

# CHINESE “WORKERS WITHOUT BENEFITS”\*

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## I. INTRODUCTION

Millions of workers in China are not afforded the rights and benefits of its labor and employment laws and thus are not “workers with benefits.” China’s labor reforms and worker “safety net” have come so far in the past 30 years, producing “workers with benefits.” Why are there still millions of *workers* in the urban sector who do not have the protections of these labor and employment law reforms, who are the “workers *without* benefits,” falling outside the labor safety net? They have been called precarious,<sup>1</sup> atypical, irregular, contingent, and include casual, temporary, part-time, dispatch, and workers called subcontractors and independent contractors, which may include construction workers, students, domestic workers, and the many other workers in informal employment relationships. They fall outside the legal protections of the labor laws; or, they may be covered, but excluded or exempted or misclassified. This situation of precarious workers occurs not only in China, but globally, and it has not gone unnoticed by the International Labour Organization (ILO).<sup>2</sup>

Labor laws in China began in earnest in 1994 with the Labor Law, which defined labor rights and obligations in somewhat general terms, with local regulations sometimes more specifically supplementing them. This was followed in subsequent years with more specific labor rights and benefit laws, including for workers health and safety, work-related injuries, unemployment insurance, and other social security benefit laws. These laws are tied into and for the benefit of workers in the employment relationship of a *labor contract*. Outside this relationship is a *contract for labor services*, which is not eligible for the benefits of the labor laws, but rather is dealt with under the contract law, as a contract of employment, such as an independent con-

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<sup>1</sup> See RUSSELL SAGE FOUNDATION, *RETHINKING WORKPLACE REGULATION: BEYOND THE STANDARD CONTRACT OF EMPLOYMENT* (Katherine V.W. Stone & Harry Arthurs eds., 2013).

<sup>2</sup> See INTERNATIONAL LABOUR ORGANIZATION, *POLICIES AND REGULATIONS TO COMBAT PRECARIOUS EMPLOYMENT* (2011), [http://www.ilo.org/wcmsp5/groups/public/—ed\\_dialogue/—actrav/documents/meetingdocument/wcms\\_164286.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_dialogue/—actrav/documents/meetingdocument/wcms_164286.pdf) [hereinafter ILO POLICIES].

tractor might have. There are legal definitions and issues arising under the various labor laws, national and local, as to how to categorize workers that this paper undertakes to explicate. The differences in consequences are the availability of the rights and benefits of the labor laws, as well as the right to resolve labor disputes under the Labor Mediation and Labor Arbitration Dispute Law.

Because as employers understand they can lower labor costs by hiring and/or classifying workers as contractors for services, there are a number of these worker categories for which legal interpretations will be discussed to test the language and the application of the law. These results will be compared with relevant ILO conventions and labor standards to evaluate how China's laws fit with those standards and identify any areas that might benefit from reform. In the end analysis, it is proposed some clarity will be provided on the issue of which worker in China should be an "employee with benefits."

## II. WHO ARE THE "EMPLOYEES WITHOUT BENEFITS?"

### A. *Precarious work*

One scholar has identified the issue of precarious work as follows:

Although precarious work was relatively rare in China until the 1980s, it has experienced rapid growth over the past two decades. The factors underlying the diffusion of precarious work are varied and interrelated, notably reflecting the impact of changes in the structure of industry, occupations, urbanization, state policies, and labor market institutions, as well as employers' manpower strategies. Although the spread of precarious work is sometimes advocated as an effective means of generating employment and increasing labor market flexibility, substantial evidence shows that such work is plagued by a series of problems, including low pay, low skill, high work intensity, poor working conditions, and lack of employment protection.<sup>3</sup>

The work arrangements that encompass the precarious workers are categorized into contractual limitations on duration (short or fixed term, temporary, casual, or day labor) and the nature of the employment relationship itself – triangular, ambiguous, misclassified or disguised employment relationships.<sup>4</sup> The working conditions often include low wages, poor occupational health and safety protections,

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<sup>3</sup> Ying Zhou, *The State of Precarious Work in China*, 57 AMERICAN BEHAVIORAL SCIENTIST 354 (2013), <http://abs.sagepub.com/content/57/3/354.abstract>.

<sup>4</sup> See ILO POLICIES, *supra* note 2, at 7.

and lack of rights or benefits.<sup>5</sup> Subcontracting is often used by primary employers as a means of shifting risk by outsourcing more dangerous jobs to subcontracted and agency workers. This forces precarious workers to undertake the more dangerous and risky jobs.<sup>6</sup> Other adverse effects of precarious work include a disproportionate impact on women. It also threatens trade union membership in that precarious workers are in an unstable position. Even if they are being exploited, few feel confident enough to organize and bargain collectively at the risk of losing their jobs.<sup>7</sup>

Precarious work arises from a combination of forces, including run-away profit-seeking, changing production schedules, global capital mobility, and ineffective labor protection laws, all resulting in increased competition. "In this context, precarious employment is as much a consequence of increased competition as it is a powerful driver of increasing competition."<sup>8</sup>

It is reported that at least one-fifth of China's 300 million urban workers held temporary jobs at the end of 2010, up more than twofold since 2008.<sup>9</sup> China's traditional model of long-term employment has been changing due to increased reliance on nonrenewable fixed-term and temporary agency employment contracts. In a recent study that pre-dates amendments to the Labor Contract Law, which regulated and limited the use of dispatch workers,<sup>10</sup> it was suggested that managers tend to adopt contingent employment practices in the presence of weak labor institutions to retain powers such as termination at will and to promote their own interests when handling conflicting intra-organizational demands. "Despite recent legislative endeavors to promote continuous employment relationships as the norm, the proportion of workers on temporary agency contracts and

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<sup>5</sup> See, e.g., John T. Addison & Christopher J. Surfield, *Atypical Work and Employment Continuity*, 48 *INDUSTRIAL RELATIONS* 655, 655 (2009); J. Benach & C. Muntaner, *Precarious Employment and Health: Developing a Research Agenda*, 61 *J. EPIDEMIOLOGY CMTY. HEALTH* 276, 276 (2007).

<sup>6</sup> See Michael Quinlan, *The Implication of Labour Market Restructuring in Industrialized Societies for Occupational Health and Safety*, 20 *ECON. & INDUS. DEMOCRACY* 427, 432-33 (1999).

<sup>7</sup> See María Menéndez, Joan Benach, Carles Muntaner, Marcelo Amable, & Patricia O'Campo, *Is Precarious Employment More Damaging to Women's Health than Men's?*, 64 *SOCIAL SCI. & MED.* 776, 777 (2007); see, e.g., Enda Brophy, *System Error: Labour Precarity and Collective Organizing at Microsoft*, 31 *CANADIAN J. COMMUN* 619 (2006).

<sup>8</sup> ILO POLICIES, *supra* note 2, at 2218.

<sup>9</sup> Xiangmin Liu, *How Institutional and Organizational Characteristics Explain the Growth of Contingent Work in China*, 68 *INDUS. & LAB. REL. REV.* 372, 372-73 (2015).

<sup>10</sup> *Id.* at 372.

nonrenewable fixed-term contracts in China has rapidly increased.”<sup>11</sup> Some firms want to keep certain employment practices that promote their own self-interest, such as the right to fire and inconsistent laws and regulations, so “they deliberately adopt contingent work to shirk their responsibilities as employers and pass on the risks to workers.”<sup>12</sup>

Some categories of workers in China suffer more than others in being “workers without benefits.” A recent study found that “engaging in informal employment incurred a 44% wage penalty for urban workers and 33% for rural migrant workers” in China.<sup>13</sup> In addition, only 29% of migrant workers in formal employment and 2% of migrant workers in informal employment were entitled to statutory pensions compared with 82% of formal workers with urban residential status.<sup>14</sup>

This type of employment is further defined as follows:

Informal employment (also known “non-standard employment” or “flexible employment”) as a flexible labor strategy has been gaining increasing attention in China since the late 1990s as a result of the massive downsizing in the state sector, the rapid expansion of the private economy, and the migration of surplus rural labor en masse to urban areas.<sup>15</sup>

Workers engaging in ‘informal employment’ can be found in three types of organizations: 1) organizations operating in the formal sector; 2) organizations operating in the informal sector; and 3) loosely formed ‘informal employment’ organization.<sup>16</sup> Informal employment includes temporary, fixed-term, seasonal, casual work, hourly work, semi-self-employment in the form of subcontracting work, self-employment and those employed by self-employed businesses. There are no national statistics to accurately capture the size of ‘informal employment’ and the spread of its sub-categories. Existing figures are estimations calculated in different ways. For example, according to one report, “over 60 percent of the workforce was engaged in ‘informal employment’ by the mid-2000s.”<sup>17</sup>

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<sup>11</sup> *Id.* at 391.

<sup>12</sup> *Id.*

<sup>13</sup> Zhou, *supra* note 4, at 10.

<sup>14</sup> *See id.*

<sup>15</sup> Fang Lee Cooke, *Labour Market Regulations and Informal Employment in China: To What Extent Are Workers Protected?*, 2 J. CHINESE HUM. RESOURCE MGMT 100, 102 (2011).

<sup>16</sup> *See* Ralf Hussmanns, *Measuring the Informal Economy: From Employment in the Informal Sector to Informal Employment 2* (Int’l Labor Office, Working Paper No. 53, 2004).

<sup>17</sup> Fang Lee Cooke & Ronald Brown, *The Regulation of Non-Standard Forms of Employment in China, Japan, and The Republic of Korea*, at 20 (International Labour Office, Conditions of Work and Employment Series No. 64, 2015), <http://>

“Workers without benefits” include these various non-standard workers, as well as vocational students, construction workers, and domestic workers, all of which are discussed below.

