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It's Not What Is on Paper, but What Is in Practice: China's New Labor Contract Law and the Enforcement Problem

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

INTRODUCTION

After decades of implementing a lifetime employment system, China has decided to shift gear and rely on private contracts to regulate domestic labor relations. The new Labor Contract Law, which officially took effect on January 1, 2008, memorializes this change. Proponents of the new law lauded it as “the most concerted effort to protect workers’ rights.” Yet many provisions in the law touched the nerves of quite a few domestic and foreign businesses in China and are criticized as overly generous to labor rights.
Around the same time the new law passed the national legislature, a
slough of media reports uncovered a labor scandal that victimized over
one thousand rural workers in China. A total of 1,340 people, including
minors and the mentally incompetent, had been kidnapped to work in
small brick kilns in central China as forced labor. Owners of the brick
kilns used fierce dogs and thugs to prevent the slave labor from escaping.
The laborers worked without receiving any pay and some were beaten to
death for working too slowly.

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

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

when workers were rarely fired and lifetime employment was almost guaranteed. See infra note 37.
com.cn/china/2007-08/13/content_6024799.htm.
alertnet.org/thenews/newsdesk/PEK225293.htm.
lead to better enforcement of labor law than under the current system and are a politically viable option.

I. BACKGROUND AND HIGHLIGHTS OF THE NEW LAW

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

In the meantime, China’s economic reform gave rise to booming development of the private sector, which consists mostly of foreign-invested enterprises (“FIEs”) and domestic private enterprises. The private sector hired rural migrant workers at a lower cost, and according
to official statistics, approximately 120 million rural workers migrated to and are currently working in cities.\textsuperscript{14}

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

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

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

\textit{A. Requirement of a Written Labor Contract}

The law requires the formation of a written labor contract at the commencement of a labor relationship\textsuperscript{19} or within one month thereafter.\textsuperscript{20}


\textsuperscript{15} Gallagher, supra note 9, at 13.


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

\textsuperscript{19} The Labor Contract Law provides that a labor relationship is established on the day the
In the event that an employer fails to sign a written contract within one year of the commencement of the labor relationship, the employer shall be deemed to have entered into a non-fixed-duration contract with the employee and must pay double the amount of the agreed upon wage.\textsuperscript{21}

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

\textbf{B. Termination of the Contract}

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

What is most troubling to employers is that the law renders the termination of a contract more expensive to the employer, regardless of...
whether it was terminated by the employer or employee, or whether it was terminated for just cause.28

C. Union Power

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

D. Notice and Record

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

E. Other Provisions

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

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

29. Id. art. 4.

30. Id.

31. Id. art. 7.

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

33. Id. art. 31.

34. Id. arts. 57–72.

35. Id. arts. 8–9.
The 1994 Labor Law already established a sufficient legal framework for protecting labor rights, which is comparable to those in Western developed countries. The 2007 Labor Contract Law favors labor rights even more. The law has many detractors who claim it will take China back to the “iron rice bowl” era. Whether the new law will really bring back the lifetime employment system and cause productivity to drop is yet to be seen. The one thing certain is that China’s notoriety for labor abuse should not be attributed to the way the law is written, but rather to how the law is enforced in practice.

II. THE CURRENT ENFORCEMENT REGIME

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

36. Halegua, supra note 4; Kahn & Barboza, supra note 18.
38. See Halegua, supra note 4; Cooney, supra note 17, at 1096 (observing that the challenge for dealing with labor abuses in China is securing compliance); New Labor Contract Law Changes China’s Employment Landscape, CHINA DAILY, Jan. 1, 2008, http://www.chinadaily.com.cn/china/2008-01/01/content_6362895.htm (suggesting that a varied intensity of law enforcement in regions could result in a difference in labor costs for businesses).
39. See Gallagher, supra note 9, at 24–25. Both SOEs and FIEs chose to make labor contracts informal and short-term (between one and two years), which means dismissals were arbitrary depending on the company’s economic health; some FIEs also set up long apprenticeships or probationary periods. See also Vai Ilo Lo, Labor and Employment in the People’s Republic of China: From a Nonmarket-Driven to a Market-Driven Economy, 6 INT’L & COMP. L. REV. 337, 377 n.267 (1995–1996) (stating that seventy to ninety percent of FIEs in major coastal economic cities did not sign employment contracts as of the time of the 1994 Labor Law). However, Mary Gallagher has pointed out that for skilled workers, or those for whom the employer offered training and educational benefits, both SOEs and FIEs tend to provide open-ended contracts. Gallagher, supra note 9, at 25.
40. See infra notes 54–82.
41. See infra notes 83–91.
42. See infra notes 92–112.
A. Voluntary Compliance by Employers

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

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

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

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

Anticipating higher labor costs after the adoption of the new law, many employers made a last-minute end run by terminating employees.

