FROM CONTRACTS TO COMPLIANCE? AN EARLY LOOK AT IMPLEMENTATION UNDER CHINA'S NEW LABOR LEGISLATION

Virginia E Ho, Indiana University - Bloomington
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Abstract: In 2008, three new primary labor laws took effect in China that together represent the first major retooling of its labor legislation in fifteen years: the Labor Contract Law, the Labor Dispute Mediation and Arbitration Law, and the Employment Promotion Law. The new laws have attracted widespread attention from the international business community, labor advocates, and observers of China’s ongoing legal reforms. However, whether the legislation can overcome and resolve fundamental implementation barriers remains largely the subject of speculation and debate. This Article offers a preliminary answer.

Drawing on the literature on corporate compliance and regulatory policy, it first describes the institutions and processes for enforcing Chinese labor law and identifies current implementation challenges. It then introduces the three laws and considers the extent to which, taken together, they are likely to motivate broader employer compliance in light of these constraints. Using implementation of the Labor Contract Law’s written contract requirement as a case study, the Article then presents the results of field research in Guangdong Province as an early indication of the laws’ impact on public policy priorities, employer practices, and legal mobilization. It concludes by commenting on the power and limits of regulatory change and suggesting directions for further reforms that might motivate a sustained transformation of workplace practices.

In an era of globalization where multinationals draw on labor and capital resources across national borders, labor relations and employment practices are still fundamentally bounded by domestic legal regimes. Indeed, it has been widely

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1 Field research for this study was conducted in the fall of 2003 and from April to June, 2008. Special thanks is owed to the faculty and students of Sun Yat Sen University School of Law Legal Clinic in Guangzhou, China and particularly to Huang Qiaoyan for her insight and assistance in facilitating this research. I am also grateful to Hilary Josephs, Li Libin and attendees at the Indiana University East Asian Studies Center panel on conflict in China for their comments on an earlier version of this article, and for the excellent research assistance provided by Xu Zhe, Wu Yan, Li Xiaoting, Cai Zhifeng, and Li Biyun, as well as to the workers, lawyers, labor rights advocates, and labor administration officials interviewed during this study who cannot be acknowledged by name. All remaining errors are mine alone. Chinese sources cited herein are on file with the author.

1 This is notwithstanding wide-ranging efforts of the International Labor Organization (ILO), the International Trade Union Confederation (ITUC), the United Nations (UN) and other international organizations to promote broader recognition of fundamental labor rights as customary international
argued that inadequate or poorly enforced labor standards in developing countries are to blame for spurring a “race to the bottom” as intense competition for investment and jobs pushes labor, environmental, and social regulations toward the lowest common denominator. Trade unions and politicians have urged that low wages and poor enforcement of labor laws give developing countries an unfair trade advantage, draining jobs away from the developed world.\(^2\) Whether they reflect reality or rhetoric, these debates are indicative of the wide “ripple effect” national labor and employment laws have in an integrated and interdependent global marketplace.

China presents an obvious case in point. Indeed, in recent years, China has been the target of many of these criticisms, not only because of its poor record of labor law enforcement, but also because of its rise as a prime destination for foreign investment and a key player in world markets. In 2008, three new primary labor laws took effect that together represent the first major retooling of China’s labor legislation since its national Labor Law was enacted in 1994: the Labor Contract Law, the Labor Dispute Mediation and Arbitration Law (the “Labor Arbitration Law”), and the Employment Promotion Law.\(^3\) Not surprisingly, these changes to the regulatory landscape have


already attracted widespread attention from the international business community, labor advocates, and others interested in China's ongoing legal reform efforts.

In contrast to the 1994 Labor Law, which loosened state control over labor relations and gave broad discretion to employers, the new laws impose greater constraints on employer discretion and take a more protective stance toward workers. This approach places labor law reforms among a number of measures adopted by the Chinese government in recent years to address the social impact of breakneck economic growth and to build a “harmonious” society. 4 The new laws also build on prior national-level efforts over the past five years to introduce or expand basic legislation governing the workplace, including the revised Trade Union Law, the Law on Production Safety, the Law on the Prevention of Occupational Illness, and the revised Law on the Protection of Disabled Persons.5 The expanse of regulatory change in the

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5 Trade Union Law (adopted by the Nat'l People's Cong. and effective Apr. 3, 1992, amended by the Standing Comm. of the Nat'l People's Cong. Oct. 27, 2001), FALÜ HUIBIAN (JINGJI XINGZHENG FA)
area of labor law is one reflection of China’s remarkable success in establishing a comprehensive and complex legal system in only thirty years. Yet over the past three decades of China’s economic and legal reforms, it has often been observed that creating a vast body of legislation is far easier than ensuring its effective implementation. Indeed, the legal framework governing employment in China is already quite protective, and many basic labor standards more resemble European practice than that of the United States. Still, China has earned a reputation for lax enforcement of its labor laws, and the gap between the law on the books and the law in practice has been wide indeed. This history itself makes clear that legislation alone is unlikely to usher in an era of “harmonious” labor relations. A number of studies have surveyed the basic terms of the Labor Contract Law and


See, e.g. JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 363 (1999).

See infra note 180.

On labor practices in China generally, see sources cited infra notes 147 to 150.
speculated about its potential impact for foreign investors, other employers, and worker rights. Less attention has been given to the Labor Arbitration Law and the Employment Promotion Law. This Article examines all three of the new labor laws together to present a clearer picture of how regulatory changes may address fundamental implementation problems confronting labor law in China and ultimately impact practices in the workplace.

Given this objective, the scope of inquiry of this Article is potentially quite broad. Studies of the "implementation" of law have encompassed administrative policymaking, institution-building, the application of law to achieve certain social objectives, and even the establishment of the rule of law. A simpler definition conceives of implementation as the process of translating the “law on the books” into practice so that it can perform its intended social purposes within the context of the institutions, actors, and social structures in which the law is “brought to life.” Applying this conceptualization in light of the stated goals of China’s new labor

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10 See Jianfu Chen, Introduction, in IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA 1-6 (Jianfu Chen et al., eds., 2000) [hereinafter IMPLEMENTATION OF LAW] (discussing the definitional difficulties and prior literature). See also Jan Michiel Otto, Toward an Analytical Framework: Real Legal Certainty and its Explanatory Factors, in id. (conceptualizing “Real Legal Certainty” as a primary goal of implementation).

11 This definition is adapted from Chen, id., at 2-3.
legislation, the question is whether the new laws will be applied in actual practice by the parties to the labor relationship – employees and employers -- and by public enforcement authorities, labor arbitrators, and courts, in a way that protects worker rights and promotes "stable and harmonious" labor relations.\(^\text{12}\)

Clearly, it is not possible to do justice to even the elements contained in the above definition, nor to do so with regard to the entire range of issues covered by Chinese labor law, in a single study. However, the above definition suggests several dimensions that are minimally necessary to promote effective implementation of labor law: (1) the establishment and operation of the basic institutions presumed by the laws, which include administrative and judicial institutions; (2) dissemination of the law to employees, employers, enforcement authorities, and the public, the first step of the “translation” process, and (3) the creation of sufficient incentives to motivate employer compliance with the law. With regard to the first element, the new legislation makes no significant change to the existing institutional context of Chinese labor law, which is introduced in Section I. The second element, though not a focus of this piece, has been a focus of the Chinese leadership and is discussed briefly in Section II.

The core inquiry in this Article is the third element -- whether the new legislation either has itself introduced or has stimulated measures that can more effectively

\(^\text{12}\) For the objectives of the new laws, see LCL, \textit{supra} note 3, at art. 1 (focusing on the “rights of workers”); Labor Arbitration Law, \textit{supra} note 3, at art. 1; EPL, \textit{supra} note 3, at art. 1. These actors and institutions are identified here and in Section I, \textit{infra}, because they are the stated subjects of the new legislation. \textit{See, e.g.} LCL, \textit{id}. I do not include unions or employer, trade or industry associations because they are not mandatory to the formation of the labor relationship or the implementation of law, although they do have a role in these areas under Chinese labor law. \textit{See Part B, infra}.
motivate employer compliance and whether there are in fact any signs of bearing fruit at this early stage. Because China confronts similar implementation challenges across its legal system, this examination of recent labor law reforms may also offer insights into the potential and limits of law as a means of responding to other critical social problems that have emerged in the context of China's economic development drive.

Section I of this Article describes the current institutional and legal framework for enforcing Chinese labor law in light of the literature on corporate compliance and regulatory policy. Section II introduces the basic goals and provisions of the Employment Promotion Law, the Labor Arbitration Law, the Labor Contract Law, and recent implementing regulations in the broader context of the evolution of Chinese labor law in the reform era. It then considers the extent to which the new legislation is likely to motivate broader compliance in light of the institutional and practical challenges identified in Section I that have limited the labor laws' effectiveness to date. Moving beyond an examination of the laws themselves, Section III draws on recent field research on implementation of the Labor Contract Law’s written contract requirement in Guangdong Province as an early indication of the degree to which the new legislation is likely to impact employer practices. The Article concludes by suggesting avenues for further reforms that could help overcome some of the observed challenges, as well as directions for further research.

I. FOUNDATIONS OF IMPLEMENTATION: REGULATORY STRATEGIES, INSTITUTIONS AND PROCESSES

Before assessing the impact of China's new legislation, it is important to understand the challenges confronting implementation of labor law to date. What motivates individuals, and by extension, firms, to comply with legal rules, and the related question of what regulatory strategies are effective in incentivizing compliance are the
subject of a broad interdisciplinary literature incorporating insights from sociology, political science, economics, law, and public policy. Although these studies are largely grounded in empirical analysis of regulatory practices and compliance in the West, many of the findings have parallels in the Chinese experience. This literature is therefore a useful framework for Part B’s discussion of China’s implementation structures and the later analysis of current reforms.

A. MOTIVATING COMPLIANCE: DETERRENT AND COOPERATIVE STRATEGIES

With regard to the question of why firms obey the law, prior studies identify three preconditions of compliance: (i) awareness of the law, (ii) the capacity to comply, and (iii) the desire to do so. This research finds that a range of “affirmative” and


14 On implementation of law in China, see generally IMPLEMENTATION OF LAW, supra note 10; ENGAGING THE LAW IN CHINA (Neil J. Diamant et al. eds., 2005); RANDALL PEERENBOOM, CHINA’S LONG MARCH TOWARD RULE OF LAW 280-342, 394-449 (2002). Caution is in order where lessons learned about law and its application are drawn from studies conducted in very different political, economic, social, and cultural contexts. Here, research on the challenges of enforcement and implementation in the Western context is intended not to establish a baseline standard against which China might be measured, but instead to reveal areas of commonality with regard to the nature of the problems.

15 See Robert A. Kagan & John T. Scholz, The “Criminology of the Corporation” and Regulatory Enforcement Strategies, in ENFORCING REGULATION 67 (K. Hawkins & J. Thomas, eds.1984); Soeren
“negative” motivations can incentivize compliance where the first two conditions are met. As Peter May explains, affirmative motivations “emanate from good intentions and a sense of obligation to comply” or a sense of “corporate virtue”, while “negative motivations arise from fears of the consequences of being found in violation of regulatory requirements.”

In reality, a dichotomous view of firms that sees them as either economically rational, profit-maximizing actors or as cooperative and law-abiding is overly simplistic. Firms are not unitary decision makers, but act in accordance with decisions made by executives, managers and employees as agents of the firm and its shareholders. Ayers and Braithwaite’s empirical studies of firm motivations, among others, also indicate that firms act from a range of competing motivations and subject to competing priorities. Depending on numerous contextual and operational concerns, firms’ different (and sometimes contradictory) commitments to economic rationality, adherence to law, and social responsibility may carry greater or lesser weight.

The ultimate goal for policymakers is to identify strategies to motivate and maximize voluntary or quasi-voluntary compliance by a significant percentage of firms so that the underlying policy objectives of the regulation can be achieved. Regulatory tools to achieve this goal have typically been defined along a spectrum from primarily


16 May, *supra* note 13, at 41 (noting that the line between the two categories is not a firm one). See also Haines, *supra* note 13 (exploring sources of and constraints on “corporate virtue”); Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMP. L. REV. 451, 465-66, nn. 43-46 (2003) (surveying debate on the source of compliance norms as internally derived or rather inspired, as rational choice theory suggests, by the prospect of external benefit or social sanctions).

17 See Ayres & Braithwaite, *supra* note 13, at 20-35.
deterrence-based to primarily "cooperative" (or "compliance-based") strategies.\textsuperscript{18} Deterrence-based enforcement systems, which have historically grounded much of Western regulatory practice, are based on a view of the firm as a rational economic actor that complies based largely on cost-benefit calculations.\textsuperscript{19} Under a deterrence paradigm, regulators appeal to negative motivations, namely the fear of sanction, to promote compliance; administrative monitoring and inspections are therefore the primary enforcement tool.\textsuperscript{20} A cooperative approach assumes that regulated firms operate from affirmative motivations, that is, they have a normative commitment to follow the law.\textsuperscript{21} Under this model, regulators and regulated firms work together toward compliance objectives, and enforcement relies more heavily on positive incentives and rewards


\textsuperscript{19} See Kagan & Scholz, supra note 15, at 69-71. But see AYRES & BRAITHWAITE, supra note 13, at 21-27 (noting that enforcement officials typically adopt more flexible, cooperative approaches in practice).

\textsuperscript{20} For a survey of literature supporting this finding, see Rechtschaffen, supra note 18, at 1186-90. In the labor context, the benefits of noncompliance may include lower wage, benefit, and workplace safety costs. In addition to potentially higher administrative costs associated with employee turnover and conflict resolution, the primary costs of noncompliance are the costs of correcting violations, plus any penalties imposed, discounted by the risk of detection.

\textsuperscript{21} See May supra note 13, at 41-42. 45-46. The regulatory goal is to “make penalties high enough and the probability of detection great enough that [violations] become economically irrational...”. Rechtschaffen, supra note 18, at 1186-87.

\textsuperscript{21} May supra note 13, at 41-42.
rather than penalties. In contrast to a deterrence model, which focuses on sanctioning past conduct, cooperative enforcement is "primarily prospective, oriented toward inducing conditions that lead to conformity, [focusing] more on the underlying conditions or violations than on the violator." Examples of compliance-focused strategies include waivers of penalties for voluntary self-disclosure and correction, educational programs, and tax incentives to companies who implement appropriate internal compliance programs. These strategies can also raise awareness of law and help address firms' capacity constraints.

Regardless of the approach adopted, full compliance by all firms is neither possible, nor perhaps desirable. Studies on the relative effectiveness of these approaches also caution that an “either-or” approach is ill-advised. Regulators face a “deterrence trap” in setting penalties and imposing them, since penalties will either be too small to deter rational violations or so large that they are beyond the means of firms to pay. Deterrence-based models are also constrained by the limited enforcement resources of regulatory agencies and the difficulty of detecting violations. But policies emphasizing sustained interaction and collaboration between enforcement authorities

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22 Id. at 43-44. See generally, SIGLER & MURPHY, supra note 13; CORPORATE LAWBREAKING AND INTERACTIVE COMPLIANCE (Jay A. Sigler & Joseph E. Murphy, eds., 1991) [hereinafter CORPORATE LAWBREAKING].

23 Rechtschaffen, supra note 18, at 1188.

24 See SIGLER & MURPHY, supra note 13, at 143-65; Malloy, supra note 16, at 455.


and regulated entities may lead to a “compliance trap” – agencies may be “captured” by regulated entities and become unwilling or unable to enforce the law objectively, consistently, and effectively.\textsuperscript{27} Facilitative enforcement approaches can also engender complacency.\textsuperscript{28} If they appear to advantage some companies over others, the legitimacy of enforcement may also be undermined, which can reduce voluntary compliance.\textsuperscript{29}

"Private" initiative presents a potential solution to some of these policy challenges.\textsuperscript{30} Corporate codes of conduct and other forms of self-regulation, are one alternative.\textsuperscript{31} Policies that empower workers, unions, or NGOs to monitor compliance, inform authorities of violations, or challenge illegal practices directly through litigation offer a further supplement to regulatory enforcement and an answer to the persistent problem of limited public resources. Because “private” or “citizen” enforcers act

\textsuperscript{27} Id.

\textsuperscript{28} May supra note 13, at 62.

\textsuperscript{29} Rechtschaffen, supra note 18, at 1223-24, n. 172. On the importance of legitimacy for voluntary compliance, see generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

\textsuperscript{30} See generally Barton H. Thompson, Jr., Symposium: Innovations in Environmental Policy: The Continuing Innovation of Citizen Enforcement, 2000 U. ILL. L. REV. 185 (2000). See also Jody Freeman, The Private Role in Public Governance, 75 N.Y. U. L. REV. 543 (2000). In this Article, “private enforcement” is used to refer to enforcement undertaken at the initiative of actors other than administrative enforcement authorities, although such action depends upon legal rules and institutions established by the state. In China's institutional context, attempts to divide “private” and “public” actors are even more problematic. Nonetheless, for the sake of simplicity, I include here enforcement actions initiated by or on behalf of workers as “private enforcement,” even if undertaken Chinese unions or other state-affiliated advocacy organizations.

without regard to institutional or political pressures, they are particularly effective in challenging violations where regulatory enforcers lack the political will to do so. These strategies can deter misconduct by raising the potential cost of a violation and the likelihood of its detection. Mobilizing private actors can also result in greater engagement between stakeholders and regulators that can produce innovative compliance-oriented outcomes.\(^ {32} \)

The wide variation in the capacity and motivation of firms to comply with the law and the inadequacy of any single public or private enforcement strategy to respond to enforcement challenges urges the need for flexible regulatory responses and a calibrated range of enforcement tools. Accordingly, many regulatory scholars have advocated “responsive regulation” that utilizes a mix of regulatory strategies.\(^ {33} \) In China, the diversity of the economy and the complex economic, political and societal influences shaping its labor markets also point to the need for multifaceted, adaptive implementation policies. Elements of such an approach are already part of China’s current enforcement schema and are strengthened by the recent labor law reforms.

B. LABOR LAW ENFORCEMENT IN CHINA: INSTITUTIONS AND PROCESSES

The foundation of modern Chinese labor and employment law is the national Labor Law, which took effect on January 1, 1995.\(^ {34} \) Like most Chinese primary legislation,

\(^{32}\text{See generally Thompson, }\text{id.}^{33}\text{See, e.g. Ayres & Braithwaite, }\text{supra note 13; Parker, }\text{supra note 26; Neil Gunningham & Peter Grabosky, }\text{Smart Regulation: Designing Environmental Policy (1998).}^{34}\text{Supra note 3. Basic worker rights established under the Labor Law include equal rights in obtaining employment, restrictions on termination, the right to choose an occupation and to be paid for one’s labor, the right to rest days and holidays, the right to a safe workplace environment, the right to receive}
it was drafted in broad terms and has been fleshed out by implementing regulations and interpretations enacted by the Ministry of Human Resources and Social Security (MOHRSS) (formerly, the Ministry of Labor and Social Security),\textsuperscript{35} by judicial interpretations issued by the Supreme People’s Court (the SPC) and subnational courts, by local and provincial-level implementing legislation, and by regulations scattered elsewhere in China’s civil and economic legislation. China is also a party to numerous labor-related treaties and international conventions, including 22 conventions of the International Labor Organization, which have been incorporated into its domestic law.\textsuperscript{36} Together, these laws and regulations form the body of Chinese labor law.

Despite the rapid diversification of the Chinese economy over the past thirty years, the institutions and processes of labor law enforcement that undergird both the Labor Law and the new labor legislation have not changed substantially since their

\textsuperscript{35} The Ministry of Labor and Social Security (MOLSS) was restructured in March, 1998 from the former Ministry of Labor. In March, 2008, the MOLSS, the Ministry of Personnel, which has oversight of state employees (now the newly formed State Civil Servants Bureau), and the State Administration of Foreign Experts Affairs were merged to form the new MOHRSS. \textit{See} “China’s Parliament Adopts Reshuffle Plan,” \textit{China Daily}, Mar. 15, 2008, \textit{available at} http://www.chinadaily.com.cn/china/2008npc/2008-03/15/content_6538946.htm (last visited Aug. 18, 2008).

\textsuperscript{36} China has ratified 25 conventions of the International Labor Organization, with 22 still in force. \textit{See} http://www.ilo.org/ilolex/cgi-lex/countrylist.pl?country=China (last visited March 12, 2008).
introduction in the late 1980s.  

Chinese labor laws provide for public enforcement by labor authorities and other agencies as well as through private dispute resolution, and expressly authorize a range of civil, administrative, and even criminal penalties for violations of labor laws. These mechanisms form a “mixed” enforcement system that integrates both cooperative and deterrent strategies. Yet it is one that has historically been grounded on cooperative strategies with deterrence-based approaches playing a secondary role. As the following discussion makes clear, many of the limits of labor law implementation in China parallel the challenges of regulatory policy and strategies identified in the literature reviewed above.

1. PUBLIC ENFORCEMENT: LABOR SUPERVISION, ADMINISTRATIVE PENALTIES, AND COOPERATIVE STRATEGIES

a. Deterrence-Based Strategies

When the relative costs of compliance are high, strong deterrent strategies may be needed to shift employers' cost-benefit calculation. This is particularly so in China's intensely competitive environment, where employers face tight profit margins and consumer pressure for lower prices. Deterrence strategies are embodied the Labor

37 Shenzhen established China's first labor inspection institution in 1989, and MOL regulations governing labor inspections and administrative penalties were first issued in 1993. LAODONG JIANCHA GAILUN: SHENZHEN SHI LAODONG JIANCHA LILUN YU SHIXIAN [LABOR INSPECTION OVERVIEW: THEORY AND PRACTICE OF LABOR INSPECTION IN SHENZHEN], 25-40 (Zeng Hongwen, ed., 2004) [hereinafter SHENZHEN LABOR INSPECTION]. Regulations establishing labor dispute resolution procedures were introduced in the 1950s and reinstituted in 1987, with final regulatory guidance passed in 1993 and following years. See HILARY JOSEPHS, LABOR LAW IN CHINA 105-06 (1st ed. 1990); VIRGINIA HARPER HO, LABOR DISPUTE RESOLUTION IN CHINA: IMPLICATIONS FOR LABOR RIGHTS AND LEGAL REFORM 36-39 (2003).

