

# LABOR AND EMPLOYMENT IN THE PEOPLE'S REPUBLIC OF CHINA: FROM A NONMARKET-DRIVEN TO A MARKET-DRIVEN ECONOMY

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## INTRODUCTION

From 1949 to the present, the People's Republic of China (China) has promulgated numerous labor-related statutes, regulations, and decrees to meet changes engendered by shifting economic and social policies.<sup>1</sup> This article attempts to provide a legislative analysis of labor and employment in China, illustrating the labor-management problems China has experienced and the corresponding policies and measures designed to resolve them. In doing so, this article will concretely depict the economic, social, and political environments in which Chinese laborers have lived and to which law as an institution has contributed.

To accomplish its objective, this article is divided into two main parts: labor measures in a nonmarket-driven economy and labor legislation in a market-driven economy. The year of 1979 is chosen as the watershed because around that time China began to launch its economic reforms.<sup>2</sup> Specifically, the discussion on labor reforms before 1979 is designed to provide background information for the current labor and employment issues in China. A larger portion of this article, however, concentrates on labor legislation since 1979, because many important labor-related statutes and regulations were passed after China had formally embarked on reforming its economy. In addition, the statutes and regulations selected here are discussed in chronological order, detailing the evolving trend of labor legislation in China. To facilitate reading, the subsequent discussion will also focus on such areas as recruitment and hiring, remuneration and benefits, discipline, termination, unemployment insurance, occupational safety and health, unionization and worker participation, and dispute resolution. Except for Special Economic Zones, this article confines its

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1. As of November 1991, China had promulgated 1,682 laws, regulations, and rules in 29 categories, while 28 provinces, autonomous regions, and municipalities directly under the central government had their own local laws and regulations for labor protection. *State Council White Paper on Human Rights* [hereinafter *White Paper*], BBC Summary of World Broadcasts, Pt. 3: The Far East, Nov. 8, 1991, available in LEXIS, World Library, ALLWLD File. The statistical data provided here are designed to assist the reader in understanding the magnitude of China's labor and employment legislation.

2. See generally THE POLITICAL ECONOMY OF REFORM IN POST-MAO CHINA [hereinafter POLITICAL ECONOMY] (Elizabeth J. Perry & Christine P. Wong eds., 1985).

scope to national laws because the discussion of autonomous regional, provincial, or municipal regulations will be beyond manageability.

Last of all, as in many other fields, theory and practice may not necessarily converge. This phenomenon may be more so in China, partly because law began to regain legitimacy only in the last decade, and partly because the country is in a transition resulting from the implementation of various reforms. In order to better understand labor relations and employment issues in China, especially those before the passage of the Labor Law of the People's Republic of China (Labor Law),<sup>3</sup> the reader should heed such recurrent themes as theory versus practice, foreign versus domestic, and national versus regional.

## I. LABOR AND EMPLOYMENT IN A NONMARKET-DRIVEN ECONOMY

The labor policies and legislation of China in its former nonmarket-driven economy can be divided into the following three periods. To a large extent, the major problems facing management in China today can be attributed to these policies and measures.

### A. *The Founding Years*

In the early years, while the Chinese government tried to consolidate the country, it also enacted regulations to deal with labor relations in industrial and commercial enterprises that had survived the civil war. The subsequent discussion will highlight regulations relating to unionization and labor insurance because they have laid the regulatory foundation for labor and employment in China.

#### 1. *Unionization and Worker Participation*

In 1950, the government promulgated the Trade Union Law of the People's Republic of China (1950 Trade Union Law), which empowers all manual and mental wage workers in enterprises, institutions, and schools the right to form unions.<sup>4</sup> Under this law, all trade unions must be organized in accordance with the constitution of the All-China

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3. Zhonghua Renmin Gongheguo Laodong Fa [The Labor Law of the People's Republic of China] [hereinafter Labor Law], July 5, 1994, reprinted in RENMIN RIBAO [People's Daily] (overseas ed.), July 7, 1994, at 2. Also reprinted and translated in 2 CHINA LAWS FOR FOREIGN BUSINESS—BUSINESS REGULATIONS [hereinafter 2 CHINA LAWS], ¶ 12-500 (CCH Australia 1993). The Labor Law took effect on January 1, 1995.

4. The Trade Union Law of the People's Republic of China, June 28, 1950, art. 1, translated in SELECTED LEGAL DOCUMENTS OF THE PEOPLE'S REPUBLIC OF CHINA [hereinafter SELECTED LEGAL DOCUMENTS] 301 (Joseph En-Pao Wang ed., 1976).

Federation of Trade Unions (ACFTU) and the resolutions adopted by the All-China Labor Congress and various congresses of industrial unions.<sup>5</sup> Trade unions in state-owned or collectively owned enterprises have the rights to represent staff and workers to participate in production management and to sign collective contracts with management.<sup>6</sup> Similarly, trade unions in privately owned enterprises have the rights to represent staff and workers to negotiate with owners, to attend consultative conferences between capital and labor, and to enter into collective contracts.<sup>7</sup>

At the same time, trade unions have the duties to protect the interests of staff and workers; to supervise the owners' or managements' implementation of labor protection, labor insurance, wage standards, factory sanitation, and safety measures; and to improve the material and cultural life of staff and workers.<sup>8</sup> More specifically, trade unions should do the following tasks to protect the basic interests of the working class: (1) to educate and organize staff and workers in upholding the law, implementing governmental policies, cultivating a new attitude toward labor, and observing labor discipline; (2) to organize emulation drives or production movements to fulfill production targets; (3) to protect public property, combat corruption, waste and bureaucracy, and fight against saboteurs in state-owned or collectively owned enterprises, institutions, and schools; (4) to promote in private enterprises the policies of developing production and of benefitting both labor and capital; and (5) to oppose all deeds which violate the law or obstruct the growth of production.<sup>9</sup>

In addition, trade unions should be notified of any engagement and discharge of staff and workers and can object to decisions in violation of laws or decrees or in contravention of the collective agreement.<sup>10</sup> The wages of full-time union officials are to be paid by trade unions, while union officials continue to share labor insurance and welfare benefits paid by owners or managements.<sup>11</sup> Most of all, owners or managements of enterprises should not interfere with union activities.<sup>12</sup>

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5. *Id.* art. 3. Primary trade union committees (grassroots unions) can be established in productive and administrative units that have 25 or more staff and workers. *Id.* art. 13.

6. *Id.* art. 5.

7. *Id.* art. 6.

8. *Id.* art. 7.

9. *Id.* art. 9.

10. *Id.* arts. 21-22. This does not apply to personnel appointed by the governments at various levels. *Id.*

11. *Id.* art. 17.

12. *Id.* art. 18.

Therefore, in theory, the 1950 Trade Union Law allows workers to have union representation, but most of the functions of the Chinese trade union are not advocative as in the Western sense. Moreover, although the 1950 Trade Union Law had been in effect for over forty years until its recent repeal, its effectiveness has been minimal because trade unions have been subordinate to the commands of the Communist Party (Party).<sup>13</sup> Nonetheless, the preceding highlights should provide a framework to understand the past and present role of trade unions in China.

## 2. *Labor Insurance*

In 1951 and 1953, the Chinese government respectively promulgated and amended the Labor Insurance Regulations of the People's Republic of China (Labor Insurance Regulations) to provide coverage for injury, sickness, disability, death, maternity, and retirement pensions.<sup>14</sup> Enterprises not covered by these regulations can settle matters relating to labor insurance through collective agreements after consultation between the owners or managements of such enterprises or of the industries to which such enterprises belong and their trade unions.<sup>15</sup>

Basically, the owner or management is responsible for the entire cost of labor insurance.<sup>16</sup> Certain expenses are disbursed directly by the management while others are paid from a labor insurance fund managed by the trade union.<sup>17</sup> Each enterprise is required to make a monthly payment in an amount equal to three percent of its total payroll to the labor insurance fund.<sup>18</sup> Thirty percent of this amount is paid to the ACFTU as the general insurance fund, whereas seventy percent is paid

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13. John Bruce Lewis & Bruce L. Ottley, *China's Developing Labor Law*, 59 WASH. U. L.Q. 1165, 1175 (1982). Lewis and Ottley explain that unions have been used as a vehicle to transmit Party policy downward and that their power has been limited by the Party's transferring control over unions to local Party committees. In addition, during the Great Leap Forward (1958-60), many of the administrative functions formerly performed by unions were transferred to the Party. *Id.*

14. Labor Insurance Regulations of the People's Republic of China [hereinafter Labor Insurance Regulations], Feb. 26, 1951 (amended Jan. 2, 1953), *translated in* SELECTED LEGAL DOCUMENTS, *supra* note 4, at 311. Enterprises covered under these regulations are (1) mines and enterprises employing 100 or more staff and workers; (2) post, railway, water and air transport, and telecommunications enterprises; (3) capital construction units of factories, mines, and transport enterprises; and (4) state-owned building companies. *Id.* art. 2.

15. *Id.* art. 3.

16. *Id.* art. 7.

17. *Id.*

18. *Id.* art. 8.

to the primary trade union committee to pay pensions, allowances, and relief benefits.<sup>19</sup>

In addition, the amounts of benefits that staff and workers or their dependents receive depend on whether the injury, sickness, disability, or death occurs on the job or away from work and whether the staff and workers are union members.<sup>20</sup> Demobilized army combat heroes working in enterprises or model staff and workers who have made outstanding contributions to their enterprises can receive preferential treatment.<sup>21</sup> Male workers who have worked for twenty-five years, including five years in the enterprise concerned, are eligible for retirement at the age of sixty, and female workers who have worked for twenty years, including five years in the enterprise concerned, can retire at the age of fifty [fifty-five].<sup>22</sup> Maternity benefits include fifty-six [ninety] days' paid leave for pregnancy, fourteen [fifteen] additional days' paid leave in case of complicated delivery or birth of twins, and a maximum of thirty days' paid leave for miscarriage during the first seven months of pregnancy.<sup>23</sup>

Consequently, the Labor Insurance Regulations enabled workers to receive a wide range of benefits based on their personal circumstances and union affiliation. In addition, social insurance and welfare benefits were basically tied to an individual's employment. Over the years,

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19. *Id.* art. 9. In the first two months, the monthly sum is to be paid entirely to the ACFTU. *Id.*

20. *Id.* arts. 12-14, 18.

21. *Id.* art. 19.

22. On June 2, 1978, the State Council promulgated the Guowuyuan Guanyu Gongren Tuixiu Tuizhi de Zanxing Banfa [Provisional Measures of the State Council Concerning Workers' Retirement and Resignation], reprinted in LAODONG ZHENGYI SHENPAN SHOUCHE [LABOR DISPUTES TRIAL MANUAL] [hereinafter LAODONG SHOUCHE] 422 (1994). Article 1 of the Measures states that, in general, male workers who are 60, or female workers who are 50, and who have worked for 10 years, should retire. *Id.* art. 1. In addition, the retirement age for women who work in State organs is 55. Guojia Jiguan Gongzuo Renyuan Tuixiu Chuli Zanxing Banfa [Provisional Measures Concerning the Handling of the Retirement of Personnel in State Organs], Dec. 29, 1955, art. 2, reprinted in ZHONGHUA RENMIN GONGHEGUO FAGUI HUIBIAN [A COLLECTION OF THE LAWS AND REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA] [hereinafter FAGUI HUIBIAN] 708 (July-Dec. 1955).

23. Labor Insurance Regulations, *supra* note 14, art. 16. The provisions on maternity of the Labor Insurance Regulations were repealed by Nuzhigong Laodong Baohu Guiding [Regulations on Labor Protection of Female Staff and Workers] [hereinafter Female Workers Protection Regulations], July 21, 1988, reprinted in ZHONGHUA RENMIN GONGHEGUO CHANGYONG FALU DAQUAN [A COMPENDIUM OF FREQUENTLY USED LAWS OF THE PEOPLE'S REPUBLIC OF CHINA] [hereinafter FALU DAQUAN] 1337 (1992). Article 8 of the Female Workers Protection Regulations states that the maternity leave of female staff and workers is 90 days; an additional 15 days shall be given in case of a complicated delivery; an additional 15 days shall be given for each additional baby born in a single birth; and a certain period of leave shall be given in case of a miscarriage based on medical certification. *Id.* art. 8.

diversity exists in the administration and interpretation of these regulations,<sup>24</sup> and shop officials have had wide discretion to determine insurance benefits.<sup>25</sup>

### 3. *Summary*

Although statutes and regulations in this period were enacted to protect the interests of labor in a system still based on employment contract,<sup>26</sup> the 1950 Trade Union Law and the Labor Insurance Regulations did lay the foundation for administering future labor relations and employee benefits. At the same time, a nonmarket-driven economy had been planted, and new labor policies and measures were on the horizon.

#### B. *From 1956 to 1965*

By the middle of 1950's, the government had succeeded in nationalizing all major industrial and commercial enterprises. Therefore, it formulated new labor policies and measures in order to meet the needs of a nationalized economy.<sup>27</sup> Among these measures, the eight-grade wage scale, the system of labor allocation through administrative assignment, and lifetime tenure have certainly contributed to China's current labor-management problems.

#### 1. *Remuneration*

In 1956, an eight-grade wage scale was adopted.<sup>28</sup> The determining factors for each grade included the complexity, strenuousness, and responsibility of a job.<sup>29</sup> Within a given grade, workers with the same educational and work experiences earned the same base wages, even though workers in certain industries or geographical areas were given subsidies for

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24. Lewis & Ottley, *supra* note 13, at 1213.

