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Is Labor Really "Cheap" in China? Compliance with Labor and Employment Laws

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IS LABOR REALLY ‘CHEAP’ IN CHINA?

COMPLIANCE WITH LABOR AND EMPLOYMENT LAWS

Abstract: This article details China’s the growing body of labor and employment laws. Specifically, this research analyzes major labor and employment law developments in China, including the newly adopted Labor Contract Law, employment discrimination sexual harassment, wages, workplace health and safety, worker privacy, and dispute resolution. The ramifications of this developing legal landscape on U.S. companies doing business in China are also discussed.

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Through intensified guidance and regulation, we will draw the attention of all enterprises, including foreign-funded ones, on improving working conditions, [and] ensuring workers' rights.¹

INTRODUCTION

The concept of so-called “cheap” Chinese labor needs to be rethought in the context of China’s new labor and employment laws.² This article explores the ramifications of China’s the growing body of laws regulating the workplace. On November 9, 2006, China issued its China’s Eleventh Five-Year Plan on the Use of Foreign Funds (the “Plan”), revealing to the public its plan with respect to foreign investment in China.³ An essential aspect of the Plan is focusing on the introduction of advanced technologies, management experiences and high-caliber personnel with

¹ Ministry of Commerce, *Speech by Mr. Wang Qishan, Vice Premier of the State Council, P.R.*

Republic of China at the International Investment Forum 2008 (Sept. 10, 2008),

<http://english.mofcom.gov.cn/aarticle/newsrelease/significantnews/200809/20080905773688.html>.

² Based on 2002 data, one researcher estimated that manufacturing employees in China averaged about 57 cents per hour (in the cities, compensation was about \$0.95, and in non-city areas, the averages were approximately \$0.41). Judith Banister, *Manufacturing Earnings and*

Compensation in China, MONTHLY LABOR REVIEW 22 (August 2005),

<http://www.bls.gov/opub/mlr/2005/08/art3full.pdf>. See, *infra*, Part IV for information about current wages.

³ Five-Year Guidelines Set for Western Development, XINHUA NEWS AGENCY (Dec. 9, 2006),

<http://www.china.org.cn/english/GS-e/191781.htm>; *China’s New Policy Stresses Quality of Foreign Investment*, PEOPLE’S DAILY ON-LINE (Nov. 9, 2006),

http://english.people.com.cn/200611/09/eng20061109_319955.html.

the aim of altering the focus to quality foreign investment from quantity. To this end, China's legal landscape is undergoing significant changes on a number of fronts.⁴ This was underscored in a recent speech by Wang Qishan, Vice Premier of the State Council, at the International Investment Forum in China when he focused on the importance of new laws, including the new Labor Contract Law, to promote fair competition.⁵ The Labor Contract Law, along with other new labor and employment laws embody a number of changes pertaining to the treatment of workers and the responsibilities of employers.

Over the past 20 years, over 140 million low-skilled workers transitioned from working at state-owned enterprises to the private sector and/or moved out of rural areas into the cities to work.⁶ This tremendous shift also creates a situation in which workers are now dependant on private employers, who may or may be concerned about worker-related issues. Turnover rates

⁴ Two major areas of change are the Property Law of the People's Republic of China [wu quan fa] (promulgated by the Nat'l People's Congress, Mar. 16, 2007, effective Oct. 1, 2007)

http://www.law-lib.com/law/law_view1.asp?id=193400, and the Anti-Monopoly Law of the People's Republic of China [fan long duan fa] (promulgated by the Standing Comm. Nat'l People's Cong. Aug. 30, 2007, effective Aug. 1, 2008, http://www.law-lib.com/law/law_view1.asp?id=212679). For a succinct overview of these two legal developments, see, Adam Bobrow, *et al.*, *China*, 42:2 THE INT'L LAWYER 945-956 (2008).

⁵ Qishan speech, *supra* note ___. For a historical perspective about the context of late 20th century labor reforms, see, Hilary K. Josephs, *Labor Reform in the Workers' State: The Chinese Experience*, 2 J. CHINESE L. 201, 206-219 (1988).

⁶ Paul W. Beamish, *The High Cost of Cheap Chinese Labor*, HARVARD BUSINESS REVIEW, 1 (June 2006).

for low-skilled workers in the 30-40% range annually, with some rising to over 100%,⁷ raise red flags about the treatment of such workers. According to a Pew Global Attitudes Project study, although most people in China embrace the free market, there is considerable concern about rising economic inequality in China.⁸ Wages and working conditions are fundamental to this concern. Although foreign investment continues to grow – Microsoft, for example, announced in May 2008 that it will invest \$280 million to build a research and development center in Beijing, accommodating 5,000 employees⁹ -- there are a range of concerns about building and expanding operations in China, including increasing labor costs.¹⁰ Such concerns are underscored by official government statements such as Chinese Premier Wen Jiabao's report to the 11th National People's Congress in which he said that the Chinese government will "severely" punish illegal

⁷ Beamish, *supra* note ___ at 1. In industrialized countries, employee turnover rates in manufacturing are roughly 5%. *Id.*

⁸ The Pew Global Attitudes Project, *The Chinese Celebrate Their Roaring Economy, As They Struggle with its Costs* (July 7, 2008), <http://pewglobal.org/reports/display.php?ReportID=261>.

⁹ Wang Xing, *Microsoft to Build \$280m R&D Center in Beijing* (May 7, 2008), <http://cys2.mofcom.gov.cn/aarticle/workaffair/200805/20080505517497.html>.

¹⁰ Keith Bradsher, *Investors Seek Asian Options to Costly China*, THE NEW YORK TIMES (June 18, 2008), http://www.nytimes.com/2008/06/18/business/worldbusiness/18invest.html?_r=1&hp&oref=slog
[in](http://www.nytimes.com/2008/06/18/business/worldbusiness/18invest.html?_r=1&hp&oref=slog); Li Fangfang, *Too Few Good Men*, CHINADAILY (Jan. 21, 2008), http://www.chinadaily.com.cn/china/2008-01/21/content_6409165.htm; David Barboza, *Shortage of Cheap Labor in China*, Int'l Herald Trib. (Apr. 3, 2006), <http://www.iht.com/articles/2006/04/02/business/labor.php>.

employment while following a “vigorous” employment policy.¹¹

To aid firms doing business in China, this paper details relevant major labor and employment law developments in China. Part I, details the requirements of the new Labor Contract Law, including the requirements of written contracts, the role of labor unions, issues regarding termination and mass layoffs. Part II addresses employment discrimination, focusing on protected persons, disability discrimination and mandatory retirement. Part III discusses sexual harassment. Part IV pertains to wages and Part V focuses on workplace health and safety. Part VI concerns emerging issues related to worker privacy. Lastly, Part VII raises issues related to employment and labor dispute resolution.

