995 achieved great progress in improving employment mobility, which greatly decreased the redundant and inefficient use of human capital.⁴⁹ Furthermore, through defining rights and obligations within the employee-employer relationship, the Labor Law of 1995 succeeded in pinning down these responsibilities and sta-

42. Leung, *supra* note 1, at 2. Early labor contract requirements can be found in the Equity Joint Venture Law of 1979 and the Cooperative Joint Venture Law of 1988, which held identical requirements that “the employment, dismissal, remuneration, welfare, labor protection and labor insurance of the staff members and workers of an equity joint venture shall be specified in contracts.” *Id.* at 3.

43. *See id.* at 2-3.

44. *See id.* at 3. Prior to the Labor Law, SOEs, as distinct from foreign-invested enterprises (“FIEs”), retained much of the socialist ideology concerning lifetime job security, benefits, and assigned job placement. Even as narrower legislation in 1986 attempted to provide greater autonomy to SOE employees, as of 1993, only a quarter of all SOE employees held labor contracts. *Id.*

45. *See id.*

46. *See id.* at 3-4.

47. *Id.* at 6.

48. *See id.* at 3.

49. *Id.* at 2-4.

bilizing a chaotic system where employment conditions were often arbitrary.⁵⁰

Despite the progressive steps the Chinese government took through implementing the Labor Law of 1995, the resulting privatization of many previously state-owned businesses and the abandonment of the job assignment programs led to a high unemployment rate, particularly among migrant workers.⁵¹ By 2006, over 160 million workers had flooded from rural to urban areas in search of work, but without urban residential status, these workers were often treated as second-class citizens and discriminated against by employers.⁵² In the same year, studies conducted by the Economic Intelligence Unit found that over 70% of migrant workers were employed unlawfully without contracts.⁵³ When contracts were signed, employers often utilized the availability of short-term contracts to prioritize enterprise flexibility over the development of their employees.⁵⁴ Employers began hiring employees for numerous short-term contracts in order to avoid labor costs associated with long-term employment.⁵⁵ Despite the government's intention to bring about stable, long-term contract positions, many employers provided contracts lasting for less than two years.⁵⁶ In order to adjust the Labor Law of 1995 to better deal with the modern issues facing Chinese employees, particularly migrant workers and fixed-employment contract employees, China enacted the Labor Contract Law of 2008.⁵⁷

c. The Labor Contract Law of 2008

The Labor Contract Law of 2008 reiterated that all working relationships required written contracts.⁵⁸ The LCL heightened employment costs and increased penalties for employers that were caught hiring employees without written contracts.⁵⁹

50. *Id.* at 3-5.

51. *See id.* at 7.

52. *Id.*

53. ANNE-MARIE KONTAKOS, THE EFFECT OF THE LABOR CONTRACT LAW ON HR IN CHINA 33, 35 (2007).

54. *See* Leung, *supra* note 1, at 6.

55. *See id.*

56. *Id.*

57. *See id.* at 8.

58. Labor Contract Law, *supra* note 4, art. 10.

59. *See id.*

Most notably, if an employer delayed writing a new employee's contract for too long, the LCL mandated that this employee would automatically receive an open-ended contract.⁶⁰

Similar to the Labor Law of 1995, the LCL mandated that all employees be classified as either fixed-term or open-ended contract employees, but the LCL went a step further and contained new provisions to curb improper reliance on short-term contracts. Article 14 of the LCL specified the situations in which a fixed or short-term contract employee could automatically obtain an open-ended contract.⁶¹ This substantial extension of the labor contract regulations was meant to limit the use of fixed-term contracts and encourage the use of long-term and open contracts.⁶²

60. See KONTAKOS, *supra* note 53, at 37.

61. *Id.* at 34. Article 14 of the LCL automatically transforms an employee's fixed-term contract into an open-ended contract when certain criteria are met. Specifically, a fixed-term contract will become open-ended when an employee wishes to renew or adjust the terms of a contract at the end of its term, the employer fails to request the new contract be of a fixed-term, and any of the following requirements are met.

- (1) The employee has been working for the Employer for ten (10) consecutive _____ years;
 - (2) When the Employer first introduces the labor contract system or the state-owned enterprise that employs him re-concludes its labor contracts as of restructuring, the employee has been working for the Employer for ten (10) consecutive years and is less than 10 years away from his legal retirement age; or
 - (3) Where a labor contract was concluded as a fixed-term labor contract on two consecutive occasions and the employee, in the absence of any of the circumstances stipulated in Article 39 and items (1) and (2) of Article 40 of this law, renews such contract.
- If an Employer fails to conclude a written labor contract with an employee within one (1) year from the date the employee commences work, they shall be deemed to have entered into an open-ended labor contract.

Labor Contract Law, *supra* note 4, art. 14.

62. See Leung, *supra* note 1, at 8; Kungang Li, *Practice and Problems: The Fixed-Term Employment Contract in China*, in REGULATION OF FIXED-TERM EMPLOYMENT CONTRACTS: A COMPARATIVE OVERVIEW 127, 136 (Roger Blanpain, Hiroya Nakakubo & Takashi Araki eds., 2010). The expansive use of fixed-term employment in China has led to a number of labor issues for Chinese workers. See Leung, *supra* note 1, at 6. First, the scarcity of employment and the abundance of human resources in China have discouraged workers from reporting substantial employment rights violations. Li, *supra*,

Additionally, the LCL clarified parts of the Labor Law of 1995 concerning termination procedures, severance, and the use of dispatch workers.⁶³ The LCL placed heightened regulations on how employers could terminate fixed-contract employees.⁶⁴ As opposed to the unilateral "at-will" approach of the Labor Law of 1995, the LCL limited employee termination to two situations: termination for cause and termination as part of a "mass-layoff."⁶⁵

Furthermore, the LCL attempted to maintain some of the benefits of the "iron rice bowl" system through the use of almost guaranteed severance. The LCL required employers to pay severance to an employee if a fixed contract expired and the employer failed to renew the contract, except where the employer had offered to renew employment under equal or better terms and the employee refused.⁶⁶ Further details are elicited in the LCL concerning when severance must be paid, but it is fair to say that in almost all foreseeable termination scenarios, severance would result.⁶⁷ The amount of severance to be paid is "set at one month's salary for each year of employment, up to a maximum of twelve years."⁶⁸

To ensure that employers could not circumvent the LCL by hiring workers through a third-party employment agency in order to avoid the use of direct employment contracts, the LCL also included provisions concerning the use of dispatch workers, or employees hired by a dispatch agency but contracted to

at 129. Fear that their employer would not renew their employment contract coupled with the expense of legal representation has led many workers to simply abide pervasive employee rights abuses. Leung, *supra* note 1, at 6. Second, without a promise of long-term employment, the Chinese workforce has become increasingly mobile. *Id.* at 5. This enhanced mobility and high employee transfer rate has made employers reluctant to invest in and train their workers, limiting their employees' professional growth. *Id.*

63. See KONTAKOS, *supra* note 53. Labor dispatch workers are temporary staff that are hired and officially contracted by a dispatch agency. They are then sent to various third-party "host employers" to work. Dexter Roberts, *Why China's Factories Are Turning to Temp Workers*, BLOOBERG BUSINESSWEEK (Mar. 8, 2012), <http://www.businessweek.com/articles/2012-03-08/why-chinas-factories-are-turning-to-temp-workers>.