25. ANDREW G. WALDER, COMMUNIST NEO-TRADITIONALISM: WORK AND AUTHORITY IN CHINESE INDUSTRY 99 (1986).

26. Henry R. Zheng, *An Introduction to the Labor Law of the People's Republic of China*, 28 HARV. INT'L L.J. 385, 386 (1987). Cf. John B. Lewis & David Fleshler, *China Charts A New Course for Labor*, E. ASIAN EXECUTIVE REP., Mar. 1987, at 9, 9. Lewis and Fleshler state that the lifetime employment system as discussed later in this article was adopted in 1952.

27. In this period, the government concentrated on regulating workers' remuneration and benefits, providing safe working conditions, and certifying standards for labor assignment. Zheng, *supra* note 26, at 387.

28. Jamie P. Horsley, *Chinese Labor*, CHINA BUS. REV., May-June 1984, at 16.

29. *Id.*

specific working conditions or price levels.<sup>30</sup> Generally, wages of the highest grade were about three times those of the lowest grade.<sup>31</sup> Although the principle of "to each according to his work" was recognized, it focused the reward system on "potential labor" rather than the outcomes of labor.<sup>32</sup> However, the government also awarded cash bonuses or compensated on a piece-rate basis to reward production that exceeded the established quotas.<sup>33</sup>

During the Great Leap Forward (1958-1960), although material incentives were not entirely abolished, the emphasis was on moral or psychological rewards.<sup>34</sup> Bonuses and piece-rate pay were eliminated because they encouraged competition among workers and hindered the development of a collective spirit that should prevail in a socialist country.<sup>35</sup> However, since the policy of moral rewards had a negative impact on the Chinese economy, the government returned to wage increases, bonuses, and piece-rate pay during the early 1960's so as to recover from the natural and political disasters of the Great Leap Forward.<sup>36</sup>

## 2. *Worker Participation*

In 1956, the government permitted staff and workers in enterprises to form congresses (staff-and-worker congresses),<sup>37</sup> which had the power to examine and discuss production plans, finances, and wages; and to decide how enterprise funds for bonuses and welfare projects should be used.<sup>38</sup> More importantly, these congresses had the power to suggest the removal of<sup>39</sup> and to elect<sup>40</sup> factory directors. Nevertheless, the introduction of staff-

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30. Brian E. Becker & Yang Gao, *The Chinese Urban Labor System: Prospects for Reform*, J. LAB. RES., Fall 1989, at 411, 417.

31. Horsley, *supra* note 28, at 16.

32. Becker & Gao, *supra* note 30, at 413-14.

33. Lewis & Ottley, *supra* note 13, at 1186.

34. *Id.* at 1186-87. In addition, Walder states that during the Great Leap Forward, China focused on expanding industrial employment for capital construction and accumulation, but the efforts were not sustainable; and that so many factories and shops were closed at the beginning of 1960s that surplus workers were relocated to the rural areas. WALDER, *supra* note 25, at 36-37.

35. Lewis & Ottley, *supra* note 13, at 1186.

36. *Id.* at 1187.

37. WALDER, *supra* note 25, at 119 n.31. Walder states that congresses of workers were established in 1956. However, Horsley states that congresses of workers were introduced in 1957. Horsley, *supra* note 28, at 22. The congresses meet once or twice a year, and the trade unions perform their work while they are not in session. *Id.* at 23.

38. Lewis & Ottley, *supra* note 13, at 1180-81.

39. *Id.* at 1181.

40. WALDER, *supra* note 25, at 119 n.31. Walder states that Party committees organized congresses of workers to elect new factory directors whom they would find more pliable. *Id.*

and-worker congresses had not really resulted in direct worker participation in management, because they had the right only to put forth criticisms and suggestions.<sup>41</sup>

### 3. *Recruitment and Hiring*

During this period, the practice of allocation of labor through administrative assignment also emerged. Under this system, job seekers were assigned by local labor bureaus to state-owned enterprises on the basis of administrative planning without reference to their interests, aptitude, or training.<sup>42</sup> This labor practice was designed to: (1) check the growth of the urban population and maintain urban living standards by restricting permanent employment in state-owned enterprises to people with urban household registration and (2) allocate jobs among industries, geographic locations, and occupations.<sup>43</sup> In effect, employment based on contract applied only to temporary workers.

In other words, the practice of labor allocation through administrative assignment had not only given urban workers employment security but also deprived them choice of occupation. For one thing, it is impracticable, if not impossible, to guarantee employment for all eligible job seekers. For another thing, high unemployment among urban high school graduates had caused local labor bureaus to pressure enterprises to employ additional workers irrespective of actual needs, which resulted in overstaffing and decline in productivity.<sup>44</sup> Therefore, worker lethargy was pervasive among state-owned enterprises, resulting in low-quality goods and services.<sup>45</sup>

Furthermore, permanent employment was the presumption.<sup>46</sup> Employees were usually guaranteed full wages or relocation by the

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41. Lewis & Ottley, *supra* note 13, at 1181.

42. HILARY K. JOSEPHS, *LABOR LAW IN CHINA: CHOICE AND RESPONSIBILITY* 14 (1990).

43. *Id.*

44. *Id.* at 9.

45. W. Gary Vause & Georgia Bush Vrionis, *China's Labor Reform Challenge: Motivation of the Production Forces*, 24 STAN J. INT'L L. 447, 447-48 & accompanying notes (1988).

46. JOSEPHS, *supra* note 42, at 11. The presumption of permanent employment may be overcome by an agreement between the parties. *Id.* Walder states that workers virtually had lifetime tenure, except for the 16 million people hired during the Great Leap Forward. During 1961-1962, most of these workers were returned to the rural areas, but some long-term workers were dismissed as well. WALDER, *supra* note 25, at 42 & n.12. Moreover, problem workers were retained and then unloaded on others, while expulsion [discussed later in this article] for political and legal offenses is more common. WALDER, *supra* note 25, at 73. Even though Lewis and Flesher said that the lifetime employment system was adopted in 1952, *supra* note 26, at 9, the author discusses it here because labor through administrative assignment and presumption of permanent employment are closely related.



government to other permanent positions if their employers partially or completely ceased operations.<sup>47</sup> Since social benefits such as housing, medical insurance, and pensions were tied to a person's employment, labor immobility prevailed.<sup>48</sup>

#### 4. *Summary*

The eight-grade wage scale had been employed for many years until its recent reform.<sup>49</sup> The problems this wage system has generated include: (1) egalitarian distribution with no link between wages and the performance of either individual workers or enterprises, (2) numerous and confusing wage scales, resulting in many contradictions among trades or professions and among workers, (3) wage management structure with excessive centralism and rigid control, depriving enterprise management of the necessary power to make decisions about wage distribution.<sup>50</sup> In addition, the practices of administrative assignment and lifetime tenure have deprived workers of choice of occupation and contributed to labor surplus, worker lethargy, and labor immobility.

#### C. *From 1966 to 1978*

Around 1966, the notorious Cultural Revolution began. Laws were criticized as the legacy of capitalism. At the workplace, the following occurrences have left significant impact on the current labor relations in China.

##### 1. *Remuneration*

First of all, bonuses and piece-rate pay were abandoned since Mao Zedong (Mao) emphasized political education as the means of creating the "new socialist man" who would work for the collective good without material rewards.<sup>51</sup> Instead, workers were paid a fixed "supplementary

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47. JOSEPHS, *supra* note 42, at 12.

48. Zheng, *supra* note 26, at 387. As one editorial said, enterprises cannot exercise their right to make recruitment decisions because those who are needed are not recruited and those who are not needed do not go away. "Renmin Ribao" Editorial Praises the Socialist Contract Labor System, BBC Summary of World Broadcasts, Sept. 16, 1986, Pt. 3: The Far East, available in LEXIS, World Library, ALLWLD File.

49. See *infra* text accompanying notes 173-75.

50. Minister of Labor and Personnel on Wage Reform [hereinafter *Wage Reform*], BBC Summary of World Broadcasts, June 11, 1986, Pt. 3: The Far East, available in LEXIS, World Library, ALLWLD File.

51. Lewis & Ottley, *supra* note 13, at 1187.

wage,"<sup>52</sup> to which only those who had been on the job by 1966 were entitled.<sup>53</sup> Moreover, as generations aged, the enforcement of a wage freeze resulted in new forms of inequity.<sup>54</sup> As a result, workers perceived the situation to be greatly unfair.<sup>55</sup>

## 2. *Discipline*

During the Cultural Revolution, work discipline was lax because after factory administrators had been criticized for taking the "capitalist road," held in temporary isolation cells, and demoted to menial tasks in the shop, they returned to find that the political environment was not conducive to the strict enforcement of rules.<sup>56</sup> In addition, demoralized managers had few incentives to enforce factory rules, because they did not receive bonuses, and the financial criteria for evaluating enterprise performance were loose and seldom enforced.<sup>57</sup> Hence, administrative punishments for violating work discipline were not enforced.<sup>58</sup>

## 3. *Union Representation*

In 1966, the national union system was abolished as a reactionary.<sup>59</sup> Trade unions and staff-and-worker congresses were replaced by revolutionary committees that were responsible for making and implementing policies.<sup>60</sup> Consequently, workers did not have unions as avenues of discussing their livelihood problems.<sup>61</sup> However, although Mao did not support a general rule to strike, he regarded bureaucracy as a major obstacle to his ideal society and endorsed strikes and boycotts as a means to obstruct bureaucracy.<sup>62</sup> Thus, the right to strike was first provided in the 1975

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52. WALDER, *supra* note 25, at 192.

53. *Id.* at 203. Workers who began work after 1966 did not receive this "supplementary wage." *Id.*

54. *Id.* at 193. Despite increasing family burdens as workers aged, many workers did not receive wage readjustments for more than ten years, so they came in late, left early, worked slowly, chatted during work hours, pretended to be ill, and often requested personal leave. *Id.* at 198.

55. *Id.* at 204.

56. *Id.* at 206-07. Work discipline met minimum standards only when most factories were under the rule of military officials from 1968-71. *Id.* at 205.

57. *Id.* at 205.

58. *Id.* at 210.

59. Lewis & Ottley, *supra* note 13, at 1176. Walder states that trade unions were disbanded in 1967 and were not formally reestablished until 1974. WALDER, *supra* note 25, at 201.

60. Lewis & Ottley, *supra* note 13, at 1181.

61. WALDER, *supra* note 25, at 201.

62. Lewis & Ottley, *supra* note 13, at 1195.

Constitution.<sup>63</sup> From 1973 to 1977, large-scale strikes and work stoppages did occur.<sup>64</sup>

#### 4. *Aftermath*

In 1978, the replacement-by-children (*dingt*) practice was formally adopted.<sup>65</sup> Under this practice, a retired worker from a permanent job could designate a child as the successor in the same enterprise, even though the successor did not necessarily hold the same position.<sup>66</sup> On one hand, the replacement system allowed enterprises to have limited autonomy in hiring and operated as a means of labor discipline (the loss of employment meant the loss of a future job for the employee's child).<sup>67</sup> On the other hand, the replacement system provided employment opportunities for high school graduates at a time when there were few options, and enabled the working class to have a formal mechanism for providing for its children.<sup>68</sup> However, some parents pretended to be sick in order to take early retirement or chose physically unfit children to take over their jobs, which resulted in the employment of unskilled workers and decline of production.<sup>69</sup>

Furthermore, the National People's Congress promulgated a revised Constitution in 1978, which guarantees the right to work,<sup>70</sup> the right to rest,<sup>71</sup> and freedom to strike.<sup>72</sup> However, citizens are not allowed to disrupt the economic order of society and undermine the economic plans of the State.<sup>73</sup> Specifically, citizens must observe labor discipline and public order.<sup>74</sup> Hence, it has been argued that the 1978 Constitution was a compromise

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63. ZHONGHUA RENMIN GONGHEGUO XIANFA [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA] [hereinafter XIANFA] (1975), art. 28, translated in SELECTED LEGAL DOCUMENTS, *supra* note 4, at 65.

64. Lewis & Ottley, *supra* note 13, at 1196.

65. See Provisional Measures of the State Council Concerning Workers' Retirement and Resignation, *supra* note 22, art. 10.

66. JOSEPHS, *supra* note 42, at 15.

67. *Id.* at 15-16.

68. *Id.* at 16.

69. See Guowuyuan Guanyu Renzhen Zhengdun Zhaoshou Tuixiu Tuizhi Zhigong Zinu Gongzuo de Tongzhi [Notice of the State Council Concerning Conscientiously Rectifying the Recruitment of the Children of Retired and Resigned Staff and Workers], Sept. 3, 1983, reprinted in LAODONG SHOUCE, *supra* note 22, at 449; JOSEPHS, *supra* note 42, at 16-17.

70. ZHONGHUA RENMIN GONGHEGUO XIANFA [CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA] (1978) [hereinafter 1978 CONSTITUTION], art. 48, translated in II SELECTED LEGAL DOCUMENTS OF THE PEOPLE'S REPUBLIC OF CHINA 125 (Joseph En-Pao Wang ed., 1979).

71. *Id.* art. 49.

72. *Id.* art. 45.

73. *Id.* art. 8.

74. *Id.* art. 57.

between the alleged request of Mao to insert the freedom to strike in the 1975 Constitution and the subsequent leaders' commitment to modernization and rapid economic growth.<sup>75</sup> Although the 1978 Constitution does not clearly state when strikes are permissible, Chinese sources reveal official support for strikes to protect workers' democratic rights as well as health and safety.<sup>76</sup> Moreover, the 1978 Constitution states: "He who does not work, neither shall he eat" and "from each according to his ability, to each according to his work."<sup>77</sup> Therefore, rewards will be given on the basis of performance. All these provisions, as critics suggest, did not entirely abandon Mao's thoughts but reinterpreted his thoughts in such a way as to emphasize work, labor discipline, and material incentives.<sup>78</sup> Consequently, bonuses were again awarded on the basis of the quality and quantity of work, absence of waste, regular attendance, and working conditions.<sup>79</sup>

By the end of this period, most workers had received wage readjustments.<sup>80</sup> The ACFTU had been formally reactivated,<sup>81</sup> and the Ninth National Trade Union Congress had adopted a revised constitution, which detailed the structure, basic tasks, and income sources of trade unions.<sup>82</sup> The central government under the leadership of Deng Xiaoping was committed to the modernization of China's industry, agriculture, science and technology, and military defense. To achieve these objectives, China opened its door to foreign investment and embarked on developing a market economy that will enhance productivity and economic performance.

