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## **NEW FORMALITIES FOR CASUAL LABOR: ADDRESSING UNINTENDED CONSEQUENCES OF CHINA'S LABOR CONTRACT LAW**

**Daniel S. S. Cairns**<sup>†</sup>

*Abstract.* China's Labor Contract Law ("LCL") came into force on January 1, 2008. The first major piece of labor legislation since the 1994 Labor Law, the Labor Contract Law expanded legal protection for workers by mandating that labor contracts be in writing and delivered to all workers. Employers, predicting that the law would effectively raise the cost of employing full-time, long-term workers, sought methods of "creative compliance" with the law. One avenue for creative compliance emerged through the loophole in the LCL for so-called "dispatch workers." Dispatch workers are formally employed by third-party dispatch service agencies and thus not covered by employment contracts with the firms where they perform their job ("accepting entities").

In the first five years following the LCL's enactment, dispatch workers grew from a negligible share of China's labor force into a pervasive phenomenon. The dispatch worker exception began to swallow the rule, eroding the intended labor protections of the LCL. In response, the Standing Committee of the National People's Congress amended the LCL, effective July 1, 2013. These amendments drastically reduced the permissible scale and purpose of dispatch labor and augured tighter regulation for the dispatch industry. Following a period of public comment, the Ministry of Human Resources and Social Services provided specific departmental rules regarding the licensing of dispatch agencies and standard industry-wide practices, effective March 1, 2014. The new regulations restricted enterprises from hiring more than ten percent of their workers as dispatch workers and clarified the obligations of dispatching agencies as employers. With reports of abuse of dispatch workers continuing to surface, the effects of the amendments and the provisions on labor remain unclear.

This comment addresses China's effort to intervene in employment arrangements via legislation. It first surveys the background of labor legislation in China from the Mao era, through reform, and into the twenty-first century. It then examines the interaction of the labor market and labor legislation, as employers respond to changes in China's labor regime through the introduction of Amendments to the LCL. Finally, this comment suggests that reform in labor legislation based on individual contract should be secondary to expanding collective labor rights.

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## I. INTRODUCTION

On February 25, 2010, the National Bureau of Statistics of China credited the country's "scientific approach to . . . economic and social development" when it boasted 8.7% real growth of GDP per capita following the Great Recession.<sup>1</sup> Despite the global economic downturn at the end of the first decade of the twenty-first century, Chinese economic prospects shined brightly in 2009. Foreign commentators were quick to attribute this growth to the strength of the Chinese workforce, perhaps exemplified by Time Magazine's nomination of "The Chinese Worker" as "Person of the Year" in 2009.<sup>2</sup> Indeed, China's "scientific approach"<sup>3</sup> from the early 2000s<sup>4</sup> and throughout the recession depended on "The Chinese Worker" as a cheap source of labor to maintain a competitive advantage in a global market.<sup>5</sup> However, by 2010, as Chinese workers asserted demands on an unprecedented scale,<sup>6</sup> the previous decade's development model premised on a strong labor market weakened.<sup>7</sup>

In what was perhaps a response to the shift in China's economy, labor tensions mounted the late 2000s and early 2010s.<sup>8</sup> A massive wave of strikes crested in 2010. Since then, worker insurgency has become a common feature of labor politics in China, despite the government's efforts to appease workers through legislation.<sup>9</sup> Disputes about dispatch labor

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<sup>1</sup> NAT'L BUREAU OF STAT. OF CHINA, STAT. COMMUNIQUÉ OF THE PEOPLE'S REPUBLIC OF CHINA ON THE 2009 NAT'L ECON. & SOC. DEV. (Feb. 25, 2010), [http://www.stats.gov.cn/english/NewsEvents/201002/t20100226\\_26295.html](http://www.stats.gov.cn/english/NewsEvents/201002/t20100226_26295.html).

<sup>2</sup> See e.g., Austin Ramzy, *The Chinese Worker*, TIME (Dec. 16, 2009), [http://content.time.com/time/specials/packages/article/0,28804,1946375\\_1947252\\_1947256,00.html](http://content.time.com/time/specials/packages/article/0,28804,1946375_1947252_1947256,00.html).

<sup>3</sup> Otherwise known as the "Kexue fazhan guan" (科学展观). [Scientific Outlook on Development].

<sup>4</sup> See *Cheap Labour Fueling Growth*, CHINA DAILY (Nov. 7, 2002), <http://www.china.org.cn/english/48127.htm>.

<sup>5</sup> THE GLOBAL RECESSION AND CHINA'S POLITICAL ECONOMY 6 (Dali Yang ed., Palgrave Macmillan 2012). See generally Dali L. Yang, *Economic Transformation and its Political Discontents in China: Authoritarianism, Unequal Growth, and the Dilemmas of Political Development*, 9 ANN. REV. OF POL. SCI. 143, 151 (2006) ("For more than a decade before 2004, wages for migrant workers toiling in factories in the Pearl River Delta hardly increased").

<sup>6</sup> See Jonathan Watts, *Strikes in China Signal End to Era of Low-Cost Labour and Cheap Exports*, THE GUARDIAN (June 17, 2010), <http://www.theguardian.com/world/2010/jun/17/china-strikes-economy>.

<sup>7</sup> See generally Guoguang Wu, *China in 2010*, 50 ASIAN SURV. 18, 18-24 (2011).

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See generally ELI FRIEDMAN, *INSURGENCY TRAP: LABOR POLITICS IN POSTSOCIALIST CHINA* (2014).

arrangements and violations have become a common subset of the larger wave of insurgency.<sup>10</sup>

The Chinese state, growing increasingly concerned about the economic effects of mass labor insurgency, strengthened legal protections for workers while simultaneously appealing to employers' interests. In China, as elsewhere,<sup>11</sup> labor law reforms granting legal protections to workers aimed to mediate industrial conflict.<sup>12</sup> China's signal effort to provide safeguards for workers in the late 2000s was the Labor Contract Law ("LCL").<sup>13</sup> Designed to increase protection for workers' rights,<sup>14</sup> it mandated labor contracts be in writing and delivered to all workers.<sup>15</sup> Under Article 14 of the LCL, the worker and employer are required to enter into an "open-term contract"<sup>16</sup> after either two fixed-term contracts or ten years together, whichever comes first.<sup>17</sup> These open-term contracts limit at-will employment, preventing termination of employment absent a statutorily-specified cause, and as such have been opposed by employers seeking labor flexibility.<sup>18</sup> To gain political purchase from these employers, the LCL excluded employees fitting the definition of "dispatch worker" (sometimes

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<sup>10</sup> See *Investigation on the Dispatch of Labor Systems*, CHINESE LABOR NEWS TRANSLATIONS (June 30, 2011), [http://www.cltranslations.org/file\\_download/141](http://www.cltranslations.org/file_download/141) (citing as example how Huangpu district court in Shanghai handled seventy-eight cases of dispatch labor-related disputes in 2010).

<sup>11</sup> See National Labor Relations Act § 1, 29 U.S.C. § 151 (1935) ("Experience has proved that protection by law of the right of employees . . . safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees"); David Walsh, *To Combat the Strike Crisis, Walsh Urges the Wagner Bill; The Massachusetts Senator Says the Measure, While Defining Unfair Practices, Would Leave Employers and Employees Free*, N.Y. TIMES (June 3, 1934), <http://query.nytimes.com/gst/abstract.html?res=9A01E4D91239E33ABC4B53DFB066838F629EDE>.

<sup>12</sup> See Virginia Harper Ho & Huang Qiaoyan, *The Recursivity of Reform: China's Amended Labor Contract Law*, 37 FORDHAM INT'L L.J. 973, 987 (2014) ("[T]here are many resemblances between the cycles of reform experienced in the West and the ongoing reform of Chinese labor and employment law").

<sup>13</sup> See generally Zhongguo Renmin Gongheguo Laodong Hetong Fa (中华人民共和国劳动合同法) [Labor Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), translated in RONALD C. BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA (2010) [hereinafter LCL].

<sup>14</sup> See *id.* at Art. 1.

<sup>15</sup> *Id.* at Art. 10.

<sup>16</sup> *Id.* at Art. 14 ("An open-ended labor contract is one where the employing unit and the worker have agreed not to stipulate a definite ending date").

<sup>17</sup> *Id.*

<sup>18</sup> See Jovita Wang, *Article 14 of China's New Labor Contract Law: Using Open-Term Contracts to Appropriately Balance Worker Protection and Employer Flexibility*, 18 PAC. RIM L. & POL'Y J. 433, 441 (2009).

“agency worker”) from the open-term contract presumption.<sup>19</sup> Labor contracts exempted other parts of the casual workforce, including part-time employees.

Even with the exception for part-time and dispatch workers, labor contract securities provided by the LCL conflict with so-called “flexible” employment trends and have proven unpopular with employers.<sup>20</sup> Anticipating the LCL coming into effect, many large enterprises avoided forming open-term employment contracts by preemptively laying off staff members and re-hiring them under new contracts.<sup>21</sup> The LCL also increased demand for dispatch workers, a section of the labor force less regulated by the labor laws, and hence less financially demanding.<sup>22</sup> As employers circumvented the LCL in the five years following its enactment, dispatch workers grew from a very small percentage into almost one-fifth of the labor force.<sup>23</sup> Whether the amendments and implementing regulations placed upon worker dispatch services are sufficient to placate labor unrest and appease employers demanding labor flexibility is a question that remains unanswered.

This comment addresses China’s effort to intervene in employment arrangements via legislation. Part II discusses the balancing act of labor protections and economic development. Part III introduces the Chinese strategy of promoting labor rights through individualized labor contracts. Part IV then examines the recent history of labor contract legislation in China, the effect of these laws, and the scope of the new amendments and implementing regulations. In Part V this comment suggests that the dispatch industry and flexible employment are incompatible with providing basic rights to workers like equal pay and workplace safety. This comment is skeptical of legislative fixes for dispatch agencies premised on individual contract rights. Ultimately, this comment contends that in order to protect China’s workers as intended under the LCL, the country would need to recognize collective rights at work.

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<sup>19</sup> See LCL, *supra* note 13, at ch. 5, sec. 2.

<sup>20</sup> Dan Harris, *China's New Labor Law as Plague on All Employer's Houses*, CHINA L. BLOG (May 5, 2008), [http://www.chinalawblog.com/2008/05/chinas\\_new\\_labor\\_law\\_as\\_plague.html](http://www.chinalawblog.com/2008/05/chinas_new_labor_law_as_plague.html).

<sup>21</sup> See *infra* Part III.

<sup>22</sup> See Harper Ho & Huang Qiaoyan, *supra* note 12, at 980-81.

<sup>23</sup> Dexter Roberts, *Why China's Factories Are Turning to Temp Workers*, BLOOMBERG BUS. WK. (Mar. 8, 2012), <http://www.businessweek.com/articles/2012-03-08/why-chinas-factories-are-turning-to-temp-workers>; see generally *The Dispatch Labor System in China Questioned*, CHINA LABOR NEWS TRANSLATIONS (Sept. 29, 2011), <http://www.clntranslations.org/article/64/dispatch-labor-questioned>.

## II. CHINA'S INDUSTRIAL RELATIONS REGIME BALANCES DEVELOPMENTAL OBJECTIVES AND SOCIALIST LABOR PROTECTIONS

China's policies toward industrial relations balance two contradictory principles. On the one hand there is the capitalist principle: China seeks to market affordable labor to employers to expand both foreign direct investment<sup>24</sup> and exports.<sup>25</sup> In this regard, China has seen fantastic results, especially vis-à-vis its main global economic partner, the United States.<sup>26</sup> On the other hand, China retains a socialist principle. The country maintains a nominally socialist political-economic order, led by the working class.<sup>27</sup> China's recent record on delivering the promised "workers' state" is most visible in efforts to alleviate social tensions.<sup>28</sup>

Historically, these two principles have waxed and waned with respect to one another. During the Mao era, the socialist principle dominated.<sup>29</sup> In 1956, China virtually abolished labor contracts and brought all workers and enterprises under government control.<sup>30</sup> China guaranteed work and livelihood to all able workers through a system of welfare known as the "iron rice bowl."<sup>31</sup> Within this context, a system of residency registration (*hukou*)<sup>32</sup> established a limiting factor on public benefits.<sup>33</sup> *Hukou* residence

<sup>24</sup> See Press Release, Ministry of Commerce, 2014 Chinese and Foreign Investment Promotion Agencies Conference Held in Beijing (Jan. 26, 2014), available at <http://english.mofcom.gov.cn/article/newsrelease/significantnews/201402/20140200485647.shtml> ("Mr. Wang Shouwen, Assistant Minister of Commerce of PRC said in his address that international investment is an important impetus to push the economic recovery. Chinese government will continue attaching great importance to the international investment and cooperation, further optimizing investment environment and improving the level of introducing FDI and going global"); see generally Elissa Braunstein & Gerald Epstein, *Bargaining Power and Foreign Direct Investment in China: Can 1.3 Billion Consumers Tame the Multinationals?* (Univ. Mass. Amherst Political Economy Research Institute Working Paper Series, Working Paper No. 45, 2002).

