

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

VIRGINIA E. HARPER HO^{*}

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

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

^{*} Visiting Assistant Professor, Indiana University Maurer School of Law. Field research for this study was conducted in the fall of 2003 and spring of 2008. Special thanks is owed to the faculty and students of Sun Yat Sen University School of Law Legal Clinic in Guangzhou, China, and particularly to Huang Qiaoyan, for their assistance in facilitating this research. I am also grateful to Hilary Josephs, Ben Liebman, Ron Brown, Ethan Michelson, Li Libin and attendees at the Indiana University East Asian Studies Center panel on "Conflict in China," Mar. 2009, for their comments on an earlier version of this Article. Excellent research assistance was provided by Xu Zhe, Wu Yan, Li Xiaoting, Cai Zhifeng, and Li Biyun. I am most of all indebted to the workers, lawyers, labor rights advocates, and labor administration officials interviewed during this study who cannot be acknowledged by name. All remaining errors are mine alone. All Chinese sources cited herein are on file with the author.

I.	FOUNDATIONS OF IMPLEMENTATION: REGULATORY STRATEGIES, INSTITUTIONS AND PROCESSES	42
A.	<i>Motivating Compliance: Deterrent and Cooperative Strategies</i> . .	42
B.	<i>Labor Law Enforcement in China: Institutions and Processes</i> . .	45
1.	Public Enforcement: Labor Supervision, Administrative Penalties, and Cooperative Strategies	47
a.	<i>Deterrence-Based Strategies</i>	47
i.	Mandatory Tiered Enforcement	49
ii.	Local Interests and Regulatory Capture	50
iii.	Low Penalties, Low Risk	51
iv.	No Big Stick at the Top	53
b.	<i>Cooperative Strategies</i>	53
2.	Private Enforcement: Labor Dispute Resolution and Beyond	54
a.	<i>Administrative Petitions and Reports</i>	55
b.	<i>Dispute Resolution Through Labor Arbitration and the Courts</i>	56
i.	Cost-Benefit Challenges of Labor Dispute Resolution	58
ii.	Trade Unions and the Crisis of Representation	59
c.	<i>Informal Labor Dispute Resolution</i>	61
d.	<i>Extralegal Modes of Private Enforcement</i>	62
e.	<i>Codes of Conduct</i>	64
II.	THE 2007 LABOR LAW REFORMS AND THEIR IMPLICATIONS FOR IMPLEMENTATION	65
A.	<i>Introduction to China's New Labor Laws</i>	66
1.	The Labor Dispute Mediation and Arbitration Law	67
2.	The Employment Promotion Law	67
3.	The Labor Contract Law	68
B.	<i>Towards "Harmonious" Labor Practices: Using Carrots and Mostly Sticks in China's New Labor Legislation</i>	71
1.	Sending the Compliance Message and Making Sure It Is Received	72
2.	Motivating Compliance Under the Labor Contract Law and the Employment Promotion Law	74
a.	<i>Deterrence Through Private Enforcement</i>	74

<i>b. Compliance-Oriented Rules</i>	76
3. Motivating Compliance Under the Labor Arbitration Law . . .	77
<i>a. Expanded Access for Worker Claims</i>	78
<i>b. Potential for Higher Claims and Awards</i>	79
<i>c. Dealing with Delay</i>	79
<i>d. Improved Arbitrator Qualifications</i>	81
<i>e. Heightened Emphasis on Mediation</i>	81
III. PROOF OF THE PUDDING? EARLY EVIDENCE OF IMPLEMENTATION FROM GUANGDONG PROVINCE—THE CASE OF LABOR CONTRACTS	83
<i>A. The Administrative Response: Impact on Public Enforcement</i> . .	86
<i>B. Real Compliance? Impact on Employers</i>	89
1. Exit	90
2. Formal Compliance and Mitigation	91
3. Evasion	93
<i>C. The Mobilization Response: Impact on Private Enforcement</i> . .	95
<i>D. Lessons and Implications</i>	98
IV. RECOMMENDATIONS AND CONCLUSION	100
<i>A. The Need for Strong Public Enforcement</i>	101
<i>B. The Need for Integrated Cooperative Strategies</i>	103
<i>C. The Importance of Unions</i>	104
<i>D. Conclusion: The Derivative Power of Law</i>	105

In an era of globalization where multinationals draw on labor and capital resources across national borders, labor relations and employment practices are still fundamentally bounded by domestic legal regimes.¹ Indeed, it has been widely argued that inadequate or poorly enforced labor standards in developing countries are to blame for spurring a “race to the bottom,” as intense competition for investment and jobs pushes labor, environmental, and social regulation toward the lowest common denominator. Trade unions and policymakers have voiced concern that low wages and poor enforcement of labor laws give developing countries an unfair trade advantage, draining jobs away from the developed world.² Whether they reflect reality or rhetoric, these debates are indicative of the wide “ripple effect” national labor and employment laws have in an integrated and interdependent global marketplace.

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

¹ This is notwithstanding wide-ranging efforts of the International Labor Organization (ILO), the International Trade Union Confederation (ITUC), the United Nations (UN) and other international organizations to promote broader recognition of fundamental labor rights as customary international law. See JENNIFER A. ZERK, *MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY* 262–64 (2006).

² For a summary of these debates, see R. BLANPAIN, *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW: CASES AND MATERIALS* 8–13 (2007). See also JAGDISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION* (2004).

³ 中华人民共和国劳动法 [Labor Law (P.R.C.)], (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1994, effective Jan. 1, 1995) STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.), translated at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383754.htm [hereinafter Labor Law]; 中华人民共和国劳动合同法 [Labor Contract Law (P.R.C.)], (promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2007, effective Jan. 1, 2008,) STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.), translated at http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471106.htm [hereinafter LCL]; 劳动争议调解仲裁法 [Law on the Mediation and Arbitration of Labor Disputes (P.R.C.)], (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 29, 2007, effective May 1, 2008) STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.) [hereinafter Labor Arbitration Law]; 中华人民共和国就业促进法 [Employment Promotion Law (P.R.C.)], (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 30, 2007, effective Jan. 1, 2008) STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.), available at http://www.law-lib.com/law/law_view.asp?id=212683 [hereinafter EPL].

interested in China's ongoing legal reform efforts.

In contrast to the 1994 Labor Law, which loosened state control over labor relations and gave broad discretion to employers, the new laws impose greater constraints on employer discretion and take a more protective stance toward workers. This approach places labor law reforms among a number of measures adopted by the Chinese government in recent years to address the social impact of breakneck economic growth and to build a "harmonious" society.⁴ The new laws also build on prior national-level efforts over the past five years to introduce or expand basic legislation governing the workplace, including the revised Trade Union Law, the Law on Work Safety, the Law on Prevention and Control of Occupational Diseases, and the revised Law on the Protection of Disabled Persons.⁵ The expanse of regulatory change in the area of labor law is a clear reflection of China's remarkable success in building a comprehensive and complex legal system in little over thirty years.

Yet over the course of China's economic and legal reforms, it has often been observed that creating a vast body of legislation is far easier than ensuring its effective implementation.⁶ Indeed, the legal framework governing employment in China is already quite protective, and many basic labor standards more resemble European practice than that of the United States. Still, China has earned a reputation for lax enforcement of its labor laws, and the gap between the law on the books and the law in practice has been wide indeed.

⁴ The Central Committee of the Chinese Communist Party (CCP) first endorsed Chinese President Hu Jintao's policy of building a "harmonious society" in 2006. See Maureen Fan, *China's Party Leadership Declares New Priority: "Harmonious Society,"* WASH. POST, Oct. 12, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101610.html>.

⁵ 中华人民共和国工会法 [Trade Union Law (P.R.C.)], (adopted by the Nat'l People's Cong., effective Apr. 3, 1992, amended by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001), 法律汇编 (经济行政法) [COLLECTED LAWS (ECONOMIC & ADMINISTRATIVE LAW)] 1122 (1996), as amended Oct. 27, 2001, translated at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383823.htm; 中华人民共和国安全生产法 [Law on Work Safety (P.R.C.)], (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2002, effective Nov. 1, 2002) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.), translated at http://www.npc.gov.cn/englishnpc/Law/2007-12/06/content_1382127.htm [hereinafter Law on Work Safety]; 中华人民共和国职业病防治法 [Law on Prevention and Control of Occupational Diseases (P.R.C.)], (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Nov. 1, 2002) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.), translated at http://www.npc.gov.cn/englishnpc/Law/2007-12/10/content_1383440.htm; 中华人民共和国残疾人保护法 [Law on the Protection of Disabled Persons (P.R.C.)], (adopted by the Standing Comm. Nat'l People's Cong., Dec. 29, 1990, effective May 15, 1991, amended by the Nat'l People's Cong., Apr. 24, 2008, effective July 1, 2008) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.). In 2007, China also ratified the ILO Convention on Occupational Health and Safety. ILO Convention on Occupational Safety and Health, June 22, 1981, 1331 U.N.T.S. 279.

⁶ See, e.g., JIANFU CHEN, CHINESE LAW: TOWARDS AN UNDERSTANDING OF CHINESE LAW, ITS NATURE AND DEVELOPMENT 363 (1999).

A number of studies have surveyed the basic terms of the new legislation and speculated about the potential impact for foreign investors, other employers, and worker rights.⁷ However, none has yet presented a comprehensive analysis of how the new regulatory changes address the fundamental implementation problems confronting labor law in China. This article is the first to take up this important question.

To ground this inquiry, it is important first and foremost to consider against what standard “successful” or “effective” implementation is to be measured. For some observers, important broad indicators would reflect administrative policymaking, institution-building, or even establishment of the “rule of law”.⁸ A more pragmatic approach might ask whether the “law on the books” has been translated into practice such that it performs its intended purposes in the context of the institutions, actors, and social structures in which it is “brought to life.”⁹ Applying the latter conception to China’s case, the question then is whether the new laws will be applied in actual practice by the parties to the labor relationship—employees and employers—and by public enforcement authorities, labor arbitrators, and courts, in a way that achieves the stated goals of the new labor legislation—that is, protecting worker rights and promoting “stable and harmonious” labor relations.¹⁰

Clearly, it is not possible to do justice to even the elements contained in this definition, nor to assess implementation across the entire range of issues covered by Chinese labor law, in a single study. However, the above definition does suggest several dimensions that are minimally necessary to effective labor law implementation: (1) the establishment and operation of the basic institutions presumed by the laws, which include administrative and judicial institutions; (2) dissemination of the law to

⁷ On the LCL, see, e.g., Sean Cooney et al., *China’s New Labour Contract Law: Responding to the Growing Complexity of Labour Relations in the PRC*, 30 U. N.S.W. L. J. 788 (2007); Hilary K. Josephs, *Measuring Progress Under China’s Labor Law: Goals, Processes, Outcomes*, 30 COMP. LAB. L. & POL’Y J. 373 (2009). On the Labor Arbitration Law, see Yun Zhao, *China’s New Labor Dispute Resolution Law: A Catalyst for the Establishment of Harmonious Relationship?* 30 COMP. LAB. L. & POL’Y J. 409 (2009).

⁸ See Jianfu Chen, *Introduction*, in IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA 1–6 (Jianfu Chen et al. eds., 2000) [hereinafter IMPLEMENTATION OF LAW] (discussing the definitional difficulties and prior literature). See also Jan Michiel Otto, *Toward an Analytical Framework: Real Legal Certainty and Its Explanatory Factors*, in IMPLEMENTATION OF LAW 23–34 (conceptualizing “Real Legal Certainty” as a primary goal of implementation).

⁹ This definition is adapted from IMPLEMENTATION OF LAW, *supra* note 8, at 2–3.

¹⁰ For the objectives of the new laws, see LCL, *supra* note 3, art. 1 (focusing on the “rights of workers”); Labor Arbitration Law, *supra* note 3, art. 1; EPL, *supra* note 3, art. 1. These actors and institutions are identified here and in Part I, *infra*, because they are the stated subjects of the new legislation. See, e.g., LCL, *supra* note 3, art. 1. I do not include here unions or employer, trade or industry associations because they are not mandatory to the formation of the labor relationship or the implementation of law, although they do have clear roles to play in these areas under Chinese labor law. See *infra* Section B.

employees, employers, enforcement authorities, and the public, as the first step of the “translation” process, and (3) the creation of sufficient incentives to motivate employer compliance with the law.

With regard to the first element, the new legislation makes no significant change to the existing institutional context of Chinese labor law, which is introduced in Part I. The second element, dissemination, is not a focus of this piece but has been a priority of the Chinese leadership. It is discussed briefly in Part II. The core inquiry for this article is the third element—whether the new legislation either has itself introduced or has stimulated measures that can more effectively motivate employer compliance and whether there are in fact any signs of its bearing fruit at this early stage.

In addition to examining aspects of the new laws that directly target historical barriers to labor law implementation, this study is the first to incorporate empirical findings of the laws’ effect on employer compliance as well as first-hand evidence of local implementation policies. Somewhat fortuitously perhaps, the primary interview and survey data presented here were obtained in the first half of 2008. As a result, this study overcomes some of the analytical difficulties posed by the global financial crisis, since it looks at the laws’ effect on local enforcement priorities and employer practices in the brief window of time before the full force of the economic downturn was felt in China. This provides an opportunity to observe responses to the laws in a market context not radically different from the one that prevailed before they took effect.

The evidence presented here highlights the complexities of labor law implementation in China. On the one hand, it challenges the common perception that labor law enforcement is utterly ineffective and that China’s workers have no real means of challenging violations of legal rights. Indeed, the findings identify many ways in which Chinese enforcement authorities and their Western counterparts face similar practical and policy choices. At the same time, this study points to the limits of legal reform as a means of promoting healthy labor-management relations, particularly in the absence of mechanisms for effective collective representation. This research therefore has implications for those considering how best to engage China with respect to a broad range of labor-related policy issues. Because China confronts similar implementation challenges across its legal system, this investigation also offers insights into the potential and limits of law as a means of responding to other critical social problems that have emerged in the context of China’s economic development drive.

Part I of this article describes the current institutional and legal framework for enforcing Chinese labor law in light of the literature on

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

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

Before assessing the impact of China's new legislation, it is important to understand the challenges that have confronted labor law implementation to date. What motivates individuals, and by extension, firms, to comply with legal rules, and the related question of what regulatory strategies are effective in incentivizing compliance are the subject of a broad interdisciplinary literature incorporating insights from sociology, political science, economics, law, and public policy.¹¹ Although these studies are largely grounded in empirical analysis of regulatory practices and compliance in the West, many of the findings have parallels in the Chinese experience. This literature is therefore a useful framework for the later discussion of China's implementation structures and the current reforms.

A. Motivating Compliance: Deterrent and Cooperative Strategies

With regard to the question of why firms obey the law, prior studies identify three preconditions of compliance: (i) awareness of the law, (ii)

¹¹ See, e.g., Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 LAW & SOC'Y REV. 41 (2004); FIONA HAINES, CORPORATE REGULATION: BEYOND "PUNISH OR PERSUADE" (1997); IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); JAY A. SIGLER & JOSEPH E. MURPHY, INTERACTIVE CORPORATE COMPLIANCE: AN ALTERNATIVE TO REGULATORY COMPULSION (1988); EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (1982).

the capacity to comply, and (iii) the desire to do so.¹² This research finds that a range of “affirmative” and “negative” motivations can incentivize compliance where the first two conditions are met. As Peter May explains, affirmative motivations “emanate from good intentions and a sense of obligation to comply” or a sense of “corporate virtue”, while “negative motivations arise from fears of the consequences of being found in violation of regulatory requirements.”¹³ In reality, a dichotomous view of firms that sees them as either economically rational, profit-maximizing actors or as cooperative and law-abiding is overly simplistic. Firms are not unitary decision makers, but act in accordance with decisions made by executives, managers and employees as agents of the firm and its shareholders. Ayres and Braithwaite’s empirical studies of firm motivations, among others, also indicate that firms act from a range of competing motivations and subject to competing priorities. Depending on numerous contextual and operational concerns, firms’ different (and sometimes contradictory) commitments to economic rationality, adherence to law, and social responsibility may carry greater or lesser weight.¹⁴

The ultimate goal for policymakers is to identify strategies to motivate and maximize voluntary or quasi-voluntary compliance by a significant percentage of firms so that the underlying policy objectives of the regulation can be achieved. Regulatory tools to achieve this goal have typically been defined along a spectrum from primarily deterrence-based to primarily “cooperative” (or “compliance-based”) strategies. Deterrence-based enforcement systems, which have historically grounded much of Western regulatory practice, are based on a view of the firm as a rational economic actor that complies based largely on cost-benefit calculations.¹⁵ Under a deterrence paradigm, regulators appeal to negative motivations, namely the fear of sanction, to promote compliance;

¹² See Robert A. Kagan & John T. Scholz, *The “Criminology of the Corporation” and Regulatory Enforcement Strategies*, in ENFORCING REGULATION 67 (K. Hawkins & J. Thomas eds., 1984); Soeren C. Winter & Peter J. May, *Motivation for Compliance with Environmental Regulations*, 20 J. POL’Y ANALYSIS & MGMT. 675 (2001).

¹³ May, *supra* note 11, at 41 (noting that the line between the two categories is not a firm one). See also HAINES, *supra* note 11 (exploring sources of and constraints on “corporate virtue”); Timothy F. Malloy, *Regulation, Compliance and the Firm*, 76 TEMP. L. REV. 451, 465–66 nn.43–46 (2003) (surveying debate on the source of compliance norms as internally derived or rather inspired, as rational choice theory suggests, by the prospect of external benefit or social sanctions).

¹⁴ See AYRES & BRAITHWAITE, *supra* note 11, at 20–35.

¹⁵ See Kagan & Scholz, *supra* note 12, at 69–71. In the labor context, the benefits of noncompliance may include lower wage, benefit, and workplace safety costs. In addition to potentially higher administrative costs associated with employee turnover and conflict resolution, the primary costs of noncompliance are the costs of correcting violations, plus any penalties imposed, discounted by the risk of detection.

administrative monitoring and inspections are therefore the primary enforcement tool.¹⁶

A cooperative approach assumes that regulated firms operate from affirmative motivations; that is, they have a normative commitment to follow the law.¹⁷ Under this model, regulators and regulated firms work together toward compliance objectives, and enforcement relies more heavily on positive incentives and rewards rather than penalties.¹⁸ In contrast to a deterrence model, which focuses on sanctioning past conduct, cooperative enforcement is “primarily prospective, oriented toward inducing conditions that lead to conformity, [focusing] more on the underlying conditions or violations than on the violator.”¹⁹ Examples of compliance-focused strategies include waivers of penalties for voluntary self-disclosure and correction, educational programs, and tax incentives to companies who implement appropriate internal compliance programs.²⁰ These strategies can also raise awareness of law and help address firms’ capacity constraints.

Regardless of the approach adopted, full compliance by all firms is neither possible nor perhaps desirable.²¹ Studies on the relative effectiveness of these approaches also caution that an “either-or” approach is ill-advised. Regulators face a “deterrence trap” in setting penalties and imposing them, since penalties will either be too small to deter rational violations or so large that they are beyond the means of firms to pay.²² Deterrence-based models are also constrained by the limited enforcement resources of regulatory agencies and the difficulty of detecting violations. At the same time, policies emphasizing sustained interaction and collaboration between enforcement authorities and regulated entities may lead to a “compliance trap”—agencies may be “captured” by regulated entities and become unwilling or unable to enforce the law objectively, consistently, and effectively.²³ Facilitative enforcement approaches can also engender complacency.²⁴ If they appear to advantage some companies over

¹⁶ See May, *supra* note 11, at 41–42, 45–46. The regulatory goal is to “make penalties high enough and the probability of detection great enough that [violations] become economically irrational . . .” Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181, 1186–87 (1998).

¹⁷ May, *supra* note 11, at 41–42.

¹⁸ *Id.* at 43–44. See generally SIGLER & MURPHY, *supra* note 11; CORPORATE LAWBREAKING AND INTERACTIVE COMPLIANCE (Jay A. Sigler & Joseph E. Murphy eds., 1991) [hereinafter CORPORATE LAWBREAKING].

¹⁹ Rechtschaffen, *supra* note 16, at 1188.

²⁰ See SIGLER & MURPHY, *supra* note 11, at 143–65; Malloy, *supra* note 13, at 455.

²¹ See SIGLER & MURPHY, *supra* note 11, at 79–80.

²² Christine Parker, *The “Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement*, 40 LAW & SOC’Y REV. 591, 591–92 (2006).

²³ *Id.*

²⁴ May, *supra* note 11, at 62.

others, the legitimacy of enforcement may also be undermined, which can reduce voluntary compliance.²⁵

"Private" initiative presents a potential solution to some of these policy challenges.²⁶ Examples include policies that empower workers, unions, or NGOs to monitor compliance, inform authorities of violations, or challenge illegal practices directly through litigation. Corporate codes of conduct and other forms of self-regulation are another alternative. All of these mechanisms offer a supplement to regulatory enforcement and ameliorate the persistent problem of limited public resources. They can also deter misconduct by raising the potential cost of a violation and the likelihood of its detection. Because "private" or "citizen" enforcers act without regard to institutional or political pressures, they can be particularly effective in challenging violations where regulatory enforcers lack the political will to do so.²⁷ Mobilizing private actors can also result in greater engagement between stakeholders and regulators that can produce innovative compliance-oriented outcomes.

The wide variation in the capacity and motivation of firms to comply with the law and the inadequacy of any single public or private enforcement strategy to respond to enforcement challenges urges the need for flexible regulatory responses and a calibrated range of enforcement tools. Accordingly, many regulatory scholars have advocated "responsive regulation" that utilizes a mix of regulatory strategies.²⁸

In China, the diversity of the economy and the complex economic, political and societal influences shaping its labor markets also point to the need for multifaceted, adaptive implementation policies. Elements of such an approach are already part of China's current enforcement schema and are strengthened by the 2008 labor law reforms.