### B. *Non-standard workers*

The ILO has noted that:

In the past, the standard employment relationship, providing a bundle of labor and social rights, ensured that employers shared some of the responsibility by offering job security despite market volatility, and reduced individual risk through collective social security provisions. In the precarious world of today, however, the flexibility burden has shifted from the enterprise or the state to the largely unprotected individual worker, resulting in precarious employment and increasingly precarious societies.<sup>18</sup>

The ILO states that *non-standard* work is commonly characterized by short and often unpredictable hours, as seen with temporary or fixed-term contracts, temporary agency or dispatched work, and self-employment.<sup>19</sup> Sometimes these new forms of contractual arrangement result in a blurring of the employment relationship, which makes it “difficult for workers to exercise their rights at work or gain access to social security benefits.”<sup>20</sup>

*Part-time* employment in China is defined as work generally compensated on an hourly basis and that does not exceed an average of 24 hours per week or 4 hours per day for the same employer.<sup>21</sup> They need not be hired under a written contract and can be dismissed (or they can quit) at will without severance pay.<sup>22</sup> These hourly-paid workers may have to carry out several ‘part-time’ jobs to generate sufficient income. Part-time workers, by law, must be paid at least the local minimum wage, though not most other labor benefits,<sup>23</sup> and can-

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[www.ilo.org/wcmsp5/groups/public/—ed\\_protect/—protrav/—travail/documents/publication/wcms\\_414584.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_protect/—protrav/—travail/documents/publication/wcms_414584.pdf).

<sup>18</sup> ILO POLICIES, *supra* note 2, at 22.

<sup>19</sup> See *Non-Standard Forms of Employment*, INTERNATIONAL LABOUR ORGANIZATION (2016) (last visited April 20, 2016), <http://www.ilo.org/global/topics/employment-security/non-standard-employment/lang—en/index.htm>.

<sup>20</sup> *Id.*

<sup>21</sup> 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) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. art. 68 (China), [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471106.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471106.htm) [hereinafter LCL].

<sup>22</sup> *Id.* arts. 69, 71.

<sup>23</sup> *Id.* art. 72.

not be subject to a probationary term.<sup>24</sup> Also, these workers, estimated to number about 60-70 million workers, are sometimes categorized as “casual employees” and fall largely outside the protection of the labor laws. They are distinguished in that they have no fixed time or labor contract.<sup>25</sup> While fixed-term employees must be provided labor contracts and are entitled to most of the same protections and benefits as open-term employees, it is unclear whether fixed term, part-time workers working between 24 and 40 hours per week must be provided a modified amount of benefits.<sup>26</sup>

By contrast, *probationary* employees may remain in that status for up to six months, have the right not to be terminated without cause<sup>27</sup> and must be paid at least the minimum wage or, at any rate, not less than eighty percent of the non-probationary rate.<sup>28</sup>

*Independent contractors* are not under the employer’s direct control and thus are outside the employment relationship and the Labor Contract Law;<sup>29</sup> or they could be *de facto* employees where the employer lacks sufficient evidence of their independent status.<sup>30</sup> Instead, independent contractors fall under the Contract Law and are parties to a labor services contract; therefore “they have no right to labor benefits except as they may be ‘employees’ falling under the employment” of another employer.<sup>31</sup> They often need to be distinguished from self-employed individuals who are not dependent and controlled by an employer.

*Dispatch Workers.* Estimates by the All-China Federation of Trade Unions (ACFTU) suggest in 2011 that there were over 60 million dispatch workers in urban China,<sup>32</sup> with a concentration of dispatch workers in State-Owned-Enterprises (SOEs) and Foreign-Invested Enterprises (FIEs).<sup>33</sup> Labor dispatching units, or temporary agencies, are defined as an employing unit to the workers.<sup>34</sup> In 2013, the Chinese government tightened the regulation of agency employ-

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<sup>24</sup> *Id.* art. 70.

<sup>25</sup> *See id.* art. 71.

<sup>26</sup> *See id.* art. 68.

<sup>27</sup> *See id.* arts. 19, 21.

<sup>28</sup> *See id.* art. 20.

<sup>29</sup> *See, e.g., id.* art. 2.

<sup>30</sup> *See id.*

<sup>31</sup> Cooke & Brown, *supra* note 18, at 32.

<sup>32</sup> *See* Virginia H. Ho & Huang Qiaoyan, *The Recursivity of Reform: China’s Amended Labor Contract Law*, 37 *FORDHAM INT’L L.J.* 973, 982-83 (2014), <http://ir.lawnet.fordham.edu/ilj/vol37/iss4/8>.

<sup>33</sup> *Id.* at 984.

<sup>34</sup> LCL, *supra* note 23, art. 58.

ment and the agency industry.<sup>35</sup> Now, dispatched workers cannot comprise more than a specific percentage of a company's total workforce and workers can only be used in temporary positions (defined as 6 months or less), auxiliary positions, and substitute positions (e.g. to cover maternity leave, long-term sick leave, and study leave).<sup>36</sup>

Dispatch workers are to be hired by the dispatch agency for two years under a fixed-term labor contract period that cannot be part-time,<sup>37</sup> and a user-employer cannot separate a continuous term of labor use into two or more short-term dispatch agreements.<sup>38</sup> The dispatch agency is responsible for the wages and must provide pay equal to that of the standard workers of the user employer.<sup>39</sup> Dispatch workers may join the union of the user-employer or the temporary agency.<sup>40</sup>

Since the enactment of the amended Labor Contract Law and the Provisional Regulations on Labor Dispatch, labor strategy has displayed new characteristics in 2014. It revealed employers' strategic responses to the new regulations to be more diverse labor deployment practices, including turning non-standard positions into permanent positions, outsourcing, part-time work, intern placement, volunteer work. In particular, business outsourcing has been a popular strategy for large SOEs and foreign firms to cope with the new labor regulations. As a result, there was an evident reduction of dispatched workers even before new regulations were in effect. From 2011 to the end of 2013, the total number of dispatched workers in the four big banks in China had reduced from 172,900 to 142,600 workers.<sup>41</sup>

### C. Vocational Students

Vocational schools have become a significant source of industrial and service labor.<sup>42</sup> China's Ministry of Education reported that

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<sup>35</sup> See Daniel S. S. Cairns, *New Formalities for Casual Labor: Addressing Unintended Consequences of China's Labor Contract Law*, 24 Wash. Int'l L.J. 219, 242 (2015).

<sup>36</sup> *Id.* at 244.

<sup>37</sup> Regulation on the Implementation of the Employment Contract Law of the People's Republic of China (promulgated by the State Council, Sept. 18, 2008, effective Sept. 18, 2008) art. 30 (China), [http://www.fdi.gov.cn/1800000121\\_39\\_521\\_0\\_7.html](http://www.fdi.gov.cn/1800000121_39_521_0_7.html).

<sup>38</sup> See LCL, *supra* note 23, art. 59.

<sup>39</sup> See *id.* art. 63.

<sup>40</sup> See *id.* art. 64.

<sup>41</sup> See *The Big Four Banks Dispatching Workers Cut 84,300 People Last Year: A Drop Of More Than Seventy Percent*, LABOR DISPATCH INDUSTRY NETWORK (July 23, 2015), <http://www.pqgidk.com/En/NewsView.asp?ID=21> (last accessed Apr. 24, 2016).

<sup>42</sup> See, e.g., Earl V. Brown, Jr. & Kyle A. deCant, *Exploiting Chinese Interns as Unprotected Industrial Labor*, 15 ASIAN-PAC. L. & POL'Y J. 149, 157 (2014).

in 2010, 42% of the 18.1 million Chinese students completing their nine years of compulsory education opted to enroll in vocational school.<sup>43</sup> Therefore, at least eight million student interns were working in commerce each year, with the internships running from three months to a year, depending on the school.<sup>44</sup> The numbers of students in the vocational programs are provided in the chart below.<sup>45</sup>

Classification	New Enrolment	Graduates
Primary School	16.9	19.3
Middle School	17.2	18.1
Academic High School	8.4	8.0
Secondary Vocational School	6.0	4.9
Technical School	1.6	1.2
Higher Vocational School	3.1	3.2
University (undergraduate)	3.5	2.6

The percentage of interns, just at Foxconn, has been estimated at being as high as thirty-three percent, or 430,000 of the company's 1.3 million factory laborers; however, Foxconn claims that only fifteen percent of its workforce is intern labor (180,000).<sup>46</sup>

A discussion of the social and legal dilemma of the employment of student interns, as "workers without benefits" in China is summarized below:

Private employers in China rely increasingly on intern labor as a major component of their workforce. All over China, industrial and service sector student interns work full and overtime schedules performing unskilled labor alongside workers, who enjoy pay and benefits that comply with or exceed the standards set by Chinese labor law. However, the interns are paid below China's standard wages and benefits, and are barred from access to the judicial and other remedies for labor law abuses.

<sup>43</sup> *The Mass Production of Labour: The Exploitation of Students in China's Vocational School System*, CHINA LABOUR BULLETIN 2 (Jan. 12, 2012), [http://www.clb.org.hk/sites/default/files/archive/en/share/File/general/vocational\\_school\\_system.pdf](http://www.clb.org.hk/sites/default/files/archive/en/share/File/general/vocational_school_system.pdf) [hereinafter *Mass Production*].

<sup>44</sup> See Eva Dou, *Chinese Tech Factories Use Student Labor*, THE AUSTRALIAN (Sept. 26, 2014, 12:00 AM), [http://www.theaustralian.com.au/business/wall-street-journal/chinese-tech-factories-use-student-labour/news-story/4a6d9b2ec97cbfbc5debcc29c5969a1?=-](http://www.theaustralian.com.au/business/wall-street-journal/chinese-tech-factories-use-student-labour/news-story/4a6d9b2ec97cbfbc5debcc29c5969a1?=).

<sup>45</sup> See *Mass Production*, *supra* note 45, at 2.

<sup>46</sup> See Alex Pasternack, *Foxconn's Other Dirty Secret: The World's Largest Internship Program*, VICE (Feb. 15, 2012, 10:45 AM), <http://motherboard.vice.com/blog/foxconn-s-other-dirty-secret-the-world-s-largest-internship-program>.