38 See May, supra note 13, at 63.
Law, which gives primary enforcement responsibility to labor bureaus established under the horizontal (kuai) authority of county, municipal, and provincial governments and the vertical (tiao) administration of the MOHRSS. The labor administration is charged with enforcing the labor laws through “labor supervision” (laodong jiandu), a system of monitoring and enforcement carried out primarily by labor inspectors from within the labor department at each jurisdiction above the county level. Its scope includes compliance with laws governing written contracts, wages, hours, and benefits, workplace rules, and prohibitions on child labor. Inspection and enforcement authority over occupational safety and health standards is the primary responsibility of the State Administration of Work Safety (SAWS) and its branches at the subnational levels.

Enforcement and oversight is based on regularly scheduled site visits, documentary review (i.e. annual self-reporting), and additional inspections during enforcement campaigns directed by central or provincial labor authorities. Labor unions, a state enterprise’s supervising department, other government agencies, and the public at large are also to engage in “labor supervision” of employer practices; labor authorities

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39 Labor Law, supra note 3, at art. 85.


42 See also LCL, supra note 3, at art. 75; Labor Inspection Measures, supra note 40, at art. 15.
also initiate on-site investigations in response to such complaints or reports.\textsuperscript{43} Many labor bureaus in south China, where the level of labor conflict runs high, rely heavily on grassroots branch offices (laodong zhan) staffed by personnel appointed by the local government (xieguan yuan) to provide additional monitoring, inspection, conflict resolution, and general “first responder” support. These branches notify the district or county labor authorities if a serious conflict has erupted, but they can also independently resolve small disputes and handle worker complaints.\textsuperscript{44}

Labor inspection regulations issued in 2004 established uniform standards, procedures, responsibilities and scope of authority for labor inspection, replacing an array of earlier administrative guidance.\textsuperscript{45} These regulations and similar provisions of the Labor Law and the Labor Contract Law authorize labor inspectors who discover labor law violations to issue warnings and corrective orders and then to impose fines within a specified range if the employer fails to respond.\textsuperscript{46} They can also coordinate with the local administration for industry and commerce (AIC) to have a company’s


\textsuperscript{44}Interviews with district A labor inspector, district labor arbitrator, and labor lawyers, Guangzhou, Sept. 2003 and May 2008.

\textsuperscript{45}See Labor Inspection Measures, supra note 40. Many of the procedural rules track the APL closely. See supra note 43.

\textsuperscript{46}Labor Law, supra note 3, at art. 89-101, 105; Labor Inspection Measures, supra note 40, at arts. 23-32; LCL, supra note 3, at art. 74
business license revoked for "serious" violations, such as using child labor.\footnote{Labor Law, supra note 3, at art. 94.} Similarly, violations of workplace safety regulations identified by occupational safety inspectors can result in fines, plant closure, criminal penalties, and personal liability for the responsible party.\footnote{See, e.g. id. at arts. 92-93; Law on Production Safety, supra note 3, at Ch. 6.} However, the deterrent force of administrative sanctions is strongly moderated by regulatory mandate and in actual application. As a result, penalties are too small and the risk of their imposition too remote to adequately incentivize compliance.\footnote{These limitations are not unique to the labor context. See, e.g. Richard J. Ferris, Jr. & Hongjun Zhang, Reaching out to the Rule of Law: China’s Continuing Efforts to Develop an Effective Environmental Law Regime, 11 WM. & MARY BILL OF RTS. J. 569, 594-600 (2003) (describing obstacles to effective environmental law enforcement).} At the same time, the cooperative emphasis of public enforcement raises many of the practical dilemmas identified in Part A.

\textit{i. Mandatory Tiered Enforcement}

Labor enforcement in China follows a tiered approach, progressing from notification of a violation to levying of administrative fines and penalties. These procedural limits are in fact mandated by China’s Administrative Penalties Law (APL), which was enacted in 1996 to prevent administrative overreaching, imposition of \textit{ad hoc} penalties, and abuses of official discretion. Under the APL, inspectors must first issue a warning and require the enterprise to correct violations; in "minor" cases, no penalty can be levied if the enterprise takes prompt remedial action.\footnote{APL, supra note 43, at arts. 23, 27.} “Serious” violations may be subject to an immediate fine, but penalties in such cases must be reduced if corrective action is taken.
This model actually compares quite favorably in some respects with Ayers and Braithwaite’s regulatory pyramid, where cooperative strategies make up the base of the pyramid and progress toward sanctions at higher levels of the pyramid only if other methods are unsuccessful.\textsuperscript{52} The lack of mandatory penalties early in the process allows labor inspectors to respond flexibly to diverse industries, employers, and practices without a “one size fits all” approach. This can promote more constructive relationships with compliance-minded employers and focus limited resources on willful violators. However, there are effectively no direct consequences to violations as long as they are corrected when the employer is "caught." Thus, employers have little incentive to be pro-active about compliance. Moreover, the success of Ayers and Braithwaite’s pyramid depends on political support for tough policies and the threat of serious sanctions at the top of the pyramid.\textsuperscript{53} Both elements have been historically lacking in local labor law enforcement.

\textit{ii. Local Interests and Regulatory Capture}

First, it is widely recognized that weak enforcement of labor laws is a function of China’s decentralized administrative structure and local government competition to attract investment, increase employment, and promote economic growth. Provincial and local governments have the power to set enforcement priorities within their respective jurisdictions, as labor and occupational health and safety inspectorates are staffed and funded by the people’s governments at the corresponding level. To be sure, local officials in south China have come under considerable pressure to prevent

\textsuperscript{52} Ayres \& Braithwaite, supra note 13, at 35-40.

\textsuperscript{53} Enforcement at the bottom of the pyramid is also more successful the “greater the range of gradated sanctions available toward the tip of the pyramid.” Parker, supra note 26, at 618.
labor unrest in recent years, and such policies can motivate stronger action toward violators. For example, under mandates from district officials in Guangzhou to reduce labor conflict, one village committee recently set a policy that officials’ bonuses would be cut if multiple strikes or workplace accidents occurred in the jurisdiction. Yet these policies also encourage officials to put effort into suppressing and diffusing conflict rather than in dealing with its underlying causes.

In responding to violations, labor inspectors emphasize the need to find the right "balance of interests" (pingheng dian) between employers, workers, and the local community; they therefore weigh whether sanctions would cause a business to fail or might lead to higher worker demands against other employers against the need to

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54 See Yang Su & He Xin, Street as Courtroom: State Accommodation of Social Protest in South China (unpublished manuscript on file with author) (noting that leadership performance is evaluated based on success in maintaining social order as well as in promoting development). See also DALI YANG, REMAKING THE CHINESE LEVIATHAN 231-232 (2004) (describing the cadre accountability system, whereby “local governments have adopted the principle of resignation for major lapses in safety, performance, and other indicators”).

55 Interview, district A labor inspectors, Guangzhou, May 22, 2008 (reporting on policies in one village (cun) outside of Guangzhou) [hereinafter 2008 District A Interview]. For this study, interviews were conducted with a labor inspector from one district in Guangzhou in 2003 and with the same labor inspector and a colleague in 2008. Phone interviews were conducted with labor bureau officials in a second district in Guangzhou in 2009. These districts employed a total of five and six full-time labor inspectors, respectively. To be sure, their views cannot be taken as representative of common enforcement practice even in Guangdong and broader studies are needed to explore the factors that may influence variations in enforcement approaches within and across jurisdictions. However, they provide anecdotal evidence that is consistent with other studies. See, e.g. CHING KWAN LEE, AGAINST THE LAW: LABOR PROTESTS IN CHINA’S RUSTBELT AND SUNBELT 20, 176-82 (2007). Interviews were granted on condition that both interviewee names and the name of the district be kept confidential.
maintain social stability and uphold the law. In the view of some, strict enforcement is simply unrealistic given local economic conditions. In addition, close ties between local officials and employers increase opportunities for regulator “capture” and foster corruption. These realities weaken the deterrent effect of potential sanctions and the legitimacy of agency enforcement, which is essential to the success of cooperative strategies as well.

iii. Low Penalties, Low Risk

Second, although administrative penalties are potentially severe, high sanctions are rarely imposed in practice. For example, under the Labor Inspection Measures, fines for overtime violations are 100 RMB to 500 RMB per worker per month, and for wage arrears, fines up to double each affected workers’ salary per worker per month can be assessed. However, labor supervision is actually more collaborative than deterrence-focused in practice and is intended as a tool to reform, rather than punish violators. Even when inspectors are called in to respond to a strike or other crisis, their primary goal is to avoid any escalation of the conflict and only secondarily to address employer

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57 Interview, district B labor inspector and arbitrator, Guangzhou, Jan. 11, 2009 [hereinafter 2009 District B Interview].

58 The problems are exacerbated when local governments have a direct ownership stake or other ties to local enterprises. Interviews, labor lawyers, Guangzhou, Sept. 2003; Interview, Liu Kaiming, Institute for Contemporary Observation, Shenzhen, Oct. 2, 2003. See also LEE, supra note Error! Bookmark not defined., at 13-21.

59 See supra note 29.

60 2008 District A Interview, supra note Error! Bookmark not defined. See also Labor Inspection Measures, supra note 40, at art. 16.
misconduct. In the words of one labor inspector, fines are rare because “you can’t fine everyone. Our job is to educate employers, not to punish them.” China is not unique in this respect. Numerous studies of U.S. state and federal enforcement practices find that most noncompliance is met with no sanctions or only minor ones, and that despite a deterrence-focused regulatory framework, enforcement practice is aimed at coaxing violators toward compliance.

As a result, penalties are generally low, despite evidence of tougher enforcement in many urban areas of Guangdong in recent years. In 2007, average per case fines in Shenzhen reached only RMB 30,000 (USD 4,400). In one major manufacturing district in Guangzhou, average fines were only RMB 3,000, an amount easily borne as

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61 See LEE, supra note Error! Bookmark not defined., at 175-82.

62 2008 District A Interview, supra note Error! Bookmark not defined.. See also SHENZHEN LABOR INSPECTION, supra note 37, at 5-6 (emphasizing education (jiaoyu) and sanctions (chufa) as interrelated tools with reference to Article 5 of the APL, which reads: “When imposing administrative penalties . . authorities should stress the mutual inter-relationship (xiang jiehe) of sanctions and education, educating citizens, legal persons and other organizations to voluntarily uphold the law (zijue shoufa).”).

63 See supra note 19; Rechtschaffen, supra note 18, at 1185, 1188-90 & nn.27-28; May, supra note 13, at 46-47, 64 and sources cited therein.

64 For example, occupational safety and health enforcers have imposed plant shutdowns that would have been unheard of five years ago. Interview with district labor inspectors, former labor arbitrator, Guangzhou, May 22, 2008. In 2008, district officials in Haizhu, near Guangzhou, imposed a fine of over RMB 10 million on a single employer. Id.

a cost of business for many employers. Furthermore, even if sanctions are imposed, due process protections give employers the right to challenge them through internal administrative review or administrative litigation. Inspectors for their part must rely on the courts to enforce penalties, where success rates are around 50 percent.

Because violators are likely to ignore or appeal high fines and defending or enforcing sanctions drains scarce time and resources, officials generally use sanctions at the low end of the legal range, deciding the amount and whether to impose them at all, on the size of the employer and the employer’s perceived ability and willingness to pay.

Certainly, fairness requires that administrative penalties be calibrated to the circumstances of the violator and the willfulness and nature of the conduct, but

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66 Interview, district labor inspectors, Guangzhou, May 22, 2008. Annual fines totaled only RMB 200,000 for this district, which had over 30,000 registered enterprises.

67 For a synopsis of these procedures, see generally JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 236-58 (2008). In 2007, administrative challenges to labor authorities accounted for 8 percent of all administrative appeals settled by courts of first instance. Approximately 30 percent upheld the agency determination. ZHONGGUO TONGJI NIANJIAN [CHINA STAT. YEARBOOK] [hereinafter ZGTJNJ], tbl. 22-31 (2008).


69 2008 District A Interview, supra note Error! Bookmark not defined. (noting that “small unlicensed (wupai) employers don’t care about fines. If you fine them, they’ll just close and reopen somewhere else in a few hours”).

since only willful violations can be sanctioned at all, this response makes clearer why penalties are rarely levied. The ease of challenge and the negotiated nature of inspection practices reduce the speed and certainty of any sanctions being imposed, both of which are key to successful deterrence.\footnote{See generally May \textit{supra} note 13, at 45-46, and studies cited therein.}

In addition, from a practical standpoint, China is no exception to the general observation made in studies of regulation and compliance about the persistent challenge of limited administrative capacity. As of the end of 2007, approximately 3,200 labor inspection units had been established nationally, with total personnel numbering only around 220,000,\footnote{MOHRSS, 2007 nian laodong he shehui baozhang shiye fazhan tongji gongbao \cite{MOHRSS2007}, May 21, 2008, \textit{available at} http://w1.mohrss.gov.cn/gb/zwxx/2008-06/05/content_240415.htm (last visited Jan. 16, 2009). These figures do not include labor supervision units established by trade unions at various levels, which have oversight and reporting functions, but not enforcement authority.} a figure dwarfed by the number of employers in China. For example, in 2008, districts in Guangzhou with oversight of 30,000 to even 100,000 registered enterprises had only six full-time labor supervision officials.\footnote{Interviews, district A and district B labor inspectors, Guangzhou, May 22, 2008, Jan. 2009.}

Urban labor bureaus have developed a number of pragmatic solutions to these constraints, relying heavily on branch office personnel, employer self-reporting, and computerized coding systems that classify employers with strong and poor compliance records so inspections can be prioritized accordingly.\footnote{\textit{Id}.}

\textit{iii. No Big Stick at the Top}

\url{http://www.osha.gov/Firm_osha_toc/Firm_toc_by_sect.html} (last visited Jan. 15, 2009) \textit{(including the size of the business and the willfulness of the violation as factors to be used in assessing penalties).}
Finally, administrative fines are the only “stick” in the labor inspectors’ arsenal. Labor inspectors cannot suspend a violator's business license or escalate sanctions for most violations; the only consequence of resisting administrative investigations or orders is that additional fines of up to RMB 20,000 can be levied.\(^75\) As a result, labor inspectors can fall victim to intentional obstruction, delays, and evasion.\(^76\) Labor inspectors interviewed in Guangzhou complained that they are simply not taken seriously, whereas “[employers] are afraid of the anjian bu (occupational safety inspectors), since they can shut down or suspend [the business].”\(^77\) Occupational safety inspectors also have internal penalty floors for certain workplace injuries and, unlike the labor bureau, high mandatory fines for repeat offenders.\(^78\) Without a credible threat of serious sanctions "up the ladder," the legitimacy and authority needed to back collaborative strategies and penalties at the base of the enforcement pyramid is weakened.\(^79\)

\(b\). **Cooperative Strategies**

In addition to traditional labor supervision programs, local governments in regions with historically poor compliance records and high levels of labor conflict have begun

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\(^75\) Labor Inspection Measures, *supra* note 40, at art. 30.


\(^77\) Interview, district labor inspector, Guangzhou, May 22, 2008.

\(^78\) *Id.*

\(^79\) High penalties at the tip of the pyramid bolster the perceived power of enforcement agencies and have a moral impact in legitimizing the enforcement message at its base. AYRES & BRAITHWAITE, *supra* note 13, at 45-47; Parker, *supra* note 26, at 617-18.
to advocate compliance-oriented (or quasi-compliance-oriented) enforcement strategies in recent years. For example, labor authorities in Shenzhen and Guangzhou have introduced blacklisting programs to publish the names of companies who are persistent violators of wage laws, with the goal of shaming violators into compliance and warning potential workers of these companies’ poor track record. Similar programs have proven highly effective in combating employer pension benefit arrears.

In 2007, Guangzhou also formalized a system of publicly awarding merit rankings to employers and industrial parks that demonstrate “harmonious labor relations” (laodong guanxi hexie qiyeye gongye yuan). The real impact of these programs on employer incentives is less certain, and they may be more noteworthy for their potential than their current effect. Participation is limited to large employers who are already exceeding compliance baselines and do not need extra incentives, while opaque application processes and selection criteria raise the prospect that the

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80 See, e.g. SHENZHEN LABOR INSPECTION, supra note 37, at 36 (advocating a “collaborative” “service-oriented” (fuwuxing) approach to enforcement).


programs are simply a new vehicle for local government cronyism. Still, these local experiments with collaborative enforcement strategies may become effective tools in time.

2. PRIVATE ENFORCEMENT: LABOR DISPUTE RESOLUTION AND BEYOND

Administrative enforcement is supplemented by mechanisms for workers to enforce labor laws by challenging illegal workplace practices. These include petitions for administrative intervention (\textit{xinfang}), labor dispute mediation, arbitration, and litigation, collective action outside state-sanctioned channels, and social accountability monitoring and certifications. Of these, labor dispute resolution is the most strongly deterrence-oriented, although most employment claims are resolved through negotiated outcomes that allow employers to exert some control over their ultimate liability. The remaining tools are at base collaborative strategies that result in interactions between the employer, employees, and third parties (i.e. state officials, auditors, customers) over the proper response to challenged labor practices. The broad space employers have to moderate the impact of private enforcement may go some way toward explaining its muted effect on compliance to date. The success of private enforcement is also tied to the effectiveness of local public institutions, including the labor bureaus and the courts.

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84 Candidates must have established unions, collective contracts, and an internal dispute mediation system. Recipients are selected through consultation among the labor bureau, union, and employer associations. \textit{Id.}

85 Litigation outside of China, such as lawsuits under the U.S. Alien Tort Claims Act, 28 U.S.C. § 1350, or under U.S. common law, is another enforcement mechanism, but one beyond the scope of this Article. For a discussion of representative cases, see \textit{BLANPAIN}, supra note 2, at 590-618.
a.  **Administrative Petitions and Reports**

Petitioning the labor bureau or the “letters and visits” (xinfang) offices of the local union, Party units, the legislature, the courts, other administrative agencies and even central authorities is a primary means for many workers to report violations and seek remedies for grievances. In general, the petitioning office responds by attempting to mediate the conflict with the employer, or they may refer concrete disputes to the courts or labor arbitration.\(^86\) Labor inspectors investigate each report, although they have discretion whether to initiate administrative enforcement action or not.\(^87\) The ultimate outcome of a petition and the speed of a response generally depend on the strength of workers’ claims, their connections to official allies at the local or higher levels, and their ability to gain leverage in negotiations with the employer and local officials through media appeals or collective protest. Individual complaints are often ignored.\(^88\) Grassroots branch staff, the “first stop” for most aggrieved workers,

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\(^{88}\) See Thireau, *supra* note 91, at 94 (finding that worker petitions in Shenzhen were more likely to receive an immediate response in intense or collective cases); LEE, *supra* note Error! Bookmark not defined., at 176-82.
can actually impair worker claims by providing inaccurate information or by urging them to drop disputes in an effort to diffuse conflict.\textsuperscript{89}

Moreover, petitioning is not without its costs. Although prohibited by the Labor Law, workers who report violations can lose their job, have their pay docked, or face other forms of retaliation by employers.\textsuperscript{90} For these reasons, petitioning, while it provides a state-sanctioned channel for workers to seek redress, is not a strong force to restrain or deter violations of law.

However, because of the costs of arbitrating labor claims prior to 2008, petitioning has been particularly important for workers of limited means and those whose claims cannot easily be framed in strictly legal terms.\textsuperscript{91} Even though petitioning may not guarantee results, without a complaint, labor inspectors may not act at all (\textit{bu gao bu li}).\textsuperscript{92} Petitioning also provides an important information channel for labor bureaus and other state agencies.

\textit{b. Labor Dispute Resolution through Labor Arbitration and the Courts}

The Labor Law and related regulations give employees and their employers the right to bring claims “arising from a labor relationship” through a three-stage labor dispute resolution process that includes mediation, arbitration, and litigation.\textsuperscript{93} In addition to back wages and other compensatory damages, arbitrators and courts can invalidate a

\textsuperscript{89} Interviews, labor lawyers, Sept. 2003; Interview, labor advocate, Panyu, May 18, 2008; Fulian Interview, \textit{infra} note 138.

\textsuperscript{90} 2008 District A Interview, \textit{supra} note \textit{Error! Bookmark not defined.}.


\textsuperscript{92} 2009 District B Interview, \textit{supra} note 57.

\textsuperscript{93} Labor Law, \textit{supra} note 3, at arts. 77-83. On labor dispute resolution procedures generally, see HO, \textit{supra} note 37.
labor contract or order restitution or reinstatement. The right to challenge employer practices through formal legal process is a core mechanism for enforcing labor laws and regulations under the Labor Law and now under the Labor Contract Law. From the state’s perspective, it offers a means of diffusing and channeling socially destabilizing conflict through formal institutional channels (i.e. labor dispute arbitration commissions and the courts).

Labor dispute arbitration is conducted through tripartite labor dispute arbitration commissions (LDACs), which are established by provincial, municipal, and local governments and are affiliated with the corresponding labor bureau.94 The mediation phase is optional, but arbitration is mandatory before a labor dispute can be appealed to court.95 Arbitrators and judges are required to attempt mediation before issuing an arbitral award or judgment.96 Parties can appeal arbitral awards to court for any reason and per China’s Civil Procedure Law, court judgments can also be appealed from the trial court level. On appeal from the LDAC, the trial court hears the case de novo, although it generally reviews the LDAC findings and may consult with the LDAC in resolving the case.97 Alternatively, certain wage claims and other labor disputes that can be recharacterized as civil claims (for example, workplace injury

94 See Labor Law, supra note 3, at art. 81. Cases are heard by single arbitrators or arbitral panels, which are not tripartite, appointed by the LDAC. See Ho, supra note 37, at 64-65.

95 See Several Questions Concerning the Application of Law to the Trial of Labor Dispute Cases Interpretation (promulgated Apr. 16, 2001 by the SPC, effective Apr. 30, 2001) [hereinafter 2001 SPC Interpretation].

96 On labor dispute resolution procedure prior to the Labor Arbitration Law, see Ho, supra note 37, at 66-67, 75-81 and sources cited therein.

97 2009 District B Interview, supra note 57. On the court standard of review, see 2001 SPC Interpretation, supra note 95, at art. 17.
claims cast as personal injury claims) may be brought directly to court without a prior LDAC ruling.  

The number of arbitrated labor disputes has soared exponentially since the early 1990s, with over 350,000 cases filed in 2007. Over 90 percent result in a full or partial victory for employees. In recent years collective disputes accounted for about one-third of all employees involved in LDAC cases, though in Guangdong province the figure is 60 percent. Courts have also been inundated with labor litigation in recent years because a majority of arbitral awards are now appealed to courts, in addition to labor disputes filed as civil claims. For example, in Guangdong in 2006, nearly 30,000 labor cases were appealed to courts, representing 85 percent of all arbitral awards. Employees are even more likely to prevail in direct civil litigation than in arbitration. These figures attest to workers’ ability to use formal process to obtain compensation for violations of legal rights.

