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# IT'S NOT WHAT IS ON PAPER, BUT WHAT IS IN PRACTICE: CHINA'S NEW LABOR CONTRACT LAW AND THE ENFORCEMENT PROBLEM

## INTRODUCTION

After decades of implementing a lifetime employment system, China has decided to shift gear and rely on private contracts to regulate domestic labor relations.<sup>1</sup> The new Labor Contract Law, which officially took effect on January 1, 2008, memorializes this change.<sup>2</sup> Proponents of the new law lauded it as “the most concerted effort to protect workers’ rights.”<sup>3</sup> Yet many provisions in the law touched the nerves of quite a few domestic and foreign businesses in China<sup>4</sup> and are criticized as overly generous to labor rights.<sup>5</sup>

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1. Labor relations are critical to the stability of Chinese society. *See infra* note 18 and accompanying text.

2. Laodong hetong fa [Labor Contract Law] (promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008) LAWINFOCHINA (last visited Dec. 31, 2008), art. 98 (P.R.C.). The Labor Contract Law is one of the trilogy of labor laws adopted by China in 2007. The other two are Laodong zhengyi tiaojie zhongcai fa [Law on Labor Dispute Mediation and Arbitration] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 2007, effective May 1, 2008) LAWINFOCHINA (last visited Dec. 31, 2008) (P.R.C.), and Jiuye cujin fa [Employment Promotion Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Jan. 1, 2008) LAWINFOCHINA (last visited Dec. 31, 2008) (P.R.C.). The Law on Labor Dispute Mediation and Arbitration sets forth the administrative procedures preceding judicial resolution of labor disputes. The Employment Promotion Law addresses employment discrimination and high unemployment rates.

3. *Labor Laws Bolstered in China*, INT’L HERALD TRIB., Jan. 2, 2008, at 9 (quoting Auret van Heerden, head of Fair Labor Association in Geneva, which monitors work conditions in sixty countries).

4. European and U.S. companies in China sent vociferous critiques of drafts of the law to the national legislature and even threatened to divest from China. *See* Aaron Halegua, *The Debate over Raising Chinese Labor Standards Goes International*, 1 HARV. L. & POL’Y REV. (Online) (2007), [http://www.hlpronline.com/2007/04/halegua\\_01.html](http://www.hlpronline.com/2007/04/halegua_01.html); GLOBAL LABOR STRATEGIES, BEHIND THE GREAT WALL OF CHINA: U.S. CORPORATIONS OPPOSING NEW RIGHTS FOR CHINESE WORKERS: OPPOSITION MAY HARM WORKERS IN THE US AND OTHER COUNTRIES 3 (2007), [http://laborstrategies.blogs.com/global\\_labor\\_strategies/files/behind\\_the\\_great\\_wall\\_of\\_china.pdf](http://laborstrategies.blogs.com/global_labor_strategies/files/behind_the_great_wall_of_china.pdf) [hereinafter BEHIND THE GREAT WALL OF CHINA]; GLOBAL LABOR STRATEGIES, UNDUE INFLUENCE: CORPORATIONS GAIN GROUND IN BATTLE OVER CHINA’S NEW LABOR LAW—BUT HUMAN RIGHTS AND LABOR ADVOCATES ARE PUSHING BACK 4 (2007), [http://laborstrategies.blogs.com/global\\_labor\\_strategies/files/undue\\_influence\\_global\\_labor\\_strategies.pdf](http://laborstrategies.blogs.com/global_labor_strategies/files/undue_influence_global_labor_strategies.pdf) [hereinafter UNDUE INFLUENCE]. Labor activists have criticized such responses by foreign corporations as a conspiracy to maintain low labor costs in China and perpetuate the “race to the bottom.” *See* BEHIND THE GREAT WALL OF CHINA, *supra*, at 7–9; UNDUE INFLUENCE, *supra*, at 10, 29–30. For an explanation of the “race to the bottom,” see Stephen F. Diamond, *The “Race to the Bottom” Returns: China’s Challenge to the International Labor Movement*, 10 U.C. DAVIS J. INT’L L. & POL’Y 39, 42–44 (2003).

5. The criticisms emphasize that under this new pro-labor law China would regress to the era

Around the same time the new law passed the national legislature, a slough of media reports uncovered a labor scandal that victimized over one thousand rural workers in China. A total of 1,340 people, including minors and the mentally incompetent, had been kidnapped to work in small brick kilns in central China as forced labor.<sup>6</sup> Owners of the brick kilns used fierce dogs and thugs to prevent the slave labor from escaping. The laborers worked without receiving any pay and some were beaten to death for working too slowly.<sup>7</sup>

The stark contrast—on one hand, a legal framework that almost excessively empowers workers, and on the other hand, atrocious labor exploitation that brings to mind China’s reputation as the world’s largest sweatshop—begs the question: what is wrong with China’s labor system?

This Note argues that even with a pro-labor legal framework on paper, the real problem for the Chinese labor system is the disconnect between the legal standards spelled out on paper and the rules actually enforced on the ground. Even before the promulgation of the Labor Contract Law, China had already established a sufficient legal framework on paper, the 1994 Labor Law for protecting workers’ rights. The missing link is the effective enforcement of the law. Part I of this Note describes China’s current labor conditions and summarizes some major features of the new Labor Contract Law that tilt the scale further toward protecting labor rights. Part II examines the existing labor law enforcement regime from the points of view of four parties: employers, individual workers, government administration authorities, and trade unions. These four parties have either incentives or obligations to enforce the law. The action and/or inaction by these four parties reveal practical problems in grassroot law enforcement in China, some of which this author predicts are unlikely to be resolved in the near future. Still, the Chinese government seems interested in channeling the discontent and anger brewing in the workforce through legal mechanisms and addressing them in a peaceful way. Part III explores the possibility for workers to bring class action lawsuits in China and discusses whether collective actions could overcome some of the identified enforcement problems. This Note concludes that, even though class action lawsuits in China still face institutional difficulties, they may

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when workers were rarely fired and lifetime employment was almost guaranteed. *See infra* note 37.

6. *1,340 Rescued from Forced Labor*, CHINA DAILY, Aug. 13, 2007, [http://www.chinadaily.com.cn/china/2007-08/13/content\\_6024799.htm](http://www.chinadaily.com.cn/china/2007-08/13/content_6024799.htm).

7. *China Detains 168 After Brick Kiln Slavery Scandal*, REUTERS, June 18, 2007, <http://www.alertnet.org/thenews/newsdesk/PEK225293.htm>.

lead to better enforcement of labor law than under the current system and are a politically viable option.

### I. BACKGROUND AND HIGHLIGHTS OF THE NEW LAW

Labor relations have been a “sensitive and contentious” subject in China.<sup>8</sup> The Chinese government first introduced the concept of labor contracts in the 1980s to phase out the “iron rice bowl” system—a figurative term for lifetime employment—that resulted in low productivity in state-owned enterprises (“SOEs”).<sup>9</sup> The 1994 Labor Law codified the policies and regulations that had been issued previously for this purpose.<sup>10</sup> It explicitly requires that a labor contract be formed before an employment relationship can be established.<sup>11</sup>

In the meantime, China’s economic reform gave rise to booming development of the private sector, which consists mostly of foreign-invested enterprises (“FIEs”) and domestic private enterprises.<sup>12</sup> The private sector hired rural migrant workers at a lower cost,<sup>13</sup> and according

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8. Hilary K. Josephs, *Labor Law in a “Socialist Market Economy”: The Case of China*, 33 COLUM. J. TRANSNAT’L L. 559, 560 (stating that China passed its first comprehensive labor law in 1994 after an extremely protracted drafting process, the beginning of which dated back to the 1950s).

9. HILARY K. JOSEPHS, LABOR LAW IN CHINA: CHOICE AND RESPONSIBILITY 7–21 (1990). The “Iron rice bowl” is a figurative term for lifetime employment and administrative allocation of labor. *See id.* The initial attempt to phase out lifetime employment did not work. Labor turnover in SOEs remained very low as workers all knew that employment outside the state sector would not provide the same job security and fringe benefits. Josephs, *supra* note 8, at 564. As a result, the contract system was soon used to facilitate mass layoffs in the state sector. Mary E. Gallagher, “Time Is Money, Efficiency Is Life”: *The Transformation of Labor Relations in China*, STUDIES IN COMP. INT’L DEV., June 2004, at 11, 22–23.