These industrial and service “internships” are largely devoid of educational, technical or vocational content and often unrelated to the vocational aspirations of the students. Employers and business-friendly local authorities in China have adopted a self-interested interpretation of the labor laws and regulations that places interns outside the protections of the labor law and bars them from taking their disputes to the labor tribunals.<sup>47</sup>

It also has been argued that for many students, this is a “forced internship” because of the entrenched relationship between schools and businesses, a relationship actively encouraged by the Chinese government. It was not unusual for schools to deduct a “commission” from the interns’ salary or get paid directly by factories for providing them with students as cheap labor.<sup>48</sup>

Two issues are raised in this area. First, reports show that many vocational students are assigned jobs unrelated to their area of study and may be assigned involuntarily under threat of having their diploma withheld. Second, their pay and working conditions are outside the protection of China’s labor laws and often sub-standard, as they are classified as not having the requisite employment relationship despite performing the same work as standard employees receiving full wages and benefits.<sup>49</sup> These two issues raise questions of legality under China’s labor laws and under ILO standards, discussed below.

Thus, many vocational student intern workers in China are a category of “workers without benefits.”

In response to this situation, the Ministry of Education, the Ministry of Finance, the Ministry of Human Resources and Social Security, the State Administration of Work Safety and the China Insurance Regulatory Commission jointly issued the Regulations for the Management of Interns from Vocational Schools (the “Regulations”) on 11 April 2016.<sup>50</sup> It replaced the 2007 regulations and expanded the scope from students at secondary schools to also include higher-level

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<sup>47</sup> See Brown & deCant, *supra* note 44, at 150-51.

<sup>48</sup> See *Mass Production*, *supra* note 45, at 4.

<sup>49</sup> See *id.* at 1.

<sup>50</sup> Circular of the Ministry of Education and Four Other Departments on Issuing the Administrative Provisions on the Internships of Vocational School Students (Apr. 11, 2016), <https://hk.lexisn.com/law/circular-of-the-ministry-of-education-and-four-other-departments-on-issuing-the-administrative-provisions-on-the-internships-of-vocational-school-students.html>; See discussion in Grace Yang, *China Institutes New Student Intern Rules*, CHINA L. BLOG (May 7, 2016), <http://www.chinalawblog.com/2016/05/china-institutes-new-student-intern-rules.html> (discussing how the new regulations could impact businesses employing Chinese students); See also Pattie Walsh et al., *Publication of Provisions on the Administration*

vocational schools. It is an important step forward and is aimed specifically at students of secondary vocational schools or advanced vocational schools hired as interns and employers engaged in manufacturing.<sup>51</sup> However, the scope of the regulation is somewhat narrow in that the new regulations are not applicable to full-time college students. Likewise, employers not engaged in manufacturing may hire students of secondary vocational schools or advanced vocational schools as interns and may handle internships as before, with both parties agreeing on their rights and obligations. The Regulations are unclear on enforcement and silent on penalties. Because the interns lack a labor contract, their legal recourse is in the courts and not arbitration.<sup>52</sup>

The obligations of the new regulations include: 1. A limitation of 10 percent of the employer's total workforce and 20 percent of similarly positioned workers; 2. Workers under 18 require guardian consent; 3. Overtime and night shift work are prohibited; 4. Wages must be 80 percent of probationary workers; 5. The duration of work cannot exceed six months; 6. The employer and school must obtain liability insurance for its interns and sign a three party agreement on rights and responsibilities.<sup>53</sup>

#### D. Construction workers

The construction industry, a pillar of China's economic development over the last thirty years, has become an important engine of China's economic development. The National Bureau of Statistics re-

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*of Internships for Vocational School Students* (May, 31, 2016), <http://www.two.birds.com/en/news/articles/2016/china/china-employment-law-update-may>.

<sup>51</sup> Jonathan M. Isaacs, et al., *New Regulations on Vocational School Interns*, CHINA EMPLOYMENT LAW UPDATE (June 2016), <http://bakerxchange.com/rv/ff00288dc6dc759025f0886e0c41961ab1141d80/p=7426043> ("According to the 2016 Regulations, there are three types of vocational internships: 'observing internships' (where the intern learns through observing the work), 'guided internships' (where the intern performs work under close supervision), and 'independent internships' (where the intern performs the work independently with minimal or no supervision). Most of the updated restrictions only apply to the third type, i.e. independent internships, since such types of internships are the ones most often subject to abuse by companies").

<sup>52</sup> See Grace Yang, *China Institutes New Student Interns Rules*, CHINA L. BLOG (May 7, 2016), <http://www.chinalawblog.com/2016/05/china-institutes-new-student-intern-rules.html>. (stating that students under 16 cannot be hired as working interns. "The provincial/municipal education administrative departments and labor bureaus are expected to come up with detailed implementing rules pursuant to these Measures").

<sup>53</sup> See *id.*; *China to Better Protect Student Interns*, XINHUANET (Apr. 27, 2016), [http://news.xinhuanet.com/english/2016-04/27/c\\_135317358.htm](http://news.xinhuanet.com/english/2016-04/27/c_135317358.htm).

ported that in 2011, China's construction industry output value exceeded 10 trillion Yuan, becoming a driving force of China's economic development. While it is a thriving industry in China, many of these same workers suffer from inferior wages and many injuries, with fatal injuries ranking only second to the mining industry.<sup>54</sup> One study found that "[a]bout 30 per cent of all migrant workers from the countryside work in the industry."<sup>55</sup>

Despite the implementation of the Labour Contract Law more than six years ago, the majority of China's construction workers still do not have a labor contract with their employer. In fact, "[a] survey of 1,445 construction workers in five cities across China found that on average only 17.4 percent of workers had a written contract."<sup>56</sup>

As one article reports, the construction industry has experienced a remarkable boom:

The Chinese construction industry has been consuming half of the world's concrete and a third of its steel and employing more than 40 million people, most of them rural workers coming from all over the country . . . . China has invested about 376 billion Yuan in construction each year. Construction is now the fourth largest industry in the country. At the turn of the 21st century, this industry accounted for 6.6 per cent of China's GDP; by the end of 2007, its total income had risen by 25.9 per cent to 5.1 trillion yuan, and gross profits had risen 42.2 per cent to 156 billion yuan. The total output value reached 2.27 trillion yuan in the first half of 2008, showing a further 24.4 per cent increase on the previous year.<sup>57</sup>

In the actual operation of the industry, it is reported that there has been a delinking of capital from industry, and of management from labor. In the production chain, top-tier contractors control construction projects through their relationships with property developers and the local state but outsource their work to low-tier subcontractors. The top-tier contractors seek to make a profit by transferring investment

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<sup>54</sup> Pan Yi Qian & Wu Qionghen, *China's Labor Contract a Paper Dream*, UTOPIA NETWORK JOURNAL (February 21, 2014), <http://www.wyxxwk.com/Article/gongnong/2014/02/314465.html>.

<sup>55</sup> Pun Ngai & Lu Huilin, *A Culture of Violence: The Labor Subcontracting System and Collective Action by Construction Workers in Post-Socialist China*, 64 THE CHINA JOURNAL 143, 144 (July 2010).

<sup>56</sup> *China's Construction Workers Left Behind*, CHINA LABOR BULLETIN (Sept. 3, 2014), <http://www.clb.org.hk/en/content/china%E2%80%99s-construction-workers-left-behind> [hereinafter *Left Behind*].

<sup>57</sup> Ngai & Huilin, *supra* note 53, at 144.

risks and labor recruitment to their subcontractors, mainly because “[t]hey don’t bother to get their hands dirty.”<sup>58</sup>

A typical scenario of a construction project in a Beijing migrant community, described below, illustrates the dilemma of how construction workers systemically fall largely outside the safety net of intended labor law protections and thus are “workers without protections.

The subcontracting system began with a well-known property developer who was responsible for land reclamation and the design of a villa project. Responsibility for the construction was shifted down the chain through a bidding process to a state-owned construction company, which only took charge of the project management and equipment arrangement for its contractors. In turn, this company relied on three “big contractors” (*dabao* 大包) who came from Jiangsu, Hebei and Guangdong; these were responsible for providing raw materials and labor for the project. Two of them set up a labor service company to help recruit rural laborers, but in reality they relied on labor-supplier subcontractors (*xiaobao* 小包 or *qingbao* 清包) to recruit the labor, manage the daily division of work and pay out wages on completion of the project. In return, these labor-supplier subcontractors further depended on labor-use facilitators (*daigong* 带工), usually relatives or co-villagers, to look for workers in their own or surrounding villages. Thus, for this building project, one thousand workers were organized into a number of small subcontracting teams that worked on the construction site. The number of workers in each subcontracting team ranged from a dozen to a hundred.<sup>59</sup>

Surveys also revealed that wage levels for construction workers were often significantly lower than reported in the Chinese media, as interviewees reported the “average daily rate varied from a low of 136 yuan in Zhengzhou to a high of 201 Yuan per day in Shenyang.”<sup>60</sup>

Subcontracting is often often connected with a “*baogongtou*” contractor, who by custom in the industry is not a registered legal employer, who brings in a large number of workers to labor on the construction project.<sup>61</sup> As an illegal employer it cannot provide a standard

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<sup>58</sup> Ngai & Huilin, *supra* note 53, at 147.

<sup>59</sup> Ngai & Huilin, *supra* note 53, at 149.

<sup>60</sup> *Left Behind*, *supra* note 54.