B. Labor Law Enforcement in China: Institutions and Processes

The foundation of modern Chinese labor and employment law is the

²⁵ Rechtschaffen, *supra* note 16, at 1223–24 n.172. On the importance of legitimacy for voluntary compliance, see generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

²⁶ See generally Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185 (2000); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000). In this article, "private enforcement" is used to refer to enforcement undertaken *at the initiative of* actors other than administrative enforcement authorities, although such action depends upon legal rules and institutions established by the state. In addition, I include here enforcement actions initiated by or on behalf of workers as "private enforcement," even if undertaken by Chinese unions or other state-affiliated advocacy organizations.

²⁷ See generally Thompson, *supra* note 26.

²⁸ See, e.g., AYRES & BRAITHWAITE, *supra* note 11; Parker, *supra* note 22; NEIL GUNNINGHAM & PETER GRABOSKY, *SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY* (1998).

national Labor Law, which took effect on January 1, 1995.²⁹ Like most Chinese primary legislation, it was drafted in broad terms and has been fleshed out by implementing regulations and interpretations enacted by the Ministry of Human Resources and Social Security (MOHRSS) (formerly, the Ministry of Labor and Social Security),³⁰ by judicial interpretations issued by the Supreme People's Court (the SPC) and subnational courts, by local and provincial-level implementing legislation, and by regulations scattered elsewhere in China's civil and economic legislation. China is also a party to numerous labor-related treaties and international conventions, including twenty-two conventions of the International Labor Organization, which have been incorporated into its domestic law.³¹ Together, these laws and regulations form the body of Chinese labor law.

Despite the rapid diversification of the Chinese economy over the past thirty years, the institutions and processes of labor law enforcement that undergird both the Labor Law and the new labor legislation have not changed substantially since their introduction in the late 1980s.³² Chinese labor laws provide for public enforcement by labor authorities and other agencies as well as through private dispute resolution, and expressly authorize a range of civil, administrative, and even criminal penalties for violations of labor laws.

These mechanisms form a "mixed" enforcement system that integrates both cooperative and deterrent strategies. Yet it is one that has historically been grounded on cooperative strategies with deterrence-based

²⁹ Labor Law, *supra* note 3. Basic worker rights established under the Labor Law include equal rights in obtaining employment, restrictions on termination, the right to choose an occupation and to be paid for one's labor, the right to rest days and holidays, the right to a safe workplace environment, the right to receive social insurance and welfare and vocational training, and the right to utilize labor arbitration and the courts to resolve labor disputes.

³⁰ The Ministry of Labor and Social Security (MOLSS) was created out of the restructuring of the Ministry of Labor in March 1998. In March 2008, the MOLSS, the Ministry of Personnel, which has oversight of state employees (now the newly formed State Civil Servants Bureau), and the State Administration of Foreign Experts Affairs were merged to form the new MOHRSS. See *China's Parliament Adopts Reshuffle Plan*, CHINA DAILY, Mar. 15, 2008, available at http://www.chinadaily.com.cn/china/2008npc/2008-03/15/content_6538946.htm (last visited Aug. 18, 2008).

³¹ See International Labour Organization, Documents Available in ILOLEX for China, <http://www.ilo.org/ilolex/cgi-lex/countrylist.pl?country=China> (last visited Mar. 12, 2008).

³² Shenzhen established China's first labor inspection institution in 1989, and administrative regulations governing labor inspections and administrative penalties were first issued in 1993. 劳动监察概论: 深圳市劳动监察理论与实践 [LABOR INSPECTION OVERVIEW: THEORY AND PRACTICE OF LABOR INSPECTION IN SHENZHEN] 25-40 (曾虹文 [Zeng Hongwen] ed., 2004) [hereinafter SHENZHEN LABOR INSPECTION]. Regulations establishing labor dispute resolution procedures were introduced in the 1950s and reinstituted in 1987, with final regulatory guidance passed in 1993 and following years. See HILARY JOSEPHS, LABOR LAW IN CHINA 105-06 (1990); VIRGINIA HARPER HO, LABOR DISPUTE RESOLUTION IN CHINA: IMPLICATIONS FOR LABOR RIGHTS AND LEGAL REFORM 36-39 (2003).

approaches playing a secondary role. As the following discussion makes clear, many of the limits of labor law implementation in China parallel the challenges of regulatory policy and strategies identified in the literature reviewed above. The following discussion draws in part on findings obtained from interviews with local labor bureau and other administrative officials, lawyers, and litigants in Guangdong in 2003, 2005, and in the spring of 2008 and 2009.³³

1. Public Enforcement: Labor Supervision, Administrative Penalties, and Cooperative Strategies

- a. *Deterrence-Based Strategies*

Prior studies suggest that when the relative costs of compliance are high, strong deterrent strategies may be needed to shift employers' cost-benefit calculations.³⁴ This finding is particularly relevant in China's intensely competitive environment, where employers face tight profit margins and consumer pressure for lower prices. Deterrence strategies are embodied in the Labor Law, which gives primary enforcement responsibility to labor bureaus established under the *kuai* (块) (horizontal) authority of county, municipal, and provincial governments and the *tiao* (条) (vertical) administration of the MOHRSS.³⁵ The labor administration is charged with enforcing the labor laws through *laodong jiandu* (劳动监督) (labor supervision), a system of monitoring and enforcement carried out primarily by labor inspectors from within the labor department at each jurisdiction above the county level. Its scope includes compliance with laws governing written contracts, wages, hours, benefits, workplace rules, and prohibitions on child labor.³⁶ Inspection and enforcement authority

³³ For this study, interviews were conducted with a labor inspector from one district in Guangzhou in 2003, with the same labor inspector and a colleague in 2008, and with the director of a street level (街头 *jietou*) office in Panyu, one of the municipal districts of Guangzhou and a major manufacturing hub, in April 2009. Phone interviews were conducted with a labor bureau official in a second district in Guangzhou in 2009. The districts covered in these interviews employed a total of five and six full-time labor inspectors, respectively. Interviews were granted on condition that both interviewee names and the names of the districts be kept confidential. To be sure, their views cannot be understood to capture the full range of common enforcement practice in Guangdong, and broader studies are needed to explore the factors that may influence variations in enforcement approaches within and across jurisdictions. However, they provide anecdotal evidence that is consistent with other studies. See, e.g., CHING KWAN LEE, *AGAINST THE LAW: LABOR PROTESTS IN CHINA'S RUSTBELT AND SUNBELT* 20, 176–82 (2007).

³⁴ See May, *supra* note 11, at 63.

³⁵ Labor Law, *supra* note 3, art. 85.

³⁶ LCL, *supra* note 3, arts. 73–79; 劳动保障监察条例 [Measures on Labor Security Inspections (P.R.C.)], (promulgated by the St. Council, Oct. 26, 2004, effective Nov. 1, 2004) ST. COUNCIL GAZ. (P.R.C.), art. 11 [hereinafter Labor Inspection Measures].

over occupational safety and health standards is vested in the State Administration of Work Safety (SAWS) and its branches at the subnational levels.³⁷

Enforcement and oversight are based on regularly scheduled site visits, documentary review (i.e. annual self-reporting), and additional inspections during enforcement campaigns directed by central or provincial labor authorities.³⁸ Labor unions, departments supervising state enterprises, other government agencies, and the public at large are also to engage in “labor supervision” of employer practices, and labor authorities may initiate on-site investigations in response to such complaints or reports.³⁹ Many labor bureaus in south China, where the level of labor conflict runs high, rely heavily on *laodong zhan* (劳动站) (grassroots branch offices) staffed by *xieguan yuan* (协管员) (administrative assistants) appointed by the local government to provide additional monitoring, inspection, conflict resolution, and general “first responder” support. These branches notify the district or county labor authorities if a serious conflict has erupted, but they can also independently resolve minor disputes and handle worker complaints.⁴⁰

Labor inspection regulations issued in 2004 established uniform standards, procedures, responsibilities and scope of authority for labor inspection, replacing an array of earlier administrative guidelines.⁴¹ These regulations and similar provisions of the Labor Law and the Labor Contract Law authorize labor inspectors who discover labor law violations to issue warnings and corrective orders and then to impose fines within a specified range if the employer fails to respond.⁴² They can also coordinate with the local administration for industry and commerce (AIC) to

³⁷As of 2008, SAWS has primary jurisdiction over enforcement of workplace safety and occupational disease regulations, while occupational health standards are established by the Ministry of Health. See State Council Notice Regarding Administrative Restructuring, No. 11, cited in MOHRSS Notice, <http://www.moh.gov.cn/publicfiles/business/htmlfiles/zwgkzt/pjggk/200804/621.htm> (last visited Sept. 13, 2009).

³⁸See also LCL, *supra* note 3, art. 75; Labor Inspection Measures, *supra* note 36, art. 15.

³⁹LCL, *supra* note 3, arts. 76–79; Labor Law, *supra* note 3, arts. 56, 87–88; Trade Union Law, *supra* note 5, arts. 22–27.

⁴⁰Interview with District A labor inspector, in Guangzhou, P.R.C. (Sept. 27, 2003) [hereafter 2003 District A Labor Inspector Interview]; interview with District A labor arbitrator, in Guangzhou, P.R.C. (Sept. 27, 2003); interview with labor arbitrator, in Shenzhen, P.R.C. (Sept. 28, 2003) [hereinafter Shenzhen Labor Arbitrator Interview].

⁴¹See Labor Inspection Measures, *supra* note 36. Many of the procedural rules track the Administrative Penalties Law closely. See 中华人民共和国行政处罚法 [Administrative Penalties Law (P.R.C.)], (promulgated by the Nat’l People’s Cong., Mar. 17, 1996, effective Oct. 1, 1996) STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.), translated at www.cecc.gov/pages/newLaws/adminPunishmentENG.php [hereinafter APL].

⁴²Labor Law, *supra* note 3, arts. 89–101, 105; Labor Inspection Measures, *supra* note 36, arts. 23–32; LCL, *supra* note 3, art. 74.

have a company's business license revoked for "serious" violations, such as the use of child labor.⁴³ Similarly, violations of workplace safety regulations identified by occupational safety inspectors can result in fines, plant closure, criminal penalties, and personal liability for the responsible party.⁴⁴ However, the deterrent force of administrative sanctions is strongly moderated by regulatory mandate and in actual application. As a result, penalties are too small and the risk of their imposition too remote to adequately incentivize compliance. The cooperative emphasis of public enforcement also raises many of the practical dilemmas of collaborative strategies identified in the previous section.

i. Mandatory Tiered Enforcement

Labor enforcement in China follows a tiered approach, progressing from notification of a violation to levying of administrative fines and penalties. These procedural limits are in fact mandated by China's Administrative Penalties Law (APL), which was enacted in 1996 to prevent administrative overreaching, imposition of *ad hoc* penalties, and abuses of official discretion. Under the APL, inspectors must first issue a warning and require the enterprise to correct violations; in "minor" cases, no penalty can be levied if the enterprise takes prompt remedial action. "Serious" violations may be subject to an immediate fine, but penalties in such cases must be reduced if corrective action is taken.⁴⁵

This model actually compares quite favorably in some respects with Ayres and Braithwaite's regulatory pyramid, where cooperative strategies make up the base of the pyramid and progress toward sanctions at higher levels of the pyramid only if other methods are unsuccessful.⁴⁶ Indeed, the lack of mandatory penalties early in the process allows labor inspectors to respond flexibly to diverse industries, employers, and practices without a "one size fits all" approach. This can promote more constructive relationships with compliance-minded employers and focus limited resources on willful violators. However, there are effectively no direct consequences to violations as long as they are corrected when the employer is "caught." Thus, employers have little incentive to be pro-active about compliance. Moreover, the success of Ayres and Braithwaite's pyramid depends on political support for tough policies and the threat of serious sanctions at

⁴³ Labor Law, *supra* note 3, art. 94.

⁴⁴ See, e.g., *id.* arts. 92–93; Law on Work Safety, *supra* note 5, ch. 6.

⁴⁵ APL, *supra* note 41, arts. 23, 27.

⁴⁶ AYRES & BRAITHWAITE, *supra* note 11, at 35–40.

the top of the pyramid.⁴⁷ Both elements have been historically lacking in local labor law enforcement.

ii. Local Interests and Regulatory Capture

First, it is widely recognized that weak enforcement of labor laws is a result of China's decentralized administrative structure and local government competition to attract investment, increase employment, and promote economic growth. Provincial and local governments have the power to set enforcement priorities within their respective jurisdictions, as labor and occupational health and safety inspectorates are staffed and funded by the people's governments at the corresponding level. To be sure, local officials in south China have come under considerable pressure to prevent labor unrest in recent years,⁴⁸ and such policies can motivate stronger action toward violators. For example, under mandates from district officials in Guangzhou to reduce labor conflict, village committees and other grassroots offices have set policies that officials' bonuses would be cut if multiple strikes or workplace accidents occurred in the jurisdiction.⁴⁹ Yet these policies also encourage officials to put effort into suppressing and diffusing conflict rather than in dealing with its underlying causes.

In responding to violations, labor inspectors emphasize the need to find the right *pingheng dian* (平衡点) (balance of interests) between employers, workers, and the local community. They therefore weigh the need to maintain social stability and uphold the law against the possibility that sanctions would cause business failure or lead to an increase in worker demands.⁵⁰ In the view of some, strict enforcement is simply unrealistic given local economic conditions.⁵¹ In addition, close ties between local officials and employers increase opportunities for regulatory "capture"

⁴⁷ High penalties at the tip of the pyramid bolster the perceived power of enforcement agencies and have a moral impact in legitimizing the enforcement message at its base. *Id.* at 45–47. Enforcement at the bottom of the pyramid is also more successful the "greater the range of graduated sanctions available toward the tip of the pyramid." Parker, *supra* note 22, at 617.

⁴⁸ See Yang Su & Xin He, *Street as Courtroom: State Accommodation of Labor Protest in South China*, (City U. H.K. Working Paper Series, 2009), available at <http://ssrn.com/abstract=1447131> (noting that leadership performance is evaluated based on success in maintaining social order as well as in promoting development). See also DALI YANG, REMAKING THE CHINESE LEVIATHAN 231–232 (2004) (describing the cadre accountability system, whereby local governments require resignation for major lapses in safety or other performance measures).

⁴⁹ Interview with District A labor inspectors, in Guangzhou, P.R.C. (May 22, 2008) (reporting on policies in one *cun* (村) (village) outside of Guangzhou) [hereinafter 2008 District A Interview]; interview with director, street office, Panyu Municipal District, Guangzhou, in Chicago, Ill. (Aug. 16, 2009) [hereinafter 2009 Street Office Interview].

⁵⁰ 2008 District A Interview, *supra* note 49; interview, District B labor inspector and arbitrator, in Guangzhou, P.R.C. (Jan. 11, 2009) [hereinafter 2009 District B Interview].

⁵¹ 2009 District B Interview, *supra* note 50.

and foster corruption.⁵² These realities weaken the deterrent effect of potential sanctions and the legitimacy of agency enforcement, which is essential to the success of cooperative strategies as well.

iii. Low Penalties, Low Risk

Second, although administrative penalties are potentially severe, high sanctions are rarely imposed in practice. For example, under the Labor Inspection Measures, fines for overtime violations are 100 to 500 RMB per worker per month. For wage arrears, fines up to double the amount owed can be assessed.⁵³

However, labor supervision is actually more collaborative than deterrence-focused in practice and is intended as a tool to reform rather than punish violators. Even when inspectors are called in to respond to a strike or other crisis, their goal is primarily to avoid any escalation of the conflict and only secondarily to address employer misconduct.⁵⁴ In the words of one labor inspector, fines are rare because "you can't fine everyone. Our job is to educate employers, not to punish them."⁵⁵ China is not unique in this respect. Numerous studies of U.S. state and federal enforcement practices find that most noncompliance is met with no sanctions or only minor ones, and that despite a deterrence-focused regulatory framework, enforcement practice is aimed at coaxing violators toward compliance.⁵⁶

As a result, penalties are generally low, despite evidence of tougher enforcement in many urban areas of Guangdong in recent years.⁵⁷ In 2007, average per case fines in Shenzhen reached only RMB 30,000

⁵² The problems are exacerbated when local governments have direct ownership stakes in, or other ties to, local enterprises. Interviews with labor lawyers, in Guangzhou, P.R.C. (Sept. 2003); interview with Liu Kaiming, Institute for Contemporary Observation, in Shenzhen, P.R.C. (Oct. 2, 2003). See also LEE, *supra* note 33, at 13–21.

⁵³ See Labor Inspection Measures, *supra* note 36, arts. 25, 26.

⁵⁴ See LEE, *supra* note 33, at 175–82.

⁵⁵ 2008 District A Interview, *supra* note 49. See also SHENZHEN LABOR INSPECTION, *supra* note 32, at 5–6 (emphasizing *jiaoyu* (教育) (education) and *chufa* (处罚) (sanctions) as inter-related tools under Article 5 of the APL, which reads: "[w]hen imposing administrative penalties . . . authorities should stress *xiang jiehe* (相结合) (the mutual inter-relationship) of sanctions and education, educating citizens, legal persons and other organizations to *zijue shoufa* (自觉守法) (voluntarily uphold the law).").

⁵⁶ See AYRES & BRAITHWAITE, *supra* note 11, at 21–27 (noting that enforcement officials typically adopt more flexible, cooperative approaches in practice); Rechtschaffen, *supra* note 16, at 1185–90 & nn.27–28 (surveying literature supporting this finding); May, *supra* note 11, at 46–47, 64 and sources cited therein.

⁵⁷ For example, occupational safety and health enforcers have ordered plant shutdowns that would have been unheard of five years ago. Interview with district labor inspectors, former labor arbitrator, in Guangzhou, P.R.C. (May 22, 2008). In 2008, district officials in Haizhu, near Guangzhou, imposed a fine of over RMB 10 million on a single employer. *Id.*

(USD 4,400).⁵⁸ In one major manufacturing district in Guangzhou, average fines were only RMB 3,000 (USD 440), an amount easily borne as a cost of business for many employers.⁵⁹ If sanctions are imposed, due process protections give employers the right to challenge them through internal administrative review or administrative litigation.⁶⁰ To enforce penalties, inspectors, for their part, must rely on the courts, where success rates are around 50%.⁶¹

Because violators are likely to ignore or appeal high fines, and defending or enforcing sanctions drains scarce time and resources, officials generally use sanctions at the low end of the legal range. Depending on the size of the employer and the employer's perceived ability and willingness to pay, officials may reduce the amount of sanctions or not impose them at all.⁶² Certainly, fairness requires that administrative penalties be calibrated to the circumstances of the violator and the willfulness and nature of the conduct, but since only willful violations can be sanctioned at all, this response makes clear why penalties are rarely levied. The ease of challenge and the negotiated nature of inspection practices reduce the speed and certainty of the official response, both of which are key to successful deterrence.⁶³

In addition, from a practical standpoint, China is no exception to the general observation made in studies of regulation and compliance about the persistent challenge of limited administrative capacity.⁶⁴ As of the end of 2007, approximately 3,200 labor inspection units had been established

⁵⁸ See 完善长效机制构建和谐劳动关系 [Perfect Lasting Structures to Establish Harmonious Labor Relations], 深圳特区报 [SHENZHEN SPECIAL ZONE DAILY], Jan. 17, 2008.

⁵⁹ 2008 District A Interview, *supra* note 49 (noting annual fines totaled only RMB 200,000 for this district, which had over 30,000 registered enterprises).

⁶⁰ For a synopsis of these procedures, see generally JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 236–58 (2008). In 2008, administrative challenges to labor authorities accounted for 7% of all administrative appeals settled by courts of first instance. Approximately 30% upheld the agency determination. 中国统计年鉴 [CHINA STAT. Y.B.], tbl. 22–31 (2009) [hereinafter ZGTJNJ].

⁶¹ See 民诉修法求解“两难” [Civil Procedure Law Amendments to Address “Two Difficulties”], 财经 [CAIJING], July 12, 2007, available at <http://www.chinavalue.net/Media/Article.aspx?ArticleId=9150&PageId=2> (last visited Feb. 12, 2009).

⁶² 2008 District A Interview, *supra* note 49 (noting that “small *wupai* (无牌) (unlicensed) employers don’t care about fines. If you fine them, they’ll just close and reopen somewhere else in a few hours.”).

⁶³ See generally May, *supra* note 11, at 45–46 and studies cited therein.

⁶⁴ For example, in the United States, OSHA budgets and enforcement activity have declined markedly since 2001, and staffing at its peak level (1980) reached 2,950 or three staff members for every 100,000 workers. *Workers Threatened by Decline in OSHA Budget, Enforcement Activity*, OMB WATCH, Jan. 23, 2008, <http://www.ombwatch.org/node/3587>. See also Melanie Trotman, *Labor Department to Tighten Scrutiny*, WALL ST. J., Aug. 19, 2009, at A3, available at <http://online.wsj.com/article/SB125064127552641791.html> (last visited Nov. 20, 2009).

nationally, with total personnel numbering only around 220,000,⁶⁵ a figure dwarfed by the number of employers in China. For example, in 2008, districts in Guangzhou with oversight of 30,000 to 100,000 registered enterprises had only six full-time labor supervision officials.⁶⁶ Urban labor bureaus have developed a number of pragmatic solutions to these constraints, relying heavily on branch office personnel, employer self-reporting, and computerized coding systems that classify employers with strong and poor compliance records and prioritize inspections accordingly.⁶⁷

iv. No Big Stick at the Top

Finally, administrative fines are the only “stick” in the labor inspectors’ arsenal. Labor inspectors cannot suspend a violator’s business license or increase sanctions for most violations; the only punishment for resisting administrative investigations or orders is an additional fine of up to RMB 20,000.⁶⁸ As a result, labor inspectors can fall victim to intentional obstruction, delays, and evasion.⁶⁹ Labor inspectors interviewed in Guangzhou also complained that they are simply not taken seriously, whereas “[employers] are afraid of the *anjian bu* (安检部) (occupational safety inspectors), since they can shut down or suspend [the business].”⁷⁰ Occupational safety inspectors have internal penalty floors for certain workplace injuries and, unlike the labor bureau, impose high mandatory fines for repeat offenders.⁷¹ Without a credible threat of serious sanctions “up the ladder,” the legitimacy and authority needed to reinforce collaborative strategies and penalties at the base of the enforcement pyramid are weakened.

b. Cooperative Strategies

In addition to traditional labor supervision programs, local govern-

⁶⁵ MOHRSS, 2007 年劳动和社会保障事业发展统计公报 [2007 MOHRSS Work Statistics Report], May 21, 2008, available at http://wl.mohrss.gov.cn/gb/zwx/2008-06/05/content_240415.htm (last visited Jan. 16, 2009). These figures do not include labor supervision units established by trade unions at various levels, which have oversight and reporting functions, but not enforcement authority.