10. Josephs, *supra* note 8, at 565. Systematic codification and distillation of existing laws and regulations on a subject is typical of civil law jurisdictions. *Id.*

11. Laodong fa [Labor Law] (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1994, effective Jan. 1, 1995) LAWINFOCHINA (last visited Dec. 31, 2008), art. 16 (P.R.C.).

12. *See* Ming Lu, Jianyong Fan, Shejian Liu & Yan Yan, *Employment Restructuring During China’s Economic Transition*, 125 MONTHLY LAB. REV. 25 (2002) (providing statistics to show that private enterprises and the service sector have become the major job creators, while state and collective ownership enterprises have been swept to the margin).

13. Josephs, *supra* note 8, at 564–65. Companies were able to hire rural migrant workers at a lower cost thanks to China’s *hukou*, or household registration, system. Used to “control the growth of the urban population and maintain urban living standards,” the system requires each individual to register in either a rural or urban area but not both. Josephs, *supra* note 9, at 14. It requires people to work and live where their household registration is (usually their birthplace). Zhiqiang Liu, *Institution and Inequality: The Hukou System in China*, 33 J. COMP. ECON. 133, 134 (2005); JOSEPHS, *supra* note 9, at 14. Thus, rural workers who migrate to and work in cities do not have a legal identity. They lose their entitlements to all kinds of social benefits, including government-subsidized housing, pensions, and health insurance because these benefits are associated with one’s residence for the convenience of central planning. Liu, *supra*, at 136.

to official statistics, approximately 120 million rural workers migrated to and are currently working in cities.<sup>14</sup>

The move toward privatization has caused labor practices in China to shift “overwhelmingly toward favoring firm autonomy, flexibility, and managerial control of work organization.”<sup>15</sup> As FIEs and domestic private enterprises took advantage of low labor costs, manufacturing sweatshops staffed by rural migrants started to appear.<sup>16</sup> Migrant workers from rural areas “bear the brunt of labor abuses.”<sup>17</sup>

The new Labor Contract Law, adopted more than a decade after the 1994 Labor Law, reiterates the government’s determination to formulate and regulate labor relations on the basis of a contract system. It is worth noting that the main reason for adopting the 2007 Labor Contract Law is different from the motivation behind the 1994 Labor Law. While the 1994 law was aimed at removing inefficiency in state-owned enterprises, the 2007 law has more of a political undertone. It seeks to appease discontent and anger among migrant workers who experienced substandard labor conditions in cities and took out their fury and frustrations in the form of social unrest and violent crimes.<sup>18</sup>

The 2007 Labor Contract Law makes the following significant amendments and additions to the 1994 Labor Law:

#### A. Requirement of a Written Labor Contract

The law requires the formation of a written labor contract at the commencement of a labor relationship<sup>19</sup> or within one month thereafter.<sup>20</sup>

14. Embassy of the People’s Republic of China in the United States of America, China to Enroll More Migrant Workers into Unions (Mar. 12, 2007), <http://www.china-embassy.org/eng/xw/t303000.htm>.

15. Gallagher, *supra* note 9, at 13.

16. See STEPHEN FROST, WORKERS’ RIGHTS FOR THE NEW CENTURY 16–36 (2002); see generally ANITA CHAN, CHINA’S WORKERS UNDER ASSAULT: THE EXPLOITATION OF LABOR IN A GLOBALIZING ECONOMY (2001).

17. Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People’s Republic of China*, 30 FORDHAM INT’L L.J. 1050, 1054 n.15 (2007) (providing a bibliography on the mistreatment of migrant workers).

18. See Joseph Kahn & David Barboza, *As Unrest Rises, China Broadens Workers’ Rights*, N.Y. TIMES, June 30, 2007, at A1 (stating that the passage of the Labor Contract Law came on the heels of media reports about the widespread use of slave labor in thousands of brick kilns and small coal mines). The labor scandal has caused complaints that the Chinese government has over-zealously embraced capitalism at the cost of labor rights. See Theodore J. St. Antoine, *Teaching ADR in the Labor Field in China*, 25 COMP. LAB. L. & POL’Y J. 105, 108 (2003) (“The government seems to have adopted the philosophy: Grow the market today and let a future generation deal with social problems and the need for greater economic equality.”).

19. The Labor Contract Law provides that a labor relationship is established on the day the

In the event that an employer fails to sign a written contract within one year of the commencement of the labor relationship, the employer shall be deemed to have entered into a non-fixed-duration contract with the employee and must pay double the amount of the agreed upon wage.<sup>21</sup>

An employer may choose from three types of contracts: fixed-duration contracts, non-fixed-duration contracts, and contracts that expire upon completion of a certain task.<sup>22</sup> However, the employer must enter into a non-fixed-duration contract after an employee has continuously worked for the employer for ten years, or if he has previously renewed a fixed-duration contract with the same employer twice, unless the employee opts out.<sup>23</sup> Again, if the employer fails to enter into the required non-fixed-duration contract, it must pay double the agreed upon wage.<sup>24</sup>

### *B. Termination of the Contract*

The new law gives employees the right to terminate a labor contract with just cause.<sup>25</sup> However, it prohibits the employer from terminating contracts with those who have been working continuously for the employer for fifteen years and have less than five years before reaching the legal retirement age.<sup>26</sup> When there is a need for downsizing, the law requires the employer to consider last those who have longer fixed-duration contracts or non-fixed-duration contracts, or who are the only one employed in their family and have an elderly person or a minor to support.<sup>27</sup>

What is most troubling to employers is that the law renders the termination of a contract more expensive to the employer, regardless of

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worker starts providing labor to the employer. Labor Contract Law, *supra* note 2, art. 7.

20. Compare Labor Contract Law, *supra* note 2, art. 10 with Labor Law, *supra* note 11, art. 16 (providing that a labor contract should be established without specifying a written requirement).

21. Labor Contract Law, *supra* note 2, arts. 14, 82.

22. *Id.* art. 12. This is the same as the Labor Law, *supra* note 11.

23. Labor Contract Law, *supra* note 2, art. 14. Under the 1994 Labor Law, the employer does not have the obligation to enter into a non-fixed-duration contract unless the employee opts in. Labor Law, *supra* note 11, art. 20.

24. Labor Contract Law, *supra* note 2, art. 82.

25. *Id.* art. 38. In the event of one of the following conditions, an employee may terminate the contract by giving notice to the employer: the employer failed to provide work safety measures, failed to pay timely work remunerations, failed to pay social security on behalf of the employee, infringed the employee's labor rights and interests in violation of laws and regulations, or caused the employee to enter into the contract under fraud or coercion. An employer has always had the right to terminate for just cause under both the 1994 and 2007 laws. See *id.* arts. 39–41; Labor Law, *supra* note 11, arts. 25–27.

26. Labor Contract Law, *supra* note 2, art. 42.

27. *Id.* art. 41.

whether it was terminated by the employer or employee, or whether it was terminated for just cause.<sup>28</sup>

### C. *Union Power*

The law adds that any management decision regarding the establishment or modification of remuneration, work time, holidays and vacation, workers' safety conditions, insurance and benefits, training, discipline, or any other conditions of employment, must first be subject to equal negotiations with the union or workers' representatives.<sup>29</sup>

### D. *Notice and Record*

The law requires that any major changes concerning workers' interests must be publicly posted on the premises of the workplace or provided in some other ways.<sup>30</sup> It also requires employers to establish and preserve a roster of all employees for inspection purposes.<sup>31</sup>

### E. *Other Provisions*

The law shortens the length of the probation period.<sup>32</sup> It provides that employers may not force employees to work overtime and that employees must be compensated if they do work overtime.<sup>33</sup> It provides rules for regulating labor dispatch and part-time employees.<sup>34</sup> It also requires that a recruiting employer must truthfully inform applicants of all relevant information and may not hold applicants' IDs or other documents hostage.<sup>35</sup>

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28. *See id.* arts. 46–47. In the event a labor contract is terminated upon the parties' agreement—by either the employer or the employee—for just cause or due to special circumstances such as the need to reorganize, downsize, declare bankruptcy, or other special business needs, an employer must make severance payments to the affected employee in the amount of one month's wage for each year worked by the employee for the employer. In the event that the employer terminates a contract in violation of the law, the employee has the right to request continued performance of the contract, otherwise the employer must pay damages in an amount that is double the severance payment.