64. See KONTAKOS, *supra* note 53, at 35.

65. *Id.*

66. *Id.*

67. See *id.* at 39.

68. *Id.*

work for a separate “host” employer.⁶⁹ First, to make sure foreign companies did not rely on foreign employment agencies, the LCL required all foreign company representatives to use dispatch agencies in China to hire any PRC nationals.⁷⁰ Second, the LCL encouraged employers to hire employees directly by describing dispatch employee positions as supplementary, replacement, or temporary.⁷¹ Third, the LCL required dispatch agencies and dispatch employees to use, at a minimum, two-year employment agreements.⁷² Procedures for termination of dispatch employees were also greatly limited,⁷³ and should an employee be terminated prior to the end of the employee’s contract, the dispatch agency was required to pay the employee minimum wage for the remaining term of the contract.⁷⁴

Finally, in an attempt to ease access to legal remedy, Article 30 of the LCL allowed all workers to “sue directly in court for unpaid wages without first going through [the previously required] labor arbitration process.”⁷⁵ Article 94 of the LCL also clarified that host employers were jointly and severally liable for violations performed by a contracting agency or dispatch employer.⁷⁶

While the Labor Contract Law of 2008 made substantial progress in terms of declaring certain contractual obligations and employee rights, the implementation and enforcement of such rights has not been as profound.⁷⁷ Although studies on the use

69. *See id.* at 37.

70. *Id.*; BRYAN CAVE LLP, CHINA AMENDS LABOR CONTRACT LAW TO ELIMINATE LABOR DISPATCH ABUSE 1 (2013), available at www.bryancave.com/bulletins/Detail.aspx?pub=4137.

71. Labor Contract Law, *supra* note 4, art. 66.

72. Labor Contract Law, *supra* note 4, art. 58.

73. *See* KONTAKOS, *supra* note 53, at 35.

74. *See id.* at 37; Labor Contract Law, *supra* note 4, art. 93.

75. Xiaoying Li, *How Does China’s New Labor Contract Law Affect Floating Workers?* 7 (Nat’l Bureau of Econ. Research, Working Paper No. 19254, 2011), available at http://www.law.harvard.edu/programs/lwp/papers/How%20Does%20China%27s%20New%20Labour%20Contract%20Law%20Affect%20Floating%20Workers%20in%20China%20_Xiaoying%20Li_.pdf.

76. Labor Contract Law, *supra* note 4, art. 94.

77. *See* JEFFREY BECKER & MANFRED ELFSTROM, THE IMPACT OF CHINA’S LABOR CONTRACT LAW ON WORKERS (2010), available at <http://www.law.harvard.edu/programs/lwp/papers/How%20Does%20China’s%20Labor%20Contract%20Law%20Impact%20Workers.pdf>.

of labor contracts after the implementation of the LCL found an increased number of employees holding some form of a labor contract,⁷⁸ these contracts are still not as universal as the law demands and often omit provisions required under the LCL.⁷⁹ Furthermore, interviewed migrant employees have reported that employers often utilize hiring tricks to circumvent the requirements of the LCL.⁸⁰ Specifically, employers have used “English-language only contracts, blank or covered-over contracts,” divided contracts with half pay in each, and six-day week assignments at 6.7 hours per day in an attempt to avoid potential overtime, wage discrepancies, and other violations of worker’s rights under the LCL.⁸¹ Dispatch workers have fared even worse as their suggested “supplemental” use has become increasingly popular. The LCL’s ambiguous language describing the use of dispatch employees and the dire worldwide economic climate during the LCL’s implementation led to excessive reliance on dispatch workers.⁸² Employers have cited poor economic conditions as justification for layoffs in violation of the LCL and have fired employees simply to rehire them under less favorable contract provisions.⁸³ Despite the enhanced regulations of the LCL, years after its implementation the dispatch system has become “abnormally prosperous,”⁸⁴ and dispatch

20New%20Labour%20Contract%20Law%20Affect%20Floating%20Workers%20in%20China%20_Xiaoying%20Li_.pdf.

78. *See id.* at 7; Li, *supra* note 75, at 12-16.

79. BECKER & ELFSTROM, *supra* note 77, at 7. Only 60% of surveyed workers had a contract at the time of their interview, and many interviewees complained that the contracts they did have lacked certain required provisions. *Id.*

80. *See id.* at 10.

81. *Id.* A study conducted by China’s Ministry of Public Security reported that in 2005 alone, approximately 87,000 public protests occurred, many of them involving migrant workers, resulting from “unpaid wages, lost land rights and working conditions.” KONTAKOS, *supra* note 53, at 34.

82. *Rights of 60 Million Labor Dispatch Workers Hard to Protect*, JINAN DAILY, Feb. 28, 2011, available at www.cntranslations.org/file_download/140.

83. *Id.*

84. *Id.* As of 2010, data obtained by the All-China Federation of Trade Unions showed that the number of domestic labor dispatch workers had reached sixty million, approximately 20% of all domestic workers in China. *Id.*

employees have consistently received diminished wages and less-protected health and safety rights.⁸⁵

Host employers often rely on workers not understanding the full breadth of their statutory rights under the LCL and use the dispatch agency as a buffer to excuse illegal actions such as docking wages, benefits, and severance pay.⁸⁶ Some employers have even begun to exploit potential employees by charging “security deposits” to begin work or charging fees for incidents of company “insubordination.”⁸⁷ Additionally, China’s new-found presence within the international economy spurred a sudden burst of foreign investment and industrial growth.⁸⁸ Tied to this foreign investment in China is the challenge of international competition, making the prospect of skirting heightened labor costs appealing to both state- and foreign-

85. See Yu, *supra* note 5; Jennifer Cheung, *Workers at State-Owned Oil Company Step Up Demand for Equal Pay for Equal Work*, CHINA LABOUR BULL. (Jan. 21, 2013), <http://www.clb.org.hk/en/content/workers-state-owned-oil-company-step-demand-equal-pay-equal-work>. One study of 600 auxiliary workers at a state-owned oil company in Shaanxi, conducted during a protest, asserted that their monthly pay was only 2000 yuan, compared with the monthly pay of 5000 yuan for the few remaining formal employees. *Id.*