The objective of this research is to analyze the ramifications of existing, newly enacted and proposed labor and employment laws on U.S. businesses doing business in China. Although enforcement of Chinese labor laws is lagging in many areas,¹² foreign firms are wise to be in full

¹¹ Chinese Premier Promises to Crack Down on Illegal Employment, XINHUA NEWS AGENCY (March 3, 2008), http://news.xinhuanet.com/english/2008-03/05/content_7721644.htm.

¹² See generally Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in The People’s Republic of China*, 30 FORDHAM INT’L L.J. 1050 (2007) (discussing evidence of emerging regulatory innovation in the area of wages). Also note that in 2006, the AFL-CIO brought a Section 301 of the Trade Act of 1974 (as amended) petition charging that the Chinese government persistently and systematically denies worker rights. Executive Summary, *Section 301 Petition Against the Chinese Government filed with the USTR* (2006), http://www.aflcio.org/issues/jobseconomy/globaleconomy/upload/china_execsum.pdf . The petition was rejected by the Bush administration. Office of the United States Trade Representative, *Position of the USTR Spokesman Regarding China Labor Petition* (July 21,

compliance with the law to avoid selective and high-profile enforcement. This paper should alert employers of their legal rights and responsibilities in the workplace in China, as well as to explore ethical considerations regarding the treatment of workers.

I. LABOR CONTRACT LAW

For over a year, the Standing Committee of the National People's Congress ("SCNPC") reviewed various drafts of the law requiring labor contracts. On June 29, 2007, the SCNPC passed the Labor Contract Law ("Labor Contract Law"), which took effect on January 1, 2008.¹³ Existing labor contracts are grandfathered by the new law. Thus, employers do not need to require existing employees to sign new contracts. The new Labor Contract law supplements and clarifies China's 1995 Labor Law ("Labor Law"), which required all employers to execute labor contracts with their employees to establish the labor relationship and to specify the "rights, interests and obligations of each party."¹⁴ The Labor Law specified that a written labor contract must contain provisions addressing: 1) the time limit of the contract; 2) the content of the work;

2006),

http://www.ustr.gov/Document_Library/Press_Releases/2006/July/Statement_from_USTR_Spokesman_Regarding_China_Labor_Petition.html.

¹³ China's Legislature Adopts Labor Contract Law (June 29, 2007),

http://news.xinhuanet.com/english/2007-06/29/content_6308557.htm. Because the official translation of the Labor Contract Law [hereinafter Labor Contract Law] was not yet available at the time this article went to print, but an unofficial translation is on file with the author.

¹⁴ Labor Law of the People's Republic of China (adopted July 5, 1994, by the 8th Sess. of the Standing Comm. of the 8th NPC; effective as of Jan. 1, 1995), Art. 16,

<http://www.jus.uio.no/lm/china.labor.law.1994/doc.html> [hereinafter Labor Law].

3) labor protection and labor conditions; 4) labor remunerations; 5) labor disciplines (e.g. work hours, rest periods, rest days, vacation time, and holidays); 6) conditions for the termination of the agreement; and 7) liabilities for violations of the agreement.¹⁵ The Labor Law also provided that an employee's labor contract may also include provisions "concerning the keeping of the commercial secrets of the employer."¹⁶ This provision was important because it afforded employers a formal mechanism to prevent employees from divulging trade secrets.¹⁷ Contracts negotiated pursuant to the Labor Law, including confidentiality provisions, are still valid for existing employees.

All employees commencing employment on or after January 1, 2008, however, have the benefit of the new Labor Contract Law, which is designed to protect their legal rights and to promote harmonious and stable employment relationships.¹⁸ The new Labor Contract Law creates significant new protections for employees, as well as a corresponding burden on employers. Inasmuch as there are some ambiguities about implementation of the Labor Contract law, on May 8, 2008, the Legislative Affairs Office of the State Council issued Draft Implementing Rules ("Draft Rules") for the PRC Labor Contract Law for public comments. Key

¹⁵ *Id.* at art. 19.

¹⁶ *Id.*, art. 22.

¹⁷ For a provocative discussion about whether a company should seek patent protection or trade secret protection in China, see, Robert Bejesky, *Investing in the Dragon: Managing the Patent Versus Trade Secret Protection Decision for the Multinational Corporation in China*, 11 TULSA J. COMP. & INT'L L. 437 (2004). This is an important issue in the context of business methods, because at this time the patentable status of business methods is in question in China. *Id.* at 441.

¹⁸ Labor Contract Law, *supra* note __ at art. 1.

provisions of the Labor Contract Law include specific requirements for the written contracts, tighter restrictions on probationary periods for employees, termination of contract and severance pay, mass layoffs, and the role of labor unions. These aspects of the law are explored below in greater detail.

A. Written Employment Contract Requirements

The Labor Contract Law requires the employment relationship to be based on a written employment contract.¹⁹ Employment contracts are divided into three types: fixed-term employment contracts, open-ended contracts and contracts for the completion of a certain project.²⁰ As a disincentive to employers who might be tempted to fail to secure a written contract with an employee, the law provides clear penalties. If an employer fails to secure a written labor contract with the employee for more than one month, but less than one year following the employee's first day of employment, the employer is required to pay double the employee's monthly salary for each month of employment without a labor contract in place.²¹ Moreover, if an employer fails to secure an employment contract within the first year of employment, the employee is automatically deemed to have an open-ended employment contract.²² Each contract must contain certain key information and may contain additional provisions.

1. Contracts Must Specify Key Information

Similar to the 1995 Labor law, the Labor Contract Law requires that employment contracts shall

¹⁹ *Id.* at art. 10.

²⁰ *Id.* at art. 12.

²¹ *Id.* at art. 82.