<sup>25</sup> Mary Amiti & Caroline Freund, *The Anatomy of China's Export Growth*, in CHINA'S GROWING ROLE IN WORLD TRADE 35, 36 (Robert C. Feenstra & Shang-Jin Wei eds., 2010) ("[China] is continuing to specialize in labor-intensive goods").

<sup>26</sup> See, e.g., David H. Autor, David Dorn & Gordon H. Hanson, *The China Syndrome: Local Labor Market Effects of Import Competition in the United States*, 103 AM. ECON. REV. 2121, 2122 (2013) ("In 2000, the low-income-country share of US imports reached 15 percent and climbed to 28 percent by 2007, with China accounting for 89 percent of this growth").

<sup>27</sup> XIANFA Art. 1 (2004) (China).

<sup>28</sup> See LIN CHUN, *THE TRANSFORMATION OF CHINESE SOCIALISM* 129 (2006); see generally CHING KWAN LEE, *AGAINST THE LAW: LABOR PROTESTS IN CHINA'S RUSTBELT AND SUNBELT* (2007).

<sup>29</sup> See generally MAURICE MEISNER, *MAO'S CHINA AND AFTER* (1999).

<sup>30</sup> KE CHEN, *LABOUR LAW IN CHINA* 31 (2011).

<sup>31</sup> SAROSH KURUVILLA, CHING KWAN LEE & MARY GALLAGHER, *FROM IRON RICE BOWL TO INFORMALIZATION: MARKETS, WORKERS, AND THE STATE IN A CHANGING CHINA* 3-4 (2011).

<sup>32</sup> Kam Wing Chan, *The Chinese Hukou System at 50*, 50 EURASIAN GEOGRAPHY & ECON. 197, 199-203 (2009).

permits provided a right to social insurance, publicly subsidized healthcare, and education to residents of a locale where they are registered.<sup>34</sup> These rights were not automatically transferrable when a worker migrated in search of work, even domestically.<sup>35</sup>

Later, under the contract system re-established by Chinese politician Deng Xiaoping,<sup>36</sup> *hukou* remained, while demand for labor depended on mobile capital.<sup>37</sup> The spatial separation of work from socialist security under the *hukou* system effectuated a rapid and efficient extraction of labor power from Chinese workers.<sup>38</sup> The resulting combination of policies put workers in a precarious position as unprotected migrants within their own country. The capitalist principle resurged.

Even in its present capitalist mode, the responsibility for safeguarding workers' interests theoretically remains vested in the Chinese Communist Party.<sup>39</sup> The Communist Party delegates authority among the All-China Federation of Trade Unions ("ACFTU"), the Ministry of Human Resources and Social Security ("MOHRSS"), and localities tasked with implementing labor laws.<sup>40</sup>

As a state-controlled body monopolizing economic collective bargaining for employees,<sup>41</sup> the ACFTU is a unique institution. Defined by the Trade Union Law, the mission of the ACFTU is twofold. First, the ACFTU "represent[s] the interests of the workers and staff members and

<sup>33</sup> Kam Wing Chan & Li Zhang, *The Hukou System and Rural-Urban Migration in China: Processes and Changes*, 160 CHINA Q. 818, 819 (1999); see Jessica L. Montgomery, *The Inheritance of Inequality: Hukou and Related Barriers to Compulsory Education for China's Migrant Children*, 21 PAC. RIM L. & POL'Y J. 591 (2012).

<sup>34</sup> Kam Wing Chan & Li Zhang, *supra* note 33, at 821.

<sup>35</sup> Montgomery, *supra* note 33, at 598-99.

<sup>36</sup> See MEISNER, *supra* note 29, at 452 (discussing Deng Xiaoping, a Chinese politician who "saw the mechanism of the market as a means to eventual socialist ends, as the most efficient way to break down the stifling system of centralized state planning to speed up the development of modern productive forces, thereby creating the essential material foundations for a future socialist society").

<sup>37</sup> Kam Wing Chan, *The Household Registration System and Migrant Labor in China: Notes on a Debate*, 36 POPULATION & DEV. REV. 357, 359 (2010).

<sup>38</sup> Ngai Pun & Jenny Chan, *The Spatial Politics of Labor in China: Life, Labor, and a New Generation of Migrant Workers*, 112 S. ATLANTIC Q. 179, 181 (2013) ("[T]he distinctively noncapitalist *hukou* system serves the interests of capital even better than the company towns or urban tenements in which Western proletarian workers were housed in the nineteenth and early twentieth centuries") (internal citations omitted).

<sup>39</sup> XIANFA General Program (2012) (China), available at [http://www.china.org.cn/china/18th\\_cpc\\_congress/2012-11/16/content\\_27138030.htm](http://www.china.org.cn/china/18th_cpc_congress/2012-11/16/content_27138030.htm).

<sup>40</sup> See RONALD C. BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA 5 (2009).

<sup>41</sup> INT'L CONFED. OF FREE TRADE UNIONS, ANN. SURV. OF VIOLATIONS OF TRADE UNION RTS. 141, 142 (2003).

safeguard[s] the legitimate rights and interests of the workers and staff members according to law.”<sup>42</sup> The ACFTU’s Constitution supplies that “[t]he basic duty of the Chinese trade unions is to protect the legitimate rights and interests of workers.”<sup>43</sup> Second, the ACFTU is to “serve as a bridge and link between the Party and workers and an important social pillar of the state power . . . .”<sup>44</sup> In this second sense, the workers organized by the ACFTU become instrumental to China’s economic development agenda.<sup>45</sup> The general international consensus is that the ACFTU’s twofold mission is a contradiction;<sup>46</sup> the union is primarily an organ of the Communist Party and only secondarily a representative of workers.<sup>47</sup>

The MOHRSS<sup>48</sup> is a bureaucratic agency directed by the State Council. The MOHRSS was formed by the 2008 National People’s Congress to supersede the functions of the Ministry of Labor and Social Security and the Ministry of Personnel.<sup>49</sup> In the wake of the economic crisis, the MOHRSS played an important role in navigating the introduction of recent monumental labor legislation, while still keeping China’s labor market competitive.<sup>50</sup>

These subordinate bodies play an important role in enacting and enforcing labor legislation. Each has impressed its influence on the development of labor dispatch legislation in China within larger transitions in the country’s political economy.

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<sup>42</sup> *Zhonghua Renmin Gongheguo Gonghui Fa* (中华人民共和国工会法) [Trade Union Law] (promulgated by Order No. 57 of the President of the People’s Republic of China, Apr. 3, 1992, amended Oct. 27, 2001, effective Apr. 3, 1992), Art. 2 (China), translated in *Trade Union Law of the People’s Republic of China*, CHINA.ORG.CN, <http://www.china.org.cn/english/DAT/214784.htm> [hereinafter Trade Union Law]

<sup>43</sup> ALL-CHINA FED’N OF TRADE UNIONS, *General Principles*, CONST. OF THE CHINESE TRADE UNIONS (Oct. 30, 2008), available at <http://www.acftu.org.cn/template/10002/file.jsp?cid=48&aid=469>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (The working class, “represents the advanced productive forces and relations of production, serves as the main force in the reform and opening-up and in socialist modernization drive and is a powerful and concentrated social force maintaining the social stability”).

<sup>46</sup> Han Dongfang, *Labor Law Strengthens Chinese Union*, ASIA TIMES (Jan. 18, 2008), [http://www.atimes.com/atimes/China\\_Business/JA18Cb01.html](http://www.atimes.com/atimes/China_Business/JA18Cb01.html).

<sup>47</sup> *Id.* (“[I]n the majority of enterprises, ACFTU branch union officials are appointed by or in some other way beholden to management, they would not dare raise an effective challenge to management on behalf of the employees”).

<sup>48</sup> Also known as *Zhonghua Renmin Gongheguo Guowuyuan* (中华人民共和国国务院).

<sup>49</sup> BROWN, *supra* note 13, at 13.

<sup>50</sup> *MOHRSS To Take Measures to Help Enterprises and Stabilize Employment*, CHINA CSR (Nov. 19, 2008), [www.chinacsr.com/en/2008/11/19/3657-mohrсс-to-take-measures-to-help-enterprises-and-stabilize-employment/](http://www.chinacsr.com/en/2008/11/19/3657-mohrсс-to-take-measures-to-help-enterprises-and-stabilize-employment/).



A. *Move to the Market Economy – “Reform and Opening” Led to Precarious Labor*

The Third Plenary Session of the Eleventh Party Central Committee, held in 1978, led to the announcement of the Communist Party’s “Four Modernizations” policy.<sup>51</sup> This policy is described in the “General Program” of the Party’s Constitution as a shift in the “focus of the work of the whole Party onto economic development . . . ushering in a new era of development in the cause of socialism . . . [and] the building of socialism with Chinese characteristics . . . .”<sup>52</sup> China dissolved the guaranteed “iron rice bowl” social welfare policies,<sup>53</sup> favoring labor contracts and market-based development.<sup>54</sup> In October 1992, during the Fourteenth Party Congress in Beijing, the arrangement was christened the “socialist market economy.”<sup>55</sup>

The “socialist market economy” has created multiple hardships for Chinese workers. Indeed, China’s economic development is predicated on the uneven application of labor rights<sup>56</sup> as part of a larger neoliberal institutional arrangement.<sup>57</sup> The Deng era initiated rapid development, with the byproduct of creating splits among rural and urban, migrant and non-migrant, and unionized and non-unionized workers.<sup>58</sup> The regional disparities wrought by “the new China” have prompted rural Chinese to seek work opportunities in cities.<sup>59</sup> By and large, this domestic migration means that workers exchange safe working conditions for work opportunities.<sup>60</sup>

Issues stemming from the disparate impacts of China’s labor law regime include: migration, wage theft, unsafe working conditions, a removed social safety net, and the externalization of the costs of social

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<sup>51</sup> See IMMANUEL C. Y. HSÜ, *THE RISE OF MODERN CHINA* 803 (6th ed. 1999).

<sup>52</sup> *THE CONSTITUTION OF THE COMMUNIST PARTY OF CHINA* 7 (2001).

<sup>53</sup> See MAURICE MEISNER, *MAO’S CHINA AND AFTER: A HISTORY OF THE PEOPLE’S REPUBLIC* 471 (3d ed. 1999).

<sup>54</sup> See generally WILLIAM HURST, *THE CHINESE WORKERS AFTER SOCIALISM* (2009).

<sup>55</sup> Tony Saich, *The Fourteenth Party Congress: A Programme for Authoritarian Rule*, 132 *CHINA Q.* 1136, 1142 (1992).

<sup>56</sup> See BROWN, *supra* note 13, at 6 (noting that “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 working conditions”).

<sup>57</sup> ELI FRIEDMAN, *INSURGENCY TRAP: LABOR POLITICS IN POSTSOCIALIST CHINA* 15 (2014), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1096&context=books>.

<sup>58</sup> BROWN, *supra* note 13, at 6.

<sup>59</sup> See Yaohui Zhao, *Leaving the Countryside: Rural-to-Urban Migration Decisions in China*, 89 *AM. ECON. REV.* 281, 281 (1999) (“The migration of rural labor to urban areas in China since the mid-1980’s has created the largest labor flow in world history”).