86. See *Rights of 60 Million Labor Dispatch Workers Hard to Protect*, *supra* note 82; BECKER & ELFSTROM, *supra* note 77, at 16. Although Article 94 of the LCL holds host employers jointly liable for the violations of the LCL committed by contracted dispatch agencies, the true appeal for host employers lies simply in remaining one step removed from the rights employees are guaranteed by law. See Roberts, *supra* note 63. Host employers are not directly responsible for paying dispatch workers’ social security installments, workers compensation, or even severance pay. Erin Wigger & Peter Schnall, *The Role of Dispatched Labor in the Exploitation of Chinese Workers*, UNHEALTHY WORK (Aug. 18, 2012), <http://unhealthyworkblog.blogspot.com/2012/08/the-role-of-dispatched-labor-in.html>. Rather, to access these benefits, dispatch workers must first reach out to the dispatch agency that hired them, with whom many have had little or no contact with since they began their employment. CHINA LABOR WATCH, BEYOND FOXCONN: DEPLORABLE WORKING CONDITIONS CHARACTERIZE APPLE’S ENTIRE SUPPLY CHAIN 17 (2012). Furthermore, workers are often completely unaware of the option of legal remedy against either the dispatch agency or their host employer and simply accept their losses and once again begin the search for work. *Id.* (“Most workers do not know where their dispatch company is located or even the company’s name. With little understanding of the law, most workers will just think they have lost their job and will not go through the trouble of demanding their rights.”).

87. *Id.*

88. See BRANDT & RAWSKI, *supra* note 2, at 12-13.

owned companies. Too often these companies found one of the primary means of cutting labor costs was the abuse of dispatch workers, an issue China realized was in dire need of resolution.⁸⁹

d. Addressing the “Dispatch” Issue: The Amended Labor Contract Law of 2013

In response to the increasing reliance on and abuse of dispatch workers, the PRC amended four sections of the 2008 LCL with the Amended PRC Labor Contract Law of 2013 (“2013 Amendments”).⁹⁰ The essence of these amendments was a push by the Chinese government to make direct hiring the primary means of employment in China.⁹¹ The four 2013 Amendments came into effect on July 1, 2013, and address principle concerns with the hope to both curtail the rampant abuse of the dispatch system and clarify when hiring dispatch workers is appropriate.

First, the 2013 Amendments modify Article 57 of the LCL, specifically to require labor dispatch agencies to have an “appropriate fixed place of business” and a “minimum registered capital” of 2,000,000 RMB.⁹² The basic thrust of this change makes bringing suit against a dispatch agency easier to accomplish. With a fixed business location and substantial registered capital, dispatch agencies will have more funds for workers to collect should their rights be violated.⁹³ Second, Article 63’s requirement of equal pay for equal work was enhanced to require host companies, in addition to dispatch agencies, to implement the same payment allocation for both dispatch and direct-hire employees.⁹⁴ Third, Article 66 was revised to state “labor dispatch employment can ‘only’ be adopted for temporary, auxilia-

89. See *id.* at 13; see *Rights of 60 Million Labor Dispatch Workers Hard to Protect*, *supra* note 82.

90. See Yu, *supra* note 5.

91. *Id.*

92. BRYAN CAVE LLP, *supra* note 70, at 2.

93. Victoria Ding & Ron Cai, *Amendments to the Labor Contract Law on Labor Dispatch Services Take Effect July 1, 2013*, DAVIS WRIGHT TREMAINE LLP (Jan. 31, 2013), <http://www.dwt.com/Amendments-to-the-Labor-Contract-Law-on-Labor-Dispatch-Services-Take-Effect-July-1-2013-01-31-2013/>.

94. BRYAN CAVE LLP, *supra* note 70, at 2.

ry, or substitute positions.”⁹⁵ Furthermore, the terms were defined as follows:

Temporary: positions that will exist for no more than six months;

Auxiliary: positions that are not the core-business-related positions in the company. Most government labor officials take the view that non-core-business-related positions comprise cafeteria workers, security guards, cleaning staff, receptionists etc.;

Substitute: positions that must be temporarily filled when an employee is on full-time study or long-term leave (e.g., maternity).⁹⁶

Article 66 was also revised to implement a “to-be-determined” maximum percentage of dispatch workers in relation to all workers that could be hired by an employer.⁹⁷ Finally, Article 92 was amended to require businesses caught engaging in labor dispatch services without a license to not only forfeit illegal gains, but also to face fines of up to five times their illegal gains.⁹⁸ Article 92 also increased the fine to 10,000 RMB per worker for labor dispatch agencies and host employers that violate the LCL and do not fix the problem within a predetermined period.⁹⁹

Clearly, if properly enforced, the 2013 Amendments to the LCL would make the use of labor dispatch workers less appealing for host employers.¹⁰⁰ The dramatic change in required registered capital, from 500,000 RMB to 2 million RMB, will drive many of the smaller enterprises out of business and, in turn, drive up costs for host employers still using the dispatch system.¹⁰¹ Additionally, the restriction to “temporary, auxiliary, or substitute” positions will likely prevent many of the positions

95. *Id.*

96. WINSTON & STRAWN LLP, AMENDMENT TO PRC LABOR CONTRACT LAW INCLUDES SIGNIFICANT CHANGES REGARDING DISPATCH ARRANGEMENTS (2013), available at <http://cdn2.winston.com/images/content/1/4/v2/1416.pdf>.

97. *See* BRYAN CAVE LLP, *supra* note 70, at 2.

98. *Id.*

99. *Id.*

100. *See* Ding & Cai, *supra* note 93.

