

Cambridge University Press
978-1-107-40265-2 - Understanding Labor and Employment Law in China
Ronald C. Brown
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PART I

UNDERSTANDING CHINA'S REGULATION OF THE WORKPLACE

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Introduction

While settling into my seat at 35,000 feet as the second leg of my flight left Japan for China, a passenger next to me asked if this was my first trip there. I replied it wasn't and that I had been involved in China's legal developments over the years. He said he was going there to explore investing in China, but he had heard that the labor laws had come to undercut the advantages of operating in China and asked if that were true. That, I replied, depends on how well you understand China, its Chinese characteristics, and the variables affecting its workers. Some workplaces are sterile laboratories with highly trained and well-paid technicians, and others can be grimy, dangerous factories that use migrant labor and have no concern for labor standards: the significance of the labor laws depends on the size of these sectors in a country with more than 800,000,000 workers! Though I may have detected a faint glazing in his eyes, he said he needed to understand how the workplace is regulated and urged me to continue and to provide him with some insights and guidelines into China's new legal environment and approaches in regulating the workplace. So, I began.

Balancing Economic Development and Labor Reforms

The story of how labor and employment issues are dealt with on an everyday basis begins with an understanding of China and insight into its system of legal regulation. The Chinese workplace is a reflection of the diverse impacts of phenomenal economic development, tightening regulations, and an evolving safety net in the workplace. It is set in urban and rural areas; in manufacturing, construction, and heavy and light industries; and in white-collar jobs. In many sectors, there is a more stable and slowly evolving skilled workforce that has come to expect and demand better labor standards and protections. Add to

this the ebb and flow of more than 150 million migrant workers into the urban areas and the absence of traditions of labor laws and law enforcement, and the image of China's workplaces comes into clearer focus. It is the story of how those workplaces accommodate to China's labor and employment laws and make them work.

Relatively low wages and labor standards for workers in China are usually initially credited for its continuing economic development and its sustained annual growth in the double digits. In recent years, with the transition to a market economy and privatization, these same low labor standards have evoked international and domestic pressures; in response, China's leaders have introduced labor reforms. These reforms attempt to meet worker needs while at the same time maintaining economic development and economic competitiveness. Since the issuance of the Labor Law in 1994, there has been a steady growth in labor legislation seeking to find that balance, provide a worker safety net, promote social and political stability, and address the often disparate effects of the economic miracle.

Labor reforms, like economic reforms, have had an uneven impact on China's 800 million workers. Rural workers too often fall outside the protection of the labor laws; and better wages and working conditions are more likely available in the urban areas that have benefitted from economic development, particularly the eastern coastal regions and cities. This concentration of workplace opportunities has worked like a magnet to attract the migration of nearly 150 million rural workers to urban areas. These migrant laborers are concentrated in manufacturing and construction and are often the victims of unpaid wages and substandard working conditions.

The great diversity of China's workplaces continues to hinder the focused application and enforcement of the newly emerging labor laws. State-owned enterprises (SOEs), former SOEs, private enterprises, foreign-invested enterprises (FIEs), and large and small enterprises all present varied challenges to local governments seeking to regulate the workplace. Employers are also mindful that they risk the loss of competitiveness if they comply with labor standards while their competitors do not.

1. Use of Laws to Regulate the Workplace

China's new legal system was developed since the *Four Modernizations* in the late 1970s. Centuries of traditions and China's more recent socialist and civil law heritage have blended together to create its present legal system, laden with Chinese characteristics. Although legislatures and government agencies serve as sources of law, as in the West, in China other legal institutions, such

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as the Supreme People's Court that issues interpretations guiding the courts in their application of the laws, serve that purpose as well.