29. *Id.* art. 4.

30. *Id.*

31. *Id.* art. 7.

32. *Id.* art. 19 (stating that the probation period shall be no more than one month for contracts of three months to one year, no more than two months for contracts of one to three years, and no more than six months for contracts of above three years or of non-fixed duration; the number of probation periods for each employee is limited to one).

33. *Id.* art. 31.

34. *Id.* arts. 57–72.

35. *Id.* arts. 8–9.

The 1994 Labor Law already established a sufficient legal framework for protecting labor rights, which is comparable to those in Western developed countries.<sup>36</sup> The 2007 Labor Contract Law favors labor rights even more. The law has many detractors who claim it will take China back to the “iron rice bowl” era.<sup>37</sup> Whether the new law will really bring back the lifetime employment system and cause productivity to drop is yet to be seen. The one thing certain is that China’s notoriety for labor abuse should not be attributed to the way the law is written, but rather to how the law is enforced in practice.<sup>38</sup>

## II. THE CURRENT ENFORCEMENT REGIME

The lack of effective and meaningful law enforcement is a chronic problem in China. In the realm of labor and employment law, employers have refused to take laws and regulations seriously and instead adopted a flexible approach to managing labor relations.<sup>39</sup> Individual workers lack law-enforcement initiatives due to ignorance, culture, and scarcity of resources.<sup>40</sup> State and local labor administrations have the legal authority to enforce labor laws but lack incentives to do so.<sup>41</sup> Trade unions, whose interests have been aligned with the Communist Party, do not have the legal power to seek law enforcement on behalf of workers.<sup>42</sup>

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36. Halegua, *supra* note 4; Kahn & Barboza, *supra* note 18.

37. *See China's Top Legislature Defends New Labor Contract Law*, XINHUA NEWS AGENCY, Dec. 21, 2007, [http://news.xinhuanet.com/english/2007-12/22/content\\_7290979.htm](http://news.xinhuanet.com/english/2007-12/22/content_7290979.htm); *Union of the State: China's New Labour Law*, ECONOMIST, Dec. 6, 2007, [http://www.economist.com/world/asia/displaystory.cfm?story\\_id=10268128](http://www.economist.com/world/asia/displaystory.cfm?story_id=10268128).

38. *See* Halegua, *supra* note 4; Cooney, *supra* note 17, at 1096 (observing that the challenge for dealing with labor abuses in China is securing compliance); *New Labor Contract Law Changes China's Employment Landscape*, CHINA DAILY, Jan. 1, 2008, [http://www.chinadaily.com.cn/china/2008-01/01/content\\_6362895.htm](http://www.chinadaily.com.cn/china/2008-01/01/content_6362895.htm) (suggesting that a varied intensity of law enforcement in regions could result in a difference in labor costs for businesses).

39. *See* Gallagher, *supra* note 9, at 24–25. Both SOEs and FIEs chose to make labor contracts informal and short-term (between one and two years), which means dismissals were arbitrary depending on the company's economic health; some FIEs also set up long apprenticeships or probationary periods. *See also* Vai Io Lo, *Labor and Employment in the People's Republic of China: From a Nonmarket-Driven to a Market-Driven Economy*, 6 IND. INT'L & COMP. L. REV. 337, 377 n.267 (1995–1996) (stating that seventy to ninety percent of FIEs in major coastal economic cities did not sign employment contracts as of the time of the 1994 Labor Law). However, Mary Gallagher has pointed out that for skilled workers, or those for whom the employer offered training and educational benefits, both SOEs and FIEs tend to provide open-ended contracts. Gallagher, *supra* note 9, at 25.

40. *See infra* notes 54–82.

41. *See infra* notes 83–91.

42. *See infra* notes 92–112.



### A. *Voluntary Compliance by Employers*

Domestic private enterprises and FIEs do not have a good track record in complying with labor and employment laws, including establishing contracts with employees and maintaining labor standards.

According to unofficial statistics, only twenty percent of domestic private companies signed contracts with their employees before the 2007 Labor Contract Law was adopted.<sup>43</sup> Only twenty percent of Chinese suppliers to multinational companies comply with wage rules, while just five percent obey hour limitations.<sup>44</sup> Domestic enterprises often rely on their relationships with the government to evade legal requirements.<sup>45</sup> Other common methods used to avoid compliance with laws include keeping two sets of books and instructing illegal laborers to hide from inspectors.<sup>46</sup>

Employment practices at FIEs are more varied. Investors from the United States and Europe have brought with them international labor practices and a higher labor standard than required by Chinese laws.<sup>47</sup> Japanese companies often adopt measures like long apprenticeship and probationary periods to reduce labor costs.<sup>48</sup> Investors from Taiwan tend to hire on an “at will” basis with reduced wages and no contract.<sup>49</sup>

The 2007 Labor Contract Law imposes some severe consequences on employers that refuse to comply.<sup>50</sup> We have yet to see the impact of these measures on employment practices, but measures adopted by employers before the official promulgation of the new law seem to indicate that compliance is unlikely to happen soon.

Anticipating higher labor costs after the adoption of the new law,<sup>51</sup> many employers made a last-minute end run by terminating employees

43. UNDUE INFLUENCE, *supra* note 4, at 8 (citing “Chinese government figures” without providing a source for the figures).

44. Halegua, *supra* note 4.

45. *Id.*

46. *Id.*

47. See Gallagher, *supra* note 9, at 31 (noting that European and American firms tend to adhere to labor regulations); Halegua, *supra* note 4. However, there are media reports that U.S. fast-food chains such as KFC, Pizza Hut, and McDonald’s pay only ¥4, or \$0.52, per hour to entry-level employees by taking advantage of their part-time or student status. See *China Probes Whether Workers Are Underpaid*, CHINA DAILY, Mar. 29, 2007, [http://www.chinadaily.com.cn/china/2007-03/29/content\\_839714.htm](http://www.chinadaily.com.cn/china/2007-03/29/content_839714.htm).

48. See Gallagher, *supra* note 9, at 24.

49. *Id.* at 24; Lo, *supra* note 39, at 377 n.267.

50. See *supra* note 21, arts. 24, 28.

51. It is estimated that the Labor Contract Law alone would raise employers’ costs by eight percent. See Geoff Dyer & Tom Mitchell, *Labor Law Set to Raise Costs in China*, FIN. TIMES, Jan. 2, 2008, at 2.

with long service records and hiring new employees as replacements,<sup>52</sup> revising existing contracts of employment,<sup>53</sup> and terminating employees before rehiring them on new contracts.<sup>54</sup> These actions aim solely to postpone the impact of the new law on the bottom line.

The employers that acted in anticipation of the new law are those that realized they would have to comply with the law sooner or later. There are still tens of thousands of domestic private businesses that know nothing about the law and will continue to keep two books or play “hide and seek” with inspectors. Merely raising the legal standard on paper would not compel those employers to change their employment practices.

### *B. Enforcement by Individual Workers*

Rural migrant workers are generally not savvy to their legal rights and therefore disinclined to seek resolution of labor disputes through legal means. China has traditionally not maintained social order by the rule of law,<sup>55</sup> as a two thousand-year-old Confucian proverb instructs, “it is better to be vexed to death than to bring a lawsuit.”<sup>56</sup> Even these days the “formal legal system is almost entirely absent from the lives of most of China's citizens.”<sup>57</sup> Instead, a majority of disputes in China end up being

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52. See Don Lee, *New Workers' Rights Being Undermined in China*, L.A. TIMES, Dec. 27, 2007, <http://www.latimes.com/business/la-fi-chinalabor27dec27,1,6295009.story?coll=la-headlines-business> (quoting a local media report that Wal-Mart dismissed 110 purchasing department workers in China as a scheme to preempt limits in the new labor contract law).

53. See *Carrefour's Re-signing of Labor Contract Causes Dispute*, CHINACSR.COM, Dec. 28, 2007, <http://www.chinacsr.com/2007/12/28/1985-carrefours-re-signing-of-labor-contract-causes-dispute/>.