101. *See id.*

previously held by dispatch workers from legally qualifying as appropriate for dispatch employment.¹⁰²

Furthermore, in order to clarify any ambiguity surrounding the adjustments made to Article 66, on August 7, 2013, the Ministry of Human Resources and Social Security issued a request for public comments on a draft adjustment of the labor dispatch section of the 2013 Amendments.¹⁰³ These Draft Labor Dispatch Regulations (“Draft Regulations”), while not yet enacted as law, would further restrict the use of dispatch workers.¹⁰⁴ Primarily, the Draft Regulations suggest two distinct changes to the LCL as amended by the 2013 Amendments: First, it would require host employers to clearly lay out what positions within their office qualify as auxiliary positions.¹⁰⁵ This list of auxiliary positions would be reviewable by the host employer’s labor union or employee representative and publicized to all employees.¹⁰⁶ Additionally, the maximum amount of auxiliary positions would be set at 10% of the combined direct-hire employees and current dispatched auxiliary workers, not including any temporary or substitute positions.¹⁰⁷ Second, the Draft Regulations clarify a host employer’s status as equally liable as the dispatch-employer.¹⁰⁸ Similar to Article 94, this draft regulation serves to eliminate the ability of host employers to avoid liability for LCL violations committed by contracted dispatch agencies. Although not yet enacted as law, when viewed as a whole, the Draft Regulations suggest that China is continuing its legislative push to eliminate reliance on dispatch employees by greatly limiting their legitimate use.

e. The Persistent Problem of Enforcement

Although labor rights of Chinese workers have increased dramatically through the use of the Labor Law of 1995, the La-

102. *See id.*

103. Elizabeth Cole, Mark Weeks & Yumiko Ohta, *China Labor Contract Law Amendments on Dispatch Employees Come into Effect—Implementation Details Still Uncertain*, COVENTUS LAW (August 27, 2013), <http://www.conventuslaw.com/china-labor-contract-law-amendments-on-dispatch-employees-come-into-effect-implementation-details-still-uncertain/>.

104. Wilson, *supra* note 6.

105. *See id.*

106. *Id.*

107. *Id.*

108. *See id.*

bor Contract Law of 2008, the 2013 Amendments to the Labor Contract Law, and potentially the 2013 Draft Regulations, a persistent problem for Chinese laborers is the poor enforcement of the law.¹⁰⁹ As of 2010, three years after the approval of the LCL, one study found that out of employees interviewed, only “sixty percent . . . had a contract at the time of their interview; [and that] 53 percent . . . had contracts before the law went into effect.”¹¹⁰ As addressed above, many of these individuals felt their contracts omitted key provisions that were required by law.¹¹¹ Similarly, dispatch workers, who are most affected by the ineffective execution of the LCL, have even begun to protest the lack of enforcement of Article 63’s equal-pay-for-equal work requirement.¹¹² Despite the fact that many of these workers perform the same function as direct-hire employees, dispatch workers receive less than half the compensation.¹¹³ Arguably, the primary impediment to Chinese workers, especially dispatch workers, is lack of access to the rights granted to them under Chinese law. Therefore, simply amending the current labor statutes to include further regulations and expanded “rights” for workers will not solve the problem. Rather, through the use of an attorney fee-shifting program for LCL violations and an enhanced notification system of legal rights and remedies, China can give bite to its labor legislation and provide workers with the rights their nation has promised them.

II. WHAT IS AN ATTORNEY FEE-SHIFTING STATUTE?

The basis of an attorney fee-shifting system is that the loser in a bout of litigation is required to pay for the winning party’s attorney fees.¹¹⁴ The concept is utilized in various fashions across the world and is rooted in two main principles: 1) that defeat in litigation justifies the imposition of legal fees on the losing party, and 2) that the winner in litigation deserves full

109. Liu Xuetan, counsel to the auxiliary workers, has stated, “Although the law prohibits unequal pay for equal work, when it comes to enforcement, that’s a very different story.” Cheung, *supra* note 85.

110. BECKER & ELFSTROM, *supra* note 77, at 7.

111. *Id.*

112. See Cheung, *supra* note 85.

113. *Id.*

114. See Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L. REV. 651 (1982).

compensation, not detracted by attorney fees, to be made fully whole.¹¹⁵ The policy incentives inherent to the idea of fee shifting concern the extensive financial burden created by litigation. The imposition of attorney fees upon a losing party acts as a great deterrent to frivolous lawsuits,¹¹⁶ eases the backlog of cases for the courts, and makes headway toward fully compensating the winning litigant.¹¹⁷

a. The Development of Attorney Fee Shifting in America

Unlike a majority of states, the United States legal system has relied primarily on a system of up-front payment where each party is responsible for their own litigation costs regardless of the outcome.¹¹⁸ This American rule seems to have grown not out of policy incentives but rather through a combination of early distrust of the legal profession and legislative refusal to address the issue.¹¹⁹ Scholars have argued that a great disdain for attorneys, who were seen as an “unnecessary luxury,” developed within colonial America and continued into the early United States.¹²⁰ This level of distrust and hostility aimed at the legal profession made the concept of court-ordered attorney fees an unpopular subject.¹²¹ Furthermore, after the Revolutionary War, as American courts began to experiment with the concept of attorney fee shifting, the U.S. Supreme Court remained persistently hostile to acceptance of such a system. In both *Arcambel v. Wiseman* and *Day v. Wood-worth*, some of the earliest Supreme Court cases where attorney fee shifting was raised, the Court refused to legitimize the practice.¹²² Rather, the Court emphasized the “general practice” of American juris-

115. David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule,”* 15 IND. INT'L & COMP. L. REV. 583, 589 (2005).

116. See Rowe, *supra* note 114.

117. See Comment, *Court Awarded Attorney Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 637-38 (1974).

118. See Root, *supra* note 115, at 585.

119. See *Court Awarded Attorney Fees and Equal Access to the Courts*, *supra* note 117, at 640.

120. *Id.*

121. *Id.*

122. *Arcambel v. Wiseman*, 3 U.S. 306, 306 (1796); *Day v. Wood-worth*, 54 U.S. 363 (1851) (identifying the early practice of the United States Supreme Court to refuse requests for attorney fees to even a successful litigant).

prudence to deny requests for attorney fees and passed the burden of such determinations to the legislature.¹²³

However, as American jurisprudence evolved, the strict adherence to the American rule waived, opening up six main categories of exceptions to the ban on attorney fee shifting.¹²⁴ Generally, American courts have found exceptions to the ban on attorney fee shifting in cases involving 1) contracts, 2) bad faith, 3) the common fund doctrine, 4) the substantial benefit doctrine, 5) contempt, and 6) fee-shifting statutes.¹²⁵

One specific fee-shifting statute that has become extremely prevalent in the United States is the Civil Rights Attorney Fees Award Act of 1976.¹²⁶ Under the Civil Rights Attorney Fees Award Act, otherwise known as 42 U.S.C. § 1988, a “court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.”¹²⁷ The justification for this divergence from the traditional American system is based on policy concerns prioritizing the assurance of adequate “access to the judicial process for persons with civil rights grievances.”¹²⁸ In an effort to expand recourse to the law for all citizens who have suffered a violation of their civil rights, this exception to the American rule encourages meritorious lawsuits by eliminating both the expense of legal counsel and the chilling effect of attorney fees among potential plaintiffs.¹²⁹

b. How Attorney Fee Shifting Works under 42 U.S.C. § 1988: The “Prevailing Party”

The first issue to address in determining appropriate attorney fees is who can actually demand such costs. Under 42 U.S.C. § 1988, reasonable attorney fees are awarded to the “prevailing party” of civil rights litigation. This category explic-

123. See *Arcambel*, 3 U.S. at 306; see also *Court Awarded Attorney Fees and Equal Access to the Courts*, *supra* note 117, at 640.