43. UNDUE INFLUENCE, supra note 4, at 8 (citing “Chinese government figures” without providing a source for the figures).
44. Halegua, supra note 4.
45. Id.
46. Id.
47. See Gallagher, supra note 9, at 31 (noting that European and American firms tend to adhere to labor regulations); Halegua, supra note 4. However, there are media reports that U.S. fast-food chains such as KFC, Pizza Hut, and McDonald’s pay only ¥4, or $0.52, per hour to entry-level employees by taking advantage of their part-time or student status. See China Probes Whether Workers Are Underpaid, CHINA DAILY, Mar. 29, 2007, http://www.chinadaily.com.cn/china/2007-03/29/content_839714.htm.
48. See Gallagher, supra note 9, at 24.
49. Id. at 24; Lo, supra note 39, at 377 n.267.
50. See supra note 21, arts. 24, 28.
with long service records and hiring new employees as replacements, \[52\] revising existing contracts of employment, \[53\] and terminating employees before rehiring them on new contracts. \[54\] These actions aim solely to postpone the impact of the new law on the bottom line.

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

**B. Enforcement by Individual Workers**

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

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


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

Even if a migrant worker is aware of the legal means of protecting his rights, the existing legal framework stacks many odds against him. Individual workers claiming infringement of labor rights must undergo arbitration before they can sue in court. However, there are some inherent problems with the labor arbitration system. First and foremost, arbitral awards are hard to enforce. Statistics show that winning rates

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

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

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

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

61. Id. at n.61.

62. Id. at 185.

63. Id. at 178.

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

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

Since many arbitration outcomes require an appeal to the court for enforcement, additional expenses inevitably accrue to the appealing


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

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

69. Id. at 1069.

70. Id.

71. Cooney, supra note 17, at 1069–70.


74. For information on the high appeal rate, see VIRGINIA HO, LABOR DISPUTE RESOLUTION IN CHINA: IMPLICATIONS FOR LABOR RIGHTS AND LEGAL REFORM 79 (2003).
party—in most cases, the workers. Court filing fees and travel expenses incurred in seeking legal representation could cost a migrant worker his life savings. Since lawyers worry about workers’ ability to pay for legal services, legal representation is hard to obtain. Also, given the typical amount of time spent on a labor case, the disputed amount in each individual case is usually too small to be profitable. Although some lawyers work on a contingency fee basis, they sometimes are unwilling to represent migrant workers because of cultural bias. Some lawyers even fear that migrant workers will not share the damage award with them as previously agreed.

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

C. Oversight by Administrative Authorities

Labor administration authorities affiliated with state and local governments have the legal obligation to supervise and inspect employers’ compliance with labor laws and regulations. The administrative


79. See id. at 179 (noting that migrants cannot pay for legal services provided by registered lawyers).

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

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

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

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

84. Laodong baozhang jiancha tiaoli [Regulation on Labor Security Supervision] (promulgated...
enforcement takes the form of “command and control” regulations.\textsuperscript{85} Under these regulations, labor administrations may impose different levels of sanction on employers that violate the law, ranging from issuing warnings and orders for correction to imposing fines.\textsuperscript{86} Again, the power of local administrations to oversee the enforcement of labor laws only looks good on paper; it has not happened in reality.

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

Second, the sanctions that labor authorities may impose are not sufficient to overcome employers’ incentives for noncompliance. Incentives for engaging in illegal employment practices and adopting low
labor standards are extremely strong among Chinese businesses as everyone tries to cut costs. However, the labor administrations’ sanctioning power is limited to imposing fines. That power is further weakened by the fact that judicial enforcement has to be constantly invoked to force employers to pay workers under administrative orders.