## II. LABOR AND EMPLOYMENT IN A MARKET-DRIVEN ECONOMY

For many years, agricultural production in China had been made on a collective basis. Depending on the number of households, production units were designated as communes, brigades, and production teams.<sup>83</sup> Near the end of the 1970's, economic reforms started with the decollectivization of agricultural production. The so-called production responsibility system allowed households to contract with their production

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75. Lewis & Ottley, *supra* note 13, at 1196.

76. *Id.*

77. 1978 CONSTITUTION, *supra* note 70, art. 10.

78. Lewis & Ottley, *supra* note 13, at 1171.

79. *Id.* at 1191. In some factories, workers themselves also made bonus decisions. *Id.*

80. WALDER, *supra* note 25, at 202-03. Wage readjustments were made in 1972 and 1977, but only the lowest paid workers and those whose promotions had been delayed received raises in 1972. *Id.*

81. Lewis & Ottley, *supra* note 13, at 1176.

82. *Id.* at 1177-79.

83. For example, 50 families were grouped as a production team, 300 families became a brigade, and 900 families formed a commune.

teams, manage their production activities, and keep whatever was left after they had fulfilled their quotas.<sup>84</sup>

Since major gains resulted in peasants' income,<sup>85</sup> the government decided to extend economic reform to urban areas where surplus workers were retained, productivity had been low, and subsidies were frequently used to keep enterprises from ceasing operations.<sup>86</sup> Simply stated, urban economic reforms entailed the introduction of various financial reforms in China's industrial system<sup>87</sup> and increased autonomy for enterprise management to make production and personnel decisions,<sup>88</sup> thus making enterprise management accountable for profits and losses.<sup>89</sup> Coupled with the enormous inflow of foreign investment, changes resulting from these reforms thus necessitate a shift in labor policy and the enactment of new labor laws.

#### A. From 1979 to 1990

During this period, the National People's Congress and the State Council promulgated a number of national statutes and regulations on labor and employment. These national laws generally contain broad language and authorize provinces, autonomous regions, and municipalities directly under the central government to fill in gaps in order to meet the particular needs and problems of their respective areas.<sup>90</sup> If contradictory

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84. See generally Vause & Vronis, *supra* note 45, at 452-57; Kathleen Hartford, *Socialist Agriculture Is Dead; Long Live Socialist Agriculture, Organizational Transformation in Rural China*, in *POLITICAL ECONOMY*, *supra* note 2, at 31, 34-38.

85. Vause & Vronis, *supra* note 45, at 454-55. See also Terry Sicular, *Rural Marketing and Exchange in the Wake of Recent Reforms*, in *POLITICAL ECONOMY*, *supra* note 2, at 83, 83-84.

86. One recent example of this practice is reported as follows: One-fourth of state enterprises under the central government operated at a loss in 1988, which caused the government to spend more than 15 percent of its budget to keep them in business. JOSEPHS, *supra* note 42, at 144-45 (citing Kristof, *Socialism Grabs a Stick: Bankruptcy in China*, N.Y. TIMES, Mar. 7, 1989, at D6).

87. See generally Barry Naughton, *False Starts and Second Wind: Financial Reforms in China's Industrial System*, in *POLITICAL ECONOMY*, *supra* note 2, at 223.

88. *Id.* at 226.

89. In the past, enterprise management was not accountable for losses, because "numerous avenues exist for enterprises to escape the consequences of misguided decisions in investment or production." *Id.* (quoting Janos Kornai's terminology of "soft budget constraint").

90. See, e.g. Regulations for Labor Management of the Tianjin Economic and Technological Development Zone, July 25, 1985, *reprinted and translated in 2 CHINA LAWS FOR FOREIGN BUSINESS—SPECIAL ZONES AND CITIES, 1985-1994* [hereinafter 2 SPECIAL ZONES], ¶ 92-009 (CCH Australia 1995); Measures of the Dalian Economic and Technological Development Zone on Labor Management for Foreign Investment Enterprises, July 25, 1987, *reprinted and translated in 2 SPECIAL ZONES*, *supra* note 90, ¶ 83-009.

provisions exist, national laws will prevail over local laws; specific provisions will override general provisions.<sup>91</sup>

In addition, China's current labor market is bifurcated in two ways. First, the domestic-sector labor market consists of workers or job seekers who work or would like to work in state-owned or collectively owned enterprises, whereas the foreign-sector labor market is open to those who work or want to work for foreign-funded companies. Second, the regular-worker market is composed of full-time, either permanent or contract, workers, whereas the non-regular-worker market contains temporary, seasonal, and rotation workers.<sup>92</sup>

As a result, the applicability of the relevant labor and employment laws of China depends on the ownership of an enterprise, the location of an enterprise, and the nature of a particular job. The following discussion will focus on the major labor and employment laws applicable to state-owned enterprises, equity joint ventures, wholly foreign-owned enterprises, and Special Economic Zone enterprises.

### 1. *State-Owned Enterprises*

As analyzed above, the practices of administrative assignment, lifetime tenure, and replacement-by-children have resulted in deprivation of occupational choice, surplus workers, labor immobility, and low productivity. In 1980, the central government began to restore merit selection and restrict the use of administrative assignment and replacement-by-children by having local labor bureaus to adopt the system of "introduction" of candidates.<sup>93</sup> Under this system, a state-owned enterprise was required to submit a hiring plan to its department-in-charge and the local labor bureau for approval.<sup>94</sup> Once the hiring plan was approved, the enterprise might advertise at the labor offices of local street

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91. Zheng, *supra* note 26, at 390. Zheng states that generally national laws prevail when they conflict with regional or local laws, but when national laws contain only broad principles or are silent, the more detailed regional or local laws prevail unless they contradict the spirit or objectives of national laws. *Id.* Therefore, in theory, national laws take precedence over regional laws. However, some areas may disregard national laws to protect local interests, thus causing a discrepancy between theory and practice. This issue merits in-depth discussion but is beyond the scope of this article.

92. Rotation workers are peasants recruited to work in enterprises such as mines. They will return to the countryside after the end of the term, and another group will be sent by their team to do the same kind of work.

93. JOSEPHS, *supra* note 42, at 17. In anticipation of the abolition of the replacement-by-children practice, many skilled workers took early retirement in the early 1980s so that their children could be assured jobs. WALDER, *supra* note 25, at 58. Hence, there were an increase of unskilled workers and a decrease of skilled workers.

94. JOSEPHS, *supra* note 42, at 17.

committees the number of job openings, nature of those jobs, job requirements, wages and benefits, and job locations.<sup>95</sup> Applicants in some cities had to take a standardized written examination (sometimes even character and physical fitness tests), after which formal assignments, subject to the approval of the enterprise, were made on the basis of test scores and applicants' preferences.<sup>96</sup>

Notwithstanding the introduction of open merit recruitment, enterprises could not engage in formal hiring without official approval, could generally hire only individuals with urban household registration, and were sometimes required to hire individuals only from particular geographical locations within the city.<sup>97</sup> In addition, although the bonus system had been resumed to motivate workers and to increase productivity, bonuses had been made on the basis of egalitarianism, arbitrarily enlarged, and drawn on funds diverted from production, thus not "rewarding the advanced, pushing the backward forward or stimulating production."<sup>98</sup> Owing to the ineffectiveness of the "introduction" system, the government officially introduced the contract employment system in 1983.<sup>99</sup>

Simply stated, the contract employment system allows management and labor to enter into an employment relationship by written agreement which automatically terminates upon expiration of the contractual term. At the beginning, the government encouraged state-owned enterprises in certain municipalities to use the contract employment system. Owing to its success, the government decided to apply it nationwide.<sup>100</sup>

In 1986 and 1987, the State Council promulgated a total of five sets of regulations to facilitate the implementation of the contract employment

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95. *Id.* at 17-18.

96. *Id.* at 18.

97. *Id.*

98. Lewis & Ottley, *supra* note 13, at 1192 (quoting from *Correctly Handle the Bonus Issue*, NANFANG RIBAO, May 19, 1980, and *Correctly Implement the Bonus System in Line With the Principle of "to Each According to His Work,"* Beijing Xinhua, May 18, 1979).

99. JOSEPHS, *supra* note 42, at 21 (citing Laodong Renshibu Guanyu JiJi Shixing Laodong Hetongzhi de Tongzhi [Notice of the Ministry of Labor and Personnel on Active Trial Implementation of the Contract Employment System], 6 STATE COUNCIL GAZETTE 213 (1983)). Although this notice has the effect of a policy statement, it proposes the following reforms: allowing enterprises to keep a percentage of above-target profits for distribution as bonuses, permitting piece-rate pay, linking a portion of wages to the profitability of the enterprise, and increasing pay differentials between skilled and unskilled jobs, light and heavy manual labor, and production and administrative work. *Id.* at 22.

100. See "Renmin Ribao" Editorial Praises the Socialist Contract Labor System, *supra* note 48. Under the labor contract system, the material interests of workers are tied to their labor; job security is linked to the destiny of enterprises; and workers efforts for society, enterprises, and themselves are merged into one. *Id.*

system.<sup>101</sup> The following summarizes these regulations and the Provisions on Reward and Punishment of Staff and Workers in Enterprises (Reward and Punishment Provisions).<sup>102</sup>

(a) General Provisions

The Provisional Regulations on the Implementation of the Contract Employment System in State-Owned Enterprises (Implementation Regulations) states that the duration of an employment contract can be long-term (over five years), short-term (one to five years), or fixed-term for rotation workers.<sup>103</sup> In addition, the employment contract should include: (1) standards for the quantity and quality of production, or work to be performed, (2) the probationary period and the duration of the employment contract, (3) production and working conditions, (4) compensation, labor insurance, and fringe benefits, (5) labor discipline, (6) liability for breach of the employment contract, and (7) other matters which the parties consider necessary.<sup>104</sup> However, the parties can modify the contract if (1) the enterprise's department-in-charge has approved change of its production or adjustment of its production duties or (2) circumstances have changed and the parties agree after mutual consultation.<sup>105</sup>

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101. Guoying Qiye Shixing Laodong Hetongzhi Zanzing Guiding [Provisional Regulations on the Implementation of the Contract Employment System in State-Owned Enterprises] [hereinafter Implementation Regulations], July 12, 1986 (amended 1992), reprinted in FAGUI HUIBIAN, *supra* note 22, at 775 (amendment reprinted in FALU DAQUAN, *supra* note 23, at 1316); Guoying Qiye Zhaoyong Gongren Zanzing Guiding [Provisional Regulations on the Hiring of Workers in State-Owned Enterprises] [hereinafter Hiring Regulations], July 12, 1986, reprinted in FAGUI HUIBIAN *supra* note 22, at 784; Guoying Qiye Citui Weiji Zhigong Zanzing Guiding [Provisional Regulations on the Dismissal of Staff and Workers in State-Owned Enterprises for Discipline Violations] [hereinafter Dismissal Regulations], July 12, 1986, reprinted in FAGUI HUIBIAN, *supra* note 22, at 787; Guoying Qiye Zhigong Daiye Baoxian Zanzing Guiding [Provisional Regulations on Waiting-for-Employment [Unemployment] Insurance for Staff and Workers in State-Owned Enterprises] [hereinafter Unemployment Insurance Regulations], July 12, 1986, reprinted in FAGUI HUIBIAN, *supra* note 22 at 789; and Guoying Qiye Laodong Zhengyi Chuli Zanzing Guiding [Provisional Regulations for the Handling of Labor Disputes in State-Owned Enterprises] [hereinafter Dispute Regulations], July 31, 1987, reprinted in FALU DAQUAN, *supra* note 23, at 1322. See also JOSEPHS, *supra* note 42, 153-75 for an English language translation of these regulations.

102. Qiye Zhigong Jiangfa Tiaoli [Provisions on Reward and Punishment of Staff and Workers in Enterprises] [hereinafter Reward & Punishment Provisions], Apr. 10, 1982, reprinted in FALU DAQUAN, *supra* note 23, at 1307.

103. Implementation Regulations, *supra* note 101, art. 2.

104. *Id.* art. 8.

105. *Id.* art. 10.



### (b) Recruitment and Hiring

Under the guidance of the local labor-administration department, enterprises shall thoroughly implement the principles of open recruitment, voluntary application, comprehensive examination of moral, mental, and physical qualifications, and selection based on merit.<sup>106</sup> Specifically, enterprises should publish a hiring notice;<sup>107</sup> emphasize cultural, technical, or physical qualifications;<sup>108</sup> and disclose a list of successful examinees from whom to select for employment.<sup>109</sup> In addition, enterprises cannot use any forms of internal recruitment and are not allowed to use replacement-by-children method.<sup>110</sup> However, enterprises can establish a probationary period, which may span from three to six months, depending on the nature of the job.<sup>111</sup> Any employment in violation of the law will be ineffective, and serious violators are subject to administrative liability.<sup>112</sup> Therefore, these provisions attempt to establish an open, merit-based hiring system and to provide enterprises with some broad guidelines on how to select their new hires.

### (c) Remuneration and Benefits

First of all, contract workers should enjoy equal rights with permanent workers (those who had been hired prior to the implementation of the contract employment system) with regard to labor, work, learning opportunities, participation in democratic management, and reception of political honors and material incentives.<sup>113</sup> Moreover, a contract worker who

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106. *Id.* art. 4.