54. See *Labor Laws Bolstered in China*, *supra* note 3 (stating that China's largest private telecom equipment manufacturer, Huawei, made termination offers to about seven thousand employees by the end of 2007).

55. The concept of “rule of law” was first incorporated into the Constitution in 1999. See Xianfa xiuzheng an [Amendment to the Constitution] (promulgated by the Nat'l People's Cong., Mar. 15, 1999, effective Mar. 15, 1999) LAWINFOCHINA (last visited Dec. 31, 2008), ch. III, § 7, art. 5 (P.R.C.) (“The People's Republic of China governs the country according to law and makes it a socialist country under rule of law.”). See CONG.-EXEC. COMM. ON CHINA, FREEDOM OF RESIDENCE AND TRAVEL, ANNUAL REPORT 72 (2004) [hereinafter CECC 2004 ANNUAL REPORT], available at <http://www.cecc.gov/pages/annualRpt/annualRpt04/CECCannRpt2004.pdf> (noting that obtaining justice in China was not simply a question of law, but also a measure of one's connections and persistence).

56. Jerome Alan Cohen, *Chinese Mediation on the Eve of Modernization*, 54 CAL. L. REV. 1201, 1201 (1966).

57. CECC 2004 ANNUAL REPORT, *supra* note 55, at 72. See Margaret Y.K. Woo, Christopher Day & Joel Hugenberger, *Migrant Access to Civil Justice in Beijing*, 4 LOY. U. CHI. INT'L L. REV. 167, 194 (2007) (observing that migrants' greatest difficulty in obtaining relief from courts is their limited understanding of their rights). See, e.g., *id.* at n.128 (describing a teenage migrant who

resolved through quasi-formal channels, a typical example of which is the system of petitioning to offices through “letters and visits.”<sup>58</sup> Such is the case for migrant laborers seeking resolution of disputes with their employers.<sup>59</sup> However, the level of local officials’ response to those letters and visits is low.<sup>60</sup> Additionally, migrant laborers tend to work illegally in cities due to the *hukou*, or residence registration, system.<sup>61</sup> They are willing to work without identification or paper documentation.<sup>62</sup> Consequently, they are willing to put up with abuse and mistreatment by employers rather than file a complaint or bring a lawsuit, which would put them in trouble with the law.<sup>63</sup>

Even if a migrant worker is aware of the legal means of protecting his rights, the existing legal framework stacks many odds against him.

Individual workers claiming infringement of labor rights must undergo arbitration before they can sue in court.<sup>64</sup> However, there are some inherent problems with the labor arbitration system. First and foremost, arbitral awards are hard to enforce.<sup>65</sup> Statistics show that winning rates

attended a migrant community organization’s training session and claimed that before attending the training she was not aware of the concept of sexual harassment).

58. CECC 2004 ANNUAL REPORT, *supra* note 55, at 72. “Letters and visits” to an office, also called *xinfang*, is a traditional practice of petitioning to higher levels of officials for assistance. *Id.* The number of petitions (both letters and visits) to Party and government *xinfang* bureaus at the county level and higher is about 11.5 million per year, compared to the six million legal cases handled annually by the judiciary. *Id.* at 73. The 2003 Supreme People’s Court Work Report states that the entire Chinese judiciary handled forty-two million petitions during the preceding five years, as compared to approximately thirty million formal legal cases. *Id.*

59. See Cooney, *supra* note 17, at 1071 (“[P]oorer workers use oral or written complaints submitted to the labor department as their principle [sic] means of trying to engage State institutions to deal with labor abuses.”). See also Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT’L L. 103 (2006) (examining the process of seeking legal redress through letters and visits to government officials).

60. See Woo, Day & Hugenberger, *supra* note 57, at 178 (stating that the level of response depends on the “subjective receptiveness of an official who may have little to gain from resolving the dispute”). It is estimated that the rate of response is 0.2%. *Id.* at 179.

61. *Id.* at n.61.

62. *Id.* at 185.

63. *Id.* at 178.

64. Previously, an individual must have exhausted both mandatory mediation within the workplace and mandatory arbitration outside the workplace before he could file a lawsuit. Qiye laodong zhengyi chuli tiaoli [Settlement of Labor Disputes in Enterprises] (issued by the St. Council on July 6, 1993, effective July 6, 1993), art. 6, *translated in* LAW INFO CHINA (last visited Jan. 19, 2009) (P.R.C.) [hereinafter Disputes Resolution Regulation]. Under the new Mediation and Arbitration Law, aggrieved workers are only required to undergo arbitration. Labor Dispute Mediation and Arbitration (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 2007, effective May 1, 2008), art. 5, *translated in* LAW INFO CHINA (last visited Jan. 25, 2009) (P.R.C.) [hereinafter Mediation and Arbitration Law].

65. 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, 754 (2007).

among workers bringing arbitration requests are generally high,<sup>66</sup> yet a vast majority of arbitration decisions are still appealed to court.<sup>67</sup> This suggests that a substantial proportion of appeals have to do with enforcement of arbitration decisions rather than dissatisfaction with the outcome. Second, labor arbitration is a highly bureaucratized process. An arbitration panel is usually composed of government labor officials.<sup>68</sup> Employer representatives on the panel are nominated by government authorities,<sup>69</sup> while employee representatives are drawn from the quasi-governmental trade union.<sup>70</sup> As such, labor arbitration “crosses over into bureaucratic implementation of the law, rather than constituting an autonomous dispute resolution procedure.”<sup>71</sup> Third, arbitrators are likely to be biased against workers.<sup>72</sup> In addition to corruption or bribery by employers, arbitrators are mired in conflicts of interests because the system forces them to obtain financial resources from local government,<sup>73</sup> which often seeks to promote businesses’ and employers’ interests.<sup>74</sup> This inevitably skews arbitrators’ decisions. Additionally, arbitration panels are generally “overburdened”<sup>75</sup> and “understaffed” in the face of an increasing number of arbitration requests from workers.<sup>76</sup>

Since many arbitration outcomes require an appeal to the court for enforcement,<sup>77</sup> additional expenses inevitably accrue to the appealing

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66. In Shandong, Guangdong, and Heilongjiang Provinces where migrant labor is concentrated, workers won respectively 62.46%, 55.88%, and 55.32% of labor disputes brought to court from 1995 to 2001. See Fu Hualing & D.W. Choy, *From Mediation to Adjudication: Settling Labor Disputes in China*, 3 CHINA RIGHTS FORUM 17, 21 (2004), [http://www.hrchina.org/public/PDFs/CRF.3.2004/From\\_Mediation\\_to\\_Adjudication\\_-\\_Settling\\_Labor\\_Disputes\\_in\\_China.pdf?](http://www.hrchina.org/public/PDFs/CRF.3.2004/From_Mediation_to_Adjudication_-_Settling_Labor_Disputes_in_China.pdf?)

67. In 2003, nearly 70% of arbitration decisions were appealed in Beijing and Shanghai, the two economically largest cities, compared to only 1.7% in 1995. See Mary E. Gallagher, “Use the Law As Your Weapon!”: *Institutional Change and Legal Mobilization in China*, in ENGAGING THE LAW IN CHINA: STATE, SOCIETY, AND POSSIBILITIES FOR JUSTICE 54, 73–74 (Neil J. Diamont et al. eds., 2005). Both the 1993 Regulations on Settlement of Labor Disputes in Enterprises and the 2007 Law on Labor Dispute Mediation and Arbitration allow appeal to a judicial court for arbitration error or failure to enforce the arbitration outcome. See Disputes Resolution Regulation, *supra* note 64. Mediation and Arbitration Law, *supra* note 64, arts. 48, 50–51.

68. Cooney, *supra* note 17, at 1068–69.

69. *Id.* at 1069.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1069–70.

75. Gallagher, *supra* note 67, at 74.

76. Statistics from the Ministry of Labor and Social Security (“MOLSS”) show that the number of new arbitration requests increased from 47,951 in 1996 to 226,391 in 2003. *Id.* at 1067–68 (citing Zhongguo laodong tongji nianjian [Yearbook of Labor Statistics] 2004, tbl.9-1).