124. See *Court Awarded Attorney Fees and Equal Access to the Courts*, *supra* note 117, at 640.

125. See *id.*

126. 42 U.S.C.A. § 1988 (West 2000).

127. *Id.*

128. *Cobb v. Miller*, 818 F.2d 1227, 1233 (5th Cir. 1987).

129. See *Kaimowitz v. Howard*, 547 F. Supp. 1345 (E.D. Mich. 1982); *Hutchinson v. Staton*, 994 F.2d 1076 (4th Cir. 1993).

itly excludes the United States but allows plaintiffs, and in some cases defendants, to retain reasonable attorney fees when they succeed in litigation. Unless the parties have explicitly agreed to an alternate payment system, in cases where a settlement is reached, courts have ruled that a plaintiff is automatically deemed the prevailing party.¹³⁰ However, prevailing defendants in civil rights actions are not always guaranteed attorney fees, even if they prevail in an action brought against them.¹³¹ Unlike plaintiff's attorneys, who are entitled to attorney fees unless the unique circumstances of the case would render such fees unjust,¹³² defendants are entitled to attorney fees only where the plaintiff's underlying claim is frivolous, unreasonable, or groundless.¹³³

c. Reasonable Attorney Fees

In regards to the calculation of "reasonable" attorney fees, great discretion is granted to the district court in its determination of fees, which is only subject to review for abuse of judicial discretion.¹³⁴ Judges may award whatever reasonable fees they deem necessary, but are free to limit compensation or grant it sparingly if they find the fee claims exorbitant or the time allegedly devoted to the litigation unreasonably high.¹³⁵ A reasonable fee is described as one "sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case,"¹³⁶ but not one that simply acts as a "form of economic relief to improve the financial lot of attorneys."¹³⁷

130. See *Davis v. Jackson*, 776 F. Supp. 2d 1314, 1317 (M.D. Fla. 2011) ("Court[s] [must] resist the . . . temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.") (citation omitted); *Maher v. Gagne*, 448 U.S. 122, 129 (1980); 42 U.S.C.A. § 1988 (West 2000).

131. See *Allen v. City of Los Angeles*, 66 F.3d 1052, 1058 (9th Cir. 1995).

132. *United States v. Mississippi*, 921 F.2d 604, 609 (5th Cir. 1991).

133. *Id.*

134. *Northington v. Marin*, 102 F.3d 1564, 1570 (10th Cir. 1996); see *Muscare v. Quinn*, 614 F.2d 577, 579-80 (7th Cir. 1980).

135. *Gagne*, 448 U.S. at 129.

136. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552 (2010).

137. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565 (1986).

Currently, the Supreme Court uses the two-step lodestar¹³⁸ method in calculating attorney fees.¹³⁹ First, the court will multiply the reported hours an attorney has worked by the court-determined hourly rate to generate the “lodestar amount.” Second, the court will adjust the lodestar amount based on any special circumstances of the case at bar.¹⁴⁰ The determination of a reasonable hourly rate is often based on the prevailing market rate for an attorney of similar skill and experience within the relevant legal community, which is generally the forum in which the court sits.¹⁴¹ However, the Supreme Court has also authorized additional factors to consider in the determination of a reasonable hourly rate.¹⁴² The twelve factors that were developed in *Johnson v. Georgia Highway Express, Inc.* have been approved by both Congress and the Supreme Court and are as follows:

- (1) the time and labor required to litigate the suit;
- (2) the novelty and difficulty of the questions presented by the lawsuit;
- (3) the skill required [to] properly . . . perform the legal service;
- (4) the preclusion of other employment opportunities for the attorney due to the attorney’s acceptance of the case;
- (5) the customary fee for such services;
- (6) whether the fee is fixed or contingent;
- (7) time limitations imposed by the client or the circumstances;
- (8) the amount in controversy involved and the results obtained;
- (9) the experience, reputation, and ability of the attorney;
- (10) the “undesirability” of the case;
- (11) the nature and length of the attorney’s profes-

138. *Lodestar Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/lodestar> (last visited Jan. 18, 2014). A lodestar is defined as “something or someone that leads or guides a person or group of people.” The two-prong lodestar analysis was first utilized by the U.S. Supreme Court in *Hensley v. Eckerhart*. *Hensley v. Eckerhart*, 461 U.S. 424, 433–34 (1983).

139. *Perdue*, 559 U.S. at 551.

140. Brooks Magratten, Robert D. Phillips Jr., Thomas Connolly, Renee Feldman & Isaac Mamaysky, *Trial Practice: Calculating Attorney Fee Awards*, GPSOLO, Mar. 2010, available at http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/magratten_phillips_connolly_feldman_mamaysky.html.

141. *See id.*; see *Blum v. Stenson*, 465 U.S. 886, 895–96 (1984).

142. *See Hensley*, 461 U.S. at 434.

sional relationship with the client; and (12) awards in similar cases.¹⁴³

As to the second prong of the lodestar calculation, in 2010, the Supreme Court greatly reduced the possibility for adjustments to the reasonable fee, permitting such post-lodestar changes only in “extraordinary circumstances.”¹⁴⁴ In *Perdue v. Kenny*, the Court held that while the lodestar method was “never intended to be conclusive in all circumstances . . . there [remains] a strong presumption that the lodestar figure is reasonable.”¹⁴⁵ This presumption is almost universally upheld in actions arguing for a reduction of the lodestar amounts.¹⁴⁶ Similarly, upward adjustments occur rarely and only when payment of fees has been exceptionally delayed or where the attorney’s work has been outstanding in the face of expensive and protracted litigation.¹⁴⁷ Therefore, it is the twelve *Johnson* factors that weigh most heavily in the final determination of reasonable attorney fees.¹⁴⁸

143. See *Daly v. Hill*, 790 F.2d 1071, 1075 (4th Cir. 1986); *Trimper v. City of Norfolk*, 58 F.3d 68, 73 (1995); see also *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717–20 (5th Cir. 1974). The twelve factors are commonly referred to as the *Johnson* factors due to their development in *Johnson v. Georgia Highway Express, Inc.* Hill, 790 F.2d at 1077. Although in the *Perdue* dictum, the Supreme Court criticized the use of the *Johnson* factors, the Court ruled specifically on the strong presumption of reasonableness developed in determining the initial lodestar reasonable rate and “did not expressly state that a court should not use the *Johnson* factors to determine [this initial] lodestar figure.” *Hudson v. Pittsylvania County*, No. 4:11CV00043, 2013 WL 4520023, at *2–3 (W.D. Va. Aug. 26, 2013). Furthermore, after *Perdue*, federal courts have continued to utilize the *Johnson* factors in developing an initial reasonable fee under the lodestar method. See, e.g., *id.*; *Jackson v. Estelle’s Place, LLC*, 391 F. App’x. 239, 243 (4th Cir. 2010); *McClain v. Lufkin Indus., Inc.*, 649 F.3d 374, 380–81 (5th Cir. 2011); *Trustees of Local 531 Pension Fund v. Flexwrap Corp.*, 818 F. Supp. 2d 585, 590–91 (E.D.N.Y. 2011).