China's recent explosion of new labor laws, implemented in 2008, ranging from the Labor Contract Law (LCL), the Employment Promotion Law (EPL), and the Labor Dispute Mediation and Arbitration Law (LMA), as well as laws dealing with related topics of mergers and acquisitions and bankruptcy, must be understood in the context of China's burgeoning economy and concern for social stability. Chinese legal regulations, based on legal traditions in civil law and of course with "Chinese characteristics," may appear somewhat similar to Western laws. However, under China's political-legal system, the lawmaking organs and the enforcement mechanisms often function differently from those in the West. The National People's Congress (NPC) and its Standing Committee enact legislation, the State Council issues regulations, and the Ministries formulate rules; their local government counterparts also issue laws and regulations. The legal system operates under a "rule-by-law" approach (with legislative supremacy), and the enforcement processes are distributed differently from Western law, involving numerous layers of government and legal institutions.¹

How Chinese laws operate is surprising to many in the West. The relationship between central and local governments and their relative authority in legislation and enforcement form a practical reality that must be dealt with. Although China is a former socialist state, it generally has a decentralized government. Central government laws (such as the 1994 Labor Law) are often merely general guidelines that thereafter depend on consistent "local implementing regulations," legislated and enforced by appropriate local authorities. For that reason, it has taken some time to provide meaningful labor protections to its workers. Labor disputes are channeled through familiar routes of alternative dispute resolution machinery, though they play out somewhat differently than in the West.

Labor laws are generally administered by the various divisions of the local labor bureaus, which are under the central ministry but, in large part, are horizontally (locally) financed and staffed. Likewise, enforcement is generally handled at the local level. In recent years there has been a growth in the number of specialized administrative agencies that, with their local labor bureau counterparts, administer and supervise specific labor law programs. One of the constant criticisms of China's labor laws is the lack of consistent enforcement by the government. However, labor disputes in China are resolved mostly by individual workers through local governmental mediation

¹ See RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002).

and arbitration. The number of these cases has risen dramatically every year as new laws are passed and an increased awareness of labor rights takes hold in the workforce. In the heavy manufacturing area of Guangzhou in 2008 there was a more than 200 percent increase in the number of labor disputes after the new Labor Contract Law took effect.² Courts are available to enforce or review many of these labor arbitrations. Recently, the courts have been authorized to directly determine certain wage claims without the prior requirement of undergoing the labor arbitration process.

2. Disparate Economic Impacts in the Workplace

China's economic development began in earnest after Deng Xiaoping began his "Four Modernizations" in 1979. Since that time many economic and legal reforms have taken place. This economic development has been uneven, causing regional and urban/rural disparities that, in turn, have brought about an influx of millions of rural workers into the cities for better work opportunities, though not necessarily better treatment or working conditions. Many of the significant labor and employment laws are applied only in the urban areas, with some additional laws applying to certain aspects of employment in the rural areas.

With the transition from the "iron rice bowl system" to labor contracts, China has moved from a socialist planned economy using SOEs to a socialist market economy.³ Privatization, layoffs, and new management strategies emphasizing profits and competition have produced both a "wage consciousness" and feelings of unfairness among workers because of regional wage disparities, occupational wage gaps, unequal job opportunities, and sagging labor and security safety nets.

Economic growth has produced a 100 to 150 million person "floating population" (predominantly underpaid migrant workers) seeking to earn their share of the pie. It also has produced national scandals in which employers refuse to pay the wages of migrant workers, presently an underclass in China. Coal miners are dying by the thousands each year because of unsafe working conditions. Consequently, the issue of better enforcement of the labor protections provided in the labor laws is part of the labor reform agenda.

China is at a crossroads. On the one hand, it has the necessary resources to make its labor law system work much better than it does. On the other

² Labor arbitration cases soaring, english.people.com.cn/90001/6551417.html.

³ For a discussion of workers in SOEs, see WILLIAM HURST, THE CHINESE WORKER AFTER SOCIALISM (2009).