⁶⁶ 2008 District A Interview, *supra* note 49; 2009 District B Interview, *supra* note 50.

⁶⁷ 2009 District B Interview, *supra* note 50.

⁶⁸ Labor Inspection Measures, *supra* note 36, art. 30.

⁶⁹ Interview with worker, in Shenzhen, P.R.C. (Sept. 28, 2003); 2009 District B Interview, *supra* note 50. See also Sean Cooney, *Making Chinese Labor Law Work: the Prospects for Regulatory Innovation in the People's Republic of China*, 30 FORDHAM INT'L L.J. 1050, 1066 (2007).

⁷⁰ 2008 District A Interview, *supra* note 49.

⁷¹ *Id.*

ments in regions with historically poor compliance records and high levels of labor conflict have begun to advocate compliance-oriented (or quasi-compliance-oriented) enforcement strategies in recent years.⁷² For example, labor authorities in Shenzhen and Guangzhou have introduced blacklisting programs to publish the names of companies who are persistent violators of wage laws, with the goal of shaming violators into compliance and warning potential workers of these companies' poor track records.⁷³ Similar programs have proven highly effective in combating employer pension benefit arrears.⁷⁴

In 2007, Guangzhou also formalized a system of publicly awarding merit rankings to employers and industrial parks that demonstrate "harmonious labor relations."⁷⁵ The real impact of these programs on employer incentives is less certain, and they may be more noteworthy for their potential than their current effect. Participation is limited to large employers who are already exceeding compliance baselines and do not need extra incentives, while opaque application processes and selection criteria raise the prospect that the programs are simply a new vehicle for local government cronyism.⁷⁶ Still, these local experiments with collaborative enforcement strategies may become effective tools in time.

2. Private Enforcement: Labor Dispute Resolution and Beyond

Administrative enforcement is supplemented by mechanisms for workers to enforce labor laws by challenging illegal workplace practices. These include petitions for administrative intervention, labor dispute mediation, arbitration, litigation, collective action outside state-sanctioned channels, and social accountability monitoring and certifications. Of these, labor dispute resolution is the most strongly deterrence-oriented, although most employment claims are resolved through negotiated out-

⁷² See, e.g., SHENZHEN LABOR INSPECTION, *supra* note 32, at 36 (advocating a collaborative "fuwuxing" (服务性) (service-oriented) approach to enforcement).

⁷³ Violators are barred from accessing banks, insurance, and other commercial resources, bidding on government contracts, or forming other businesses in the area. See ChinaCSR.com, *Shenzhen Exposes 12 Companies for Not Paying Salaries*, Jan. 3, 2008, <http://www.chinacsr.com/2008/01/03/1997-shenzhen> (last visited Jan. 15, 2009); see also Xie Chuanjiao, *Work Safety Offenders to Be Put on Blacklist*, CHINA DAILY, Oct. 8, 2008, available at http://www.chinadaily.com.cn/bizchina/2008-10/08/content_7087578.htm (describing similar national programs by SAWS).

⁷⁴ See Mark W. Frazier, *What's in a Law? China's Pension Reform and Its Discontents*, in *ENGAGING THE LAW IN CHINA* 108 (Neil J. Diamant et al. eds., 2005).

⁷⁵ Guangzhou Labor Bureau, 关于印发“广州市劳动关系和谐工业园区标准(试行)的通知” [Notice of Guangzhou Provisional Standards for Enterprises and Industrial Zones with Harmonious Labor Relations], Oct. 8, 2007, available at www.gzlss.gov.cn/hexie/gzwlj/1.php.

⁷⁶ Candidates must have established unions, collective contracts, and an internal dispute mediation system. Recipients are selected through consultation among the labor bureau, union, and employer associations. *Id.*

comes that allow employers to exert some control over their ultimate liability. The remaining tools are at base collaborative strategies that result in interactions between the employer, employees, and third parties (e.g. state officials, auditors, customers) over the proper response to challenged labor practices. The broad space employers have to moderate the impact of private enforcement may go some way toward explaining its muted effect on compliance to date. The success of private enforcement is also tied to the effectiveness of local public institutions, including the labor bureaus and the courts.

a. Administrative Petitions and Reports

Petitioning the labor bureau or the *xinfang* (信访) (letters and visits) offices of the local union, the legislature, the courts, other administrative agencies and even central authorities is a primary means for many workers to report violations and seek remedies for grievances. In general, the petitioning office responds by attempting to mediate the conflict with the employer, or it may refer concrete disputes to the courts or labor arbitration.⁷⁷ Labor inspectors claim to investigate each report made to their office, although they have discretion to decide whether to initiate administrative enforcement action or not.⁷⁸

The ultimate outcome of a petition and the speed of a response generally depend on the strength of workers' claims, their connections to official allies at the local or higher levels, and their ability to gain leverage in negotiations with the employer and local officials through media appeals or collective protest. Individual complaints are often ignored.⁷⁹ Grassroots branch staff, the "first stop" for most aggrieved workers, can actually impair worker claims by providing inaccurate information or by urging them to drop disputes in an effort to diffuse conflict.⁸⁰ Moreover, petitioning is not without its costs. Although prohibited by the Labor Law, workers

⁷⁷ See generally Carl F. Minzer, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103 (2006); *China's Legislature Focuses Supervision on Workers' Safety, Environment*, PEOPLE'S DAILY, Mar. 9, 2006, available at http://english.peopledaily.com.cn/200603/09/eng20060309_249203.html (reporting migrant worker petitions and visits to the NPC).

⁷⁸ 2003 District A Labor Inspector Interview, *supra* note 40; 2009 District B Interview, *supra* note 50; Labor Inspection Measures, *supra* note 36, art. 15.

⁷⁹ See Isabelle Thireau & Hua Linshan, *The Moral Universe of Aggrieved Chinese Workers: Workers' Appeals to Arbitration Committees and Letters and Visits Offices*, 50 CHINA J. 83, 94 (2003) (finding that worker petitions in Shenzhen were more likely to receive an immediate response in intense or collective cases); LEE, *supra* note 33, at 176–82.

⁸⁰ Interview with worker in Shenzhen, P.R.C. (Sept. 28, 2003); interview with labor advocate in Panyu, P.R.C. (May 18, 2008) [hereinafter Panyu Labor Advocate Interview]; interview with former head of Guangdong Provincial Women's Federation (retired), in Guangzhou, P.R.C. (May 15, 2008) [hereinafter Fulian Interview].

who report violations can lose their jobs, have their pay docked, or face other forms of retaliation by employers.⁸¹ For these reasons, petitioning, while it provides a state-sanctioned channel for workers to seek redress, is not a strong force to restrain or deter violations of law.

However, because of the costs of arbitrating labor claims prior to 2008, petitioning has been particularly important for workers of limited means and those whose claims cannot easily be framed in strictly legal terms.⁸² Even though petitioning may not guarantee results, without a complaint, labor inspectors may not act at all.⁸³ Petitioning also provides an important information channel for labor bureaus and other state agencies.

b. Dispute Resolution Through Labor Arbitration and the Courts

The Labor Law and related regulations give both employees and employers the right to bring claims “arising from a labor relationship” through a three-stage labor dispute resolution process that includes mediation, arbitration, and litigation.⁸⁴ In addition to back wages and other compensatory damages, arbitrators and courts can invalidate a labor contract or order restitution or reinstatement. The right to challenge employer practices through formal legal process is a core mechanism for enforcing labor laws and regulations under the Labor Law and now under the Labor Contract Law. From the state’s perspective, it offers a means of diffusing and channeling socially destabilizing conflict through formal institutional channels (i.e. labor dispute arbitration commissions and the courts).

Labor dispute arbitration is conducted through labor dispute arbitration commissions (LDACs), which are established by provincial, municipal, and local governments and are affiliated with the corresponding labor bureau.⁸⁵ The mediation phase is optional, but arbitration is mandatory before a labor dispute can be appealed to court.⁸⁶ Arbitrators and judges are required to attempt mediation before issuing an arbitral award or

⁸¹ 2008 District B Interview, *supra* note 50.

⁸² See Thireau & Hua, *supra* note 79.

⁸³ 2009 District B Interview, *supra* note 50 (admitting that “if there is no complaint, then there is no action” (*bu gao bu li*) (不告不理)).

⁸⁴ Labor Law, *supra* note 3, arts. 77–83. See HO, *supra* note 32 (describing labor dispute resolution procedures generally).

⁸⁵ See Labor Law, *supra* note 3, art. 81. Cases are heard by single arbitrators or arbitral panels, which are not tripartite and are appointed by the LDAC. See HO, *supra* note 32, at 64–67, 75–81 (describing labor dispute resolution procedure).

⁸⁶ See Interpretation of SPC on Several Issues about the Application of Law for the Trial of Labor Dispute Cases (promulgated by the Sup. People’s Ct., Apr. 16, 2001, effective Apr. 30, 2001), arts. 2, 21 [hereinafter 2001 SPC Interpretation].

judgment.⁸⁷ Parties can appeal arbitral awards to court for any reason and pursuant to China's Civil Procedure Law, court judgments can also be appealed from the trial court level. On appeal from the LDAC, the trial court hears the case *de novo*, although it generally reviews the LDAC findings and may consult with the LDAC in resolving the case.⁸⁸ Alternatively, under recent interpretive guidance from the SPC, certain wage claims and other labor disputes that can be recharacterized as civil claims (for example, workplace injury claims cast as personal injury claims) may be brought directly to court without a prior LDAC ruling.⁸⁹

Even before the 2008 legislation was introduced, the number of arbitrated labor disputes had soared exponentially since the early 1990s, with over 350,000 cases filed in 2007. Over 90% resulted in a full or partial victory for employees.⁹⁰ Collective disputes have generally accounted for about 40% of all employees involved in LDAC cases.⁹¹ Courts have also been inundated with labor litigation in recent years because a majority of arbitral awards are now appealed to courts and many labor disputes can be filed as civil claims. For example, in recent years, most arbitral awards in Guangdong have been appealed to courts.⁹² Current figures are much higher.⁹³ Employees are even more likely to prevail in direct civil litigation than in arbitration.⁹⁴ These figures attest to workers' ability to use formal process to obtain compensation for violations of legal rights.

Yet these data raise the question of why the litigation explosion (and a parallel upsurge in labor conflict) has failed to have any noticeable impact on overall compliance with labor laws. Although space does not permit an in-depth analysis of this question here, part of the explanation lies with

⁸⁷ See HO, *supra* note 32, at 66–67, 75–81.

⁸⁸ 2009 District B Interview, *supra* note 50. On the standard of judicial review, see 2001 SPC Interpretation, *supra* note 86, art. 17.

⁸⁹ See Interpretation on Several Issues Concerning the Application of the Law in the Trial of Labour Disputes (II) (promulgated by the Sup. People's Ct., Aug. 14, 2006, effective Oct. 1, 2006), art. 3, available at <http://www.asianlii.org/cn/legis/cen/laws/iotspeosictaoltoldc1266> [hereinafter 2006 SPC Interpretation].

⁹⁰ ZGTJNJ, *supra* note 60, tbl. 22-5.

⁹¹ See 中国劳动统计年鉴 [CHINA LABOR STAT. Y.B.] 495–99 tbls. 9-1, 9-2 (2008) [hereinafter LDTJNJ]. In Guangdong province, recent figures stand at nearly 50%. *Id.*

⁹² For example, nearly 49,000 labor disputes were resolved (and presumably many more filed) in Guangdong courts of first instance in 2007, a number that exceeds by 50% the total number of arbitral awards issued by the LDACs (33,000). See *id.* at 497–99 tbl. 9.2; 广东省高级人民法院工作报告 2009 [2009 Work Report of the Guangdong Intermediate People's Court], available at http://www.rd.gd.cn/pub/rdweb/dhl/rdhyzy2/dhwj/fygzbg/200902/t20090217_80272.html (last visited Nov. 11, 2009). Arbitral awards rather than total cases resolved is used as the basis of comparison since mediated settlements are rarely appealed. Interview with labor lawyer in Guangzhou, P.R.C. (Sept. 18, 2003) [hereinafter Guangzhou Labor Lawyer Interview 2003].

⁹³ See *infra* Part III(C).

⁹⁴ See Fu Hualing & D.W. Choy, *From Mediation to Adjudication: Settling Labor Disputes in China*, 3 CHINA RTS. F. 17, 21 (2004).

institutional, procedural, and practical limits that have reduced violators' expected liability risk.⁹⁵

i. Cost-Benefit Challenges of Labor Dispute Resolution

First, as with administrative fines, damages awards are compensatory and so are not calibrated to deter future violations. With the exception of workplace injury or occupational illness claims, where arbitral awards may exceed RMB 60,000 (USD 8,800), a typical recovery in most cases will be less than a few thousand RMB (several hundred U.S. dollars).⁹⁶ In light of these returns, the cost of litigating has historically been too high for many potential plaintiffs. Although court fees are now nominal, arbitration fees, which until May 2008 were based on the amount in controversy, typically started at RMB 300–500, close to the monthly wage of unskilled workers.⁹⁷

Class or impact litigation might be expected to lower some of these barriers and produce a broader deterrent effect. However, despite the growing number of workers pursuing *jiti* (集体) (collective) labor disputes, strict standing limits, requirements that all plaintiffs be named in the complaint, and fee rules charging per plaintiff costs in both individual and collective labor arbitrations have limited the potential of collective litigation.⁹⁸

Migrants and unskilled laborers most in need of the law's protections also confront numerous logistical and informational barriers to filing and pursuing their claims.⁹⁹ Evidentiary and procedural rules, such as a short sixty-day statutory filing deadline for labor arbitration and the narrow view of jurisdiction taken by labor arbitrators and the courts, further limited the number and type of claims accepted for arbitration and disad-

⁹⁵ A possible explanation is that the number of labor disputes arbitrated as of 2007 was still small compared to the number of civil cases and the number of employers in China. See ZGTJNJ, *supra* note 60, tbl. 22-25 (reporting 4.7 million civil cases filed in 2007 and 5.4 million in 2008). But this merely raises the question of why caseloads have not been higher or the cases brought without broader impact.

⁹⁶ Shenzhen Labor Arbitrator Interview, *supra* note 40; interview with former Guangzhou district labor arbitrator, in Hong Kong, P.R.C. (June 29, 2008).

⁹⁷ See 广东省劳动争议仲裁收费管理办法 [Guangdong Labor Dispute Arbitration Fee Management Measures], (promulgated by the Guangdong Labor Bureau, Apr. 10, 2004) (on file with author). Court costs for civil cases are generally RMB 50, and since 2007, costs for labor disputes have been reduced to RMB 10. 诉讼费用交纳办法 [Measures on the Payment of Litigation Costs], (promulgated by the St. Council, Dec. 19, 2006, effective Apr. 1, 2007) ST. COUNCIL GAZ. (P.R.C.).

⁹⁸ See Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523 (1998).

⁹⁹ See, e.g., LEE, *supra* note 33, at 157–201; Mary E. Gallagher, *Mobilizing the Law in China: "Informed Disenchantment" and the Development of Legal Consciousness*, 40 LAW & SOC'Y REV. 783 (2006).

vantaged workers unfamiliar with legal process.¹⁰⁰ National and local regulatory reforms, including those introduced by the new laws, have taken steps to reduce some of these practical and procedural barriers.

Still, employers also can avoid having to pay compensation in a timely manner even if a claim is filed, which reduces its perceived certainty and cost, and therefore its potential deterrent effect. Because employers have a considerable advantage in terms of financial resources, time, and familiarity with the legal process, they have frequently postponed or avoided paying claims by dragging out proceedings. Moreover, arbitration commissions and courts are set within the local government and are thus subject to the same resource limitations, local policy priorities, and corporatist influences as local labor enforcement authorities, though some labor lawyers observe that pro-employer bias is no longer routine and is noticeable only in sensitive cases.¹⁰¹ Finally, enforcement of judgments remains difficult even though workers typically prevail.¹⁰²

ii. Trade Unions and the Crisis of Representation

A more fundamental constraint lies with gaps in effective worker representation. Although the Labor Law brought China closer to international norms on core labor standards, China's failure to recognize freedom of association outside of the official union, the All-China Federation of Trade Unions (the ACFTU), and its continued repression of independent union organizing remain significant exceptions.¹⁰³ Official statistics report that over 170 million of China's workers belong to trade unions, including over 50% of workers in foreign-invested enterprises; migrant

¹⁰⁰ Some estimates indicate that throughout the 1990s as many of 75% of all labor disputes filed in some courts were made because LDACs had rejected the claims as untimely. See Fu & Choy, *supra* note 94, at 20. Since arbitration is mandatory, such plaintiffs lost all right to pursue a claim until the SPC issued guidance in 2001 and 2006 allowing for review of LDAC threshold rulings and authorizing courts to hear some claims as civil cases. See 2001 SPC Interpretation, *supra* note 86; 2006 SPC Interpretation, *supra* note 89.

¹⁰¹ Interview with Huang Qiaoyan, labor lawyer and instructor, Sun Yat Sen University School of Law Legal Aid Clinic, in Guangzhou, P.R.C. (May 28, 2008) [hereinafter Huang Interview 2008]; Panyu Labor Advocate Interview, *supra* note 80. See Benjamin L. Liebman, *China's Courts: Restricted Reform*, 191 CHINA Q. 620 (2007) (noting high costs, low efficiency, corruption, and political oversight as key challenges confronting local courts).

¹⁰² See Ma Wei, *The WTO and Chinese Labor Rights*, 3 CHINA RTS. F. 39, 40 (2005) (quoting noted labor law scholar, Chang Kai, stating "workers have gone through all kinds of hardships and difficulties to win court cases, but there has been no way to enforce the decisions, so they come away empty-handed.").

¹⁰³ China has also failed to ratify ILO Conventions No. 87 and No. 98, which cover freedom of association and the effective recognition of the right to collective bargaining. Ratifications for ILO Convention No. 87, <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C087> (last visited Oct. 29, 2009); Ratifications for ILO Convention No. 98, <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C098> (last visited Oct. 29, 2009).

workers and employees of private enterprises are largely without union representation.¹⁰⁴ All unions must be established under the ACFTU's supervision and leadership.¹⁰⁵

The Labor Law, the Trade Union Law, and Collective Contract Regulations issued by the then Ministry of Labor in 1994 give unions an expansive role in mediating workplace-level labor relations, communicating and implementing Party policy, monitoring employer compliance, reporting violations to public agencies, facilitating labor dispute prevention and resolution, and in general promoting the implementation and enforcement of the labor laws.¹⁰⁶ Many play an important role in educating workers about legal rights and have successfully represented workers in mediating and litigating labor disputes.¹⁰⁷

However, unions are generally viewed by workers to be irrelevant as a source of effective representation. First, because all Chinese unions operate under the leadership of the Party, their primary allegiance is to state interests, which have historically favored social stability and economic development, rather than to workers' interests.¹⁰⁸ Where they exist, enterprise-level unions are funded by the employer and have typically been headed by management.¹⁰⁹ Unions also lack the authority to initiate col-

¹⁰⁴ This includes enterprises with investment from Hong Kong, Taiwan, and Macao. ALL-CHINA FED'N OF TRADE UNIONS, BLUE PAPER ON THE ROLE OF THE CHINESE TRADE UNIONS IN SAFEGUARDING THE LEGITIMATE RIGHTS AND INTERESTS OF THE WORKERS (May 19, 2007), available at <http://www.acftu.org.cn/template/10002/file.jsp?cid=67&aid=399>. On unionization in the private sector and among migrants, see Yuchao Zhu, *Workers, Unions and the State: Migrant Workers in China's Labour-Intensive Foreign Enterprises*, 35 DEV. & CHANGE 1023 (2004).

¹⁰⁵ Trade Union Law, *supra* note 5, art. 9.

¹⁰⁶ See 集体合同规定 [Collective Contract Regulations (P.R.C.)], (promulgated by the Ministry of Labour and Soc. Sec., Dec. 5, 1994, effective Jan. 1, 1995) (amended Jan. 20, 2004, effective May 1, 2004); Trade Union Law, *supra* note 5, arts. 19–36. See, e.g., Labor Law, *supra* note 3, arts. 7 (right to organize), 27 (staff reductions), 30 (grievances), 33–35 (collective contracts), 80–81 (dispute resolution), 88 (labor supervision). The 2006 amendments to China's Company Law also give the union a potentially greater role in corporate governance by requiring a one-third employee presence on corporate supervisory boards and representation on certain boards of directors. Company Law (P.R.C.), (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective Dec. 29, 1993) (amended Oct. 27, 2005, effective Jan. 1, 2006) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.), arts. 45, 68 (giving employees representation on the boards of directors of state-invested limited liability companies), 52, 71, 118 (requiring employee representation on certain supervisory boards), available at <http://openchina.com.es/wp-content/uploads/2007/04/prc-company-law.pdf>.

¹⁰⁷ See Feng Chen, *Between the State and Labour: The Conflict of Chinese Trade Unions' Double Identity in Market Reform*, 176 CHINA Q. 1006 (2003) [hereinafter Chen, *Between the State and Labour*]; Feng Chen, *Legal Mobilization by Trade Unions: the Case of Shanghai*, 52 CHINA J. 27 (July 2004) [hereinafter Chen, *Legal Mobilization*].

¹⁰⁸ Trade Union Law, *supra* note 5, arts. 4, 6. See also Chen, *Between the State and Labour*, *supra* note 107.