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98 On wage claims in civil court, see Art. 3, Interpretation on Several Issues Concerning the Application of the Law in the Trial of Labour Disputes (2), translated in CHINA L. & PRAC., Nov. 2006, 2400/06.08.14 [hereinafter 2006 SPC Interpretation]. This interpretation authorized practices previously used by litigants whose claims were barred by the LDAC, typically because the existence of a labor relationship could not be established or because the claim was time-barred. See Fu Hualing & D.W. Choy, From Mediation to Adjudication: Settling Labor Disputes in China, 3 CHina RIGHTS FORUM 17, 21 (2004).

99 ZGTJNJ, supra note 67, tbl. 22-5.


101 Id. at tbl. 9.2. Arbitral awards rather than total cases resolved is used as the basis of comparison since mediated settlements are rarely appealed. Interview, labor lawyers, Guangzhou, Sept. 2003.

102 2009 District B Interview, supra note 57. See also Fu, supra note Error! Bookmark not defined., at 21.
Yet they raise the question of why this litigation explosion (and a parallel upsurge in labor conflict) has failed to have any noticeable impact on overall compliance with labor laws. Although space does not permit an in-depth analysis of this question here, part of the explanation lies with institutional, procedural, and practical limits that reduce violators’ expected liability risk.103

First, as with administrative fines, damages awards are compensatory and so are not calibrated to deter future violations. With the exception of workplace injury or occupational illness claims, where arbitral awards may exceed RMB 60,000 (USD 8,800), a typically recovery in most cases will be less than a few thousand RMB (several hundred U.S. dollars).104 In light of these returns, the cost of litigating is too high for many potential plaintiffs. Although court fees are now nominal, arbitration fees, which were based on the amount in controversy prior to May 2008, typically started at RMB 300-500, close to the monthly wage of unskilled workers.105

103 On obstacles to labor arbitration and the courts, see generally Halegua, supra note 76; Mary E. Gallagher, Mobilizing the Law in China: "Informed Disenchantment" and the Development of Legal Consciousness, 40 LAW & SOC’Y REV. 783 (2006); Ho, supra note 37, at 151-67. A possible explanation is that the number of labor disputes arbitrated is still small compared to the number of civil cases and the number of employers in China. See ZGTJNJ, supra note 67, at tbl. 22-25 (reporting 4.7 million civil cases filed in 2007). But this merely begs the question of why caseloads are not higher or the cases brought without broader impact.

104 Interviews, labor lawyers, Guangzhou, Dongguan, Shenzhen, Sept.-Oct., 2003; Interview, former Guangzhou district labor arbitrator, Hong Kong, June 29, 2008.

105 See Guangdongsheng laodong zhongcai fei guanli banfa [Guangdong Labor Dispute Arbitration Fee Management Measures] (issued by Guangdong Labor Bureau, Apr. 10, 2004, in force to Apr. 30, 2008). Court costs for civil cases are generally RMB 50, and since 2007, costs for labor disputes have been reduced to RMB 10. Susong Feiyong Jiaona Banfa [Measures on Case Handling Fees] (promulgated by the State Council, Dec. 8, 2006, effective Apr. 1, 2007). Courts may allocate LDAC
Class or impact litigation might be expected to lower some of these barriers and produce a broader deterrent effect. However, despite the growing number of workers pursuing collective (jiti) labor disputes, strict standing limits, requirements that all plaintiffs be named in the complaint, and fee rules charging per plaintiff costs in both individual and collective labor arbitrations have limited its potential force.¹⁰⁶

Migrants and unskilled laborers most in need of the law’s protections also confront numerous logistical and informational barriers to filing and pursuing their claims.¹⁰⁷ Evidentiary and procedural rules, such as a short 60-day statutory filing deadline for labor arbitration and the narrow view of jurisdiction taken by labor arbitrators and the courts, have further limited the number and type of claims accepted for arbitration and disadvantaged workers unfamiliar with legal process.¹⁰⁸ National and local regulatory

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¹⁰⁷ See, e.g. LEE, supra note Error! Bookmark not defined., at 157-201; Ching Kwan Lee, From the Specter of Mao to the Spirit of the Law: Labor insurgency in China, 31 THEORY & SOC’Y 31 189 (2002).

¹⁰⁸ Because LDACs typically take a strict view of jurisdiction, some estimates indicate that as many of 75% of all case filings in some LDACs were rejected as untimely or because of failure to establish a labor relationship. See Fu, supra note Error! Bookmark not defined., at 20. Since arbitration is mandatory, such plaintiffs lost all right to pursue a claim rejected by the LDAC until the SPC issued guidance in 2001 and 2006 allowing for review of these threshold rulings and authorizing them to hear claims outside the labor law as civil cases. See 2001 SPC Interpretation, supra note 95; 2006 SPC Interpretation, supra note 98. A claimant’s status now determines whether a claim should be filed with the LDAC or with the court rather than whether a claim can be filed at all.
reforms, including those introduced by the new laws, have taken steps to reduce some of these practical and procedural barriers.

Still, employers also can avoid having to pay compensation in a timely manner even if a claim is filed, which reduces its perceived certainty and cost and therefore its potential deterrent effect. Because employers have a considerable advantage in terms of financial resources, time, and familiarity with the legal process, they frequently postpone or avoid paying claims by dragging out proceedings.¹⁰⁹ Moreover, arbitration commissions and courts are set within the local government and are thus subject to the same resource limitations, local policy priorities, and corporatist influences as local labor enforcement authorities, though some labor lawyers observe that pro-employer bias is no longer routine and is noticeable only in sensitive cases.¹¹⁰ Finally, enforcement of judgments remains difficult even though workers typically prevail.¹¹¹

A more fundamental constraint lies with gaps in effective worker representation.

¹⁰⁹ This is especially true for employers who are “repeat players” in Galanter’s terms and therefore have an added advantage over the “one-shotters” – their employees. See Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y. REV. 95 (1974).

¹¹⁰ Interview, Huang Qiaoyan, labor lawyer and instructor, Sun-Yat Sen University School of Law Legal Aid Clinic, Guangzhou, May 2008 [hereinafter Huang Interview 2008]; Interview, labor advocate, Panyu, May 18, 2008. On local courts, see Benjamin Liebman, *China’s Courts: Restricted Reform*, 91 CHINA Q. 620 (2007) (noting high costs, low efficiency, corruption, and political oversight as key challenges confronting the courts).

¹¹¹ See Ma Wei, *The WTO and Chinese Labor Rights*, 3 CHINA RIGHTS FORUM 39,40 (2005) (quoting noted labor law scholar, Chang Kai, stating “workers go through all kinds of hardships and difficulties to win court cases, but there has been no way to enforce the decisions, so they come away empty-handed”). *See also supra* note 68.
Although the Labor Law brought China closer to international norms on core labor standards, China’s failure to recognize freedom of association outside of the official union, the All-China Federation of Trade Unions (the ACFTU), and its continued repression of independent union organizing remain significant exceptions.\(^{112}\) Trade unions are directed to monitor and support employer compliance with law and to challenge violations internally and through reporting to public agencies.\(^{113}\) Many play an important role in educating workers about legal rights and have successfully represented workers in mediating and litigating labor disputes.\(^{114}\)

However, because all Chinese unions operate under the leadership of the Party, their primary allegiance is to state interests, which have historically favored social stability and economic development, rather than to workers.\(^{115}\) Where they exist, enterprise-level unions are funded by the employer and have typically been headed by management.\(^{116}\) Unions also lack the authority to initiate collective action; they lack


\(^{113}\) Trade Union Law, supra note 5, at art. 36.

\(^{114}\) See Feng Chen, Between the State and Labour: The Conflict of Chinese Trade Unions’ Double Identity in Market Reform, 176 CHINA Q. 1006 (2003); Feng Chen, Legal Mobilization by Trade Unions, 52 CHINA J. 27 (July 2004).

\(^{115}\) Trade Union Law, supra note 5, at arts. 4, 6. See also Chen, id.

\(^{116}\) See id. at 1017; Simon Clarke, Chang-Hee Lee, & Qi Li, Collective Consultation and Industrial Relations in China, 42 BRIT. J. INDUST. REL. 235, 241-44 (2004); International Trade Union Confederation, Internationally Recognized Core Labor Standards in the People’s Republic of China,
power to call a strike and instead must negotiate a resolution if one arises in order to allow production to resume.\(^{117}\) Although unions can be persistent in pressing for worker rights in clear-cut cases, they retreat where the dispute may lead to collective action.\(^{118}\)

In recent years, a growing number of NGOs and legal aid centers have been engaged in labor advocacy and educational initiatives and have begun to play a vital role in assisting employee litigants. However, few are well-positioned to handle large-scale cases with a broad social impact.\(^ {119}\) Private lawyers might also be expected to fill the gap as well, but with standard legal fees in labor cases starting at several thousand yuan, paid counsel is beyond the reach of many.\(^ {120}\) What makes the problem worse is that labor cases are time-consuming and not lucrative. As a result, few lawyers are willing to take them on.\(^ {121}\) This representation deficit further weakens workers' ability

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117 Id. at art. 27.

118 See Chen (2003), supra note 114.

119 See generally, Jingwei He & Hui Huang, NGOs Defending Migrant Labor Rights in the Pearl River Delta Region: A Descriptive Analysis, 35 H.K.J. Soc. Sci. 41 (2008). For further detail on the role and limits of legal aid and labor advocacy in China, see Halegua, supra note 76; Ho, supra note 37, at 150-58.

120 On fees, see Halegua, id., at 271-73; Ho, id.

to pursue collective claims, which further limits the aggregate impact of labor litigation on employer conduct.

c. **Informal Labor Dispute Resolution**

For all these reasons, the role of labor arbitration and the courts in resolving labor conflict and in motivating broader compliance is less expansive than the trends in arbitrated labor disputes and court filings suggest. Gender, social status, and connection to official allies impact litigants’ willingness to utilize formal legal channels, and many illegal labor practices go unchallenged.\(^{122}\) For these reasons, formal legal action may not be the most important or even most effective strategy for workers to seek redress.

China’s labor laws preference informal dispute resolution, such as conciliation, independent settlement, and mediation, as a means of quickly defusing destabilizing conflict at the grass-roots level and lessening the burden on arbitrators and the courts. Enterprise mediation committees (EMCs) in state enterprises, “negotiation systems” in non-state enterprises, and local community mediation bodies provide forums for mediating labor disputes. Labor inspectors also call upon labor arbitrators to intervene in a crisis and mediate settlements even though no concrete dispute has been (or may ever be) filed for arbitration. Since the mid-1990s, labor arbitrators have handled the same number of disputes (or more) outside of a lawsuit (*anwai*) in response to these referrals as through standard labor arbitration proceedings.\(^{123}\) In

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\(^{122}\) Not all grievances have a legal remedy. See Mary E. Gallagher, “*Use the Law as Your Weapon!*”: *Institutional Change and Legal Mobilization in China,* in *ENGAGING THE LAW IN CHINA,* supra note 14, at 54 (discussing the narrowing of rights of state employees under contract employment). On factors affecting worker recourse to legal process, see Thireau, *supra* note 91, at 84 & n.3.

\(^{123}\) See LDTJNJ, *supra* note 100, at tbl. 9-2.
addition, over one-third of cases filed for arbitration and a similar percentage of civil
cases are resolved through arbitral and judicial mediation, respectively.\textsuperscript{124} Despite an
overall decline in mediated claims,\textsuperscript{125} these figures still exceed the number of cases
decided by arbitrators or judges, not including independent settlements for which
precise data is not available.\textsuperscript{126}

Mediation can advance worker interests by allowing them to get immediate
compensation and avoid protracted petitioning or litigation in exchange for a lower
recovery.\textsuperscript{127} The compliance rate for settlements reached before or during arbitration
is high.\textsuperscript{128} However, whether mediation promotes or weakens deterrence depends on
an employer’s estimate of the risk that higher costs will be imposed in arbitration or
litigation. If barriers to employee access (including low awareness of legal rights)
make it unlikely a claim will be filed, employers can offer settlements that have no
real tie to damages that might be awarded by an arbitrator or court. If instead, there is
a real risk that employees will file claims (and historically, over 90\% of workers who
file recover some damages), settlements will more likely be reached “in the shadow of
the law,” thus strengthening the indirect impact of arbitrated claims. Historically, the

\textsuperscript{124} Approximately 25\% of employment-related civil cases are mediated and an additional 30\%
withdrawn, which includes cases settled by the parties. ZGTJNJ, \textit{supra} note 67, at tbl. 22-29.

\textsuperscript{125} See Ho, \textit{supra} note 37, at 55-62.

\textsuperscript{126} For some labor lawyers, filed claims represent only 40 percent of total dispute resolutions.

Interview, labor lawyer, Guangzhou, Sept. 2003.

\textsuperscript{127} If employers are unwilling to settle or mediate, they are likely to take the claim through the entire
appeals process in an effort to wear out the plaintiffs. See Ho, \textit{supra} note 37 at 188-193. On labor
dispute mediation, see Halegua, \textit{supra} note 76.

\textsuperscript{128} Interview, labor lawyers, Guangzhou, Sept. 2003.
former scenario has been the more common.\textsuperscript{129}

c. \textit{Extralegal Modes of Private Enforcement}

Neither the Labor Law, the Trade Union Law, nor subsequent regulations contain any express affirmation of the right to strike or relax China’s restrictive policies toward freedom of association, independent trade unions, and independent collective bargaining.\textsuperscript{130} Nonetheless, strikes, demonstrations, and other forms of mass resistance have become commonplace over the past decade, mobilizing pensioners and laid-off state workers in China’s northern “rustbelt” and migrant workers in the Pearl River Delta.\textsuperscript{131} The frequency and scale of collective conflict has also grown. According to official estimates, more than 90,000 "collective incidents" occurred nationwide in 2006, and in Guangdong province, the ACFTU reported 875 instances of mass protests arising over wage arrears alone, involving a total of 74,000 workers.\textsuperscript{132}

Substantial research has shown that most collective action is an act of desperation in the face of constraints on legal and administrative remedies.\textsuperscript{133} As the mass

\textsuperscript{129} Id. See also Halegua, supra note 76.

\textsuperscript{130} However, workers are authorized to refuse to perform dangerous tasks. \textit{See} Labor Law, \textit{supra} note 3, at art. 56; \textit{Law on Production Safety}, \textit{supra} note 3.


demonstrations in south China at the end of 2008 attest, where employers shut down or abscond without leaving sufficient assets behind, the local government offers the only source of compensation and workers are forced to engage in collective protest to assert their claims.\footnote{This pattern is so institutionalized that local governments have "crisis" funds established for this purpose (weiji fei). For a detailed review of the crisis and how local governments respond, see Su & He, supra note \textit{Error! Bookmark not defined.}.} In such contexts, the goal of promoting employer compliance prospectively is difficult to achieve or even irrelevant.

Nonetheless, strikes and collective protest are an increasingly powerful tool of workers, threatening employers with production losses, negative press attention, investigations or penalties by labor authorities, settlement demands, and increased turnover. Labor advocates in Guangdong have observed a greater space for strike activity in recent years, noting that crack-downs by authorities have become less frequent.\footnote{Interview, labor advocate, Panyu, May 18, 2008.} To be sure, appeals for justice outside officially sanctioned legal channels remain high risk.\footnote{See Su & He, supra note \textit{Error! Bookmark not defined.} (noting that collective action will be suppressed if organizers can be clearly identified).} The unpredictability of the size, scale, and the official response also lessens their deterrent effect. However, large-scale labor protests can have a noticeable impact by imposing real costs on employers and pushing local officials, arbitrators, and even court personnel to take action.\footnote{\textit{Id.} (detailing the pro-active role of court officials in handling mass labor conflict).}

Increasingly bold media coverage by local reporters of illegal enterprise practices, quickly disseminated via the Internet, is another major vehicle for workers to challenge labor law violations. For example, media coverage helped speed resolution of a case involving 36 female workers poisoned at the Anjia shoe factory in
Dongguan, Guangdong in 2002, attracting wide debate on the internet and greater attention by the local government to occupational safety concerns. The media’s advocacy role is particularly critical in the absence of robust representation by unions (or lawyers) and can give workers added leverage to achieve results in litigation or in petitioning local officials. While it cannot motivate broader employer compliance singlehandedly, domestic media can be an important tool in contesting serious cases.

d. Codes of Conduct

Corporate and multi-stakeholder codes of conduct and social certification programs, such as SA8000, are an alternative means of introducing and enforcing labor standards that have been widely used by multinationals with suppliers in China since the 1990s. Most make compliance with local law a minimum benchmark and are monitored and enforced through social audits. Their effectiveness derives primarily from the threat of lost business if standards are not adhered to over time or a certification is lost.

The impact of these tools and broader corporate social responsibility initiatives are the subject of extensive research beyond the scope of this Article. In general, these

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140 They have also been used in U.S. courts to assert legal liability of multinational buyers for abusive labor practices abroad. See BLANPAIN, supra note 2, at 590-606.

141 For a review of the debates surrounding social audits and codes of conduct, see Richard Locke, Thomas Kochan, Monica Romis, & Fei Qin, Beyond corporate codes of conduct: Work organization
studies identify a number of limitations: corporate codes are generally imposed and enforced with little input from manufacturers or their employees, they may be poorly monitored or easily evaded by manufacturers adept at passing audits rather than improving operating practices, and they may "crowd out" enforcement initiatives by local authorities.\footnote{142}

Nonetheless, corporate codes remain an important complement to other public and private enforcement initiatives. Although the codes and standards generally do not confer enforceable rights on employees unless incorporated into the labor contract, many introduce internal monitoring, management, training, and reporting systems that better engage workers and management in the compliance effort. Research on their use in China shows that they can indeed motivate higher labor standards, as well as raise worker awareness of basic labor rights.\footnote{143}

II. THE 2007 LABOR LAW REFORMS AND THEIR IMPLICATIONS FOR IMPLEMENTATION

Since the basic institutions and procedures described above were first established, the Chinese economy has undergone rapid changes that prior to 2007 were not addressed in any fundamental way within the existing legal framework. Intended to ground the new “socialist market economy”, the Labor Law created uniform regulations for state-owned, private, and foreign-invested employers, moved labor relations from an

\footnote{142 See id. and sources cited therein. On evasion by Chinese firms, see Dexter Roberts & Pete Engardio, Secrets, Lies, & Sweatshops, BUS. WK., Nov. 27, 2006, at 50-57.}

\footnote{143 See supra note 141.}
administrative model toward a market-driven one, paved the way for state-owned enterprise restructuring, and established basic labor standards to rein in abusive labor practices in the foreign-invested sector and beyond.\footnote{144} By its terms, the Labor Law reflected a considered effort to balance between productivity and social welfare, public policy and private incentives, and the state’s continued interest in oversight and control with its reduced role in the emerging market economy.\footnote{145} But striking the right balance between these competing economic and social welfare goals has proven difficult in practice.

For example, the contract employment mandate fostered the growth of the private sector by giving greater flexibility and autonomy to employers. But it also meant the end of entitlements and job security for state sector workers that found no real substitute under the new labor laws.\footnote{146} Since the mid-1990s, state-sector restructuring has left millions effectively unemployed, but current programs to expand employment and retraining opportunities and create a safety net for these workers have failed to stem the crisis.\footnote{147} At the same time, the broad discretion granted to employers under the Labor Law and subsequent regulations has allowed abusive workplace practices and employer noncompliance with fundamental aspects of the labor law to continue unabated, particularly in the private sector. Dangerous working conditions, nonpayment of wages and statutory benefits, failure to sign labor contracts, and the use of essentially bonded labor in manufacturing sweatshops have been documented.

\footnote{144} For a review of the history of the Labor Law, see RONALD C. KEITH, ZHIQIU LIN, LAW AND JUSTICE IN CHINA’S NEW MARKETPLACE 93-105 (2001); Josephs, supra note 112.

\footnote{145} Labor Law, supra note 3, at art. 1.

\footnote{146} Gallagher, supra note 122, at 54..

\footnote{147} See generally WILLIAM HURST, THE CHINESE WORKER AFTER SOCIALISM (forthcoming 2009).
extensively in Western media coverage and in academic studies too numerous to cite here.\footnote{See generally \textit{Anita Chan, China’s Workers Under Assault} (2001).} Such practices have had a disproportionate effect on migrant workers, who make up the bulk of the workforce in the labor-intensive manufacturing centers of China's coastal provinces.\footnote{On the effect of substandard labor practices on migrants and the extent of related reforms, see \textit{Bianyuan Ren: Migrant Labor in South China} (Liu Kaiming, ed. 2003); Yuchao Zhu, \textit{Workers, Unions and the State: Migrant Workers in China’s Labour-Intensive Foreign Enterprises}, 35 \textit{Dev. \\& Change} 1011 (2004); Cooney, \textit{supra} note 76; Lee, \textit{supra} note \textit{Error! Bookmark not defined.}, at 157-70.} In addition, in contrast to the mid-1990s, the majority of Chinese workers are now employed outside state enterprises in a range of private enterprises where traditional enterprise-based structures for mediating labor relations, such as trade unions, worker representative congresses, and enterprise mediation commissions are largely extent nonexistent. Employers in China also now rely extensively on informal, part-time, temporary, or subcontracted workers, which are not fully addressed under the 1994 Labor Law.

Taken together, the rapid transition and uneven growth of the Chinese economy and widespread noncompliance with existing labor laws have produced an unprecedented level of labor conflict across China.\footnote{See supra text accompanying notes \textit{Error! Bookmark not defined.-}102, 130-139.} As Section I indicates, current enforcement channels have proven ill-equipped to respond. The 2007 labor legislation represents China's latest national-level effort to craft a uniform response to these changing labor market conditions and to respond to the growing labor crisis through legal reform.

A. INTRODUCTION TO CHINA'S NEW LABOR LAWS
While the new laws do not fully respond to all of these challenges, they do reflect the Chinese leadership’s effort to promote greater stability and equity within China’s labor markets. They also promise to strengthen the deterrent force of Chinese labor law, particularly through private enforcement. The following discussion introduces the objectives and basic content of each of the new laws as a foundation for Part B’s analysis of how the new legislation alters existing remedies and enforcement mechanisms and the implications for employer compliance. Readers already familiar with the new laws may wish to proceed directly to Part B.