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hand, labor relations have seemed to come second to the forces of economic development, and China seems unsure whether, if it makes the choice to better enforce its labor laws, it will be placed at a competitive disadvantage internationally. Employers who might otherwise follow the labor laws are in a quandary; why spend the money to follow these laws if they are not enforced?⁴

To understand the nuances of current employment relations in China, one must put them into the context of China's fast-moving economic transition. When the scope of economic transition broadened from policies establishing special economic development zones into policies transforming all of China's economy from a socialist planned economy to a socialist market economy, social and economic changes were both expected and indeed occurred. With a market economy came competition, the need for more flexible management, and the quest for profits – which required cutting costs. For China's labor-intensive industrial economy, this usually meant keeping labor costs low. Privatization and competitive measures brought layoffs (especially in the already overstaffed SOEs) and kept wages and benefits to bare minimums. With individual control waning, conditions fostered efforts to achieve workers' economic improvement through collective negotiations.

Wage concerns of workers came to have increasing importance as widening gaps occurred in the annual growth of real wages versus GNP, with great numbers of workers feeling left out. China's impressive economic growth in GNP for more than two decades was not matched by the real wage growth of workers, which has roughly kept pace with rates of inflation.⁵ The lawful minimum wage in China varies by locales according to local economic factors, reflecting the national mandate under China's Regulations on Minimum Wage.⁶ According to those regulations, China seeks to accommodate an international labor standard that sets local minimum wages within the range of

⁴ Simon Clark, Chang-Hee Lee and Qi Li, *Collective Consultation and Industrial Relations in China*, British Journal of Industrial Relations, June 2004, at 248.

⁵ The comparison of ILO official statistics (ILO LABORSTA database) to the rate of inflation shows that there was at least a relative wage decline among Chinese manufacturing workers. See Anita Chan, *A Race to the Bottom*, 46 CHINA PERSPECTIVES 41, 42 (2003). According to the ILO LABORSTA database, in 1993 the average wage at all economic enterprises was about 281 yuan/month and in 2006 it was 1750 yuan/month. Not surprisingly, the lowest average in 2006, 786 yuan/month, was in the agricultural services area, whereas the highest was in the financial sector (3273 yuan/month). In manufacturing, the average was 1497 yuan/month. See ILO LABORSTA, *Table 5A Wages, by Economic Activity*, available at <http://laborsta.ilo.org/> (last visited Aug. 2, 2008).

⁶ Zui di gong zi gui ding [Regulations on Minimum Wage] art. 6 (promulgated by Ministry of Labor and Social Security, Jan 20, 2004, effective Mar. 1, 2004), http://www.chinacourt.org/flwk/show1.php?file_id=91496 (last visited Aug. 2, 2008) [hereinafter Reg. Minim. Wage].

40 percent to 60 percent of the average wage standard in the locality.⁷ One source states that in 1993 China's average minimum wages met or exceeded the 40 percent minimum, but by the late 1990s there had been a steady and consistent erosion below that minimum.⁸ (The old interim measure to regulate FIE wages was abolished in 2004.)

Some Chinese citizens were able to realize Deng Xiaoping's famous slogan, "to get rich is glorious," much faster than others, and with economic reforms came great wage diversity between regions, between urban and rural areas, and between management and labor. In 2007, average income ranged from 3,432 yuan per month in Shanghai to 1,601 yuan per month in Chongqing.⁹ Minimum wage variations between local governments ranged from 850 yuan per month in Nanjing to 730 yuan per month in Beijing.¹⁰

Observations by former World Bank President James Wolfensohn about China's wage gaps have raised alarms; he stated that their likely consequence is social unrest.¹¹ According to the World Bank, China in the past twenty years has achieved great progress in reducing the number of people in poverty (insufficient food and clothing) from 200 million people to 29 million, but

⁷ Reg. Minim. Wage, Attachment Section 2. Calculations Methods of Minimum Wage Standard. The 40%–60% range is the international standard used when calculating the minimum wage.