<sup>61</sup> See Tingyu An, *Towards the Sustainable Development of Construction Labor Market in China: Through Cultivating Subcontractor’s Role in the Labor Supply Business* 26 (Sept. 2011) (unpublished Ph.D dissertation, Kochi University of

employment relationship and give workers a labor contract that falls under the protection and benefits of the labor laws. Rather, their relationship is a contract for labor services with the *baogongtou*, as a civil law employer, with enforcement for wages being under the civil contract law.<sup>62</sup>

### E. Domestic workers

The ILO reports there about 20 million domestic workers in China, and approximately ninety percent are female between the ages of 30-40 years of age, coming from rural to urban areas.<sup>63</sup> They largely are care workers, but also may be "cleaners" doing laundry and house-cleaning and while normally self-employed, may work for an agency that sends them to clients. As average income increases, the demand for domestic help continues to increase and it is estimated that some forty percent of urban Chinese families have a demand for domestic help, indicating an additional 15 million potential job opportunities.<sup>64</sup>

Domestic workers typically work long hours, maybe 10 hours per day, have little or no time off, and do not sign labor contracts.<sup>65</sup> The ILO reports:

Many domestic workers endure long working hours. Thirty-five percent of domestic workers in Guangzhou and Beijing work about 10 hours per day; 28% of domestic workers in Chengdu and Guangzhou do not get week-ends off. It is also well-known that households will not compensate overtime. The rate of contract coverage is low among domestic workers. More than 50% of domestic workers in Guangzhou and Chengdu, and 27% of domestic workers in Beijing did not sign a contract with either the domestic service agencies or the household.<sup>66</sup>

Further, it is reported that "[m]ore than 60% of domestic workers in Beijing and Chengdu have not joined any insurance scheme. Those who have are mostly laid-off workers rather than rural migrants."<sup>67</sup>

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Technology), <http://kutarr.lib.kochi-tech.ac.jp/dspace/bitstream/10173/773/1/1128003773.pdf>.

<sup>62</sup> *See id.*

<sup>63</sup> INTERNATIONAL LABOUR ORGANIZATION, FACT SHEET: DOMESTIC WORKERS IN CHINA 1 (n.d.), [http://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms\\_114256.pdf](http://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms_114256.pdf) [hereinafter FACT SHEET].

<sup>64</sup> *Id.*

<sup>65</sup> Xinying Hu, *Paid Domestic Work as Precarious Work in China* 112, 127 (2010), <http://summit.sfu.ca/item/9971>.

<sup>66</sup> FACT SHEET, *supra* note 61, at 1-2.

<sup>67</sup> *Id.* at 2.

Workers actually formed a union in Xian, but as they are not recognized as employees, there is minimal legal effect.<sup>68</sup>

There are some domestic workers recruited by dispatch agencies for traditional domestic work, and for which the agency pays their social insurance, but this is reported to be a low percentage.<sup>69</sup>

For the most part, domestic workers are in the informal economy and are not regulated by China's labor laws due to a lack of "employment relationship" with a legally recognized employer ("working unit") and are often explicitly excluded from labor legislation. Thus, they too are "workers without benefits."

### III. LEGAL ISSUES

#### A. *Employment Relationships*

The legality of denying workers benefits and labor protections is determined by legislation providing to whom rights and benefits are accorded and the level of government enforcement. Workers can be legislatively categorized as 1. *outside the included definitional coverage* of the required employment relationship, such as independent contractors; 2. *excluded*, such as domestic workers; 3. *"ambiguous" working relationships (or law ignored and/or not enforced)*, such as workers without a labor contract or proof of employment, vocational students, construction workers, misclassified workers, or part-time and other contingent workers. Regarding the continuing difficulty of determining an employment relationship, the ILO has observed:

The issue of who is or is not in an employment relationship – and what rights/protections flow from that status – has become problematic in recent decades as a result of major changes in work organization and the adequacy of legal regulation in adapting to those changes. Worldwide, there is increasing difficulty in establishing whether or not an employment relationship exists in situations where (1) the respective rights and obligations of the parties concerned are not clear, or where (2) there has been an attempt to disguise the employment relationship, or where (3) inadequacies or gaps exist in the legal framework, or in its interpretation or application.<sup>70</sup>

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<sup>68</sup> See *id.* at 1, 3.

<sup>69</sup> See INTERNATIONAL LABOUR ORGANIZATION, SITUATIONAL ANALYSIS OF DOMESTIC WORK IN CHINA 5 (n.d.), [http://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms\\_114261.pdf](http://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms_114261.pdf).

<sup>70</sup> INTERNATIONAL LABOUR ORGANIZATION, THE EMPLOYMENT RELATIONSHIP: AN ANNOTATED GUIDE TO ILO RECOMMENDATION NO. 198 at 3 (2007), [http://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms\\_114261.pdf](http://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms_114261.pdf).

## 1. Employment Relationships in China

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

Defining the employment relationship for purposes of coverage under China’s legal system often requires a two-step examination of the national and local laws to determine the proper “operating law” at the level of application. This is due to China’s decentralized system, in which the central government passes broad, general legislation and leaves to local governments the responsibility of promulgating detailed implementing regulations to apply the national laws which may or may not always be fully consistent. Coverage by the labor laws has also been determined on a geographical basis rather than by the employment relationship. That is, the distinction between urban and rural may be determinative. Additionally, until legislative clarification in the 2000s, large numbers of migrant workers were unprotected. The 2008 Employment Promotion Law (EPL) clearly provides that rural workers who go to cities in search of employment shall enjoy labor rights equal to those of urban workers.<sup>71</sup>

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

Article 2 of the Labor Law specifies that the law is applied to laborers who form a “labor/employment relationship” or have a “labor contract.”<sup>72</sup> Many interpretations over the years have attempted to clarify this language. The latest attempt came in 2008 with the Labor Contract Law, which confirmed the relationship and again required a written contract.<sup>73</sup>

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ilo.org/wcmsp5/groups/public/—ed\_dialogue/—dialogue/documents/genericdocument/wcms\_172417.pdf.

<sup>71</sup> See Law of the People’s Republic of China on Promotion of Employment (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Jan. 1, 2008) 2007 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. art. 20 (China), [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471590.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471590.htm).

<sup>72</sup> See *id.* art. 2.

<sup>73</sup> See LCL, *supra* note 23, ch. 1.

Yet, even without a written contact, a *de facto* employment relationship can arise. In 1996, early guidance on the application of the 1994 Labor Law provided that within the territory of the People's Republic of China (PRC), as long as the employment relationship (including a *de facto* relationship) exists, the Labor Law applies. The key elements are that the worker (1) provides physical or mental labor for compensation and (2) becomes a member of the enterprise or entity. Even without a contract, a worker is a *de facto* employee if he or she is a member and is paid for labor. This *de facto* employment relationship also provides the right to access arbitration and litigation.

## 2. The Employee

Employees/workers were not explicitly defined in the 1994 Labor Law, but were subsequently referenced in the 2001 amendments to the Trade Union Law as "individuals who perform physical or mental work in enterprises, institutions and government authorities within the Chinese territory and who earn their living primarily from wages or salaries."

Under the 1994 Labor Law, employment relationship is intended as an inclusive phrase covering employees/workers. The 2003 Work-Related Injury Insurance Regulation defines it as "laborers who keep a labor relation with the employing entity in all forms of employment. . . ." Documented foreign employees legally working in China generally are covered under the Labor Law.

Whether "contingent" workers are employees covered by the labor laws was to be resolved in 1996 by the then-Ministry of Labor. It formally abolished any legal distinction between contingent or temporary workers and formal employees; and they are to enjoy the same rights, unless provided otherwise.<sup>74</sup> Of course, that may depend, as this article explores.

Under most labor service contracts (*laowu hetong*), independent contractors lack a legal "employment relationship" with the "employer" in question. Typically, therefore, the daily performance by these workers is not under the direct control of the employer and there is no right of control. This distinction is significant in that many employer duties under the labor laws apply only to employees rather than to independent contractors, whose breaches are dealt with under the Contract Law, not the [Labor Contract Law (LCL)] and [Labor Mediation and Arbitration Act (LMA)].<sup>75</sup>

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<sup>74</sup> Brown, *supra* note 32, at 29-30.

<sup>75</sup> *Id.* at 30.



“Migrant workers, under new laws and regulations, have the right to labor contracts. . . and enjoy labor rights equal to those of urban workers.”<sup>76</sup>

### 3. Exclusions

Exclusions from applicable legal obligations developed as the [specific labor laws after the 1994 Labor Law] sought a balance between promoting economic development and labor protections. Exclusions are found . . . in [ ] provisions excluding and exempting employee categories, such as independent contractors (not employees), civil servants [and domestic workers] (excluded), and managers (exempted from overtime).<sup>77</sup>

#### B. Legal Benefits and Protections

The following examines the legal issue of *workers without benefits* regarding entitlement to social insurance benefits and labor protections.

The Social Insurance Law (SIL) provides for five types of insurance for workers who qualify for the benefits: old-age (pension), medical, unemployment, maternity, and work-related injury.<sup>78</sup> For standard workers, typically there are shared costs between the employer and “*employee*” (except for work-related injury and maternity insurance that are paid solely by the employer), as illustrated below.<sup>79</sup>

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<sup>76</sup> *Id.* at 30.

<sup>77</sup> *Id.* at 31.

<sup>78</sup> Zhonghua Renmin Gongheguo She Hui Bao Xian Fa (中华人民共和国社会保险法) [Social Insurance Law (P.R.C.)] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2010, effective July 1, 2011) art. 64 (China) [http://en.hxlawyer.com/news\\_detail/newsId=225.html](http://en.hxlawyer.com/news_detail/newsId=225.html). [hereinafter *SIL*]; See Ronald C. Brown, *Measuring China’s Social Insurance Law Under International Standards of International Labour Organization and Influences of Social Dimension Provisions of Free Trade Agreements and Bilateral Investment Treaties*, 45 HONG KONG LAW JOURNAL 651 (2015); See also Manuela Reintgen *The social security system in China*, ECOVIS (Jun. 27th, 2014), <http://www.ecovis.com/focus-china/chinas-social-security-system/>.

<sup>79</sup> Lesli Ligorner, Gordon Feng, & Mitchell Mosvick, *Social Insurance Law*, CHINA BUSINESS REVIEW (Jan. 1, 2012), <http://www.chinabusinessreview.com/the-new-prc-social-insurance-law-and-expatriate-employees/>.