²² *Id.* at art. 14.

specify: 1) the name, domicile and legal representative or main person in charge of the employer; 2) the name, domicile and number of the resident ID card or other valid identity document of the worker; 3) the term of the employment contract; 4) the job description and the place of work; 5) working hours, rest and leave; 6) labor compensation; 7) social insurance; 8) labor protection, working conditions and protection against hazards; and 9) other matters which laws and statutes require to be included in employment contracts.²³ This information is fundamental to the contract.

2. Contracts May Include Confidentiality Provisions

The employer and worker may stipulate other matters, such as confidentiality of trade secrets and intellectual property.²⁴ If a worker has a confidentiality obligation, the worker and employer may agree on competition restriction provisions in the contract. Such provisions obligate the employer to pay financial compensation to the worker on a monthly basis during the term of the competition restriction after the termination or ending of the employment contract.²⁵ If the worker violates the non-competition restrictions, he is required to pay liquidated damages to the employer, as stipulated under the contract.²⁶

²³ *Id.* at art. 17.

²⁴ *Id.* at art. 23. For a detailed discussion about the use of noncompete provisions and China's unfair competition law, see Marisa Anne Pagnattaro, *Protecting Trade Secrets in China: Update on Employee Disclosures and the Limitations of the Law*, 45:2 A.B.L.J. 399 (2008); Marisa Anne Pagnattaro, *The Google Challenge: Enforcement of Noncompete and Trade Secret Agreements for Employees Working in China*,” 44:4 A.B.L.J. 603 (2007).

²⁵ Labor Contract Law, *supra* note ___ at art. 23.

²⁶ *Id.* at arts 23, 25 and 90.

The Contract Labor Law specifically states that only senior management, senior technicians and those bound to keep information confidential may be held to non-competition agreements.²⁷ The terms of the non-competes, the geographic limits and the cap on liquidated damages are all subject to mutual agreement between the employer and employee. Importantly, however, the Contract Labor Law specifies that the maximum term of a non-compete clause is two years.²⁸ Overall, the Contract Labor Law is clear that an employee can be contractually prohibited from working for a competing employer that produces the same type of products or is engaged in the same type of business as the current employer, as well as prohibited from establishing his own business to produce the same type of products or engage in the same type of business.²⁹

3. Annual Leave

In connection with the Labor Contract Law, China has also issued new regulations to aid implementation of the law. On December 14, 2007, the State Council issued *Regulations on Paid Annual Leave for Employees* (Leave Regulations), which became effecting January 1, 2008.³⁰ The Leave Regulations dictate the minimum amount of annual leave for all employees “working

²⁷ *Id.* at art. 24.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Taylor Wessing, *China Tips 2* (April 2008),

http://www.taylorwessing.com/uploads/tx_siruplawyermanagement/China_Tips.pdf. Note:

Contacting Roland Falder at Taylor Wessing to obtain an English translation of the Regulations on Paid Annual Leave for Employees and *Measures of Holidays for National Festivals and Memorial Days*.

continuously” for over one year, exclusive of public holidays, as follows:

Minimum Annual Paid Leave	Continuous Employment
5 days	< 10 years
10 days	10-20 years
15 days	> 20 years

If the employer is “not able to arrange annual leaves for an employee with the employee’s consent,” the employer is required to pay the employee three times the average daily salary per untaken leave day.³¹ Despite the clarifying regulations, some questions remain, such what constitutes “continuous employment,” and what should happen if the employee does not apply for annual leave.

In connection with the Labor Contract Law, the State Council also issued revised *Measures of Holidays for National Festivals and Memorial Days*, which took effect on December 14, 2007. There are 11 “official” national holidays in 2008: new one-day holidays for to celebrate traditional festivals of Tomb-Sweeping Day, Dragon-Boat Festival, and Mid-Autumn Festival; a three-day holiday for the Spring Festival, one-day May Day holiday (shortened from three days); three-day National Day; and a one-day New Year holiday.³² The measures increased the overall number of national public holidays from 10 to 11 days.

B. Tighter Restrictions on Probationary Periods

³¹ *Id.*

³² Gary Bowman and Peter Bachmann, *China Revises National Holidays for 2008* (Dec. 17, 2007), <http://www.bizchina-update.com/content/view/418/2/>.

The Labor Contract Law specifies the permitted length of probationary employment, which is tied to the term of the underlying employment contract.³³ The intent of the law is to prevent employers from misusing probationary periods, and allows an employer to stipulate only one probation period with any individual worker.³⁴ The law now provides:³⁵

Term of the Employment Contract	Maximum Length of the Probationary Period
< 3 months or a project basis	0 months
≥3 months < 1 year	≤ 1 month
≥ 1 year < 3 months	≤ 2 months
≥ 3 years or a non-fixed/open-ended contract	≤ 6 months

The law also provides that, during the probationary period, the employee’s salary may not be lower than the lowest salary for the same position or 80% of the salary provided for in the employment contract.³⁶ The employer may not terminate an employment contract during the probation period, unless certain specified criteria are met.³⁷

C. Termination of a Contract & Severance Pay

Contracts can end due to certain circumstances, such as expiration, death of the worker,

³³ Labor Contract Law, *supra* note __ at arts. 19-21.

³⁴ *Id.* at art. 19.

³⁵ *Id.*

³⁶ *Id.* at art. 20.

³⁷ *Id.* at art 21. Termination must be consistent with one of the reasons set forth in Labor Law Art.39 or 40. *See, infra*, Part I. C. for further elaboration.

bankruptcy of the employer.³⁸ In accordance with the Contract Labor Law, employment contracts can be terminated under certain specified following conditions. At the most basic level, a worker and an employer may terminate their employment “after consultations.”³⁹ Although it is unclear what would constitute sufficient consultations, the law is more specific about other details regarding termination of the labor contracts. Specifically, a worker can unilaterally terminate a contract with 30 days written notice, under certain conditions, including: failure to timely provide full pay; failure to provide the working conditions in the contract; not providing employment benefits; and having company rules violating the law.⁴⁰ Additionally, if there are certain extreme circumstances, a worker can terminate the contract with no advance notice, e.g. threats of violence from the employer, or orders for work that threatens personal safety.⁴¹

Likewise, the Labor Contract Law specifies the circumstances in which an employer may terminate the labor contract. Employers can unilaterally terminate a contract for the following conditions: if the worker cannot satisfy the conditions of employment during probation, if there is a material breach of the contract, if the employee engages in serious dereliction of duty, if the employee is involved in graft, or if the employee has a business/employment relationship with another employer or commits a criminal act that is prosecuted.⁴² Other circumstances in which an employer may terminate an employment contract include: if the worker cannot work after a

³⁸ *Id.* at art. 44.