1. THE LABOR DISPUTE MEDIATION AND ARBITRATION LAW

The last of the three new labor laws to be enacted, the Labor Arbitration Law, which came into force on May 1, 2008, is also one of the most significant. As noted above, the exponential growth in the number of arbitrated labor dispute cases and a similar upsurge in labor-related protests have made apparent the limits of legal and administrative channels as a means of achieving social stability. With few exceptions, the Labor Arbitration Law retains the institutions and procedural rules described in Section I. However, it is the first primary national law directed at expanding access to labor dispute resolution forums and addressing long-standing procedural inefficiencies. It also for the first time brings state personnel disputes within LDAC jurisdiction, eliminating parallel adjudication mechanisms that largely duplicated those for labor disputes. Implementing regulations issued on January 1, 2009 direct LDACs to give priority to collective dispute resolution and clarify LDAC jurisdictional questions, evidentiary responsibilities, and case acceptance rules.\footnote{Laodong renshi zhengyi zhongcai banan guize [Rules on Handling Labor and Personnel Dispute Arbitration Cases] (promulgated by the MOHRSS and effective Jan. 1, 2009) [hereinafter Labor Arbitration Implementing Rules].}
Because the entire Labor Arbitration Law concerns labor dispute resolution, which is a key enforcement tool, a full treatment of the changes it introduces and its potential impact on employer compliance are reserved for Part B of this Section.

2. THE EMPLOYMENT PROMOTION LAW

The second of the new laws, the Employment Promotion Law, is primarily a policy mandate to all levels of government to respond to the vast number of unemployed, underemployed, and transient workers in the Chinese economy. Accordingly, it has received far less public attention in China and it introduces more limited changes to existing requirements than the Labor Arbitration Law and Labor Contract Law. Although the true figures may be impossible to determine, recent official reports put China’s national urban unemployment rate at around 4 percent.\textsuperscript{152} These numbers are expected to grow in the future, despite a dearth of qualified workers in many specialized fields and evidence that employers in the manufacturing sector have been experiencing a deficit of unskilled labor for the past five years.\textsuperscript{153} The Employment Promotion Law identifies increasing employment as a key economic development goal and encourages employment services, vocational training, and placement assistance.\textsuperscript{154}

This emphasis on job creation is not particularly ground-breaking. Because the 1994 Labor Law was drafted in anticipation of state sector restructuring, it already directs

\textsuperscript{152} These numbers do not fully capture the pool of laid-off state employees or the surplus of agricultural workers that feed the flow of migrant labor into China’s urban manufacturing hubs. On the limits of such estimates, see Dorothy J. Solinger, \textit{Why We Cannot Count the “Unemployed,”} 167 CHINA Q. 671 (2001).


\textsuperscript{154} EPL, \textit{supra} note 3.
enterprises, public institutions, and social organizations to expand employment opportunities.\(^{155}\) Similar central directives have since followed. However, the Employment Promotion Law does promise new incentives to employers who expand hiring opportunities, such as tax incentives and preferential access to loans for small and medium-sized enterprises.\(^{156}\) It also contains provisions regulating employment service agencies and providing for civil and administrative remedies if such agencies engage in illegal practices, such as retaining worker residency cards or requiring deposits.\(^{157}\)

The major innovation under the Employment Promotion Law is its expanded prohibition of certain forms of workplace discrimination. Workplace discrimination is already proscribed under the Labor Law, the amended Law on the Protection of the Rights and Interests of Women (Women’s Rights Law), and the amended Law on the Protection of Disabled Persons,\(^{158}\) and discriminatory practices are being challenged with greater frequency in the courts.\(^{159}\) The 2005 amendment of the Women’s Rights Law notably introduced new prohibitions on sexual harassment (though without definition), discriminatory retirement policies aimed at women, and contractual terms that restrict women’s freedom to marry or bear children, all commonly used by many

\(^{155}\) Labor Law, \textit{supra} note 3, at arts. 10 and 11.

\(^{156}\) See \textit{e.g.} EPL, \textit{supra} note 3, at arts. 17, 19. The burden for funding many of the programs under the EPL will, however, be borne by local governments. \textit{See, e.g. id.} at art. 15.

\(^{157}\) EPL, \textit{supra} note 3, at arts. 41, 64-68.


manufacturers that prefer to hire young, female migrant workers. The Employment Promotion Law builds on these laws with the broadest nondiscrimination prohibitions in any Chinese legislation to date, targeting hiring discrimination based on ethnicity, gender, disability, and status as a carrier of infectious disease, such as Hepatitis B. The Employment Promotion Law is also the first national level law to outlaw local policies discriminating against rural workers in favor of urban residents. These rights can be enforced through civil litigation.

3. THE LABOR CONTRACT LAW

The Labor Contract Law is the centerpiece of the 2007 labor law reforms. Its passage marked the culmination of a lengthy and relatively transparent drafting process that sparked intense policy debates within China’s leadership and drew attention from the international community. As with other major draft legislation enacted by the NPC in recent years, its Standing Committee circulated drafts for public comment in 2006 and early 2007 that attracted an unprecedented wave of over 190,000

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161 EPL, supra note 3, at arts. 5, 26.

162 Id. at art. 31. On migrant workers in South China and related literature, see Zhu, supra note 149; ITUC 2008 Report, supra note 116, at 11-12.

163 EPL, supra note 3, at arts. 62, 68.

164 Zhu Zhe, People to have bigger say in laws, CHINA DAILY, Mar. 10, 2008. See also CHEN, supra note 67, at 203-205, 697 (discussing public participation in law-making). Draft implementing regulations of the LCL were also released on the internet and in other media for public comment during 2008.
recommendations from grassroots trade union organizations, foreign and domestic business associations and labor rights organizations. A number of the final provisions adopt a more moderate approach consistent with some of the input received during the comment period.

Still, the Labor Contract Law generally marks a retreat from the broad deference given to employers under the 1994 Labor Law. While the 1994 Labor Law was designed to facilitate greater flexibility and mobility within the workforce, many new measures in the Labor Contract Law, such as limits on terminations, protections for temporary and seconded workers, and rules on open-ended labor contracts, are intended to increase workers’ job security. Much of the law is devoted to detailed prohibitions on a wide range of common violations and anticipating and foreclosing avenues for evasion, although most are already in force under current administrative guidance, judicial interpretations, and various implementing regulations at the provincial and local levels that have been enacted over the past fifteen years. It makes no fundamental changes to the existing institutional roles of unions, the labor bureaucracy, and the courts in implementing and enforcing labor law.

a. Broadening the Scope of China’s Labor Law

A primary contribution of the Labor Contract Law is its expansion of the scope of labor law protections. The 1994 Labor Law replaced administrative regulations governing different enterprise forms separately with a single labor law regime that was intended to apply broadly to all enterprises and economic organizations and to all “laborers” (laodongzhe), both management and non-managerial employees, who

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165 For a detailed analysis of the drafting process and the various interest groups involved, see generally Gallagher, supra note 9.
establish a “labor relationship.”\textsuperscript{166} The existence of a “labor relationship” is typically evidenced by a written labor contract, though proof of a labor relationship may also be shown in the absence of a written agreement.\textsuperscript{167} Its absence removes the worker from the jurisdiction of labor bureau authorities and the LDACs, making challenge of employer practices more difficult.

In recent years, new issues have emerged concerning the proper scope of the labor law as the use of temporary workers, workers seconded by labor service agencies (i.e. labor “dispatch”), moonlighting, and other informal work arrangements have become widespread.\textsuperscript{168} Informal and temporary arrangements allow employers to respond to rapidly changing needs in China’s fast-paced and competitive environment and reflect a global trend toward more flexible and less stable employment relationships.\textsuperscript{169} However, such workers were not clearly protected by prior labor laws in the absence of a written labor contract.\textsuperscript{170}

This gap also created adverse incentives for employers to evade compliance with much of Chinese labor law, including basic wage and overtime limits, by hiring on a short-term basis or via labor services agencies, either without a written contract or

\textsuperscript{166} Labor Law, supra note 34, at art. 2. See HILARY K. JOSEPHS, LABOR LAW IN CHINA 41-45 (2nd ed. 2003).

\textsuperscript{167} Labor Law, supra note 34, at art. 2; LCL, supra note 3, at arts. 2, 7

\textsuperscript{168} On the informal economy, see LUIGI TOMBA PARADOXS OF LABOUR REFORM 147-65 (2002).


\textsuperscript{170} For example, the 1994 Labor Law is directed at the employing unit (\textit{yongren danwei}), and so offers no guidance on the responsibilities owed by labor service agencies and contracting firms toward seconded workers. In other cases, the lack of written contract created an evidentiary issue over the existence of a labor relationship.
under a commercial services contract with the agency. For example, allegations widely reported in local media in 2007 charged that McDonald’s, KFC, and Pizza Hut, among others, had failed to sign labor contracts with part-time workers and had paid wages at less than 40% of the local statutory minimum levels. Concerns about such practices, inadequate control of labor service agencies, many illegally established, and the potential impact of the growing informal workforce on the overall stability of the labor force motivated greater regulation of these types of arrangements under the Labor Contract Law.

However, employers still have fewer obligations toward temporary and seconded workers under the Labor Contract Law, creating incentives for employers to structure their hiring practices accordingly. The Labor Contract Law now brings both oral and written agreements for part-time work, defined as less than four hours per day and twenty-four hours per week, within the ambit of the labor law, and mandates that part-time or temporary employees be paid at least the applicable minimum wage. Nonetheless, part-time employees are “at will” and can be terminated on notice at any time without severance and without cause.

The Labor Contract Law also introduces specific conditions for the establishment and regulatory oversight of labor services agencies and clarifies the obligations of both the “dispatching” and receiving enterprises toward seconded workers. Articles 57 to 67


172 See Gallagher *supra* note 9, at 29, 34 and sources cited therein. See also Li Hongguang, "*Laodong hetong fa* shishi sigeyue, laodong zengyi chuxian xinqingkuang [LCL in force for four months, emerging issues in labor disputes], GONGREN RIBAO [WORKER’S DAILY], May 5, 2008 (noting high number of illegal labor service agencies).

173 LCL, *supra* note 3, at arts. 68-69, 72.

174 *Id.* at art. 71.
of the law clarify that the dispatching agency is the employer under the labor laws and require the agency to enter into full-time labor contracts that satisfy minimum legal standards for a minimum term of two years. Subcontracted workers may join the union of either the dispatching or receiving enterprise and must be paid the same wages as the enterprise where the worker serves. If the employee is not assigned to an enterprise within the two-year period, the subcontracting agency must still pay at least the local minimum wage for the entire two years. Enterprises utilizing seconded workers, including the representative offices of foreign companies, are now also expressly required to provide seconded workers with overtime pay, bonuses, training, wage adjustments, and statutory labor protections and may bear direct liability for violations.

Although the Labor Contract Law states that subcontracted workers should be reserved to fill temporary or auxiliary positions, the final implementing regulations did not define “temporary”, leaving room for employers to continue to fill basic positions with temporary workers. However, the restrictions on labor dispatch or secondment generally leave few loopholes, making it difficult for employers to avoid their obligations under the labor law by hiring subcontracted workers. For example, employers cannot re-dispatch workers to any other company, and no firm can

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175 LCL, supra note 3, at arts. 57-63; LCL Implementing Regulations (promulgated by the State Council on Sept. 3, 2008, effective Sept. 18, 2008, at art. 30).

176 Id. at arts. 62, 92. LCL Implementing Regulations, at arts. 4, 29. Representative offices of foreign companies in China have no separate legal personality and are required to hire through labor service agencies.

177 LCL, supra note 3, at 59, 66. See Shenzhen Survey, infra 292 (finding continued evidence of these practices, including employers citing temporary workers for violations of workplace rules to justify not offering them permanent positions).
establish its own affiliate as a “captive” employment service agency.  

b. Contract Formation, Modification, and Termination

One of the key features of the Labor Contract Law that attracted strong reaction from the international business community is its restrictive approach to contract formation, modification, rescission, resignation, and termination. Since the passage of the 1994 Labor Law, employers have shied away from open-ended contracts in favor of fixed term agreements with shorter terms, most now typically for one year. To promote job stability, the Labor Contract Law expands employees’ rights to form open-ended (wu guding) contracts, introduces new restrictions on contract termination, and creates more expansive severance rights. Similar statutory rights are common across Asia and are not unlike rules governing contract formation and termination under French and German law.

i. Contract Formation and Modification

Under both the 1994 Labor Law and the Labor Contract Law, all employers must sign written contracts with their employees that contain certain mandatory terms. Labor contracts may be for a fixed period, which is the most typical, but can also be project-based, or open-ended. Indefinite contracts are those where no set term is specified and the term is for practical purposes permanent. The term of the contract is particularly important, since it determines the amount of severance owed if the

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178 LCL, supra note 3, at arts. 62, 67; LCL Implementing Regulations, at art. 28.
179 See Gallagher, supra note 9.
181 LCL, supra note 3, at arts. 10, 17. Cf. Labor Law, supra note 34, at arts. 16, 19.
182 LCL, supra note 3, at arts. 12-15.
183 Id. at art. 14.
contract terminates and because, as discussed below, employees with long-term or open-ended contracts have added protections against early termination.

In response to widespread violations of the basic written contract requirement, particularly in many small and medium-sized domestic enterprises, the Labor Contract Law mandates written contracts be signed within one month of when the employee begins work and for the first time imposes uniform penalties for noncompliance.\(^\text{184}\)

The Labor Contract Law also closes a gap in the Labor Law by requiring contract modifications to be in writing.\(^\text{185}\)

One of the most significant changes introduced by the Labor Contract Law is its expansion of the circumstances under which an open-ended contract can be established. Under the 1994 Labor Law, workers who have worked continually for the same employer for over ten years may enter into an open-ended contract only if the worker requests one \textit{and} the employer agrees to renew the contract.\(^\text{186}\) Most workers were unaware of this right.\(^\text{187}\) With the Labor Contract Law, employer consent to an open-ended contract is no longer required whenever a worker meeting the tenure requirements renews or re-concludes a contract, and the contract will be open-ended unless the worker opts for a fixed-term contract.\(^\text{188}\) In addition, employees who have already signed two fixed-term contracts after January 1, 2008 have the right to renew as an open-ended contract thereafter, regardless of the total

\[^{184}\text{LCL, supra note 3, at art. 10.}\]
\[^{185}\text{Id. at art. 26.}\]
\[^{186}\text{Labor Law, supra note 34, at art. 20.}\]
\[^{187}\text{Interview, Huang Qiaoyan, labor lawyer and instructor, Sun-Yat Sen University School of Law Legal Aid Clinic, Guangzhou, Sept. 2003 [hereinafter Huang Interview 2003].}\]
\[^{188}\text{Labor Contract Law, art. 2. Cf. Labor Law, supra note 34, at art. 20.}\]
length of the prior term contracts. Because of strict limits on early contract terminations, this change effectively gives employers one contract term to decide whether the employee should be retained long-term or not; if a second term contract is signed, the ball is in the employee’s court. Failure to sign a written contract within one year also gives rise to an implied open-ended contract. These rules push employers to make critical choices about staffing needs in advance and determine early the mix of standard contracted employees, temporary hires or subcontracted workers required to meet rapid changes in demand.

ii. Probationary Terms

Probationary periods of up to six months were permitted under the 1994 Labor Law. However, because probationary employees can be easily dismissed without severance for not satisfying job expectations, abuses of probationary periods are common. Article 19 of the Labor Contract Law targets many of these practices, the only exceptions are if the employer has cause to terminate the employee without notice under Article 39 of the LCL or with notice for incompetency, under Article 40 (1)-(2). This is similar to the French rule, where fixed term contracts may be renewed only once. See BLANPAIN, supra note 2, at 436.

This rule bears some resemblance to the German rule that all term contracts must be in writing or employment will be deemed permanent. See BLANPAIN, supra note 2, at 398.

Labor Law, supra note 34, at art. 21. See also DONG BAOHUA & DONG RUNQING, CASE ANALYSIS ON LATEST PRC LABOR CONTRACT LAW 363 (2007) (reviewing local Shanghai regulations and administrative guidance of the then MOLSS).

See id. The LCL stipulates that probation employees can only be dismissed if “there is evidence proving” unsatisfactory performance or other cause. LCL, arts. 21, 39. Cf. Labor Law, supra note 34, at arts. 25, 28. Employees can also resign on 3 days’ notice during the probation period for any reason.
such as keeping a worker on successive or open-ended probation in order to avoid paying full (i.e. nonprobationary) wage rates, and paying less than minimum wage to probationary employees. In addition, under the Labor Contract Law, a worker can only serve one probationary period, which is based on the length of the contract and capped at six months; the law also now mandates wages of at least the local minimum wage during the probation period.  

If effectively enforced, these rules set tight limits on an employer’s ability to use probationary status to evade obligations to employees.

iii. Collective Contracts and the Role of Labor Unions

All unions must be established under the ACFTU's supervision and leadership. Although migrant workers and the private sector are largely without union representation, official statistics report that over 170 million of China’s workers belong to trade unions, including over 50 percent of workers in foreign-invested enterprises. The Labor Law, the Trade Union Law, and Collective Contract Regulations issued by the then Ministry of Labor in 1994 give unions an expansive role in mediating workplace-level labor relations, communicating and implementing

LCL, supra note 3, at art. 37. Cf. Labor Law, supra note 34, at art. 32 (permitting immediate resignation without notice).

193 Probationary wages must also exceed 80% of the contracted wage and 80% of the lowest full-time wage for the same job. LCL, supra note 3, at arts. 19-20.

194 Trade Union Law, supra note 5, at art. 11.

Party policy, facilitating labor dispute prevention and resolution, and in promoting the
implementation and enforcement of the labor laws. The 2006 amendments to
China's Company Law also give the union a potentially greater role in corporate
governance by requiring a one-third employee presence on corporate supervisory
boards and representation on certain boards of directors. The Labor Contract Law
further broadens the union’s role by giving unions the right to be informed and
“consulted” in advance of any terminations or the adoption of workplace rules and
regulations.

Although its primary focus is on individual labor contracts, the Labor Contract Law
also incorporates basic principles from the Trade Union Law, the Labor Law and the
Collective Contract Regulations on the formation and function of collective
contracts. These rules give the trade union or a representative selected by the
workers the right to negotiate (xieshang) collective contracts with the employer on

\[196\] See Jiti hetong guiding [Collective Contract Regulations] (promulgated Dec. 5, 1994 by the MOL,
effective Jan. 1, 1995), amended Jan. 20, 2004, effective May 1, 2004; Trade Union Law, supra note 5,
at arts. 19-34. For the union’s role under the Labor Law, see, e.g. arts. 7 (right to organize), 27 (staff
reductions), 30 (grievances), 33-35 (collective contracts), 80-81 (dispute resolution), and 88 (labor
supervision).

\[197\] Company Law (promulgated by the Standing Comm. of the Nat'l People's Cong., amended Oct. 27,
2005, effective Jan. 1, 2006), at art. 45, 68 (employee representation on board of directors of state-
invested limited liability companies), 52, 71, 118 (employee representation on supervisory boards)

\[198\] See text accompanying notes 233 to 236 infra.

\[199\] LCL, supra note 3, at arts. 51-56. Cf. Trade Union Law, supra note 5, art. 20; Labor Law, supra
note 34, at arts. 33-35; Collective Contract Regulations, supra note 196.
On behalf of all employees and to represent employees in litigating any breach.\textsuperscript{200} Collective contracts set a floor for the terms of employment that may be contained in individual labor contracts. The Labor Contract Law adds little to this existing law, which already details clear rules for the “consultation” process, the scope of such contracts, and the resolution of related disputes.\textsuperscript{201}

Collective contracts were introduced when the PRC Trade Union Law was first enacted in 1992 and, according to official statistics, now cover over 60 percent of China's workers.\textsuperscript{202} Because of the challenge of unionizing and negotiating with individual enterprises, regional and industry-focused collective contracts have been a focus of the ACFTU’s strategy since 2000, particularly in areas with high concentrations of smaller enterprises.\textsuperscript{203} Such contracts are typically entered into between the local or industry union association and the employer or employer’s association and are encouraged under the Labor Contract Law.\textsuperscript{204} Collective contracts may also be limited rather than comprehensive in scope, and collective agreements on wages, workplace safety, or job training now cover millions of workers in China.\textsuperscript{205}

\textsuperscript{200} Trade Union Law, supra note 5, at 20.


\textsuperscript{203} Id., at 7-8, 11.

\textsuperscript{204} See id., at 11; LCL, supra note 3, at arts. 53-54.

\textsuperscript{205} See Breaking the Impasse, supra note 202, at 9-11.
Although a complete assessment of the role of Chinese unions and the meaning of “collective consultation” is beyond the scope of this Article, a substantial multi-disciplinary literature spanning management science, law, and sociology has critically examined these issues both within and beyond the state sector.\textsuperscript{206} These studies find that despite the broad mandate given to unions under applicable law, the conflicted institutional nature of China’s unions prevents them from operating as an effective counterweight to managerial discretion or as a strong advocate of Chinese workers.\textsuperscript{207} Unsurprisingly, then, collective contracts are generally drafted by employers with little real negotiation and tend to be limited to minimum legal requirements.\textsuperscript{208}

\textit{iv. Contract Termination}

The Labor Contract Law’s provisions on contract termination and re-employment promote stable, longer-term employment relationships, while affirming employers’ right to reduce staff levels and protect their economic interests if business conditions require. As with other aspects of the Labor Contract Law, its primary innovation is the introduction of a range of new penalties for illegal terminations, including expanded severance obligations to preempt employer end-runs around the new


\textsuperscript{207} On the nature of Chinese unions, see \textit{id.} and \textit{supra} text and notes \textbf{Error! Bookmark not defined.-} 118.

\textsuperscript{208} See Breaking the Impasse, \textit{supra} note 202, at 11; ITUC 2008 Report, \textit{supra} note 116, at 3.
restrictions. As under the Labor Law, contracts can be dissolved by mutual agreement of the parties or on statutorily defined grounds. Employees may unilaterally terminate the contract on thirty days’ notice if the employer fails to pay wages or social insurance deposits or provide adequate labor protection and safe working conditions, fraudulently coerces the employee to sign the contract, violates statutory obligations, or causes harm by imposing illegal rules or regulations. The Labor Contract Law also gives workers the right to terminate the contract immediately if the employer engages in violent or abusive practices. In all other cases employees who terminate the contract early must provide thirty days’ notice and compensate their employer for any damage.