<sup>60</sup> See *id.*

reproduction to the countryside.<sup>61</sup> Even in the 1960s, Chinese social welfare benefited industrial workers who were covered at the expense of peasants who were not.<sup>62</sup> The division of workers was driven by the economics of development.<sup>63</sup> By focusing economic development on the Eastern seaboard—cities like Shenzhen, Shanghai, and Beijing—while simultaneously enforcing the *hukou* residency permit system, China has pursued an institutional arrangement that spatially separates economic growth and social reproduction.<sup>64</sup> This arrangement functionally depresses wages,<sup>65</sup> inhibiting worker bargaining power and providing cheap labor to employers.<sup>66</sup> The process is sometimes referred to as “informalization,”<sup>67</sup> “work precarity,”<sup>68</sup> or “casualization.”<sup>69</sup>

In China, workers in the informal economy are often members of the migrant population known as *liudong renkou* (commonly translated, “floating population”). The types of employment in the informal economy range from hired workers without formal contracts to those who are misclassified as informal employees, as well as to domestic workers, temporary workers, casual workers, community service workers, hourly workers without specified wages, and workers in small enterprises without formalized employment.<sup>70</sup> *Liudong renkou* is a section of the workplace

<sup>61</sup> LINDA WONG, MARGINALIZATION AND SOCIAL WELFARE IN CHINA 3 (2005) (“Since the mid-1980s, an increasing number of peasant migrants, between 80 to 100 million, have sought work and business opportunities in urban areas. Nevertheless, they still carry their rural status and do not qualify for urban welfare”).

<sup>62</sup> JOYCE K. KALLGREN, *Social Welfare and China's Industrial Workers*, in CHINESE COMMUNIST POLITICS IN ACTION 540, 542-43 (A. Doak Barnett ed., 1969).

<sup>63</sup> *Id.* at 542.

<sup>64</sup> Eli Friedman, *Outside the New China*, JACOBIN (Sept. 2013), <http://jacobinmag.com/2013/09/outside-the-new-china/>.

<sup>65</sup> Anita Chan, *A Race to the Bottom*, 46 CHINA PERSP. 41, 42 (2003).

<sup>66</sup> See Ching Kwan Lee & Eli Friedman, *China Since Tiananmen: The Labor Movement*, CORNELL U. (July 15, 2009), <http://digitalcommons.ilr.cornell.edu/articles/837> (“[China’s neoliberal regime] has created an influx of investment, insatiable demand for Chinese products, employment opportunities for Chinese workers, and room for the Chinese economy to grow by putting the squeeze on labor. But . . . [t]he global financial and economic crisis is pushing the fundamental problem—the dispossession of workers as direct producers—to the surface, testing the limits of the Chinese approach to development”).

<sup>67</sup> See generally Josh Bivens, *Growing "Informalization" of Employment in the Developing World*, ECON. POLICY INST. (July 28, 2004), [www.epi.org/publication/webfeatures\\_snapshots\\_07282004/](http://www.epi.org/publication/webfeatures_snapshots_07282004/).

<sup>68</sup> See generally Brett Neilson, *Precarity as a Political Concept, or, Fordism as Exception*, 25 THEORY, CULTURE & SOC’Y 51 (2008).

<sup>69</sup> See, e.g., Neil M. Coe, Jennifer Johns & Kevin Ward, *Agents of Casualization? The Temporary Staffing Industry and Labour Market Restructuring in Australia*, 9 J. ECON. GEOGRAPHY 55 (2008).

<sup>70</sup> See Mary Gallagher, John Giles, Albert Park & Meiyang Wang, *China's 2008 Labor Contract Law: Implementation and Implications for China's Workers* 7 (The World Bank Development Research Group, Working Paper No. 6542, 2014), available at <http://library1.nida.ac.th/worldbank/fulltext/wps06542.pdf>.

playing an increasingly large role in Chinese economic production.<sup>71</sup> Before the implementation of the LCL and its Amendments, roughly 12.5% of peasant workers had labor contracts.<sup>72</sup> The remainder were unprotected by China's labor laws.<sup>73</sup> Informally employed workers supplied 21% of the country's gross domestic product (GDP) growth from 1991 to 1995, 52% from 1996 to 2000, and then 54% from 2001 to 2005.<sup>74</sup> Overall, between 1990 and 2004, informal employment grew by 12.5% annually.<sup>75</sup> By 2005, over one-third of the overall labor force was informally employed.<sup>76</sup> In 2007, the MOHRSS predicted informal employment would become the default form of work in the coming decades. The extent of the informalization of the workforce reached such a level that, prior to the enactment of the LCL, the country faced a major scandal when large-scale slave labor practices were discovered.<sup>77</sup>

Thus, despite tremendous economic growth and social development since market liberalization in 1978,<sup>78</sup> labor standards deteriorated for a large portion of China's workforce as they were forced into informal

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<sup>71</sup> Madison Park & CY Xu, *Is Migrant System China's Apartheid?*, CNN (Dec. 25, 2012), <http://www.cnn.com/2012/12/25/world/asia/china-migrant-family/index.html>.

<sup>72</sup> See Li Jing, *China's New Labor Contract Law and Protection of Workers*, 32 FORDHAM INT'L L.J. 1083, 1094 n.38 (2008).

<sup>73</sup> See HAINA LU, THE RIGHT TO WORK IN CHINA: CHINESE LABOR LEGISLATION IN THE LIGHT OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 287 (2011).

<sup>74</sup> Ying Zhou, *The State of Precarious Work in China*, 57 AM. BEHAV. SCI. 354, 368 (2013) (citing figures from 2006 *Zhongguo Feizhenggui Jiuye Fazhan Baogao: Laodongli Shichang de Zai Guancha* (2006 中国非正规就业发展报告：劳动力市场的再观察) [*The 2006 Report on the Development of Informal Employment in China: A Review of the Labor Market*] (Ren Yuan & Peng Xizhe eds., 2007)).

<sup>75</sup> *Id.* at 356 (citing figures from Hu Angang & Zhao Li, *Woguo Zhuanxingqi Chengzhen Feizhenggui Jiuye yu Feizhenggui Jingji (1990-2004)* (我国转型期城市非正规就业与非正规经济 (1990-2004)) [*Urban Informal Employment and Informal Economy in the Transitional Period in China (1990-2004)*], 21(3) J. TSINGHUA UNIV. 111, 111-19 (2006)).

<sup>76</sup> Mary Gallagher, *China's Worker's Movement & the End of the Rapid-Growth Era*, 143 DAEDALUS, J. AM. ACAD. ARTS & SCI. 81, 86 (2014).

<sup>77</sup> Joseph Kahn & David Barboza, *China Passes a Sweeping Labor Law*, N.Y. TIMES (June 30, 2007), <http://www.nytimes.com/2007/06/30/business/worldbusiness/30chlabor.html> ("Passage of the measure came shortly after officials and state media unearthed the widespread use of slave labor in as many as 8,000 brick kilns and small coal mines in Shanxi and Henan provinces, one of the most glaring labor scandals since China began adopting market-style economic policies a quarter century ago. Police have freed nearly 600 workers, many of them children, held against their will in factories owned or operated by well-connected businessmen and local officials").

<sup>78</sup> See *China's Reforms: The Second Long March*, THE ECONOMIST (Dec. 11, 2008), <http://www.economist.com/node/12758848>.

employment.<sup>79</sup> The legislative response to this phenomenon emerged in the form of the LCL.

It is important to note that China is not unique in how it experiences the effects of informal labor. The International Labour Organization (“ILO”) estimates that informal employment comprises the majority of all non-agricultural work worldwide.<sup>80</sup> Informal work, the ILO stresses, is characterized by poor working conditions, poverty, and susceptibility to wage theft and other abuses.<sup>81</sup> Migrant workers, women, minorities, and others from precarious social positions are especially vulnerable to the hazards of informal employment.<sup>82</sup>

### III. CHINA PROMOTED WORKERS’ RIGHTS THROUGH INDIVIDUALIZED LABOR CONTRACTS

The LCL was designed to expand on earlier labor laws. In fact, the LCL was not the first gesture toward providing labor rights through individualized labor contracts. In 1994, the Labor Law (*Zhonghua renmin gongheguo laodong fa*) consolidated all previous labor legislation and promulgated a unified law of labor relations on a national level.<sup>83</sup> The law guaranteed access to arbitration, litigation, and workers’ compensation.<sup>84</sup> It mandated labor contracts between employers and employees.<sup>85</sup> Under the Labor Law the requirements for labor contracts were similar to what would later be clarified in the LCL: contracts should specify the timing of the employment, the content of the job, pay, disciplinary policy, termination procedures, and the legal consequences for breach.<sup>86</sup>

However, in the context of market reform and economic restructuring, workplace protections such as the Labor Law appeared inadequate.<sup>87</sup>

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<sup>79</sup> See Harper Ho & Huang Qiaoyan, *supra* note 12, at 978; see generally Albert Park & Fang Cai, *The Informalization of the Chinese Labor Market* 17-35 (Aug. 2009), <http://ihome.ust.hk/~albertpark/papers/informalization.pdf>.

<sup>80</sup> *Informal Economy*, INT’L LABOUR ORG., <http://ilo.org/global/topics/employment-promotion/informal-economy/lang--en/index.htm> (last visited Oct. 7, 2014).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Harper Ho & Huang Qiaoyan, *supra* note 12, at 989-90.

<sup>84</sup> BROWN, *supra* note 40, at 25.

<sup>85</sup> Laodong Fa (劳动法) [Labor Law] (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1994, effective January 1, 1995) Art. 16 (China).

<sup>86</sup> *Id.* at art. 19.

<sup>87</sup> See Wang, *supra* note 18, at 438; Lyle Morris, *An Uncertain Victory for China’s Workers*, YALE GLOBAL ONLINE (June 24, 2008), [yaleglobal.yale.edu/content/uncertain-victory-china’s-workers](http://yaleglobal.yale.edu/content/uncertain-victory-china’s-workers) (“The

Privatization, layoffs, and unequal treatment under the Labor Law created the floating worker population.<sup>88</sup> Additionally, social safety nets effectively vanished and workplace protections went unenforced.<sup>89</sup>

The LCL retained most of the core protections set forth in the Labor Law, yet it also strengthened the contractual provisions.<sup>90</sup> Enacted in June 2007 and entered into force on January 1, 2008,<sup>91</sup> its stated purposes were “clarifying the rights and obligations of both parties of labor contracts” and “protecting the legitimate rights and interests of employees.”<sup>92</sup>

In line with the stated purposes, the contents of the LCL can be divided into four categories. First, the LCL contained new legislation aimed at protecting workers and securing their benefits.<sup>93</sup> Second, the new law clarified employer obligations.<sup>94</sup> Third, the LCL required notice to individual workers of their rights and the obligations of their employers.<sup>95</sup> Finally, the law proposed better monitoring of labor conditions through empowering local labor officials.<sup>96</sup>

The legal protections to workers were numerous. The LCL provided for for-cause termination provisions in many contracts for full-time, long-term employees. It required severance pay for most workers covered by a full-time contract, set limits on overtime hours, and required employers to provide written contracts to all employees beginning January 1, 2008.<sup>97</sup> The LCL also required permanent contracts for workers employed for a specific period of time, limiting the practice of temporary contracts.<sup>98</sup> Additionally, the law promoted social insurance coverage for workers and ensured payment of overtime wages.<sup>99</sup> Proponents of the LCL hoped that the increased portion of the labor force covered by contracts would tend to

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[LCL] – brought about after a spate of headline-grabbing incidents of severe worker abuse in China – is to curb worker abuse”).

<sup>88</sup> See BROWN, *supra* note 40, at 6.

<sup>89</sup> *Id.* at 6-11.

<sup>90</sup> Wang, *supra* note 18, at 434.

<sup>91</sup> See LCL, *supra* note 13.

<sup>92</sup> *Id.* at Art. 1.

<sup>93</sup> *Id.*

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

<sup>95</sup> *Id.* at Art. 8.

<sup>96</sup> *Id.* at Art. 5.

<sup>97</sup> *Id.* at Art. 10.

<sup>98</sup> *Id.* at Art. 15.