	Shanghai Employer	Shanghai Employees	Beijing Employer	Beijing Employees
Pension	22%	8%	20%	8%
Medical insurance	12%	2%	10%	2% + ¥3
*Work-related injury	0.5%	0%	0.2%	0%
Unemployment	1.7%	1%	1%	0.2%
Maternity insurance	0.8%	0%	0.8%	0%
<b>Total</b>	<b>37%</b>	<b>11%</b>	<b>32%</b>	<b>10.2% +¥3</b>
Maximum amount (¥)	4,325	1,286	4,033	1,289
Minimum amount (¥)	855	257	628	188

Source: Shanghai Bureau of Human Resources and Social Security, Beijing Bureau of Human Resources and Social Security

Under the Social Insurance Law, both “employers and full-time employees” must contribute to at least three and up to five social insurance programs.<sup>81</sup> *Part-time workers* are also covered, but are expected to self-enroll in the social insurance programs, as employers are not responsible for enrolling them or paying their premiums.<sup>82</sup>

## 1. Non-Standard Workers

### a. *Self-employed*

China’s Social Insurance Law allows workers who are *self-employed* to participate in *pensions*, but significantly, only if they pay their own contributions, rather than the employer paying, as in the case of standard workers. For a self-employed individual to receive a pension, they must contribute to the national pension fund for an *aggregate of 15 years*.<sup>83</sup> This requirement is the same for all non-stan-

<sup>80</sup> *Id.*

<sup>81</sup> Reintgen, *supra* note 81, (“Employers and employees must pay monthly premiums into three of the funds”).

<sup>82</sup> *Id.* (“[P]art-time employees who did not participate in the social security schemes through their employers. . . can participate in the pension and medical insurance schemes on merely a voluntary basis”); *SIL*, *supra* note 80, art. 10 (“Employees shall participate in the basic endowment insurance and the basic endowment insurance premiums shall be jointly paid by employers and employees. Individual industrial and commercial households without employees, part-time employees not participating in the basic endowment insurance through their employers and other persons in flexible employment may participate in the basic endowment insurance, but shall pay the basic endowment insurance premiums themselves”).

<sup>83</sup> *Id.* at art. 16.

dard workers. Self-employed individuals may also participate in the basic medical insurance programs, work-related injuries, maternity insurance, and unemployment insurance,<sup>84</sup> but they must pay the premiums on their own.<sup>85</sup>

*b. Independent Contractors*

Independent contractors fall outside the scope of the employment relationship when they are not under the employer's direct control. Article 2 of the Labor Contract Law indicates that its scope applies only where there is a labor relationship.<sup>86</sup> Both labor law and the Labor Contract Law apply only to parties in a employment relationship, thus neither applies to independent contractors.<sup>87</sup> Independent contractors, like self-employed individuals, may qualify for pensions, medical insurance, work-related injury insurance, maternity insurance, and unemployment insurance; however, to do so, independent contractors must pay the entire premium.<sup>88</sup> An independent contractor becomes an employee when an employer exerts sufficient control over work activities. Construction workers deemed as independent contractors have recourse for wages under contract law, as discussed below.

*c. Part-time Workers*

Regarding "worker benefits," part-time workers are covered, but they are expected to self-enroll in social insurance programs, as employers are not responsible for enrolling them or paying their premiums.<sup>89</sup> In order for an employee, full-time or part-time, to qualify for a pension, he or she must reach mandatory retirement age and must also have contributed to the fund for an aggregate of fifteen years.<sup>90</sup>

Unemployment insurance is available to individuals who meet the following three requirements: (1) the employer and former employee have paid the unemployment insurance premiums for the year prior to the individual's unemployment; (2) the former employee has

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<sup>84</sup> *Id.* at arts. 33, 44, 53.

<sup>85</sup> *Id.* art. 23.

<sup>86</sup> LCL, *supra* note 21, art. 2.

<sup>87</sup> *See* Recursivity, *supra* note 32, at 1000.

<sup>88</sup> SIL, *supra* note 70, arts. 10, 23, 60, 64.

<sup>89</sup> *Id.* at art. 10, 23, 36, 53 ("Employees shall participate in the basic endowment insurance and the basic endowment insurance premiums shall be jointly paid by employers and employees. Individual industrial and commercial households without employees, part-time employees not participating in the basic endowment insurance through their employers and other persons in flexible employment may participate in the basic endowment insurance, but shall pay the basic endowment insurance premiums themselves").

<sup>90</sup> *Id.* art. 16.

been terminated; and (3) the former employee is capable and currently seeking employment elsewhere.<sup>91</sup>

As to “worker rights,” the Labor Contract Law mandates that part-time employee salaries be no lower than the minimum standard wages prescribed by the local government;<sup>92</sup> “they need not be hired under a written contract; and, they may be dismissed (or quit) at will without severance pay.”<sup>93</sup> Since part-time workers are defined as those working 24 hours or less during a fixed term<sup>94</sup>, it is unclear whether part-time workers working between 24 and 40 hours per week should be provided a modified amount of benefits.

#### *d. Dispatch Workers*

Labor dispatch workers typically follow a trilateral agreement system. First, a worker signs a contract with a temporary agency, and in turn, the temporary agency contracts with a company to provide it with temporary workers. Under the LCL, “[T]he dispatch agreements shall stipulate . . . ‘the amounts and terms of payments of remunerations and social security premiums. . .’”<sup>95</sup> The company receiving the dispatch workers (“receiving unit”) is required to provide overtime pay, performance bonuses, and welfare benefits related to the job the dispatch workers will perform.<sup>96</sup>

In 2014, China’s Ministry of Human Resources and Social Security promulgated the “Interim Regulations on Labor Dispatch.”<sup>97</sup> The new regulations limit the numbers and scenarios in which a receiving firm may hire dispatch workers.<sup>98</sup> Under the Interim Regula-

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<sup>91</sup> *Id.* art. 45.

<sup>92</sup> LCL, *supra* note 21, art. 72.

<sup>93</sup> *Id.* arts. 69, 71; Cooke & Brown, *The Regulation of Non-Standard Forms of Employment in China, Japan and the Republic of Korea* CONDITIONS OF WORK AND EMPLOYMENT SERIES NO. 64, 31 (2015) (“The expression ‘part-time employment’ in China does not equate to the usage of the same term under the ILO Part-Time Work Convention, 1994 (No. 175), EU law or in other jurisdictions; this expression refers instead to essentially casual work that is paid by the hour, such as domestic workers who carry out household chores and those employed by enterprises carrying out auxiliary chores.”).

<sup>94</sup> *Id.* at 31.

<sup>95</sup> LCL, *supra* note 21, art. 59.

<sup>96</sup> *Id.* art. 62(3).

<sup>97</sup> *China’s New Labor Dispatch Rules to be Enforced March 1*, CHINA BRIEFING, (Feb. 28, 2014), <http://www.china-briefing.com/news/2014/02/28/chinas-new-labor-dispatch-rules-to-be-enforced-march-1.html>.

<sup>98</sup> *See id.*

tions, receiving firms may only hire dispatch workers for temporary, auxiliary, or replaceable positions.<sup>99</sup>

*e. Vocational Students*

In many cases, the current practice of compelling industrial interns to work at substandard wages as a condition of being certified for graduation arguably violates not only Chinese labor laws, but some would argue, also forced labor conventions under international law.<sup>100</sup> Legislative changes in 2016, as discussed earlier, have potentially ameliorated many of these issues.<sup>101</sup>

One of the primary legal issues for vocational students is whether they have an employment relationship with the employer.<sup>102</sup> Generally, vocational internships are negotiated between individual schools and the potential employers.<sup>103</sup> Therefore, there is no labor contract entered into. The 1996 Vocational Education Law expanded vocational training throughout China and promoted skill training to more students so as to modernize China's economy.<sup>104</sup> The law obliged enterprises to "accept students and teachers from vocational schools and vocational training organizations to perform internships," and provide appropriate work compensation.<sup>105</sup> Authors Brown and De-

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<sup>99</sup> Duncan Abate, et. al., *China Issues Interim Provisions on Labour Dispatch*, MAYERBROWN JSM 1; See *China's New Labor*, *supra* note 99 ("Temporary position: position with a duration of no more than six months; [a]uxiliary position: position that provides auxiliary services to the main or core business of the employer; [r]eplaceable positions: A position that can be performed by a dispatched employee in place of a permanent employee during the period when such employee is away from work for study, vacation, or other reasons").

<sup>100</sup> See INT'L LABOR ORG., COMM. OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS ("CEACR"), *General Survey Concerning the Forced Labour Convention*, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957, para. 57 (2007), <http://ilo.org/public/libdoc/ilo/P/09661/09661%282007%291B.pdf>; See also Brown, *supra* note 16, at 21.

<sup>101</sup> See Circular of the Ministry of Education and Four Other Departments on Issuing the Administrative Provisions on the Internships of Vocational School Students (Apr. 11, 2016), <https://hk.lexisn.com/law/circular-of-the-ministry-of-education-and-four-other-departments-on-issuing-the-administrative-provisions-on-the-internships-of-vocational-school-students.html>.

<sup>102</sup> Brown, *supra* note 16, at 23.

<sup>103</sup> *Id.* at 181; *The Mass Production of Labour: The Exploitation of Students in China's Vocational School System*, COLUMBIA LIGHTHOUSE FOR THE BLIND (last visited Apr. 24, 2015). [http://www.clb.org.hk/sites/default/files/archive/en/share/File/general/vocational\\_school\\_system.pdf](http://www.clb.org.hk/sites/default/files/archive/en/share/File/general/vocational_school_system.pdf).

<sup>104</sup> *The Mass Production of Labour*, *supra* note 104; Vocational Education Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Sept. 1, 1996), art 1.