In some cases, the Labor Contract Law expands employers’ right to terminate a labor contract. For example, as noted earlier, the Labor Contract Law clarifies that part-time employees are “at will” and that probationary employees can be terminated for

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209 See Part B, infra. “Termination” (jiechu) refers to a dissolution of the contract by either party or otherwise ceases to be in force on statutory grounds stated in the contract before its term expires, in contrast to contract expiration (zongzhi) at the end of the term or on statutory grounds for expiration.

210 LCL, supra note 3, at art. 36. Cf. Labor Law, supra note 34, at art. 24. No other grounds may be stated in the contract. LCL Implementing Regulations, supra note 175, at art. 13.

211 LCL, supra note 3, at art. 38 (referencing art. 26); LCL Implementing Regulations, supra note 175, at art. 18.

212 LCL, supra note 3, at arts. 37-38; Labor Law, supra note 34, at art. 31-32.

213 LCL, supra note 3, at arts. 37, 90. Following earlier administrative and local regulations, liquidated damages for employer-provided training expenses are permitted if the employee has a term of service commitment. LCL, art. 22. See also DONG, supra note 191, at 371-74 (reviewing local rules in Shanghai).
unsatisfactory performance at any time.\textsuperscript{214} The Labor Contract Law also expands employers’ right to terminate for serious breach to cover an employee’s obtaining a position elsewhere that “materially affects” work performance for the initial employer.\textsuperscript{215} However, these examples are the exception. All other terminations are allowed only if the employer has first attempted to remove the circumstances justifying the dissolution, has paid severance, has provided thirty days’ notice or one months’ severance in lieu of notice, and consulted with the union, and if the employee is not within a protected category of employees, such as workers undergoing medical treatment or female workers on maternity leave.\textsuperscript{216} Unilateral terminations without severance must be on defined grounds of serious breach, such as fraud, criminal liability, corruption, or causing “substantial harm” to the employer.\textsuperscript{217} As per the Trade Union Law, the employer must also notify the union in advance of any unilateral termination, and courts have invalidated dismissals for failure to comply with this rule.\textsuperscript{218}

\textsuperscript{214} LCL, \textit{supra} note 3, at art. 71.

\textsuperscript{215} \textit{Id.} at art. 39(4)-(5). \textit{Cf.} Labor Law, \textit{supra} note 34, at art. 25.

\textsuperscript{216} On employer grounds to terminate other than for serious breach, see Labor Law, \textit{supra} note 34, at art. 26, LCL, \textit{supra} note 3, at arts. 40, 46. Staff reductions of more than 20 people or 10% of the workforce are addressed under Article 41 of the LCL. For the six categories protected from no-fault dissolution and layoff in restructuring, see LCL, \textit{supra} note 3, at arts. 41-42 (adding protection for long-term employees within 5 years of retirement and workers undergoing occupational disease evaluations). \textit{Cf.} Labor Law, \textit{supra} note 34, at art. 27, 29.

\textsuperscript{217} LCL, \textit{supra} note 3, at art. 39.

\textsuperscript{218} Employers are not required to negotiate with the union, but must provide a written response to any union demands challenging employer breach of contract or illegal conduct. LCL, \textit{supra} note 3, at art. 43; Trade Union Law, \textit{supra} note 5, at art. 21. In one case in Shanghai, this rule was even applied to an
v. Mass Layoffs and Terminations for Economic Reasons or in the Context of Business Transition

One of the major reform dilemmas confronted by both the 1994 Labor Law and the Labor Contract Law is how to give firms the flexibility to adopt more efficient corporate structures and pursue investment opportunities while addressing employee-related liabilities and limiting the social impact of workforce downsizing in connection with enterprise restructuring and other ownership transitions. In addition to the 2006 revisions to China’s Bankruptcy Law, which give other creditors priority over employee claims, China has also introduced a sizeable body of legislation on mergers, acquisitions, and divestitures to undergird a new wave of investment and create a clearer regulatory foundation for internal enterprise restructurings.219

The Labor Contract Law brings labor laws in line with these regulatory changes. It clarifies and expands the permitted grounds for staff reductions to include layoffs due to restructuring under the Bankruptcy Law as well as a broad range of internal and external circumstances, such as technology changes, that could alter (not just impair) the firm’s operations.220 Because unilateral termination rights are already quite limited, these business justifications for workforce reductions under the Labor employer without a union presence, although Article 43 does not require consultation with “employee representatives” in the absence of a trade union. See Case 35 in DONG, supra note 191, at 570-80.


220 These circumstances are: “serious difficulties in production and/or business operations”, changes in the “objective economic circumstances” from when the contract was signed, or changes in technology, or “management operation style” that cannot be satisfactorily addressed by a contract amendment. LCL, supra note 3, at art. 41. Cf. Labor Law, supra note 34, at art. 27 (permitting staff reductions for “difficulties in production and management” or during statutory reorganization).
Contract Law are significant. Labor contracts also end automatically upon a closure or bankruptcy of the business, although outstanding liabilities to employees survive.\footnote{LCL, arts. 44; 46(6).}

At the same time, the Labor Contract Law creates new compliance obligations for employers approaching large-scale workforce transitions. For example, the Labor Contract Law mandates that labor contracts remain valid through the closing of a merger or divestiture and must be performed by the surviving entity, and that labor contracts continue to be performed notwithstanding an acquisition or a change in name or management.\footnote{LCL, supra note 3, at arts. 33-34. Employees assumed by the successor retain their accumulated tenure unless severance is paid by the original employer. LCL Implementing Regulations, supra note 175, at art. 10. Although under standard international practice employment contracts are typically terminated as of closing (and re-executed if assumed by the buyer), workforce reductions can still be easily justified post-closing under these rules on the basis of changed economic circumstances or other permitted statutory grounds. The rule's actual effect, then, is on the timing of workforce adjustments. Presumably, the initial employer could also undertake a workforce reduction on statutory grounds in advance of closing under Article 34 of the LCL, but as a practical matter it is unlikely that the parties would opt to do so. Cf. Labor Law, supra note 34, at art. 27 (requiring employers to notify the union or worker representatives 30 days prior to any layoffs for statutorily permitted economic reasons).}

Second, certain workers, including those hired under open-ended or “long-term” fixed contracts or those who are the sole wage-earner in their family must now be given preference in retention and in rehiring after a mass layoff involving more than 20 workers or 10 percent of the workforce; workers protected from termination for cause are protected from layoffs for economic reasons as well.\footnote{LCL, supra note 3, at arts. 41-42, 46-47.}

Finally, although no actual negotiation with the union is required, the ECL retains
existing requirements that employers explain the reasons for the layoff to the union and consider their “opinions”, in addition to paying severance and submitting a restructuring plan to the labor authorities in advance.\textsuperscript{224}

vi. \textit{Severance}

Another element of the Labor Contract Law that attracted considerable controversy is its expansion of existing severance obligations to cover nearly all dismissals other than employer-initiated dismissals for cause. The amount of severance is calculated based on actual wages (including bonuses and subsidies) and the years of tenure and is capped at up to three times the local average monthly wage and 12 years’ tenure, with a minimum severance of one-months’ salary for any employee with a contract of over six months.\textsuperscript{225} Notably, this includes an obligation to pay severance when a fixed-term contract expires and is not renewed unless the employee refuses to do so when offered equal or better terms.\textsuperscript{226} For employers, then, severance becomes an inherent added cost of any new hire. Dissolving and forming a new company does not relieve employers of their obligations to pay severance, which apply to all employees terminated because of the closure or bankruptcy of the company.\textsuperscript{227} As discussed further in Section III, additional severance may also be imposed as damages for certain violations of the labor laws.

c. \textit{Employee Confidentiality and Non-Competition Obligations}

\textsuperscript{224} LCL, \textit{supra} note 3, at arts. 41, 46-47. \textit{Cf.} Labor Law, \textit{supra} note 34, at art. 27 (requiring employers to notify the union or worker representatives 30 days prior to any layoffs for statutorily permitted economic reasons and to “report” to the labor authorities).

\textsuperscript{225} LCL, \textit{supra} note 3, at art. 47; LCL Implementing Regulations, \textit{supra} note 175, at art. 27.

\textsuperscript{226} LCL, \textit{supra} note 3, at art. 46.

\textsuperscript{227} \textit{Id.} at art. 46(6).
The Labor Contract Law, like the 1994 Labor Law, affirms employers’ right to impose confidentiality and non-compete obligations in labor contracts or by separate agreement. Although the Labor Contract Law sets stricter conditions on their enforceability than typical U.S. state laws, its provisions reflect a more evenhanded approach toward employer and employee interests than other areas of the labor laws reviewed thus far.

Confidentiality commitments covering company trade secrets or other intellectual property may only be entered into with senior management, technical personnel or others with knowledge of company trade secrets.228 In contrast to non-compete covenants, confidentiality provisions can apply indefinitely and are enforceable without additional consideration. Employers have the right to sue for breach under the labor law, to bring a civil suit under the Contract Law and the Anti-Unfair Competition Law, or seek administrative or, rarely, criminal penalties.229


229 See generally JOSEPHS, supra note 166, at 101-12 (reviewing remedies for breach of confidentiality and non-compete covenants). In recent years, a significant number of cases have been successfully litigated against employees for misappropriation of trade secrets under the Anti-Unfair Competition
While the 1994 Labor Law does not specifically address non-compete covenants, the Labor Contract Law introduces uniform national parameters for their enforceability and confirms the right to damages for breach. Under the Labor Contract Law, only senior management (gaoji guanli renyuan), senior technical personnel, and employees with confidentiality obligations can be subject to a non-compete covenant within the scope described in Article 24 of the Labor Contract Law, for a maximum of two years. In keeping with current local regulations but in contrast with standard U.S. practice, the Labor Contract Law requires consideration to be paid monthly during any non-compete period beyond the contract term. Since no national compensation floor and/or cap were adopted, the minimum consideration standard and geographic limits on these covenants are left to existing local regulations, which typically require a percentage of the employee’s prior annual wages be paid as consideration.

Moonlighting and employee poaching are both ubiquitous in China, and the 1994 Labor Law and the Labor Contract Law provide for damages against a company that

\[\text{\textsuperscript{230}}\text{LCL, supra note 3, at arts. 24, 90. See also Company Law, supra note 197, at art. 49 (imposing a duty of loyalty obligation on directors and managers that could also preclude certain competitive conduct); Labor Law, supra note 34, art. 25(3) (permitting immediate termination for “serious dereliction of duty” (yanzhong shizhi) or self-dealing (yingsi wubi)). China’s new Anti-Monopoly Law, which supersedes some aspects of the Anti-Unfair Competition Law, does not address restrictive covenants as such. Anti-Monopoly Law (promulgated by the Standing Comm. of the Nat’l People’s Cong. Aug. 30, 2007, effective Aug. 1, 2008).}\]

\[\text{\textsuperscript{231}}\text{For references to select local regulations, see K. Lesli Ligorner, Noncompete Agreements: Clarity amid Uncertainty, CHINA BUS. REV., July-Aug. 2008, at 26.}\]
recruits and/or hires anyone employed under contract elsewhere if the new position “materially affects” work performance for the initial employer. These remedies, as well as noninterference covenants with suppliers or customers, offer employers additional protection beyond a noncompete, which again, can only be imposed on certain employees and in tandem with confidentiality obligations.

d. Company Policies and Procedures

In contrast to standard U.S. practice, the Labor Contract Law makes clear that employee handbooks and company rules and policies are part of the contractual terms and conditions of employment. These workplace rules and policies can only be validly adopted or modified under the Labor Contract Law after “equal consultation” (pingdeng xiesheng) with the employees or the union and opportunity for comment, although there is no obligation that management adopt union proposals. Workers also have the right under the new law to voice objections to existing workplace policies. Company rules that fail to comply with the labor laws and regulations are invalid and can subject an employer to damages claims. Moreover, if an employer fails to follow the proper procedure and then seeks to terminate an employee for a violation, the worker may also be able to successfully challenge the decision and win reinstatement and possibly damages as well. Although unions have historically imposed little real restraint on management proposals of any kind, these rules do give the union a potentially stronger role in influencing management decision-making. At

232 LCL, supra note 3, at art. 39(4); Labor Law, supra note 34, at art. 99.

233 LCL, supra note 3, at art. 4. See also Company Law, supra note 197, at art. 18.

234 Id.

235 Id. at art. 80.

236 Id. at art. 38.
a minimum, they make it imperative for employers to carefully review the content of their policies and follow consultation procedures to reduce the risk of employee claims.

B. TOWARDS “HARMONIOUS” LABOR PRACTICES: USING CARROTS AND (MOSTLY) STICKS IN CHINA’S NEW LABOR LEGISLATION

As discussed above, China’s new labor legislation adds little to the fundamental obligations of employers under the 1994 Labor Law and subsequent regulations. The legislation does, however, promise to address some of the major deficiencies that have constrained enforcement, and therefore, compliance to date. The following discussion uses the deterrence/compliance spectrum described in Section I to consider how each of the new laws might realign employer incentives in favor of greater voluntary compliance.

Of course, any conclusions from such a review remain subject to important caveats raised earlier: firms do not respond uniformly to changes in the regulatory environment, regulatory enforcement approaches are multidimensional and complex, and national legislation in China often fails to transform local regulatory practices. Nonetheless, I argue here that China’s new labor laws reflect a clear effort to strengthen the deterrent force of law, while integrating new approaches to incentivize quasi-voluntary compliance by employers. With few exceptions, whether these efforts will in fact motivate employer compliance will depend largely on the initiative of employees as private enforcers of the labor law, as the new legislation does not significantly alter current public enforcement tools.

1. SENDING THE COMPLIANCE MESSAGE AND MAKING SURE IT’S RECEIVED: HEIGHTENED AUTHORITY AND CLARITY OF LABOR LAW
As scholars of Western public policy have observed, regulation serves an “expressive function” in communicating public policy objectives and priorities, and the policy message transmitted through legislation has consequences for society that may be equally or more important than the content of the regulation itself.\(^237\) The expressive dimension of regulation is arguably more powerful within the Chinese system given historical conceptions of law in the PRC as a tool of class struggle during the Mao years and then as an instrument of Party policy during the reform period.\(^238\) Although legislation in China is now shaped most directly by technical experts, academics, and even through public input, the Party’s continued role in agenda-setting, oversight, and approval of draft legislation, as well as its influence over legislative and administrative appointments, ensure that new regulatory measures still bear the stamp of the state's official policy direction.

As an initial matter, the fact that the Employment Promotion Law, the Labor Contract Law, and the Labor Arbitration Law are primary national laws (jiben fa) places them at the top of China's legislative hierarchy and gives them precedence over prior local, provincial, or administrative enactments. That they were passed within a seven-month period is an even stronger statement of the state’s commitment to stricter regulation of the workplace. In addition, the passage of the Labor Contract Law after four, rather than the customary three, hearings also reflects the priority lawmakers have placed on labor policy as well as the high level of debate generated by the drafting process. The higher formal authority of the labor laws may motivate more


\(^{238}\) See generally *CHEN*, supra note 67, at 44-76, 177-206.
employers to take them seriously, and the strong deterrent focus of the new laws themselves, discussed further below, further supports the overall compliance message. By directly stipulating grounds for administrative sanction and in some cases, precise penalties, the Labor Contract Law, in particular, also sends a clear “get tough” message to local enforcement officials. For example, it incorporates existing administrative rules authorizing labor inspectors to double back wages owed by employers who ignore orders to pay employees.  

The tougher public enforcement mandate is bolstered by a last-minute addition to the Labor Contract Law that for the first time creates a private right of action for damages against government agencies that fail to enforce the law, causing harm to workers. Whether any cases succeed on these grounds may ultimately be less important than what these rights say about the obligation of local officials to enforce the law.

In addition, basic knowledge of regulations and the clarity of legal norms are critical to employers' ability to comply with law. Prior regulatory studies confirm that the complexity of laws reduces knowledge of the rules and makes compliance more

\[239\) LCL, supra note 3, at art. 85. See Labor Inspection Measures, supra note 40, at arts. 26, 30 (authorizing double wages and administrative penalties of RMB 2,000 to 20,000).

\[240\) LCL, supra note 3, at art. 95. Cf. Labor Law, supra note 3, at art. 103 (providing only for administrative or criminal liability for neglect of official duty and other misconduct). This clause was added to the LCL just days after a disaster at a brick kiln in Shanxi drew outrage at the negligence of workplace safety inspectors. Telephone interview, Chris Xiaoyun Lin, lead drafter of the American Chamber of Commerce comments on the LCL, Oct. 16, 2008 [hereinafter, "Lin Interview"]. See also "Laodong hetongfa gaodu zhongshi laodong xingzheng bumen" [LCL greatly emphasizes labor administrative departments], XINHUA (online), Oct. 6, 2007, available at http://news.xinhuanet.com/legal/2007-06/29/content_6308921.htm (last visited Jan. 11, 2009).
difficult or even impossible.\textsuperscript{241} Given the broad dissemination of the Labor Law in the mid-1990s, the level of labor unrest across China, and the proliferation of corporate codes of conduct and social audits, employers who argue they are unaware of basic obligations to sign written labor contracts, pay a minimum wage and statutory benefits in a timely manner, and provide a safe working environment, are clinging to a very thin reed. Nonetheless, key elements of Chinese labor law, such as prohibitions on bonded labor and rules on severance, were previously contained not in the national Labor Law, but in myriad administrative notices, interpretative guidance, and subnational legislation of varying authority and consistency.\textsuperscript{242} Penalties for non-compliance were spelled out only in administrative regulations and notices.\textsuperscript{243} The same was true with regard to the rules governing labor dispute resolution and the work of labor arbitration commissions, such as rules on case filing, fees, and dispute resolution procedures.\textsuperscript{244} Identifying and accessing these regulations thus poses serious practical challenges. As Cooney has observed, reliance on administrative regulations and local rules suggests that regulatory mandates are directed more at

\textsuperscript{241} On awareness of rules and compliance, see Winter et al., \textit{supra} note 15; Raymond J. Burby, Robert G. Paterson, "Improving Compliance with State Environmental Regulations," 12 \textit{J. POLICY ANALYSIS \\ & MANAGEMENT} 753 (1993).

\textsuperscript{242} These problems are endemic to legislation in China generally. See Peerenboom, \textit{supra} note 14, at 239-79. The example of prohibitions on bonding is discussed in greater detail in Cooney, \textit{supra} note 76, at 1058.

\textsuperscript{243} For example, the Labor Inspection Measures, \textit{supra} note 40, and the \textit{Circular on Administrative Penalties for the Contravention of the Labor Law}, which preceded it. \textit{Cited in Ho, supra} note 37, at n.33.

\textsuperscript{244} See generally Ho, \textit{supra} note 37, at 36-81.
judges and the labor bureaucracy than to employers or workers.\textsuperscript{245} It also weakens the deterrent effect of private enforcement by making it more difficult for workers to determine if they have a legal claim and how to pursue it.

The passage of these laws at the national level strengthens the authority of earlier legal rules they incorporate, but it also makes the compliance message more likely to be heard in the first place. As with other major national level legislation in China, the Labor Contract Law and the Labor Arbitration Law (and to a far lesser extent the Employment Promotion Law) were accompanied by an extensive dissemination (\textit{pufa}) campaign in local bookstores, other print media, on the internet, and through trade union and state agency-sponsored programs, all aimed at raising public awareness of the new law.

The Labor Contract Law also sets clearer standards for employers, leaving less room to claim ignorance or excuse substandard practices. For example, the Labor Contract Law specifies both damages and administrative penalties for engaging in bonded labor or violating labor sub-contracting rules, as well as a range of other illegal practices.\textsuperscript{246} By confirming the illegality of these practices, the Labor Contract Law smooths the way for workers to challenge illegal practices in labor arbitration and the courts, and more importantly, in direct negotiations with employers. Likewise, the Labor Arbitration Law raises awareness of the basic procedural rules governing labor dispute resolution, broadening access to the dispute resolution process.

\textsuperscript{245} Cooney, \textit{supra} note 76, at 1058.

\textsuperscript{246} See, \textit{e.g.} LCL, \textit{supra} note 3, at art. 88 (imposing damages and administrative sanctions for causing injury), art. 84 (setting fines of at least RMB 500 and up to RMB 2,000 \textit{per worker} for requiring bonds or deposits), art. 92 (providing for fines of RMB 1,000-5,000 \textit{per worker} for labor dispatch violations). For similar prohibitions under earlier administrative regulations, see \textit{supra} note 243.
The national stature of these laws should also promote greater regulatory consistency regionally within China, which may make identifying the applicable rules easier to some extent and at the same time reduce the range within which local authorities can compete for investment with weaker local standards. On the whole, then, greater clarity and consistency in labor law can be expected to improve voluntary compliance, and clearer penalties may also deter violations by raising the risk of employee claims and the prospect of tougher public enforcement. The following discussion details how specific changes in the new legislation may influence employer compliance.

2. MOTIVATING COMPLIANCE UNDER THE LABOR CONTRACT LAW AND THE EMPLOYMENT PROMOTION LAW

As discussed in Section I, China’s enforcement model operates in practice as a “mixed” model, and specific changes introduced by the Labor Contract Law and the Employment Promotion Law are in line with this approach. These laws appeal first to deterrence motivations by strengthening private enforcement: they introduce tougher penalties for non-compliance and expand the range of claims and potential parties that can be pursued in labor arbitration. However, the Labor Contract Law also adopts new measures that are geared toward promoting quasi-voluntary compliance.

a. Deterrence Through Private Enforcement

First, the Labor Contract Law and the Employment Promotion Law extend the reach of litigation by establishing new bases for employee claims. This increases the potential costs of noncompliance. For example, the Employment Promotion Law’s expanded definition of workplace discrimination to protect Hepatitis B carriers and migrant workers affords them new civil rights of action against employers. The Labor Contract Law expands the range of parties who can be held liable for violations of the labor law beyond the direct employer to include its successor in interest, its financial
sponsor, an enterprise to whom a seconded worker provides services, and recruiters, while the Employment Promotion Law permits new civil claims (and administrative remedies) against employment service agencies.\textsuperscript{247}

Moreover, the Labor Contract Law expands the scope of “labor relationships” to include temporary workers, clarifies obligations toward seconded workers, and stipulates that the labor relationship begins as soon as work is performed even if no contract is signed.\textsuperscript{248} Because the existence of a “labor relationship” is such a critical threshold jurisdictional issue, the clear status of these workers under the labor laws affords them greater statutory protections and access to labor arbitration, which under the new legislation may now offer a cheaper and faster resolution for resolving labor disputes.