<sup>99</sup> See Xiaoying Li, *How Does China's New Labor Contract Law Affect Floating Workers?* 3 (Nov. 15, 2011) (unpublished article) (on file with Harvard Law School).

formalize the labor economy, thereby facilitating the enforcement of already-existing labor protections such as the Labor Law.<sup>100</sup>

Formalizing the labor economy involved overcoming twin hurdles: restricting probationary periods for workers<sup>101</sup> and curtailing frivolous firing. Probationary hiring was explicitly challenged by the original summary draft of the LCL.<sup>102</sup> Prior to its enactment, it was estimated that less than 20% of workers in small- or medium-sized private sector enterprises benefited from labor contracts.<sup>103</sup> Under the LCL, companies would face penalties for failing to provide contracts to their workers.<sup>104</sup> Additionally, the third consecutive labor contract between a given employer and employee will necessarily be an “open term labor contract,” meaning it will contain a for-cause provision.<sup>105</sup> There was an observable increase in the number of workers benefiting from labor contracts. From 2007 to 2008 there was a 3% increase in the mean percentage of workers with open-term contracts.<sup>106</sup> Although the majority of workers today remain employed under short-term contracts,<sup>107</sup> the law increased the gross number of workers with individual labor contracts, along with social insurance and workers’ compensation.<sup>108</sup>

In addition to covering more workers as a share of the total workforce, the LCL deepened gains for covered workers.<sup>109</sup> Economists Fan Cui, Ying Ge, and Fengchun Jing found that:

[L]abor law reform significantly encouraged wage and nonwage benefit growth. The impact of labor law reform is greater for state-owned firms and collective-owned firms, for

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<sup>100</sup> See Harper Ho & Huang Qiaoyan, *supra* note 12, at 975-76.

<sup>101</sup> See LCL, *supra* note 13, at art. 19-21.

<sup>102</sup> See Kahn & Barboza, *supra* note 77.

<sup>103</sup> See RONALD C. BROWN, EAST ASIAN LABOR AND EMPLOYMENT LAW: INTERNATIONAL AND COMPARATIVE CONTEXT 481 (2012).

<sup>104</sup> LCL, *supra* note 13, at art. 82 (stating that employers who fail to conclude a written labor contract with an employee pay workers double wages).

<sup>105</sup> *Id.* at art. 14.

<sup>106</sup> Changhee Lee & Mingwei Liu, *Measuring the Effects of the Collective Voice Mechanism and the Labour Contract Law: A Survey of Labour Relations and Human Resources Management Practices in 600 Enterprises in China*, INT’L LABOUR ORG., 37 (2012).

<sup>107</sup> *Id.*

<sup>108</sup> See Richard B. Freeman & Xiaoying Li, VOX, *Has China’s New Labour Contract Law Worked?* (Dec. 22, 2013), <http://www.voxeu.org/article/has-china-s-new-labour-contract-law-worked>.

<sup>109</sup> Fan Cui, Ying Ge & Fengchun Jing, *The Effects of the Labor Contract Law on the Chinese Labor Market*, 10 J. EMPIRICAL LEGAL STUD. 462 (2013), available at <http://onlinelibrary.wiley.com/doi/10.1111/jels.12016/full> (“Implementation of the Labor Contract Law reduced the wage elasticity of labor demand, especially in highly unionized and skill-intensive industries”).

large and domestic firms, and for regions with high union intensity and skill intensity.<sup>110</sup>

An early result of the LCL was to make layoffs more costly.<sup>111</sup> Employees with seniority became more protected in their jobs because the LCL requires open-ended contracts for employees who either receive a third temporary contract or who have been at a firm for more than ten years.<sup>112</sup> In the first year of the LCL, this had the measurable effect of raising the mean percentage of employees covered by open-ended contracts.<sup>113</sup> Additionally, the percentage of workers with medical coverage, age insurance, injury insurance (workers' compensation), and unemployment insurance increased after the implementation of the LCL.<sup>114</sup>

A. *The LCL Opened a Loophole While Pursuing Workers' Rights Through Individualized Labor Contracts*

The informal, non-standard workforce, including dispatch workers and other temporary workers in China, has grown globally.<sup>115</sup> The so-called "labor dispatch" industry, which is comprised of human resources firms akin to temporary staffing agencies elsewhere, was one face of a national trend toward informal or precarious employment.<sup>116</sup> While informal employment generally plagued China's workforce, the dispatch industry, itself a subset of informal work, did not pose a regulatory problem until after the implementation of the LCL.<sup>117</sup> This is because the LCL opened a loophole through which employers could pursue formalized, precarious employment.

The Chinese government has increased regulation of dispatch labor because the industry circumvented formal labor relationships and

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<sup>110</sup> *Id.*

<sup>111</sup> See Changhee Lee & Mingwei Liu, *supra* note 106.

<sup>112</sup> LCL, *supra* note 13, at art. 14.

<sup>113</sup> See Changhee Lee & Mingwei Liu, *supra* note 106.

<sup>114</sup> See *China's Social Security System*, CHINA LABOUR BULLETIN, [www.clb.org.hk/en/view-resource-centre-content/110107](http://www.clb.org.hk/en/view-resource-centre-content/110107) (last visited Oct. 7, 2014).

<sup>115</sup> See KATHERINE STONE & HARRY ARTHURS, *RETHINKING WORKPLACE REGULATION* 6 (2013).

<sup>116</sup> See Ying Zhou, *supra* note 74, at 356 ("[E]mployment has become more precarious across all sectors of the economy, characterized by the increase in the prevalence of nonstandard work arrangements such as temporary work, casual or seasonal work, and dispatch work").

<sup>117</sup> See Li Jing, *supra* note 72, at 1121; *An Investigation of the Dispatch Labor System*, CHINA LABOR NEWS TRANSLATIONS (June 30, 2011), available at [http://www.clntranslations.org/file\\_download/141](http://www.clntranslations.org/file_download/141); See Dominic Hui, *Recent Trends in Employment Law in China – A Battlefield Report*, 24 EMP. & INDUS. REL. L. 14, 16 (2014).

undermined the stated goals of the LCL. Discussion of the dispatch labor industry first appeared in Chinese political discourse in 2002.<sup>118</sup> Soon thereafter it attracted policy attention, beginning as early as 2005.<sup>119</sup> It then received regulation in 2008.<sup>120</sup> Because dispatch labor circumvented the formalization of labor relationships, there was an inherent tension between labor protections based on individual contract and the labor dispatch industry.

In the twelve years since its emergence, the dispatch agency has come under increasing regulation to encourage compliance with individualized labor contracts. In the five years following the regulation of the industry through the LCL, the government has clarified the contours of the industry and adopted increasingly detailed regulations. Under the new regulations, dispatch employment is redefined, and three categories of nonstandard workers are defined: part-time workers, temporary workers, and dispatch workers.

### B. *Seeing the Other Side of the Financial Crisis*

Public comment on the LCL prior to its enactment was voluminous.<sup>121</sup> The American Chamber of Commerce in Shanghai, for example, threatened to lead a divestment movement if the law passed.<sup>122</sup> The LCL came into force in January 2008<sup>123</sup> as the global financial crisis known as “the Great Recession” affected global demand for Chinese exports,<sup>124</sup> and was heavily

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<sup>118</sup> Shanshan Xu, *Thoughts About Further Standardizing and Developing Model of Labor Dispatch Market*, INT’L CONFERENCE ON GLOBAL ECON., COMMERCE AND SERV. SCI. 328, 328 (2014), available at [http://www.atlantis-press.com/php/download\\_paper.php?id=11001](http://www.atlantis-press.com/php/download_paper.php?id=11001).

<sup>119</sup> See Yan Di, *China’s Employment Policies and Strategies 7*, ORG. FOR ECON. CO-OP. AND DEV., [www.oecd.org/employment/emp/37865430.pdf](http://www.oecd.org/employment/emp/37865430.pdf) (last visited Nov. 13, 2014); see also Guowuyuan Guanyu Jinyibu Jiaqiang Jiuye Zai Jiuye Gongzuo de Tongzhi (国务院关于进一步加大力度促进再就业工作的通知) [Circular of the State Council on Further Intensifying the Work of Employment and Re-employment] (promulgated by the State Council, Nov. 4, 2005, effective Nov. 11, 2005) (China), available at [www.lawinfochina.com/display.aspx?lib=law&id=4732&CGid](http://www.lawinfochina.com/display.aspx?lib=law&id=4732&CGid).

<sup>120</sup> See LCL, *supra* note 13, at art. 57-67; see also Harper Ho & Huang Qiaoyan, *supra* note 12, at 1032 (“China is only one of many governments to introduce new measures on dispatched workers in the past decade”).

<sup>121</sup> See Ronald C. Brown, *China’s New Labor Contract Law*, 3 CHINA L. REP. 4 (2007).

<sup>122</sup> See Aaron Halebua, *The Debate Over Raising Chinese Labor Standards Goes International*, 1 HARV. L. POL’Y. REV. (Apr. 5, 2007), <http://www.law.harvard.edu/programs/lwp/HalebuaChineseLaborStandardsHLPR2007.pdf>.

<sup>123</sup> See LCL, *supra* note 13.

<sup>124</sup> Keith Bradsher, *China Reports Falling Prices and Low Demand*, N.Y. TIMES (Mar. 10, 2009), <http://www.nytimes.com/2009/03/11/business/worldbusiness/11yuan.html>.



criticized when the financial crisis hit China that same year.<sup>125</sup> Business interests vociferously opposed many of the provisions, claiming that the law would make it difficult to maintain operations in China.<sup>126</sup> Some argued the LCL made it harder for business to survive the economic downturn.<sup>127</sup> Others claimed the LCL fueled China's massive strike wave in 2010.<sup>128</sup> The law allegedly fed illegitimate causes of action to litigious employees<sup>129</sup> and raised the price of labor.<sup>130</sup> It even received blame for the failure of a number of enterprises.<sup>131</sup>

These criticisms range in validity. On the one hand, in some instances the law was opportunistically and unfairly criticized. On the other hand, the law had measurably positive effects for workers,<sup>132</sup> which may have raised employers' costs. Furthermore, the law likely provided a weapon for workers in the courts.<sup>133</sup> China's national labor union, the ACFTU, expressed its public support for the law.<sup>134</sup> However, ambiguity lingers regarding whether the rising costs of labor in China in 2008 were attributable to the financial crisis impeding demand for Chinese labor, or the increased cost of labor protections under the LCL.<sup>135</sup> According to one estimate, the LCL directly contributed a 2-3% increase in labor costs for foreign enterprises.<sup>136</sup> Others credited labor shortages and an attendant weak labor market for rising wages. Whatever the reason for the rise in wages, some garment manufacturers, for example, relocated their operations

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<sup>125</sup> See BROWN, *supra* note 13, at 39.

<sup>126</sup> Kahn & Barboza, *supra* note 77.

<sup>127</sup> Wang, *supra* note 18, at 448.

<sup>128</sup> See *Unions in China: Strike Breakers*, THE ECONOMIST (June 3, 2010), <http://www.economist.com/node/16282233>.

<sup>129</sup> Kevin Jones & Stan Abrams, *Year Of The Rat Brings A Plague Upon Employers In China*, CHINA CSR (May 5, 2008), [www.chinacsr.com/en/2008/05/05/2308-year-of-the-rat-brings-a-plague-upon-employers-in-china/](http://www.chinacsr.com/en/2008/05/05/2308-year-of-the-rat-brings-a-plague-upon-employers-in-china/).

<sup>130</sup> See Halegua, *supra* note 122.

<sup>131</sup> See BROWN, *supra* note 103.

<sup>132</sup> See *supra* Part III.

<sup>133</sup> See Chen Hong, *Maneuver on Labor Law Faces Block*, CHINA DAILY (July 22, 2008), [http://www.chinadaily.com.cn/China/2008-07/22/content\\_6865144.htm](http://www.chinadaily.com.cn/China/2008-07/22/content_6865144.htm).

<sup>134</sup> See Zhu Zhe, *Union to Help Refine Labor Law Application*, CHINA DAILY (Dec. 6, 2007), <http://english.people.com.cn/90001/90776/6315896.html>.

<sup>135</sup> See, e.g., Myssie You, *Interview: Rising Costs Send HKI to the Garment Factory Exit*, EJ INSIGHT (Oct. 25, 2013, 5:12 PM), <http://www.ejinsight.com/20131025-interview-rising-costs-send-hki-to-the-garment-factory-exit/>.