<sup>105</sup> *Id.* art. 37.

cant argue that China codified the principle of “equal pay for equal work” under the Labor Law and Labor Contract Law;<sup>106</sup> and, under this principle, interns who work full and overtime as unskilled labor arguably should receive compensation equal to their standard employee co-workers.<sup>107</sup> However, the Labor Law and Labor Contract Law are not explicit on that point and it appears only to apply if the factual circumstances indicate that the work done by vocational students is done solely for the benefit of their employer, and does not afford any educational benefit on the student. In 2010, the Chinese Supreme Court rejected a contrary draft and declined to expressly exclude vocational students from labor protections, arguably leaving the door open for students to be afforded labor law protections under new interpretations.<sup>108</sup> In 2016, a new law regulating covered student interns from vocational schools provided for minimum wages of 80 percent of regular employees’ probationary wages and other labor protections.<sup>109</sup>

#### f. Construction Workers

A common legal dilemma with migrant construction workers is that the “employer” does not provide labor contracts as required by law for standard employees;<sup>110</sup> and studies show that for whatever reason, it is often the case that constructions workers lack social insurance

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<sup>106</sup> Brown & Decant *supra* note 44 at 170. LCL, art. 63; *See also* Victoria Ding and Ron Cai, *Amendments to the Labor Contract Law on Labor Dispatch Services*, Davis, Wright, & Tremaine LLP (Jan. 13, 2013), <http://www.dwt.com/Amendments-to-the-Labor-Contract-Law-on-Labor-Dispatch-Services-Take-Effect-July-1-2013-01-31-2013/>.

<sup>107</sup> Brown, *supra* note 16, at n. 67-68.

<sup>108</sup> *Id.* at n. 49; Brown & Decant, *supra* note 44, at 177 (noting differences between the third draft and the final opinion); Pun Ngai & Lu Huilin, *A Culture of Violence: The Labor Subcontracting System and Collective Action by Constructive Workers in Post-Socialist China*, 64 THE CHINA JOURNAL 151 (2010) In the above scenario, none of the workers had a labor contract; and, “instead of payouts of a weekly or monthly wage, construction workers are usually paid an irregular *shenghuo fei* (生活费 living allowance) arranged by their subcontractors, until the completion of the project or the end of the year. The allowance ranges from a hundred to a few hundred yuan per month (about 10 to 20 per cent of their promised monthly income), depending on the subcontractor—barely enough to cover food and other daily expenses.”

<sup>109</sup> *See China to Better Protect Student Interns*, XINHUANET (Apr. 27, 2016), [http://news.xinhuanet.com/english/2016-04/27/c\\_135317358.htm](http://news.xinhuanet.com/english/2016-04/27/c_135317358.htm).

<sup>110</sup> *China: Beijing’s Migrant Construction Workers Abused*, HUMANRIGHTSWATCH, (Mar. 12, 2008), <https://www.hrw.org/news/2008/03/12/china-beijings-migrant-construction-workers-abused>.

coverage.<sup>111</sup> Another problem is that the “employer” is “not the labor-supplier subcontractor [who is dealing with the workers,] but the second- or third-level contractor who out-sourced the work.”<sup>112</sup> The subcontractor, however, [is] the only one responsible for wage payment, because he recruited the workers, even though he was not the [“employer”] in a legal sense.<sup>113</sup> Inasmuch as “the labor supplier subcontractors do not have corporate status, [they] do not have the legal status to employ workers” and thus the employment arrangement that is either absent or ambiguous.<sup>114</sup>

On that point, it is reported that:

In December 2013, the People’s Court of Linmu County, Shandong Province, [ ] ruled that a de facto employment relationship existed between a construction company and the worker of a subcontractor who died on the construction company’s project site.

The local people’s court affirmed the arbitration award and ruled that a de facto employment relationship did exist between [the worker] and the construction company because the construction company subcontracted construction work to individuals who were not licensed contractors. “Neither the subcontractor nor the sub-subcontractors had the legal capacity to hire employees.” [Further, Baker & McKenzie noted that:]

According to a notice issued by the Ministry of Human Resources and Social Security in 2005, if an entity, such as a construction or mining entity, contracts work to an unlicensed organization or individual who does not have the legal capacity to hire employees, then the construction or mining entity assumes employer responsibilities for any worker recruited by such organization or individual to complete the work.<sup>115</sup>

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<sup>111</sup> Left Behind, *supra* note 54. (“less than half of the construction workers surveyed had any kind of social insurance and, despite the high injury and accident rates on China’s construction sites, the survey found that just seven percent of workers had work-related injury insurance.”)

<sup>112</sup> Ngai, *supra* note 109, at 152.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at n. 29.

<sup>115</sup> Baker and McKenzie, *Deceased Worker of Sub-contractor Held to Have De Facto Employment with Construction Company*, China Employment Law Update (Feb. 2014), <http://bakerxchange.com/rv/ff0015b35e85a316207621f05541b7884bd6b9fa/p=8463984>.

*g. Domestic Workers*

In China there are no specific legal provisions governing the working conditions of domestic workers.<sup>116</sup> In fact, in

Article 2, Law of the Explanation of Certain Provisions of Labor Law issued by the Ministry of Labor . . . in 1994” it was expressly provided that the Labor Law was not applicable to domestic workers. A judicial interpretation by the People’s Supreme Court stated that “disputes between a family or [an] individual and a domestic worker’ are not considered labor disputes” under the law.<sup>117</sup>

“Domestic work is regarded as informal employment and private individuals/families do not fulfill the definition of an ‘employing unit’.”<sup>118</sup> “Without legal employment status, most domestic workers cannot be guaranteed their wages, working hours, labor protection or social security and are workers without benefits.”<sup>119</sup>

## 2. Other Relevant Workplace Laws

China’s *Workplace Safety Law* applies to the “production operation units.”<sup>120</sup> It grants safety rights to “employees” to be told of hazards, not have their rights waived, to make suggestions without reprisals, to stop work if lives are in danger, and if injured shall have social insurance according to their rights under the law.<sup>121</sup>

The *Prevention and Control of Occupational Diseases* is to prevent occupational diseases incurred to the laborers of enterprises, institutions and private business units resulted from contacting powder dust, radioactive substances, and other poisonous and harmful substances in the work.<sup>122</sup>

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<sup>116</sup> ZENGYI XIE, LABOR LAW IN CHINA: PROGRESS AND CHALLENGES 4 (Li Yang & Li Peilin eds., 2015).

<sup>117</sup> *Id.* (quoting *The Interpretation of Applicable Laws in Adjudicating Labor Disputes of the Supreme Peoples’ Court* (II), 2006, Article 7).

<sup>118</sup> Fact Sheet, *supra* note 61 (citing LCL, *supra* note 23, art. 2).

<sup>119</sup> Fact Sheet, *supra* note 61 (citing LCL, *supra* note 23, art. 2).

<sup>120</sup> Law of The People’s Republic Of China On Work Safety (promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2002, effective Nov. 1, 2002), art. 2, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/76096/108029/F924956495/CHN76096%20Eng2.pdf>.

<sup>121</sup> *Id.* art. 44-52.

<sup>122</sup> Law of the People’s Republic of China on Prevention and Control of Occupational Diseases, (promulgated by the Standing Comm. Nat’l People’s Cong. Oct. 27, 2001, effective May 1, 2002) arts. 1-2 (2001), [http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=76103&p\\_country=CHN&p\\_classification=14](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=76103&p_country=CHN&p_classification=14).



The 1994 *Labor Law* applies to "laborers who form a labour relationship therewith within the territory of the [P.R.C.]"<sup>123</sup>

The 2008 *Labor Contract Law* "is applicable where organizations such as enterprises, self-employed economic organizations and private non-enterprise units within the territory of the [P.R.C.] establish labor relationships with workers through concluding, performing, modifying, revoking or terminating labor contracts with them."<sup>124</sup>

The 2008 *Law of the People's Republic of China on Labor-dispute Mediation and Arbitration* grants the right to mediate and arbitrate "labor disputes arising between employing units and workers."<sup>125</sup>

The *Trade Union Law* provides,

[A]ll manual and mental workers in enterprises, institutions and government departments within the territory of China who rely on wages or salaries as their main source of income. . . have the right to organize or join trade unions according to law. No organizations or individuals shall obstruct or restrict them.<sup>126</sup>

The 1994 *Labor Law* also provides that "[L]abourers shall have the right to participate in, and organize, trade unions in accordance with the law."<sup>127</sup> It appears from this language that workers outside the regular employment relationship can be eligible for union membership.

As can be observed, regardless of how the word worker is translated (employees, laborers, workers), the issue comes back to the requirement of an employment relationship and a labor contract; and,

<sup>123</sup> Labour Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994) art. 2, <http://english.mofcom.gov.cn/article/policyrelease/internationalpolicy/200703/20070304475283.html>.

<sup>124</sup> Labor Contract Law of the People's Republic of China, (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective July 1, 2013) art. 2, [http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471106.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471106.htm) <http://www.lawinfochina.com/display.aspx?lib=law&id=6133>.

<sup>125</sup> Law of the People's Republic of China on Labor-dispute Mediation and Arbitration art. 2 (promulgated by the Standing Comm. of the Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008) art. 2, 22, <http://www.ilo.org/dyn/travail/docs/488/Law%20of%20the%20People's%20Republic%20of%20China%20on%20Labor-dispute%20Mediation%20and%20Arbitration.doc>. ("The worker and the employing unit, between whom a labor dispute arises, constitute the two parties to the labor dispute case for arbitration. Where a labor dispute arises between a labor dispatching unit or an employing unit on the one hand and a worker on the other, the labor dispatching unit and the employing unit constitute a joint party.")

<sup>126</sup> Trade Union Law of the People's Republic of China (amended by the Standing Comm. of the Nat'l People's Cong., Oct. 27, 2001) art. 3, [http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383823.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383823.htm).

<sup>127</sup> Labour Law, *supra* note 123, art. 7.

therein lies the conundrum. What does the employment relationship include and who is entitled to a labor contract?