The Labor Contract Law also strengthens the deterrent effect of current labor law by establishing clearer remedies and stronger penalties for noncompliance that can be awarded as damages in the context of private labor disputes.\textsuperscript{249} Most notably, the Labor Contract Law for the first time introduces non-compensatory (i.e. punitive) damages against employers who violate the written contract requirement or illegally terminate employees. Under the Labor Contract Law, an employer who fails to execute a written contract within one month of hire will owe compensation at twice

\textsuperscript{247} See, \textit{e.g.} LCL, \textit{supra} note 3, at arts. 33, 34, 92, 93, and 95. The EPL sanctions back up the LCL’s prohibitions on bonding and requiring security deposits.

\textsuperscript{248} See LCL, \textit{supra} note 3, at art. 10, and Ch. 5. Exceptions remain for agricultural workers, domestics, independent contractors, workers who moonlight or otherwise perform services for hire for someone other than their employer, or workers employed by an unregistered enterprise. These exceptions leave room for continued debate in specific cases on the line between labor law, contract law, and general civil law principles.

\textsuperscript{249} See LCL, \textit{supra} note 3, at arts. 80-95.
the employee’s monthly salary for up to one year.\(^{250}\) Similarly, employers who terminate an employee illegally owe double severance in compensation.\(^{251}\) These provisions shift the burden to employers to make sure a termination is defensible under the law, although since both penalties are keyed to wages, the perceived pricetag will still be nominal for many employers. The Labor Contract Law also provides that if an employee performs any work during an illegally extended probationary period, the employer must pay full wages at the level that would be paid to non-probationary employees as restitution.\(^{252}\)

Finally, employers may now also face claims for damages under the Labor Contract Law, in addition to possible administrative penalties, if workers suffer harm under an invalid or illegally authorized workplace rule, if the labor contract does not contain statutorily mandated terms, or if the employee does not receive a copy of the contract.\(^{253}\)

The Labor Contract Law also weakens employers’ ability to frustrate employee lawsuits by threatening counterclaims for breach of contract. For example, the law gives employees broad grounds to unilaterally terminate their contract without

\(^{250}\) *Id.* at art. 82.

\(^{251}\) LCL, *supra* note 3, at art. 87. Severance is based on actual monthly wages, but is capped at the average monthly wage in the jurisdiction for employees earning more than three times that amount. *See id.* at art. 47. For example, in 2008, the minimum wage in Guangdong Province ranged from top levels in Guangzhou and Shenzhen of RMB 860 and 1000 per month to lows of RMB 530 to 580 in less developed areas. Guangdong Wage Standards, *available at* http://www.51labour.com/lawcenter/zhbz/index.asp?staid=1 (member access only) (on file with author).

\(^{252}\) LCL, *supra* note 3, at art. 83.

\(^{253}\) *See id.* at arts. 80-81.
liability if the employer is violating the labor laws. Alternatively, if their employer breaches any statutory obligations, the contract content is itself illegal, or the employer used fraud or coercion, employees can seek to invalidate the underlying contract itself and claim damages. An employer cannot contract around these protections by imposing any liquidated damages obligations, other than for breach of a term of service or a noncompete commitment.

b. Compliance-Oriented Rules

The changes introduced by the Labor Contract Law (and to a lesser extent the Employment Promotion Law) that have been reviewed thus far reflect a deterrence-based regulatory approach geared at raising the potential costs of violations. However, several of the more unique rules introduced by the Labor Contract Law are compliance-oriented in nature, geared toward producing a better alignment of employers’ interests and state regulatory goals. The most important is the rule that gives rise to an implicit open-ended contract if an employer fails to conclude a written contract with an employee after more than one year of service, in addition to obligating the employer to pay double the monthly wages as damages. Since open-ended contracts give employees the greatest job security and impose the most

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254 LCL, supra note 3, at art. 38.

255 Id. at arts. 26, 86. Only contracts containing illegal terms or entered into through fraud or coercion, are voidable. Cf. Labor Law, supra note 3, at art. 18. Under the LCL, a contract ceases to have binding force once invalidated but it is not void from inception, which would (as under the Labor Law) give the employer grounds to argue no valid employment relationship ever existed and that obligations under the labor law should not apply.

256 LCL, supra note 5, at arts. 22, 23, 25.

257 Id. at arts. 14, 82. Of course, an employer may be able to limit their liability by terminating the employee before they have served for one year.
restrictions and costs on employers, this rule incentivizes employers to be proactive in
signing written contracts in order to reduce long-term liability. At the same time,
making open-ended contracts the default gives maximum protection to workers where
the nature of the employment relationship is unclear.

The new rules on part-time workers are another area where the law appeals to
employers’ self-interest to promote compliance. Although part-time workers can be
retained by multiple employers, their primary obligation is performance of the first
part-time contract. This rule rewards employers who sign contracts with part-time
workers by giving them priority rights to the employee’s time that can be enforced
against a second employer in claim for interference with the initial employment
contract. These measures promise to further diversify China’s current enforcement
model to achieve greater gains from both “carrots” and “sticks.”

3. MOTIVATING COMPLIANCE UNDER THE LABOR ARBITRATION
LAW

Under both the 1994 Labor Law and the Labor Contract Law, avenues for employees
to directly challenge employer misconduct are a key element of China’s labor law
enforcement strategy, and given the limitations of administrative enforcement in
China, private enforcement determines to no small extent the deterrent force of the
labor laws. The Labor Contract Law’s emphasis on damage awards to deter
noncompliance, such as the double severance and double wage rules, arguably makes
employee claims an even more important enforcement tool. However, the ultimate
deterrent effect of the new rules depends on employers’ assessment of the potential
risk of losing labor disputes that either alone or in the aggregate will result in
significant financial liability.

258 Id. at art. 91.
The Labor Arbitration Law impacts both parts of that calculation. First, it increases employers’ risk of an arbitration claim, which given typical case outcomes, increases the number of cases an employer might expect to lose. Second, procedural changes it introduces may stimulate higher damages claims and speed the dispute resolution process, increasing the real cost of labor claims. For reasons discussed below, the Labor Arbitration Law’s renewed emphasis on mediated outcomes should not significantly alter this picture.

a. Expanded Access for Worker Claims

The Labor Arbitration Law introduces two key changes that expand the scope of labor arbitration and lower key barriers to worker access of formal labor dispute resolution processes. First, in reaction to long-standing concerns that 60 days was not an adequate time for many workers to become aware of a violation and take steps to file a claim, the Labor Arbitration Law extends the statute of limitations for filing a labor arbitration claim to one year “from the time a party knew or should have known that his or its rights were infringed.” This increases the risk horizon for employers, but is shorter than the two-year time bar for most civil law claims in court. The Labor Arbitration Law also incorporates existing tolling rules to keep cases from being

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259 Labor Arbitration Law, supra note 3, at art. 27.

barred when workers pursue remedies outside of litigation and to forestall employers from deliberately impeding workers who may be unaware of the filing deadline.\textsuperscript{261}

Secondly, the law eliminates all fees previously charged to file and process a labor arbitration claim.\textsuperscript{262} In addition, workers can no longer be required to post a bond when applying for advance execution during an arbitral proceeding in order to allow early recover of wages, reimbursement for medical bills, severance or damages if non-execution will “materially affect the applicant’s livelihood”.\textsuperscript{263} The law does not affect the obligations of parties to a labor dispute to bear the cost of their own legal fees. Finally, in apparent reaction to the volume of factory shutdowns at the end of 2008, the law’s implementing rules confirm that litigants can proceed directly against the investor of an enterprise that closes, has had its business license suspended, or is bankrupt.\textsuperscript{264}

\textit{b. Potential for Higher Claims and Awards}

The new statute of limitations rules and the elimination of arbitral fees also have an indirect effect in that both allow plaintiffs to seek higher damages awards than was possible under prior law. Because arbitration fees for large claims, for example, those over RMB 10,000, were based on a percentage of the claimed amount, the elimination of arbitration fees removes a clear financial disincentive that had restrained plaintiffs

\textsuperscript{261} See Labor Arbitration Law, \textit{supra} note 3, at art. 27 (restarting the time bar once a party asserts rights against the other party or seeks a remedy from a government authority (for example, through petitioning), or once a settlement has been reached, and suspending it for events of force majeure).

\textsuperscript{262} \textit{Id.} at art. 53.

\textsuperscript{263} A further condition is that the parties’ rights and obligations must be clear. \textit{Id.} at art. 44.

\textsuperscript{264} Labor Arbitration Implementing Rules, \textit{supra} note 151.
from seeking large (or inflated) damage awards.\footnote{265} In addition, under the Labor Arbitration Law the one-year filing deadline does not apply at all to wage claims until the end of the employment relationship, so any claim for unpaid wages during the employment term can seek recovery for the entire period, plus claims thereafter for arrears during the full year of the statutory period.\footnote{266} If the size of worker claims increases measurably, it may increase the willingness of counsel to take on labor cases, which could give workers added leverage in litigation or in settlement.

c. Dealing with Delay

The Labor Arbitration Law also promises to reduce procedural delays by shortening the time period from filing to arbitral award and by introducing an alternative “arbitration only” option. These reforms may cut the time required for workers to obtain a remedy and reduce the ability of employers to use delay tactics. From a workers’ standpoint, then, the expected net impact of the new rules will be to lower the cost of legal action and increase its potential rewards, while increasing the probability of litigation and the potential liability of employers.

On average, most LDAC adjudications were completed within the 60 days required under prior regulations, but additional extensions were common.\footnote{267} The Labor

\footnote{265} See supra note 105.

\footnote{266} See Labor Arbitration Law, supra note 3, at art. 27. This rule adopts the position of the 2006 SPC Interpretation, which allows employees to recover damages for the entire employment term if they pursue a claim while employed. Under prior practice, damages were typically limited to the harm caused during the 60-day period. Huang Interview 2003, supra note 187.

\footnote{267} Interview, district labor arbitrator, Guangzhou, Sept. 17, 2003 (reporting average resolutions of 90 days); LAODONG ZHENGYI TIAOJIE ZHONGCAI FA ZEYI [ANALYSIS OF THE LABOR ARBITRATION LAW] 243 (Wang Jianping et al. eds. 2008) (reporting average LDAC resolution rates of 40-50 days in Guangdong).
Arbitration Law establishes a firm deadline, limiting the time between case acceptance and case resolution to 45 days for routine cases with an additional 15 days for complicated cases. The tough deadlines at the arbitration phase may not reduce systemic delays, since either party may simply proceed directly to court if no award is issued within that period. However, the Labor Arbitration Law also incorporates existing mechanisms for partial awards and default judgments, which are intended to improve the efficiency of the LDAC process and reduce delays.

Historically, completing arbitration and two appeals to court could take 12 to 18 months; sensitive cases could take years. With over 80 percent of arbitral awards now appealed to court, the redundancy created by *de novo* court review of arbitral awards had come to be seen as a further impediment to timely case resolution, a challenge to the institutional legitimacy of the LDACs, and a tool for employers to wear down plaintiffs. The Labor Arbitration Law now specifies a category of labor disputes for which an arbitral award is final under an arbitration-only system (*yì cái zhōng shèn*), namely, any claims for wages, medical bills for work-related injury, severance pay or damages in an amount “not exceeding twelve months at the local minimum monthly wage rate” and “certain disputes arising to implementation of state labor standards on working hours, rest, leave, or social insurance”.

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268 Labor Arbitration Law, *supra* note 3, at art. 43.

269 *Id.* at art. 43 (partial awards); art. 36 (default awards).


271 This argument draws force from the fact that the vast majority of arbitral awards favor workers and the same basic results occur on appeal. *Supra* note 102.

272 Labor Arbitration Law, *supra* note 3, at art. 47. Implementing guidance issued in Guangdong clarifies that arbitrators can segregate and render a final award on claims that *individually* are below the
employees can appeal an award for any reason and employers also enjoy fairly broad grounds for review of “final” awards, summary arbitration may produce less finality than it promises. Still, it is the first major legislative effort to expedite final resolution for the vast majority of labor disputes. The new rule also benefits employers by requiring workers who want to utilize summary arbitration to limit the size of their claims. It is too soon to tell how frequently courts will find grounds to vacate an award, which will determine the real utility of the new procedure.

Finally, it should be noted that while the Labor Arbitration Law gives the LDAC a greater role in resolving routine claims, many labor-related claims, such as discrimination claims and undisputed wage claims, will continue to be resolved directly by courts, in addition to claims appealed from arbitration. In many cases, plaintiffs can make strategic choices about whether labor arbitration or civil litigation increases their chances of a faster and larger potential recovery. However, it is unclear whether the lines now drawn between labor arbitration and the courts will

monetary threshold, even if the aggregate total of all claims is higher. See Guiding Opinion on Several Issues Concerning the Application of the Labor Arbitration Law and the LCL (issued by Guangdong Provincial People's Court, Guangdong Provincial LDAC on and effective June 23, 2008), at art. 9, translated in CHINA L. & PRAC., Sept. 1 2008.

273 Labor Arbitration Law, supra note 3, at art. 48 (authorizing workers to appeal to a People’s Court within 15 days of the arbitral award), art. 49 (incorporating the standards set in the SPC’s 2006 Interpretation and permit employers to appeal for vacature for LDAC error in the application of law, lack of jurisdiction, procedural violations, falsified or concealed evidence, arbitrator misconduct, or an award that “perverts the law”).

274 For example, civil tort damages for personal injury are generally lower than damages for occupational injury. Huang Interview 2008, supra note 110. However, civil tort law provides a broader range of remedies for reputational injury than labor law. See DONG, supra note 191, at 687-90.
indeed promote efficient resolution of labor disputes. It is likely that these changes will create initial confusion over threshold jurisdictional matters and a more urgent need for greater coordination and consistency between arbitrator and court approaches to labor cases.

d. Improved Arbitrator Qualifications

Studies of regulatory effectiveness find that it depends in part on the perceived legitimacy of enforcement institutions, which is enhanced by public confidence in their impartiality and professionalism. 275 Although concerns about local protectionism and the fairness and neutrality of labor arbitrators and the courts have not abated, 276 China has made prodigious steps in recent years to improve the competency and reputation of judicial and administrative officials at all levels, including labor arbitrators. 277 The Labor Arbitration Law establishes higher qualifications for labor arbitrators, making judicial or legal experience a mandatory prerequisite unless the applicant has at least five years’ experience in a labor union, human resource management, or similar position. 278 It also affirms litigants’ right to challenge a particular arbitrator for conflicts of interest or for meeting privately, being entertained by, or accepting accepting gifts from any party. 279 These measures promise to further improve the quality of labor arbitration, which may in time give greater force to private litigation as an enforcement strategy.

275 See, e.g. TYLER, supra note 29.

276 See, e.g. LEE, supra note Error! Bookmark not defined., at 183.

277 On arbitrator qualifications and related reforms, see HO, supra note 37, at 64-65, 203-04. On the quality of the judiciary, see Liebman, supra note 111.

278 Labor Arbitration Law, supra note 3, at art. 20.

279 See id. at art. 33.
e. Heightened Emphasis on Mediation

In keeping with the emphasis on informal dispute resolution under prior regulations, an entire chapter of the Labor Arbitration Law is devoted to mediation, although it largely tracks existing regulations on labor dispute mediation procedure.\textsuperscript{280} The law acknowledges the limitations on enterprise-based mediation in non-unionized firms, directing grassroots mediation institutions to accept labor disputes and alleviate caseload pressure on arbitrators and courts.\textsuperscript{281} Although further study is needed to assess how employers in China weigh their options to settle or litigate labor claims, mediation or settlement under the new legislation could in fact amplify the deterrent force of formal legal action. A worker that can claim double damages under the Labor Contract Law will likely be unwilling to settle for far less, and with the expanded access to labor arbitration and the courts afforded under the Labor Arbitration Law, an offer that is too low is now more likely than ever to prompt a lawsuit. Moreover, in some cases, successful litigation can have a ripple effect on employers. For example, labor advocates report that settlements obtained in arbitral mediation in one case can spark demands for comparable compensation by fellow employees.\textsuperscript{282} For all of these reasons, employers’ potential liability for labor violations, even in settlement, is likely to rise under the new laws. In addition, the Labor Arbitration Law for the first time creates clear rules for enforcing certain independent settlements. Although settlements reached outside of an arbitration or court proceeding have always been technically binding, there has previously been no clear mechanism to enforce them. In the event of a breach, a party

\textsuperscript{280} Id. at ch. 2.

\textsuperscript{281} See id. at art. 10.

\textsuperscript{282} Interview, labor advocate, Panyu, May 18, 2008.
would simply start over in arbitration or sue in court to determine what the agreement was and whether it had been breached. This is still the general procedure under the Labor Arbitration Law.\footnote{Labor Arbitration Law, \textit{supra} note 3, at arts. 14-15.}

However, the law now provides that courts can translate mediation agreements on payment of overdue wages, medical bills for work-related injury, severance or damages into directly enforceable payment orders (\textit{zhifuling}) without arbitration.\footnote{See \textit{id.} at art. 16. Court “orders to pay” (\textit{zhifuling}) may also be issued under Article 30 of the LCL if an employer has failed to make full and timely payment of employee wages. However, under China’s Civil Procedure Law (CPL), such orders have no force if the debtor (i.e. the employer) disputes the obligation. \textit{See Zhonghua Renmin Gongheguo Minshi susong fa} [Code of Civil Procedure] (promulgated Apr. 9 1991 by the Natl. People's Cong., amended Oct. 28, 2007 by the Standing Comm. of the Natl. People's Cong. effective Apr. 1, 2008), at art. 194, \textit{translated in CHINA L. \\& PRAC.}, Mar. 2008, at 18. In contrast, a mediated settlement is an acceptance of the obligation, so a payment order would be effective.} The new measures promise faster recovery for workers and complement the other provisions in the Labor Arbitration Law that allow these types of disputes to be resolved through faster binding arbitration.\footnote{Labor Arbitration Law, \textit{supra} note 3, at art. 47.} Speeding enforcement increases the real cost of damages to employers who violate the law, which should further strengthen the deterrent force of settlement demands.

III. PROOF OF THE PUDDING? EARLY EVIDENCE OF IMPLEMENTATION FROM GUANGDONG PROVINCE – THE CASE OF LABOR CONTRACTS

Although China’s new labor legislation represents a major shift toward tighter regulation of the workplace, primarily through stronger private enforcement tools,
whether employers in China are facing a radically different world or a continuation of past practice has remained largely the subject of speculation and debate. This Section presents a preliminary look at the ways in which the new legislation has been “translated into practice” in order to provide a useful starting point for future empirical work as experience with the new laws evolves. Part A presents the administrative response – regulatory policies stimulated by the new legislation; Part B examines the employer response - the impact of the new legislation on employer practices; and Part C centers on the mobilization response – workers’ response to the new legislation through the lens of labor dispute resolution. Part D distills the primary findings.

Because the broad scope of the new legislation makes it impossible to address all aspects of its implementation, I focus here on the basic requirement that employers enter into written labor contracts with their employees, with reference to related aspects of the other two new labor laws. This is an interesting and important area of inquiry for a number of reasons. First, the written contract requirement is the foundation of labor relations under the Labor Law and the Labor Contract Law. The contract provides clear evidence of an employment relationship, establishes compensation and other key terms of that relationship, informs the employee of basic statutory rights, and is the starting point in evaluating competing claims if a dispute arises. Second, the rule is one that should enjoy a maximum chance of successful implementation. It is enforced through the combined initiative of unions, employees, labor bureau officials, labor arbitrators, the courts, and, where codes of conduct apply, by external auditors. Form contracts are readily available to employers from the local government. As noted above, the written contract requirement is also one area in which the Labor Contract Law adopts both deterrent and quasi-compliance-based
strategies to promote compliance: violations can result in double wage damages and/or administrative fines and ultimately gives rise to an implied indefinite term contact, which is the most restrictive from an employer standpoint.

Still, the most interesting reason to assess this area is the irony that written labor contracts are the subject of new major legislation in the first place. The evolution of China’s labor contract system spans decades and dates back to policies first proposed by Liu Shaoqi and Deng Xiaoping in the mid-1960s. As early as 1979, foreign joint ventures were permitted to hire on the basis of fixed–term labor contracts, and regulations adopted in the 1980s extended contract-based employment to state-owned enterprises.\(^{286}\) The 1994 Labor Law solidified labor contracts as the foundation of Chinese labor relations and spurred forward official campaigns to promote its full implementation across the Chinese economy.\(^{287}\)

Nonetheless, as of 1997, only half of state sector employees were covered by written contracts.\(^{288}\) Surveys by the NPC and the State Council in 2005 found that fewer than 20 percent of small and medium sized enterprises used labor contracts and nearly half of all migrant workers lacked a written labor contract.\(^{289}\)

The following analysis is based on personal interviews conducted in Guangdong in the spring of 2008 with labor lawyers, labor advocacy organizations, labor arbitrators, and enforcement officials, in addition to media reports and official sources.

\(^{286}\) On the history and early implementation of the contract employment system, see JOSEPHS, supra note 166, at 49-50, 54-67.


\(^{288}\) JOSEPHS, supra note 166, at 67.

\(^{289}\) See Victorien Wu, Labor Relations in Focus, 33 CHINA BUS. REV. 40, 42 (2006).
Guangdong has long been an important focus of research on labor issues in China because it is one of China’s largest manufacturing centers and also one of the provinces most impacted by labor conflict.\(^\text{290}\) Over 60 percent of Guangdong employers are either private or foreign-invested enterprises, many from Taiwan and Hong Kong.\(^\text{291}\) Migrant workers from rural provinces make up the bulk of the workforce in Guangdong, particularly in manufacturing and construction sectors.

The findings in Part B are based in part on two surveys, one of 417 employers in Guangdong and elsewhere in the Pearl River Delta conducted by private human resource consultants from December 2007 to January 2008 (the “HR Survey”), and one of 320 workers in Shenzhen conducted by the Shenzhen Dagongzhe Migrant Worker Centre in April 2008 (the “Shenzhen Survey”).\(^\text{292}\)

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\(^{290}\) One-quarter of all labor arbitration cases nationally are filed in Guangdong each year. LDTJNJ, supra note 100, at tbl. 9-2. Guangdong has also been at the epicenter of labor protest and contention for over a decade. See generally LEE, supra note Error! Bookmark not defined..

\(^{291}\) GUANGDONG SHENG TONGJI NIANJIAN [GUANGDONG STATISTICAL YEARBOOK] (2008), tbl. 2.10.