³⁹ Labor Contract Law, *supra* note ___ at art. 36.

⁴⁰ *Id.* at arts. 37 and 38. If the worker is on probation, only three day notice is required. *Id.* at art. 37.

⁴¹ *Id.* at art. 38.

⁴² *Id.* at art 39.

period of sick leave due to a non-work related injury or illness; remains incompetent to do the work even after training or adjustment of job duties, or some other major change in circumstances rendering the employment contract non-performable.⁴³ Under such circumstances, the employer is required to give the employee 30 days notice or pay one month's wages.⁴⁴

The Contract Labor Law also contains very specific provisions governing severance pay, requiring employers to pay severance pay under a broad variety of circumstances.⁴⁵ In general, the employers are required to pay severance pay which equals the employee's monthly wage times the number of years of employment.⁴⁶ For high-income employees, if the monthly wage of the employee is greater than three times the average monthly wage of local employees in the preceding year, then the formula is different. In this circumstance, severance pay equals three times the average monthly wage of local employees times the number of years of employment (not exceeding 12 years).⁴⁷ Although the formulas sound straight-forward, there could be calculation issues regarding factors such as the number of years of employment, the calculation of the average local monthly wage, etc.

D. Mass Lay-Offs

Similar to the Worker Adjustment and Retraining Notification Act (WARN Act) in the United States, the Contract Labor Law addresses mass layoffs. Pursuant to the Contract Labor Law, a mass lay-off is defined as involving 20 or more employees, or fewer than 20 employees if by a

⁴³ *Id.* at art.40.

⁴⁴ *Id.*

⁴⁵ *Id.* at arts. 36, 38, 40, 41, 44 and 46.

⁴⁶ *Id.* at art 47.

⁴⁷ *Id.*

proportion that accounts for more than ten percent of the total number of employees.⁴⁸ To reduce its workforce, an employer is required to explain the circumstances of the layoff to the labor union or to all of its employees 30 days in advance and to consider options. During a mass lay-off, the employer is also required to retain “priority persons,” defined as those who 1) have concluded with the employer fixed-term employment contracts with a relatively long term; 2) have concluded open-ended employment contracts with the employer; or 3) who are the only ones in their families to be employed and whose families have an elderly person or a minor for whom they need to provide.⁴⁹ On its face, the broad definition of priority persons appears to create a situation in which it companies would be required to retain many individuals.

Moreover, mass lay-offs are only permitted: 1) if there is a restructuring pursuant to the Enterprise Bankruptcy Law; 2) if there are serious difficulties in production and/or business operations; 3) if the enterprise switches production, introduces a major technological innovation or revises its business method and, after amendment of employment contracts, still needs to reduce its workforce; or 4) if there is another major change in the objective economic circumstances relied upon at the time of conclusion of the employment contracts, rendering them unperformable.⁵⁰

E. The Role of Labor Unions

The official trade union organization in China is the All-China Federation of Unions (“ACFTU”).⁵¹ Founded on May 1, 1925, the ACFTU currently consists of 31 provincial trade

⁴⁸ *Id.* at art. 41.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ All-China Federation of Unions, <http://www.acftu.org.cn/>.

union federations, 10 national industrial unions and 1.324 million grassroots trade union organizations (in 2.753 million enterprises and institutions), with 169.94 million members.⁵²

Unlike labor unions in the United States, the ACFTU is controlled by the government, not union members.⁵³

The power of the ACFTU is illustrated by Wal-Mart's expansion in China. Breaking its general practice of resisting unions, Wal-Mart agreed to allow employee unions in its stores in China.⁵⁴ In 2006, when Wal-Mart made this decision, it employed approximately 23,000 people in China in 60 stores.⁵⁵ Currently, Wal-Mart has 206 retail units in China, including 100 Wal-Mart Supercenters, and over 80,000 employees.⁵⁶ According to a senior ACFTU organizer, success in unionizing Wal-Mart stores is seen as a "springboard to similar campaigns" aimed at companies doing business in China and is "an irreversible trend."⁵⁷ Local branches of the ACFTU are taking steps to unionize 80% of subsidiaries of Fortune Global 500 companies by

⁵² ACFTU, *A Brief Introduction of the All-China Federation of Trade Unions* (Sept. 20, 2007), <http://www.acftu.org.cn/template/10002/file.jsp?cid=63&aid=156>.

⁵³ Cooney, *supra* note __ at 1072.

⁵⁴ Allen T. Cheng and Lee Spears, *Wal-Mart to Allow Unions in China*, WASHINGTON POST (August 10, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/09/AR2006080901924.html>.

⁵⁵ *Id.*

⁵⁶ *Wal-Mart China Fact Sheet* (May 2008), http://walmartstores.com/media/factsheets/fs_1999.pdf.

⁵⁷ David Lague, *Unions Triumphant at Wal-Mart in China*, Int'l Herald Tribune (Oct. 13, 2006), <http://www.ihrt.com/articles/2006/10/12/business/unions.php> (quoting Gio Wencai).

the end of September 2008.⁵⁸

This effort is undoubtedly helped by the Contract Labor Law which allows labor unions to play a more important role in representing the interests of employees. One key aspect of the role of unions is consulting with employers about labor rules and regulations regarding wage, hour, break, leave work safety and hygiene, insurance and benefits, training, and work discipline.⁵⁹ This very broad set of categories potentially gives unions a formidable degree of control over the workplace. Unions are also charged with jointly coordinating with the local labor administration authorities and the employer to resolve any employment issues⁶⁰ and negotiating “collective contracts.”⁶¹ Importantly, unions may also be involved in assisting and guiding workers in negotiating their employment contracts,⁶² demanding the employer rectify any legal violations or violations of a worker’s employment contract;⁶³ and being advised and consulted with in connection with any mass lay-off.⁶⁴

The role of labor unions as defined under the Labor Contract Law signals the potential

⁵⁸ Baker & McKenzie, *Unionization Campaign Against Fortune Global 500 Companies*

Intensifies, CHINA EMPLOYMENT LAW UPDATE (Aug. 2008),

http://www.bakernet.com/NR/rdonlyres/4345529E-2C29-4C48-BDCE-0532CE65936A/0/china_employmentlawupdate_ca_aug08.pdf.