### C. ILO Standards

There are numerous ILO conventions relating to the many aspects of workers in the workplace, including the core labor standards<sup>128</sup> that set forth international labor standards, including wage, safety, accidents, etc. There also is a more targeted ILO Recommendation No. 198, Employment Relationship Recommendation, 2006.<sup>129</sup> The stated goal of this Recommendation is that “[M]embers should formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship.”<sup>130</sup>

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<sup>128</sup> See, e.g., Int’l Law Comm’n, 14th Session, Forced Labour Convention, 14 ILO 29 (June 28, 1930), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C029](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029); Int’l Law Comm’n, 40th Session, Abolition of Forced Labour Convention, 40 ILO 105 (June 25, 1957), [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C105](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105); Int’l Law Comm’n, 34th Session, Equal Remuneration Convention, 34 ILO 100, (June 29, 1951), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312245:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312245:NO); Int’l Law Comm’n, 42nd Session, Discrimination (Employment and Occupation) Convention, 42 ILO 29, (15 June, 1958), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_ILO\\_CODE:C111](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C111); Int’l Law Comm’n, 58th Session, Minimum Age Convention, 58 ILO 138 (June 26, 1973), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_ILO\\_CODE:C138](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C138); Int’l Law Comm’n, 87th Session, Worst Forms of Child Labour Convention, 87 ILO 182 (June 17, 1999), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312327:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312327:NO); Int’l Law Comm’n, 31st Session, Freedom of Association and Protection of the Right to Organize Convention, 31 ILO 87, (June 9, 1948), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312232](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232); Int’l Law Comm’n, 32nd Session, Right to Organize and to Bargain Collectively Convention, 32 ILO 98, (July 01, 1949) [http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312243](http://ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312243).

<sup>129</sup> Int’l Law Comm’n, 95th Session, Employment Relationship Recommendation, 95 ILO 198 (June 15, 2006), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312535:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312535:NO) [hereafter Recommendation]; see also INTERNATIONAL LABOUR ORGANIZATION, THE EMPLOYMENT RELATIONSHIP: AN ANNOTATED GUIDE TO ILO RECOMMENDATION NO. 198 ¶ 1 (2007), [http://www.ilo.org/ifpdial/areas-of-work/labour-law/WCMS\\_172417/lang-en/index.htm](http://www.ilo.org/ifpdial/areas-of-work/labour-law/WCMS_172417/lang-en/index.htm).

<sup>130</sup> Int’n Law Comm’n, 95th Session, Employment Relationship Recommendation, 95 ILO 198, (June 15, 2006), (“For the purposes of the national policy of protection

Many or most of the workers in precarious jobs are in the informal economic sector, which, by definition, are not covered or protected by occupational health and safety laws or social security legislation in most countries even though there may be pertinent ILO Conventions. The ILO has repeatedly urged nations and enterprises to extend coverage to those workers not covered by formal employment contracts.<sup>131</sup>

Changes in the nature of work in developing and developed countries have caused the ILO to develop standards for atypical and precarious employment. The ILO began to expand its policies to include precarious workers with the Convention Concerning Part-time Work in 1994<sup>132</sup> and the Convention Concerning Home Work in 1996.<sup>133</sup> The ILO's more recent initiative, titled "Decent Work", began in 1999 and attempted "to improve the conditions of all people, waged, unwaged, and those in the formal and informal markets, by enlarging labor and social protections."<sup>134</sup>

"On June 12, 2015, the ILO [ ] announced its first standards for assisting laborers in the informal market" in Recommendation 204: Recommendation Concerning the Transition from the Informal to the Formal Economy.<sup>135</sup> Its goals are to

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for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties. [ ] Members should promote clear methods for guiding workers and employers as to the determination of the existence of an employment relationship.").

<sup>131</sup> International Labour Conference, *Transitioning From the Informal to the Formal Economy*: Rep. of the Int'l Labour Conference, 17, ILC 103 (June 2014); see also, Joan Burton, *WHO Healthy Workplace Framework and Model: Background and Supporting Literature and Practices* 81 (Feb. 2010), [http://apps.who.int/iris/bitstream/10665/113144/1/9789241500241\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/113144/1/9789241500241_eng.pdf?ua=1).

<sup>132</sup> See generally Int'l Law Comm'n, 81st Session, Part-Time Work Convention, 81 ILO 175 (June 24, 1994), [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0:NO:12100:P12100\\_INSTRUMENT\\_ID:312320](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0:NO:12100:P12100_INSTRUMENT_ID:312320).

<sup>133</sup> See generally Int'l Law Comm'n, 83rd Session, Home Work Convention, 83 ILO 177 (June 20, 1996), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100\\_ILO\\_CODE:C177](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO::P12100_ILO_CODE:C177).

<sup>134</sup> LEAH F. VOSKO, *PRECARIOUS WORK, WOMEN AND THE NEW ECONOMY: THE CHALLENGE TO LEGAL NORMS* 58. (Judy Fudge & Rosemary Owens eds. 2006). See generally International Labour Office Director General, *Report of the Director General: Decent Work*, ILC 87 (June 1999), <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>.

<sup>135</sup> Library of Congress, *International Labour Organization: Standards for the Informal Economy Proposed*, GLOBAL LEGAL MONITOR (July 1, 2015), <http://www.loc.gov/law/foreign-news/article/international-labour-organization-standards-for-the-informal-economy-proposed/>; Int'l Labour Org. [ILO], *Recommendation*

[F]acilitate the transition of workers and businesses from the informal to the formal economy, while respecting workers' fundamental rights and ensuring opportunities for income security, livelihoods, and entrepreneurship; promote the creation, preservation, and sustainability of enterprises and decent jobs in the formal economy and the coherence of macroeconomic, employment, social protection and other social policies; and prevent the informalization of formal economy jobs.<sup>136</sup>

“More than half of the workers in the world are thought to be involved in the informal economy and most are denied workplace rights, social protection, and other benefits of the formal economy.”<sup>137</sup> This especially impacts women, youths, ethnic minorities, migrants, older people, and the disabled who are disproportionately represented in the informal economy.<sup>138</sup>

These workers are presumed to be forced into the informal economy due to a lack of better opportunities. The Recommendation contains a strategy and practical guidance on steps that could be taken to facilitate the movement of people from informal to formal status.<sup>139</sup>

In sum, the ILO conventions and recommendations all call upon members to provide rights and benefits to most workers, including the non-standard workers.

As to domestic workers, while “[t]he [ILO] promotes the Agenda on Decent Work for Domestic Workers: Rights, Productive Jobs, Social Protection and Representation in Domestic Services (2006-2015), which addresses the needs and concerns of domestic workers as some of the most vulnerable and least protected workers worldwide”,<sup>140</sup> in 2013, a new Convention, Domestic Workers Conven-

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*Concerning the Transition from the Informal to the Formal Economy*, ILO Gen. Conf. Rec. 204 (June 12, 2015).

<sup>136</sup> Library of Congress, *supra* note 134; International Labour Organization, *ILO Adopts Historical Standard to Tackle the Informal Economy*, ILO NEWS (June 12, 2015), [http://www.ilo.org/ilc/ILCSessions/104/media-centre/news/WCMS\\_375615/lang-en/index.htm](http://www.ilo.org/ilc/ILCSessions/104/media-centre/news/WCMS_375615/lang-en/index.htm).

<sup>137</sup> Library of Congress, *supra* note 134.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Fact Sheet: Domestic Workers in China*, PROJECT TO PROMOTE EQUALITY AND DECENT WORK FOR WOMEN THROUGH TRAFFICKING PREVENTION, PROTECTION FOR DOMESTIC WORKERS, AND GENDER, (last accessed Apr. 22, 2015), [http://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms\\_114256.pdf](http://www.ilo.org/wcmsp5/groups/public/—asia/—ro-bangkok/documents/publication/wcms_114256.pdf); see also Pamela Gomez, *What Role Can People in Poverty Play in Eradicating Extreme Poverty?*, WORLD BANK 11 (Apr. 9, 2014) <http://siteresources>.

tion, 2011 (No. 189) was adopted<sup>141</sup> and has been ratified by over 20 countries.<sup>142</sup> “Rights [to be] given to domestic workers as decent work [include] daily and weekly [ ] rest hours, [ ] minimum wage, and [the right] to choose the place where they live and spend their leave.”<sup>143</sup> It also states “ratifying [ ] parties should take protective measures against violence and should enforce a minimum age [ ] consistent with the minimum age for other types of employment.” Also, “they are [ ] not to be required to reside at the house where they work, or to stay at the house during their leave.”<sup>144</sup>

#### IV. OBSERVATIONS, ANALYSIS, AND CONCLUSION

##### A. *Observations and Analysis*

Which workers are entitled to legal benefits and labor protections? With the significant changes occurring globally and in China in the nature of work, it is time to re-imagine the concept of worker and recast labor legislation as the improvement of those who work.<sup>145</sup> Should those workers dependent on an employer for their livelihood who are categorized as contingent or in less than a standard employ-

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worldbank.org/CSO/Resources/GomezRoleOfPeopleInPoverty.pdf (“The main rights given to domestic workers as decent work are daily and weekly (at least 24 h) rest hours, entitlement to minimum wage and to choose the place where they live and spend their leave. Ratifying states parties should also take protective measures against violence and should enforce a minimum age, which is consistent with the minimum age at other types of employment. [Workers furthermore have a] right to a clear (preferably written) communication of employment conditions, which should in case of international recruitment be communicated prior to immigration. They are furthermore not required to reside at the house where they work, or to stay at the house during their leave.”); *see generally* Int’l Labour Office, 100th Session, *Domestic Workers Convention*, ILC 189 (2011)

<sup>141</sup> Int’l Labour Office, 100th Session, *Domestic Workers Convention*, ILC 189 (2011), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C189](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189) (Providing the following definitions “(a) the term *domestic work* means work performed in or for a household or households; (b) the term *domestic worker* means any person engaged in domestic work within an employment relationship; (c) a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker.”)