¹⁰⁹ See Chen, *Between the State and Labour*, *supra* note 107, at 1017; Simon Clarke, Chang-Hee Lee & Qi Li, *Collective Consultation and Industrial Relations in China*, 42 BRIT. J. INDUS. REL. 235, 241–44 (2004); INTERNATIONAL TRADE UNION CONFEDERATION, INTERNATIONALLY

lective action; they lack power to call a strike and instead must negotiate a resolution if one occurs in order to allow production to resume.¹¹⁰ Although unions can be persistent in pressing for worker rights in clear-cut cases, they retreat where the dispute may lead to collective action.¹¹¹

In recent years, a growing number of NGOs and legal aid centers have been engaged in labor advocacy and educational initiatives and have begun to play a vital role in assisting employee litigants. However, few are well-positioned to handle large-scale cases with a broad social impact.¹¹² Private lawyers might also be expected to fill the gap as well, but with standard legal fees in labor cases starting at several thousand *yuan*, paid counsel is beyond the reach of many.¹¹³ What makes the problem worse is that labor cases are time-consuming and not lucrative, so few lawyers are willing to take them on.¹¹⁴ This representation deficit further weakens workers' ability to pursue collective claims, which limits the aggregate impact of labor litigation on employer conduct.

c. Informal Labor Dispute Resolution

For all these reasons, the role of labor arbitration and the courts in resolving labor conflict and in motivating broader compliance is less expansive than the trends in arbitrated labor disputes and court filings suggest. Gender, social status, and connection to official allies impact litigants' willingness to utilize formal legal channels, and many illegal labor practices go unchallenged.¹¹⁵ For these reasons, formal legal action may not be the most important or even most effective strategy for workers to seek redress.

China's labor laws emphasize informal dispute resolution, such as conciliation, independent settlement, and mediation, as a means of quickly defusing destabilizing conflict at the grass-roots level and lessening the burden on arbitrators and the courts. Enterprise mediation committees

RECOGNIZED CORE LABOR STANDARDS IN THE PEOPLE'S REPUBLIC OF CHINA 3 (May 23, 2008), available at http://www.ituc-csi.org/IMG/pdf/China_report._16_May.1330.FINAL.pdf (last visited Dec. 2, 2008) [hereinafter ITUC 2008 Report]. Unionization is not mandatory, but employers must permit their workers to establish a union if they wish to do so and must contribute funds to support it. Labor Law, *supra* note 4, arts. 7–8; Trade Union Law, *supra* note 5, arts. 35–42.

¹¹⁰ Trade Union Law, *supra* note 5, art. 27.

¹¹¹ See Chen, *Between the State and Labour*, *supra* note 107.

¹¹² See generally Jingwei He & Hui Huang, *NGOs Defending Migrant Labor Rights in the Pearl River Delta Region: A Descriptive Analysis*, 35 H.K. J. SOC. SCI. 41 (2008).

¹¹³ See HO, *supra* note 32, at 150–58.

¹¹⁴ Shenzhen Labor Arbitrator Interview, *supra* note 40; Guangzhou Labor Lawyer Interview 2003, *supra* note 92; see also Ethan Michelson, *The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work*, 40 LAW & SOC'Y REV. 1 (2006).

¹¹⁵ See Thireau & Hua, *supra* note 79, at 84.

(EMCs) in state enterprises, “negotiation systems” in non-state enterprises, and local community mediation bodies provide forums for mediating labor disputes. Labor inspectors also call upon labor arbitrators to intervene in a crisis and mediate settlements even though no concrete dispute has been (or may ever be) filed for arbitration. Indeed, since the mid-1990s, labor arbitrators have handled the same number of disputes (or more) *anwai* (案外) (outside of a lawsuit) in response to these referrals as through standard labor arbitration proceedings.¹¹⁶ In addition, over one-third of cases filed for arbitration and a similar percentage of civil cases are resolved through arbitral and judicial mediation, respectively,¹¹⁷ and despite an overall decline in mediated claims,¹¹⁸ more cases are resolved through workplace mediation than are decided by arbitrators or judges, not including independent settlements for which precise data are not available.¹¹⁹

Mediation can advance worker interests by allowing them to get immediate compensation and avoid protracted petitioning or litigation in exchange for a lower recovery.¹²⁰ The compliance rate for settlements reached before or during arbitration is high.¹²¹ However, whether mediation promotes or weakens deterrence depends on an employer’s estimate of the risk that higher costs will be imposed in arbitration or litigation. If barriers to employee access (including low awareness of legal rights) make it unlikely a claim will be filed, employers can offer settlements that have no real tie to damages that might be awarded by an arbitrator or court. If employers perceive a high likelihood that employees will file claims (and historically, over 90% of workers who file recover some damages), settlements will more likely be reached “in the shadow of the law,” thus strengthening the indirect impact of arbitrated claims. Historically, the former scenario has been the more common.¹²²

d. Extralegal Modes of Private Enforcement

Neither the Labor Law, the Trade Union Law, nor subsequent regula-

¹¹⁶ See, e.g., LDTJNJ, *supra* note 91, at 497–99 tbl. 9-2.

¹¹⁷ Approximately 30% of employment-related civil cases are mediated and an additional 25% are withdrawn, which includes cases settled by the parties. ZGTJNJ, *supra* note 60 tbl. 22-29.

¹¹⁸ See HO, *supra* note 32, at 55–62.

¹¹⁹ For some labor lawyers, filed claims represent only 40% of total dispute resolutions. Guangzhou Labor Lawyer Interview 2003, *supra* note 92.

¹²⁰ On labor dispute mediation, see generally Aaron Halegua, *Getting Paid: Processing the Labor Disputes of China’s Migrant Workers*, 26 BERKELEY J. INT’L L. 254, 263 (2008). If employers are unwilling to settle or mediate, they are likely to take the claim through the entire appeals process, in order to wear out the plaintiffs. See HO, *supra* note 32, at 188–193.

¹²¹ Guangzhou Labor Lawyer Interview 2003, *supra* note 92.

¹²² *Id.* See also Halegua, *supra* note 120.

tions contain any express affirmation of the right to strike or relax China's restrictive policies toward freedom of association, independent trade unions, and independent collective bargaining. Nonetheless, strikes, demonstrations, and other forms of mass resistance have become commonplace over the past decade, mobilizing pensioners and laid-off state workers in China's northern "rustbelt" and migrant workers in the Pearl River Delta.¹²³ Even before the onset of the financial crisis, the frequency and scale of collective conflict was on the rise. According to official estimates, more than 90,000 "mass incidents" occurred nationwide in 2006, and in Guangdong province, the ACFTU reported 875 instances of mass protests arising over wage arrears alone, involving a total of 74,000 workers.¹²⁴ By 2008, national reports of "mass incidents" put the figure at 127,467.¹²⁵

Substantial research has shown that most collective action is an act of desperation in the face of constraints on legal and administrative remedies.¹²⁶ As the mass demonstrations in south China at the end of 2008 attest, where employers shut down or abscond without leaving sufficient assets behind, the local government offers the only source of compensation and workers are forced to engage in collective protest to assert their claims. In such contexts, the goal of promoting employer compliance prospectively is difficult to achieve or even irrelevant.

Nonetheless, strikes and collective protest are increasingly powerful tools of workers, threatening employers with production losses, negative press attention, investigations or penalties by labor authorities, settlement demands, and increased turnover. Labor advocates in Guangdong have observed a greater space for strike activity in recent years, noting that crack-downs by authorities have become less frequent.¹²⁷ To be sure, appeals for justice outside officially sanctioned legal channels remain high-risk.¹²⁸ The unpredictability of the size, scale, and the official response also lessens their deterrent effect. However, large-scale labor protests can have a noticeable impact by imposing real costs on employers and push-

¹²³ On labor protest in China, see generally LEE, *supra* note 33.

¹²⁴ See CHINA LABOUR BULLETIN, THE CASE OF CHINA: THE CHALLENGE OF LABOUR UNREST IN A COMMUNIST-RUN CAPITALIST ECONOMY (Dec. 4, 2008), available at <http://www.clb.org.hk/en/node/100349> [hereinafter CHINA LABOUR UNREST]. See also ITUC 2008 Report, *supra* note 109, at 7–8.

¹²⁵ See CHINA LABOUR BULLETIN, GOING IT ALONE: THE WORKERS' MOVEMENT IN CHINA (2007–2008) (July 2009), available at http://www.china-labour.org.hk/en/files/share/File/research_reports/workers_movement_07-08.pdf [hereinafter GOING IT ALONE], at 7 n.14 and sources cited therein.

¹²⁶ See LEE, *supra* note 33; Feng Chen, *Subsistence Crises, Managerial Corruption and Labour Protests in China*, 44 CHINA J. 41, 62–63 (2000).

¹²⁷ Panyu Labor Advocate Interview, *supra* note 80.

¹²⁸ See, e.g., Su & He, *supra* note 48 (noting that collective action will be suppressed if organizers can be clearly identified).

ing local officials, arbitrators, and even court personnel to take action.¹²⁹

Increasingly bold media coverage by local reporters of illegal enterprise practices, quickly disseminated via the internet, is another major vehicle for workers to challenge labor law violations. For example, media coverage helped speed resolution of a case involving thirty-six female workers poisoned at the Anjia shoe factory in Dongguan, Guangdong in 2002, which attracted wide debate online and greater attention by the local government to occupational safety concerns.¹³⁰ The media's advocacy role is particularly critical in the absence of robust representation by unions (or lawyers) and can give workers added leverage to achieve results in litigation or in petitioning local officials.¹³¹ While it cannot motivate broader employer compliance singlehandedly, domestic media can be an important tool in contesting serious cases.

e. Codes of Conduct

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

The impact of these tools and broader corporate social responsibility initiatives are the subject of extensive research beyond the scope of this article.¹³² In general, these studies identify a number of limitations: corporate codes are generally imposed and enforced with little input from manufacturers or their employees, they may be poorly monitored or easily evaded by manufacturers adept at passing audits rather than improving operating practices, and they may "crowd out" enforcement initiatives by local authorities.¹³³

¹²⁹ *Id.* (detailing the pro-active role of court officials in handling mass labor conflict).

¹³⁰ Fulian Interview, *supra* note 80. This attorney had formerly represented Anjia workers on behalf of the provincial Women's Federation.

¹³¹ See generally Benjamin Liebman, *Watchdog or Demagogue? The Media in the Chinese Legal System*, 105 COLUM. L. REV. 1 (2005).

¹³² For a review of the debates surrounding social audits and codes of conduct, see Richard Locke, Thomas Kochan, Monica Romis & Fei Qin, *Beyond Corporate Codes of Conduct: Work Organization and Labour Standards at Nike's Suppliers*, 146 INT'L LAB. REV. 21, 21-24 (2007); Ngai-Ling Sum & Pun Ngai, *Globalization and Paradoxes of Ethical Transnational Production: Code of Conduct in a Chinese Workplace*, 9 COMPETITION & CHANGE 181 (2005).

¹³³ See Sum & Pun, *supra* note 132. On evasion by Chinese firms, see Dexter Roberts & Pete Engardio, *Secrets, Lies, & Sweatshops*, BUS. WK., Nov. 27, 2006, at 50.

Nonetheless, corporate codes remain an important complement to other public and private enforcement initiatives. Although the codes and standards generally do not confer enforceable rights on employees unless incorporated into the labor contract, many introduce internal monitoring, management, training, and reporting systems that better engage workers and management in the compliance effort. Research on their use in China shows that they can indeed motivate higher labor standards, as well as raise worker awareness of basic labor rights.¹³⁴

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

Since the basic institutions and procedures described above were first established, the Chinese economy has undergone rapid changes that prior to 2007 were not addressed in any fundamental way within the existing legal framework. Intended to ground the new “socialist market economy,” the Labor Law created uniform regulations for state-owned, private, and foreign-invested employers, moved labor relations from an administrative model toward a market-driven one, paved the way for state-owned enterprise restructuring, and established basic labor standards to rein in abusive labor practices in the foreign-invested sector and beyond. By its terms, the Labor Law reflected a considered effort to balance between productivity and social welfare, public policy and private incentives, and the state’s continued interest in oversight and control with its reduced role in the emerging market economy.¹³⁵ However, striking the right balance between these competing economic and social welfare goals proved difficult in practice.

For example, the Labor Law’s contract employment mandate fostered the growth of the private sector by giving greater flexibility and autonomy to employers even as it meant the end of entitlements and job security for state sector workers that found no real substitute under the new labor laws.¹³⁶ At the same time, the broad discretion it granted to employers allowed abusive workplace practices and employer noncompliance with fundamental aspects of the law to continue unabated, particularly in the private sector. Dangerous working conditions, nonpayment of wages and statutory benefits, failure to sign labor contracts, and the use of essentially bonded labor in manufacturing sweatshops have been documented exten-

¹³⁴ See sources cited at *supra* note 132.

¹³⁵ Labor Law, *supra* note 3, art. 1.

¹³⁶ See Mary E. Gallagher, “Use the Law as Your Weapon!”: Institutional Change and Legal Mobilization in China, in *ENGAGING THE LAW IN CHINA*, *supra* note 74, at 54.

sively in Western media coverage and in academic studies too numerous to cite here.¹³⁷ Such practices have had a disproportionate effect on migrant workers, who make up the bulk of the workforce in the labor-intensive manufacturing centers of China's coastal provinces.¹³⁸

In addition, the majority of Chinese workers are now employed outside state enterprises in a range of private enterprises where the traditional enterprise-based structures for mediating labor relations, such as trade unions, worker representative congresses, and enterprise mediation commissions are largely nonexistent. In keeping with global trends toward more flexible and less stable employment relationships,¹³⁹ employers in China also now rely extensively on informal, part-time, temporary, or subcontracted workers, arrangements which are not fully addressed under the 1994 Labor Law.¹⁴⁰

Taken together, the rapid transition and uneven growth of the Chinese economy, as well as widespread noncompliance with existing labor laws have produced an unprecedented level of labor conflict across China. As Part I indicates, current enforcement channels have proven ill-equipped to respond. The 2007 labor legislation represents China's latest national-level effort to craft a uniform response to these changing labor market conditions and to alleviate the growing labor crisis through legal reform.

A. *Introduction to China's New Labor Laws*

While the new laws do not fully address all of these challenges, they do reflect the Chinese leadership's effort to promote greater stability and equity within China's labor markets. They also promise to strengthen the deterrent force of Chinese labor law, particularly through private enforcement. The following discussion introduces the objectives and basic

¹³⁷ See, e.g., ANITA CHAN, CHINA'S WORKERS UNDER ASSAULT: THE EXPLOITATION OF LABOR IN A GLOBALIZING ECONOMY (2001).

¹³⁸ On the effect of substandard labor practices on migrants and the extent of related reforms, see BIANYUAN REN: MIGRANT LABOR IN SOUTH CHINA (Liu Kaiming, ed. 2003); Zhu, *supra* note 104; Cooney, *supra* note 69; LEE, *supra* note 33, at 157–70.

¹³⁹ See generally Kathryn Van Wezel Stone, *Flexibilization, Globalization, and Privatization: Three Challenges to Labour Rights in Our Time*, 44 OSGOODE HALL L.J. 77 (2006); Kathryn Van Wezel Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251 (2006).

¹⁴⁰ See LUIGI TOMBA, PARADOXES OF LABOUR REFORM 147–65 (2002). Ambiguity about part-time and seconded workers under the Labor Law encouraged employers to evade compliance with basic wage and overtime limits by hiring on a short-term basis or via labor services agencies. See Feng Jianhua, *Mixed Reaction to Workers' Rights Law*, BEIJING REV., July 12, 2007, at 25 (reporting violations by McDonald's, KFC, and Pizza Hut). See also 李鸿光, 《劳动合同法》实施四个月劳动争议出现新情况 [Li Hongguang, *LCL in Force for Four Months, Emerging Issues in Labor Disputes*], 工人日报 [WORKER'S DAILY], May 5, 2008 (noting high number of illegal labor service agencies).

content of each of the new laws as a foundation for Section B's analysis of how the new legislation alters existing remedies and enforcement mechanisms and the implications for employer compliance.

1. The Labor Dispute Mediation and Arbitration Law

The last of the three new labor laws to be enacted, the Labor Arbitration Law, is also one of the most significant. As noted above, the exponential growth in the number of arbitrated labor dispute cases and a similar upsurge in labor-related protests have made apparent the limits of legal and administrative channels as a means of achieving social stability. With few exceptions, the Labor Arbitration Law, which came into force on May 1, 2008, retains the institutions and procedural rules described in Part I. However, it is the first primary national law directed at expanding access to labor dispute resolution forums and addressing long-standing procedural inefficiencies. It also for the first time brings state personnel disputes within LDAC jurisdiction, eliminating parallel adjudication mechanisms that largely duplicated those for labor disputes. Implementing regulations issued on January 1, 2009 direct LDACs to give priority to collective dispute resolution and clarify LDAC jurisdictional questions, evidentiary responsibilities, and case acceptance rules.¹⁴¹ Because the entire Labor Arbitration Law concerns labor dispute resolution, which is a key enforcement tool, a full treatment of the changes it introduces and its potential impact on employer compliance is reserved for Section B.

2. The Employment Promotion Law

The second of the new laws, the Employment Promotion Law, is primarily a policy mandate to all levels of government to respond to the vast number of unemployed, underemployed, and transient workers in the Chinese economy. Accordingly, it has received far less public attention in China and introduces more limited changes to existing requirements than the Labor Arbitration Law or Labor Contract Law. Although the true figures may be impossible to determine, official reports prior to 2008 put China's national urban unemployment rate at 4%,¹⁴² this despite a dearth of qualified workers in many specialized fields and evidence that employers in the manufacturing sector have been experiencing a deficit of un-

¹⁴¹ 劳动争议仲裁办案规则 [Rules on Handling Labor and Personnel Dispute Arbitration Cases], (promulgated by the MOHRSS, effective Jan. 1, 2009), *available at* <http://www.chinanews.com.cn/gn/news/2009/01-09/1521652.shtml> [hereinafter Labor Arbitration Implementing Rules].

¹⁴² 2008 CHINA STAT. Y.B., tbl. 4-1 (reporting 2007 official estimates).

skilled labor for the past five years.¹⁴³ The Employment Promotion Law identifies increasing employment as a key economic development goal and encourages employment services, vocational training, and placement assistance. It also contains provisions regulating employment service agencies that support related provisions in the Labor Contract Law and provide for civil and administrative remedies if service agencies engage in illegal practices, such as retaining worker residency cards or requiring deposits.¹⁴⁴

This emphasis on job creation is not particularly ground-breaking.¹⁴⁵ Rather, the major innovation under the Employment Promotion Law is its expanded prohibition of workplace discrimination. Certain forms of workplace discrimination are already proscribed under the Labor Law, the amended Law on the Protection of the Rights and Interests of Women (Women's Rights Law), and the amended Law on the Protection of Disabled Persons,¹⁴⁶ and discriminatory practices are being challenged with greater frequency in the courts.¹⁴⁷ The Employment Promotion Law builds on these laws with the broadest nondiscrimination prohibitions in any Chinese legislation to date, targeting hiring discrimination based on ethnicity, gender, disability, and status as a carrier of infectious disease, such as Hepatitis B.¹⁴⁸ It is also the first national-level law to outlaw local policies discriminating against rural workers in favor of urban residents.¹⁴⁹ All of these rights can be enforced through civil litigation.¹⁵⁰

3. The Labor Contract Law

The Labor Contract Law is the centerpiece of the 2007 labor law reforms. Its passage marked the culmination of a lengthy and relatively

¹⁴³ See *Help Wanted*, ECONOMIST, Oct. 9, 2004, at 39.

¹⁴⁴ EPL, *supra* note 3, arts. 41, 64–68.

¹⁴⁵ The 1994 Labor Law and subsequent administrative notices already direct enterprises, public institutions, and social organizations to expand employment opportunities. Labor Law, *supra* note 3, arts. 10–11.

¹⁴⁶ See, e.g., 中华人民共和国妇女权益保障法 [Law on the Protection of the Rights and Interests of Women], (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 3, 1992, effective Oct. 1, 1992, amended Aug. 28, 2005, effective Dec. 1, 2005) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.), arts. 23, 27, 40, translated at <http://www.wcwonline.org/pdf/lawcompilation/TheRevisedLawProtection.pdf> [hereinafter Women's Rights Law] (outlawing sexual harassment (though undefined), discriminatory retirement policies aimed at women, and contractual terms that restrict women's freedom to marry or bear children). On workplace discrimination law, see generally Ronald C. Brown, *China's Employment Discrimination Laws During Economic Transition*, 19 COLUM. J. ASIAN L. 361 (2006).

¹⁴⁷ See Fu Hualing & Richard Cullen, *Weiquan (Rights Protection) Lawyering in an Authoritarian State: Toward Critical Lawyering*, 59 CHINA J. 111, 117–18 (2008).

¹⁴⁸ EPL, *supra* note 3, arts. 5, 26.

¹⁴⁹ *Id.* art. 31.

¹⁵⁰ *Id.* arts. 62, 68.

transparent drafting process that sparked intense policy debates within China's leadership and drew attention from the international community. As with other major draft legislation enacted by the National People's Congress (NPC) in recent years, its Standing Committee circulated drafts for public comment in 2006 and early 2007 that attracted an unprecedented wave of over 190,000 recommendations from grassroots trade union organizations, foreign and domestic business associations and labor rights organizations.¹⁵¹ A number of the final provisions adopt a more moderate approach consistent with some of the input received during the comment period.

Still, the Labor Contract Law generally marks a clear retreat from the broad deference given to employers under the 1994 Labor Law. While the 1994 Labor Law was designed to facilitate greater flexibility and mobility within the workforce, many new measures in the Labor Contract Law, such as limits on terminations, protections for part-time and seconded workers,¹⁵² and rules on open-ended labor contracts,¹⁵³ are intended to increase workers' job security. Most of the rules contained in the Labor Contract Law are in fact already in force under current administrative guidance, judicial interpretations, and implementing regulations at the provincial and local levels. However, the law contains more detailed prohibitions and new penalties for a wide range of common violations and anticipates and forecloses avenues for evasion. It makes no fundamental changes to the existing institutional roles of unions, the labor bureaucracy, and the courts in implementation and enforcement. However, it does broaden the union's role by requiring that unions be informed and "consulted" in advance of any terminations or if workplace rules and regulations are adopted.¹⁵⁴

One of the key features of the Labor Contract Law that attracted strong reaction from the international business community and is of direct relevance to this study is its restrictive approach to contract formation.