⁵⁹ Labor Contract Law, *supra* note __ at art. 4.

⁶⁰ *Id.* at art. 5.

⁶¹ *Id.* at art. 51.

⁶² *Id.* at art. 6.

⁶³ *Id.* at art. 4.

⁶⁴ *Id.* at art. 41.

for significant union involvement. In addition to this national law, local measures may give unions even more control. For example, in Shenzhen, regulations provide a stronger role to unions in collective bargaining.⁶⁵ The Shenzhen Implementation Measures for the PRC Union Law use the term “collective bargaining” (as opposed to “collective consultation” in the national law), strengthening the unions’ ability to take on a larger and more aggressive role on behalf of employees.⁶⁶

Although unionizing is presented under the guise of protecting worker rights, one of the effects of this drive to unionize foreign companies is adding costs to make these companies less competitive with Chinese companies.⁶⁷

II. EMPLOYMENT DISCRIMINATION

Employment laws in China also address the pervasive issue of employment discrimination and the issues related to redressing grievances.⁶⁸

A. Protected Persons: 1994 Labor Law and the EPL

On August 30, 2007, the Standing Committee of the National People’s Congress passed the

⁶⁵ Baker & McKenzie, *Regulations Give Unions in Shenzhen Larger Role*, CHINA EMPLOYMENT LAW UPDATE (Aug. 2008), http://www.bakernet.com/NR/rdonlyres/4345529E-2C29-4C48-BDCE-0532CE65936A/0/china_employmentlawupdate_ca_aug08.pdf.

⁶⁶ *Id.*

⁶⁷ Amy L. Sommers and Michael E. Burke, 3:1 CHINA LAW REPORTER (Jan. 2007), <http://meetings.abanet.org/webupload/commupload/IC860000/newsletterpubs/Jan07CLR.pdf>.

⁶⁸ See Xun Zeng, *Enforcing Equal Opportunities in China*, 9 U. Pa. J. Lab. & Emp. L. 991 (2007) (generally discussing gender, age and height discrimination in China prior to the Labor Contract Law and the EPL).

Employment Promotion Law (EPL), which became effective on January 1, 2008.⁶⁹ The intent of the new law is to promote employment and prohibit job discrimination. The EPL builds on the provisions in the 1994 Labor Law, which provides that an employer may not discriminate on the basis of nationality, race, sex, or religious belief.⁷⁰ The EPL addresses employment discrimination based on ethnicity, race, gender, disability, and religious belief in hiring or in the conditions of employment.⁷¹ For the first time, the law gives employees the right to sue employers for discrimination.⁷² Unlike the widely disregarded Labor Law, the EPL appears to have the potential of being enforced. Together the 1994 Labor Law and the ELP, provide the legal framework from preventing employment discrimination.

The protections afforded by the Labor Law and the EPL are quite broad. For example, the Labor Law prohibits the employment of persons under the age of sixteen years.⁷³ Despite that law, however, there are often reports about child labor cases in China.⁷⁴ With regard to women,

⁶⁹ Employment Promotion Law (EPL), [need to add a cite to an English translation].

⁷⁰ Labor Law, *supra* note _ at art. 12.

⁷¹ EPL, *supra* note __ at arts. 3 and 26.

⁷² EPL, *supra* note __ at art. 62.

⁷³ Labor Law, *supra* note at art. 15. Note: there are exceptions for minors in the entertainment sector and athletic events. Additionally, there are restrictions on the type of work workers aged 16-18 may engage in, e.g. prohibitions on working in underground mining, working with poisonous or harmful substances, and engaging in physically intense labor.

⁷⁴ *See, e.g.,* David Barboza, *China Says Abusive Child Labor Ring is Exposed*, THE N.Y. TIMES (May 1, 2008), (reporting that China was investigating whether hundreds or thousands of children from poor areas in the southwest part of the country were sold as slave laborers in

the law is quite detailed. The Labor Law prohibits female employees from working in mining operations, dangerous occupations, working in high altitudes, at low temperatures or in contact with cold water, or performing strenuous physical labor during menstruation.⁷⁵ Moreover, pregnant women are also not allowed to engage in strenuous physical labor, and expectant mothers in their final trimester of pregnancy are barred from night work and overtime.⁷⁶ Maternity leave is a minimum of ninety days⁷⁷ and nursing mothers are not allowed to work overtime, night hours or engage in strenuous physical labor for up to one year after childbirth.⁷⁸

Other protections for women include that they are entitled to equal pay for equal work⁷⁹ and employers may not raise hiring standards for women.⁸⁰ According to a survey published by the Shanghai Women's Federation, sexual discrimination is rife when female university

booming coastal factory cities); China Labour Bulletin, *As China's Economy Grows, So Does China's Child Labour Problem* (June 10, 2005), <http://www.china-labour.org.hk/en/node/15889> (noting that although child labor is hardly a new phenomenon, it is increasing in China).

⁷⁵ Labor Law, *supra* note _ at arts. 59 and 60.

⁷⁶ *Id.* at art 61.

⁷⁷ *Id.* at art 62.

⁷⁸ *Id.* at art 63.

⁷⁹ Law of the People's Republic of China on the Protection of Rights and Interests of Women, art. 24, (adopted Apr. 3, 1992, amended Aug. 28, 2005), http://www.womenofchina.cn/Policies_Laws/Laws_Regulations/1466.jsp.

⁸⁰ EPL, *supra* note __ at __.

graduates seek employment.⁸¹ The survey found that 55.8 percent of the female graduates claimed that they were discriminated against while seeking jobs.⁸² In addition to the national law, local law can offer additional protections. In January 2007, Heilongjiang province became the first reported jurisdiction in China to create fines for employers that discriminate against women during recruitment. The fines range from RMB\$1,000 to RMB\$5,000 per violation and are part of local implementing rules for the Law on the Protection and Rights of Women.⁸³

The law also protects against discrimination based on disability,⁸⁴ and against employment discrimination based on communicable disease.⁸⁵ This is particularly important, as a reported 120 million people living with the Hepatitis B virus in China are vulnerable to

⁸¹ *Sex Bias Exists In Shanghai Job Market*, PEOPLE'S DAILY ONLINE (Aug. 9, 2004),

http://english.peopledaily.com.cn/200408/09/eng20040809_152320.html.