144. Lyle Denniston, *Analysis: The Lodestar as Gold Standard*, SCOTUSBLOG (Apr. 21, 2010, 10:59 AM), <http://www.scotusblog.com/2010/04/analysis-the-lodestar-as-gold-standard/>.

145. See *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553–54 (2010).

146. See *Magratten et al.*, *supra* note 140.

147. See *id.*

148. See *Denniston*, *supra* note 144.

d. Problems with the Current Attorney Fee-Shifting Rule

Although providing legal recourse to the poor and most vulnerable populations is a justifiable pursuit, the Civil Rights Attorney Fees Award Act of 1976 has led to growing problems for municipalities and their taxpayers within the United States.¹⁴⁹ The most basic of these issues is the granting of huge attorney fees in conjunction with modest jury awards to plaintiffs.¹⁵⁰ Litigation is a costly endeavor and can often drag on for years at a time.¹⁵¹ Attorney fees for civil rights cases vary, but often range from US\$200 to US\$500 per hour.¹⁵² These high hourly rates, combined with the heavy presumption against post-lodestar adjustments, make the initiation and protraction of litigation more appealing than securing justice for one's client. Dragging litigation on for years with extensive statistical analysis, expert research, broad discovery, and numerous attorneys¹⁵³ assigned to a case can lead to vastly disproportionate awards of attorney fees when compared to plaintiff awards.¹⁵⁴ Additionally, plaintiffs' attorneys are also often awarded the same "reasonable fees" in cases where the parties reach an agreeable settle-

149. See Katherine Macfarlane, *In Shira Scheindlin's Courtroom, Stop-and-Frisk Lawyers Are the Only Winners*, NEW YORK OBSERVER (Nov. 13, 2013, 7:00 AM), <http://observer.com/2013/11/stop-and-frisk-lawyers/>.

150. See *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986); see also Max McCann, *Police Misconduct Litigation: Keeping an Open Mind*, OVERLAWYERED (Sep. 23, 2013), <http://overlawyered.com/police-abuse-litigation-incentives-keeping-open-mind/>.

151. See Pacific Research Institute, *Study Claims U.S. 'Tort Tax' Tops \$9,800 Per Family*, INS. J. (Mar. 3, 2007), <http://www.insurancejournal.com/news/national/2007/03/27/78137.htm>. The study notes that America's legal system imposes an economic cost of more than US\$865 billion every year and leads to extensive defensive costs made to limit potential legal liability. *Id.*

152. See, e.g., *Doe v. Bridgeport Police Dept.*, 468 F. Supp. 2d 333, 339 (D. Conn. 2006); *Duckworth v. Whisenant*, 97 F.3d 1393, 1398–99 (11th Cir. 1996); *Winston v. O'Brien*, 951 F. Supp. 2d 1004, 1009 (N.D. Ill. 2013).

153. See *Tucker v. City of New York*, 704 F. Supp. 2d 347, 355 (S.D.N.Y. 2010).

154. See, e.g., Macfarlane, *supra* note 149 (focusing on *Daniels v. City of New York*, where, after a settlement between the parties, plaintiffs' counsels were awarded over US\$3.5 million in fees and costs while the ten named plaintiffs received only US\$167,000).

ment,¹⁵⁵ which further encourages amassing clientele rather than diligent lawyering. The combination of high hourly rates, less merit-based awards, and a relaxed standard of “prevailing parties” for plaintiffs, has created a genuine market of civil rights litigation.¹⁵⁶ However, although problems with fee shifting must be acknowledged, the practice has ultimately proved a crucial tool in providing indigent claimants access to legal remedy for violations of their civil rights.¹⁵⁷

III. APPLICATION TO CHINESE LABOR LAW

a. Fee Shifting

Despite the problems that the United States has faced in its use of fee-shifting statutes, it is exactly this type of litigation scheme that Chinese workers desperately need to gain access to their employment rights.¹⁵⁸ The current crisis facing Chinese laborers, specifically dispatch laborers, is not a lack of statutory authority mandating specific employment practices, but rather a complete lack of knowledge and government enforcement of these rights. However, the implementation of an attorney-fee shifting program, similar to the United States’ Civil Rights Attorney Fee Act of 1976, can create an appealing market for employment rights cases in China that will incentivize attorneys to actively seek out laborers in need of assistance. Through the use of attorney fees as a supplementary financial incentive, China can modify ordinary market conditions surrounding LCL violation litigation and make it profitable to

155. See *Prison Legal News v. Schwarzenegger*, 608 F.3d 446, 451 (9th Cir. 2010); FED. R. CIV. P. 68; *Marek v. Chesny*, 473 U.S. 1, 9–11 (1985) (noting that in the context of Section 1983 civil rights actions, settlement offers made pursuant to Federal Rule of Civil Procedure 68 include attorney fees within its definition of costs).

156. “In estimating the significance of any rise in civil suits against police officers, it’s worth keeping in mind that this is not just the pursuit of social justice. It’s an industry.” See McCann, *supra* note 150.

157. See Md. Access to Justice Comm’n, *Fee-Shifting to Promote the Public Interest in Maryland*, 42 U. BALT. L.F. 38, 47–50 (2011).

158. See *id.* The Maryland Access to Justice Commission argues that the use of attorney fee shifting within the realm of U.S. civil rights cases has generated a beneficial market shaped around enhanced financial incentives for attorneys. *Id.*

connect individuals whose rights have been violated with groups who can adequately fight for their compensation.¹⁵⁹

China has already successfully tested the use of attorney fee shifting in other legal forums.¹⁶⁰ In 1993, China began allowing prevailing parties under the Law Against Unfair Competition to seek out reasonable expenses associated with the investigation and litigation of their claims.¹⁶¹ Similarly, in 2002, China's Supreme People's Court specifically acknowledged the use of attorney fee shifting in cases of trademark infringement and other actions of copyright litigation.¹⁶² Additionally, despite a lack of statutory authorization, some Chinese courts have even implemented a fee-shifting approach on an ad hoc basis for successful plaintiffs in consumer and personal injury cases.¹⁶³ Fee shifting in these areas can arguably suggest a rising dissatisfaction with the current payment system, in which each party pays their own attorney fees and many successful plaintiffs lose large portions of their awards to attorney commissions. Therefore implementation of this type of fee-shifting system would not be completely unprecedented, and would likely be well received by both laborers and plaintiff counsels.