107. Hiring Regulations, *supra* note 101, art. 4.

108. *Id.* art. 7.

109. *Id.* art. 5.

110. *Id.*

111. Implementation Regulations, *supra* note 101, art. 6.

112. Hiring Regulations, *supra* note 101, art. 13.

113. Implementation Regulations, *supra* note 101, art. 3. More specifically, contract workers receive equal treatment with permanent workers in the following areas: (1) wages, labor insurance, and fringe benefits (to the extent that the contract worker's insurance and fringe benefits are lower than those of the permanent worker, the former will receive a wage subsidy, the amount of which is about 15 percent of his/her standard wages, *id.* art. 18, which specifies the requirements of "doing the same kind of work" and "employed in the same position"); (2) bonuses, allowances, food, labor protection articles, grain subsidies, and cost-of-living allowances, *id.* art. 18 (containing the requirement of "doing the same kind of work," but not the phrase "employed in the same position"); (3) funeral expenses, benefits for direct lineal survivors, and relief allowances if the contract worker died as a result of sickness or work-related injury, *id.* art. 22; and (4) public holidays, marriage or funeral leave, leave to visit relatives, commuting allowances, and heating and cooling allowances. *Id.* art. 24.

has obtained new employment and will be doing the same kind of work will receive wages at the same former grade if he/she passes an examination.<sup>114</sup> Nonetheless, if the contract worker will perform a different kind of work, he/she will receive not less than the wages of a grade-two worker during the probationary period.<sup>115</sup> After probation, the contract worker will be evaluated, and his/her wage grade will be set accordingly.<sup>116</sup> In addition, a worker whose contract has expired or whose contract is terminated due to inability to work after illness or nonwork-related injury, or pursuant to the conditions allowing him/her to terminate the contract, is to be paid a livelihood allowance in an amount equal to one month's standard wages for each year of service, subject to a cap of twelve months.<sup>117</sup> However, a worker whose contract is terminated pursuant to the Provisional Regulations on the Dismissal of Staff and Workers in State-Owned Enterprises for Discipline Violations (Dismissal Regulations)<sup>118</sup> or due to removal of name, expulsion, labor reeducation, or criminal punishment, or who has quit his/her job without approval, is not entitled to a livelihood allowance.<sup>119</sup>

For retired contract workers, the government has established a social insurance system. Every month an enterprise shall pay, as a pretax expense, about fifteen percent of the total wages of its contract workers to a

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114. *Id.* art. 19.

115. *Id.*

116. *Id.*

117. *Id.* art. 23. A contract worker can terminate a contract in four situations which will be discussed later in this article. See *infra* text accompanying note 137.

118. Dismissal Regulations, *supra* note 101, art. 2. The relevant provisions will be discussed later. See *infra* note 134.

119. Implementation Regulations, *supra* note 101, art. 23. Removal of name (*chuming*) from the enterprise's employee list is usually used when the worker does not change after repeated criticism and education. It is a type of punishment imposed especially in case of absenteeism, but is not an administrative penalty. ZHONGGUO LAODONG RENSHI BAIKE QUANSHU [THE ENCYCLOPEDIA OF CHINESE LABOR AND PERSONNEL] [hereinafter BAIKE QUANSHU] 865 (revised ed. 1991). Expulsion (*kaichu*) is the most serious type of administrative penalty which is imposed on someone who is not suitable for continuously working in State organs, enterprises, institutions, parties, public/social organizations due to violation of the law, neglect of duty, absence of change after education, etc. *Id.* at 152. In case of expulsion, the factory director proposes such a measure, the staff-and-worker congress decides, and the department-in-charge of the enterprise and the local labor or personnel department will be informed. Reward & Punishment Provisions, *supra* note 102, art. 13. Dismissal (*citui*) is used when there has been a violation of discipline, but the conditions for removal of name or expulsion have not been met. A dismissed worker can register as someone waiting for employment and can obtain waiting-for-employment relief and medical allowances. Sometimes the word "dismissal" refers to the expiration of a temporary-work contract, so it contains no connotation of punishment. BAIKE QUANSHU, *supra* note 119, at 1095-96. If an enterprise dismisses a worker, it must solicit the opinions of the union and report to its department-in-charge and local labor-and-personnel department. Dismissal Regulations, *supra* note 101, art. 3.

retirement fund, whereas a contract worker will contribute, by monthly deduction, not more than three percent of his/her standard wages to the retirement fund.<sup>120</sup> Failure to make payments on time will result in a late charge determined by regulation, and if there are insufficient funds to spend, the State will give an appropriate supplement.<sup>121</sup> Retirement benefits for a contract worker consist of pensions (plus additional subsidies required by regulations), medical allowances, funeral allowances, direct lineal survivors' benefits, and relief allowances.<sup>122</sup> The amount of pension is to be proportionally determined by the number of years for which contributions have been made, the amount paid, and the average income of the worker in a certain period.<sup>123</sup> However, medical allowances, funeral allowances, survivors' benefits, and relief allowances will be set in accordance with relevant regulations.<sup>124</sup>

As a result, the preceding provisions reflect the government's policies to (1) provide contract workers with the same treatment as that of permanent workers, (2) guarantee contract workers the same wages as they change jobs unless the new jobs are of a different nature, (3) allow contract workers to receive a certain sum of money once they become unemployed, and (4) create a social insurance fund for future retired contract workers.

#### (d) Discipline

The Reward and Punishment Provisions specifically enumerates seven categories of situations in which staff and workers who remain unchanged after criticism and education will receive administrative or economic sanction.<sup>125</sup> "Administrative punishment" means warning, demerits,

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120. Implementation Regulations, *supra* note 101, art. 26.

121. *Id.*

122. *Id.* art. 27.

123. *Id.* A retired contract worker will receive a pension every month until death. *Id.* A contract worker who has contributed to the retirement fund for a relatively short period of time can obtain his/her pension in a lump sum. *Id.*

124. *Id.*

125. Reward & Punishment Provisions, *supra* note 102, art. 11. The seven categories are as follows: (1) violation of labor discipline, frequent tardiness, early departure, absence from work without good cause, slow-down, and failure to finish production or work assignments; (2) insubordination without proper reasons concerning work assignment, transfer, command, or causing trouble without grounds, gathering a crowd to create disturbance, and fighting, thus affecting the order of production, work, and society; (3) neglect of duty, violation of operational and safety rules, or giving orders in violation of rules, which results in accidents causing losses of life and property; (4) being irresponsible, producing scraps, damaging facilities or equipment, or wasting raw materials and energy, which results in economic losses; (5) abuse of power, violation of policies and decrees, violation of financial and economic discipline, tax evasion, nonremittance of profits, abusive

demotion, removal from office, retention under observation (probation), and expulsion.<sup>126</sup> When an enterprise imposes an economic punishment, the amount of fines should not exceed 20 percent of the standard wages of the staff or worker.<sup>127</sup>

In administering administrative or economic punishment, the enterprise should solicit the opinion of the trade union and allow the staff or worker to defend.<sup>128</sup> The examination and approval of punishment must be done within five months from the date of the verification of the mistake in the case of expulsion and within three months for other types of discipline.<sup>129</sup> Moreover, the staff or worker may appeal to the leading organ above the enterprise within ten days of the announcement of the punishment, which will also be administered while the appeal is pending.<sup>130</sup> Therefore, these provisions outline the circumstances under which labor discipline will be imposed and equip workers with procedural safeguards to contest disciplinary measures.

#### (e) Termination

The Implementation Regulations state that the duration of an employment contract is to be determined through consultation between the enterprise and the worker.<sup>131</sup> Generally, the contract automatically expires at the end of its term, but if production or work requires, the parties can

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granting of awards, wasting of the country's resources and capital, and obtaining personal gains at the expense of the public; (6) corruption, theft, profiteering/speculation, smuggling, bribery, extortion, or any other conduct which is illegal or violates discipline; and (7) any other serious mistakes. These kinds of behavior can be serious enough to constitute crimes. *Id.* The Reward and Punishment Provisions apply to staff and workers in enterprises owned by the whole people and urban collectively owned enterprises. *Id.* art. 4.

126. *Id.* art. 12. An enterprise may also impose a one-time fine at the same time. *Id.*

When an enterprise administers the punishment of retention under observation, the retention period should be from one to two years, during which the disciplined staff or worker will receive only living expenses that are less than his/her wages. *Id.* art. 14. After the observation, the staff or worker can become a formal employee again if his/her performance is good, and his/her wages will be determined anew. *Id.* art. 14. However, if his/her performance under observation is poor, the staff or worker shall be expelled. *Id.* art. 14. If an enterprise removes a staff or worker from office, it may, if necessary, lower his/her wage grade. *Id.* art. 15. In addition, if an enterprise decides to punish by demotion, the staff or worker should be demoted generally by one grade, not exceeding two grades. *Id.* art. 15. If a staff or worker is absent from work without good reasons for more than 15 consecutive days or more than 30 days in one year, the enterprise can remove his/her name. *Id.* art. 18.

127. *Id.* art. 16.

128. *Id.* art. 19.

129. *Id.* art. 20.

130. *Id.* art. 21.

131. Implementation Regulations, *supra* note 101, art. 9.

agree to renew the contract, except for rotation workers.<sup>132</sup> In addition, the contract automatically terminates upon the worker's being removed of name, expelled, ordered for labor reeducation, or criminal punishment.<sup>133</sup>

Basically, an enterprise can terminate a labor contract if any of these circumstances arises: (1) the worker is found to be unqualified for employment during the probationary period, (2) the worker becomes sick or sustains nonwork-related injury and is unable to perform his/her original job after the end of sick leave, (3) the worker should be dismissed in accordance with the Dismissal Regulations,<sup>134</sup> and (4) the enterprise has declared bankruptcy or is undergoing reorganization at the verge of bankruptcy.<sup>135</sup>

Nonetheless, an enterprise cannot terminate a contract if: (1) the contract has not expired, and any of the aforementioned four conditions is not met, (2) the worker has been confirmed by the labor-review committee to be suffering from occupational disease or work-related injury, (3) the worker is on sick leave for illness or nonwork-related injury, (4) a female worker is pregnant, on maternity leave, or nursing a baby, and (5) the enterprise has to comply with State regulations.<sup>136</sup>

At the same time, a worker can terminate the contract under these circumstances: (1) as affirmed by the government agencies concerned, adverse safety and health conditions of the work site will seriously endanger the bodily health of the worker; (2) the enterprise cannot pay compensation pursuant to the labor contract; (3) having received the enterprise's consent, the worker undertakes education at or above the middle technical school level at his/her own expenses; and (4) the enterprise does not perform its contractual duties, violates the State's policies, laws, regulations, or intrude upon the worker's lawful rights and interests.<sup>137</sup>

In any case, either party must give one month's advance notice to terminate the contract, and the enterprise must report to its department-in-

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132. *Id.*

133. *Id.* art. 13.

134. According to the Dismissal Regulations, an enterprise can dismiss a staff or worker in these situations after education or administrative punishment prove to be ineffective: (1) serious violation of labor discipline, which affects the order of production and work; (2) violation of operating rules, damaging facilities or equipment, or wasting raw materials and energy, which results in economic losses; (3) poor service manner, frequent arguments with customers, or deeds injuring the interests of consumers; (4) reluctance to being transferred in the normal course of business; (5) corruption, theft, gambling, jobbery, or fraud which does not amount to a crime; (6) making trouble without grounds or fighting, causing a serious disruption of social order; and (7) other serious mistakes. Dismissal Regulations, *supra* note 101, art. 2.

135. Implementation Regulations, *supra* note 101, art. 12.

136. *Id.* art. 14.

137. *Id.* art. 15.

charge and the local labor-administration department for record.<sup>138</sup> If the breaching party has caused the other party to incur economic losses, it should compensate the latter for the losses, depending on the consequences and extent of responsibility.<sup>139</sup> When an enterprise wants to terminate an employment contract, it should solicit the opinion of the trade union.<sup>140</sup> If a dismissed worker disagrees over the dismissal decision, he/she can appeal to local labor-dispute arbitration committee within fifteen days of the receipt of the dismissal certificate.<sup>141</sup> If the arbitration decision is not acceptable, the dispute can be brought to the local people's court.<sup>142</sup> Therefore, the preceding provisions not only set forth the conditions under which termination of an employment contract is permissible but also allow a staff or worker to refute the dismissal decision.

(f) Unemployment Insurance

A contract worker who is waiting for employment [unemployed] can receive unemployment relief and a medical allowance in accordance with governmental regulations.<sup>143</sup> The Provisional Regulations on Waiting-for-Employment [Unemployment] Insurance for Staff and Workers in State-Owned Enterprise apply to (1) staff and workers in bankrupt enterprises, (2) staff and workers laid off in enterprises undergoing reorganization pending bankruptcy, (3) workers whose contracts have expired and been terminated, and (4) dismissed staff and workers.<sup>144</sup> In addition, the administration of the unemployment insurance fund is done by the labor-service company under the local labor-administration department,<sup>145</sup> and the sources of the unemployment insurance fund consist of 1 percent of the total standard wages of all staff and workers, interest earned therein, and subsidies of local financial authorities.<sup>146</sup>

Based on the average standard wages of the staff or worker during the two years prior to his/her departure, the monthly payment of unemployment assistance shall be given as follows: (1) a staff or worker of a bankrupt enterprise or an enterprise undergoing reorganization will receive a

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138. *Id.* art. 16.

139. *Id.*

140. *Id.* art. 17; Dismissal Regulations, *supra* note 101, art. 3.