⁸² *Id.*

⁸³ Baker & McKenzie, *Province Created Fines for Discriminatory Hiring Practices*, CHINA EMPLOYMENT LAW UPDATE 2, (Feb. 2007),

<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1017&context=lawfirms>.

⁸⁴ See Eric G. Zhang, *Employment of People With Disabilities: International Standards and Domestic Legislation and Practices in China?*, 34 *Syracuse J. Int'l L. & Com.* 517 (2007)

(discussing international conventions, Chinese law, and challenges of preventing discrimination against people with physical disabilities). The law also arguably also covers mentally disabled workers who are vulnerable to abuses in the workplace. For a recent example, see, *6 Mentally Disabled Workers Rescued from Kilns Being Cared For*, XINHUA NEWS Agency (June 25, 2007), <http://china.org.cn/english/China/214969.htm>.

⁸⁵ EPL, *supra* note __ at art. 30.

discrimination.⁸⁶ As a supplement to the EPL, the Chinese Ministry of Labor and Social Security issued regulations on October 30, 2007, called the Employment Service and Employment Management Regulations, imposing fines up to RMB 1,000 on employers who require applicants to take a Hepatitis B test.⁸⁷

Another very problematic area is the treatment of migrant workers. The EPL bans employers from discriminating against migrant workers moving to urban areas seeking employment opportunities.⁸⁸ The new law is vital to address the treatment of migrant workers. According to one report, there are widespread abuses of construction workers in Beijing, including the lack of labor contracts, unpaid wages, substandard wages, inadequate food and housing, unsafe working conditions, and a lack of insurance coverage.⁸⁹

B. Age Discrimination and Mandatory Retirement

Interestingly, the Labor Law and the EPL do not prohibit age discrimination in employment. China, does, however, have a rather early retirement age. The legal retirement age is 60 years for men and 55 year for women, or 50 year in exceptional cases.⁹⁰ In light of the burden on the

⁸⁶ China Labour Bulletin, <http://www.china-labour.org.hk/en/node/100011> - need a copy of specifics

⁸⁷ Andreas Lauffs and Jeffrey Wilson, *Changes to Laws and Regulations Continue*, ABA LABOR & EMPLOYMENT LAW INTERNATIONAL LABOR LAW COMMITTEE NEWSLETTER (Dec. 2007).

⁸⁸ EPL, *supra* note ___ at art. 31.

⁸⁹ Human Rights Watch, “*One Year of My Blood,*” *Exploitation of Migrant Construction Workers in Beijing*, (March 2008), <http://www.hrw.org/reports/2008/china0308/>.

⁹⁰ *Raise in Mandatory Retirement Age Not an Option*, CHINADAILY (December 22, 2006), <http://en.invest.china.cn/english/government/193535.htm>.

pension system, the government considered raising the age.⁹¹ Female delegates at the ninth National People's Congress also questioned the mandatory retirement age for women, which holds women back from enjoying equal employment rights.⁹² In any event, at this point, many men and women, especially in state-owned enterprises, retire early to make openings for new graduates and to streamline businesses.

III. SEXUAL HARASSMENT

The concept of recourse for workplace sexual harassment is new in China. In 2003, He Yingzhi sued her boss for sexual harassment for violating her right to human dignity and won.⁹³ The suit was unprecedented, because there was no explicit law in place to protect women from sexual harassment in the workplace in China. Yingzhi accused her boss of locking her in a room, grabbing her violently, kissing her, jokingly referring to her as "his wife," and making obscene remarks to her. The penalty was \$250 fine and an apology.⁹⁴ Since that time, China enacted specific protections for workplace sexual harassment.

On December 1, 2005, the Amended Law of the People's Republic of China on the Protection of Rights and Interests of Women went into effect ("Amended Law").⁹⁵ The Amended

⁹¹ *Id.*; China May Raise Retirement Age to Ease Pension Shortage, CHINADAILY (Nov. 28, 2006), http://www.chinadaily.com.cn/china/2006-11/28/content_744935.htm.

⁹² *Different Retirement Ages in China for Men and Women Questioned*, PEOPLE DAILY (Aug. 25, 2003), http://english.peopledaily.com.cn/200308/25/eng20030825_123043.shtml.

⁹³ Julie Chao, *Harassment Suit Stirs Up Chinese*, THE ATLANTA JOURNAL AND CONSTITUTION B1 (July 17, 2003).

⁹⁴ *Id.*

⁹⁵ Amended Law of the People's Republic of China on the Protection of Rights and Interests of

Law prohibits sexual harassment against women.⁹⁶ It also states that female workers shall have the right to file a complaint with the units where they work and in the departments where they work.⁹⁷ The Amended Law, however, does not give any more specific information beyond these broad statements. The lack of a clear definition can create confusion and make enforcement difficult. Additionally, the Amended Law appears to be much narrower than Title VII protection in the United States, because it does not explicitly protect men from harassment by women and does not appear to protect women from harassment by other women.

As is often the case, local measures add additional layers of protection for workers. On July 31, 2006, the Hunan Province issued Measures for Enforcement of the Law of the People's Republic of China on the Protection of Rights and Interests of Women in the Hunan Province ("Hunan Law"), which went into effect on October 1, 2006.⁹⁸ Pursuant to the Hunan Law, sexual harassment can take the form of behavior, language, words, words, pictures, and electronic messages with obscene content. The victim of the alleged sexual harassment can report the incident to the police for investigation, who will then determine if there should be an administrative punishment or a criminal penalty. The harassment victim can also sue in courts for civil remedies. Moreover, the Hunan law requires employers to prevent and prohibit sexual

Women (effective December 1, 2005) ("Amended Law"),

<http://www.china.org.cn/english/government/207405.htm>.

⁹⁶ *Id.* at art. 20.