⁸ Chan, *supra*, note 4, at 42. In Beijing in 2000 the average wage was reported at 1,362.30 yuan/month and the minimum wage at 412 yuan/month. See Beijing Labor and Social Security Bureau, Guan yu tiao zheng 2000 nian Beijingshi zui di gong zi biao zhun de tong zhi [Notice on 2000 Beijing Minimum Wage Guideline] (June 27, 2000), http://www.bjld.gov.cn/tszl/zdshbz/t20010907_2142.htm (last visited Aug. 2, 2008). Beijing's minimum wage in July, 2008 was reported at 800 yuan/month. See Beijing Labor and Social Security Bureau, Guan yu tiao zheng 2008 nian Beijingshi zui di gong zi biao zhun de tong zhi [Notice on 2008 Beijing Minimum Wage Guideline] (June 30, 2008), http://www.bjld.gov.cn/zxzx/zxzc/t20080701_402248451.htm (last visited Aug. 2, 2008). The exact average wage of workers earning in China is difficult to ascertain, and it varies by political districts. According to a 2004 survey conducted by one research institute under the Development Research Center of the State Council (DRCSC), 70.8% of Chinese urban employees earned 800 to 2,500 yuan (US\$96.74 to US\$302.3) monthly. See *Chinese Urban Employees Earn More*, CHINA DAILY, May 31, 2004, http://www.chinadaily.com.cn/english/doc/2004-05/31/content_335250.htm (last visted Aug. 2, 2008).

⁹ 2007 CHINA STATISTICAL YEARBOOK, *Table 5-23*.

¹⁰ See Nanjing Labor and Social Security Bureau, Guan yu tiao zheng 2007 nian Nanjingshi zui di gong zi biao zhun de tong zhi [Notice on 2007 Nanjing Minimum Wage Guideline] (Oct. 10, 2007), http://www.njlss.gov.cn/pub/ldbz/xgk/wjxx/hgz/200710/t20071011_9925.htm; Beijing Labor and Social Security Bureau, Guan yu tiao zheng 2007 nian Beijingshi zui di gong zi biao zhun de tong zhi [Notice on 2007 Beijing Minimum Wage Guideline] (June 28, 2007), <http://www.bjld.gov.cn/LDJAPP/search/fgdetail.jsp?no=10766> (last visited Aug. 2, 2008).

¹¹ David Murphy, *The Dangers of Too Much Success*, FAR EASTERN ECONOMIC REVIEW, June 10, 2004, at 29.

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Wolfensohn pointed out that China still has 400 million people living on less than US\$2/day. Incomes are rising, but the rate of increase in the urban areas is two times that in rural areas. President Wolfensohn estimated that the wage gap in ten years would be one of the highest in the world, and he noted that in 2003 ten million citizens engaged in protests, not only regarding labor issues (such as layoffs and wages) but also regarding rising rural taxes and forced relocation in urban areas.¹²

Another wage gap exists between workers and managers. A recent survey by the State Council found that 61 percent of managers of Chinese enterprises were paid salaries that were three to fifteen times higher than those of employees, whereas 21 percent were paid salaries that were fifteen to fifty times higher and 15 percent of the managers at FIEs were paid wages that were fifty times more.¹³

A large number of low-wage workers are not even paid. A December 2003 government survey in China found that 72 percent of China's millions of migrant workers were owed back pay. The Construction Ministry estimated that workers in 2003 were owed more than \$12 billion in wages by their employers even though the law requires that wages be paid at least monthly; the unpaid debts to migrants were estimated to be one-third of the value of production in construction and real estate industries.¹⁴ Those involved say most of the workers do not have formal labor contracts, as the law requires. The Beijing municipal government in the first six months of 2004 helped 110,000 migrant workers recover 290 million yuan (US\$35 million) of unpaid wages, resulting in the first decline in labor disputes in Beijing since 2000.¹⁵

¹² *Id.* at 30. CCP's Outlook magazine reported that three million people staged 58,000 protests on labor issues across China in 2003. See also *Labor Activists Detect Change and China Repression*, REUTERS NEWS, Jan. 13, 2005, <http://www.china-labour.org.hk/en/node/4090> (last visited Aug. 2, 2008).