77. For information on the high appeal rate, see VIRGINIA HO, LABOR DISPUTE RESOLUTION IN CHINA: IMPLICATIONS FOR LABOR RIGHTS AND LEGAL REFORM 79 (2003).

party—in most cases, the workers. Court filing fees and travel expenses incurred in seeking legal representation could cost a migrant worker his life savings.<sup>78</sup> Since lawyers worry about workers' ability to pay for legal services, legal representation is hard to obtain.<sup>79</sup> Also, given the typical amount of time spent on a labor case, the disputed amount in each individual case is usually too small to be profitable.<sup>80</sup> Although some lawyers work on a contingency fee basis,<sup>81</sup> they sometimes are unwilling to represent migrant workers because of cultural bias.<sup>82</sup> Some lawyers even fear that migrant workers will not share the damage award with them as previously agreed.<sup>83</sup>

Indeed, the law creates on paper a cause of action so that workers can sue and obtain redress. However, protracted proceedings and limited resources prevent most workers from obtaining relief via legal channels. The legal default is also unfriendly to low-income workers because their claims would be limited to breach of contract under the new law and would not generate large enough damages to attract the plaintiffs' bar.

### C. Oversight by Administrative Authorities

Labor administration authorities affiliated with state and local governments have the legal obligation to supervise and inspect employers' compliance with labor laws and regulations.<sup>84</sup> The administrative

78. Woo, Day & Hugenberger, *supra* note 57, at 192. See Benjamin L. Liebman, Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523, 1534 (1998) (examining the impact of court fees). The typical salary of a migrant is averaged at ¥1,100 (\$137.50) per month. See *Migrant Workers Expect Higher Monthly Salaries*, XINHUA NEWS AGENCY, Feb. 7, 2006, <http://china.org.cn/english/null/157162.htm>.

79. See Woo, Day & Hugenberger, *supra* note 57, at 179 (noting that migrants cannot pay for legal services provided by registered lawyers).

80. *Id.* at 187–89 (observing that most private lawyers assist migrants to satisfy pro bono services requirements or on a contingency fee basis).

81. Lawyers in China are prohibited from charging contingency fees for certain labor lawsuits, including any action seeking payment of labor remuneration. See *Lvshi fuwu shoufei guanli banfa* [Measures for the Administration of Lawyers' Fees] (promulgated by the Ministry of Justice, State Development and Reform Commission, Apr. 13, 2006, effective Dec. 1, 2006) LAWINFOCHINA (last visited Dec. 31, 2008), art. 11 (P.R.C.).

82. See Ethan Michelson, *The Practice of Law As an Obstacle to Justice: Chinese Lawyers at Work*, 40 LAW & SOC'Y REV. 1, 18–21 (2006) (stating that private registered attorneys in Beijing are unwilling to take migrant labor cases because of the low fees available and cultural stereotypes against rural migrants); see also Margaret Y.K. Woo & Yaxin Wang, *Civil Justice in China: An Empirical Study of Courts in Three Provinces*, 53 AM. J. COMP. L. 911, 920–23 (2005) (noting the disparate levels of attorney representation in rural versus urban areas).

83. See, e.g., Woo, Day & Hugenberger, *supra* note 57, at 188 n.113 (stating that a well-known migrant labor lawyer in Beijing allegedly was owed ¥5,000,000 from 161 former migrant clients who had refused to pay his fees even though the lawyer had won settlements for them).

84. *Laodong baozhang jiancha tiaoli* [Regulation on Labor Security Supervision] (promulgated

enforcement takes the form of “command and control” regulations.<sup>85</sup> Under these regulations, labor administrations may impose different levels of sanction on employers that violate the law, ranging from issuing warnings and orders for correction to imposing fines.<sup>86</sup> Again, the power of local administrations to oversee the enforcement of labor laws only looks good on paper; it has not happened in reality.

First, government officials lack economic and political incentives to scrutinize local businesses’ employment practices. Performance evaluations of local officials largely depend on economic growth in the locality.<sup>87</sup> Forcing compliance with labor laws would add costs to local businesses and in turn slow down the area’s economic growth. These considerations easily outweigh the interest of protecting workers’ rights. Also, uncovering substandard labor practices may cause bad publicity<sup>88</sup> that negatively affects the evaluations of local officials. Consequently, local labor officials are generally unwilling to upset employers by vigorously enforcing the law. Some simply perform sporadic whirlwind-style campaigns under the pretense of law enforcement.<sup>89</sup>

Second, the sanctions that labor authorities may impose are not sufficient to overcome employers’ incentives for noncompliance. Incentives for engaging in illegal employment practices and adopting low

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by the St. Council, Nov. 1, 2004, effective Dec. 1, 2004) LAWINFOCHINA (last visited Dec. 31, 2008), art. 3 (P.R.C.) (“The labor security administration of the State Council shall be in charge of the labor security supervision work of the whole country. The labor security administration of a local people’s government at the county level or at any level above shall be in charge of the labor security supervision work within its own administrative area.”). These labor administrations operate both under the Ministry of Labor and Social Security and under their respective local government. See Cooney, *supra* note 17, at 1061.

85. Cooney, *supra* note 17, at 1061. The “command and control”-style regulations are legal instruments that state rules, charge an agency with implementation, and then set out a range of sanctions that a state agency can impose if the rules are violated. *Id.*

86. For violation of labor laws and regulations or forcing workers to work overtime, labor administrations may give warnings, order corrections, and impose a fine of no less than ¥100 and no more than ¥500 for each affected employee. Regulation on Labor Security Supervision, *supra* note 84, art. 25. For refusal to pay wages, overtime pay, minimum pay, or economic compensation after cancellation of an employment contract, labor administrations may order payment and impose punitive damages of 50% to 100% of the total owed amount. *Id.* art. 26. For violations of work safety conditions, labor administrations may impose fines of no less than ¥1,000 and no more than ¥5,000 for each affected employee. *Id.* art. 23.

87. Halebua, *supra* note 4.

88. See, e.g., *supra* notes 6–7 (media reports about slave labor at small brick kilns).

89. For examples of sporadic law enforcement campaigns, see Xin Frank He, *Sporadic Law Enforcement Campaigns As a Means of Social Control: A Case Study from a Rural-Urban Migrant Enclave in Beijing*, 17 COLUM. J. ASIAN L. 121 (2003) (arguing that enforcement by sporadic campaigns is a sophisticated regime that results in legal collusion between local government, the enforcer, and law violators whose survival benefits the government; it achieves a balance of interests between central and local governments).

labor standards are extremely strong among Chinese businesses as everyone tries to cut costs.<sup>90</sup> However, the labor administrations' sanctioning power is limited to imposing fines. That power is further weakened by the fact that judicial enforcement has to be constantly invoked to force employers to pay workers under administrative orders.<sup>91</sup>

Third, there is a shortage of labor inspectors across the country.<sup>92</sup> Consequently, businesses have sufficient time to "prepare" for administrative inspections by, for example, fabricating records or coaching employees to deceive inspectors, in case bribery does not work.

The 2007 Labor Contract Law is silent on increasing the power of labor administrative authorities to compel employers' compliance with the law. This seems to suggest that "command and control"-style administrative regulations and the above-listed defects with the current administrative enforcement mechanism are likely to continue.

#### *D. Legal Power of Trade Unions*

In developed countries, the power imbalance between workers and the management is usually corrected by the worker's ability to unionize and pursue collective actions.<sup>93</sup> Unions negotiate collective bargaining agreements and organize strikes or walk-outs to force concessions from the management. There is no such mechanism for counterbalancing the power disparity in China. The Chinese concept of trade unions is very different from that in Western developed countries.

No independent trade unions are allowed in China. The only officially-recognized and "legal" labor organizations are those affiliated with the All-China Federation of Trade Unions ("ACFTU").<sup>94</sup> Different from the

90. Cooney, *supra* note 17, at 1063 (stating that noncompliance with law by some businesses creates substantial pressure on others that might otherwise choose to abide by the law).

91. *See id.* at 1063–64. Sean Cooney suggests that the limited sanction power available to labor administrations is an "unfortunate by-product" of administrative reforms aimed at preventing agencies from arbitrarily imposing punishments on individuals. *Id.* at 1064.

92. *Id.* at 1066 (citing Zhongguo falv nianjian [Law Yearbook of China] 45 (2003) and other sources) (stating that there are three thousand inspecting agencies and forty thousand labor inspectors in China, yet the number of business entities in China total thirty million).