<sup>136</sup> See BROWN, *supra* note 40, at 482.

elsewhere to avoid the rising cost of labor.<sup>137</sup> In November 2008, the MOHRSS issued a formal request for companies to minimize layoffs.<sup>138</sup>

Foreign demand for Chinese products declined following the financial crisis of 2008.<sup>139</sup> Provincial governments attempted to keep their labor affordable and competitive to retain foreign capital.<sup>140</sup> For example, in January 2009, the Guangdong Provincial Procuratorate issued a “Ten-point Opinion” related to stabilizing the economy.<sup>141</sup> The opinion stressed that law enforcement should exercise caution when investigating white-collar crime.<sup>142</sup> It instructed law enforcement to protect local enterprises by focusing prosecutions on workers who may engage in industrial action and slow production.<sup>143</sup> Legal pressure on workers would discourage work-related grievances, thereby shielding local enterprises that violated labor laws. The lack of workers’ rights enforcement by localities like Guangdong and the efforts of employers to evade formalizing employment undermined the power of the LCL.

Employers responded to the law’s economic effects in three ways. First, the LCL’s expansion of contract coverage and labor security for workers incentivized employers to try reducing workforce costs.<sup>144</sup> For example, in anticipation of the LCL some companies, such as the camera manufacturer Olympus Optical Co., Ltd., laid off Chinese workers and shifted production to neighboring countries.<sup>145</sup> Second, some employers sought means of “creative compliance”<sup>146</sup> with the LCL through the use of

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<sup>137</sup> See You, *supra* note 135.

<sup>138</sup> MOHRSS to Take Measures to Help Enterprises and Stabilize Employment, CHINA CSR (Nov. 19, 2008), [www.chinacsr.com/en/2008/11/19/3657-mohrss-to-take-measures-to-help-enterprises-and-stabilize-employment/](http://www.chinacsr.com/en/2008/11/19/3657-mohrss-to-take-measures-to-help-enterprises-and-stabilize-employment/).

<sup>139</sup> See Bradsher, *supra* note 124; Keith Bradsher, *Trade Losses Rise in China, Threatening Jobs*, N.Y. TIMES (Jan. 12, 2009), <http://www.nytimes.com/2009/01/13/business/worldbusiness/13yuan.html>.

<sup>140</sup> See United Nations Conference on Trade and Development, July 2009, *World Investment Report 2009: Transnational Corporations, Agricultural Production and Development*, 14, UNCTAD/WIR/2009 (Sept. 17, 2009), available at [unctad.org/en/docs/wir2009\\_en.pdf](http://unctad.org/en/docs/wir2009_en.pdf) (In 2009, “China recorded a 21% decline in [FDI] inflows during this period compared to the same period in 2008 . . .”).

<sup>141</sup> *Guangdong Procuratorate: CEOs Suspected of General Crimes May Face Arrest*, SINA NEWS (Feb. 8, 2014), <http://news.sina.com.cn/c/2009-01-07/011216990059.shtml>.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> See Richard B. Freeman & Xiaoying Li, *Has China’s New Labor Contract Law Worked?*, VOX (Dec. 22, 2013), <http://www.voxeu.org/article/has-china-s-new-labour-contract-law-worked>.

<sup>145</sup> See, e.g., *New Labor Law Introduced in China*, N.Y. TIMES (Jan. 1, 2008), <http://www.nytimes.com/2008/01/01/business/worldbusiness/01iht-chilabor.1.8968456.html>.

<sup>146</sup> See Sean Cooney, Sarah Biddulph, Li Kungang & Ying Zhu, *China’s New Labour Contract Law: Responding to Growing Complexity of Labour Relations in the PRC*, 30 UNIV. OF N.S.W.L.J. 786-801, 790

dispatch labor.<sup>147</sup> Third, many employers simply chose to not provide labor contracts to workers.

Migrant workers were especially susceptible to this third type of response. One survey of forty municipalities reported that only 12.5% of migrant workers are covered by contract.<sup>148</sup> By 2010 one estimate put the number of workers in small enterprises with labor contracts in Wuhan, Hubei at only 5%.<sup>149</sup> Lack of overtime payment was (and remains) a common concern among workers.<sup>150</sup> The equal pay provisions also failed to reach dispatch workers.<sup>151</sup> One survey of temporary workers in Guangzhou showed they earned one-third of the pay of formal employees.<sup>152</sup> Thus, economic pressures undermined enforcement of the LCL and the aspiration to provide labor rights by individual contract.

#### IV. THE PROVISIONS ON DISPATCH AND PART-TIME WORKERS PROVIDED AVENUES FOR FLEXIBLE EMPLOYMENT OF WORKERS

In an attempt to compromise between the perceived need for labor flexibility<sup>153</sup> and the labor protections of the law, the 2008 LCL outlined a trilateral contractual relationship between workers, dispatch agencies, and businesses who act as customers for the dispatch agencies.<sup>154</sup> In a dispatch

(2007), available at [www.austlii.edu.au/au/journals/UNSWLJ/2007/45.pdf](http://www.austlii.edu.au/au/journals/UNSWLJ/2007/45.pdf) (anticipating this employer response).

<sup>147</sup> See Harper Ho & Huang Qiaoyan, *supra* note 12, at 981.

<sup>148</sup> Jenny Chan, *Meaningful Progress or Illusory Reform? Analyzing China's Labor Contract Law*, 18 *NEW LAB. F.* 2, 44 (2009).

<sup>149</sup> See BROWN, *supra* note 40, at 482.

<sup>150</sup> See Edward Wong, *As China Aids Labor, Unrest Is Still Rising*, *N.Y. TIMES* (June 20, 2010), <http://www.nytimes.com/2010/06/21/world/asia/21chinalabor.html> (citing a study finding 90% of surveyed factories underpay workers for overtime hours).

<sup>151</sup> *China Tightens Loophole on Hiring Temporary Workers*, *REUTERS* (Dec. 28, 2012), [www.reuters.com/article/2012/12/28/us-china-labor-idUSBRE8BR04120121228](http://www.reuters.com/article/2012/12/28/us-china-labor-idUSBRE8BR04120121228) ("Although in theory contracted or dispatch workers are paid the same, with benefits supplied by the agencies who are legally their direct employers, in practice many contracted workers, especially in manufacturing industries and state-owned enterprises, do not enjoy benefits and are paid less").

<sup>152</sup> Alice Yan, *New Chinese Law on Protecting Casual Workers Slammed as Ineffective*, *S. CHINA MORNING POST* (July 8, 2013), <http://www.scmp.com/news/china/article/1277562/new-chinese-law-protecting-casual-workers-slammed-ineffective> [hereinafter *New Chinese Law on Protecting Casual Workers Slammed as Ineffective*]

<sup>153</sup> *Id.* (quoting HR services expert explaining, "[t]he flexibility of this labour model fits the demand of enterprises that need workers when their business prospers, but can then just let them go when they are in a downturn, without any risk of labour contract disputes").

<sup>154</sup> Feng Xu, *Labor Law Developments in China: The Emergence of Temporary Staffing Agencies in China*, 30 *COMP. LAB. L. & POL'Y J.* 431, 431 (2009).

labor<sup>155</sup> arrangement, a worker signs the labor contract with the dispatch agency. The dispatch agency, under separate contract with a business enterprise, then dispatches the worker to the business, which acts as the “accepting entity.”<sup>156</sup> The workers are therefore not employed by the host company, but are rather merely “leased” from the dispatch agency.<sup>157</sup>

Labor contracts between dispatch agencies and workers must be set for a fixed-term of no fewer than two years.<sup>158</sup> To be established under the Company Law of the People’s Republic of China,<sup>159</sup> the dispatch agencies are “employers” of the workers.<sup>160</sup> The agency assumes all liability as employer under the law and is obligated to provide labor contracts to the dispatch workers.<sup>161</sup>

Section 2 of the LCL contains ten provisions relating to worker dispatch services.<sup>162</sup> Article 57 of the pre-Amendments LCL set out a minimum renminbi (RMB) 500,000 registered capital requirement for all worker dispatch services.<sup>163</sup> Under Article 58, a contract between the dispatch service provider and the worker must conform to all of the requirements of any other labor contract, and must additionally state the specifics of the dispatch arrangement.<sup>164</sup> Article 66 of the Labor Contract Law provides that dispatch workers shall only be employed in “temporary,” “auxiliary,” or “substitute” positions.<sup>165</sup>

Under the LCL, the accepting entity, while not formally the employer, has several obligations to the dispatch worker. First, the accepting entity must comply with state labor standards, including safe working conditions.<sup>166</sup> Additionally, part-time workers are subject to wage and hour regulations such as local minimum wage laws.<sup>167</sup> The accepting entity must pay overtime, performance bonuses, and benefits relevant to the position,<sup>168</sup>

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<sup>155</sup> See LCL, *supra* note 13, at art. 53.

<sup>156</sup> *Id.* at arts. 58-59.

<sup>157</sup> See *id.*

<sup>158</sup> *Id.* at art. 58.

<sup>159</sup> *Id.* at art. 57; See generally The Company Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., October 27, 2005, effective January 1, 2006) (China), *translated in english.wzj.saic.gov.cn/laws/061027085055-0.htm*.

<sup>160</sup> See LCL, *supra* note 13, at art. 58.

<sup>161</sup> *Id.* at arts. 17, 58.

<sup>162</sup> *Id.* at arts. 57-67.

<sup>163</sup> *Id.* at art. 57.

<sup>164</sup> *Id.* at art. 58.

<sup>165</sup> *Id.* at art. 66.

<sup>166</sup> *Id.* at art. 62(1).

<sup>167</sup> *Id.* at art. 72.

<sup>168</sup> *Id.* at art. 62(3).

train dispatch workers,<sup>169</sup> and adjust wages for long-term dispatch workers.<sup>170</sup> Accepting entities, additionally, are prohibited from establishing their own dispatch agencies<sup>171</sup> or sub-dispatching workers to other business enterprises.<sup>172</sup> These provisions were intended to clarify the role of accepting entities and to minimize the differences between dispatch workers and other employees performing the same function in a workplace.<sup>173</sup>

Part-time employees are the other side of the nonstandard workforce that grew after the implementation of the LCL. In the original language of the LCL, since amended, part-time workers were defined narrowly: part-time workers were those paid on an hourly-wage basis and could not work more than four hours per day or more than twenty-four hours per week.<sup>174</sup> Employers were not required to provide labor contracts to part-time employees.<sup>175</sup> Without labor contracts, part-time employees are not granted several benefits otherwise granted to employees. For example, while employers were required to pay severance to full-time employees, they were not required to do the same for part-time employees.<sup>176</sup>

*A. The LCL Itself Supplied the Formal Means through Which Employers Could Evade the Intent of the Law.*

Even though the original LCL limited the use of dispatch workers, the provisions of the law were ineffective. Indeed, the use of dispatch labor expanded rapidly from the years 2008 to 2013. In 2010, the ACFTU produced a survey suggesting there were up to sixty million dispatch workers in China.<sup>177</sup> More recently, according to the China Labor Dispatch Industry Indepth Research and Investment Strategy Report, 2013-2017, there are roughly 26,000 labor dispatch companies in China, employing approximately twenty-seven million people. Dispatch workers make up

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<sup>169</sup> *Id.* at art. 62(4).

<sup>170</sup> *Id.* at art. 62(5).

<sup>171</sup> *Id.* at art. 67.

<sup>172</sup> *Id.* at art. 62.

<sup>173</sup> See Wang, *supra* note 18, at 439.

<sup>174</sup> See LCL, *supra* note 13, at art. 68.

<sup>175</sup> *Id.* at art. 69.

<sup>176</sup> *Id.* at art. 71.