¹⁵¹ For a detailed analysis of the drafting process and the various interest groups involved, see generally Mary E. Gallagher & Dong Baohua, *Legislating Harmony: Labour Law Reform in Contemporary China*, in *GLOBALIZATION AND THE FUTURE OF LABOUR LAW* (Michael Link ed., forthcoming 2009). Draft implementing regulations of the LCL were also released on the internet and in other media for public comment during 2008.

¹⁵² LCL, *supra* note 3, arts. 57–72; 中华人民共和国劳动合同法实施条例 [Regulation on Implementation of the Labor Contract Law (P.R.C.)], (promulgated by the St. Council, Sept. 18, 2008, effective Sept. 18, 2008), ST. COUNCIL GAZ. (P.R.C.), art. 30 (introducing conditions for the establishment and oversight of labor services agencies, and clarifying obligations of "dispatching" and receiving enterprises toward seconded workers) [hereinafter LCL Implementing Regulations]. The LCL also imposes direct payment and compliance obligations on companies utilizing seconded workers. LCL, *supra* note 3, arts. 62, 92; LCL Implementing Regulations, *supra*, arts. 4, 29.

¹⁵³ See LCL, *supra* note 3, arts. 10, 12–15, 17; cf. Labor Law, *supra* note 3, arts. 21, 27.

¹⁵⁴ See LCL, *supra* note 3, arts. 4, 38, 41, 43, 46, 47, 80; Trade Union Law, *supra* note 5, arts. 21, 27.

Under both the 1994 Labor Law and the Labor Contract Law, all employers must sign written contracts with their employees that contain certain mandatory terms.¹⁵⁵ In response to widespread violations of this rule, particularly in many small and medium-sized domestic enterprises, the Labor Contract Law now mandates that contracts be signed within one month of when the employee begins work, and for the first time imposes uniform penalties for noncompliance. Labor contracts may be for a fixed period, which is the most typical, but can also be project-based, or *wu guding* (无固定) (open-ended), that is, one of unlimited duration.¹⁵⁶ Since the passage of the 1994 Labor Law, employers have shied away from open-ended contracts in favor of fixed-term agreements with shorter terms, most now typically for one year. To promote job stability, the Labor Contract Law expands employees' rights to form open-ended contracts,¹⁵⁷ introduces new limits on contract termination,¹⁵⁸ and creates more expansive employee rescission¹⁵⁹ and severance rights,¹⁶⁰ all of which drew fire from business advocates. However, similar statutory rights are common across Asia and are not unlike rules governing contract formation and termination under French and German law.¹⁶¹ Many of these rules bring labor law into line with other regulatory changes, such as the 2006 revisions to China's Bankruptcy Law, which give other creditors priority over

¹⁵⁵ LCL, *supra* note 3, arts. 10, 17; *cf.* Labor Law, *supra* note 29, arts. 16, 19.

¹⁵⁶ LCL, *supra* note 3, arts. 10, 12–15.

¹⁵⁷ Open-ended contracts can arise without employer consent whenever a worker with sufficient tenure renews or re-concludes a contract, unless the worker opts for a fixed-term contract. *Id.* art. 14. *Cf.* Labor Law, *supra* note 3, art. 20. In addition, employees who have already signed two fixed-term contracts generally have the right to renew as an open-ended contract thereafter, regardless of the total length of the prior term contracts. LCL, *supra* note 3, arts. 14, 97.

¹⁵⁸ Absent grounds to terminate for serious breach, unilateral terminations are allowed only if the employer has first attempted to remove the circumstances justifying the dissolution, has provided thirty days' notice or one months' severance in lieu of notice, and consulted with the union, and if the employee is not within a protected category, such as workers undergoing medical treatment or female workers on maternity leave. *See* LCL, *supra* note 3, arts. 40–47; Trade Union Law, *supra* note 5, art. 21; *cf.* Labor Law, *supra* note 3, arts. 26, 27, 29. Special rules apply to mass terminations, and employees under long-term or open-ended contracts receive special protections. LCL, *supra* note 3, arts. 41, 42, 46, 47; *cf.* Labor Law, *supra* note 3, art. 27.

¹⁵⁹ LCL, *supra* note 3, arts. 37, 38; LCL Implementing Regulations, *supra* note 151, art. 18; *cf.* Labor Law, *supra* note 3, arts. 31, 32.

¹⁶⁰ Severance obligations now cover nearly all dismissals other than employer-initiated dismissals for cause. The amount of severance is calculated based on actual wages (including bonuses and subsidies) and the years of tenure. LCL, *supra* note 3, arts. 46, 47; LCL Implementing Regulations, *supra* note 151, art. 27.

¹⁶¹ *See* MARVIN J. LEVINE, WORKER RIGHTS AND LABOR STANDARDS IN ASIA'S FOUR NEW TIGERS: A COMPARATIVE PERSPECTIVE (1997); BLANPAIN, *supra* note 2, at 398–99 (reviewing German laws providing, *inter alia*, that unwritten term contracts are deemed permanent, imposing tight restrictions on terminations, and limiting temporary employment to two years), 436–48 (detailing French laws providing, *inter alia*, that fixed term contracts may be renewed only once and that “serious” cause is required to terminate a contract of unlimited duration).

employee claims, and legislation on mergers, acquisitions, and divestitures.¹⁶²

Although its primary focus is on individual labor contracts, the Labor Contract Law also incorporates basic principles from the Trade Union Law, the Labor Law and the Collective Contract Regulations on the formation and function of collective contracts, which set a floor for the terms of employment contained in individual labor contracts. Here too, the Labor Contract Law largely reiterates existing law, which already details clear rules for the “consultation” process, the role of the trade union or a worker representative in *xieshang* (协商) (negotiation) of the contract terms, the scope of such contracts, and the resolution of related disputes.¹⁶³

*B. Towards “Harmonious” Labor Practices:
Using Carrots and Mostly Sticks in China’s New Labor Legislation*

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

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

¹⁶² See 中华人民共和国企业破产法 [Enterprise Bankruptcy Law (P.R.C.)], (promulgated by the Nat’l People’s Cong., Aug. 27, 2006, effective June 1, 2007) STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.), arts. 109–113.

¹⁶³ LCL, *supra* note 3, arts. 51–56; *cf.* Trade Union Law, *supra* note 5, art. 20; Labor Law, *supra* note 29, arts. 33–35; Collective Contract Regulations, *supra* note 106. On collective consultation, see generally Ronald C. Brown, *China’s Collective Contract Provisions: Can Collective Negotiations Embody Collective Bargaining?* 16 DUKE J. COMP. & INT’L L. 35 (2006); Clarke, Lee & Li, *supra* note 109.

new legislation does not significantly alter current public enforcement tools or incentives.

1. Sending the Compliance Message and Making Sure It Is Received

As scholars of Western public policy have observed, regulation serves an “expressive function” in communicating public policy objectives and priorities, and the policy message transmitted through legislation has consequences for society that may be equally or more important than the content of the regulation itself.¹⁶⁴ The expressive dimension of regulation is arguably more powerful within the Chinese system given historical conceptions of law as a tool of class struggle during the Mao years and then as an instrument of Party policy during the reform period. Although legislation in China is now shaped most directly by technical experts, academics, and even through public input, the Party’s continued role in agenda-setting, oversight, and approval of draft legislation, as well as its influence over legislative and administrative appointments, ensure that new regulatory measures still bear the stamp of the state’s official policy direction.

As an initial matter, the fact that the Employment Promotion Law, the Labor Contract Law, and the Labor Arbitration Law are *jiben fa* (基本法) (primary national laws) places them at the top of China’s legislative hierarchy and gives them precedence over prior local, provincial, or administrative enactments. The higher formal authority of the labor laws may motivate more employers to take them seriously, and the strong deterrent focus of the new laws themselves, discussed further below, further supports the overall compliance message. Their national stature also promotes greater regulatory consistency regionally within China, as seen, for example, in the Labor Contract Law provisions that standardize rules on enforcement of non-compete and confidentiality commitments.¹⁶⁵

Most critically, the passage of these laws at the national level makes the compliance message more likely to be heard in the first place, since like other major national legislation in China, the Labor Contract Law and the Labor Arbitration Law (and to a far lesser extent the Employment Promotion Law) were accompanied by an extensive *pufa* (普法) (dissemination) campaign in local bookstores, other print media, on the inter-

¹⁶⁴ See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 938–39 (1991) (arguing that public policy has important indirect impacts on social understandings, norms, and meanings).

¹⁶⁵ LCL, *supra* note 3, arts. 24, 90; *cf.* Labor Law, *supra* note 3, arts. 22, 102.

net, and through trade union and state agency-sponsored programs, all aimed at raising public awareness of the new laws.

By directly stipulating grounds for administrative sanction and in some cases, precise penalties, the Labor Contract Law, in particular, also sends a clear "get tough" message to local enforcement officials. For example, it incorporates existing administrative rules authorizing labor inspectors to double back wages owed by employers who ignore orders to pay employees.¹⁶⁶ The tougher public enforcement mandate is bolstered by a last-minute addition to the Labor Contract Law that for the first time creates a private right of action for damages against government agencies that fail to enforce the law, causing harm to workers.¹⁶⁷ Whether any cases succeed on these grounds may ultimately be less important than what these rights say about the obligation of local officials to enforce the law.

In addition, basic knowledge of regulations and the clarity of legal norms are critical to employers' ability to comply with law. Prior regulatory studies confirm that the complexity of laws reduces knowledge of the rules and makes compliance more difficult or even impossible.¹⁶⁸ In China, despite the broad dissemination of the Labor Law in the mid-1990s, key elements of the labor law, such as prohibitions on bonded labor and severance rules, were previously contained not in the national Labor Law, but in myriad administrative notices, interpretative guidance, and subnational legislation of varying authority and consistency.¹⁶⁹ Penalties were spelled out only in administrative regulations and notices.¹⁷⁰ The same was true with regard to rules governing labor dispute resolution case filing, fees, and procedures and the work of labor arbitration commissions. As Cooney has observed, this reliance on administrative regulations and local rules suggests that regulatory mandates are directed more at the labor bureaucracy than to employers, workers or judges.¹⁷¹ It also weakens the deterrent effect of private enforcement by making it more difficult for workers to determine if they have a legal claim and how to pursue it.

¹⁶⁶ LCL, *supra* note 3, art. 85; *cf.* Labor Inspection Measures, *supra* note 36, arts. 26, 30 (authorizing double wages and administrative penalties of RMB 2,000 to 20,000).

¹⁶⁷ LCL, *supra* note 3, art. 95; *cf.* Labor Law, *supra* note 3, art. 103 (providing only for administrative or criminal liability for neglect of official duty and other misconduct). This clause was added to the LCL just days after exposés of slave labor at a brick kiln in Shanxi drew outrage at negligent workplace safety inspectors. Telephone interview with Chris Xiaoyun Lin, Senior Counsel, Akin Gump (lead drafter of the American Chamber of Commerce comments on the LCL) (Oct. 16, 2008) [hereinafter Lin Interview].

¹⁶⁸ See Winter & May, *supra* note 12; Raymond J. Burby & Robert G. Paterson, *Improving Compliance with State Environmental Regulations*, 12 J. POL'Y ANALYSIS & MGMT. 753 (1993).

¹⁶⁹ The example of prohibitions on bonding is discussed in greater detail in Cooney, *supra* note 69, at 1058.

¹⁷⁰ See, e.g., Labor Inspection Measures, *supra* note 36.

¹⁷¹ Cooney, *supra* note 69, at 1058.

The Labor Contract Law sets clearer standards for employers, leaving less room to claim ignorance or excuse substandard practices. For example, the Labor Contract Law specifies both damages and administrative penalties for engaging in bonded labor or violating labor sub-contracting rules, as well as a range of other illegal practices.¹⁷² Confirming the illegality of these practices smoothes the way for workers to challenge illegal practices in labor arbitration and the courts, and more importantly, in direct negotiations with employers. Likewise, the Labor Arbitration Law raises awareness of the basic procedural rules governing labor dispute resolution, broadening access to the dispute resolution process.

In sum, the improved clarity and consistency of the new legislation can be expected to facilitate voluntary compliance, while clearer penalties can deter violations by raising the risk of employee claims and the prospect of tougher public enforcement. The following discussion identifies specific changes in the new legislation that may further influence employer compliance.

2. Motivating Compliance Under the Labor Contract Law and the Employment Promotion Law

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

a. Deterrence Through Private Enforcement

First, the Labor Contract Law and the Employment Promotion Law extend the reach of litigation by establishing new bases for employee claims. This increases the potential costs of noncompliance. For example, the Employment Promotion Law's expanded definition of workplace discrimination to protect Hepatitis B carriers and migrant workers affords them new civil rights of action against employers. The Labor Contract

¹⁷² See, e.g., LCL, *supra* note 3, arts. 84 (setting fines of at least RMB 500 and up to RMB 2,000 *per worker* for requiring bonds or deposits), 88 (imposing damages and administrative sanctions for causing injury), 92 (providing for fines of RMB 1,000–5,000 *per worker* for labor dispatch violations).

Law expands the range of parties who can be held liable for violations of the labor law beyond the direct employer to include its successor in interest, its financial sponsor, an enterprise to whom a seconded worker provides services, and recruiters, while the Employment Promotion Law permits new civil claims (and administrative remedies) against employment service agencies.¹⁷³

Moreover, the Labor Contract Law expands the scope of "labor relationships" to include temporary and part-time workers, clarifies obligations toward seconded workers, and stipulates that the labor relationship begins as soon as work is performed even if no contract is signed.¹⁷⁴ Because the existence of a "labor relationship" is a critical threshold jurisdictional issue, the clear status of these workers under the labor laws affords them greater statutory protections and access to labor arbitration, which under the new legislation now offers a cheaper and potentially faster path to resolving labor disputes.¹⁷⁵

The Labor Contract Law also strengthens the deterrent effect of current labor law by establishing clearer remedies and stronger penalties for noncompliance that can be awarded as damages in the context of private labor disputes. Most notably, the Labor Contract Law for the first time introduces non-compensatory (i.e. punitive) damages against employers who violate the written contract requirement or illegally terminate employees. Under the Labor Contract Law, an employer who fails to execute a written contract within one month of hire will owe compensation at twice the employee's monthly salary for up to one year.¹⁷⁶ Similarly, employers who terminate an employee illegally owe double severance in compensation.¹⁷⁷ These provisions shift the burden to employers to make sure a termination is defensible under the law, although since both penalties are keyed to wages, the perceived pricetag will still be nominal for many employers.

¹⁷³ See, e.g., *id.* arts. 33, 34, 92, 93, 95. The EPL sanctions back up the LCL's prohibitions on bonding and security deposits.

¹⁷⁴ See, e.g., *id.* arts. 10, 51–72. Exceptions remain for agricultural workers, domestics, independent contractors, workers who moonlight or otherwise perform services for hire for someone other than their employer, or workers employed by an unregistered enterprise.

¹⁷⁵ The existence of a "labor relationship" is typically evidenced by a written labor contract, although it may also be proven by other evidence. See Labor Law, *supra* note 3, art. 2; LCL, *supra* note 3, arts. 2, 7. Its absence removes the worker from the jurisdiction of labor bureau authorities and the LDACs, making challenge of employer practices more difficult.

¹⁷⁶ LCL, *supra* note 3, art. 82.

¹⁷⁷ *Id.* art. 87. Severance is capped at the average monthly wage in the jurisdiction for employees earning more than three times that amount. *Id.* art. 47. In 2008, the minimum wage in Guangdong Province ranged from top levels in Guangzhou and Shenzhen of RMB 860 and 1000 per month to lows of RMB 530 to 580 in less developed areas. Guangdong Wage Standards, available at <http://www.51labour.com/lawcenter/zhbz/index.asp?staid=1> (member access only).

The Labor Contract Law also provides that if an employee performs any work during an illegally extended probationary period, the employer must pay full wages at the level that would be paid to non-probationary employees as restitution.¹⁷⁸ Finally, employers may now also face claims for damages under the Labor Contract Law and possible administrative penalties if the labor contract does not contain statutorily mandated terms, if the employee does not receive a copy of the contract, or if the worker is terminated or suffers other harm under workplace rules that are invalid or not properly adopted after consultation with the union.¹⁷⁹

The Labor Contract Law also weakens employers' ability to frustrate employee lawsuits by threatening counterclaims for breach of contract. For example, the law gives employees broad grounds to unilaterally terminate their contract without liability if the employer is violating the labor laws.¹⁸⁰ Alternatively, if the employer breaches any statutory obligations, the contract content is itself illegal, or if the employer used fraud or coercion to induce the contract, employees can seek to invalidate the underlying contract itself and claim damages.¹⁸¹ An employer cannot contract around these protections by imposing any liquidated damages obligations, other than for breach of a term of service or a noncompete commitment.¹⁸²

b. Compliance-Oriented Rules

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

¹⁷⁸ LCL, *supra* note 3, art. 83.

¹⁷⁹ See *id.* arts. 80–81. Company rules that do not substantively conform to the labor laws and regulations are invalid. *Id.* art. 80. Workplace rules and policies can only be validly adopted or modified after “equal consultation” (平等协商) (*pingdeng xieshang*) with the employees or the union and opportunity for comment, although there is no obligation that management adopt union proposals. *Id.* arts. 4, 38.

¹⁸⁰ *Id.* art. 38.

¹⁸¹ *Id.* arts. 26, 86. Only contracts containing illegal terms or entered into through fraud or coercion, are voidable. *Cf.* Labor Law, *supra* note 3, art. 18.

¹⁸² LCL, *supra* note 3, arts. 22, 23, 25.

es.¹⁸³ Since open-ended contracts give employees the greatest job security and impose the most restrictions and costs on employers, this rule incentivizes employers to be proactive in signing written contracts in order to reduce long-term liability. At the same time, making open-ended contracts the default gives maximum protection to workers where the nature of the employment relationship is unclear.

The new rules on part-time workers are another area where the law appeals to employers' self-interest to promote compliance. Although part-time workers can be retained by multiple employers, their primary obligation is performance of the first part-time contract. This rule rewards employers who sign contracts with part-time workers by giving them priority rights to the employee's time that can be enforced against a second employer in claim for interference with the initial employment contract.¹⁸⁴ Similar rules give priority over full-time employees' time to the initial employer as well.¹⁸⁵ These measures promise to further diversify China's current enforcement model to achieve greater gains from both "carrots" and "sticks."

3. Motivating Compliance Under the Labor Arbitration Law

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

The Labor Arbitration Law impacts both parts of that calculation. First, it increases the likelihood that workers will sue, which given typical case outcomes, increases the number of cases an employer might expect to lose. Second, procedural changes it introduces may stimulate higher damages claims and speed the dispute resolution process, increasing the

¹⁸³ *Id.* arts. 14, 82. Of course, an employer may be able to limit their liability by terminating the employee before they have served for one year.

¹⁸⁴ *Id.* art. 91.

¹⁸⁵ An employer may terminate for serious breach if an employee obtains a position elsewhere that "materially affects" work performance for the initial employer. *Id.* art. 39(4); *cf.* Labor Law, *supra* note 3, art. 25(2).

real cost of labor claims. For reasons discussed below, the Labor Arbitration Law's renewed emphasis on mediated outcomes is not likely to significantly alter this picture.

a. Expanded Access for Worker Claims

The Labor Arbitration Law introduces two key changes that expand the scope of labor arbitration and lower key barriers to worker access to formal labor dispute resolution processes. First, in reaction to long-standing concerns that 60 days was not an adequate time for many workers to become aware of a violation and take steps to file a claim, the Labor Arbitration Law extends the statute of limitations for filing a labor arbitration claim to one year "from the time a party knew or should have known that his or its rights were infringed."¹⁸⁶ This increases the risk horizon for employers, but is still shorter than the two-year time bar for most civil law claims in court.¹⁸⁷ The Labor Arbitration Law also incorporates existing tolling rules to keep cases from being barred when workers pursue remedies outside of litigation and to forestall employers from deliberately impeding workers who may be unaware of the filing deadline.¹⁸⁸

Secondly, the law eliminates all fees previously charged to file and process a labor arbitration claim.¹⁸⁹ In addition, workers can no longer be required to post a bond during an arbitral proceeding when applying for pre-award recovery of wages, reimbursement for medical bills, severance or damages, so long as non-execution will "materially affect the applicant's livelihood."¹⁹⁰ The law does not affect the obligations of parties to a labor dispute to bear their own legal fees. Finally, in apparent reaction to the volume of factory shutdowns at the end of 2008, the law's implementing rules confirm that litigants can proceed directly against the investor of an enterprise that closes, has had its business license suspended, or is bankrupt.¹⁹¹

¹⁸⁶ Labor Arbitration Law, *supra* note 3, art. 27.

¹⁸⁷ General Principles of Civil Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), 1987 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., art. 135 (P.R.C.).

¹⁸⁸ See Labor Arbitration Law, *supra* note 3, art. 27 (restarting the time bar once a party asserts rights against the other party or seeks a remedy from a government authority—for example, through petitioning—or once a settlement has been reached, and suspending it for events of force majeure).

¹⁸⁹ *Id.* art. 53.

¹⁹⁰ A further condition is that the parties' rights and obligations must be clear. *Id.* art. 44(1).

¹⁹¹ Labor Arbitration Implementing Rules, *supra* note 141.

b. Potential for Higher Claims and Awards

The new statute of limitations rules and the elimination of arbitral fees also have an indirect effect in that both allow plaintiffs to seek higher damages awards than was possible under prior law. Because arbitration fees for large claims, for example, those over RMB 10,000, were based on a percentage of the claimed amount, the elimination of arbitration fees removes a clear financial disincentive that had restrained plaintiffs from seeking large damage awards.¹⁹² In addition, the statute of limitations on wage claims does not begin to run until the end of the employment relationship, so any claim for unpaid wages filed before then can seek a full recovery, while claims filed thereafter can seek arrears for the entire preceding year covered by the statutory period.¹⁹³ If the size of worker claims increases measurably, it may increase the willingness of counsel to take on labor cases, which could give workers added leverage in litigation or in settlement.

c. Dealing with Delay

Historically, most LDAC adjudications were completed within the sixty days required under prior regulations, but additional extensions were common.¹⁹⁴ Completing arbitration and two appeals to court could take twelve to eighteen months; sensitive cases could take years.¹⁹⁵ With over 80% of arbitral awards appealed to court, the redundancy created by *de novo* court review of arbitral awards was widely recognized as a further impediment to timely case resolution, a challenge to the institutional legitimacy of the LDACs, and a tool for employers to wear down plaintiffs.