93. *Id.* at 1072.

94. Gonghui fa [Trade Union Law] (adopted by the Nat'l People's Cong., Apr. 3, 1992, amended by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Oct. 27, 2001), art. 11, LAWINFOCHINA (last visited Dec. 31, 2008) (P.R.C.). The ACFTU is considered the largest labor organization in the world, with a membership of almost 170 million, more than 500,000 full-time officials, and more than 1.3 million "grassroots level" (enterprise-level) unions. All-China Fed'n of Trade Unions, A Brief Introduction to the All-China Federation of Trade Unions (Sept. 20, 2007), <http://www.acftu.org.cn/template/10002/file.jsp?cid=63&aid=156>. It has been suggested that in addition to political reasons, market conditions are not conducive to the cultivation of independent

western concept of trade unions, the ACFTU is a “quasi-governmental entity.”<sup>95</sup> As a matter of law, it is subordinate to both the state and the Chinese Communist Party (“CCP”).<sup>96</sup> It partially relies on government subsidies for funding.<sup>97</sup> It has limited legal authority to protect labor interests and seek concessions from the management.<sup>98</sup>

More importantly, the law prohibits unions from organizing strikes.<sup>99</sup> Instead, the primary role of unions in China is to “prevent work stoppages.”<sup>100</sup> Without the right to organize strikes, unions in China lack the basic weapon to defend workers’ rights from arbitrary and abusive management practices.

An important legal power that unions in China do have is the ability to negotiate collective contracts.<sup>101</sup> However, research has shown that

labor unions in China because unless there is labor scarcity, which would allow workers to take advantage of their enhanced bargaining power against the management, it is difficult for independent labor unions to become established. Josephs, *supra* note 8, at 578–79.

95. Ronald C. Brown, *China’s Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?*, 16 DUKE J. COMP. & INT’L L. 35, 52 (2006).

96. See Trade Union Law, *supra* note 94, art. 4 (stating that trade unions must “insist on the leadership of the Chinese Communist Party.”); ACFTU Charter General Principles (2003), available at <http://www.acftu.org/template/10005/file.jsp?cid=807&aid=42622> (last visited Feb. 12, 2008) (noting that trade unions are “important social pillars for the state political regime”).

97. Trade Union Law, *supra* note 94, art. 42 (naming the other sources of funding: membership dues, two percent of all employees’ pre-tax wages, a portion of revenues submitted by state-owned enterprises to local governments, and other miscellaneous revenues of the union).

98. The union may request that the management correct violations of labor standards, assist employees in signing individual contracts, negotiate and sign collective contracts on behalf of member employees, and seek arbitration or lawsuits if necessary to remedy the management’s violation of terms in the collective contract. See Trade Union Law, *supra* note 94, arts. 19–20, 49. Before the management may unilaterally terminate an individual labor contract, it must first notify the union and if any objection is raised by the union, the management must study the union’s opinion but not necessarily accept the opinion or change the termination decision. *Id.* art. 21. Additionally, unions have obligations to support and assist an individual worker’s pursuit of legal rights at arbitration or litigation. *Id.*; see Labor Contract Law, *supra* note 2, art. 78.

99. Trade Union Law, *supra* note 94, art. 25 (stating that when a strike or disruption to production occurs, the trade union at the enterprise shall negotiate with the enterprise management and assist the latter in reviving production and workplace order as quickly as possible). The right to strike was removed from the 1982 Constitution and strikes have been considered illegal since. See XIAN FA art. 15 (1982) (P.R.C.) (“The state prohibits in accordance with the law any organization or individual from disturbing the social-economic order.”). However, worker-initiated strikes still happen quite often and sometimes on a large scale. There were eight thousand reported strikes in China in 2000 and subsequently dozens of strikes involving as many as fifty thousand workers. St. Antoine, *supra* note 18, at 109.

100. Lawrence Cox, *Freedom of Religion in China: Religious, Economic and Social Disenfranchisement for China’s Internal Migrant Workers*, 8 ASIAN-PAC. L. & POL’Y J. 370, 412 (2007).

101. The 2004 Jiti hetong guiding [Provisions on Collective Contracts] (promulgated by the Ministry of Labor and Social Security, Jan. 20, 2004, effective May 1, 2004) LAWINFOCHINA (last visited Dec. 31, 2008) (P.R.C.) provides details for the process of negotiating and signing collective contracts, which include the selection of negotiating representatives, scope of negotiable subjects,



collective contracts do not provide increased protection to workers because they are rarely enforced or renewed.<sup>102</sup> What's more, the bargaining process has the potential of being bureaucratized. The negotiation, formation, and performance of collective contracts are subject to the supervision of local government authorities.<sup>103</sup> When a dispute arises in the bargaining process, either party may submit a written application to the local labor administrative authority and get it involved in resolving the dispute.<sup>104</sup> With the local government interjecting itself into the negotiation process, the final collective contract becomes in effect "an agreement between the local party-state and the firm's management."<sup>105</sup>

Further undermining the union's role in representing individual workers and seeking meaningful law enforcement is the fact that the union's interest in China has been aligned with that of the management.<sup>106</sup> Since the union is subordinate to the Party and the Party's primary goal now is to promote economic growth,<sup>107</sup> the union's interest is inevitably aligned with the interest of business owners and the management; the union ends up sharing the same goal as the management, which is to

supervision by the local labor administration, procedures for collective negotiation, and duties of proper conduct for collective negotiations such as fair representation and fair treatment of employees. Brown, *supra* note 95, at 38–45.

102. Gallagher, *supra* note 9, at 23. Of the thirteen thousand labor disputes arbitrated in Shanghai in 2001, not a single dispute concerned a collective contract; one trade union official stated "we won't re-sign collective contracts again in three years unless we are forced to, because this thing has no meaning." *Id.*

103. Provisions on Collective Contracts, *supra* note 101, art. 7. See also Labor Contract Law, *supra* note 2, art. 54 (stating that collective contracts are only effective if local labor administration authorities receive a copy and raise no objections within fifteen days of receipt).

104. *Id.* art. 49. The administrative resolution must be completed in thirty days with an extension of no more than fifteen days. *Id.* art. 52. At the end of the administrative resolution process, an agreement on dispute resolution must be formulated and signed by both the parties and the labor administration authority. *Id.* art. 53.

105. Gallagher, *supra* note 9, at 23.

106. See Zana Z. Bugaighis, *What Impact Will the Revised Trade Union Law of China Have on Foreign Business?*, 16 PAC. RIM L. & POL'Y J. 405, 409 (2007); John Bruce Lewis & Bruce L. Ottley, *China's Developing Labor Law*, 59 WASH. U. L.Q. 1165, 1175 (1982) (stating that unions have been used as a vehicle to transmit Party policy downward and that their power has been limited by the Party's transfer of control over unions to local Party committees). Many administrative functions formerly performed by unions were transferred to the Party during the Great Leap Forward period (1958–1960). *Id.* The ACFTU was first established in 1925 and operated under the principle of democratic centralism. See Bugaighis, *supra*, at 408–09. Before the privatization of the economy, workers' interests were protected by lifetime jobs and benefits, therefore the union had no need to play a strong role in asserting labor rights. See Gallagher, *supra* note 9, at 23. For a description of the historical development of the ACFTU, see Bugaighis, *supra*, 408–11; All-China Fed'n of Trade Unions, *A Brief History of the ACFTU's Development* (Sept. 30, 2007), <http://english.acftu.org/template/10002/file.jsp?cid=65&aid=214>.

107. Gallagher, *supra* note 9, at 23.

maintain workplace harmony.<sup>108</sup> In reality, the union often plays the role of mediating disputes between the management and workers.<sup>109</sup>

The low unionization rate at FIEs and domestic private enterprises where labor abuses most often occur further dampens the hope of relying on union power to make sure what is written on paper is carried out in everyday employment practices.<sup>110</sup>

Compared to government labor authorities, trade unions ought to be a stronger force in securing employer compliance with the law. Union officials outnumber government inspectors,<sup>111</sup> and grassroots-level union officials are located within the business, which facilitates monitoring. However, the union's actual compliance function is weak. Due to its Party and state affiliations, it has little legal power to compel employers'

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108. The President of the ACFTU, Wang Zhaoguo, remarked on the heels of the promulgation of the Labor Contract Law that efforts to protect the legal rights of workers were required to "bring the role of the working class as the main force in promoting social harmony into full play." *Union Leader Calls for Protecting Workers' Legal Rights*, XINHUA NEWS AGENCY, Jan. 18, 2008, [http://news.xinhuanet.com/english/2008-01/18/content\\_7449418.htm](http://news.xinhuanet.com/english/2008-01/18/content_7449418.htm).