<sup>177</sup> Bryan Cave, *China Amends Labor Contract Law to Eliminate Labor Dispatch Abuse*, BRYAN CAVE LLP (Apr. 18, 2013), <http://www.bryancave.com/files/Publication/030e4ed6-0109-4ce8-9d0a-4c9928c016d8/Presentation/PublicationAttachment/91bb2766-574c-417f-ad07-4e32cd68550a/LaborAlert4-18-13.pdf>.

roughly 5% of the total workforce.<sup>178</sup> Some industries have a larger representation of dispatch workers than others.<sup>179</sup> For example, 20% of Bank of China workers were dispatched.<sup>180</sup> Some sectors of government-run enterprises employ a workforce comprised predominantly of dispatch workers.<sup>181</sup>

There is a permissible role for labor dispatch, but labor leasing is often used by employers as a semi-legal shortcut to reduce labor costs.<sup>182</sup> One way to do this is to use dispatch labor as a method of probationary hiring. In this method, the temporary dispatch is a trial for future full-time employees. Employers evaluate dispatch worker productivity and screen for the best employees. This process eliminates selection and error risk and effectively reduces personnel costs. Reports from Chinese labor dispatch providers confirm this:

“If a worker doesn’t obey orders, then they can just get rid of them,” says Zhang Zhiru, director of the Shenzhen Chunfeng Labor Dispute Service. And although required to by law, labor dispatchers often do not provide social welfare insurance, which can make up as much as 40 percent of a full-fledged employee’s cost . . . .<sup>183</sup>

The practice of employing temporary dispatch workers as a business practice designed to lower labor costs is so widespread, it is used by foreign

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<sup>178</sup> *China Labor Dispatch Industry In-depth Research and Investment Strategy Report, 2013-2017*, QIANZHAN (May 6, 2014), <http://en.qianzhan.com/report/detail/6cdf8ac1017640a3.html> (last visited Oct. 7, 2014).

<sup>179</sup> *Rights of 60 Million Labor Dispatch Workers Hard to Protect*, CHINA LABOR NEWS TRANSLATIONS (Feb. 28, 2011), [http://www.cntranslations.org/file\\_download/140](http://www.cntranslations.org/file_download/140) (listing industries with larger representation of dispatch workers: “petroleum, chemical, telecommunications, finance, banking, aviation, and railways”).

<sup>180</sup> Jiang Jie, *Equal Work Rights For Temps*, GLOBAL TIMES (Aug. 9, 2013), <http://www.globaltimes.cn/content/802695.shtml>.

<sup>181</sup> See *Rights of 60 Million Labor Dispatch Workers Hard to Protect*, *supra* note 179, at 1.

<sup>182</sup> See DORSEY & WHITNEY LLP, *NEW LABOR CONTRACT LAW AFFECTS EMPLOYMENT ARRANGEMENTS OF FOREIGN INVESTED ENTERPRISES IN CHINA* (June 25, 2013), [http://www.dorsey.com/eu\\_China\\_Labor\\_Contract\\_Law\\_062413/](http://www.dorsey.com/eu_China_Labor_Contract_Law_062413/) (“[B]enefits of labor dispatching arrangements include: Savings in local HR manpower and cost because the labor dispatching agency will handle the payroll, social insurance, income tax return and other employment matters; Reducing the parent company’s cost of hiring because dispatched employees are not deemed as regular employees and therefore are often omitted from company’s global head count”).

<sup>183</sup> Roberts, *supra* note 23.

multinational companies operating in China, including Swire Beverages Limited.<sup>184</sup>

Attrition dispatch, also known as “reverse dispatch” is the practice of transferring full-time contract employees to a dispatch service to reduce the number of fixed staff and enhance flexibility.<sup>185</sup> Attrition dispatch brings administrative simplicity to firms: it “freed them from having to navigate the paperwork required by labour and tax authorities.”<sup>186</sup> The practice also saves money for firms through lower wages and social security payments.<sup>187</sup> Notwithstanding LCL Article 63, which provides that “workers dispatched shall have the right to receive the same pay as that received by employees of the accepting entity for the same work,”<sup>188</sup> workers whose contracts are with a dispatch agency “are paid a much lower salary and enjoy fewer benefits than formal coworkers.”<sup>189</sup> A story from China Labor Watch’s investigation into multinational electronics manufacturers illustrates the practice:

At Tyco Electronics and Catcher Technology for example, although the factories directly employ some workers, they sign labor contracts with a separate labor dispatch agency. As a result of this inconsistency, the factories may arbitrarily fire workers, providing workers with almost no job security.<sup>190</sup>

The arrangement weakens worker bargaining power so much that workers pay a fee to the dispatch company in order to work.<sup>191</sup> Although prohibited by Article 60 of the LCL,<sup>192</sup> the practice continues and is sometimes

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<sup>184</sup> BROWN, *supra* note 40, at 482.

<sup>185</sup> See Haiyan Wang, Richard P. Applebaum, Francesca Degiuli & Nelson Lichtenstein, *China's New Labour Contract Law: Is China Moving Towards Increased Power For Workers?*, THIRD WORLD Q. 494 (Mar. 31, 2009); see also *Chinese Students Go Undercover To Investigate Coca Cola: Students Beaten By Manager When He Asked For His Wages*, CHINA LABOR NEWS TRANSLATIONS 2 (Sept. 16, 2009), [http://www.clntranslations.org/file\\_download/86](http://www.clntranslations.org/file_download/86).

<sup>186</sup> *China Hand - Labour Pains*, THE ECONOMIST INTELLIGENCE UNIT (Oct. 17, 2013), 2013 WLNR 26138423.

<sup>187</sup> *Id.*

<sup>188</sup> See LCL, *supra* note 13, at art. 63.

<sup>189</sup> Jiang Jie, *supra* note 180.

<sup>190</sup> CHINA LABOR WATCH, TRAGEDIES OF GLOBALIZATION: THE TRUTH BEHIND ELECTRONICS SWEATSHOPS NO CONTRACTS, EXCESSIVE OVERTIME AND DISCRIMINATION: A REPORT ON ABUSES IN TEN MULTINATIONAL ELECTRONICS FACTORIES, 6 (2012), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2104&context=globaldocs>.

<sup>191</sup> Roberts, *supra* note 23.

<sup>192</sup> See LCL, *supra* note 13, at art. 60 (“No worker dispatch service provider or accepting entity may charge any fee from any dispatched worker.”).

administered discriminatorily. A description from China Labor Watch describes this violation in practice:

Within 100 meters from the back gate of the Tyco factory, there is a labor dispatch company, Huacai, which conducts recruitment for Tyco. Tyco and Huacai have signed a long-standing agreement, through which Huacai recruits workers on behalf of Tyco. Workers recruited via the labor dispatch company sign a contract with Huacai only [not the factory]. Wages are also distributed to workers by Huacai who use it as an intermediary. The Huacai employees stressed they only recruited women and do not recruit male workers. At the back gate of the factory, on the surrounding streets, there is a large-scale labor market with many different companies that all recruit for Tyco. Female workers seeking recruitment must pay \$15 USD fee and male workers must pay a \$30 USD fee.<sup>193</sup>

Such practices exceed the permissible scope of labor dispatch under the LCL, but nevertheless remain common.<sup>194</sup> The LCL provided incentives that led to this arrangement. It allowed reverse dispatch, the expanded use of labor dispatch to avoid the rising costs of employing full-time workers and thereby it tacitly permitted industry to prey upon precarious workers. Ultimately, the LCL birthed a dispatch labor industry that undermined the remedial intent of the law.<sup>195</sup>

*B. China Amended and Clarified the Labor Contract Law to Address Excessive Use of Informal Labor*

In its earliest stages following the LCL, “labor dispatch” practices were limited. The Regulation on the Implementation of the Labor Contract Law of the People's Republic of China (“Implementing Regulations”) applied the obligations of other employers to dispatch agencies.<sup>196</sup> The

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<sup>193</sup> CHINA LABOR WATCH, *supra* note 190.

<sup>194</sup> See Harper Ho & Huang Qiaoyan, *supra* note 12.

<sup>195</sup> *Id.*

<sup>196</sup> Zhonghua Renmin Gongheguo Laodong Hetong Fa Shishi Tiaoli (中华人民共和国劳动合同法实施条例) [The Regulation on the Implementation of the Labor Contract Law of the People's Republic of China] (promulgated by Order No. 535 by the State Council of the People's Republic of China, Sept. 3, 2008, effective Sept. 3, 2008) Art. 29 (China), translated in <http://en.pkulaw.cn/display.aspx?id=7055&lib=law&>



implementing regulations require employers to comply with all relevant state and national labor laws when employing temporary workers.<sup>197</sup> Employers must also provide severance pay to temporary workers.<sup>198</sup>

However, under the early version of the LCL, there was no legal deterrent against using part-time temporary workers to replace full-time workers.<sup>199</sup> In fact, many companies found it economically profitable to shift work from full-time employees, who were required to be provided with a labor contract, to part-time employees, who were comparatively cheaper.<sup>200</sup>

Recognizing that the expansion of labor dispatch thwarts the purpose of the LCL<sup>201</sup> and undermines economic stability by causing labor unrest,<sup>202</sup> the Standing Committee of the National People's Congress amended the Law in 2013 to curb the abuse of dispatch labor.<sup>203</sup> The Eleventh National Congress voted to amend on December 28, 2012.<sup>204</sup> The resulting Amendments were announced by January 2013 and came into effect on July 1, 2013.<sup>205</sup> The Amendments addressed the largely under regulated dispatch worker industry and set narrow limits on dispatch employment.<sup>206</sup>

SearchKeyword=&SearchCKeyword=%c0%cd%b6%af%ba%cf%cd%ac%b7%a8 [hereinafter "Implementing Regulations"].

<sup>197</sup> *Id.* at arts. 27-32.

<sup>198</sup> *Id.* at art. 31.

<sup>199</sup> See Wang, *supra* note 18 at 454-56.

<sup>200</sup> See Harper Ho & Huang Qiaoyan, *supra* note 12 at 977.

<sup>201</sup> See *supra* Part IV.A.

<sup>202</sup> See *supra* Part III.B.

<sup>203</sup> *New Amendments to China Labor Contract Law to Set Restrictions on the Use of Labor Dispatch*, FROST BROWN TODD LLC (June 26, 2013), <http://isg.frostbrowntodd.com/New-Amendments-to-China-Labor>.

<sup>204</sup> Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Guanyu Xiugai "Zhonghua Renmin Gongheguo Laodong Hetong Fa" De Jueding (全国人民代表大会常委会于修改《中华人民共和国劳动合同法》的决定) [Standing Committee of the National People's Congress Decision Regarding Amendments to the Labor Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 28, 2012, effective July 1, 2013), [http://www.gov.cn/flfg/2012-12/28/content\\_2305571.htm](http://www.gov.cn/flfg/2012-12/28/content_2305571.htm) (China) [hereinafter Amendments].

<sup>205</sup> MCDERMOTT, WILL & EMERY REVISIONS TO LABOUR CONTRACT LAW ADDRESS EMPLOYEE DISPATCH ISSUES, COMPANY EMPLOYMENT MODELS (Jan. 19, 2013), <http://www.mwe.com/Revisions-to-Labour-Contract-Law-Address-Employee-Dispatch-Issues-Company-Employment-Models-01-17-2013/>.

<sup>206</sup> See generally LAODONG ZHONGCAI WANG (劳动争议网) [LABOR ARBITRATION NETWORK], LAODONG HETONG FA XIUZHENG AN JI LAODONG ZHENYI SIFA JIESHI SHIWU CAOZU LAODONG HETONG FA WANG (劳动合同法修正案及劳动争议司法解案操作) [LABOR CONTRACT LAW AMENDMENT AND JUDICIAL INTERPRETATION OF THE PRACTICAL OPERATION OF LABOR DISPUTES] (May 20, 2013), <http://www.ldht.org/html/peixun/3195.html>.

The ACFTU, for its part, advocated closing the contractual workaround of the LCL.<sup>207</sup> The loophole, which had not gone unnoticed by employers or legal analysts,<sup>208</sup> “allowed workers to sign labour contracts with intermediary employment agencies rather than directly with their ultimate employers.”<sup>209</sup> The Amendments did not fix the loophole altogether, though they established standards for this practice.<sup>210</sup>

The Amendments define the positions listed in LCL Art. 66. Temporary positions are defined to be six months or less.<sup>211</sup> Auxiliary positions support and service the principal business activity but are not core positions.<sup>212</sup> Dispatch workers may be employed in substitute positions when full-time employees are on leave or otherwise unavailable.<sup>213</sup> The enterprise is required to replace full-time workers with other full-time workers when possible.<sup>214</sup> The rule now clarifies that contractual (i.e. bilateral) employment is the default form of employment in China; dispatch labor may only be used to supplement, not replace, a firm’s full-time workforce.

Dispatch agencies also now operate under tighter regulation. The Amendments provide a minimum size for dispatch agencies.<sup>215</sup> All dispatch agencies are required to have operating capital expenses over two million yuan; the earlier requirement was only RMB 500,000.<sup>216</sup> This provision should help to clarify the difference between dispatch centers and labor trafficking networks.<sup>217</sup> For example, firms now must be registered with an administrative labor bureau, and small or solo dispatch agencies will not be permitted.<sup>218</sup> The Amendments require that all written contracts also

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<sup>207</sup> *China Hand: Labour Pains*, *supra* note 186.