\(^{292}\) The first survey was conducted online by Job88.com, a human resource consulting service and supplemented by phone interviews with human resource managers of enterprises in Shenzhen and elsewhere in the Pearl River Delta. Job 88 Xin laodong hetong fa qiyeyingdui qingkuang diaocha baogao [Job88 Survey Report on Enterprise Responses to the New Labor Contract Law], available at http://www.job88.com/other/qzbg/index.html (last visited Dec. 13, 2008) [hereinafter the “HR Survey”]. The second survey was conducted by the Shenzhen Dagongzhe Migrant Worker Centre using 320 written surveys completed by workers approached outside the workplace in night markets and other areas in industrial districts in Shenzhen where workers congregate. “Laodong Hetong Fa” Shishixia Gongren de Shikuang Diaocha Baogao [Survey Report on the True Condition of Workers under the Implementation of the Labor Contract Law], May 19, 2008 [hereinafter, the “Shenzhen Survey”]. Informal interviews were conducted by the Migrant Worker Centre during the survey process as well as in-depth interviews of 9 of the surveyed workers following the written investigation.
A. THE ADMINISTRATIVE RESPONSE: IMPACT ON PUBLIC ENFORCEMENT

Not surprisingly, the passage of the Labor Contract Law made full implementation of the written contract requirement by all employers a top policy priority of the MOHRSS, a goal framed strictly in terms of contract execution rates. Labor authorities in Guangdong and other major investment hubs followed suit, urging tougher inspections targeting contract execution, payment of wage arrears and full employer participation in statutory insurance programs. The Labor Contract Law sparked new initiatives by the ACFTU to promote collective contract negotiations in

In both surveys, over one-third of the respondents were small and medium-sized enterprises with less than 100 employees, and an additional one-third employed fewer than 1,000 employees. Nearly half of the employers covered in the surveys were manufacturers. 50% of the workers in the Shenzhen Survey were employed by Chinese-owned private enterprises, 26% by Hong Kong-invested enterprises, 14% by Taiwanese-invested enterprises, and 9% by other foreign-invested enterprises. Eighty-one percent had been employed less than five years by their current employer. The full survey report, including a list of interviewees and analysis of the raw survey data, is on file with the author.


These aggressive targets were matched by new unionization campaigns targeting migrant workers, private enterprises and Fortune 500 multinationals; most large foreign employers now have a union presence. By the end of 2008, labor authorities began to proclaim success. In September, Guangdong provincial labor authorities reported that written contracts had been signed with 97% of all employers and over 53,000 collective contracts, covering 6.6 million workers. Certainly, contract execution rates, even if as high as reported, are only a rough measure of actual compliance, and implementation campaigns alone have not always borne lasting fruit. Still, enforcement authorities in Guangdong, particularly at the provincial level, have been unabashed in sending a tougher enforcement message. Top labor officials in Guangdong have repeatedly dismissed employer concerns about

295 See Shenzhen laodongju bada juceuo guanqie laodong hetong fa: jinnian laodong hetong qiandinglv jiang chaoguo 95%] [Shenzhen labor bureau's 8 major measures to implement Labor Contract Law: labor contract execution rate will pass 95%], available at www.sznews.com/jbjob/content/2008-01/21/content_1799723.htm [hereinafter "Shenzhen Target"].


298 According to district labor bureau officials in Guangzhou, high contract execution rates do not include many small, labor-intensive employers. 2009 District B Interview, supra note 57.
cost increases under the new legislation as mere complaints about lost “illegal” cost-
savings from flouting labor laws.\footnote{See, e.g. Guangdong diaoyan biaoming "Laodong hetong fa" de shishi zhishi zengjiafeifa qiye chengben [Guangdong survey reveals the LCL has only raised illegal enterprise costs], FAZHI RIBAO [LEGAL DAILY], May 4, 2008.} Soon after the Labor Contract Law took effect, Shenzhen and Guangzhou stepped up inspections by labor authorities.\footnote{2009 District B Interview, supra note 57. Laodong zhongcai anjian tongbi zeng liangbei duo [Labor arbitration cases more than double], Shenzhen News Network, May 5, 2008, \url{available at sznews.com/news/content/2008-05/05/content_2017899.htm} (last visited 06/05/2008).} Shenzhen also enacted new regulations on “harmonious labor relations” that impose tough new fines for failure to sign labor contracts and allow labor inspectors to shut down or suspend operations for serious wage arrears. The new rules also set up a program to blacklist serious violators, strip their investment incentives, and deny them access to future preferential credit and investment perks for 5 years.\footnote{Shenzhen jingji tequ hexie laodong guanxi cujin ti aolie [Shenzhen SEZ Measures on Promoting Harmonious Labor Relations] (promulgated Sept. 25, 2008, effective Nov. 1, 2008) [hereinafter Harmonious Labor Relations Measures].} In a similar tone, Guangdong provincial labor authorities proposed aggressive new fines of up to RMB 500,000 (USD 73,000) in 2008 for employers that fail to timely pay worker salaries.\footnote{“Guangdong to Implement CNY 500,000 Penalty on Back Pay, ChinaCSR.com,” June 5, 2008, \url{available at www.china.csr.com/en/2008/06/05/2412-guangdong-to-implement-cny500000-penalty-on-back-pay} (last visited Oct. 2, 2008).} Despite the gap between enforcement rhetoric and local realities in China, these developments cannot be dismissed as mere window-dressing. Historically, such pronouncements were rare, as local governments focused on attracting investment and
easing the impact of labor and environmental regulations. However, in the past several years, Shenzhen, Guangzhou, and other investment-saturated areas throughout the Pearl River Delta have begun to adjust their industrial policies to favor high-technology, value-added production over labor-intensive manufacturing in order to maintain a competitive edge over Vietnam, Indonesia and other low-wage destinations. The policy shift away from labor-intensive industries has not been tempered by the Employment Promotion Law's mandate to raise employment rates, which could be expected to encourage lax enforcement against large employers. Stricter measures also bring local authorities more in line with central-level mandates to toughen up on violators and prevent social unrest. For these reasons, labor enforcement officials interviewed in this study were unperturbed by the prospect of labor-intensive manufacturing shifting elsewhere, noting that the government wants to reduce labor mobility and the number of migrants in order to lower crime rates and encourage long-term residence. Official policies have been bolstered by the impact of the labor “famine” (mingong huang) on many employers in Guangdong in recent years. The shortage gave migrants and other workers in Guangdong more leverage to demand higher wages and avoid employers that fail to provide safe working environments.


304 Officials and lawyers in Guangzhou uniformly dismiss the EPL as a policy statement with no practical impact on employer practices or current enforcement policies. Interviews, district A and district B labor inspectors, Guangzhou, Jan. 2009; Fulian Interview, supra note 138.


The recent collapse of thousands of manufacturing sweatshops has left labor markets in an uncertain state, pushed local governments to focus resources on quelling labor protests and funding workers’ unpaid wage claims, and led to calls to suspend implementation of the Labor Contract Law. Nonetheless, Guangdong's provincial leadership continues to express the view that the shutdowns will leave room for more high-tech employers. Despite some evidence to the contrary, local authorities continue to assert that the global economic crisis has not weakened their efforts to enforce the new labor laws. Since any crackdown may be perceived as unreasonably harsh in the midst of desperate economic conditions, looser enforcement approaches may well be appropriate. Nonetheless, the continued commitment to "upgrade" Guangdong’s investment environment may well motivate labor authorities to act more forcefully once the dust settles.

B. REAL COMPLIANCE?: IMPACT ON EMPLOYERS

All employers had until February 1, 2008 to comply with the written contract requirement. With a gap of six months from the passage of the Labor Contract Law at the end of June, 2007 until its effective date of January 1, 2008, they also had ample opportunity to prepare a compliance (or evasion) strategy. For employers who were already following existing labor law, the new legislation imposes few new burdens. Indeed, notwithstanding strong critiques of the early drafts, the U.S. business

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309 2009 District B Interview, supra note 57 (but admitting that violations are only investigated if a complaint is filed). See also Canaves, supra note 307.
community in China has generally voiced support for the Labor Contract Law as a welcome step toward leveling the playing field with domestic competitors. But the true targets of the Labor Contract Law are those employers that were previously unwilling to comply under the Labor Law. Historically, labor compliance has been more consistent among U.S. multinational affiliates, other Western-invested enterprises, and large private employers. Violations have been most widespread among small, local private employers and foreign enterprises owned by investors from Hong Kong, Taiwan, and South Korea.\textsuperscript{310} Although reaction to the new legislation varies, the response of many of the employers in this target population suggests significant implementation challenges remain.

1. Exit

Much speculation after the passage of the Labor Contract Law centered on the potential cost impact of the new legislation and whether it would result in an exodus of manufacturing jobs and epidemic business failures among small and medium-sized firms. Clearly, the new laws do impose some costs on all employers: broader severance obligations, costs incurred to bring current contracts, workplace rules, and existing practices into line with the new standards and monitor ongoing compliance, and potentially higher screening costs for new hires. According to some estimates, labor costs for compliant firms were predicted to rise by as much as 20 percent, with an unknown, but substantially higher cost increase for firms whose survival depended

on cost savings from violating labor regulations.\textsuperscript{311} Fifty-three percent of employers in the HR Survey reported some increase in projected labor costs, and for over 40 percent, the added cost of severance for all non-renewed term contracts was the most significant new change.\textsuperscript{312} Major multinationals and other large employers with less cost sensitivity and stronger compliance records report less concern.\textsuperscript{313}

China has in fact experienced a wave of factory closures and relocations that coincided with the introduction of the new labor legislation and worsened dramatically in the wake of the U.S. financial crisis and global economic downturn.\textsuperscript{314} But making an empirical case that tougher labor regulations are the sole, or even leading cause, of these trends may be difficult. Manufacturers have already been struggling in the two to three years leading up the passage of the new labor legislation because of rising wage rates, a stronger yuan, tougher tax policies, stricter enforcement of product standards, and higher production costs, all cutting into razor-thin profit margins.\textsuperscript{315} Labor costs for some employers had already nearly doubled in the preceding four years, with annual increases in locally set minimum wage levels now routine in Guangdong and elsewhere.\textsuperscript{316} Many employers had already


\textsuperscript{312} HR Survey, supra note 292.

\textsuperscript{313} Lin Interview, supra note 241.


\textsuperscript{315} See, e.g., Deeper Pain, supra note 308.

\textsuperscript{316} See Lee, supra note 314.
announced plans to close, relocate to lower-cost destinations elsewhere in China or to
Southeast Asia, or consolidate their China operations in 2006 and 2007, before the
new legislation took effect. This suggests that companies operating in south China
are responding to a structural economic shift that for some has been speeded by the
prospect of higher costs under the new laws.

2. Formal Compliance and Mitigation
A fundamental goal of the Labor Contract Law is to promote stable labor relations
and greater job security. Evidence from employer surveys indicates that the new
legislation has in fact motivated some adjustment in contracting practices, though not
in all cases in directions likely to promote these goals. Findings from the Shenzhen
Survey confirm that the Labor Contract Law has indeed prompted employers to
execute written contracts. Seventy-three percent of employees surveyed had signed
written contracts, with noncompliance substantially higher among locally-owned
private enterprises and small and medium-sized enterprises. Some resistance to the
contract rules also comes from workers who are loath to commit to a single

317 See, e.g., Jonathan Yang, HK Firms Flee Surging Operating Costs in Pearl River Delta, SCMP, Mar.
14, 2008; Where is Everybody? ECONOMIST, Mar. 15, 2008, at 77. 2008 District A Interview, supra
note Error! Bookmark not defined. (reporting half of registered employers in the district had
relocated to lower-wage areas of Guangdong prior to the passage of the new laws).

318 The following results are reported in Shenzhen Survey, supra note 292.

319 Employers of fewer than 1000 workers had a 36% noncompliance rate, in contrast to 6% of large
employers; local employers had a 42% noncompliance rate as compared to less than 14% for foreign-
invested enterprises. Id.
This level of formal compliance, though markedly lower than official figures for the same period, is nonetheless rather dramatic evidence that the Labor Contract Law has incentivized employer compliance at an initial level. However, employers’ responses represent more an attempt to mitigate the cost impact of the Labor Contract Law, without substantial change from past practice. On the one hand, only around 10 percent of employers in the HR Survey planned to cut staff because of the Labor Contract Law’s passage, and 20 percent expected to terminate contracts less frequently because of the higher severance costs imposed by the Labor Contract Law. However, nearly 30 percent planned to increase use of labor services and seconded workers. The Shenzhen Survey found similar evidence of greater reliance on external or temporary hires that could be paid less than permanent workers, as well as continued use of extended probations (although 80% of employers in the HR Survey reported standard probationary terms in line with the Labor Contract Law).

These surveys also confirm media reports that employers are hesitant to enter into long-term or indefinite contracts. Thirty percent of employers responding to the HR Survey planned to use term contracts of one year or less in 2008, with an additional 50 percent planning to use two to three year contracts. Similarly, 60 percent of employees in the Shenzhen Survey had contracts of one year or less, with 33 percent

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320 2008 District A Interview, supra note Error! Bookmark not defined.. However, in the Shenzhen Survey, 75% of surveyed workers reported they had not signed a contract because the employer hadn’t proposed one. Shenzhen Survey, supra note 292.

321 Id. See also Shenzhen Survey, supra note 292.

322 HR Survey, supra note 292.

323 HR Survey, supra note 292.
under two or three-year contracts. Less than 7 percent of these employees had indefinite (wuguding qixian) contracts, and fewer than 30 percent of employers in the HR Survey planned to introduce them, in part because of confusion over the obligations they impose. These results are particularly interesting because employers in the HR Survey are better equipped to comply with the law, given their dedicated human resource staff and contact with human resource consultants, yet both surveys report fairly similar trends.

3. Evasion

Ample evidence of employer resistance to the new labor laws appeared early. Within a few months of the passage of the Labor Contract Law in 2007, reports of employer tactics to avoid the more burdensome effects of the law, from mass dismissals to signing “labor services” (i.e. independent contractor) agreements rather than employment contracts, proliferated in the domestic and international media. Huawei, a Chinese global telecommunications giant, attracted the media spotlight and an investigation by forcing “voluntary” resignations of 7,000 workers in December, 2007, with the intent to rehire in January and reset the employees’ tenure clock (qingling). Others attempted to avoid hiring full-time workers by implementing two half-time shifts, contracting through two separate legal entities simultaneously.

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324 Id. (reporting that some employers view indefinite contracts as an “iron rice bowl”, while others believe (mistakenly) that indefinite contracts will lock in workers and prevent turnover), Shenzhen Survey, supra note 292. See also Guangdong qiye eyi guibi qian wuqixian hetong jiang shiwei xingwei wuxiao [Guangdong enterprise evasion of open-ended contracts will be found invalid], NANFANG RIBAO [SOUTHERN DAILY], July 8, 2008, available at http://news.xinhuanet.com/legal/2008-07/08/content_8508037.htm.

and creating “new” companies to hire the same employees on new terms. The speed and ingenuity of these efforts are proof positive of the substantial challenges confronting implementation of the Labor Contract Law.

Despite clear evidence of formal compliance with the written contract requirement, interviews conducted in connection with the Shenzhen Survey and with labor lawyers provide further indication of the continuation of many common abusive workplace practices and many employers’ utter disregard for the spirit and substance of the labor contract rules. Most prominent are employers forcing employees to sign written contracts without full disclosure of the contract terms or under terms that prevent employees from relying on the contract to protect their legal rights. For example, one employee at a Taiwanese-invested plastics factory reported, “When we were signing contracts, the [employer] covered up the content of the contract and just asked us to sign. The workers all thought this was unreasonable, so everyone started refusing to sign. A week later, the boss said whoever didn’t sign would be docked a month’s pay . . . . Everyone signed.” Other employers have threatened termination to employees

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326 See Yingdui xinlaodong fa [Reactions to the new labor law], available at http://gd.news.163.com/special/0036sp/laodongfa20071218.html (last visited Jan. 19, 2009). See also HR Survey, supra note 292 (reporting that a small minority (3%) planned to contract through two separate legal entities consecutively).

327 Except where noted, findings are from the Shenzhen Survey, supra note 292. The survey also uncovered other abusive practices that are beyond the scope of this Article, such as general failure to pay severance, violations of overtime and wage rules, and increased room and board charges and wage deductions for workplace infractions that reduce employees' real wages. Id.
who refuse to sign English labor contracts or contracts stipulating lower wages than those currently earned by the employee.  

Six percent of employees in the Shenzhen Survey were forced to sign completely blank form contracts, while another 13 percent signed contracts missing key terms, such as the employer’s name or the place of employment. 63 percent reported that the contract terms did not accurately reflect the employer’s name and address, the worker’s position, or other terms of employment. For example, employees at a Hong Kong-invested electronics factory covered by the Shenzhen Survey were required to sign two contracts, each stipulating a wage of RMB 750 and together totaling their original RMB 1500 monthly wage. This allowed the employer to rely only on one contract (and half the wages) to calculate overtime and social insurance payments. Another employer put workers on leave and threatened to terminate them without compensation if they refused to sign a contract stamped with the corporate seal of two different companies.

Almost all of these evasive and coercive practices are directly foreclosed in some way by the Labor Contract Law and are grounds for damages or invalidation of the contract itself. Others, like Huawei’s attempt to reset workers’ tenure clocks, are prohibited in new local regulations. However, these kinds of violations can

Footnotes:

328 Fulian Interview, supra note 138. Tellingly, the Shenzhen Harmonious Labor Relations Measures specify Chinese contracts. Supra note 301, at art.61.

329 See, e.g. LCL, supra note 3, at art. 26 (grounds for invalidating a contract); arts. 80-81 (providing for damages if contracts do not contain statutory terms); arts. 59.66 (limiting hires through a labor services agency to temporary rather than continuous employment).

330 Although the LCL implementing regulations are silent on the issue, new regulations in Shenzhen clarify that workers retain previously accrued tenure if they are rehired within six months. See Harmonious Labor Relations Measures, supra note 301, at art. 24.
ultimately only be challenged if workers file and prove their claims in arbitration.
Although labor inspectors should and can easily determine if an employer has
executed written contracts with employees or not, they do not have the capacity to
review contract content and will not step into the contract formation process unless a
complaint is filed. They do not generally intervene even if the local form contracts
are not consistent with the law.\textsuperscript{331}

However, defects in the content or formalization of the contract may themselves make
legal challenge even more difficult or allow an employer to evade responsibility
altogether. For example, if a worker challenged a contract that provided for the
“wrong” wage amount, the worker would have to show that the contract was coerced.
The employer could argue that the parties negotiated lower compensation in exchange
for the added security of a written agreement. If instead the employee refused to sign
the contract and was terminated as a result, the Labor Contract Law implementing
regulations would allow the employer to justify the termination because of the
employee’s refusal to sign, and to avoid this result, the employee would again have to
argue coercion.\textsuperscript{332}

Although some local courts have demonstrated a willingness to
sanction employers who engage in such practices,\textsuperscript{333} these cases raise difficult
evidentiary issues and will generally be harder to resolve.

\textsuperscript{331} 2008 District A Interview, \textit{supra} note \texttt{Error! Bookmark not defined.}.

\textsuperscript{332} \textit{See} \textit{LCL} Implementing Regulations, \textit{supra} note 175, at art. 5. This rule provides needed protection
to employers who attempt to sign contracts with their employees and are refused, but the rule contains
no exceptions to protect employees who reasonably reject a contract from termination.

\textsuperscript{333} \textit{See}, \textit{e.g.} \textit{He Jun Lin v. Foshan Nanhai Zhongnan Machinery Co., Ltd.}, Foshan Intermediate People's
Court, Case No. 1163, Nov. 18, 2008, available at \texttt{www.chinalawinfo.com} (subscription only)
(awarding double severance for illegal termination where the employer refused to negotiate contract
terms and then fired the worker for refusing to acquiesce).
More critically, the “four corners” of the labor contract are now determinative in the event of a dispute under the Labor Contract Law. Because all contract modifications must now be in writing, employees cannot rely on separate commitments to “repair” deficiencies in the written agreement once a legal dispute arises.334 This problem is compounded by survey findings showing that as many employees still are not provided with a copy of their contract, as required by the Labor Contract Law.335 Under these circumstances, identifying and challenging illegal contract terms or other workplace practices becomes even more difficult.

C. THE MOBILIZATION RESPONSE: IMPACT ON PRIVATE ENFORCEMENT

Since it was first introduced in 1994, China’s Labor Law has sparked an upsurge of labor disputes and mobilized petitioners and protesters alike.336 Studies of labor contention and dispute resolution in China have observed a steady rise in popular rights consciousness in the intervening years.337 Given the broad dissemination of the Labor Contract Law and the Labor Arbitration Law in particular, it is perhaps then no surprise that the new legislation mobilized stronger grassroots demands by workers for employers to comply with the law almost immediately in 2008. This response is particularly noteworthy since the Labor Contract Law does not apply to contracts

334 See LCL, supra note 3, at art. 26.

335 Shenzhen Survey, supra note 292 (reporting that nearly one quarter of employees surveyed had not received a copy of their contract).

336 On labor dispute trends, see HO, supra note 37. On law in the context of protest, see LEE, supra note Error! Bookmark not defined.. On the use of law as a frame for labor petitions, see Thireau, supra note 91.

entered into before January 2008 and the Labor Arbitration Law did not take effect until May.

Still, by early 2008, Shenzhen had already reported a more than 100% increase in letters and visits and a 232% surge in the number of labor arbitration cases filed. Labor arbitrators in Guangdong also saw a 300% increase in case filings for May and June 2008 once arbitration fees were eliminated on May 1, and local trial courts saw their caseloads doubled in 2008 as well. Outside Guangdong, Beijing and Shanghai area LDACs witnessed similar trends.

The type of claims filed provide clear evidence of the legislation’s impact, with more claims being filed for double wages because of failure to sign written contracts, or for double severance because of wrongful termination – both newly authorized by the

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338 Laodong zhongcai anjian tongbi zeng liangbei, supra note 300.


Labor Contract Law.  However, there is also some indication that the state's effort to channel labor conflict through formal legal process has in fact exacerbated contentious labor relations and imposed costs on employers and on local institutions that exceed the ultimate economic benefits realized by workers. For example, in one recent occupational injury case before an intermediate court in Guangdong, the worker tacked on a claim for double wages (which was ultimately rejected by the court) alleging his employer failed to sign a contract with him, even though the worker had already filed an arbitration claim to terminate the labor relationship before the legal deadline for such a contract to be signed. The elimination of labor arbitration fees and the prospect of quicker resolution through summary arbitration has also opened the door to a flood of “micro” claims, some as low as RMB 60 (less than USD 10). At the same time, some labor lawyers report that their clients are demanding higher (even inflated) claims now that fees tied to claim size are eliminated.