The Labor Arbitration Law promises to reduce these procedural delays by shortening the time period between case acceptance and case resolution to forty-five days for routine cases with an additional fifteen days

¹⁹² See Guangdong Labor Dispute Arbitration Fee Management Measures, *supra* note 97.

¹⁹³ Labor Arbitration Law, *supra* note 3, art. 27. This rule adopts the position of the 2006 SPC Interpretation, which allows employees to recover damages for the entire employment term if they pursue a claim while employed. Under prior practice, damages were typically limited to the harm caused during the sixty-day period. Interview with Huang Qiaoyan, labor lawyer and instructor, Sun Yat Sen University School of Law Legal Aid Clinic, in Guangzhou, P.R.C. (Sept. 2003) [hereinafter Huang Interview 2003].

¹⁹⁴ Interview with district labor arbitrator in Guangzhou, P.R.C. (Sept. 17, 2003) (reporting average resolutions of 90 days); 中华人民共和国劳动争议调解仲裁法释义 [EXPLANATION OF THE LABOR ARBITRATION LAW] 243 (王建平 [Wang Jianping] et al. eds.) (2008) (reporting average LDAC resolution rates of forty to fifty days in Guangdong).

¹⁹⁵ Huang Interview 2003, *supra* note 193; interview with labor arbitrator, in Shenzhen, P.R.C. (Sept. 28, 2003). See also CHINA LABOUR BULLETIN, HELP OR HINDRANCE TO WORKERS: CHINA'S INSTITUTIONS OF PUBLIC REDRESS (2008) (reporting on one case extending thirteen years).

for complicated cases. The tough deadlines at the arbitration phase may not reduce systemic delays, since either party may simply proceed directly to court if no award is issued within that period.¹⁹⁶ However, the Labor Arbitration Law also incorporates existing mechanisms for partial awards and default judgments, which are intended to improve the efficiency of the LDAC process and reduce delays.¹⁹⁷

It also specifies a category of labor disputes for which an arbitral award is final under an arbitration-only system (一裁终审) (*yi cai zhong shen*), namely, any claims for wages, medical bills for work-related injury, severance pay or damages in an amount “not exceeding twelve months at the local minimum monthly wage rate” and “certain disputes arising to implementation of state labor standards on working hours, rest, leave, or social insurance.”¹⁹⁸ Since employees can appeal an award for any reason and employers also enjoy fairly broad grounds for review of “final” awards, summary arbitration may produce less finality than it promises.¹⁹⁹ Still, it is the first major legislative effort to expedite final resolution for the vast majority of labor disputes. The new rule also benefits employers by requiring workers who want to utilize summary arbitration to limit the size of their claims. It is too soon to tell how frequently courts will find grounds to vacate an award, which will determine the real utility of the new procedure.

For workers, these new rules can be expected to lower the cost of legal action and increase its potential rewards, while employers face higher risk of labor litigation and potential liability. Finally, it should be noted that while the Labor Arbitration Law gives the LDAC a greater role in resolving routine claims, many labor-related claims, such as discrimination claims and undisputed wage claims, will continue to be resolved directly by courts, in addition to claims appealed from arbitration. In many cases, plaintiffs can make strategic choices about whether labor arbitration or civil litigation increases their chances of a faster and larger poten-

¹⁹⁶ Labor Arbitration Law, *supra* note 3, art. 43.

¹⁹⁷ *Id.* arts. 36 (default awards), 43 (partial awards).

¹⁹⁸ *Id.* art. 47. Implementing guidance issued in Guangdong clarifies that arbitrators can segregate and render a final award on claims that *individually* are below the monetary threshold, even if the aggregate total of all claims is higher. See Guiding Opinion on Several Issues Concerning the Application of the Labor Arbitration Law and the LCL (issued by Guangdong Provincial Higher People’s Court, Guangdong Provincial LDAC, June 23, 2008, effective June 23, 2008), art. 9, *translated in* CHINA L. & PRAC., Sept. 2008.

¹⁹⁹ Labor Arbitration Law, *supra* note 3, arts. 48 (authorizing workers to appeal to a People’s Court within 15 days of the arbitral award), 49 (incorporating the standards set in the SPC’s 2006 Interpretation that permit employers to seek vacature of an LDAC award for error in the application of law, lack of jurisdiction, procedural violations, falsified or concealed evidence, arbitrator misconduct, or an award that “perverts the law”).

tial recovery.²⁰⁰ While it is unclear whether the lines now drawn between labor arbitration and the courts will indeed promote efficient resolution of labor disputes, they clearly create an urgent need for greater coordination and consistency between arbitrator and court approaches to labor cases that has yet to be worked out.

d. Improved Arbitrator Qualifications

Studies of regulatory effectiveness find that it depends in part on the perceived legitimacy of enforcement institutions, which is enhanced by public confidence in their impartiality and professionalism.²⁰¹ Although concerns about local protectionism and the fairness and neutrality of labor arbitrators and the courts have not abated, China has made prodigious steps in recent years to improve the competency and reputation of judicial and administrative officials at all levels, including labor arbitrators. The Labor Arbitration Law is in keeping with these efforts, as it establishes higher qualifications for labor arbitrators and requires judicial or legal experience unless the applicant has at least five years' experience in a labor union, human resource management, or similar position.²⁰² It also affirms litigants' right to challenge a particular arbitrator for conflicts of interest or for meeting privately, being entertained by, or accepting gifts from any party.²⁰³ These measures promise to further improve the quality of labor arbitration, which may in time improve its perceived utility as an enforcement strategy.

e. Heightened Emphasis on Mediation

In keeping with the emphasis on informal dispute resolution under prior regulations, an entire section of the Labor Arbitration Law is devoted to mediation, although it largely tracks existing regulations on labor dispute mediation procedure.²⁰⁴ Acknowledging the limitations on enterprise-based mediation in non-unionized firms, the law directs grassroots mediation institutions to accept labor disputes and alleviate caseload pressure on arbitrators and courts.²⁰⁵

²⁰⁰ For example, civil tort damages for personal injury are generally higher than damages for occupational injury. Huang Interview 2008, *supra* note 101. Civil tort law also provides a broader range of remedies for reputational injury than labor law. See DONG BAOHUA & DONG RUNQING, CASE ANALYSIS ON LATEST PRC LABOR CONTRACT LAW 687–90 (2007).

²⁰¹ See, e.g., TYLER, *supra* note 25.

²⁰² Labor Arbitration Law, *supra* note 3, art. 20.

²⁰³ *Id.* art. 33.

²⁰⁴ *Id.* arts. 10–16.

²⁰⁵ See *id.* art. 10.

Although further study is needed to assess how employers in China weigh their options to settle or litigate labor claims, mediation or settlement under the new legislation could in fact amplify the deterrent force of formal legal action. A worker that can claim double damages under the Labor Contract Law will likely be unwilling to settle for far less, and with the expanded access to labor arbitration and the courts afforded under the Labor Arbitration Law, an offer that is too low is now more likely than ever to prompt a lawsuit. Moreover, in some cases, successful litigation can have a ripple effect on employers. For example, settlements obtained in arbitral mediation in one case can spark demands for comparable compensation by fellow employees.²⁰⁶ For all of these reasons, employers' potential liability for labor violations, even in settlement, is likely to rise under the new laws.

In addition, the Labor Arbitration Law for the first time creates clear rules for enforcing certain independent settlements, which should further strengthen their deterrent force. Although settlements reached outside of an arbitration or court proceeding have always been technically binding, there has previously been no clear mechanism to enforce them. In the event of a breach, a party would simply start over in arbitration or sue in court to determine what the agreement was and whether it had been breached. Although this is still the general procedure under the Labor Arbitration Law, the law now provides that courts can translate mediation agreements on payment of overdue wages, medical bills for work-related injury, severance or damages into directly enforceable *zhifuling* (支付令) (payment orders) without arbitration.²⁰⁷ The new measures promise faster recovery for workers and complement the other provisions in the Labor Arbitration Law that allow these types of disputes to be resolved through faster binding arbitration.

²⁰⁶ Panyu Labor Advocate Interview, *supra* note 80.

²⁰⁷ Labor Arbitration Law, *supra* note 3, arts. 14–16. A court's *zhifuling* (支付令) (orders to pay) may also be issued under Article 30 of the LCL if an employer has failed to make full and timely payment of employee wages. However, under China's Code of Civil Procedure, such orders have no force if the debtor (i.e. the employer) disputes the obligation. See 中华人民共和国民事诉讼法 [Code of Civil Procedure], (promulgated Apr. 9 1991 by the Natl. People's Cong., amended Oct. 28, 2007 by the Standing Comm. of the Natl. People's Cong., effective Apr. 1, 2008) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.), art. 194, at 18. Since a mediated settlement is an acceptance of the obligation, such a payment order would be effective and enforceable.

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

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

Because the broad scope of the new legislation makes it impossible to address all aspects of its implementation, I focus here on the basic requirement that employers enter into written labor contracts with their employees, with reference to related aspects of the other two new labor laws. This is an interesting and important area of inquiry for a number of reasons. First, the written contract requirement is the foundation of labor relations under the Labor Law and the Labor Contract Law. The contract provides clear evidence of an employment relationship, establishes compensation and other key terms of that relationship, informs the employee of basic statutory rights, and is the starting point in evaluating competing claims if a dispute arises. Second, the rule is one that should enjoy a maximum chance of successful implementation. Form contracts are readily available to employers from the local government. The rule's force is backed by the combined monitoring and enforcement resources of unions, employees, labor bureau officials, labor arbitrators, the courts, and, where codes of conduct apply, by external auditors. Finally, employers have ample incentives to comply under the Labor Contract Law, both "carrots" and "sticks": violations can result in double wage damages and/or administrative fines and ultimately give rise to an implied open-ended term contract, which is the most restrictive from an employer standpoint.

Still, the most interesting reason to focus on this area is the irony that written labor contracts are the subject of new major legislation in the first place. The evolution of China's labor contract system spans decades and dates back to policies first proposed by Liu Shaoqi and Deng Xiaoping in the mid-1960s. As early as 1979, foreign joint ventures were permitted to hire on the basis of fixed-term labor contracts, and regulations adopted in

the 1980s extended contract-based employment to state-owned enterprises.²⁰⁸ The 1994 Labor Law solidified labor contracts as the foundation of Chinese labor relations and spurred forward official campaigns to promote its full implementation across the Chinese economy.²⁰⁹ Similarly, collective contracts, which are typically entered into between the local or industry union association and the employer or employer's association, were introduced when the Trade Union Law was first enacted in 1992.²¹⁰

Nonetheless, as of 1997, only half of state sector employees were covered by written contracts.²¹¹ Surveys by the NPC and the State Council in 2005 found that fewer than 20% of small and medium sized enterprises used labor contracts, and nearly half of all migrant workers lacked a written labor contract of any kind.²¹²

Because of the challenge of unionizing and negotiating with individual enterprises, regional and industry-focused collective contracts have been a focus of the ACFTU's strategy since 2000, particularly in areas with high concentrations of smaller enterprises.²¹³ According to official statistics, collective contracts now cover over 60% of China's workers, and limited collective agreements on wages, workplace safety, or job training also now cover millions of workers.²¹⁴

Western policymakers and labor advocates might well expect, then, that a study of labor contract implementation would naturally center on collective labor contracts. However, notwithstanding efforts by the ACFTU to show strong "numbers," changes in the level and scope of collective contracts are a less useful indicator of implementation and employer compliance in the Chinese context than individual labor contracts. In addition, a substantial multi-disciplinary literature spanning management science, law, and sociology has critically examined the role of Chinese unions and the meaning of "collective consultation" and concluded that the conflicted institutional nature of China's unions prevents them from operating as an effective counterweight to managerial discretion or as a strong advocate of workers in collective negotiations. This is a find-

²⁰⁸ On the history and early implementation of the contract employment system, see HILARY K. JOSEPHS, *LABOR LAW IN CHINA* 49–50, 54–67 (2nd ed. 2003).

²⁰⁹ See, e.g., 中国劳动年鉴 1995–1996 [CHINA LABOR Y.B. 1995–1996] 279 (1996) (reporting 95% contract execution rates among state, collective, and foreign-invested enterprises in Guangdong).

²¹⁰ See CHINA LABOUR BULLETIN, *BREAKING THE IMPASSE: PROMOTING WORKER INVOLVEMENT IN THE COLLECTIVE BARGAINING AND CONTRACTS PROCESS 2* (2007) [hereinafter *BREAKING THE IMPASSE*].

²¹¹ JOSEPHS, *supra* note 208, at 67.

²¹² See Victorien Wu, *Labor Relations in Focus*, 33 CHINA BUS. REV. 40, 42 (2006).

²¹³ See *BREAKING THE IMPASSE*, *supra* note 210, at 7–8, 11.

²¹⁴ By 2005, 58% of all workers in China were reportedly covered by collective contracts, in contrast to the end of 1995, when collective contracts covered workers at only 1.8% of enterprises. See *BREAKING THE IMPASSE*, *supra* note 210, at 6–7, 9–11.

ing borne out by numerous media reports since the passage of the new legislation as well.²¹⁵ Not surprisingly then, collective contracts are generally drafted by employers with little real negotiation and tend to be limited to minimum legal requirements. The precise terms of employment that might form the basis of a dispute are contained instead in individual labor contracts, which are, for all of these reasons, the subject of this article.

The following analysis of labor contract implementation is based on personal interviews conducted in Guangdong in the spring of 2008 with labor lawyers, labor advocacy organizations, labor arbitrators, and enforcement officials, in addition to media reports and official sources. Local officials in two other districts near Guangzhou were interviewed in 2009. Guangdong has long been an important focus of research on labor issues in China because it is one of China's largest manufacturing centers and also one of the provinces most impacted by labor conflicts. Over 60% of Guangdong employers are either private or foreign-invested enterprises, many from Taiwan and Hong Kong.²¹⁶ Migrant workers from rural provinces make up the bulk of the workforce in Guangdong, particularly in manufacturing and construction sectors.

The findings on employer responses in Section B are based in part on the results of two surveys, one of 417 employers in Guangdong and elsewhere in the Pearl River Delta conducted by private human resource consultants between December 2007 and January 2008 (the "HR Survey"),²¹⁷ and one of 320 workers in Shenzhen conducted by the Shenzhen Dagongzhe Migrant Worker Centre in April 2008 (the "Shenzhen Survey").²¹⁸ The first survey was conducted online and supplemented by phone interviews conducted by the agency with human resource managers of enterprises in Shenzhen and elsewhere in the Pearl River Delta. The

²¹⁵ See generally Brown, *supra* note 163; Malcolm Warner & Ng Sek-Hong, *Collective Contracts in Chinese Enterprises: A New Brand of Collective Bargaining under "Market Socialism"?*, 37 BRIT. J. INDUST. REL. 295 (1999); Zhu, *supra* note 104; Chen, *Legal Mobilization*, *supra*, note 107. See also Anita Chan, *China's Free (Read Bonded) Labour Market*, in GLOBALIZATION AND LABOUR IN THE PACIFIC REGION 260 (2000); GOING IT ALONE, *supra* note 125, at 32-44 (confirming the persistence of these limits).

²¹⁶ 广东省统计年鉴 [GUANGDONG STATISTICAL Y.B.] (2008), tbl.2.10.

²¹⁷ This survey was conducted by Job88.com, a human resource consulting service, and its staff. JOB88 新“劳动合同法”企业应对情况调查报告 [Job88 Survey Report on Enterprise Responses to the New Labor Contract Law], <http://image3.job88.com/08/dcb20080114/index.html> (last visited Dec. 13, 2008) [hereinafter HR Survey].

²¹⁸ 劳动合同法实施下工人的实况调查报告 [Survey Report on the True Condition of Workers under the Implementation of the Labor Contract Law], May 19, 2008 [hereinafter Shenzhen Survey]. The author did not participate in the design or administration of either the HR Survey or the Shenzhen Survey. A copy of the full Shenzhen Survey report, including a list of interviewees, related descriptors and findings, and summary presentations of the raw data is on file with the author.

Shenzhen Survey was conducted by the Dagongzhe Migrant Worker Centre, whose staff approached workers in night markets and other areas in industrial districts in Shenzhen where workers congregate. Informal interviews were conducted by the staff during the survey process, and in-depth interviews of nine of the surveyed workers followed the written investigation. In both surveys, over one-third of the respondents were small and medium-sized enterprises with less than 100 employees, and an additional one-third employed fewer than 1,000 employees. Nearly half of the employers covered in the surveys were manufacturers. Half of the workers in the Shenzhen Survey were employed by domestically owned private enterprises, 26% by Hong Kong-invested enterprises, 14% by Taiwanese-invested enterprises, and 9% by other foreign-invested enterprises. Eighty-one percent had been employed less than five years by their current employer.²¹⁹

A. The Administrative Response: Impact on Public Enforcement

Not surprisingly, the passage of the Labor Contract Law made full implementation of the written contract requirement by all employers a top policy priority of the MOHRSS, a goal framed strictly in terms of contract execution rates.²²⁰ Labor authorities in Guangdong and other major investment hubs followed suit, urging tougher inspections targeting contract execution, payment of wage arrears and full employer participation in statutory insurance programs.²²¹ The Labor Contract Law sparked new initiatives by the ACFTU to promote collective contract negotiations in large state and private domestic enterprises and foreign-invested enterprises.²²² These aggressive targets were matched by new unionization

²¹⁹ Data on the investor's nationality and legal form was not available in the HR Survey.

²²⁰ MOHRSS, 2007 年劳动和社会保障事业发展统计公报 [2007 EMPLOYMENT DEVELOPMENT STATISTICAL REPORT], May 21, 2008, available at http://www.molss.gov.cn/gb/zwxx/2008-06/05/content_240415.htm.

²²¹ See, e.g., Shanghai Labor Bureau, 全国集中开展农民工“签约行动” [Nation Initiates Migrant Worker Contract Execution Campaign], 劳动报 [LABOR DAILY], Mar. 4, 2008, available at www.1233sh.gov.cn/2007sxy/2007news/2007mts/20080304_1046875.shtml (urging implementation of written contracts for employers of migrant workers); 广东省将启动工资倍增计划职工人均工资拟涨 12% [Guangdong Province Will Launch Plan to Double Wages; Average Monthly Wages to Rise 12%], 中国青年报 [CHINA YOUTH], May 7, 2008, available at unn.people.com.cn/GB/14770/21733/7207001.html.

²²² See 郑向鹏 冯力, 深圳劳动局八大举措贯彻《劳动合同法》今年劳动合同签订率将超过 95% [Zheng Xiangpeng, Feng Li, Shenzhen Labor Bureau's Eight Major Measures to Implement Labor Contract Law: Labor Contract Execution Rate Will Exceed 95%], 深圳特区报 [SHENZHEN TODAY], Jan. 21, 2008 available at www.sznews.com/jbjob/content/2008-01/21/content_1799723.htm [hereinafter “Shenzhen Target”].

campaigns targeting migrant workers, private enterprises and Fortune 500 multinationals.²²³

By the end of 2008, labor authorities began to proclaim success. In September, Guangdong provincial labor authorities reported that written contracts had been signed with 97% of all employers and over 53,000 collective contracts, covering 6.6 million workers.²²⁴ National surveys commissioned by the NPC Standing Committee at the end of 2008 announced that 93% of all large employers had signed contracts, in addition to over a million collective contracts covering 143 million workers.²²⁵

Certainly, contract execution rates, even if as high as reported, are only a rough measure of actual compliance, and implementation campaigns alone have not always borne lasting fruit.²²⁶ Still, enforcement authorities in Guangdong, particularly at the provincial level, have been unabashed in sending a tougher enforcement message. Throughout 2008 and 2009, representatives of the NPC as well as top labor officials in Guangdong have repeatedly dismissed employer concerns about cost increases under the new legislation as mere complaints about lost “illegal” cost-savings from flouting labor laws.²²⁷ Soon after the Labor Contract Law took effect, Shenzhen and Guangzhou stepped up inspections by labor authorities.²²⁸ Shenzhen also enacted new regulations on “harmonious labor relations” that impose tough new fines for failure to sign labor contracts and allow labor inspectors to shut down or suspend operations for serious wage arrears. The new rules also set up a program to blacklist serious violators, strip their investment incentives, and deny them access to future

²²³ See Guan Xiaofeng, *Overseas firms must unionize—trade union official*, CHINA DAILY (online), Oct. 8, 2008, http://www.chinadaily.com.cn/china/2008-10/08/content_7085203.htm; Shan Juan, *Unions vow to secure decent jobs*, CHINA DAILY (online), Mar. 12, 2008, http://www.chinadaily.com.cn/bizchina/2008-03/12/content_6529233.htm (last visited Nov. 20, 2009).

²²⁴ 广东省劳动和社会保障厅, 省劳动保障厅召开会议部署贯彻落实《劳动合同法实施条例》 [Guandong Labor and Social Security Bureau, Provincial Labor Bureau Holds Conference: Departments Must Fully Implement “Labor Contract Law Implementation Regulations”] (Sept. 27, 2008), http://www.gd.lss.gov.cn/gd/lss/sy/pnews/t20080927_77947.htm (last visited Oct. 6, 2008) [hereinafter Guangdong Labor Conference].

²²⁵ *We'll Use Labor Law to Save Jobs*, CHINA DAILY (online), Mar. 10, 2009.

²²⁶ According to district labor bureau officials in Guangzhou, high contract execution rates do not include many small, labor-intensive employers. 2009 District B Interview, *supra* note 50.

²²⁷ See, e.g., 邓新建, 广东调研表明《劳动合同法》的实施只是增加了违法企业成本 [Deng Xinjian, *Guangdong Survey Reveals the LCL Has Only Raised Illegal Enterprise Costs*], 法制日报 [LEGAL DAILY], May 4, 2008, available at http://www.legaldaily.com.cn/bm/2008-05/04/content_843698.htm; Huang, *supra* note 225.