141. Dismissal Regulations, *supra* note 101, art. 5.

142. *Id.*

143. Implementation Regulations, *supra* note 101, art. 25.

144. Unemployment Insurance Regulations, *supra* note 101, art. 2. See *infra* notes 322-25 and accompanying text for subsequent changes in unemployment insurance.

145. *Id.* art. 12. The duties of the labor-service company include registration of unemployed staff and workers, management and disbursement of the unemployment insurance fund, job counseling and placement, provision of job retraining, etc. *Id.*

146. *Id.* art. 3.

maximum of twenty-four months if his/her seniority is five years or more (60 to 75 percent of standard wages from the first to twelfth month and 50 percent of standard wages from the thirteen to twenty-fourth month), and a maximum of twelve months at the rate of 60 to 75 percent if his/her seniority is less than five years; (2) a worker whose labor contract has expired or been terminated may obtain unemployment relief in accordance with (1), starting from the month following termination of his/her livelihood allowance; and (3) a dismissed worker may receive unemployment relief as provided in (1).<sup>147</sup>

However, a staff or worker may not obtain unemployment relief if (1) he/she has received the maximum benefits under article 7, (2) he/she is reemployed (including self-employment), (3) he/she turns down two introductions to a job without proper reasons, and (4) he/she receives labor reeducation or serves a criminal sentence during the unemployment period.<sup>148</sup> Therefore, these provisions enable workers in a mobile labor market to receive financial assistance once they become unemployed.

#### (g) Unionization and Worker Participation

As discussed above, the 1950 Trade Union Law empowers staff and workers to form grassroots unions, whose functions are more welfare-oriented and educative rather than advocative. 1982, China revised its Constitution and deleted the provision on freedom to strike. The deletion of the right to strike has been attributed to the Chinese leaders' reaction to the Polish Solidarity movement.<sup>149</sup> It has also been regarded as another step by the State to strengthen labor discipline.<sup>150</sup> Thus, in theory, workers in China have no right to strike. However, according to a spokesman for the ACFTU, workers may temporarily evacuate the work site if the working conditions endanger their lives or even hold short-term strikes after they

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147. *Id.* art. 7.

148. *Id.* art. 9.

149. Bruce L. Otley & John Bruce Lewis, *Labor Law in the SEZ's: Moving Toward Western Norms*, E. ASIAN EXECUTIVE REP., Feb. 1983, at 11-12. Otley and Lewis report that this view is supported by article 15 of the 1982 Constitution, which has been newly added and states that "disturbances of the orderly functioning of the socialist economy or disruption of the state economic plan by any organization or individual is prohibited." *Id.* (citing XIANFA (1982)).

150. *Id.* Otley and Lewis cite article 28 of the 1982 Constitution (the government will punish actions that "disrupt the socialist economy") and article 52 (citizens must "protect public property, observe labor discipline and public order, and respect social ethics") to support their view.

have exhausted all normal means of presenting their reasonable demands.<sup>151</sup> In addition, the 1982 Constitution gives workers the right to participate in the democratic management of state-owned enterprises through the establishment of staff- worker congresses.<sup>152</sup>

#### (h) Dispute Resolution

When a dispute arises out of the performance of a labor contract, the parties may request mediation from the enterprise's labor-dispute mediation committee or directly apply for arbitration from the local labor-dispute arbitration committee.<sup>153</sup> If the mediation committee agrees to accept the case, it must resolve the dispute within thirty days of either the oral or written request for mediation.<sup>154</sup> If the dispute is not resolved within thirty days, the mediation effort will be considered unsuccessful.<sup>155</sup>

If the dispute arises out of the performance of a labor contract, the parties should request arbitration in writing within sixty days of the occurrence of the dispute or thirty days of the date on which mediation failed.<sup>156</sup> However, if the dispute arises out of expulsion, removal of name, or dismissal for violation of discipline, the parties should request arbitration in writing within fifteen days of the announcement of the enterprise's decision.<sup>157</sup> In addition, the arbitration committee shall decide whether or not to accept the case within seven days of its receipt of the written request for arbitration and provide explanation if it decides not to take the case.<sup>158</sup>

If a party does not appear in the arbitration proceeding without proper justification after it has been notified twice of the time and place of the arbitration, the arbitration committee may proceed to arbitrate in its absence.<sup>159</sup> Particularly, if the arbitration committee agrees to arbitrate, it should conclude the case within sixty days.<sup>160</sup> If one or both parties do not accept the arbitral award, the dispute can be brought to the people's court

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151. Horsley, *supra* note 28, at 23. Zheng also states that the Interim Regulations on Union Inspectors for the Supervision of Labor Protection permit union inspectors to direct workers to refuse to work if working conditions endanger their lives or health. Zheng, *supra* note 26, at 399-400.

152. XIANFA (1982), art. 16, *reprinted and translated in* 1 CHINA LAWS FOR FOREIGN BUSINESS—BUSINESS REGULATIONS [hereinafter 1 CHINA LAWS], ¶ 4-500 (CCH Australia 1993). See also text accompanying notes 37-41.

153. Dispute Regulations, *supra* note 101, art. 5.

154. *Id.* art. 15.

155. *Id.*

156. *Id.* art. 16.

157. *Id.*

158. *Id.* art. 17.

159. *Id.* art. 21.

160. *Id.* art. 24.



within fifteen days of its receipt.<sup>161</sup> Likewise, if one party does not comply with the arbitration decision or sue, the other party may apply to the court to have the arbitration award enforced.<sup>162</sup>

Therefore, to resolve a labor dispute, the parties must first go through administrative channels before they can have it adjudicated in court. In practice, labor disputes have been resolved mainly through mediation and arbitration channels, while lawsuit is the last resort.<sup>163</sup>

### (i) Discussion

The contract employment system is designed to reduce the problems generated by the practices of administrative assignment, lifetime tenure, and replacement-by-children. On one hand, the contract employment system allows workers to move to those sectors where demand for their labor exists, thus eliminating the burden of enterprises to support surplus workers.<sup>164</sup> Moreover, since workers are permitted to change jobs, the contract employment system facilitates propagation of technical knowledge, decreases over-specialization, and reacts to changes in individual attitudes towards work.<sup>165</sup>

On the other hand, it is estimated that about thirty years must pass before all workers in state-owned enterprises are covered by the contract employment system.<sup>166</sup> In addition, government and Party officials in rural provinces tend to be more conservative about reform and to resist change in the power structure.<sup>167</sup> Enterprises may also require workers who have extensive training or technical skills to sign very long-term contracts, because they will not invest in training workers without knowing that the training will benefit them.<sup>168</sup> Consequently, the objective of developing a full-scale labor market will be frustrated.

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161. *Id.* art. 25.

162. *Id.*

163. In 1990, as incomplete statistics reveal, labor-dispute mediation committees and local labor-dispute arbitration committees throughout the country handled 18,573 cases and settled 16,813 cases, of which 15,881 were settled through mediation with a success rate of 94 percent. *White Paper*, *supra* note 1. Nine hundred and thirty-two cases were settled through arbitration, whereas 218 cases were settled through lawsuit after arbitration failed. *Id.* Moreover, an earlier survey showed that most arbitration cases involved direct or indirect dismissals, and workers won most cases reaching the dispute resolution process because enterprises failed to comply with procedural requirements. JOSEPHS, *supra* note 42, at 116-18.

164. JOSEPHS, *supra* note 42, at 10.

165. *Id.*

166. Lewis & Flesher, *supra* note 26, at 11.

167. *Id.* at 12.

168. *Id.* at 11.

In addition, the contract employment system has generated other problems. First of all, nepotism and avoidance of dirty, difficult, or dangerous jobs have resulted.<sup>169</sup> Job insecurity, in particular, has caused some workers to doubt about the desirability of economic reforms.<sup>170</sup> Hence, there must be a concomitant change of attitude among workers so that they will be able to handle the fear and discomfort associated with the new system.

Along with those who avoid "three Ds" jobs, workers who have been dismissed as a result of labor rationalization will aggravate the problem of unemployment.<sup>171</sup> Since the problem of redundant workers can also be attributed to the renovation of existing manufacturing facilities, the contract employment system alone will not suffice. Thus, the government must find ways to provide retraining and to place displaced workers.

Furthermore, contract workers have received discriminatory treatment in the areas of membership to unions and staff-and-worker congresses, opportunity to receive further education, pay raises, job assignments, housing, medical treatment, sick leave benefits, and financial entitlements.<sup>172</sup> Therefore, this situation will also hinder the implementation of the contract employment system.

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169. *Workers Set to Lose Their "Iron Rice Bowls,"* The Xinhua General Overseas News Service, July 29, 1991, available in LEXIS, World Library, ALLWLD File.

170. Nicholas D. Kristof, *Capitalist-style Layoffs Ignite Sabotage and Strikes in China*, N.Y. TIMES, June 11, 1992, at A1. This article reports the following: Workers in several cities had attacked factory directors who tried to introduce market-oriented changes, and there were increasing reports of strikes and acts of sabotage. For example, Huang Chuanying, a bank director, began dismissing bank employees considered incompetent and unproductive. Cao Weihua, a dismissed employee, firebombed Huang's house and severely wounded Huang, his wife, and their two children. Cao was sentenced to death. In addition, a laid-off driver at a toothpaste factory drove his truck over his boss. The central government suggested that the manager be hailed as a "martyr" for reform, but the workers refused to nominate the manager for the honor. These incidents suggested that opposition to fundamental change came not only from octogenarian communist hard-liners but also from ordinary blue-collar workers, who had, in the past, taken initiative and pushed liberalization more quickly than the Politburo intended. The article also states that most workers seemed not to be as antagonistic to change as worried by it, and that some people preferred economic liberalization. *Id.*

171. In 1988, the official figure for unemployment was 3 million. Guy Dinmore, *Labor Disputes Simmer under China's Austerity Program*, THE REUTER LIB. REP., Apr. 12, 1989, available in LEXIS, World Library, ALLWLD File. In 1993, China's urban unemployment rate was 2.6 percent, and the total number of jobless people in cities was to amount to about 5 million in 1994. Chris Yeung, *Laws Planned to Curb Layoffs*, SOUTH CHINA MORNING POST, Apr. 27, 1994, § News, at 10, available in LEXIS, World Library, ALLWLD File. To solve the problem of unemployment, the government has tried to encourage private enterprises and establish rural nonagricultural enterprises. Vause & Vrionis, *supra* note 45, at 450 n.12.

172. Vause & Vrionis, *supra* note 45, at 464, n.79.

Actually, the reduction of worker lethargy depends on the success of wage reforms. During the 1980's, China started a number of programs to reform its eight-grade wage system. In state institutions and public organizations, the graded wage system has been abolished and replaced by the structural wage system in which wages are to be related to specific work posts.<sup>173</sup> In state-owned enterprises, wage reforms include the method of linking the total payroll with the economic results of the enterprise and simplifying and unifying the wage scales of staff and workers.<sup>174</sup> For example, the method of linking the total payroll of the enterprise with either the profit or taxes paid to the State has been used, and in 1985, reference wage scales were introduced, which simplified and merged the 300 or so complicated wages scales into five wages scales for three industries in one locality.<sup>175</sup> However, it takes time for the wage reforms to be fully implemented, and an effective performance appraisal system is also indispensable to their success.

Other than that, if the trade union in China is not advocative, the protection of workers will depend more on the institution of staff-and-worker congress. In some enterprises, staff-and-worker congresses include members of the Party committee, factory directors, engineers, and technicians, even though the majority of the delegates must be workers.<sup>176</sup> It has been reported that (1) a few congresses have exercised decision-making authority over enterprise policies pertaining to such areas as production, budgets, labor safety, formulation and revision of rules, and distribution of funds; (2) factory directors in many enterprises are required to submit work reports to the congresses at regular intervals; and (3) many congresses have the power to elect workshop directors, section chiefs, and other grassroots leaders.<sup>177</sup> In several factories, congresses also have the power to elect directors, subject to the approval by the government.<sup>178</sup>

Nonetheless, staff-and-worker congresses have also met opposition. Even though congresses can elect factory directors, they are still subject to the control of the Party secretaries, who are appointed to factories by higher

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173. *Wage Reform*, *supra* note 50.

174. *Id.*

175. *Id.*

176. Lewis & Ottley, *supra* note 13, at 1182. A staff-and-worker congress should include workers, technicians, managerial personnel, and leading cadres, and one-fifth of the representatives should be leading cadres. Quanmin Souyouzhi Gongye Qiye Zhigong Daibiao Dahui Tiaoli [Provisions on Staff-and-Worker Congresses in State-Owned Enterprises], Sept. 15, 1986, art. 12, *reprinted in* LAODONG SHOUCHE, *supra* note 22, at 59.

177. Lewis & Ottley, *supra* note 13, at 1183.

178. *Id.* Horsley also reports that by late 1983, over 200,000 state-owned enterprises had established staff-and-worker congresses, and workers in over 15,000 enterprises and mines had elected their directors. Horsley, *supra* note 28, at 22-23. It is not clear to what kind of director Horsley refers.

Party officials.<sup>179</sup> Congresses had been established in 80 percent of the factories in Shanghai and Beijing, but they were "still far from being an authoritative organ for the workers to become the masters of an enterprise and run it."<sup>180</sup> In particular, the scope of the functions and powers of staff-and-worker congresses is limited and varies among factories.<sup>181</sup> Hence, if the staff-and-worker congress is designed to control the increased autonomy of factory managers and to resolve labor dispute before it becoming a full-blown conflict, its effectiveness is yet to be seen.

Last of all, housing shortage is a very serious problem in China and can reduce labor mobility. As one article said, "[i]t is impossible to overstate the significance of the housing shortage and allocation system as an impediment to the development of a more efficient labor system."<sup>182</sup> Since labor immobility due to housing shortage will frustrate the current efforts of labor reform, the government must also find ways to increase the availability of housing.