⁹⁷ *Id.*

⁹⁸ Jeffery Wilson and Ding Yi, *First Provincial Regulations Defining Sexual Harassment Under 2005 Law Take Effect*, ABA Section of Labor & Employment Law International Committee Newsletter (Nov. 2006).

harassment in the workplace.⁹⁹ Inasmuch as the Hunan Law does not provide penalties for employers who fail to prevent harassment or who do not act on harassment complaints, this provision may not be very effective. Despite this fact, however, it is possible that a female employee who is harassed may be able to sue her employer if it has not taken measures to protect women in the workplace from being harassed.

Other jurisdictions also followed suit to further refine what is actionable as sexual harassment. In December 2006, Shaanxi issued a new provincial regulation detailing activities constituting sexual harassment, including unwanted sexual advances aimed at women, featuring pornographic material or sexual requests in verbal, written, graphic, electronic or physical form.¹⁰⁰ In April 2007, the Standing Committee of the Shanghai Municipal People's Congress passed new legislation, revising the Shanghai Municipal Measures for Implementing the Law on Protection of Women's Rights, specifying cases of sexual harassment may include verbal abuse, written text, pictures, text messaging and physical contact. Victims will now be able to lodge appropriate complaints to their employer, relevant government departments or directly to public security organs and take active measures to ensure the perpetrators are prosecuted to the full extent of the law.¹⁰¹

There is at least one reported case of criminal penalties for violating the sexual harassment laws. In July 2008, a Chinese man was sentenced to five months in detention for

⁹⁹ *Id.*

¹⁰⁰ *Shaanxi Cracks Down on Sexual Harassment* (Dec. 1, 2006),
<http://www.china.org.cn/english/features/cw/190872.htm>.

¹⁰¹ *Sexual Harassment Law Refined in Shanghai*, XINHUA NEWS AGENCY (Apr. 7, 2007),
<http://www.china.org.cn/english/China/209250.htm>.

kissing a female colleague against her will, the first time punishment has been meted out under the new sexual harassment law.¹⁰² The man invited one of his new female staff into his office Sichuan province to "discuss work matters," but then told her he wanted to be her boyfriend. When the women turned Liu down, he turned off the lights, held her by the neck and kissed her, the report said. After the woman screamed out and fought back, colleagues next door heard her and dialed (the police). The man was found guilty of "using force to act indecently towards a woman."¹⁰³

IV. WAGES

In early 2003, the Ministry of Labor and Social Security issued the Regulations on Minimum Wage. These regulations may be supplemented by regional regulations. For example, in 2005, Shanghai's minimum wage rose from 635 yuan (US\$77) to 690 yuan (US\$83) and minimum hourly wages for part-time workers were raised from 5.5 yuan (US\$0.66) to 6 yuan (US\$0.73).¹⁰⁴ Similarly, Beijing's minimum wage rose from 545 yuan (US\$66) to 580 yuan (US\$70) and the minimum hourly wages for part-time workers were raised from from 6.8 yuan (US\$0.82) to 7.3 yuan (US\$0.88).¹⁰⁵ Beijing also raised monthly pensions for former state enterprise workers by about 10 percent to an average of 120 yuan (US\$15).¹⁰⁶

¹⁰² Man Detained in China's First Sexual Harassment Case, CHINADAILY (July 16, 2008).

http://www.chinadaily.cn/china/2008-07/16/content_6851867.htm.

¹⁰³ *Id.*

¹⁰⁴ *Shanghai, Beijing Raise Minimum Monthly Wages*, ChinaDaily (July 1, 2005),

http://www.chinadaily.com.cn/english/doc/2005-07/01/content_456392.htm.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

In addition to changes prompted by the government-mandated minimums, wages are rising more than ten percent a year in China for many assembly-line workers and wages are rising at an even higher rate for skilled workers.¹⁰⁷ An important aspect of this increase is the fact that some U.S. companies have been pressured to raise wages. For example, McDonald's announced it would raise wages for about 95% of its workers from between 12-56%, with an average of 30%. These wages are higher than the local minimum wage levels: 15% higher in Beijing and Guangzhou, and 12% higher in Shanghai.¹⁰⁸ Moreover, in January 2008, the Ministry of Labor and Social Security in China announced that it is working on legislation to encourage employers to implement salary raises to lessen the effects of rising inflation.¹⁰⁹ Although these wages are still low by U.S. standards, the increases represent incremental movement toward more substantial wages for workers.

The largest single cause of labor disputes in China, however, is the widespread problem of underpayment and non-payment of wages.¹¹⁰ The Labor law requires wages to be paid monthly to laborers in a form of currency and not deducted or delayed without justification.¹¹¹ As a practical matter, very often the entire workforce can go without wages or overtime payments for several months at a time. Human Rights Watch reports that “the most acute

¹⁰⁷ Bradsher, *supra* note __.

¹⁰⁸ Vivian Wai-yin Kwok, *McDonald's Raising Wages in China*, FORBES (Aug. 7, 2007), http://www.forbes.com/markets/2007/08/07/mcdonalds-china-pay-markets-equity-cx_jc_0807markets1.html.

¹⁰⁹ *China Drafts Code to Regulate Salaries*, CHINADAILY (Jan. 22, 2008), http://www.chinadaily.com.cn/bizchina/2008-01/22/content_6414328.htm.

¹¹⁰ Cooney, *supra* note __ at 1053.

¹¹¹ Labor Law, *supra* note __ at art. 50.

problem faced by migrant construction workers in Beijing is the routine failure of their employers to pay them fully and promptly.”¹¹² Workers can sue individually or collectively, although courts often impose restrictions on the number of workers in each collective case.¹¹³ This is an area ripe for increased involvement of unions under their expanded role. In fact, the effectiveness of the ACFTU can be seen in its dealings with Wal-Mart. On July 25, 2008, Wal-Mart reached a collective bargaining agreement with the ACFTU. Under its first agreement in Shenyang, Wal-Mart will increase employees’ wages by 8% this year and in 2009.¹¹⁴ These changes in wages signal what may be an end to the incredibly low wages that may have initially attracted foreign investment in China.

V. WORKPLACE HEALTH AND SAFETY

Employers are required to establish a program of workplace health and safety, and to take specific measures to guard against workplace accidents.¹¹⁵ Examples include: protective work clothing, goggles, hard hats, etc. as appropriate for the workplace. Not surprisingly, there are reports of many migrant worker safety violations in Beijing.¹¹⁶ Another substantial issue is exposure to hazardous substances. China is attempting to address issues regarding exposure to

¹¹² *One Year of My Blood*, *supra* note ___ at ___.