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

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

D. Legal Power of Trade Unions

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

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

90. Cooney, supra note 17, at 1063 (stating that noncompliance with law by some businesses creates substantial pressure on others that might otherwise choose to abide by the law).
91. See id. at 1063–64. Sean Cooney suggests that the limited sanction power available to labor administrations is an “unfortunate by-product” of administrative reforms aimed at preventing agencies from arbitrarily imposing punishments on individuals. Id. at 1064.
92. Id. at 1066 (citing Zhongguo falv nianjian [Law Yearbook of China] 45 (2003) and other sources) (stating that there are three thousand inspecting agencies and forty thousand labor inspectors in China, yet the number of business entities in China total thirty million).
93. Id. at 1072.
94. Gonghui fa [Trade Union Law] (adopted by the Nat’l People’s Cong., Apr. 3, 1992, amended by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2001, effective Oct. 27, 2001), art. 11, LAWINFOCHINA (last visited Dec. 31, 2008) (P.R.C.). The ACFTU is considered the largest labor organization in the world, with a membership of almost 170 million, more than 500,000 full-time officials, and more than 1.3 million “grassroots level” (enterprise-level) unions. All-China Fed’n of Trade Unions, A Brief Introduction to the All-China Federation of Trade Unions (Sept. 20, 2007), http://www.acftu.org.cn/template/10002/file.jsp?cid=63&aid=156. It has been suggested that in addition to political reasons, market conditions are not conducive to the cultivation of independent
western concept of trade unions, the ACFTU is a “quasi-governmental entity.”
95 As a matter of law, it is subordinate to both the state and the
Chinese Communist Party (“CCP”).
96 It partially relies on government
subsidies for funding. It has limited legal authority to protect labor
interests and seek concessions from the management.
97
More importantly, the law prohibits unions from organizing strikes.
99 Instead, the primary role of unions in China is to “prevent work
stoppages.”
100 Without the right to organize strikes, unions in China lack
the basic weapon to defend workers’ rights from arbitrary and abusive
management practices.

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

96. See *Trade Union Law*, supra note 94, art. 4 (stating that trade unions must “insist on the
leadership of the Chinese Communist Party.”); ACFTU Charter General Principles (2003),
(noting that trade unions are “important social pillars for the state political regime”).
97. *Trade Union Law*, supra note 94, art. 42 (naming the other sources of funding: membership
dues, two percent of all employees’ pre-tax wages, a portion of revenues submitted by state-owned
enterprises to local governments, and other miscellaneous revenues of the union).
98. The union may request that the management correct violations of labor standards, assist
employees in signing individual contracts, negotiate and sign collective contracts on behalf of member
employees, and seek arbitration or lawsuits if necessary to remedy the management’s violation of
terms in the collective contract. See *Trade Union Law*, supra note 94, arts. 19–20, 49. Before the
management may unilaterally terminate an individual labor contract, it must first notify the union and
if any objection is raised by the union, the management must study the union’s opinion but not
necessarily accept the opinion or change the termination decision. *Id.* art. 21. Additionally, unions
have obligations to support and assist an individual worker’s pursuit of legal rights at arbitration or
litigation. *Id.*; see *Labor Contract Law*, supra note 2, art. 78.
99. *Trade Union Law*, supra note 94, art. 25 (stating that when a strike or disruption to
production occurs, the trade union at the enterprise shall negotiate with the enterprise management and
assist the latter in reviving production and workplace order as quickly as possible). The right to strike
was removed from the 1982 Constitution and strikes have been considered illegal since. *See XIAN FA
art. 15 (1982) (P.R.C.) (“The state prohibits in accordance with the law any organization or individual
from disturbing the social-economic order.”). However, worker-initiated strikes still happen quite
often and sometimes on a large scale. There were eight thousand reported strikes in China in 2000 and
subsequently dozens of strikes involving as many as fifty thousand workers. St. Antoine, supra note 18, at 109.
100. Lawrence Cox, *Freedom of Religion in China: Religious, Economic and Social
Disenfranchisement for China’s Internal Migrant Workers*, 8 ASIAN-PAC. L. & POL’Y J. 370, 412
(2007).
101. The 2004 Jiti hetong guiding [Provisions on Collective Contracts] (promulgated by the
Ministry of Labor and Social Security, Jan. 20, 2004, effective May 1, 2004) LAWINFOCHINA (last
visited Dec. 31, 2008) (P.R.C.) provides details for the process of negotiating and signing collective
contracts, which include the selection of negotiating representatives, scope of negotiable subjects,
Collective contracts do not provide increased protection to workers because they are rarely enforced or renewed. What’s more, the bargaining process has the potential of being bureaucratized. The negotiation, formation, and performance of collective contracts are subject to the supervision of local government authorities. When a dispute arises in the bargaining process, either party may submit a written application to the local labor administrative authority and get it involved in resolving the dispute. With the local government interjecting itself into the negotiation process, the final collective contract becomes in effect “an agreement between the local party-state and the firm’s management.”