In any event, the government appears to have great faith in the contract employment system and plans to have it fully implemented throughout the country.<sup>183</sup> One report states that there were about 35 million contract workers in state-owned enterprises in 1994.<sup>184</sup>

## 2. *Equity Joint Ventures and Wholly Foreign-Owned Enterprises*

In order to attract foreign capital and technology, China promulgated the Law of People's Republic of China on Sino-Foreign Joint Equity Enterprises (Joint Venture Law) in 1979.<sup>185</sup> From 1980 to 1990, the

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179. Fox Butterfield, *China Is Testing Worker Voting in Its Factories*, N.Y. TIMES, Oct. 12, 1980, §1, pt. 1, at 11.

180. *Id.* (quoting WORKERS' DAILY).

181. Lewis & Ouley, *supra* note 13, at 1184. In the Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People, Apr. 13, 1988, *reprinted and translated in* 2 CHINA LAWS, *supra* note 3, ¶ 13-534, art. 52, the functions and powers of staff-and-worker congresses are delineated.

182. Becker & Gao, *supra* note 30, at 419. See also JOSEPHS, *supra* note 42, at 143. Josephs states that enterprises usually allocate housing based on seniority, that a contract worker who changes jobs will not be able to accumulate the necessary seniority for housing, and that housing available in major cities is beyond the means of the average worker.

183. As discussed later in this article, the newly promulgated Labor Law, *supra* note 3, indicates the government's intent to use the contract employment system throughout the nation.

184. *China's Parliament Passes Copyright Rules*, Agence France Presse, July 5, 1994, p. Financial (quoting Xinhua News Agency), available in LEXIS, World Library, ALLWLD File.

185. The Law of the People's Republic of China on Sino-Foreign Joint Equity Enterprises [hereinafter Joint Venture Law], July 1, 1979 (amended 1990), *reprinted and translated in* 1 CHINA LAWS, *supra* note 152, ¶ 6-500. The Law of the People's Republic

government issued a series of regulations to provide foreign investors with some guidelines on labor relations in equity joint ventures or wholly foreign-owned enterprises.<sup>186</sup> The following summary should provide a framework to understand labor relations in foreign-funded enterprises in China.

(a) General Provisions

The Joint Venture Law states that (1) the board of directors is empowered to discuss and act on important issues, such as labor and wage plans as well as the appointment or hiring of general managers, chief engineer, chief accountant, and auditor, and (2) provisions governing the employment and dismissal of employees of a joint venture shall be stipulated in the agreement concluded between the parties in accordance with the law.<sup>187</sup> To provide foreign-funded enterprises with more guidelines,

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of China on Sino-Foreign Cooperative Enterprises was also promulgated on Apr. 13, 1988, *reprinted and translated in* 1 CHINA LAWS, *supra* note 152, ¶ 6-100; articles 13 & 14 generally refer to employment conditions stipulated in labor contracts and the establishment of trade unions. *Id.*

186. Regulations of the People's Republic of China on Labor Management in Joint Ventures Using Chinese and Foreign Investment [hereinafter Labor Management Regulations], July 26, 1980, *reprinted and translated in* 1 CHINA LAWS, *supra* note 152, ¶ 6-520; Regulations for the Implementation of the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment [hereinafter Joint Venture Implementation Regulations], Sept. 20, 1983 (amended 1986), *reprinted and translated in* 1 CHINA LAWS, *supra* note 152, ¶ 6-550; Provisions for the Implementation of the Regulations on Labor Management in Joint Ventures Using Chinese and Foreign Investment [hereinafter Labor Management Implementation Provisions], Jan. 19, 1984, *reprinted and translated in* 1 CHINA LAWS, *supra* note 152, ¶ 6-522; Law of the People's Republic of China concerning Enterprises with Sole Foreign Investment [hereinafter Sole Foreign Investment Law], Apr. 12, 1986, 2 CHINA LAWS, *supra* note 3, ¶ 13-506; State Council Regulations concerning Encouragement of Foreign Investment [hereinafter Encouragement Regulations], Oct. 11, 1986, 2 CHINA LAWS, *supra* note 3, ¶ 13-509; Regulations on the Right of Autonomy of Foreign Investment Enterprises in the Hiring of Personnel and on Employees' Wages, Insurance, and Welfare Expenses [hereinafter Autonomy Regulations], Nov. 10, 1986, 2 CHINA LAWS, *supra* note 3, ¶ 12-590; Implementation of the Right of Autonomy of Foreign Investment Enterprises in Their Use of Personnel [hereinafter Autonomy Implementation], Apr. 25, 1988, 2 CHINA LAWS, *supra* note 3, ¶ 12-606; and the Detailed Rules for the Implementation of the Law of the People's Republic of China on Sole Foreign Investment Enterprises [hereinafter Rules for Sole Foreign Investment Enterprises], Dec. 12, 1990, *id.*, ¶ 13-507.

187. Joint Venture Law, *supra* note 185, art. 6. The labor plans of a joint venture, after being decided by the board of directors, must be filed with the department-in-charge of the joint venture and the local labor-and-personnel department. Labor Management Implementation Provisions, *supra* note 186, art. 1. The Encouragement Regulations also state that foreign-invested enterprises should report their recruiting, hiring, dismissal, or termination of staff and workers to the local labor-and-personnel department. Encouragement Regulations, *supra* note 186, art. 15.

subsequent laws and regulations state that matters concerning the terms and conditions of employment, including hiring, dismissal, resignation of staff and workers; tasks of production or work; wages, awards, and punishment; working time and vacation; labor insurance and welfare; labor protection; labor discipline; the duration of the contract; the conditions for modifying and terminating the contract; and the rights and obligations to be executed by both parties must be stipulated in labor contracts.<sup>188</sup>

In addition, joint ventures may conclude and sign collective labor contracts with the trade unions established therein or individual labor contracts with their staff or workers.<sup>189</sup> If a joint venture has no trade union, the labor contract may be concluded between the joint venture and the representatives of staff and workers.<sup>190</sup> The labor contract or its amendment, however, must be submitted to the labor-and-personnel department of the provincial, autonomous regional, or municipal government for approval.<sup>191</sup>

#### (b) Recruitment and Hiring

At the beginning, a joint venture recruiting new employees could select them only within the areas stipulated by the labor-and-personnel department.<sup>192</sup> However, it was allowed to hire outside its locality engineering, technical, operations, and management employees who were not available in its area, subject to the approvals of the labor-and-personnel department of the provincial, autonomous regional, or municipal government and of the relevant district.<sup>193</sup> Subsequently, a foreign-invested enterprise may recruit staff and workers outside its locality and no longer needs to obtain the approval of the labor-and-personnel department at the provincial level, even though the labor-and-personnel department of the relevant district shall organize, coordinate, and serve.<sup>194</sup> In any event, selection of

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188. Labor Management Regulations, *supra* note 186, art. 2; Labor Management Implementation Provisions, *supra* note 186, art. 5; Sole Foreign Investment Law, *supra* note 186, art. 12; Rules for Sole Foreign Investment Enterprises, *supra* note 186, art. 67.

189. Labor Management Regulations, *supra* note 186, art. 2; Labor Management Implementation Provisions, *supra* note 186, art. 5.

190. Labor Management Implementation Provisions, *supra* note 186, art. 5.

191. Labor Management Regulations, *supra* note 186, art. 2 (labor contract); Labor Management Implementation Provisions, *supra* note 186, art. 5 (labor contract and its amendment). "Municipality" refers to a city which is directly under the control of the central government. The provincial, autonomous regional, and municipal labor-and-personnel department can also delegate its approval to the labor-and-personnel department above the county level. Labor Management Implementation Provisions, *supra* note 186, art. 5.

192. Labor Management Implementation Provisions, *supra* note 186, art. 2.

193. *Id.* art. 3; Autonomy Regulations, *supra* note 186, art. 1(I).

194. Autonomy Implementation, *supra* note 186, arts. 1 & 3.

prospective employees should be based on examination of qualification,<sup>195</sup> and a probation period can be set.<sup>196</sup>

Perhaps because foreign investors complained of having difficulties in recruiting workers of their choice and in raising productivity,<sup>197</sup> subsequent regulations provide that the units to which operations and management employees, engineering and technical personnel, and workers belong should give active support, permit transfer, and not use unreasonable tactics such as collection of fees or withdrawal of housing to create restrictions.<sup>198</sup> If the original unit unreasonably obstructs the transfer, the staff or worker who wants to transfer to a foreign-funded enterprise may resign, and his/her years of service may be consecutively calculated.<sup>199</sup> If a dispute arises, the parties may apply to the local labor-dispute arbitration committee or the personnel-exchange service agency authorized by the local government for arbitration.<sup>200</sup> Most of all, when circumstances warrant, the local labor-and-personnel department may directly handle the transfer.<sup>201</sup> Therefore, these provisions indicate that foreign investors are getting more governmental assistance in their recruitment efforts. Apart from that, high-ranking managerial personnel appointed by the Chinese party to a foreign-invested enterprise shall be people capable of grasping policies, familiar with technology, equipped with management ability, courageous to develop, and able to cooperate and work together with foreign investors.<sup>202</sup> In fact, managers and directors should not be transferred during their term of office without authorization.<sup>203</sup> If a transfer of managerial personnel is necessary, the board of directors must give its approval.<sup>204</sup> In case of a director, the unit which assigns the Chinese director shall seek the views of both the enterprise's reviewing-and-approving organ and the other parties to the joint venture.<sup>205</sup> These provisions appear to ensure that the hiring of managerial

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195. Labor Management Regulations, *supra* note 186, art. 3.

196. A joint venture may set a probationary period for those whom it has directly recruited or who are recommended by its department-in-charge or the labor-and-personnel department. After the probationary period, the joint venture officially employ those who qualify and return those who failed. If the rejected person is a permanent staff member or worker, he/she shall be reinstated by the original unit. Labor Management Implementation Provisions, *supra* note 186, art. 3.

197. Lewis & Flesher, *supra* note 26, at 12.

198. Encouragement Regulations, *supra* note 186, art. 15; Autonomy Regulations, *supra* note 186, art. 1(ii); Autonomy Implementation, *supra* note 186, art. 2.

199. Autonomy Implementation, *supra* note 186, art. 2.

200. *Id.*

201. *Id.*

202. Autonomy Regulations, *supra* note 186, art. 1(iii).

203. *Id.*; Autonomy Implementation, *supra* note 186, art. 6.

204. Autonomy Regulations, *supra* note 186, art. 1(iii).

205. Autonomy Implementation, *supra* note 186, art. 6.

personnel will be based on qualifications rather than personal connections. In addition, since talent-raiding has been growing in China<sup>206</sup> and the continuity of management will lead to greater efficiency, these provisions seem to be enacted for the purpose of protecting enterprises from losing valuable employees.

Last of all, foreign-funded enterprises are required to enhance the occupational and technical training of their employees and to establish an assessment (examination) system so that the production and management skills of their employees can match the production and development requirements of the enterprises.<sup>207</sup> Therefore, training programs would be an important component in the personnel management of foreign-funded enterprises.

In sum, foreign-funded enterprises may directly recruit their staff and workers, though once geographically restricted, outside their localities. Moreover, joint ventures should select their prospective employees through examination and may establish a probationary period before offering employment. In addition, the government has tried to assist foreign enterprises in recruiting and maintaining competent personnel by providing means to facilitate transfer and prevent talent-raiding. Finally, the provisions on training and acquisition of skills reflect the government's policy of promoting management and technical expertise in the Chinese workforce.

### (c) Remuneration and Benefits

At the outset, the wages of staff and workers of a joint venture were to be set at 120 to 150 percent of the "real wages" of staff and workers of state-owned enterprises of the same trade in the locality.<sup>208</sup> The "real wages" means the average wages of staff and workers in state-owned enterprises of the same trade in the locality with similar production capacity and technical conditions, and the specific amount is to be determined by the local labor-and personnel department, finance department, and the

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206. The demand for local managers far exceeds supply, with joint ventures often raiding one another for managerial talent. *12.00 Labor* [hereinafter *12.00 Labor*], BUS. INT'L INVESTING LICENSING & TRADING, Feb. 1, 1993, available in LEXIS, World Library, ALLWLD File.

207. Joint Venture Implementation Regulations, *supra* note 186, art. 92; Rules for Sole Foreign Investment Enterprises, *supra* note 186, art. 68. See also Labor Management Implementation Provisions, *supra* note 186, art. 6. The Labor Management Implementation Provisions also state that joint ventures shall provide training for new employees, formally employ those who have passed examinations, and either return those who have failed or extend their training period. Labor Management Implementation Provisions, *supra* note 186, art. 2.

208. Labor Management Regulations, *supra* note 186, art. 8.



department-in-charge of the enterprise.<sup>209</sup> In addition, wage increases are to be determined by the board of directors in accordance with the joint-venture contract and production and operations conditions; hence, joint ventures do not have to synchronize their wage increases with those of state-owned enterprises.<sup>210</sup>

Several years later, the wage level of staff and workers in foreign-funded enterprises is to be determined by the board of directors and cannot be less than 120 percent of the average wages of employees of similar state-owned enterprises of the same industry in the locality.<sup>211</sup> Moreover, the wages will be adjusted gradually in accordance with the economic performance of the enterprise.<sup>212</sup> In other words, if economic performance is good, wages may be increased significantly; if economic performance is poor, they may be slightly increased or not increased at all.<sup>213</sup> Nonetheless, wage standards, the form of wages, rewards and subsidies of staff and workers, and the salaries of high-ranking officials in joint ventures are to be determined by the board of directors,<sup>214</sup> and the wage-and-bonus system must adhere to the principles of "to each according to his work" and "more pay for more work."<sup>215</sup>

Other than wages, a joint venture must pay for its workers' labor insurance, medical expenses, welfare benefits, and the amount which the government subsidizes for housing, basic living necessities, culture, education, and hygiene and health of workers, in accordance with the standards existing in state-owned enterprises.<sup>216</sup> The amount of the aforementioned payments should be checked and determined by the labor-and-personnel department of the province, municipality, or autonomous region; finance department; and other relevant departments.<sup>217</sup> In fact, it must be adjusted correspondingly to any changes of labor insurance, welfare

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209. Labor Management Implementation Provisions, *supra* note 186, art. 12.