109. See, e.g., Gallagher, *supra* note 9, at 29–30 (stating that the trade union is "part of the total developmentalist machine" at China's economic development zones as it serves as a mediator between foreign management and Chinese workers for purposes of creating harmony and consensus and that, in the event of a strike, the union acts in cooperation with the Public Security Bureau and the Labor Bureau to resume production as quickly as possible).

As a matter of fact, enterprise management often dominates unions. The management usually participates in the selection of union representatives and most union officials in FIEs and SOEs jointly serve in management positions. *Id.* at 28, 32. See Trade Union Law, *supra* note 94, art. 9 (prohibiting close relatives of enterprise managers from becoming candidates for union positions but imposing no such prohibition on management personnel themselves). Additionally, union officials are paid wages and benefits by enterprise management. *Id.* art. 41.

110. See Brown, *supra* note 95, at 57. There are indications that the unionization rate at FIEs may go up fairly quickly in the near future. See Gallagher, *supra* note 9, at 29, 31 (suggesting that FIEs, especially Japanese firms, support the unionization of employees because of cultural barriers in directly communicating to employees and for purposes of establishing a good public image; however, Taiwanese companies tend to suppress unionization because of mistrust of the Communist Party); Bugaighis, *supra* note 106, at 405 (stating that Wal-Mart, the biggest anti-union company in the United States, agreed to allow unionization among its employees in China after resisting infiltration of the ACFTU for two years). The goal is to unionize eighty percent of FIEs by the end of 2007. *Id.* at 406. In August 2006, twenty-six percent of FIEs were unionized. *Id.* at 427. There was even a proposal by the ACFTU President, Wang Zhaoguo, to make foreign enterprise unionization mandatory. *Id.* at 427–28. On the other hand, it is unknown whether the unionization rate at domestic private enterprises will go up as quickly. By 2003, at most thirty percent of domestic private enterprises were unionized. Cooney, *supra* note 17, at 1076. The ACFTU has adopted the approach of establishing national or regional industrial unions instead of enterprise-level unions to incorporate domestic small and medium private enterprises. See Brown at 58; Labor Contract Law, *supra* note 2, art. 53 (noting that industry-wide collective contracts or regional collective contracts may be established among small businesses in the construction, mining, and restaurant industries).

111. There were three thousand labor inspecting agencies and forty thousand official labor inspectors in China in 2002. Cooney, *supra* note 17, at 1066 (citing Law Year Book of China (2003)). According to ACFTU, there are five hundred thousand full-time union officials. See Cooney, *supra* note 92 and accompanying text.

compliance with the law. It has no right to organize strikes, nor the power to negotiate collective contracts in an adversarial way. Despite the large number of union members in China, the unionization rate is still low in FIEs and private enterprises where labor relations are the most contentious.<sup>112</sup> Even if workers in those enterprises are unionized, they have no way of gaining more leverage as they cannot effectively mobilize the union to act against the management.<sup>113</sup>

The 2007 Labor Contract Law undoubtedly makes a significant stride from the 1994 Labor Law. It reads an implied contract into every employment relationship and makes the termination of an employment contract much harder than before. The significant changes in law could substantially enhance the protection of labor rights, if only they were to be carried into full force in practice. An examination of the current enforcement regime—including voluntary compliance by employers, enforcement efforts by individual workers, oversight and inspection by government administrative authorities, and collective negotiation by trade unions—does not present an optimistic picture. In this sense, the 2007 Labor Contract Law is no more than a beginning.

### III. CLASS ACTION LAWSUIT—AN ALTERNATIVE LAW ENFORCEMENT OPTION

The insufficiency of the existing labor law enforcement mechanism requires a search for alternatives. An alternative mechanism needs to create enough deterrence to stop employers from violating the law and new incentives for government enforcement authorities to take vigorous actions. It must also take into consideration the reality that workers generally lack financial resources to pursue legal actions individually.

Workers in China have filed and won class action lawsuits against employers, even though the number of such cases remains low.<sup>114</sup> There

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112. Until 2003, unions did not represent migrant workers because they were classified as agricultural workers and therefore not part of the “working class” participating in the union. Cooney, *supra* note 17, at 1076.

113. See Brown, *supra* note 95, at 71 (stating that there is no consequence for the union even if it does not fully or fairly represent employees’ interests in labor rights disputes, and proposing that affirmative obligations should be imposed on the union and legal causes of action should be created by which the union’s action or inaction could be challenged by employees).

114. Liebman, *supra* note 78, at 1529 n.49 (mentioning twenty workers who successfully sued their former employer for back pay); Traci Daffer, Note, “*I Am Fighting for the Right to Eat, and I Will Keep Fighting. The Truth Is on Our Side*”: Class Action Litigation As a Means of Enacting Social Change in China, 75 UMKC L. REV. 227, 231–32 (2006) (noting that six hundred former textile workers filed a pending class action lawsuit seeking back wages). Around ten percent of suits filed annually are class actions. *Id.* at 231.

are both benefits and difficulties for joining all potential claimants in a lawsuit, but compared to other means of changing the status quo, class action lawsuits remain a viable option under the current legal framework and political climate in China.

#### A. *Legal and Political Feasibility*

China is one of the few countries outside the United States that allow citizens to file class action lawsuits.<sup>115</sup> The Law of Civil Procedure contains two provisions on “joint lawsuits.” Articles 54 and 55 of the law allow class action suits for cases involving a fixed and unknown number of litigants, respectively.<sup>116</sup>

Filing a class action lawsuit is a politically feasible option to resolve labor disputes, in contrast to holding strikes and labor protests, which are illegal in China and unlikely to gain legal status in the near future. “[T]he Party has given ‘direct or indirect’ backing to ‘nearly all class action suits.’”<sup>117</sup> The reason is not hard to understand: “the government would prefer seeing ‘disputes settled in the courts rather than streets,’”<sup>118</sup> as the former still gives the government a measure of control.

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115. Daffer, *supra* note 114, at 227. Even though civil law countries often reject joint lawsuits because they appear to ignore the distinction between the public and private spheres and bind unnamed parties to the outcome, China is unique in that it has a strong collective tradition. *Id.* at 229 (pointing to Confucian principles, which deny individual rights, and Maoist communism, which stresses total immersion in the collectivity).

116. Mingshi susong fa [Civil Procedure Law] (adopted by the Nat'l People's Cong., Apr. 9, 1991, revised by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective Oct. 28, 2007) arts. 54, 55. However, under article 55, a potential claimant must opt in by registering with the court in order to be a party to the lawsuit, which is different from the U.S. opt-out approach adopted in FED. R. CIV. P. 23. A potential problem with the opt-in approach is that a Chinese court has the discretion to issue (or not) notice of the lawsuit. Daffer, *supra* note 114, at 231. This means that without notice potential claimants, especially those in rural areas, are unlikely to join a lawsuit.

117. Daffer, *supra* note 114, at 237 (citing Shai Oster, *Order in the Court*, ASIaweek (Nov. 9, 2001)). Preliminary research seems to indicate a pattern that class action lawsuits against private businesses tend to prevail while those against local governments are likely to fail. *Id.* at 232–35 (listing examples of successful and unsuccessful class action lawsuits). However, under the Administrative Procedure Law, no suit can be brought against the Communist Party; only specific administrative actions can be challenged. *Id.* at 235.

118. *Id.* at 237–38. The Chinese government has taken great efforts to channel more social dissatisfaction into the legal mechanism. The Ministry of Justice has advocated establishing a population of law, or *pufa*, as a means to improve citizens' familiarity with legal rights and institutions. Ministry of Justice, Law Popularization, [http://www.legalinfo.gov.cn/english/Law-Popularization/node\\_7616.htm](http://www.legalinfo.gov.cn/english/Law-Popularization/node_7616.htm) (last visited Feb. 12, 2008).