¹³ *Lao zong yuan gong shou ru cha ju zui da chao wu shi bei* [Managers Earns Fifty Times More], GUANGZHOU DAILY, (Apr. 25, 2004), A2 (citing Guo wu yuan fa zhan yan jiu guan li diao cha bao gao [Human Resource Report] (2004). News articles available at http://gzdaily.dayoo.com/gb/content/2004-04/25/content_1517025.htm (last visited Aug. 2, 2007). Comparatively, a 2003 U.S. report revealed that in private industry, the relative pay for white-collar occupations was 118; compared to 84 and 52 for blue-collar and service employees, respectively. Within the white-collar group, wages also varied considerably, with the relative pay of executive, administrative, and managerial workers (182) far surpassing the relative pay of sales workers (84) and administrative support workers (79). John E. Buckley, Relative Pay Rates among Major Industry and Occupational Groups, March 2003, <http://www.bls.gov/opub/cwc/cm20030318arc01p1.htm>. See also, Robert Z. Lawrence, Blue-Collar Blues: Is Trade to Blame for Rising U.S. Income Inequality? (2008).

¹⁴ Anthony Kuhn, *A High Price to Pay for a Job*, FAR E. ECON. REV., Jan. 22, 2004, at 30-32.

¹⁵ Li Jing, Beijing Government Urges Employers to Pay Up, CHINA DAILY, Sep. 14, 2004, at 3, http://www.chinadaily.com.cn/english/doc/2004-09/14/content_374270.htm (last visited

When adding up some of the negative side effects of economic reforms – slow-rising wages, widening wage gaps, and unpaid wages of migrant workers (who make up the “floating population” of 150 million Chinese citizens) – with each affected employee seeking to find his or her share of the new economic growth, one can understand why a top priority of the central government is to put a social security safety net in place with accompanying labor law protections. This effort brought into existence the 1994 Labor Law, which broadly outlined labor standards requirements. By 2004, many of the standards had been more formally enacted into specific laws and regulations, including those for minimum wage and hours. Notwithstanding the progress in legislation, employees have continued to demand that the laws be made to work, and some collective protests have demanded improved benefits.

Beginning in late 2008, after passage of the new labor laws and the onset of the global economic downturn, two effects were felt. First, some employers felt the burdens of the new laws, especially the *new Labor Contract Law*, impacted too heavily, causing some closures; second, the impact of the *global downturn*, with its declining demand for exports, caused layoffs and bankruptcies. Some employers evaded the requirements of the new labor reforms, which in turn caused many more labor arbitrations (now easier with new Labor Mediation and Arbitration Law) and even more worker protests.¹⁶

Meanwhile, declining global demand for China’s textile and apparel products affects the employers of the 20 million workers in that industry, which in 2008 accounted for more than one-half of its \$300 billion trade surplus¹⁷; wage

Aug. 2, 2008). See also Guo yu ji shu gong ren duan que de diao yan bao gao [Analyzing Labor Shortage and Skilled Labor Shortage], http://www.fsa.gov.cn/web_db/sdzg2005/map/CGL/glbq-082.htm.

¹⁶ Sky Canaves, Closures Strain China’s Labor Laws, WALL ST. J., Jan. 16, 2009, http://online.wsj.com/article/SB1232150435018192065.html?mod=todays_us_page_one. Joanna Law, Employers, prepare for trouble, China Law & Practice, March, 2009, at 9-10, www.chinalawandpractice.com. Andrew Batson, China’s Falling Exports Signal Shift, March 12, 2009, <http://online.wsj.com/article/SB123674128193891921.html>. On November 19, 2008, the government, attempted to counter the residual ill-effects on workers’ wages and benefits caused by foreign employers who closed their factories and fled, by issuing *Working Guidelines on Cross-border Pursuit of Liability Initiation of Legal Action by Relevant Interested Parties in connection with Abnormal Withdrawal from China of Foreign Investors* (hereinafter, Working Guidelines) (Ministries of Commerce, Foreign Affairs, Public Security, and Justice); and see Susan Finder, Chasing the vanished foreign investor, China Law & Practice, February, 2009, at 20-21, www.chinalawandpractice.com.

¹⁷ David Barboza, *Textile capital Shaoxing hobbled by a downturn gone global*, New York Times, February 28, 2009, www.nytimes.com/2009/02/28/business/worldbusiness/28textile.html?n=Top/Reference/Times%20Topics/People/B/Barboza,%20David.