<sup>142</sup> *Ratifications of C189 – Domestic Workers Convention, 211 (No. 189)*, INTERNATIONAL LABOUR ORGANIZATION, (Sept. 5, 2013), [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:2551460](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460).

<sup>143</sup> Pamela Gomez, *What Role Can People in Poverty Play in Eradicating Extreme Poverty?*, WORLD BANK 11 (Apr. 9, 2014) <http://siteresources.worldbank.org/CSO/Resources/GomezRoleOfPeopleInPoverty.pdf>

<sup>144</sup> *Id.*

<sup>145</sup> *See* Katherine Stone & Harry Arthurs, *Rethinking Workplace Regulation* (2013).

ment relationship be denied the same legal rights and benefits of their co-workers doing the same work? If so, for what policy reason should they be distinguished?

Clearly, not all ILO labor convention standards are to be applied to all workers in all circumstances.<sup>146</sup> For example, a truly independent contractor should not have the Termination of Employment Convention, 1982 (No. 158) applied; but why not a dependent contractor? Is a Chinese construction worker really an independent contractor?

On the other hand, it would seem only fair that occupational health and safety legislation should protect all workers in the workplace, even though the Occupational Safety and Health Convention, 1981 (No. 155) appears not to provide protection for non-employees such as independent contractors.<sup>147</sup> Likewise, shouldn't the ILO standards under the Occupational Safety and Health Convention, 1981 (No. 155) provide protection for non-"employees," rather than limiting it to those in the employment relationship? Even the Convention on Protection of Wages, 1949 (No. 95), appears to apply only to those who are in the employer-employee relationship. Perhaps the inquiry should be— who in the workplace does not deserve legally decent treatment and labor protections? Why should such protection be limited to the common law definition of the employment relationship?

In China, there are certain problem areas in the workplace that stand out. With at least one-fifth of China's 300 million urban workers holding temporary jobs at the end of 2010,<sup>148</sup> China's traditional model of long-term employment has been changing due to increased reliance on the informal sector, nonrenewable fixed-term, and temporary agency employment contracts. "Informal employment ([ ]'non-standard employment' or 'flexible employment') as a flexible labor strategy has been [growing] in China";<sup>149</sup> and now, with a high percentage of its workforce in this "informal" economy, with some estimates at 60 percent, the dilemma of "*workers without benefits*" is clear.<sup>150</sup> Even workers fitting in the formal standard employment relationship may not have been provided a labor contract as proof of their employment relationship and can find themselves as "workers without benefits."

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<sup>146</sup> See Breen Creighton & Shae McCrystal, *Who Is A 'Worker' In International Law?*, 37 (2015). Draft paper produced for presentation at the LLRN Conference, Amsterdam, June 25-27 2015. (on file with author).

<sup>147</sup> See generally Int'l Law Comm'n, 67th Session, Occupational and Health Convention, *Convention Concerning Occupational Safety and Health and the Working Environment* ILC 155, (June 22, 1981).

<sup>148</sup> See Liu, *supra* note 10; Cooney et al., *supra* note 10.

<sup>149</sup> See Cooke & Brown, *supra* note 16, at 19.

<sup>150</sup> See *id.* at 20.

By law, standard workers are required to be given labor contracts, which entitle them to labor benefits and protections. Non-standard workers are often denied many of these rights and benefits, which can vary between national and local regulation. There is a widespread practice, particularly in some industries, of not providing labor contracts, notwithstanding its illegality.

*B. To summarize: who are these “workers without benefits?”*

*Independent contractors* are numerous and often misclassified. They need to be distinguished from the estimated 62 million *self-employed individuals* who are not dependent and controlled by an employer, and who are often outside legal labor benefits and protections.<sup>151</sup>

There are some 60-70 million *part-time workers* in China, sometimes categorized as “casual” employees, who lack full workplace benefits. Though the law permits these “casual” employees to enroll in workplace benefits by paying, there is an obvious obstacle— these part-time workers often have inadequate income to do so, or have not met the required length of service to qualify for unemployment insurance.

New regulations covering the estimated 60 million *dispatch workers* in China<sup>152</sup> appear to have slowed their use and created some equity in the workplace regarding labor benefits and protections, if not labor stability.

The following categories of workers raise issues regarding *ambiguous employment relationships* requiring legal interpretations, future policy decisions and regulations, and the will to enforce current laws. Can a vocational student be an employee? Is a construction worker really an independent contractor? Are domestic workers properly categorized as being outside an employment relationship and unprotected by labor laws?

There are over 8 million *vocational students* in factories, and as part of their “educational program,” they work alongside regular workers who have labor contracts and are entitled to employment rights and benefits.<sup>153</sup> The question arises— where this work generally or

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<sup>151</sup> *Id.* (reporting that in 2013 there were over 61 million workers employed in the “self-employed businesses”).

<sup>152</sup> See Recursivity, *supra* note 34, at 982-83, n. 37 (“These figures come from a widely cited report of the Economic Observer quoting the results of a 2011 study of labor dispatch by China’s national labor union, the All-China Federation of Trade Unions (ACFTU”).

<sup>153</sup> Dou, *supra* note 46; Mass Production of Labour, *supra* note 44; Lucy Hornby, *Use of Student Interns Highlights China Labor Shortage*, REUTERS (Jan. 6, 2013), <http://www.reuters.com/article/us-china-labour-interns-idUSBRE9050CV201301>

specifically is unrelated to an educational program, shouldn't it lose its educational purpose and transform the "student" into a regular employee? Otherwise, there is a large supply of vocational student interns working at the low wage of 80 percent of a regular employee's probationary wage rate at work unrelated to their vocational education.<sup>154</sup>

Of the 40 million *construction workers* in China, the vast majority of them are reported to lack a labor contract with their employer.<sup>155</sup> The Chinese construction industry employs more than 40 million people, "most of them rural workers coming from all over the country[,] [with] [a]bout 30 per cent of all migrant workers coming from the countryside work in the industry."<sup>156</sup> With the apparent widespread practice of illegally using *baogong tou* ("contractors") to employ the construction gangs (which labels the workers as "labor service workers" entitled to only their wages under the Contract Law, and too often lacks labor benefits and rights)<sup>157</sup> why not enforce current laws of this outlawed practice; better mandate the use of labor contracts; or consider having the general contractor be jointly liable?<sup>158</sup>

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06 ("In any given year, at least 8 million vocational students man China's assembly lines and workshops").

<sup>154</sup> See *China to Better Protect Student Interns*, XINHUA.NET (Apr. 27, 2016), [http://news.xinhuanet.com/english/2016-04/27/c\\_135317358.htm](http://news.xinhuanet.com/english/2016-04/27/c_135317358.htm).

<sup>155</sup> While this is illegal and there are remedies, most workers do not contest it. See *Left Behind*, *supra* note 54. In another study of the New World China Land, reputed to be China's largest private developer, with billions in annual profits, it was reported that "above 95% of migrant workers are led and introduced by a labor contractor ([ ] Bao Gong Tou) to work" and "the rate of signing labor contracts is close to zero." *Migrant Workers in the Construction Industry—the Largest National Private Developer, The New World China Land, Turn Blind Eye to the Chinese Labor Law*, STUDENTS AND SCHOLARS AGAINST CORPORATE MISBEHAVIOR (SACOM), Jan. 4, 2009, available at <http://sacom.hk/media-type/investigative-reports/page/6/>. See generally *id.* It goes on to report on working conditions, low wages, long hours, zero participation of social security insurance, occupational injury, and lack of protective equipment. *Migrant Workers in the Construction Industry—the Largest National Private Developer, The New World China Land, Turn Blind Eye to the Chinese Labor Law*, STUDENTS AND SCHOLARS AGAINST CORPORATE MISBEHAVIOR (SACOM), Jan. 4, 2009, available at <http://sacom.hk/media-type/investigative-reports/page/6/>. See generally *id.*

<sup>156</sup> Ngai & Huilin, *supra* note 53, at 144.

<sup>157</sup> *Id.* at 147. In this study it was found that "less than half of the construction workers surveyed had any kind of social insurance and, despite the high injury and accident rates on China's construction sites, the survey found that just seven percent of workers had work-related injury insurance." *Left Behind*, *supra* note 51.

<sup>158</sup> Liability for the wages may be shared with the general contractor pursuant to government regulations. LCL, *supra* note 23, art. 12; Notice of the Ministry of Labour and Social Security and the Ministry of Constructions regarding the publication of the Measures of Controlling the Payment of the Migrant Workers' Salary



*Domestic workers* in China have been estimated to number about 20 million.<sup>159</sup> For the most part they fall outside the protection of the labor laws since they are not in an employment relationship with a statutory employer. The ILO is promoting better protections and improved labor benefits and rights. Perhaps it is time to provide some regulatory protections for these workers who are totally at the mercy of their bosses.

In analyzing the information pertaining to workers in standard and non-standard employment, in formal and informal employment relationships, and in the special problem categories of vocational schools and construction where the nature of the employment relationship has been deemed ambiguous (notwithstanding the law), and the statutory exclusion of worker categories, such as domestic workers, it becomes clear that in China's admittedly large work force, there are millions of its citizens who are currently workers without benefits.

If reforms were considered in view of ILO standards, the guiding principle would be to expand coverage, application, and enforcement of China's social insurance and labor protections and extend them to more of the disenfranchised employees who are denied rights and benefits of the law by economic obstacles such as self-pay for benefits, and by lax and inconsistent enforcement of existing social insurance and labor laws.

The labor safety net in China, notwithstanding all its recent advancements, is still allowing too many of its hard-working citizens to fall outside the net, leaving them unprotected and as *workers without benefits*.

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(issued September 6, 2004). This joint liability may extend to worker accidents where there is fault by the employer and the general contractor has no knowledge of the baogong tou's lack of legal identity. Interpretation on Cases of Personal Injury, art. 11; LCL, *supra* note 23, art. 94; Ngai & Huilin, *supra* note 50, at 147.

<sup>159</sup> Fact sheet, *supra* note 61.