<sup>208</sup> See generally CHINA LAW & PRACTICE, EMPLOYMENT CONTRACT LAW: LOOPHOLES REVEALED, (Mar./Apr. 2013), [www.chinalawandpractice.com/Article/3148986/Search/Employment-Contract-Law-loop-holes-revealed.html](http://www.chinalawandpractice.com/Article/3148986/Search/Employment-Contract-Law-loop-holes-revealed.html).

<sup>209</sup> *China Hand: Labour Pains*, *supra* note 186.

<sup>210</sup> *Id.*

<sup>211</sup> Amendments, *supra* note 204, at art. 3.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> See LCL, *supra* note 13, at art. 57.

<sup>216</sup> *Id.*

<sup>217</sup> See generally EMBASSY OF THE UNITED STATES: BEIJING, CHINA, TRAFFICKING IN PERSONS REPORT 2012, <http://beijing.usembassy-china.org.cn/2012tipr.html> (last visited July 11, 2014).

<sup>218</sup> See LCL, *supra* note 13, at art. 57.

identify the proper rate of pay for workers and verify that the worker's payment complies with the contracts.<sup>219</sup>

One goal of the Amendments was to remove the cost-saving use of dispatch labor to evade the LCL.<sup>220</sup> The Amendments make clear that dispatch employees are required to be paid the same amount as full-time employees doing the same work.<sup>221</sup> This equal pay provision requires that workers performing the same job shall be provided not only with equal pay—as under Article 63 of the original LCL<sup>222</sup>—but with equal overall compensation, including social security payments, wages, workers' compensation, and other benefits.<sup>223</sup>

The amended law also narrows the scope of dispatch labor. The Amendments contain new rules on the duration of temporary contracts. Under the new law, no temporary position can last more than six months.<sup>224</sup> The purpose of this amendment was to prevent the formation of a subset of the workforce perpetually trapped in temporary positions.

The Amendments restrict the types of jobs that may be substituted to “auxiliary positions” and “substitute positions.”<sup>225</sup> Auxiliary positions are supportive of the primary functions of the business.<sup>226</sup> Substitute positions may have a stronger nexus to the main operations of the enterprise, but dispatch workers are only available for such positions to cover full-time employees on leave.<sup>227</sup>

Further, the Amendments specified dispatch workers must not exceed a specified percentage of a firm's workforce, which is determined by a labor arm of the State Council.<sup>228</sup> Because the amendment was unclear, this led to

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<sup>219</sup> *Amended Labor Contract Law Targets Equal Pay*, CHINA DAILY (July 1, 2013), [http://usa.chinadaily.com.cn/business/2013-07/02/content\\_16705182.htm](http://usa.chinadaily.com.cn/business/2013-07/02/content_16705182.htm) (hereinafter *LCL Targets Equal Pay*).

<sup>220</sup> See Pei Zhang, *New Amendments to China Labor Contract Law Set Restrictions on the Use of Labor Dispatch*, FROST BROWN TODD LLC (June 17, 2013), <http://www.lexology.com/library/detail.aspx?g=86b31aec-13dc-4a28-a441-c17497af9f2c>.

<sup>221</sup> *LCL Targets Equal Pay*, *supra* note 219; see also Alice Yan, *New Law on Casual Workers Attacked: Many Outsourced Staff Still Getting a Fraction of the Pay of Their Full-Time Peers and Firms are Accused of Employing Too Many of Them*, S. CHINA MORNING POST (July 8, 2013), 2013 WLNR 16564288.

<sup>222</sup> See LCL, *supra* note 13, at art. 63.

<sup>223</sup> Amendments, *supra* note 204, at art. 2.

<sup>224</sup> *Id.* at art. 3.

<sup>225</sup> See *id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at art. 66.

speculation that there would either be no national percentage, or if there were, it would be around 30-40%.<sup>229</sup>

The Amendments prescribed tougher penalties for violations.<sup>230</sup> The fine for violations range from RMB 5,000 to RMB 10,000 per employee.<sup>231</sup> Article 92 of the pre-Amendments LCL provided for fines only ranging from RMB 1,000 to RMB 5,000.<sup>232</sup> Under Article 92 of the Amendments, fines for violation of the LCL came to include revocation of a dispatch agency's business license, joint and several liability between dispatch agency and accepting entity, and confiscation of illegal gains.<sup>233</sup>

The Amendments did not resolve the practice of companies providing limited dispatch services with their own workforce and subcontracting out workers to other companies.<sup>234</sup> In this way, a company could reduce workforce demands and minimize severance compensation by arranging for its contract workers to work at other companies while retaining its manpower.

### C. Remaining Problems with Enforcement and Misuse of Dispatch Labor

Even with heftier legal penalties in place, many provisions of the LCL still lacked enforcement. For example, the equal pay provision, which had been in legal effect since the Labor Law, did not effectively equalize dispatch employees.<sup>235</sup> Abusive dispatch labor and residual ambiguity posed social and regulatory problems.

In an effort to clarify some of the ambiguities left by the amendment, the MOHRSS issued draft provisions for public comment on August 7, 2013, one month after the Amendments came into effect.<sup>236</sup> The agency accepted comments on the Draft Provisions until September 2013.<sup>237</sup>

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<sup>229</sup> *In The News: Labour Dispatch Provisions, State Council Approvals and a New Financial Supervision Agency*, CHINA LAW AND PRACTICE (Sept. 12, 2013), 2013 WLNR 24178325.

<sup>230</sup> Amendments, *supra* note 204, at art. 92.

<sup>231</sup> *Id.*

<sup>232</sup> See LCL, *supra* note 13, at art. 92.

<sup>233</sup> Amendments, *supra* note 204, at art. 92.

<sup>234</sup> See *Mediation to Have Bigger Role in Labor Disputes*, PEOPLE'S DAILY (Feb. 1, 2013), <http://english.people.com.cn/90882/8116899.html>.

<sup>235</sup> See, e.g. Jiang Jie, *supra* note 180 ("On July 29, [2013] a sanitation worker passed out from sunstroke on duty in Henan Province and later died. However, the family ended up receiving no work-related injury insurance from his employer because of his dispatched status").

<sup>236</sup> Renli Ziyuan Shehui Baozhang Bu Laowu Paiqian Ruogan Guiding (Zhenqiu Yijian Gao) (人力资源社会保障部劳务派遣若干规定 (征求意见稿)) [Certain Provisions Regarding Labor Dispatch (Draft Provisions)] (proposed Aug. 7, 2013), available at

Reactions to the Draft Provisions from business were hostile, as they were for the LCL and its Amendments. Specifically, the Draft Provisions upset some employers by proposing a national cap of 10% dispatch workers in a given firm.<sup>238</sup> Nevertheless, following the initial period of public comment, a version of the Draft Provisions took effect on March 1, 2014.<sup>239</sup>

The Interim Provisions provided specificity where the Amendments had been silent. For example, the Amendments had contained some residual ambiguity relating to the definition of “auxiliary position” and other terms.<sup>240</sup> Auxiliary positions under the Interim Provisions are now defined on a firm-by-firm basis, but only after negotiation with either a labor union or employee representative.<sup>241</sup> Also, whereas the permissible positions for dispatch laborers in an enterprise had been narrowed to temporary, auxiliary, and substitute work, the Interim Provisions specified that such positions may only be filled after the employees consult an “employees’ congress” and negotiate with the labor union or employees’ representatives.<sup>242</sup> Some scholars welcome the newest wave of reform, yet predict it will take many years for employers to adjust to the new legal regime.<sup>243</sup> The Interim Provisions demand a more ambitious rate of compliance; all firms are granted two years to reduce the total number of dispatch employs under the law’s threshold.<sup>244</sup>

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[http://www.mohrss.gov.cn/SYrlzyshshzbz/zxhd/SYzhengqiuuyijian/201308/t20130807\\_109508.htm](http://www.mohrss.gov.cn/SYrlzyshshzbz/zxhd/SYzhengqiuuyijian/201308/t20130807_109508.htm) [hereinafter *Draft Provisions*].

<sup>237</sup> *Id.*

<sup>238</sup> *Draft Provisions*, *supra* note 236, at art. 5; *see, e.g., Draft Provisions Limit Placed Workers To 10%*, 2013 WLNR 24178330 (quoting Philip Cheng of Hogan Lovells, Shanghai) (“From a business perspective, the 10% limit can be shocking, especially if you are a company where the majority of your workforce are placed workers. But from a social policy perspective, this is not at all surprising and reflects how the government has been looking to tackle labour dispatch arrangements”).

<sup>239</sup> *Lao Wu Pai Qian Zanxing Guiding* (劳务派遣暂行规定) [Interim Provisions on Labor Dispatch], ZHONGHUA RENMIN GONGHEGUO RENLIZIYUAN HE SHEHUIBAOZHANG BU (中华人民共和国人力资源和社会保障部) [MINISTRY RES. & SOC. SEC. OF THE P.R.C.] (Mar. 1, 2014),

[http://www.mohrss.gov.cn/gkml/xxgk/201401/t20140126\\_123297.htm](http://www.mohrss.gov.cn/gkml/xxgk/201401/t20140126_123297.htm) [hereinafter *Interim Provisions*]; *See also* Taylor Wessing, *International Law at Work – February 2014: China’s Interim Provisions on Agency Workers Issued*, THE LAWYER (Feb. 28, 2014), <http://www.thelawyer.com/briefings/international-law-at-work-february-2014-chinas-interim-provisions-on-agency-workers-issued/3017001.article>.

<sup>240</sup> *See* Chao Tong & Ron Cai, *Labor Dispatch Under the Amended Labor Contract Law of China*, DAVIS WRIGHT TREMAINE LLP (Sept. 4, 2013), [www.dwt.com/Labor-Dispatch-Under-the-Amended-Labor-Contract-Law-of-China-09-04-2013/](http://www.dwt.com/Labor-Dispatch-Under-the-Amended-Labor-Contract-Law-of-China-09-04-2013/).

<sup>241</sup> *Interim Provisions*, *supra* note 239, at art. 3.

<sup>242</sup> *Interim Provisions*, *supra* note 239, at art. 3.

<sup>243</sup> *See, e.g.,* Harper Ho & Huang Qiaoyan, *supra* note 12 (“[W]hen new rules have attempted to push companies to make significant changes far beyond the level of current practice, decades may be required for the reforms to take root.”).

<sup>244</sup> *Interim Provisions*, *supra* note 239, at art. 27.

## V. THE RIGHT TO STRIKE COULD REPLACE THE REMEDIAL INTENT OF THE LABOR CONTRACT LAW

This comment suggests that it is doubtful that the Interim Provisions (which mark the most recent iteration in a long line of attempts to legislate workers' rights through individual contracts) can fully achieve their objective.

First, although the Labor Contract Law and its more recent Amendments and Interim Provisions create strong legal protections for workers' rights, a problem with enforcement remains. The 10% cap on dispatch workers will likely be ignored by many enterprises. A manager from a dispatch agency in Shanghai recently admitted that:

On average, more than half of the workers at the enterprises we work with are dispatched by us – in some cases the figure is 90 percent . . . if we followed the rule that the percentage should be limited to 10 per cent, as some authorities are saying, my company would shut down within one or two years.<sup>245</sup>

Secondly, precarious work and informalization of the economy are, by now, dominant trends that are predicted to continue.<sup>246</sup> Because informally employed workers do not benefit from workplace protections premised on individual labor contracts, labor standards for these workers will continue to deteriorate despite legislative fixes to the labor contract theory of workers' rights. A decade ago, before the LCL, Professor Wang Yi cautioned against China's more general transition from "status" to "contract":

[I]n the discourse of a contractual world each and every relationship is rootless, starting anew, from zero. Therefore, to recover a sense of social justice in China today, it is necessary to put aside modern notions of . . . the wage contract, and go

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<sup>245</sup> *New Chinese Law on Protecting Casual Workers Slammed as Ineffective*, *supra* note 152.