210. *Id.*

211. Autonomy Regulations, *supra* note 186, art. 2(I).

212. *Id.*

213. *Id.*

214. Labor Management Regulations, *supra* note 186, art. 9; Joint Venture Implementation Regulations, *supra* note 186, art. 94.

215. Joint Venture Implementation Regulations, *supra* note 186, art. 93.

216. Labor Management Regulations, *supra* note 186, art. 11; Labor Management Implementation Provisions, *supra* note 186, art. 13. The Labor Management Implementation Provisions state that the joint venture may request a variance. Labor Management Implementation Provisions, *supra* note 186, art. 14. The Autonomy Regulations also state that foreign-funded enterprise will disburse a housing subsidy in accordance with requirements of local governments to be used for construction and purchase of housing for staff and workers. Autonomy Regulations, *supra* note 186, art. 2(iii).

217. Labor Management Implementation Provisions, *supra* note 186, art. 13.

benefits, and government subsidies in state-owned enterprises.<sup>218</sup> Along with that, a foreign-invested enterprise will disburse old-age pension and unemployment insurance funds in accordance with the requirements of local governments.<sup>219</sup> Nevertheless, export and technologically advanced foreign enterprises are exempt from paying state subsidies, except labor insurance, welfare costs, and housing subsidies.<sup>220</sup>

Last of all, joint ventures are required to give compensation to staff and workers who are dismissed within the labor contract period or those who are dismissed upon the expiration of the labor contract.<sup>221</sup> A dismissed staff and worker will receive one month's average wages for each year of service.<sup>222</sup> For more than ten years of service, the dismissed staff and worker shall receive one-and-a-half months' average wages, starting from the eleventh year.<sup>223</sup> For a staff and workers who has resigned, the joint venture does not need to grant compensation.<sup>224</sup>

As a result, the wages of the staff and workers in a foreign-funded enterprise are higher than those of their counterparts in a state-owned enterprise. In theory, pay raises are tied to the economic performance of an enterprise. Moreover, although a joint venture may pay subsidies and bonuses which are to be determined by its board of directors, it must pay for labor insurance, medical expenses, welfare benefits, state subsidies, old-age pensions, and unemployment insurance which are to be determined by the government. Nonetheless, to promote export and attract advanced technology, the government requires export-oriented and technologically advanced enterprises to pay only labor insurance, welfare costs, and housing subsidies. In cases of dismissal, joint ventures are required to make severance pay.

#### (d) Discipline

A joint venture may, according to the severity of the case, criticize, educate, or impose administrative punishment on its staff and workers whose violations of labor discipline and its rules and regulations have engendered "certain consequences."<sup>225</sup> In addition, a joint venture may impose a lump-

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218. *Id.*

219. Autonomy Regulations, *supra* note 186, art. 2(ii).

220. Encouragement Regulations, *supra* note 186, art. 3. This amount of subsidies generally equals to 15 percent of the total wages. Lewis and Flesher, *supra* note 26, at 12.

221. Labor Management Implementation Provisions, *supra* note 186, art. 7.

222. *Id.*

223. *Id.*

224. *Id.* art. 8.

225. *Id.* art. 10. See also Encouragement Regulations, *supra* note 186, art. 15; Autonomy Regulations, *supra* note 186, art. 1(iv).

sum fine or economic compensation when necessary and may discharge serious offenders who refuse to change after repeated admonition.<sup>226</sup> If a joint venture takes disciplinary action, it must solicit the opinions of the trade union, listen to the defense of the staff or worker, and have the general and deputy-general manager decide.<sup>227</sup>

Compared with the Provisions on Reward and Punishment, these provisions are broad and vague, but they give joint ventures or wholly foreign-owned enterprises more flexibility in administering labor discipline. On the whole, these provisions emphasize oral reprimand and economic penalty.

(e) Termination

A joint venture may lay off surplus staff and workers resulting from changes in production and technical condition or those who remain unqualified after training and are unsuitable for other available positions.<sup>228</sup> A notice of dismissing a staff and worker based on redundancy or other reasons must be given to the trade union and the worker personally one month in advance and be filed with the department-in-charge of the joint venture and the local labor-and-personnel department.<sup>229</sup>

Although punishment by discharge is permissible, a joint venture was at first required to obtain the approval of its department-in-charge and the labor-administration department.<sup>230</sup> Subsequently, a foreign-funded enterprise was required only to report the dismissal to the local labor-and-personnel department.<sup>231</sup> However, a joint venture cannot dismiss staff and workers who are under medical treatment or recuperation due to work-related injury or occupational disease, who are receiving treatment in hospital for sickness or nonwork-related injury, or who are six months or more pregnant or on maternity leave.<sup>232</sup>

On the other hand, if an employee of a joint venture wants to leave for special circumstances and submits his/her resignation through the trade union one month in advance, the joint venture should give its consent if

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226. Labor Management Implementation Provisions, *supra* note 186, art. 10.

227. *Id.*

228. Labor Management Regulations, *supra* note 186, art. 4. The discharged staff and worker will receive other work assignment from the department-in-charge of the joint venture or the labor-administration department. *Id.* See also Encouragement Regulations, *supra* note 186, art. 15; Autonomy Regulations, *supra* note 186, art. 1 (iv).

229. Labor Management Implementation Provisions, *supra* note 186, art. 7.

230. Labor Management Regulations, *supra* note 186, art. 5.

231. Encouragement Regulations, *supra* note 186, art. 15. Indeed, the Autonomy Regulations do not mention any approval or reporting requirement. Autonomy Regulations, *supra* note 186, art. 1(iv).

232. Labor Management Implementation Provisions, *supra* note 186, art. 7.

proper reasons are given.<sup>233</sup> If the resignee has received training paid by the joint venture but has not worked for the number of years stipulated in the labor contract, he/she shall refund a certain amount of the training expenses as provided in the contract.<sup>234</sup>

Furthermore, no department, unit, or individual can intervene when a foreign-invested enterprise dismisses a staff or worker in accordance with the provisions of the contract or other relevant regulations.<sup>235</sup> If the dismissed staff or worker was borrowed from another unit, he or she shall be accepted back by the original unit.<sup>236</sup> However, if the dismissed staff or worker was recruited and employed by the foreign-funded enterprise, he or she shall register as waiting for employment with the labor-service company or personnel-exchange service agency of the local area prior to his/her employment.<sup>237</sup> In that case, the departments concerned may introduce employment which the dismissed worker may accept, or the dismissed worker can seek employment on his or her own.<sup>238</sup>

Consequently, a foreign-funded enterprise can discharge its staff or workers due to changes in production or technical condition or as a disciplinary measure. A staff or worker can obtain an earlier termination of the labor contract, but he/she is required to reimburse the enterprise for training expenses. This requirement probably is to ensure that enterprises will not hesitate to invest in future employees. Most of all, the government has removed the approval requirement for termination and attempted to eliminate barriers to legitimate dismissals.

#### (f) Occupational Safety and Health

Joint ventures are required to implement the relevant rules and regulations of the Chinese government on labor protection and to guarantee safe and "civilized" production.<sup>239</sup> The labor-administration department is authorized to supervise and inspect their compliance.<sup>240</sup> Joint ventures are also required to provide labor protection articles to staff and workers with reference to the standards used in state-owned enterprises.<sup>241</sup> In case of work-related injury or death, serious occupational poisoning, or injury from

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233. *Id.* art. 8.

234. *Id.*

235. Autonomy Implementation, *supra* note 186, art. 5.

236. *Id.*

237. *Id.*

238. *Id.*

239. Labor Management Regulations, *supra* note 186, art. 13. See also Labor Management Implementation Provisions, *supra* note 186, art. 15.

240. Labor Management Regulations, *supra* note 186, art. 13.

241. Labor Management Implementation Provisions, *supra* note 186, art. 16.

occupational accident, a joint venture shall report in time to its department-in-charge, the local labor-and-personnel department, and the trade union, as well as accept their investigation and handling of the incident.<sup>242</sup>

Basically, these provisions are broad guidelines and direct foreign-funded enterprises to follow specific labor safety and health regulations. In addition, the requirement of reporting any injury or death will enable the government to monitor industrial accidents and formulate necessary policies.

(g) Unionization and Worker Participation

Staff and workers of a joint venture *have the right* to form a primary trade union and carry on trade union activities.<sup>243</sup> In addition, since trade unions are representatives of the interests of staff and workers, they have the power to represent staff and workers to sign labor contracts with joint ventures and to supervise the execution of those contracts.<sup>244</sup>

The basic tasks of trade unions in joint ventures are as follows: (1) to protect the democratic rights and material interests of staff and workers in accordance with the law; (2) to assist joint ventures in arranging and rationally utilizing welfare and bonus funds; (3) to organize political, professional, scientific, technical studies as well as conduct literary, artistic, and sports activities; and (4) to educate staff and workers to observe labor discipline and strive to complete the economic tasks of the enterprise.<sup>245</sup>

Furthermore, trade union representatives have the right to attend as nonvoting members the meetings of the board of directors held to discuss important issues such as development plans, production and operational activities, and so forth, and to *reflect* the opinions and demands of the staff and workers.<sup>246</sup> In board meetings held to discuss and deliberate on employee awards and penalties, wage system, welfare benefits, labor protection and insurance, and so forth, trade union representatives can attend as nonvoting members, and the board should *listen* to the opinions of the trade union and obtain its cooperation.<sup>247</sup> In cases of termination and punishment, trade unions have the right to object on the basis of unreasonableness and send representatives to seek a negotiated settlement with the board of directors.<sup>248</sup>

At the same time, a joint venture shall actively support the work of the trade union and provide housing and facilities for the union's office work,

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242. *Id.* art. 17.

243. Joint Venture Implementation Regulations, *supra* note 186, art. 95.

244. *Id.* art. 96.

245. *Id.* art. 97.

246. *Id.* art. 98.

247. *Id.*

248. Labor Management Regulations, *supra* note 186, art. 6.

meetings, and welfare, cultural, and sports activities.<sup>249</sup> Each month a joint venture shall pay 2 percent of the total real wages of its staff and workers as a trade union's fund, which the union shall use in accordance with the relevant budget-management rules formulated by the ACFTU.<sup>250</sup>

Initially, staff and workers in a wholly foreign-owned enterprise *may* establish a trade union which may conduct union activities and protect their legitimate rights and interests.<sup>251</sup> However, subsequent rules state that the staff and workers of a wholly foreign-owned enterprise *have the right* to establish primary trade unions and conduct union activities.<sup>252</sup> The duties of such a union,<sup>253</sup> its representatives' attendance of board meetings,<sup>254</sup> and the required support from the enterprise<sup>255</sup> are similar to those of the trade union in a joint venture.

As a result, unions in foreign-funded enterprises are supposed to represent the interests of workers, but they are also required to assist in arranging and utilizing welfare and bonus funds, to organize activities, and to reduce the disruption of economic tasks. Moreover, even though union representatives can attend board meetings, they do not have power because the law requires enterprises to only *listen* to their opinions. Therefore, the provision of funds and facilities alone will not enable unions to fully represent the interests of workers.

#### (h) Dispute Resolution

A labor dispute occurring in a joint venture should first be resolved through consultation.<sup>256</sup> If consultation fails to settle the dispute, either party or both parties may ask for arbitration by the labor-administration department of the people's government of the province, autonomous region,

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249. Joint Venture Implementation Regulations, *supra* note 186, art. 99.

250. *Id.*

251. Sole Foreign Investment Law, *supra* note 186, art. 13.

252. Rules for Sole Foreign Investment Enterprises, *supra* note 186, art. 69.

253. *Id.* art. 71.

254. *Id.* The representatives of a trade union in a wholly foreign-owned enterprise can attend meetings of the enterprise held to discuss and decide on such issues as employee awards and penalties, wage system, welfare benefits, labor protection and insurance, and the enterprise shall *listen* to the union's opinions and obtain its cooperation. However, the trade union is not given the right to attend meetings held to discuss development plans as well as production and operational activities. *Id.*

255. A wholly foreign-funded enterprise shall actively support the trade union, provide necessary office space and facilities, and allocate funds for the union to use. Sole Foreign Investment Law, *supra* note 186, art. 13; Rules for Sole Foreign Investment Enterprises, *supra* note 186, art. 72.

256. Labor Management Regulations, *supra* note 186, art. 14.

or municipality where the joint venture is located.<sup>257</sup> Moreover, if one party disagrees to the arbitration outcome, it may file a suit in court.<sup>258</sup>

This pattern of dispute resolution is similar to that required in state-owned enterprises. As of now, information about the actual practice of resolving labor disputes in joint ventures and wholly foreign-owned enterprises is not readily available. However, it has been reported that labor disputes were ended by the intervention of local authorities as well as arbitration.<sup>259</sup>

### (i) Discussion

The foregoing discussion demonstrates that the government has been increasingly accommodative toward foreign investors. Compared with their state counterparts, foreign enterprises have been given much more latitude in deciding their personnel matters. To a certain extent, the sphere of "managerial prerogatives" has been preserved by the apparent absence of staff-and-worker congresses in foreign-invested enterprises, as well as the general and somewhat precatory language of the provisions regarding trade unions. Nevertheless, the reality facing foreign investors is less optimistic than it appears.