²²⁸ 2009 District B Interview, *supra* note 50. 孙妍, 劳动仲裁案件同比增两倍多 [Sun Yan, *Labor Arbitration Cases More than Double*], 深圳新闻网 [SHENZHEN NEWS NETWORK], May 5, 2008, available at http://sznews.com/news/content/2008-05/05/content_2017899.htm (last visited June 5, 2008).

preferential credit and investment perks for 5 years.²²⁹ In a similar tone, Guangdong provincial labor authorities proposed aggressive new fines of up to RMB 500,000 (USD 73,000) in 2008 for employers that fail to timely pay worker salaries.²³⁰

Despite the gap between enforcement rhetoric and local realities in China, these developments cannot be dismissed as mere window-dressing. Historically, such pronouncements were rare, as local governments focused on attracting investment and easing the impact of labor and environmental regulations. However, in the past several years, Shenzhen, Guangzhou, and other investment-saturated areas throughout the Pearl River Delta have begun to adjust their industrial policies to favor high-technology, value-added production over labor-intensive manufacturing in order to maintain a competitive edge over Vietnam, Indonesia and other low-wage destinations.²³¹ The policy shift away from labor-intensive industries has not been tempered by the Employment Promotion Law's mandate to raise employment rates, which could be expected to encourage lax enforcement against large employers.²³² Stricter policies have been bolstered by the impact of a *mingong huang* (民工荒) (labor "famine") on many employers in Guangdong in recent years, which gave migrants and other workers in Guangdong more leverage to demand higher wages and avoid employers that failed to provide safe working environments. Such policies also bring local authorities more in line with central-level mandates to toughen up on violators and prevent social unrest.²³³ For these reasons, labor enforcement officials interviewed in early 2008 were unperturbed by the prospect of labor-intensive manufacturing shifting elsewhere, noting that the government wants to reduce labor mobility and the number of migrants in order to lower crime rates and encourage long-term residence.²³⁴

The collapse of thousands of manufacturing sweatshops since that time has left labor markets in an uncertain state, pushed local govern-

²²⁹ 深圳经济特区和谐劳动关系促进条例 [Shenzhen SEZ Measures on Promoting Harmonious Labor Relations], (promulgated Sept. 25, 2008, effective Nov. 1, 2008) [hereinafter Harmonious Labor Relations Measures].

²³⁰ ChinaCSR.com, *Guangdong to Implement CNY 500,000 Penalty on Back*, June 5, 2008, <http://www.chinacsr.com/en/2008/06/05/2412-guangdong-to-implement-cny500000-penalty-on-back-pay> (last visited Oct. 2, 2008).

²³¹ See Chi-Chu Tschang, *China Rushes Upmarket*, BUS. WK., Sept. 17, 2007, at 38–39.

²³² Officials and lawyers I spoke with in Guangzhou uniformly dismissed the EPL as a policy statement with no practical impact on employer practices or current enforcement policies. 2008 District A Interview, *supra* note 49; 2009 District B Interview, *supra* note 50; Fulian Interview, *supra* note 80.

²³³ See, e.g., *China's Legislature Focuses Supervision on Workers' Safety, Environment*, *supra* note 77.

²³⁴ 2008 District A Interview, *supra* note 49.

ments to focus resources on quelling labor protests and funding workers' unpaid wage claims, and led to calls to suspend implementation of the Labor Contract Law.²³⁵ Nonetheless, Guangdong's provincial leadership continues to stand by its view that the shutdowns will leave room for more high-tech employers as part of a new policy to "empty the cage for new birds" (*teng long huan niao*) (腾笼换鸟).²³⁶ And despite some evidence to the contrary, local authorities continue to assert that the global economic crisis has not weakened their efforts to enforce the new labor laws.²³⁷ Since any crackdown may be perceived as unreasonably harsh in the midst of desperate economic conditions, looser enforcement approaches may well be appropriate. Whether the continued commitment to "upgrade" Guangdong's investment environment will motivate labor authorities to act more forcefully once the dust settles will likely depend heavily on whether its gamble to attract wealthier, and it is hoped, more law-abiding, employers succeeds.

B. Real Compliance? Impact on Employers

For employers who were already following existing labor law, the new legislation imposes few new burdens. Indeed, notwithstanding strong critiques of the early drafts, the U.S. business community in China has generally voiced support for the Labor Contract Law as a welcome step toward leveling the playing field with domestic competitors. But the true targets of the Labor Contract Law are those employers that were previously unwilling to comply under the Labor Law. Historically, labor compliance has been more consistent among U.S. multinational affiliates, other Western-invested enterprises, and large private employers, while violations have been most widespread among small, local private employers and foreign enterprises owned by investors from Hong Kong, Taiwan, and South Korea.²³⁸

²³⁵ See Edward Wong, *Factories Shut, Workers are Suffering*, N.Y. TIMES (online version), Nov. 14, 2008, available at <http://www.nytimes.com/2008/11/14/world/asia/14china.html?hp> (last visited Nov. 18, 2008); Sky Canaves, *World News: Factory Closures Strain China's Labor Law*, WALL ST. J., Jan. 17, 2009, at A6; GOING IT ALONE, *supra* note 125, at 14–16 (citing reports that over 117 incidents occurred in Dongguan alone at the end of 2008).

²³⁶ Bill Meyer, *China Factory Closure a Sign of Deeper Pain*, INT'L BUS. TIMES, Oct. 21, 2008, available at http://www.ibtimes.com.hk/articles/20081021/china-factory-closure_1.htm [hereinafter *Deeper Pain*].

²³⁷ 2009 District B Interview, *supra* note 50 (but admitting that violations are only investigated if a complaint is filed); 2009 Street Office Interview, *supra* note 49. See also Canaves, *supra* note 235.

²³⁸ See Stephen J. Frenkel, *Globalization, Athletic Footwear Commodity Chains and Employment Relations in China*, 22 ORG. STUDIES 531, 541–42 (2001) (surveying literature on labor practices of Guangdong employers). For an empirical study confirming these observations, see Minquan Liu,

All employers had until February 1, 2008 to comply with the written contract requirement. With a gap of six months from the passage of the Labor Contract Law at the end of June, 2007 until its effective date of January 1, 2008, they also had ample opportunity to prepare a compliance (or evasion) strategy. Although reaction to the new legislation varies, the response of many of the employers in this target population suggests significant implementation challenges remain.

1. Exit

Much speculation after the passage of the Labor Contract Law centered on the potential cost impact of the new legislation and whether it would result in an exodus of manufacturing jobs and epidemic business failures among small and medium-sized firms. China has in fact experienced a wave of factory closures and relocations that coincided with the introduction of the new labor legislation and worsened dramatically in the wake of the U.S. financial crisis and global economic downturn.²³⁹ However, making an empirical case that tougher labor regulations are the sole, or even leading cause, of these trends may be difficult.

Clearly, the new laws do impose some costs on all employers and in a way that has had particular bite during the financial crisis. In particular, severance must generally be paid whenever a fixed-term contract expires and is not renewed, making it an inherent added cost of any new hire.²⁴⁰ Other costs may be incurred to bring current contracts, workplace rules, and existing practices into line with the new standards and monitor ongoing compliance, in addition to potentially higher screening costs for new hires who now cannot be terminated as easily. According to some estimates, small businesses have seen cost increases of at least 8% to as high as 20%.²⁴¹ Even before the crisis, 53% of employers in the HR Survey reported some increase in projected labor costs, and for over 40%, the added cost of severance for all non-renewed term contracts was the most significant.²⁴² Major multinationals and other large employers with less

Luodan Xu & Liu Liu, *Wage-Related Labour Standards and FDI in China: Some Survey Findings from Guangdong Province*, 9 PAC. ECON. REV. 225 (2004).

²³⁹ See, e.g., Don Lee, *Some Owners Deserting Factories in China*, L.A. TIMES (online version), Nov. 3, 2008, <http://articles.latimes.com/2008/nov/03/business/fi-factory3> (last visited Nov. 18, 2008). See also *supra* notes 235–236.

²⁴⁰ The sole exception is if the employee refuses to accept a renewal offered on equal or better terms. LCL, *supra* note 3, art. 46(5).

²⁴¹ See, e.g., *No Revision of Employment Law Expected*, CHINA L. & PRAC., Apr. 2009.

²⁴² HR Survey, *supra* note 217.

cost sensitivity and stronger compliance records have reported less concern.²⁴³

However, manufacturers were already struggling in the two to three years leading up the passage of the new labor legislation because of rising wage rates, a stronger yuan, tougher tax policies, stricter enforcement of product standards, and higher production costs, all cutting into razor-thin profit margins.²⁴⁴ Labor costs for some had already nearly doubled in the preceding four years, with annual increases in locally set minimum wage levels now routine in Guangdong and elsewhere.²⁴⁵ Many employers had announced plans to close, relocate to lower-cost destinations elsewhere in China or to Southeast Asia, or consolidate their China operations in 2006 and 2007, before the new legislation took effect.²⁴⁶ This suggests that in early 2008, companies operating in south China were responding to a structural economic shift that for some was speeded by the prospect of higher costs under the new laws.

2. Formal Compliance and Mitigation

A fundamental goal of the Labor Contract Law is to promote stable labor relations and greater job security. Evidence from employer surveys indicates that the new legislation has in fact motivated some adjustment in contracting practices, though not in all cases in directions likely to promote these goals. Findings from the Shenzhen Survey confirm that the Labor Contract Law has indeed prompted employers to execute written contracts.²⁴⁷ Seventy-three percent of employees surveyed had signed written contracts, with noncompliance substantially higher among locally-owned private enterprises and small and medium-sized enterprises.²⁴⁸ This level of formal compliance, though markedly lower than official figures, is nonetheless rather dramatic evidence that the Labor Contract Law has incentivized employer compliance at an initial level.

However, employers' responses represent more an attempt to mitigate the cost impact of the Labor Contract Law than a substantial change from past practice. On the one hand, only around 10% of employers in the HR

²⁴³ Lin Interview, *supra* note 167.

²⁴⁴ See, e.g., *Deeper Pain*, *supra* note 236.

²⁴⁵ See Lee, *supra* note 239.

²⁴⁶ See, e.g., Jonathan Yang, *HK Firms Flee Surging Operating Costs in Pearl River Delta*, S. CHINA MORNING POST, Mar. 14, 2008, at 3; *Where is Everybody?* ECONOMIST, Mar. 15, 2008, at 91; 2008 District A Interview, *supra* note 49 (reporting half of registered employers in the district had relocated to lower-wage areas of Guangdong prior to the passage of the new laws).

²⁴⁷ The following results are reported in Shenzhen Survey, *supra* note 218.

²⁴⁸ Employers of fewer than 1,000 workers had a 36% noncompliance rate, in contrast to 6% of large employers; local employers had a 42% noncompliance rate as compared to less than 14% for foreign-invested enterprises. *Id.*

Survey planned to cut staff because of the Labor Contract Law's passage, and 20% expected to terminate contracts less frequently because of the higher severance costs imposed by the Labor Contract Law. However, nearly 30% planned to increase use of labor services and seconded workers.²⁴⁹ The Shenzhen Survey found similar evidence of greater reliance on external or temporary hires, as well as continued use of extended probation periods prohibited by the Labor Contract Law (although 80% of employers in the HR Survey reported standard probationary terms in line with the Labor Contract Law).²⁵⁰ These practices give employers added flexibility and lower costs, since temporary and probationary hires can be paid less than permanent workers and can in some cases be terminated more easily.²⁵¹ They have also become more widespread in the wake of the financial crisis.²⁵²

These surveys confirm media reports that employers are hesitant to enter into long-term or open-ended contracts, which require higher severance payments and give employees added protections against early termination. Thirty percent of employers responding to the HR Survey planned to use term contracts of one year or less in 2008, with an additional 50% planning to use two to three year contracts.²⁵³ Similarly, 60% of employees in the Shenzhen Survey had contracts of one year or less, with 33% under two or three-year contracts. Less than 7% of these employees had open-ended contracts, and fewer than 30% of employers in the HR Survey planned to introduce them, in part because of confusion over the obligations they impose.²⁵⁴ These results are particularly interesting because employers in the HR Survey are presumably better equipped to comply with the law, given their dedicated human resource staff and contact with human resource consultants, yet both surveys report fairly similar trends.

²⁴⁹ HR Survey, *supra* note 217.

²⁵⁰ *Id.* See also Shenzhen Survey, *supra* note 218. Under the Labor Contract Law, a worker can only serve one probationary period, which is based on the length of the contract and is capped at six months. LCL, *supra* note 3, art. 19.

²⁵¹ For example, probationary employees can be terminated at any time if "there is evidence proving" unsatisfactory performance or other cause. LCL, *supra* note 3, arts. 21, 39; *cf.* Labor Law, *supra* note 3, arts. 25, 28. Part-time workers are "at will" under the Labor Contract Law. LCL, *supra* note 3, art. 71.

²⁵² See *No Revision of Employment Law Expected*, *supra* note 241.

²⁵³ HR Survey, *supra* note 217.

²⁵⁴ *Id.* (reporting that some employers view open-ended contracts as an "iron rice bowl," while others believe (mistakenly) that open-ended contracts will lock in workers and prevent turnover). Shenzhen Survey, *supra* note 218.

3. Evasion

Ample evidence of employer resistance to the new labor laws appeared early. Within a few months of the passage of the Labor Contract Law in 2007, reports of employer tactics to avoid the more burdensome effects of the law, from mass dismissals to signing “labor services” (i.e. independent contractor) agreements rather than employment contracts, proliferated in the domestic and international media. Huawei, a Chinese global telecommunications giant, attracted the media spotlight and an investigation by forcing “voluntary” resignations of 7,000 workers in December 2007, with the intent to rehire in January and reset the employees’ tenure clock (清零) (*qingling*).²⁵⁵ Because employers have fewer obligations toward part-time and seconded workers under the Labor Contract Law, some attempted to avoid hiring full-time workers by implementing two half-time shifts or contracting through two separate legal entities simultaneously.²⁵⁶ Still others created “new” companies to hire the same employees on new terms.²⁵⁷ The speed and ingenuity of these efforts are proof of the substantial challenges confronting implementation of the Labor Contract Law.

Despite clear evidence of formal compliance with the written contract requirement, interviews conducted in connection with the Shenzhen Survey and with labor lawyers provide further indication of the continuation of many common abusive workplace practices and many employers’ utter disregard for the spirit and substance of the labor contract rules.²⁵⁸ Most prominent are employers forcing employees to sign written contracts without full disclosure of the contract terms or under terms that prevent employees from relying on the contract to protect their legal rights. For example, one employee at a Taiwanese-invested plastics factory reported,

When we were signing contracts, the [employer] covered up the content of the contract and just asked us to sign. The workers all

²⁵⁵ Denise Tsang, *HK Employers Warned to Brake Sackings*, S. CHINA MORNING POST, Dec. 18, 2007.

²⁵⁶ See NetEase, 应对新劳动法: 企业损招不断 [*Reactions to The New Labor Law*], available at <http://gd.news.163.com/special/0036sp/laodongfa20071218.html> (last visited Jan. 19, 2009). See also HR Survey, *supra* note 217 (reporting that a small minority (3%) planned to contract through two separate legal entities consecutively).

²⁵⁷ *Reactions to the New Labor Law*, *supra* note 257.

²⁵⁸ Except where noted, the findings that follow are from the Shenzhen Survey, *supra* note 218. The survey also uncovered other abusive practices that are beyond the scope of this article, such as failure to pay severance, violations of overtime and wage rules, hiring workers on “temporary” status for permanent positions, increased room and board charges and wage deductions for workplace infractions that reduce employees’ real wages, and citing temporary workers for violations of workplace rules to justify not offering them permanent positions. *Id.*

thought this was unreasonable, so everyone started refusing to sign. A week later, the boss said whoever didn't sign would be docked a month's pay Everyone signed.

Other employers have threatened termination to employees who refuse to sign English labor contracts or contracts stipulating lower wages than those currently earned by the employees.²⁵⁹

Six percent of employees in the Shenzhen Survey were forced to sign completely blank form contracts, while another 13% signed contracts missing key terms, such as the employer's name or the place of employment. 63% reported that the contract terms did not accurately reflect the employer's name and address, the worker's position, or other terms of employment. For example, employees at a Hong Kong-invested electronics factory covered by the Shenzhen Survey were required to sign two contracts, each stipulating a wage of RMB 750 and together totaling their original RMB 1,500 monthly wage. This allowed the employer to rely only on one contract (and half the wages) to calculate overtime and social insurance payments. Another employer put workers on leave and threatened to terminate them without compensation if they refused to sign a contract stamped with the corporate seal of two different companies.

Almost all of these evasive and coercive practices are directly foreclosed in some way by the Labor Contract Law and are grounds for damages or invalidation of the contract itself.²⁶⁰ Others, like Huawei's attempt to reset workers' tenure clocks, are prohibited in new local regulations.²⁶¹ However, these kinds of violations can ultimately only be challenged if workers file and prove their claims in arbitration. Although labor inspectors should and can easily determine if an employer has executed written contracts with employees or not, they do not have the capacity to review contract content and will not step into the contract formation process unless a complaint is filed. They do not generally intervene even if the local form contracts are not consistent with the law.²⁶²

However, defects in the content or formalization of the contract may themselves make legal challenge even more difficult or allow an employer to evade responsibility altogether. For example, if a worker challenged

²⁵⁹ Fulian Interview, *supra* note 80. Tellingly, the Harmonious Labor Relations Measures specify Chinese contracts. Harmonious Labor Relations Measures, *supra* note 229, art. 61.

²⁶⁰ See, e.g., LCL, *supra* note 3, art. 26 (grounds for invalidating a contract); arts. 80–81 (providing for damages if contracts do not contain statutory terms); arts. 59, 66 (limiting labor services agency hires to temporary positions only).

²⁶¹ Although the LCL Implementing Regulations are silent on the issue, regulations in Shenzhen clarify that workers retain previously accrued tenure if they are rehired within six months. See Harmonious Labor Relations Measures, *supra* note 229, art. 24.

²⁶² 2008 District A Interview, *supra* note 49.

a contract that provided for the “wrong” wage amount, the worker would have to show that the contract was coerced. The employer could argue that the parties negotiated lower compensation in exchange for the added security of a written agreement. If instead the employee refused to sign the contract and was terminated as a result, the Labor Contract Law implementing regulations would allow the employer to justify the termination because of the employee’s refusal to sign, and to avoid this result, the employee would again have to argue coercion.²⁶³ Although some local courts have demonstrated a willingness to sanction employers who engage in such practices,²⁶⁴ these cases raise difficult evidentiary issues and will generally be harder to resolve.

More critically, the “four corners” of the labor contract are now determinative in the event of a dispute under the Labor Contract Law. Because all contract modifications must now be in writing, employees cannot rely on separate commitments to “repair” deficiencies in the written agreement once a legal dispute arises.²⁶⁵ This problem is compounded by survey findings showing that many employees still are not provided with a copy of their contract, as required by the Labor Contract Law.²⁶⁶ Under these circumstances, identifying and challenging illegal contract terms or other workplace practices becomes even more difficult.

C. The Mobilization Response: Impact on Private Enforcement

Since it was first introduced in 1994, China’s Labor Law has sparked an upsurge of labor disputes, mobilizing petitioners and protesters alike, and studies of labor contention have observed a steady rise in popular rights consciousness in the intervening years.²⁶⁷ Given the broad dissemination of the Labor Contract Law and the Labor Arbitration Law in particular, it is perhaps then no surprise that the new legislation sparked stronger grassroots demands by workers for employers to comply with the law almost immediately in 2008. This response is particularly noteworthy since the Labor Contract Law does not apply to contracts entered into be-

²⁶³ See LCL Implementing Regulations, *supra* note 152, art. 5. This rule provides needed protection to employers who attempt to sign contracts with their employees and are refused, but contains no exceptions to protect employees who reasonably reject a contract from termination.

²⁶⁴ See, e.g., 贺军林/佛山南海中南机械有限公司 [He Jun Lin v. Foshan Nanhai Zhongnan Machinery Co., Ltd.], 广东佛山市中级人民法院 [Foshan Intern. People’s Ct.], Case No. 1163, Nov. 18, 2008, available at www.chinalawinfo.com (subscription only) (awarding double severance for illegal termination where the employer refused to negotiate contract terms and then fired the worker for refusing to acquiesce).

²⁶⁵ See LCL, *supra* note 3, art. 26.

²⁶⁶ Shenzhen Survey, *supra* note 218 (reporting that nearly one quarter of employees surveyed had not received a copy of their contract).

²⁶⁷ See, e.g., Yongshun Cai, *Social Conflict and Modes of Action in China*, 59 CHINA J. 89 (2008).

fore January 2008 and the Labor Arbitration Law did not take effect until May.

Still, by early 2008, Shenzhen had already reported a more than 100% increase in letters and visits and a 232% surge in the number of labor arbitration cases filed.²⁶⁸ Labor arbitrators in Guangdong also saw a 300% increase in case filings for May and June 2008 once arbitration fees were eliminated on May 1, and local trial courts saw their caseloads doubled in 2008 as well.²⁶⁹ Outside Guangdong, Beijing and Shanghai area LDACs witnessed similar trends, pushing national labor arbitration caseloads for 2008 to double their 2007 level.²⁷⁰

The type of claims filed provide clear evidence of the legislation's impact, with more claims being filed for double wages because of failure to sign written contracts, or for double severance because of wrongful termination—both newly authorized by the Labor Contract Law.²⁷¹

However, the state's effort to channel labor conflict through formal legal process appears to have also exacerbated contentious labor relations and imposed costs on employers and on local institutions that may in some cases exceed the ultimate economic benefits realized by workers. For example, in one recent occupational injury case before an intermediate court in Guangdong, the worker tacked on a claim for double wages (which was ultimately rejected by the court) alleging his employer failed to sign a contract with him, even though the worker had already filed for arbitration to terminate the labor relationship before the legal deadline for

²⁶⁸ 孙妍 [Sun Yan], *supra* note 228.