Currently, Chinese labor attorneys have few incentives to represent poor workers in employment rights cases. Migrant workers and dispatch workers on average earn only 1290 RMB per year, while the average commission for attorneys can range from 500 to 5000 RMB.¹⁶⁴ This enormous investment in legal counsel greatly discourages employees from bringing small claims in the first place, and the small awards for unpaid wages or overtime rarely cover the attorney commissions.¹⁶⁵ For the claims pursued, cultural biases often lead Chinese law firms to avoid representing migrant workers, in particular, because they fear successful claimants will refuse to share any damage

159. *Id.* at 38–39.

160. See Donald C. Clarke, *The Private Attorney-General in China: Potential and Pitfalls*, 8 WASH. U. GLOBAL STUD. L. REV. 241, 253 (2009).

161. *See id.*

162. *See id.*

163. *See id.*

164. *See* Liang, *supra* note 9.

165. *See id.*

award granted.¹⁶⁶ Therefore, due to the small payout and possibility of lack of payment, Chinese law firms lack the financial incentive to seek out and diligently assist workers litigate LCL claims.¹⁶⁷

However, through the use of a modified attorney fee-shifting program, China can incentivize attorneys to find and accept employee rights cases, as well as litigate them to the best of their abilities. By adopting the American system of “reasonable hourly rates,” utilizing the twelve *Johnson* factors to determine reasonableness, and adopting the relaxed standard of “prevailing party,” the financial incentive to represent employee rights claims would dramatically increase.¹⁶⁸ Similar to the plaintiff’s attorneys in civil rights cases throughout the United States, the huge potential payout for attorneys would make litigating even minor employment rights claims extremely appealing.¹⁶⁹ Therefore, employees who previously lacked the funds necessary to obtain legal counsel would have access at no personal cost.

However, the vast benefits of attorney fee shifting should not overshadow the problem of excessive attorney fees in the face of nominal litigant awards. As addressed in Part II(d), the combination of high hourly rates, less merit-based enhancements or reductions, and a relaxed prevailing party standard has led to cases with attorney fees completely disproportionate from the plaintiff’s actual award.¹⁷⁰ To remedy this issue, China must maintain the reasonableness requirements embodied in the *Johnson* factors, implement statutorily imposed maximum and minimum hourly rates, and place a heavier emphasis on merit-based enhancements and reductions. The use of the *Johnson*

166. See Yin Lily Zheng, Note, *It’s Not What Is on Paper, but What Is in Practice: China’s New Labor Contract Law and the Enforcement Problem*, 8 WASH. U. GLOBAL STUD. L. REV. 595, 606 (2009).

167. See *id.*

168. E.g., Macfarlane, *supra* note 149. In the context of American civil rights cases, Macfarlane details the significant financial incentive created for attorneys to litigate cases when attorney fee shifting, reasonable hourly rates, the twelve *Johnson* factors, and the relaxed standard of prevailing party have been implemented.

169. See McCann, *supra* note 150 (establishing the significant financial incentives for civil rights attorneys to bring “marginal, not just high-value” cases to court).

170. See *Riverside*, 477 U.S. at 561; see McCann, *supra* note 150.

factors, when combined with set maximum and minimum reasonable rates, will greatly temper the degree of attorney-fee liability employers may face in employment rights cases, but the emphasis on merit-based enhancements will balance this slight diminished incentive with a powerful motivation to provide high quality legal representation.

Local government organizations are the best entities to set the appropriate range of attorney fees in determining maximum and minimum hourly rates.¹⁷¹ Local governments can best balance the strong nationwide desire to provide access to legal remedy for employees with their own liability as an employer, along with the liability of private organizations in their locale. This balance of policy incentives will lead to an equitable range of reasonable rates and will avoid the burdensome expenses seen in some civil rights cases in the United States.¹⁷²

Additionally, the dramatic limitations on American post-lodestar adjustments should not be implemented in China's attorney fee-shifting legislation. With the limits on reasonable attorney fees in place, lawyers will still hold a strong financial incentive to accept and litigate employment rights cases, but lack an incentive to provide effective and efficient lawyering.

171. China is divided into twenty-two provinces, five "autonomous" regions, and four municipalities that are directly controlled by the Chinese central government. The provincial governments, the people's governments of the autonomous regions, and the municipal governments under the Central Government, which exercise authority over these geographic sectors of China, are responsible for the implementation of local laws and regulations. *China's Political System: The Local Administrative System*, CHINA.ORG, <http://www.china.org.cn/english/Political/28842.htm> (last visited Apr. 20, 2014). It is this level of government that would be best suited to address necessary limitations on judicial discretion in determining appropriate attorney fees.

172. See, e.g., David D. Dudley & Frances Reynolds Colbert, *Determining Reasonable Attorney Fees*, 85 WIS. LAW. 10 (2012), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=85&Issue=10&ArticleID=10217>. In response to cases involving violations of consumer protection laws in which attorney fees far exceeded the awarded compensatory damages, Wisconsin enacted statute 814.045, which limits reasonable attorney fees to a maximum of three times the amount of compensatory damages awarded. This set limit is overcome only in rare circumstances where the court determines greater amounts are reasonable. *Id.*

Since a majority of cases in all actions result in settlement,¹⁷³ any system that refuses to award attorney fees in settled cases will eliminate the incentive for attorneys to work. Therefore, a better approach toward increasing the quality of advocacy provided to Chinese laborers is to give courts greater discretion in determining both reductions and enhancements to the final lodestar award. Rather than adopt the “extraordinary circumstances” requirement of *Perdue*,¹⁷⁴ China should craft local legislation that can incentivize good lawyering without leading to ridiculous discrepancies between plaintiff awards and attorney fees. The appropriate factors to determine post-lodestar adjustments, as well as the limitations on such adjustments, are again best suited for local Chinese governing bodies who can properly balance the need for enforcement in employee rights claims with the resulting economic and municipal liability concerns associated with such reforms. Furthermore, these organizations are best suited to quickly realize if the increased judicial discretion in awarding post-lodestar fee enhancements needs further limitation to achieve its purpose of creating a financial incentive for attorneys, without granting excessive and undeserved fee awards.

b. Enhanced Notification

The modified fee-shifting system proposed above will provide a necessary tool for Chinese laborers to access their employment rights under the Labor Contract Law of 2008 and the subsequent amendments. However, despite the strong financial motivation this new market of LCL claims will provide for attorneys, the system will not succeed without employees actually understanding their labor and employment rights.