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

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

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

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

105. Gallagher, supra note 9, at 23.

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

107. Gallagher, supra note 9, at 23.
maintain workplace harmony.\textsuperscript{108} In reality, the union often plays the role of mediating disputes between the management and workers.\textsuperscript{109}

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

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

\begin{itemize}
\item \textsuperscript{108} The President of the ACFTU, Wang Zhaoguo, remarked on the heels of the promulgation of the Labor Contract Law that efforts to protect the legal rights of workers were required to “bring the role of the working class as the main force in promoting social harmony into full play.” \textit{Union Leader Calls for Protecting Workers’ Legal Rights, XINHUA NEWS AGENCY}, Jan. 18, 2008, http://news.xinhuanet.com/english/2008-01/18/content_7449418.htm.
\item \textsuperscript{109} \textit{See}, e.g., Gallagher, supra note 9, at 29–30 (stating that the trade union is “part of the total developmentalist machine” at China’s economic development zones as it serves as a mediator between foreign management and Chinese workers for purposes of creating harmony and consensus and that, in the event of a strike, the union acts in cooperation with the Public Security Bureau and the Labor Bureau to resume production as quickly as possible).
\item \textsuperscript{110} As a matter of fact, enterprise management often dominates unions. The management usually participates in the selection of union representatives and most union officials in FIEs and SOEs jointly serve in management positions. \textit{Id.} at 28, 32. \textit{See} Trade Union Law, supra note 94, art. 9 (prohibiting close relatives of enterprise managers from becoming candidates for union positions but imposing no such prohibition on management personnel themselves). Additionally, union officials are paid wages and benefits by enterprise management. \textit{Id.} art. 41.
\item \textsuperscript{111} \textit{See} Brown, supra note 95, at 57. There are indications that the unionization rate at FIEs may go up quickly in the near future. \textit{See} Gallagher, supra note 9, at 29, 31 (suggesting that FIEs, especially Japanese firms, support the unionization of employees because of cultural barriers in directly communicating to employees and for purposes of establishing a good public image; however, Taiwanese companies tend to suppress unionization because of mistrust of the Communist Party); Bugaighis, supra note 106, at 405 (stating that Wal-Mart, the biggest anti-union company in the United States, agreed to allow unionization among its employees in China after resisting infiltration of the ACFTU for two years). The goal is to unionize eighty percent of FIEs by the end of 2007. \textit{Id.} at 406. In August 2006, twenty-six percent of FIEs were unionized. \textit{Id.} at 427. There was even a proposal by the ACFTU President, Wang Zhaoguo, to make foreign enterprise unionization mandatory. \textit{Id.} at 427–28. On the other hand, it is unknown whether the unionization rate at domestic private enterprises will go up as quickly. By 2003, at most thirty percent of domestic private enterprises were unionized. Cooney, supra note 17, at 1076. The ACFTU has adopted the approach of establishing national or regional industrial unions instead of enterprise-level unions to incorporate domestic small and medium private enterprises. \textit{See} Brown at 58; Labor Contract Law, supra note 2, art. 53 (noting that industry-wide collective contracts or regional collective contracts may be established among small businesses in the construction, mining, and restaurant industries).
\item \textsuperscript{111} There were three thousand labor inspecting agencies and forty thousand official labor inspectors in China in 2002. Cooney, supra note 17, at 1066 (citing Law Year Book of China (2003)). According to ACFTU, there are five hundred thousand full-time union officials. \textit{See} Cooney, supra note 92 and accompanying text.
\end{itemize}
compliance with the law. It has no right to organize strikes, nor the power
to negotiate collective contracts in an adversarial way. Despite the large
number of union members in China, the unionization rate is still low in
FIEs and private enterprises where labor relations are the most
contentious.112 Even if workers in those enterprises are unionized, they
have no way of gaining more leverage as they cannot effectively mobilize
the union to act against the management.113