### *B. Benefits of Filing a Labor Class Action*

Class action lawsuits, first and foremost, solve the cost problem of individual lawsuits. When a group of workers seek justice collectively, limited financial resources may be pooled together to overcome the constraint imposed by court costs and attorneys' fees that would have been prohibitive had the workers litigated individually.<sup>119</sup>

On a related point, the possibility of filing a class action lawsuit creates incentives for lawyers to represent low-income workers. Lawyers may see the opportunity to obtain not only financial but also reputational benefits, even though each separate individual claim may only generate limited fees.<sup>120</sup> It is very likely that the publicity received by high profile cases will create future business for the lawyer.

Media attention attracted by class action lawsuits also helps empower workers seeking legal remedies.<sup>121</sup> If the damages awarded in a class action are too low to hurt an employer's bottom line, the social and political pressure generated by intense media coverage of the lawsuit would probably be enough to make not only the employer but also local government authorities feel compelled to respond. Sometimes simply filing the lawsuit would be enough to force the employer to settle or attract the interest of higher-level government officials.<sup>122</sup> Especially for FIEs, media exposure would be an effective deterrent, as foreign investors generally worry about both domestic and overseas publicity. For potential claimants, constant media reports of labor lawsuits provide examples of others seeking legal actions and show that such actions are feasible.

119. The Civil Procedure Law, *supra* note 116, art. 107, permits courts to reduce or waive costs when appropriate. The Supreme People's Court has stated that in class actions court fees shall be paid by the losing party. Liebman, *supra* note 78, at 1534.

120. Until the promulgation of the 1996 Lawyers Law, all lawyers remained "state legal workers," but now they are free to choose their cases. *Id.* at 1536. However, government regulation prohibits lawyers from charging on a contingency basis for "collective litigation" or suits seeking back wages. Measures for the Administration of Lawyers' Fees, *supra* note 81, arts. 11–12. In addition, it is unclear to what extent lawyers can legally encourage class action or expand the plaintiff group. Liebman, *supra* note 78, at 1538.

121. See Keith J. Hand, *Using Law for a Righteous Purpose: The Sun Zhigang Incident and Evolving Forms of Citizen Action in the People's Republic of China*, 45 COLUM. J. TRANSNAT'L L. 114, 183–84 (arguing that media coverage and internet dissemination could play a critical role in China's legal reforms by catching the attention of senior officials and forcing the government to be responsive).

122. Liebman, *supra* note 78, at 1540–41 (noting the pressure is particularly important given the difficulties courts face in enforcing judgments and the power local authorities often have over local courts).

### C. Difficulties Facing Labor Class Actions

A labor class action lawsuit, like any other labor or employment lawsuit in China, faces the institutional barrier that arbitration must precede litigation. Thus, it is especially troublesome for potential class action plaintiffs because they would have to synchronize their proceedings so that everyone is finished with arbitration and eligible to file a lawsuit at the same time. The mandatory arbitration requirement also creates problems for those who wish to opt in as class members but have not yet undergone arbitration. Some scholars have already suggested that the mandatory arbitration requirement must be abolished for more effective enforcement of labor law in China.<sup>123</sup>

Additionally, some lawyers may be deterred from representing workers in a class action lawsuit despite the prospect of reaping a hefty fee, as a large-scale, high-stake litigation often puts the lawyer in the spotlight and subjects him or her to retaliation by the employer.<sup>124</sup>

Local protectionism may work against class-action lawsuits as well. Courts in China are funded by local governments and local Party personnel offices have the power to nominate judges.<sup>125</sup> Thus, “the favoring of locals over outsiders” may exert extrajudicial influence on the outcome.<sup>126</sup> Even without the external pressure, judges may be unwilling to accept class action suits due to the concern that the cases will be too complex and time-consuming for them to manage.<sup>127</sup> Some judges may simply feel they are not competent enough to adjudicate class actions.<sup>128</sup>

In any case, individuals may not be timely informed of the opportunity to opt in as a member of the class.<sup>129</sup> They may also be intimidated from

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123. See Cooney, *supra* note 17, at 1088.

124. See Lee, *supra* note 52 (mentioning that lawyers trying to reach out to migrant workers and educate them about protections under the new labor law are subject to severe physical violence such as beating, hacking, and disfigurement); Daffer, *supra* note 114, at 234 (noting that a lawyer representing investors in a class action claim against the government for illegal seizure of their oil wells was imprisoned for four months).

125. Daffer, *supra* note 114, at 238–39.

126. *Id.* at 238.

127. Judges are often evaluated based on the number of cases they process. A class action creates extra work for a judge: he must notify prospective class members, supervise the appointment of class representatives, and if plaintiffs are successful, oversee the distribution of awards to large numbers of individuals. Liebman, *supra* note 78, at 1533.

128. Until 1995, neither a college degree nor formal legal training were required for a person to become a judge in China. Daffer, *supra* note 114, at 241–42.

129. Liebman, *supra* note 78, at 1535 n.89 (observing that although notices of class actions may be publicized in popular newspapers or on television, they may also be publicized only in legal newspapers or court circulars).

joining a class action when the employer is well-connected and the chance of retaliation is high.<sup>130</sup>

### CONCLUSION

A meaningful evaluation of China's new Labor Contract Law is incomplete without contemplating how effectively the law will be enforced in actuality. Ever since the opening of China three decades ago, foreign investors have entered the country not only to take advantage of the huge market, but also to benefit from the low labor cost.<sup>131</sup> Gradually the Chinese labor market has reset, and arguably lowered, the global norm for wages and work standards. Labor organizations and academics have described the global impact of this phenomenon as a "race to the bottom."<sup>132</sup> This situation has affected China's international relations—the United States has insisted that China implement a labor standard consistent with international standards and has used China's labor practices as a condition for granting trade privileges.<sup>133</sup>

It has been more than twenty years since the Chinese government first chose to transform the country's labor system from one that was completely subject to central planning to one that is based on a free-market contract system. The change may have been abrupt initially, but that does not justify the fact that what was drafted twenty years ago has yet to be fully implemented in practice. This Note argues that due to the lack of an effective enforcement mechanism, the law has been relegated to paper, while in reality politics and the market dictate employment relations. Consequently, reports of labor scandals and workers' protests abound as China leads the world in the "race to the bottom."

In passing the 2007 Labor Contract Law, the Chinese government has signaled to the world its determination to improve the country's labor record. As if to compensate for the impotent enforcement regime, the new law includes many pro-labor provisions that risk sending the country back to the low-productivity "iron rice bowl" era. What is missing in the new legal framework, however, are specific measures addressing the chronic failure of law enforcement.

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130. *Id.* at 1533–34.

131. China alone accounted for fifty percent of the double increase in global workforce in the past several decades. Tim Costello et al., *Labor Rights in China*, FOREIGN POLICY IN FOCUS, Dec. 21, 2006, <http://www.fpif.org/fpiftxt/3824>. About twenty-five percent of the global workforce is now Chinese. UNDUE INFLUENCE, *supra* note 4, at 10.

132. See Costello et al., *supra* note 131.

133. Josephs, *supra* note 8, at 577.

This Note examined the current labor law enforcement regime by taking the stances of employers, individual workers, government agencies, and trade unions. It analyzed, from each party's perspective, why law enforcement does not follow through on a seemingly solid legal foundation. The analysis suggests the need for an alternative enforcement mechanism—class action lawsuit—which would allow individual workers to have more control in a collective way. A class action lawsuit has the strength of being a feasible option under the current political climate in China. In contrast to public protests, it allows individual workers to remain within the bounds of the legal process; it fits into the government's agenda to establish and present to the world a modern legal society, and it dovetails the political scheme to funnel social discontent through courts rather than letting disputes play out on the street. "*Imagining* what is possible, tempered by what is *likely* within 'Chinese conditions,' can move forward the possibilities of real labor reform."<sup>134</sup> Admittedly, some collective labor actions that only intend to generate modest public pressure may be construed as an intolerable threat to the Party and the state. Hopefully, by keeping disputes inside a courtroom, class action lawsuits will more likely be construed as the former rather than the latter.

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134. Brown, *supra* note 94, at 69.

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