A majority of Chinese workers learn of their employment rights through conventional media sources, such as television or the Internet. However, older, poorer, and less educated workers have extremely limited access to these resources.¹⁷⁵ The resulting effect is that the most vulnerable populations of

173. See Jonathan D. Glater, *Study Finds Settling Is Better than Going to Trial*, N.Y. TIMES, Aug. 8, 2008, at C1 (addressing the appeal of settlement and estimating that 80–92% of cases never actually reach the trial phase of litigation).

174. See *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 556 (2010).

175. BECKER & ELFSTROM, *supra* note 77, at 16.

workers, migrant and dispatch laborers, are the least likely to obtain reliable information concerning their rights as workers.¹⁷⁶ Therefore, to compliment the fee-shifting model and secure knowledge of employment rights, additional regulations mandating notification of LCL rights in the workplace must be implemented. As seen in many federal and state statutes in the United States, poster notifications are used to ensure workers obtain knowledge of some of their most basic rights.¹⁷⁷ For example, under 29 C.F.R. § 1903.2, employers in the United States are required to display posters developed by the Occupational Safety and Health Administration.¹⁷⁸ The posters are required to be placed in “a conspicuous place where workers can see it” and specifically inform workers of their rights under the Occupational Safety and Health Act.¹⁷⁹ Similarly, under New York Labor Law § 661, New York State employers are required to post displays informing workers of the current New York State minimum wage, overtime rates, and other wage requirements in multiple languages.¹⁸⁰

China should adopt a similar poster-requirement system that notifies workers of basic, fundamental employment rights, such as the requirements of fixed and open-ended contracts, overtime pay, and severance pay. The poster requirement must mandate placement in a conspicuous location where it can easily be seen by workers and should be written in both Simplified and Traditional Chinese characters¹⁸¹ to ensure that a majority of workers have notice of their employment rights. While em-

176. *See id.* at 8.

177. *See, e.g., Poster Page: Workplace Poster Requirements for Small Businesses and Other Employers*, U.S. DEP'T OF LABOR, <http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm> (last visited Mar. 26, 2014).

178. *OSHA's Workplace Poster: Job Safety and Health: It's the Law*, OCCUPATIONAL SAFETY & HEALTH ADMIN. (2013), <https://www.osha.gov/Publications/poster.html>.

179. *Id.*

180. N.Y. LAB. LAW § 661 (McKinney 2010).

181. *Simplified Chinese vs Traditional Chinese*, ELANEX, http://www.elanex.com/EN/languages_chinese.aspx (last visited Apr. 20, 2014) (noting that traditional written Chinese holds greater popularity in Taiwan, Hong Kong, and among many Chinese peoples spread throughout the world, while simplified Chinese is more popular throughout Mainland China and Singapore).

ployers may not actively comply with these regulations, as seen with those regulations currently in place, the new market for labor attorneys will have lawyers actively seeking out these easily identifiable and provable violations of the LCL.

CONCLUSION

Despite the implementation of the Labor Law of 1995, the Labor Contract Law of 2008, and the 2013 Amendments to the Labor Contract Law, Chinese workers still lack adequate access to their employment rights. While these regulations seem to reflect a nationwide policy in favor of employee rights, a solution to the enforcement problem will not be found in procuring more restrictive employment regulations. Rather, through the use of a modified attorney fee-shifting system and a poster notification requirement, China can provide workers with the means to access these statutory rights. By using the American fee-shifting system in civil rights cases as a model, including adjustments to limit unreasonable costs, China can incentivize attorneys to seek out employee-rights cases and provide legal representation at no charge. Furthermore, by utilizing a poster notification system of employment rights, China can combat the confusion among workers concerning their statutory rights and fuel the employee rights litigation market. With these minor legislative adjustments, China can complement its already progressive employment regulations with the means for workers to access their legal rights.

*Christopher John Yee Coyne**

* B.A., B.S., Fordham University (2011); J.D., Brooklyn Law School (expected 2015); Managing Editor of the *Brooklyn Journal of International Law* (2014–2015). I would like to thank the staff and editors of the *Journal* for their invaluable help and insightful edits during the preparation of this Note. Thank you also to my friends, family, and my girlfriend, Tara Lepelletier, for their support and encouragement throughout this process. Finally, I would like to thank my parents, Dan and Mazie Coyne, for their unwavering love and support throughout all my endeavors and for which I am eternally grateful. All errors and omissions are my own.

“TWO HOUSEHOLDS, BOTH ALIKE IN DIGNITY”: THE INTERNATIONAL FEUD BETWEEN ADMIRALTY AND BANKRUPTCY

*Two households, both alike in dignity,
In fair Verona, where we lay our scene,
From ancient grudge break to new mutiny,
Where civil blood makes civil hands unclean.
From forth the fatal loins of these two foes
A pair of star-cross'd lovers take their life;
Whose misadventured piteous overthrows
Do with their death bury their parents' strife.
The fearful passage of their death-mark'd love,
And the continuance of their parents' rage,
Which, but their children's end, nought could remove,
Is now the two hours' traffic of our stage;
The which if you with patient ears attend,
What here shall miss, our toil shall strive to mend.¹*

INTRODUCTION

In 2012, the Japanese shipping firm Sanko Steamship Co. (“Sanko”) unilaterally refused to make lease payments on certain of its commercial shipping vessels.² After Sanko stopped making its payments, multiple creditors, including the Liberian navigation firm Evridiki Navigation, Inc. (“Evridiki”), proceeded quasi in rem³ against the *M/V Sanko Mineral* (“the *Mineral*”) and attached the vessel while it was in port at Baltimore, Maryland.⁴ Sanko refused to post a bond, which would have released the *Mineral*, out of concern that such action would affect its private resolution process with its chief creditors.⁵ The vessel, however, still contained cargo for which Sanko’s customers had already paid.⁶ Several of these customers, some incorporated abroad and others in the United States,

1. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 1, prologue.

2. *Evridiki Navigation, Inc. v. Sanko S.S. Co.*, 880 F. Supp. 2d 666, 668 (D. Md. 2012).

3. See discussion *infra* Part I.A.

4. *Evridiki*, 880 F. Supp. 2d at 668.

5. In furtherance of its efforts to avoid a formal bankruptcy filing, Sanko had started a private resolution process with its chief creditors. *Id.* at 669.

6. *Id.* at 668.