²⁶⁹ 中国劳动仲裁网, 广东劳动争议案占全国 1/4 “免费仲裁”遭遇人才荒 [China Labor Arbitration Network, *Guangdong's Labor Disputes at 1/4 of the National Total, "Free Arbitration" Creates a Personnel Crisis*] (2008), available at www.chinalabor.cc/Article/12933.html (last visited June 5, 2008), [hereinafter *Personnel Crisis*]; Zhan Lisheng, *Labor Arbitration Cases Soaring in Guangzhou*, CHINA DAILY, Dec. 11, 2008, available at http://www.chinadaily.com.cn/china/2008-12/11/content_7292345.htm#; 珠三角劳动争议成倍激增, 企业败诉比率奇高 [Pearl River Delta Labor Disputes Rise Sharply], CHINA NEWS NETWORK, June 3, 2008 (reporting court caseloads).

²⁷⁰ Shanghai Labor Bureau, 浦东在全市率先做实兼职仲裁员制度 [Pudong Implements Part-time Arbitrator System], May 7, 2008, available at www.12333sh.gov.cn/2007sxy/2007news/2007zxd/200805/t20080507_1049278.shtml [hereinafter *Pudong Arbitration*] (reporting over 150% increases in arbitration caseloads during the first quarter of 2008); 刘宏, 劳动争议调解仲裁法运行调查: 案多人少矛盾靠什么化解 [Liu Hong, *Labor Arbitration Law Implementation Survey: Case Surplus, Personnel Shortage*], 人民网 [PEOPLE'S DAILY], available at <http://acftu.people.com.cn/GB/67579/7333023.html> (last visited June 5, 2008) (reporting on caseloads in Beijing). See ZGTJNJ, *supra* note 60, at tbl. 22-5.

²⁷¹ See *Pudong Arbitration*, *supra* note 270. See, e.g., 贺军林/佛山南海中南机械有限公司 [He Junlin v. Foshan Nanhai Zhongnan Machinery], *supra* note 264.

such a contract to be signed.²⁷² The elimination of labor arbitration fees and the prospect of quicker resolution through summary arbitration has also opened the door to a flood of “micro” claims, some as low as RMB 60 (less than USD 10),²⁷³ and encouraged workers to sue immediately before even attempting a negotiation with their employer.²⁷⁴ Labor lawyers report that some clients are also demanding higher, and even inflated, claims now that fees tied to claim size are eliminated.²⁷⁵

More critically, labor arbitration institutions and courts are simply ill-equipped to handle the flood of labor cases. Labor arbitrators in Guangdong account for only seven percent of China's total LDAC full-time personnel and have historically handled one-fourth of all labor disputes in China.²⁷⁶ What makes the situation worse is that claims under the new legislation are likely to be particularly fact-intensive and difficult to adjudicate. With the flood of cases, LDACs have been completely unable to meet the firm sixty-day deadline, pushing cases onto local courts. In 2008, courts in Guangdong and other coastal regions experienced a nearly 300% increase in cases, bringing the national total to 286,221 and leading to calls for separate labor courts.²⁷⁷ As the economic crisis has deepened, caseloads in the first quarter of 2009 already show a 60% increase over those levels. These trends give courts, already actively engaged in mediating labor conflict, an even greater institutional role. It also raises new questions about the relationship between labor arbitration and the courts that will become more important as litigants test the range of options now available to them.

The problem of limited administrative resources at the local level does not admit of an easy solution. Labor officials are responding by emphasizing mediation and early case settlement, hiring more personnel, relying more heavily on part-time arbitrators and establishing more sub-local organizations to diffuse labor conflict.²⁷⁸ However, since all costs of funding labor arbitration and enforcing the labor law fall squarely on the

²⁷² 罗若富/广东省六建集团有限公司 [Luo Ruofu v. No. 6 Construction Co., Ltd.], 广东佛山市中级人民法院 [Foshan Interim. People's Ct.], Case No. 738, July 4, 2008, available at www.chinalawinfo.com (subscription only).

²⁷³ 2009 District B Interview, *supra* note 50. See also *id.*

²⁷⁴ *Cases Soar as Workers Seek Redress*, CHINA DAILY, Apr. 22, 2009.

²⁷⁵ Fulian Interview, *supra* note 80.

²⁷⁶ See Personnel Crisis, *supra* note 269.

²⁷⁷ *Cases Soar as Workers Seek Redress*, *supra* note 274; *Chinese Lawmakers Call for More Special Courts for Labor Contract Disputes*, XINHUA, Sept. 5, 2009.

²⁷⁸ Interview with former district labor arbitrator, Guangzhou, May 22, 2008. See also Pudong Arbitration, *supra* note 270 (reporting higher use of part-time arbitrators). As of September, 2008, Guangdong had established over 7,000 organizations at the local (district, township, village) and sub-local (street, village, district, and industry) levels to mediate labor disputes. Guangdong Labor Conference, *supra* note 224.

shoulders of local governments, funding and training gaps present at least a short-term challenge.²⁷⁹ These limits may increase pressure on grassroots personnel to suppress labor conflict rather than confront illegal workplace practices.

To be sure, LDAC and court figures reveal only a small part of the mobilization picture. For example, by mid-2008, labor inspectors were already receiving complaints demanding written contracts and double wages as compensation from workers empowered by the new laws.²⁸⁰ Moreover, labor conflict and social protest in China have historically been mobilized, justified, and framed in terms of law.²⁸¹ Recent labor protests appear to have been fueled less by demands for new law-based rights and more by “subsistence demands” on local officials to fill the gap left by employers who have shut their doors.²⁸² If history is any guide, these are further signs that law will likely have greater force beyond formal process than within it.

D. Lessons and Implications

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

The evidence reported here also indicates that some of the primary goals of the new legislation—expanding the labor contract system and removing barriers to labor arbitration and litigation—are beginning to be realized. With regard to the first, employers exhibited a new-found enthusiasm in 2008 for executing written contracts, even illegally. This suggests that the incentives created by the Labor Contract Law—the threat of claims for double wages and implied open-ended contracts—are having an impact.²⁸³ It also indicates that the grassroots mobilization of workers

²⁷⁹ 2009 District B Interview, *supra* note 50. Interview with former district labor arbitrator, in Guangzhou, P.R.C., May 22, 2008 (reporting that part-time arbitrators were paid from arbitration fees prior to the Labor Arbitration Law).

²⁸⁰ 2008 District A Interview, *supra* note 49.

²⁸¹ See, e.g., LEE, *supra* note 33; KEVIN J. O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* (2006).

²⁸² See Wong, *supra* note 235; Su & He, *supra* note 48.

²⁸³ The true cost of noncompliance depends on the perceived effectiveness of labor litigation, not public enforcement. Although workers can report violations or engage in protests to get leverage

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

Yet whether private enforcement will have the expected deterrent impact on employers who historically have flouted the labor laws remains an open question. Without fundamental changes to prevent employer capture of local authorities, strengthen the independence of local LDACs and courts, eliminate corruption, and enforce arbitral awards and judgments, a rise in labor litigation will have only a limited deterrent effect.²⁸⁴

Moreover, the new labor legislation may ultimately prove to be too much too soon. In the past, mobilizing workers to claim legal rights without resolution of fundamental institutional and practical constraints has led to disillusionment with law and driven workers to the streets.²⁸⁵ Now, with LDACs and the courts hard-pressed to respond to the high expectations generated by the new labor laws, law reform has arguably fueled new heights of social unrest that may well undermine the institutional legitimacy of LDACs and local courts.²⁸⁶ In time, this pressure may provide the political motivation for local officials to implement the new laws more effectively before conflict erupts. To date, however, official responses have been directed at crisis management rather than prevention.

Indeed, other indications that the underlying objectives of the new legislation—protecting worker rights and promoting “harmonious and stable” labor relations—may prove difficult to attain were evident even in early 2008. A significant shift toward longer-term contractual relationships has not yet occurred. In many cases, compliance with the letter but not the spirit of the written contract obligation has confounded the Labor Contract Law’s goal of making explicit the rights and interests of the con-

against employers, inspectors will refer legal claims to the LDAC and assess no penalty if a contract is signed. Thus, the risk of labor bureau enforcement under the new law is the same even though some areas are imposing tougher fines on resistant employers. 2009 District B Interview, *supra* note 50.

²⁸⁴ Tellingly, when asked whether his company was concerned about the prospect of more employee litigation under the new laws, one lawyer for a Taiwanese-owned employer in Dongguan responded, “No. . . . We can just bribe [arbitrators or judges].” Interview, Bloomington, Indiana, Nov. 19, 2008. Other employers share these views. See *GOING IT ALONE*, *supra* note 125, at 27.

²⁸⁵ See Gallagher, *supra* note 99; LEE, *supra* note 33.

²⁸⁶ Local governments in south China are already well aware of these risks. See generally Su & He, *supra* note 48.

tracting parties.²⁸⁷ The exit of employers unable or unwilling to shoulder higher compliance costs is unlikely to advance these goals, since it simply shifts the burden of noncompliance to other regions or countries.

IV. RECOMMENDATIONS AND CONCLUSION

Peter Schuck has observed that “law’s greatest limitation is its inability to effectively shape behavior driven by diverse and dynamic social conditions. . . . Its efforts to regulate markets are notoriously reactive . . . law is always several steps behind markets, desperately trying to catch up and never quite succeeding.” Law, he writes, has proven particularly weak in the face of “strongly motivated and strategically fluid behaviors.”²⁸⁸ Although Schuck’s critique was directed at the role of law in the United States (he cites evasive tax planning as his case in point), it resonates with equal strength in China and no less in the area of labor law.

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

However, the findings here point equally to the inability of law to predict and foreclose new patterns of noncompliance or to produce broader changes in employment practices in the near term. Indeed, the reality of written contract implementation among Shenzhen employers shows that law has achieved compliance in form, but not in substance. Tighter regulations have also had unintended consequences that could limit workers’ ability to assert legal rights.

As Alford and Shen observed nearly a decade ago with regard to China’s environmental laws, it is therefore critical that an “environment of legality” be created at the local level in order for new regulatory measures to operate effectively.²⁸⁹ Without it, China’s new labor legislation will have raised the compliance bar (and compliance costs) for law-abiding employers, but failed to rectify substandard practices among the firms most directly targeted by the new laws. Truly “leveling the playing field” for all employers will require the combined initiative of local govern-

²⁸⁷ See LCL, *supra* note 3, art. 1.

²⁸⁸ PETER SCHUCK, THE LIMITS OF LAW 428–29 (2000).

²⁸⁹ William Alford & Yuanyuan Shen, *Limits of Law in Addressing China’s Environmental Dilemma*, 16 STAN. ENVTL. L. J. 125, 148 (1997).

ments, workers, and civil society at the grassroots level, and fundamental change in labor relations and workplace practices will depend upon a revitalization of China's trade unions as true representatives and advocates of worker interests.

A. The Need for Strong Public Enforcement

While further regulatory reforms of private enforcement may spur some degree of change in corporate practices, the legislation reviewed in this article already represents significant progress in this direction. Despite persistent challenges, labor arbitration and litigation proceedings offer real remedies for many workers facing violations of legal rights, and the Labor Arbitration Law now resolves major procedural deficiencies of prior law. Future regulatory initiatives might better address enforcement problems by requiring defendants to post a bond for all or a portion of the claim while an arbitral award or judgment is pending. Other options to strengthen private enforcement, such as allowing labor arbitrators to shift attorney fees to defendants as damages and providing financial support to workers while they pursue their claims, are already emerging in new local regulations.²⁹⁰

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

One thoughtful objection to a renewed deterrence approach is that aggressive, top-down enforcement can in fact be counter-productive. Research has shown that get-tough strategies can backfire both where firms are well-intentioned, and where they are ambivalent about the legitimacy

²⁹⁰ See Harmonious Labor Relations Measures, *supra* note 229, art. 58 (allowing arbitrators or judges to shift attorney fees of up to RMB 5,000 to losing defendants) and art. 56 (authorizing workers in financial straits to apply for government aid to enable them to pursue labor litigation). China has a general no-fee-shifting rule on attorney fees, although court costs are borne either by the losing party or jointly. See Measures on Case Handling Fees, *supra* note 97, art. 29.

and reasonableness of regulations.²⁹¹ With strong market incentives to voluntarily comply with Chinese labor law, most large Western multinationals fall into the first category, while many firms competing on cost at the bottom of the global supply chain fall in the other. Tough measures can promote evasion and distrust toward regulators, and ultimately, lead to lower compliance and higher enforcement costs. These are obvious dangers in light of the precarious financial situation of many employers. However, concerns about overly aggressive enforcement do not appear to be justified in light of current regulatory practice and the procedural protections available to employers under Chinese law. Without strong, consistent regulatory enforcement, compliant firms will continue to operate at a competitive disadvantage while violators go unchecked.

Furthermore, regulatory agencies are better positioned to address the root causes of labor disputes and socially destabilizing labor unrest than employees, particularly in view of the limits (or lack) of union representation for many. Litigation is a blunt tool that disaggregates conflict, increasing the administrative burden of arbitrators, courts, and employers. It is also less effective in dealing with the kinds of systemic labor violations common among south China's manufacturers, since it offers remedies only to litigants. In contrast, administrative officials can order a prospective change in underlying practices that affect an entire workforce. Tough administrative penalties send a message that reinforces private enforcement by affirming worker rights. A stronger regulatory environment can also enhance the effectiveness of codes of conduct and other voluntary corporate social responsibility initiatives.²⁹² For all these reasons, it offers the best hope of putting all employers in China on a level playing field with regard to labor practices.

Studies showing the success of multi-faceted and pragmatic enforcement strategies in dealing with wage arrears and pension defaults in Guangdong and elsewhere in China indicate that financial constraints and limited institutional capacity are not primary impediments to enforcement if local authorities have the political will to take action.²⁹³ Indeed, as discussed in Part III, the new legislation has already catalyzed tougher policy responses by provincial and local governments that may in time alter the status quo for employers in some areas of the Pearl River Delta. Greater cooperation in auditing and information sharing among local enforcement

²⁹¹ Malloy, *supra* note 13, at 522, 523. See also BARDACH & KAGAN, *supra* note 11, at 102–19; Kagan & Scholz, *supra* note 12, at 74–77.

²⁹² See Richard Locke et al., *Does Monitoring Improve Labor Standards? Lessons from Nike*, 61 INDUS. & LAB. REL. REV. 3 (2007) (finding that effective national laws correlated with improved compliance with codes of conduct).

²⁹³ On wage reforms, see Cooney, *supra* note 69. On pensions, see Frazier, *supra* note 74, at 108–30.

agencies, such as the labor bureau, workplace safety inspectorates, and authorities responsible for issuing business registrations offer a further solution to these challenges.²⁹⁴ Local officials might also better partner with private auditors, consultants, corporate monitors, and labor advocacy NGOs to build on existing monitoring, education and advocacy initiatives. Allowing greater space for independent civil society organizations to operate could promote true partnership in furtherance of these common goals.

B. The Need for Integrated Cooperative Strategies

Even if stronger deterrent strategies are introduced, existing cooperative administrative enforcement approaches that are flexible and focused on education and compliance provide an important complement. Publication of enforcement actions is one technique already being used by local authorities which can deter violators as well as serve an educational function. Regulatory strategies to reduce the compliance burden for small employers and provide additional incentives for self-regulation are also needed, since the costs of compliance and the lack of effective internal compliance mechanisms can impair the capacity of even well-intentioned firms to follow the law.²⁹⁵ Although the APL already mandates penalty waivers if an employer remedies a violation, small and medium-sized employers may benefit from explicit rules providing clear grace periods and penalty reductions for compliance.

Such programs could easily build on existing compliance initiatives. For example, Guangdong's current merit program, described in Part I, currently rewards firms largely based on compliance outcomes (i.e. implements annual wage increases, has no major labor crisis, etc.). This program could be expanded to include a voluntary compliance certification program under which participating firms would adopt compliance plans, internal management systems, and audit procedures meeting agency criteria. Participants would receive preferential regulatory treatment,

²⁹⁴ Labor supervision is explicitly a matter for agency coordination and mutual reporting under the Labor Law and the LCL, and labor inspections and health and safety audits will necessarily target the same employers. See LCL, *supra* note 3, art. 76; Labor Law, *supra* note 3, art. 87. However, labor inspectors interviewed in this study engaged in only limited joint enforcement efforts and some reported having no direct contact with other agencies. 2008 District A Interview, *supra* note 49; 2009 District B Interview, *supra* note 50; interview with labor inspector in Jilin, Guangxi, (Jan. 10, 2009).

²⁹⁵ See Malloy, *supra* note 13 (describing managerial or "systems-based" obstacles that can defeat internal compliance routines in complex firms as well); CHRISTOPHER STONE, WHERE THE LAW ENDS 233-36 (1975) (discussing organizational causes of firm violations).

such as tax incentives, reduced filing obligations, preferred designations in public procurement bids, and/or protection from criminal liability.

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

C. The Importance of Unions

Clearly, multiple, mutually reinforcing implementation strategies are needed if a broader culture of compliance is to prevail in south China's manufacturing centers. However, ensuring effective worker representation is foundational to the success of these efforts. The evidence of illegal contracting practices presented in Part III highlights most clearly the importance of true collective bargaining and advocacy before a new (or renewed) employment relationship formally begins. Although labor bureau authorities can be asked to intervene, only strong worker representation during the contracting process can keep the contract from being wielded as a shield (or sword) of management in a labor arbitration or court proceeding.

Indeed, the flood of labor disputes unleashed by the Labor Arbitration Law makes effective unions or other worker representatives more critical for workers negotiating or pursuing claims, but they also create a need for factory-level processes that can help compliance-minded employers to effectively respond to workforce tensions before disputes arise. Although new patterns of Chinese trade unionism are still evolving, the history of organized labor in Korea, Japan, and Taiwan shows that independent and active unions need not raise the specter of adversarial labor relations, and indeed may result in greater worker commitment to the well-being of

their firm.²⁹⁶ The establishment of unions or other internal mechanisms that give employees voice at the workplace can also encourage an engaged workforce, which has been shown to enhance productivity as well as legal compliance.²⁹⁷

While recent campaigns have expanded the rolls of union members, it is not clear that China's unions will seize the opportunity afforded by the new legislation to play a stronger advocacy role. Recent guidelines issued by the ACFTU in August, 2008 attempt to introduce a separation between management and senior union leadership that, if followed, represent a significant step in equipping China's unions to serve as a better advocate for worker interests.²⁹⁸ Some studies find signs of an identity evolution among some Chinese unions and strong local support among top leaders in Guangdong and elsewhere for true collective bargaining.²⁹⁹ Reports on the experience of Wal-Mart's unions in China provides further evidence of the high expectations of workers and their willingness to "take ownership" of new union structures to overcome employer "capture" of local officials (even local union branches).³⁰⁰ Given the historical role of China's unions, these developments are significant. However, the state is unlikely to loosen limits on collective labor litigation, permit independent union organizing, or disengage the official union from Party leadership, casting doubt on the long-term impact of these changes.

D. Conclusion: The Derivative Power of Law

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

²⁹⁶ THE PROCESS OF INDUSTRIALIZATION AND THE ROLE OF LABOUR LAW IN ASIAN COUNTRIES 6–7 (R. Blanpain ed., 1996) (characterizing union-management relations in these countries as decentralized and cooperative).

²⁹⁷ See Locke et al., *supra* note 292; Frenkel, *supra* note 238.

²⁹⁸ Measures for the Election of the Trade Union Chairman of an Enterprise (for Trial Implementation) (promulgated by the ACFTU, Jul. 25, 2008, effective Jul. 25, 2008), *translated in* CHINALAWINFO.

²⁹⁹ See China Labour Unrest, *supra* note 124; Stephen Chen, *Union Set to Set up Defence of Labour Rights*, S. CHINA MORNING POST, Oct. 20, 2008.

³⁰⁰ See China Labor News Translations, *The Emergence of Real Trade Unionism in Wal-Mart Stores*, (May 4, 2008), <http://www.clntranslations.org/article/30/draft> (last visited Jan. 6, 2009).

of workers and manufacturers from south China, is as yet unknown. The findings and recommendations presented here are therefore necessarily preliminary.

Further research is needed to examine implementation of the new legislation in the state sector and in regions beyond Guangdong, to identify how trends in collective bargaining and trade unionism are shaping workplace practices, and to assess empirically the relative force of private and public enforcement mechanisms and market conditions in shaping employer compliance. Further study on the application and interpretation of the laws by labor arbitrators and the courts is also needed as case experience develops. These findings might shed light on a number of questions that emerge in the regulatory literature reviewed earlier, such as the nature of the interactions between public and private enforcement strategies, the challenges of calibrating “reasonable” regulatory approaches, and whether understandings of corporate compliance motivations identified in the Western context hold with equal force where compliance norms have been only unevenly internalized by local business interests.

Deeper understandings of China’s implementation dilemmas might also inform the thinking of our own policymakers, labor advocates and business leaders as we confront, surprisingly perhaps, many of the same challenges—transient employment relationships defined by individual and often informal employment contracts, enforcement that depends on atomized dispute resolution, and limits on the force and relevance of regulatory tools and collective representation. Recognition of this common ground might stimulate constructive dialogue on both sides of the Pacific around ways to overcome compliance obstacles and foster both sustainable employment practices and sustainable business models, approaches that might better address the root causes of workplace conflict.

For the present, though, one central lesson can already be drawn from the early implementation of China’s labor law reforms—that law’s power to shape corporate practice and influence local policy is in fact derivative, drawing force primarily through the initiative of employee litigants. Thus, the true strength of the new laws lies in their capacity to affirm, shape, and mobilize the demands and expectations of China’s workers. Grassroots labor activism, expressed through formal legal processes and beyond, can in turn bring pressure to bear on employers and on the local state as well. (Indeed, workers’ willingness to lay claim to labor rights in the face of local authorities’ ambivalence and employers’ resistance arguably motivated many of the current labor law reforms themselves.). Public enforcement strategies may be better suited to promoting a “culture of compliance,” and private and public enforcement mechanisms will be most effective when they complement and reinforce each other. But with

stronger support from local authorities, growing demands for true workplace representation, and expanded avenues to challenge noncompliance, this experience urges that the future of labor relations and business culture in “the factory of the world” are now even more likely to be transformed from the bottom up.