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

III. CLASS ACTION LAWSUIT—AN ALTERNATIVE LAW ENFORCEMENT
OPTION

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

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

112. Until 2003, unions did not represent migrant workers because they were classified as
agricultural workers and therefore not part of the “working class” participating in the union. Cooney,
supra note 17, at 1076.
113. See Brown, supra note 95, at 71 (stating that there is no consequence for the union even if it
does not fully or fairly represent employees’ interests in labor rights disputes, and proposing that
affirmative obligations should be imposed on the union and legal causes of action should be created by
which the union’s action or inaction could be challenged by employees).
114. Liebman, supra note 78, at 1529 n.49 (mentioning twenty workers who successfully sued
their former employer for back pay); Traci Daffer, Note, “I Am Fighting for the Right to Eat, and I
Will Keep Fighting: The Truth Is on Our Side”: Class Action Litigation As a Means of Enacting Social
Change in China, 75 UMKC L. Rev. 227, 231–32 (2006) (noting that six hundred former textile
workers filed a pending class action lawsuit seeking back wages). Around ten percent of suits filed
annually are class actions. Id. at 231.
are both benefits and difficulties for joining all potential claimants in a
lawsuit, but compared to other means of changing the status quo, class
action lawsuits remain a viable option under the current legal framework
and political climate in China.

A. Legal and Political Feasibility

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

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

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

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

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

118. Id. at 237–38. The Chinese government has taken great efforts to channel more social
dissatisfaction into the legal mechanism. The Ministry of Justice has advocated establishing a
population of law, or pufa, as a means to improve citizens’ familiarity with legal rights and
Popularization/node_7616.htm (last visited Feb. 12, 2008).
B. Benefits of Filing a Labor Class Action

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

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

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

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

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

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

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

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

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

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

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

123. See Cooney, supra note 17, at 1088.
124. See Lee, supra note 52 (mentioning that lawyers trying to reach out to migrant workers and educate them about protections under the new labor law are subject to severe physical violence such as beating, hacking, and disfigurement); Daffer, supra note 114, at 234 (noting that a lawyer representing investors in a class action claim against the government for illegal seizure of their oil wells was imprisoned for four months).
125. Daffer, supra note 114, at 238–39.
126. Id. at 238.
127. Judges are often evaluated based on the number of cases they process. A class action creates extra work for a judge: he must notify prospective class members, supervise the appointment of class representatives, and if plaintiffs are successful, oversee the distribution of awards to large numbers of individuals. Liebman, supra note 78, at 1533.
128. Until 1995, neither a college degree nor formal legal training were required for a person to become a judge in China. Daffer, supra note 114, at 241–42.
129. Liebman, supra note 78, at 1535 n.89 (observing that although notices of class actions may be publicized in popular newspapers or on television, they may also be publicized only in legal newspapers or court circulars).
joining a class action when the employer is well-connected and the chance of retaliation is high.\textsuperscript{130}

CONCLUSION

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

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

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

\textsuperscript{130} Id. at 1533–34.

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

\textsuperscript{132} See Costello et al., supra note 131.

\textsuperscript{133} Josephs, supra note 8, at 577.
This Note examined the current labor law enforcement regime by taking the stances of employers, individual workers, government agencies, and trade unions. It analyzed, from each party’s perspective, why law enforcement does not follow through on a seemingly solid legal foundation. The analysis suggests the need for an alternative enforcement mechanism—class action lawsuit—which would allow individual workers to have more control in a collective way. A class action lawsuit has the strength of being a feasible option under the current political climate in China. In contrast to public protests, it allows individual workers to remain within the bounds of the legal process; it fits into the government’s agenda to establish and present to the world a modern legal society, and it dovetails the political scheme to funnel social discontent through courts rather than letting disputes play out on the street. “Imagining what is possible, tempered by what is likely within ‘Chinese conditions,’ can move forward the possibilities of real labor reform.”¹³⁴ Admittedly, some collective labor actions that only intend to generate modest public pressure may be construed as an intolerable threat to the Party and the state. Hopefully, by keeping disputes inside a courtroom, class action lawsuits will more likely be construed as the former rather than the latter.

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¹³⁴ Brown, supra note 94, at 69.

* J.D. (2009), Washington University School of Law. I would like to thank my husband, JW Feng, for his great patience and support while I was working on this Note.