¹¹³ China Labour Bulletin, Nonpayment of Wages, <http://www.china-labour.org.hk/en/node/100011>.

¹¹⁴ *Wal-Mart Strikes Pay Deal with Chinese Union*, FORBES (July 25, 2008), http://www.forbes.com/2008/07/25/walmart-china-unions-lead-cx_mk_0725acftu.html.

¹¹⁵ Labor Law, *supra* note _ at arts. 52-57.

¹¹⁶ *One Year of My Blood*, *supra* note ___ at ___.

toxic chemicals in the workplace.¹¹⁷ According to a report by China Labor Rights, accidents, injuries and deaths in China's coal mine, construction and manufacturing industries are distressingly commonplace.¹¹⁸ Moreover, many workers have to contend with chronic illnesses such as silicosis brought on by unsafe working conditions. Suing for compensation is very often the only method of seeking redress open to injured workers.¹¹⁹

VI. WORKER PRIVACY

Interestingly enough, China is endeavoring to protect employee personal data; as a supplement to the EPL, the Chinese Ministry of Labor and Social Security issued the Employment Service and Employment Management Regulations on October 30, 2007, requiring employers to keep employee personal information confidential.¹²⁰ Employers are required to obtain written consent of employees to disclose personal information or to use technology or “intellectual achievements” of employees. There are, however, no penalties for employers who fail to obtain consent.¹²¹ This undertaking is contrary to other aspects of employment in China, where there is no concept of what is referred to as a “reasonable expectation of privacy” in the U.S.

¹¹⁷ Monique Lee Hawthorne, *Confronting Toxic Work Exposure in China: The Precautionary Principle and Burden Shifting*, 37 ENTL. L. 151 (2007).

¹¹⁸ China Labor Rights, Industrial Injury Cases Reports, <http://www.china-labour.org.hk/en/node/100011?tid=90003>.

¹¹⁹ *Id.*

¹²⁰ Andreas Lauffs and Jeffrey Wilson, *Changes to Laws and Regulations Continue*, ABA LABOR & EMPLOYMENT LAW INTERNATIONAL LABOR LAW COMMITTEE NEWSLETTER (Dec. 2007).

¹²¹ *Id.*

Most notably, nearly 12.4 million people in Shenzhen, China, will have residency cards fitted with RFID computer chips containing their name, address work history, educational background, religion, ethnicity, police record, medical insurance status, and reproductive history.¹²² The Chinese government also has ordered all large cities to issue such high-tech residency cards to approximately 150 million people who now live in a city, but have not yet acquired permanent residency.¹²³ Under these programs workers relinquish a significant level of privacy, as part of the government's efforts to manage the enormous migrant population.

VII. EMPLOYMENT AND LABOR DISPUTE RESOLUTION

Lastly, although there are many labor and employment laws on the books in China, enforcement of rights is an ongoing issue. Many workers are not even aware that they have labor rights, leave alone have the ability to seek enforcement.¹²⁴ Human Rights Watch reports that “workers have

¹²² Keith Bradsher, *China Enacting a High-Tech Plan to Track People*, N. Y. TIMES, August 12, 2007, <http://www.nytimes.com/2007/08/12/business/worldbusiness/12security.html?ex=1189137600&en=107bdb9d809c09b6&ei=5070>. For more information on using RFID to track employees, see, Marisa Anne Pagnattaro, *Getting Under Your Skin – Literally: RFID in the Employment Context*, __ University of Illinois Journal of Law, Technology & Policy __ (forthcoming 2008), currently available at <http://www.jltp.uiuc.edu/works/Pagnattaro.htm>.

¹²³ *Id.*

¹²⁴ Erik Eckholm, *Workers' Rights Suffering as China Goes Capitalist*, THE NEW YORK TIMES (Aug. 22, 2001), <http://query.nytimes.com/gst/fullpage.html?res=990CE3DF1731F931A1575BC0A9679C8B63>.

few realistic routes for redress” of employment and labor disputes.¹²⁵ A simple comparison of the number of lawyers in the U.S. and China is telling: in the U.S. there is one lawyer for every 270 people and in China there is one lawyer for every 10,650 people.¹²⁶

China, however, is taking steps to allow for more meaningful redress of employment disputes. The *Labor Dispute Mediation and Arbitration Law of the People’s Republic of China* was promulgated in December 29, 2007 and went into effect on May 1, 2008.¹²⁷ Features of the new law include: extending the deadline to file a claim for labor arbitration to one year (previously 60 days), shortening to deadline for the arbitration tribunal to render an award to 45 days upon acceptance of the case, and eliminating arbitration fees. The new law could significantly strengthen labor arbitration in China, but it is too soon to judge its effectiveness.

CONCLUSION

This overview of major employment and labor laws is designed to alert employers and employees of their rights and responsibilities in the workplace in China. It is also always important for employers to check for local laws and regulations, which supplement the national laws. Overall, as is the case with many aspects of Chinese law, the labor and employment laws

¹²⁵ Testimony of Sophie Richardson, Human Rights Watch, *The Impact of the 2008 Olympic Games on Human Rights and the Rule of Law in China*, Congressional-Executive Commission on China (Feb. 27, 2008), <http://cecc.gov/pages/hearings/2008/20080227/richardson.php>.

¹²⁶ Geoffrey A. Fowler and Key Canaves, *Chinese Seeks a Day in Court: With New Faith in the Rule of Law, More Citizens File Suits*, WALL ST. J. A12 (July 1, 2008).

¹²⁷ *Labor Dispute Mediation and Arbitration Law of the People’s Republic of China* (promulgated in December 29, 2007, effective May 1, 2008), <http://tradeinservices.mofcom.gov.cn/en/b/2007-12-29/27880.shtml>.

are in a period of amendment and refinement, as the country positions itself in the 21st century global marketplace. For now, how should U.S. companies govern themselves in China? The safest course of action is to be in full compliance with the law and take the same kinds of preemptive steps that they do in the U.S.: implement policies related to such issues as hiring, promotion, compensation, diversity training, discipline, firing, and workplace safety; create a handbook detailing those policies; and maintain careful records, including employees' hours and overtime. Of course, such measures are time consuming, require a human resources staff and can be costly, which may cause some companies to rethink their operations in China.