More critically, labor arbitration institutions and courts are simply ill-equipped to handle the flood of labor cases. Labor arbitrators in Guangdong account for only seven percent of China's total LDAC full-time personnel and have historically handled one-fourth of all labor disputes in China. What makes the situation worse is that claims under the new legislation are likely to be particularly fact-intensive and

341 See Pudong Arbitration, id. See, e.g. He Junlin v. Foshan Nanhai Zhongnan Machinery, supra note 333.
343 2009 District B Interview, supra note 57. See also id.
344 Fulian Interview, supra note 138.
345 See Personnel Crisis, supra note 339.
difficult to adjudicate. This virtually assures that LDACs will be unable to meet the firm 60 day deadline, pushing cases onto local courts. Some labor lawyers anticipate that arbitrators may, out of bureaucratic self-interest, focus on “easy” cases and punt tougher cases to the courts.\(^3\) This could give courts, which are already actively engaged in mediating labor conflict, an even greater institutional role. It also raises new questions about the relationship between labor arbitration and the courts that will become more important as litigants test the range of options now available to them.

The problem of limited administrative resources at the local level does not admit of an easy solution. Labor officials are responding by emphasizing mediation and early case settlement, hiring more personnel, relying more heavily on part-time arbitrators and establishing more sub-local organizations to diffuse labor conflict.\(^4\) However, since all costs of funding labor arbitration and enforcing the labor law fall squarely on the shoulders of local governments, funding and training gaps present at least a short-term challenge.\(^5\) These limits may increase pressure on grassroots personnel to suppress labor conflict rather than confront illegal workplace practices.

To be sure, LDAC and court figures reveal only a small part of the mobilization picture. For example, by mid-2008, labor inspectors were already receiving

\(^3\) Fulian Interview, supra note 138.

\(^4\) Interview, former district labor arbitrator, Guangzhou, May 22, 2008. See also Pudong Arbitration, supra note 340 (reporting higher use of part-time arbitrators). As of September, 2008, Guangdong had established over 7,000 organizations at the local (district, township, village) and sub-local (street, village, district, and industry) levels to mediate labor disputes. Guangdong Labor Conference, supra note 297.

\(^5\) 2009 District B Interview, supra note 57. Interview, former district labor arbitrator, Guangzhou, May 22, 2008 (reporting that part-time arbitrators were paid from arbitration fees prior to the Labor Arbitration Law).
complaints demanding written contracts and double wages as compensation from workers empowered by the new laws. Moreover, labor conflict and social protest in China have historically been mobilized, justified, and framed in terms of law. Recent labor protests appear to have been fueled less by demands for new law-based rights and more by "subsistence demands" on local officials to fill the gap left by employers who have shut their doors. Nonetheless, if history is any guide, law will likely have greater force beyond formal process than within it.

D. LESSONS AND IMPLICATIONS

Several observations can be made from these findings. First, the new legislation bolstered public enforcement policies in Guangdong that had already been moving in the direction of tighter regulatory controls. Although the sources relied on here do not permit a full comparison of local responses in areas with differing economic conditions and policy objectives, this suggests that labor law enforcement will continue to be shaped most directly by development priorities and policy goals at the local level than through top-down mandates.

The evidence reported here also indicates that some of the primary goals of the new legislation -- expanding the labor contract system and removing barriers to labor arbitration and litigation -- are beginning to be realized. With regard to the first, employers are exhibiting a new-found enthusiasm for executing written contracts,

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349 2008 District A Interview, supra note Error! Bookmark not defined..

350 See, e.g. LEE, supra note Error! Bookmark not defined.; KEVIN J. O’BRIEN & LIANJIANG LI, RIGHTFUL RESISTANCE IN RURAL CHINA (2006).

351 See Wong, supra note 307. On official accommodation of worker demands, see Su & He, supra note Error! Bookmark not defined.

352 Indeed, central government attempts to enforce law often generate local resistance when not matched by local policy commitments. Ferris et al., supra note 49, at 596.
even illegally. This suggests that the incentives created by the Labor Contract Law—the threat of claims for double wages and implied open-ended contracts—are having an impact.\textsuperscript{353} It also indicates that the grassroots mobilization of workers presents a real enforcement risk to employers. Employers only face these consequences if workers prevail in formal legal channels or can effectively pressure employers to grant their demands. "Strategic" maneuvering is only necessary if such efforts will likely succeed.

Indeed, the Labor Arbitration Law and the other 2007 legislation have clearly generated high expectations among workers, raised awareness of legal rights, and sparked any upsurge in labor arbitration and litigation. Higher demands from the workforce and a higher risk of labor litigation means that employers in south China and major metropolitan areas are likely to face higher aggregate costs to defend and settle or litigate such claims.

Yet whether private enforcement will have the expected deterrent impact on employers who historically have flouted the labor laws remains an open question. Without fundamental changes to prevent employer capture of local authorities, strengthen the independence of local LDACs and courts, eliminate corruption, and

\begin{footnote}
\textsuperscript{353} The true cost of noncompliance depends on the perceived effectiveness of labor litigation. Although workers can report to labor authorities to get leverage against employers, inspectors will refer claims for compensation to the LDAC and assess no penalty if a contract is signed. Thus, the risk of labor bureau enforcement under the new law is the same even though some areas are imposing tougher fines on resistant employers. 2009 District B Interview, \textit{supra} note 57. Further research on employer motivations is needed to confirm whether employers are most influenced by potential damages imposed by the LDAC or whether local government contract execution enforcement campaigns (or other factors) are more salient; similar campaigns had little effect on employer practices in the wake of the Labor Law.
\end{footnote}
enforce arbitral awards and judgments, a rise in labor litigation will have only a limited deterrent effect.\textsuperscript{354}

Moreover, in the past, mobilizing workers to claim legal rights without resolution of fundamental institutional and practical constraints has led to disillusionment with law and legal process and driven workers to the streets.\textsuperscript{355} With LDACs and the courts hard-pressed to respond to the demands generated by the passage of the new labor laws, their institutional legitimacy may well be undermined, and law reform may actually fuel new heights of social unrest. Local governments in south China are already well aware of these risks.\textsuperscript{356} In time, this pressure may provide the political motivation for local officials to implement the new laws more effectively before conflict erupts. At present, however, the success of the state's efforts to reduce labor conflict by further opening the doors of the LDACs and the courts remains uncertain. Indeed, this study also provides other indications that the more fundamental objectives of the new legislation -- protecting worker rights and promoting "harmonious and stable" labor relations -- that are essential to preventing labor unrest may prove difficult to attain. Based on the survey results, a significant shift toward longer-term contractual relationships has not yet occurred. In many cases compliance with the letter but not the spirit of the written contract obligation has confounded the Labor Contract Law's goal of making explicit the rights and interests of the

\textsuperscript{354} Telling, when asked whether his company was concerned about the prospect of more employee litigation under the new laws, one lawyer for a Taiwanese-owned employer in Dongguan responded, “No. . . We can just bribe [arbitrators or judges].” Interview, Bloomington, Indiana, Dec. 4, 2008.

\textsuperscript{355} See Gallagher, supra note 103; LEE, supra note Error! Bookmark not defined.

\textsuperscript{356} See generally Su & He, supra note Error! Bookmark not defined.
contracting parties. Nor is the exit of employers unable or unwilling to shoulder higher compliance costs likely to advance these goals, since it simply shifts the burden of noncompliance to other regions or countries. The untimely onset of the global financial crisis has only underscored the limits of legal mechanisms as a source of social order.

IV. RECOMMENDATIONS AND CONCLUSION

Peter Schuck has observed that “law’s greatest limitation is its inability to effectively shape behavior driven by diverse and dynamic social conditions. . . . Its efforts to regulate markets are notoriously reactive . . . law is always several steps behind markets, desperately trying to catch up and never quite succeeding.” Law, he writes, has proven particularly weak in the face of “strongly motivated and strategically fluid behaviors.”

Although Schuck’s critique was directed at the role of law in the United States (he cites evasive tax planning as his case in point), it resonates with equal strength in China and no less in the area of labor law.

Based on the preliminary evidence presented in this Article, the regulatory reforms introduced under China’s recent labor legislation have already brought about no small improvement in the availability and force of labor litigation. They have also motivated employers, even those least inclined to do so, to pay heed to a fundamental legal obligation -- the written contract mandate. These results are positive indications of implementation success at an initial level.

However, the findings here point equally to the inability of law to predict and foreclose new patterns of noncompliance, or to produce broader changes in employment practices in the near term. Indeed, the reality of written contract

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357 See LCL, supra note 3, at art. 1.

implementation among Shenzhen employers shows that law has achieved compliance in form, but not in substance. In fact, tighter regulations have had unintended consequences that limit workers’ ability to assert legal rights.

As Alford and Shen observed nearly a decade ago with regard to China’s environmental laws, it is therefore critical that an “environment of legality” be created at the local level in order for new regulatory measures to operate effectively.\(^\text{359}\)

Without it, China’s new labor legislation will have raised the compliance bar (and compliance costs) for law-abiding employers, but failed to rectify substandard practices among the firms most directly targeted by the new laws. Accordingly, I submit that truly "leveling the playing field" for all employers will require the combined initiative of local governments, workers, and civil society at the grassroots level, and that fundamental change in labor relations and workplace practices will depend upon a revitalization of China's trade unions as true representatives and advocates of worker interests.

1.  **The Need for Strong Public Enforcement**

While further regulatory reforms of private enforcement may spur a transformation in corporate practices, the legislation reviewed in this Article already represents significant progress in this direction. Despite persistent challenges, labor arbitration and litigation proceedings offer real remedies for many workers facing violations of legal rights, and the Labor Arbitration Law now resolves major procedural deficiencies of prior law. Future regulatory initiatives might better address enforcement problems by requiring defendants to post a bond for all or a portion of the claim while an arbitral award or judgment is pending. Other options to strengthen

private enforcement, such as allowing labor arbitrators to shift attorney fees to
defendants as damages and providing financial support to workers while they pursue
their claims, are already emerging in new local regulations.\textsuperscript{360}

In light of these positive developments, the more critical need is now for local labor bureaus to create a compliance-oriented business environment through stronger public enforcement. Introducing (and making public) stiffer fines for persistent violators and penalty floors is one tool. Illegal contracting practices could also be deemed a serious violation warranting an immediate penalty even if ultimately corrected. Further reforms might permit labor inspectors to order shutdowns or suspension of violator's business licenses for repeat offenses or if the conduct results in serious or widespread harm. Others could deny blacklisted violators tax and investment incentives or permit banks to deny credit to violators, a tool already used against violators of environmental laws. Shenzhen's new "harmonious labor" regulations may also provide useful models.

One thoughtful objection to a renewed deterrence approach is that aggressive, top-down enforcement has been shown to be counter-productive both where firms are well-intentioned, and where they are ambivalent about the legitimacy and

\textsuperscript{360} See Shenzhen jingji tequ hexie laodong guanxi cujin tiaolie [Regulations on the Promotion of Harmonious Labor Relations in the Shenzhen SEZ] (promulgated Sept. 25, 2008, effective Nov. 1, 2008), at art. 58 (allowing arbitrators or judges to shift attorney fees of up to RMB 5,000 to losing defendants) and art. 56 (authorizing workers in financial straits to apply for government aid to enable them to pursue labor litigation). China has a general no-fee-shifting rule on attorney fees, although court costs are borne by the losing party or jointly, if joint liability is found. See Measures on Case Handling Fees, supra note 104, at art. 29.
reasonableness of regulations.\textsuperscript{361} With strong market incentives to voluntarily comply with Chinese labor law, most large Western multinationals fall into the first category, while many firms competing on cost at the bottom of the global supply chain fall in the other. Tough measures can promote evasion and distrust toward regulators, and ultimately, lead to lower compliance and higher enforcement costs.\textsuperscript{362} However, concerns about overly aggressive enforcement do not appear to be justified in light of current regulatory practice and the procedural protections available to employers under Chinese law. Without strong, consistent regulatory enforcement, compliant firms will continue to operate at a competitive disadvantage while violators go unchecked. Furthermore, regulatory agencies are better positioned to address the root causes of labor disputes and socially destabilizing labor unrest than employees, particularly in view of the limits (or lack) of union representation for many. Litigation is a blunt tool that disaggregates conflict, increasing the administrative burden of arbitrators, courts, and employers. It is also less effective in dealing with the kinds of systemic labor violations common among south China's manufacturers, since it offers remedies only to litigants. In contrast, administrative officials can order a prospective change in underlying practices that affect an entire workforce. Tough administrative penalties send a message that reinforces private enforcement by affirming worker rights. A stronger regulatory environment can also enhance the effectiveness of codes of

\textsuperscript{361} Malloy, supra note 16, 522, 523. See also BARDACH & KAGAN, supra note 13, at 102-19; Kagan et al., supra note 15, at 74-77.

\textsuperscript{362} See sources cited at id.
conduct and other voluntary corporate social responsibility initiatives.\textsuperscript{363} For all these reasons, it offers the best hope of putting all employers in China on a level playing field with regard to labor practices.

Studies showing the success of multi-faceted and pragmatic enforcement strategies in dealing with wage arrears and pension defaults in Guangdong and elsewhere in China indicate that financial constraints and limited institutional capacity are not primary impediments to enforcement if local authorities have the political will to take action.\textsuperscript{364} Indeed, as discussed in Section III, the new legislation has already catalyzed tougher policy responses by provincial and local governments that may in time alter the status quo for employers in the Pearl River Delta. Greater cooperation in auditing and information sharing among local enforcement agencies, such as the labor bureau, workplace safety inspectorates, and authorities responsible for issuing business registrations, offer a further solution to these challenges.\textsuperscript{365} Local officials might also better partner with private auditors, consultants, corporate monitors, and


\textsuperscript{364} On wage reforms, see Cooney, supra note 76. On pensions, see Frazier, supra note 82, at 108-30.

\textsuperscript{365} Labor supervision is explicitly a matter for agency coordination and mutual reporting under the Labor Law and the LCL, and labor inspections and health and safety audits will necessarily target the same employers. See LCL, supra note 3, at art. 76; Labor Law, supra note 3, at art. 87. However, labor inspectors interviewed in this study engaged in only limited joint enforcement efforts and some reported having no direct contact with other agencies. Interviews, district A and district B labor inspectors, Guangzhou, May 22, 2008, Jan. 2009; interview, labor inspector, Jilin, Guangxi, Jan. 10, 2009.
labor advocacy NGOs to build on existing monitoring, education and advocacy initiatives. Allowing greater space for independent civil society organizations to operate could promote true partnership in furtherance of these common goals.

2. The Need for Integrated Cooperative Strategies

Even if stronger deterrent strategies are introduced, existing cooperative administrative enforcement approaches that are flexible and focused on education and compliance provide an important complement. Publication of enforcement actions is one technique already being used by local authorities which can deter violators as well as serve an educational function. Regulatory strategies to reduce the compliance burden for small employers and provide additional incentives for self-regulation are also needed, since the costs of compliance and the lack of effective internal compliance mechanisms can impair the capacity of even well-intentioned firms to follow the law. \(^{366}\) Although the APL already mandates penalty waivers if an employer remedies a violation, small and medium-sized employers may benefit from explicit rules providing clear grace periods and penalty reductions for compliance. Such programs could easily build on existing compliance initiatives. For example, Guangdong's current merit program, described in Section I, currently rewards firms largely based on compliance outcomes (i.e. implements annual wage increases, has no major labor crisis, etc.). This program could be expanded to include a voluntary compliance certification program under which participating firms would adopt compliance plans, internal management systems, and audit procedures meeting

\(^{366}\) Internal barriers can be significant for larger employers as well. See Malloy, supra note 16 (describing managerial or “systems-based” obstacles that can defeat internal compliance routines in complex firms); CHRISTOPHER STONE, WHERE THE LAW ENDS 233-36 (1975) (discussing organizational causes of firm violations).
agency criteria. Participants would receive preferential regulatory treatment, such as tax incentives, reduced filing obligations, preferred designations in public procurement bids, and/or protection from criminal liability.\textsuperscript{367}

Ideally, local governments would allow compliance with recognized certification systems, such as SA8000 and China's homegrown version for the textile industry, CSC9000T, to qualify under the merit program. This would reduce duplication and reward law-abiding employers. Local officials could also partner with independent certification agencies to offer technical assistance to small employers who wished to qualify, thus lowering the cost burden of establishing a compliance system. Firms would be required to recertify periodically, and, as in the current program, could lose their certification if they experienced a high incidence of labor disputes, industrial accidents, or other serious violations. Adopting such programs at the provincial level would lessen the risk of co-optation by local business interests, avoid the proliferation of local programs with competing requirements, and offer the maximum benefits to participating firms regardless of their place of operation within the province.

3. \textit{The Importance of Unions}

Clearly, multiple, mutually reinforcing implementation strategies are needed if a broader culture of compliance is to prevail in south China’s manufacturing centers. However, ensuring effective worker representation is foundational to the success of these efforts. The evidence of illegal contracting practices presented in Section III highlights most clearly the importance of collective bargaining and advocacy before a

\footnote{For a survey of such programs in the U.S. and their rationale, see SIGLER & MURPHY, \textit{supra} note 13, at 144-54; INTERACTIVE COMPLIANCE, \textit{supra} note 22; Malloy, \textit{supra note} 16, at 512-20 and nn. 181-82. One example is the EPA National Performance Track, http://www.epa.gov/perftrac/ (last visited Jan. 18, 2009).}
new (or renewed) employment relationship formally begins. Although labor bureau authorities can be asked to intervene, such practices can only be prevented if workers are organized to confront management in the first instance. Only strong worker representation during the contracting process can keep the contract from being wielded as a shield (or sword) of management in a labor arbitration or court proceeding.

Indeed, the flood of labor disputes unleashed by the Labor Arbitration Law makes effective unions or other worker representatives even more critical for workers negotiating or pursuing claims once a dispute arises. Although new patterns of Chinese trade unionism are still evolving, the history of organized labor in Korea, Japan, and Taiwan shows that independent and active unions need not raise the specter of adversarial labor relations, and indeed may result in greater worker commitment to the well-being of their firm.\textsuperscript{368} Moreover, the establishment of unions or other internal mechanisms that give employees voice at the workplace encourages an engaged workforce, which can enhance the effectiveness of corporate codes of conduct.\textsuperscript{369}

While recent campaigns have expanded the rolls of union members, whether China’s unions will seize the opportunity afforded by the new legislation to play a stronger advocacy role and engage in true collective bargaining remains to be seen. Although the state is unlikely to loosen limits on collective labor litigation, permit independent union organizing, or disengage the official union from Party leadership, there are

\textsuperscript{368} R. Blanpain, ed. \textit{THE PROCESS OF INDUSTRIALIZATION AND THE ROLE OF LABOUR LAW IN ASIAN COUNTRIES} 6-7 (1996) (characterizing union-management relations in these countries as decentralized and cooperative).

\textsuperscript{369} See Locke et al., \textit{supra} note 363; Frenkel, \textit{supra} note 310.
some positive developments. Recent guidelines issued by the ACFTU in August, 2008 attempt to introduce a separation between management and senior union leadership that, if followed, represent a significant step in equipping China's unions to serve as a better advocate for worker interests.\footnote{370} Recent studies find signs of an identity evolution among some Chinese unions and strong local support among top leaders in Guangdong and elsewhere for true collective bargaining.\footnote{371} Reports on the experience of Wal-Mart's unions in China provides further evidence of the high expectations of workers and their willingness to "take ownership" of new union structures to overcome employer "capture" of local officials (even local union branches).\footnote{372} Given the historical role of China's unions, these changes are already significant even if they may be slowed by the changing economic context.\footnote{373}

4. \textit{Conclusion: The Derivative Power of Law}

It is perhaps too soon to know if a deeper transformation of "business as usual" will occur in the coming years, and the broader social and economic context in which law operates may play a significant role. If local development strategies, particularly in south China, continue to shift toward higher value-added production, some of the proposals outlined above will be more likely to take root, and employers may themselves become more amenable to socially responsible business practices and

\footnote{370}{Trial Measures for Election of Enterprise Labor Union Chairman (issued by the ACFTU, Aug. 1, 2008).}

\footnote{371}{See China Labour Unrest, \textit{supra} note 132; Stephen Chen, \textit{Union set to set up defence of labour rights}, SCMP, Oct. 20, 2008.}


\footnote{373}{See Tom Mitchell, \textit{Daunting Departure}, \textit{FIN} TIMES (online), Jan. 8, 2008 (reporting economic conditions stalling collective bargaining initiatives).}
participatory labor relations. The impact of macro-economic changes, such as the
global economic downturn and the exodus of workers and manufacturers from south
China, are also unknown. The findings and recommendations presented here are
therefore necessarily preliminary.

Future research is needed to examine implementation of the new legislation in the
state sector and in regions beyond Guangdong, to identify how new trends in
collective bargaining and trade unionism are shaping workplace practices, and to
assess empirically the relative force of private and public enforcement mechanisms
and market conditions in shaping employer compliance. Further study on the
application and interpretation of the laws by labor arbitrators and the courts is also
needed as case experience develops.

Despite the limits of law, the early implementation of China's labor law reforms
provides an example of law's power to shape corporate practice and influence local
policy in China, and in an area with significant ramifications for its economic and
social welfare agendas. However, this power is in fact derivative. The key
innovations of the new laws have force primarily through the initiative of employee
litigants. Thus, the true strength of the new laws lies in their capacity to affirm,
shape, and mobilize the demands and expectations of China's workers. Grassroots
labor activism, expressed through formal legal process and beyond, can in turn bring
pressure to bear on employers and on the local state as well. (Indeed, workers'
willingness to lay claim to labor rights in the face of local authorities' ambivalence
and employers' resistance arguably motivated many of the current labor law reforms

374 See CHRISTOPHER D. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE
BEHAVIOR 38-39 (1975) (observing that at later stages of corporate development, firms are likely to
become more social-oriented rather than entirely profit-oriented).
themselves.) As I have argued here, public enforcement strategies may be best suited to promoting a "culture of compliance," and private and public enforcement mechanisms will be most effective when they complement and reinforce each other. But with stronger support from local authorities, the possibility of broader, active union representation, and expanded avenues to challenge noncompliance, the future of labor relations and business culture in "the factory of the world" are now even more likely to be transformed from the bottom up.