<sup>246</sup> See SAROSH KURUVILLA, CHING KWAN LEE & MARY GALLAGHER, FROM IRON RICE BOWL TO INFORMALIZATION: MARKETS, WORKERS, AND THE STATE IN A CHANGING CHINA 4 (2011) ("Precarious labor, as many sociological and labor studies have maintained, has spread like wildfire in an age of neoliberalism and flexible accumulation, afflicting the advanced industrialized world no less than the underdeveloped economies [citations omitted]. Although the competitive pressures of global capitalism may be commonly felt, we argue that national circumstances and institutions [in China] dictate the extent and effects of increased flexibility and informalizations").

back to the origins of a collective world, when our people were ready to create a utopian society together.<sup>247</sup>

Through the foregoing analysis of employment law reform and worker insurgency, it seems Professor Yi correctly foresaw the shortcomings of contract-based rights. Since China's economic reform period, "[t]he commodification of labour has been the constitutive process of China's turn to capitalism."<sup>248</sup> Legislative attempts to provide rights notwithstanding, it appears unlikely China's economic growth could be used to improve workers' livelihood.

Under China's labor law regime, workers' rights are defined narrowly as the right to contract as individuals. Labor laws defined this way are not so much labor protections as they are a method for reducing economic stoppages due to industrial action and an inoculation against collective rights. The LCL, in this sense, is a bargain struck to appease disgruntled workers while still maintaining a flexible labor market.<sup>249</sup> The LCL's protections were designed to curb the abuses of the system, while simultaneously fostering capitalist development.

Third, a more robust system of protecting workers' rights would be to eliminate the barriers to collective organizing in China. However, that is a path China has not opened. As one of ten governments characterized by the ILO as being "of chief economic importance," China holds an important seat on the organization's Governing Body.<sup>250</sup> Nevertheless, China has not ratified four of the ILO's eight fundamental conventions, including the two conventions explicitly concerned with the right to organize: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).<sup>251</sup> Article 2 of the ILO Convention 87 proclaims:

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the

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<sup>247</sup> Wang Yi, *From Status to Contract?*, in ONE CHINA, MANY PATHS 191 (Chaohua Wang ed., 2003).

<sup>248</sup> Eli Friedman & Ching Kwan Lee, *Remaking the World of Chinese Labour: A 30-Year Retrospective*, 48 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 507, 508, (2010).

<sup>249</sup> See LCL, *supra* note 13, at art. 1.

<sup>250</sup> CORNELL UNIV. LAW LIB., ILO RESEARCH GUIDE, <http://www.lawschool.cornell.edu/library/WhatWeDo/ResearchGuides/ILOguide.cfm> (last revised Oct. 2010).

<sup>251</sup> ILO, UP-TO-DATE CONVENTIONS NOT RATIFIED BY CHINA, [http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210\\_COUNTRY\\_ID:103404](http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:103404) (last visited Nov. 11, 2014).

organisation concerned, to join organisations of their own choosing without previous authorisation.<sup>252</sup>

Convention 98 reiterates and clarifies the right to organize. Article 8(1)(a) of the UN's International Covenant on Economic, Social, and Cultural Rights (ICESCR) protects:

The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.<sup>253</sup>

In addition to the right to form and join trade unions, paragraphs two through three of the CESCR also protects “the right of trade unions to establish national federations,” “the right of trade unions to function freely,” and “the right to strike.”<sup>254</sup> The ILO declares “freedom of association and the effective recognition of the right to collective bargaining” as a “fundamental principle” that its members are obliged “to respect, to promote, and to realize. . . .”<sup>255</sup>

According to a survey of quantitative studies of Chinese unions, union membership and the associated increase in democratic voices in a workplace has had multiple beneficial effects for workers and the economy as a whole.<sup>256</sup> For example, workplaces with unions are likely to have lower intra-firm wage inequalities than non-unionized workplaces.<sup>257</sup> Union presence in a workplace correlates positively with employer compliance

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<sup>252</sup> ILO Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organise, Art. II, July 9, 1948, 68 U.N.T.S. 17.

<sup>253</sup> The United Nations International Covenant on Economic, Social, and Cultural Rights, Art. 8(1)(a), Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>254</sup> *Id.*

<sup>255</sup> ILO Declaration on Fundamental Principles and Rights at Work, art. 2, June 18, 1998, 37 I.L.M., 1233.

<sup>256</sup> See Chang Hee Lee, *Industrial Relations and Collective Bargaining in China* (2009) (ILO, Working Paper No. 7 2009), available at [www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/publication/wcms\\_146612.pdf](http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-beijing/documents/publication/wcms_146612.pdf).

<sup>257</sup> Chang Hee Lee & Mingwei Liu, *Collective Bargaining in Transition: Measuring the Effects of Collective Voice in China*, in *THE ROLE OF COLLECTIVE BARGAINING IN THE GLOBAL ECONOMY: NEGOTIATING FOR SOCIAL JUSTICE* 205, 216 (Susan Hayter ed., 2011).



with mandatory social insurance contributions.<sup>258</sup> As the survey authors conclude, “workplace industrial relations institutions offer a channel for the collective voice of workers at the workplace – to a certain extent.”<sup>259</sup>

China’s labor union, the ACFTU, has proven inadequate in providing this right and is seriously flawed as a representative of workers.<sup>260</sup> Granted, there are signs the ACFTU meets its obligation to improve working conditions. For example, the ACFTU’s intervention into the dispatch labor debate and its response to the health effects of overwork.<sup>261</sup> Even so, the ACFTU is restrained by a lack of fundamental labor rights such as the right to organize, defined as the right held by each and every individual to form and join unions with colleagues, and to participate in collective bargaining.<sup>262</sup>

Fourth, if the abuse of dispatch labor continues, workers left without formal remedies will resort to industrial action rather than legal means to achieve improved working conditions. According to estimates by China Labor Bulletin, a Hong Kong-based NGO, the amount of strikes in China from July to August 2013 were double those observed for the same period the previous year.<sup>263</sup> China Labor Bulletin maintains a detailed strike map, which illustrates the numerical prevalence of strikes in the Pearl River Delta.<sup>264</sup>

Individual legal remedies are difficult to achieve for practical reasons. Civil suits depend on lawyers in private practice who are willing to take risks. Still, some lawyers in China are pioneering a “law case intervention programme,” where lawyers work pro bono to take on an individual worker’s legal case.<sup>265</sup> Han Dongfang, a labor activist imprisoned for advocating the formation of an autonomous union during the 1989 Tiananmen Square protests, is one of the most vocal advocates for this method. Because Chinese civil law provides that workers may file suit for

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<sup>258</sup> *Id.* at 219.

<sup>259</sup> *Id.* at 222.

<sup>260</sup> See Halegua, *supra* note 122, at 2 (“Most union officials answer to the employer, who pays their wages and is able to fire them at will. Far from being elected representatives of the workers, union officials are often relatives and friends of the employers or other managers within the company”).

<sup>261</sup> See He Dan, *Worker’s Right to a Rest Stressed*, PEOPLE’S DAILY (Oct. 19, 2013), <http://english.people.com.cn/90882/8430389.html>.

<sup>262</sup> See Trade Union Law, *supra* note 42, at art. 2.

<sup>263</sup> *China’s Workers Turn Up the Heat in Summer of Protest*, CHINA LABOUR BULLETIN (Sept. 11, 2013), <http://www.clb.org.hk/en/content/china’s-workers-turn-heat-summer-protest>.

<sup>264</sup> *Strike Map*, CHINA LABOUR BULLETIN, <http://www.numble.com/PHP/mysql/clbmap.html> (last visited Nov. 11, 2014).

<sup>265</sup> Han Dongfang, *Chinese Labour Struggles*, 34 NEW LEFT REV. 65, 79-80 (2005).

backpay, he supports lawsuits over pursuing official channels like arbitration and filing union grievances.<sup>266</sup>

There are others like Han. Zhou Litai, who gained fame and notoriety for representing the indigent migrant labor force, claims to have filed over 12,000 cases on behalf of workers.<sup>267</sup> For years Zhou took on the cases under a contingency fee agreement, receiving nothing for cases that he lost.<sup>268</sup> Zhou even provided free room and board to hundreds of injured workers whom he represented.<sup>269</sup> The model is reminiscent of early labor hall tactics among American unions.

Legal casework of this sort is no guarantee of a remedy, however, and organizing clandestinely is even riskier. Despite the official discouragement of independent labor unions, and the criminalization of autonomous worker actions, unauthorized wildcat strikes (i.e., strikes not authorized by the union) have proliferated in China. In June 2010, for example, Honda factory workers in Foshan, Guangdong Province, led several extended walkouts to demand an end to unsafe working conditions, wage arrears, and lack of collective bargaining power.<sup>270</sup> Then, in December of 2011, an estimated 8,000 employees of Korea-based electronics manufacturer LG, struck in Nanjing, Jiangsu province to protest low wages.<sup>271</sup>

The Supreme People's Court, noting the surge in labor unrest following the passage of the Labor Contract Law, suggested that the fault lay with employers.<sup>272</sup> According to Sun Jungong, "[s]ome enterprises tend to ignore the protection of workers' rights in order to maximize profits and minimize labor costs, with illegal unemployment and violations of employees' legitimate rights being common."<sup>273</sup> The agitation among workers may be tied to the LCL in more than one way. First, the Labor

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<sup>266</sup> *Id.* at 79.

<sup>267</sup> Feng Shu, *Soliciting Justice*, GLOBAL TIMES (Nov. 9, 2012), <http://www.globaltimes.cn/content/743434.shtml>.

<sup>268</sup> See Yao Ying, *Legal 'Savior' Fighting for his Fees*, CHINA DAILY (July 5, 2004), [www.chinadaily.com.cn/english/doc/2004-07/05/content\\_345478.htm](http://www.chinadaily.com.cn/english/doc/2004-07/05/content_345478.htm).

<sup>269</sup> Feng Shu, *supra* note 267.

<sup>270</sup> David Barboza & Hiroko Tabuchi, *Power Grows for Striking Chinese Workers*, N.Y. TIMES (June 8, 2010), [http://www.nytimes.com/2010/06/09/business/global/09labor.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/06/09/business/global/09labor.html?pagewanted=all&_r=0); David Barboza, *Workers in China Accept Deal, Honda Says*, N.Y. TIMES (June 4, 2010), <http://www.nytimes.com/2010/06/05/business/global/05honda.html>.

<sup>271</sup> Edward Wong, *China: Strike at a Korean Factory*, N.Y. TIMES (Dec. 28, 2011), [http://www.nytimes.com/2011/12/29/world/asia/workers-at-korean-factory-strike-over-low-wages.html?\\_r=0](http://www.nytimes.com/2011/12/29/world/asia/workers-at-korean-factory-strike-over-low-wages.html?_r=0).

<sup>272</sup> Edward Wong, *Global Crisis Adds to Surge of Labor Disputes in Chinese Courts*, N.Y. TIMES, (Sept. 15, 2010), <http://www.nytimes.com/2010/09/16/world/asia/16china.html>.

<sup>273</sup> *Id.*

Contract Law may have been successful in raising workers' awareness of their legal rights. Second, the laws may have created more protections with which employers are not prepared to comply. In conjunction with this, the lack of enforcement built into the laws has left workers with legal wrongs without formal remedies.<sup>274</sup>

## VI. CONCLUSION

According to Ke Chen, the emphasis of labor contract reform as the basis for promoting labor standards in China is rooted in a balancing act between providing a flexible labor market that preserves employers' right to meet their personnel needs, and safeguarding the employees' right to work and rights at work.<sup>275</sup> It is a mediated policy, seeking the benefits of the former system where the state was responsible for workers' livelihoods, and the benefits of a dynamic economy that can take advantage of a fluid labor market.

Through several iterations of amendment, clarification, and refinement through multiple levels of government, China sought to close the loopholes opened by the attempt to provide workers' rights through individual contract. Meanwhile, the reforms made no meaningful contribution toward collective rights. Considering the statistical expansion of informal work, the regulatory problems posed by the labor dispatch industry, the lack of enforcement of existing remedial legislation, and the lack of collective rights, it remains unclear whether China can have it both ways through its balancing act between socialism and capitalism.

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<sup>274</sup> See Edward Wong, *As China Aids Labor, Unrest Is Still Rising*, N.Y. TIMES (June 20, 2010), <http://www.nytimes.com/2010/06/21/world/asia/21chinalabor.html>.

<sup>275</sup> CHEN, *supra* note 30, at 37.