As of now, foreign-funded enterprises have encountered several problems, most of which are identical or similar to those in state-owned enterprises. First of all, it is difficult for foreign-owned enterprises to recruit skilled workers because the current Chinese workforce is characterized by an oversupply of unskilled labor and an undersupply of skilled and professional labor.<sup>260</sup> In addition, joint ventures that used the existing workforce of or delegated hiring responsibility to their Chinese partners experienced pressure to overstaff or take nonproductive employees due to

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257. *Id.*

258. *Id.*

259. In Tianjin, one strike had lasted for almost a month until the local labor bureau negotiated a settlement, and another strike was resolved after several weeks of arbitration. Andrew Quinn, *Strikes Hit Foreign Factories in China's Tianjin*, THE REUTER LIB. REP., Sept. 28, 1993, available in LEXIS, World Library, ALLWLD File. In Zhuhai, officials from the Zhuhai Municipal Government Labor Bureau and Zhuhai Administration Service Center for Foreign Investment would also mediate a labor dispute at the Japanese National Panasonic Motor Company. *Strikes at Japanese Firm in S. China Ends*, U.P.I., § Financial, Jan. 17, 1995, available in LEXIS, World Library, ALLWLD File.

260. JOSEPHS, *supra* note 42, at 19. It has been reported that although many companies have found recent university graduates who are talented and highly motivated, the shortage is acute in South China, which has far fewer institutions for higher education. *China—Investment Climate*, 1995 NATIONAL TRADE DATA BANK MARKET REPORTS, June 8, 1995 [hereinafter *China—Investment Climate*], available in LEXIS, World Library, ALLWLD File.

individuals' Party affiliations.<sup>261</sup> Along with that, since discipline was quite lax during the Cultural Revolution, management now faces a pool of workers, many of whom are not used to administration of labor discipline. Most of all, owing to a shortage of qualified persons for managerial and technical positions, foreign companies have to spend considerable amounts of money on training courses and seminars.<sup>262</sup>

In order to improve the situation, one provision states that the departments concerned should educate leaders of various levels as well as staff and workers to increase their understanding and ensure foreign-invested enterprises' right of autonomy in their use of personnel according to international practice.<sup>263</sup> To those who have violated the relevant regulations and the suggestions therein and caused aberration in the areas of recruitment and dismissal of employees, education and criticism would be given.<sup>264</sup> In serious cases, legal responsibility will be pursued in accordance with actual circumstances, or administrative penalties will be imposed.<sup>265</sup> Notwithstanding these provisions, it is difficult to predict how much deterrent effect they will have. Actually, one report states that innovative measures are made to circumvent the law so as to tackle unforeseen circumstances.<sup>266</sup>

On the other hand, many foreign-funded enterprises have not complied with the law. Despite the fact that the regulations require foreign-funded enterprises and workers or their unions to sign labor contracts, this mandate

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261. Vause & Vrionis, *supra* note 45, at 469.

262. Currently, it is difficult to find people with specialized technical skills or training in accounting, finance, marketing, advertising, and management. Most engineers are either not specialized or bound for employment in state-owned enterprises. Chinese universities have just begun to offer Western-style business classes. A Shanghai joint venture brought in experts from its overseas headquarters several times a year to train employees, which cost \$5,000 per employee per year, \$1,000 more than the average annual pay packet. On average, Beijing companies spent 3,000-5,000 renminbi on training regular staff in the first year of employment and at least about 10,000 renminbi on annual management training. Joint ventures trying to fill a gap in the Chinese manufacturing discover a corresponding gap in the educational preparation. 12.00 *Labor*, *supra* note 206.

263. Autonomy Implementation, *supra* note 186, art. 8.

264. *Id.*

265. *Id.*

266. Owing to complaints filed by state-owned enterprises that they were losing their best employees for not being able to offer wages comparable to those of foreign investment enterprises, the government issued internal directives that allowed the wage levels of Chinese employees to exceed 120 percent only when increased efficiency and profits allowed, and that wage levels exceeding 150 percent must be approved by the enterprises' departments-in-charge and the local labor bureaus. Christine Casati, *Satisfying Labor Laws—and Needs*, CHINA BUS. REV., July-Aug. 1991, at 16, 17-18.



has not been conscientiously observed.<sup>267</sup> In addition, many workers have been employed without going through any recruitment formalities.<sup>268</sup> This practice can lead to nepotism or corruptive actions. Similarly, it has been reported that foreign-funded enterprises have imposed innovative and/or strict disciplinary measures.<sup>269</sup> Even worse, many foreign-funded enterprises have not provided workers with safe working conditions.<sup>270</sup>

As of the end of 1993, only about 10,000 of China's more than 40,000 foreign-owned enterprises had any forms of union organization.<sup>271</sup> Indeed,

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267. One article states that more than 90 percent of Taiwan-funded enterprises and other wholly foreign-owned enterprises in Xiamen, 70 percent of all foreign-funded enterprises in Shantou, and 90 percent of all foreign-funded enterprises in Zhuhai have not signed employment contracts with their workers. "Massive Survey" Accuses Foreign Firms of "Wantonly" Abusing Workers [hereinafter *Massive Survey*], BBC Summary Of World Broadcasts, Mar. 2, 1994, Pt. 3: Asia-Pacific, available in LEXIS, World Library, ALLWLD File. Moreover, in Shandong, 70-80 percent of foreign firms have not signed labor contracts with their staff and workers. *Survey in Shandong Shows Workers Now Rejecting Foreign Firms as Employers*, BBC Summary of World Broadcasts, July 5, 1994, Pt. 3: Asia-Pacific, available in LEXIS, World Library, ALLWLD File.

268. *Massive Survey*, *supra* note 267. In 1992, 19.5 percent of the 280,000 staff and workers in the 2,055 sampled enterprises in Shenzhen were employed without going through any recruitment formalities. *Id.*

269. Workers at foreign-owned factories in Tianjin went on strike over low pay and bad conditions at least ten times in 1993. One strike began after the bosses at a South Korean factory forced slow workers to kneel before them and sometimes kicked their legs. Quinn, *supra* note 259 (citing BEIJING YOUTH NEWS). Other reports state that workers were beaten for producing poor-quality goods, fired for dozing on the job during long work hours, fined for chewing gum, and locked up in a doghouse for stealing. Sheila Tefft, *Growing Labor Unrest Roils Foreign Businesses in China*, CHRISTIAN SCIENCE MONITOR, Dec. 22, 1993, § World, at 1, available in LEXIS, World Library, ALLWLD File. In Shanghai, a joint venture forbade its employees to spend more than five minutes in the lavatory, and employees were allowed to use it only once a day. Graham Hutchings, *Unrest Flares as Workers Face Abuse in China*, DAILY TELEGRAPH, Apr. 1, 1994, § International, at 18 (citing OUTLOOK), available in LEXIS, World Library, ALLWLD File.

270. In Tianjin, 30 women workers of a foreign-funded enterprise lived in a room of 20 square meters in area, and they had no beds. All the windows in the workshop were sealed by welding, and the window glass was painted over. In addition, a poisoning case in a garment factory in Dalian causing 42 casualties was a result of poisonous gas being released by fabric supplied by an overseas customer for processing. Similarly, a survey conducted among five township/town clinics in Shenzhen indicates that they received a total of 11,679 in-patients during the survey period, 8.84 percent of whom were workers from foreign-owned enterprises and had been injured in industrial accidents. *Massive Survey*, *supra* note 267. In the first half of 1994, 127 foreign-employed workers were killed at work, and the Taiwanese owner of a cutlery factory refused to compensate 142 workers who had lost fingers and limbs. *Beijing Sets Minimum Wage for China's Workers*, EXTEL EXAMINER, Nov. 9, 1994, § Miscellaneous, available in LEXIS, World Library, ALLWLD File.

271. Geoffrey Crothall, *Strikes Prompt Call to Unionize; Call to Unionize Strike-Plagued Foreign Enterprises*, SOUTH CHINA MORNING POST, Feb. 22, 1994, § News, at 1, available in LEXIS, World Library, ALLWLD File. Cf. *Trade Unions Play Important Role*

many small, wholly foreign-owned enterprises in South China are not unionized,<sup>272</sup> even though workers in those enterprises are more susceptible to abuses and need the most protection. Almost all coastal provinces and cities have issued regulations to require the establishment of trade unions in joint ventures.<sup>273</sup> Since 1991, the ACFTU has started a recruitment drive to establish unions in joint ventures.<sup>274</sup> Based on the preceding discussion, however, it is doubtful whether the establishment of unions alone will lead to greater worker protection.

Last of all, although the law provides special protection for female workers,<sup>275</sup> they have been discriminated in effect because employers do not want to hire them due to expensive costs of maternity leave.<sup>276</sup> Consequently, there has been a divergence between theory and practice of labor relations in foreign-funded enterprises.

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in *Foreign-Funded Companies*, Xinhua News Agency, Apr. 28, 1995, available in LEXIS, World Library, ALLWLD File, which states that by the end of 1994, there had been 32,000 unions in foreign-funded enterprises, 40.6 percent of the enterprises.

272. *China—Foreign Labor Trends 1990-92* [hereinafter *Foreign Labor Trends*], NATIONAL TRADE DATA BANK MARKET REPORTS, Dec. 17, 1992, available in LEXIS, World Library, ALLWLD File.

273. *Id.* However, one reports states that some enterprises have agreements with localities not to establish unions in their factories. *China—Investment Climate*, *supra* note 260.

274. *Foreign Labor Trends*; Hiroyuki Akita, *Union Leader Says Cooperation Key; China Law Targets Workers at Foreign Companies*, THE NIKKEI WEEKLY, Feb. 6, 1995, §Asia & Pacific, at 18, available in LEXIS, World Library, ALLWLD File, which states that the grassroots section of the ACFTU wants to establish unions in 80 percent of all foreign firms in China by the end of 1995 (all foreign firms in coastal areas and 60 percent in the interior). On November 1, 1994, the ACFTU, the Organization Department of the Central Committee of the Communist Party, the State Economic and Trade Commission, the Ministry of Foreign Trade and Economic Cooperation, the Ministry of Labor, and the State Administration for Industry and Commerce jointly issued the Circular on Several Issues About Strengthening the Work Regarding Labor Union in Foreign-Funded Enterprises, which urged all localities to step up efforts to organize workers in foreign investment enterprises. *Labor; Circular Urges Establishment of Trade Unions in Foreign-Funded Firms*, BBC Summary of World Broadcasts, Nov. 5, 1994 (citing Xinhua News Agency), Pt. 3: Asia-Pacific, available in LEXIS, World Library, ALLWLD File.

275. See generally *Female Workers Protection Regulations*, *supra* note 23. In addition, China subsequently promulgated the Law on the Protection of Female Rights and Interests, which states that enterprises cannot discriminate women in cases of recruitment or promotion. *Zhonghua Renmin Gongheguo Funu Quanyi Baozhang Fa* [The Law of the People's Republic of China on the Protection of Female Rights and Interests] [hereinafter *Female Rights Law*], Apr. 3, 1992, arts. 22, 24, reprinted in FAGUI HUIBIAN 27 (1992).

276. *Foreign Labor Trends*, *supra* note 272. Discrimination against women occurs in both the foreign-sector and domestic-sector labor markets. In the domestic-sector labor market, women are the first to lose their jobs when layoffs are necessary. *Id.* This issue merits in-depth discussion but is beyond the scope of this article.

### 3. *Special Economic Zones*

Since 1978, China has established five Special Economic Zones (SEZs) to attract foreign capital, advanced technology, and modern management techniques.<sup>277</sup> The regulations for implementing the Joint Venture Law state that joint ventures established in the SEZs shall abide by the laws and regulations adopted by the National People's Congress, its Standing Committee, or the State Council.<sup>278</sup> As a result, the activities of SEZ enterprises are governed by national laws and SEZ regulations. In 1980, the National People's Congress adopted the Regulations on Special Economic Zones in Guangdong Province.<sup>279</sup> Subsequently, the Guangdong Provincial People's Congress enacted two sets of regulations.<sup>280</sup> Since three SEZs exist in the Guangdong Province, this article will summarize the salient provisions of the preceding regulations.<sup>281</sup>

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277. Otley & Lewis, *supra* note 149, at 11. In 1978, China established four SEZs—three in Guangdong Province (Shenzhen, Zhuhai, and Shantou) and one in Xiamen, Fujian Province. Later, the Hainan Island was added to the list, so Hainan is not mentioned in the article. The principal forms of business arrangement in the SEZs are compensation trade, cooperative production, and wholly foreign-owned enterprises. *Id.* n.1.

278. Joint Venture Implementation Regulations, *supra* note 186, art. 116. See also Labor Management Implementation Provisions, *supra* note 186, art. 18.

279. Regulations of the People's Republic of China on Special Economic Zones in Guangdong Province [hereinafter SEZ Regulations], Aug. 26, 1980, *reprinted and translated in* 1 CHINA LAWS FOR FOREIGN BUSINESS—SPECIAL ZONES AND CITIES, 1985-1994 [hereinafter 1 SPECIAL ZONES], ¶ 70-800 (CCH Australia 1995).

280. Regulations on Trade Unions in Enterprises in the Special Economic Zones in Guangdong Province [hereinafter Guangdong Trade Union Regulations], May 8, 1985, *reprinted and translated in* 1 SPECIAL ZONES, *supra* note 279, ¶ 70-855; Labor Regulations Governing the Special Economic Zones in Guangdong Province [hereinafter Labor Regulations on SEZs], Aug. 12, 1988, *reprinted and translated in* 1 SPECIAL ZONES, *supra* note 279, ¶ 70-885 (these regulations are applicable to foreign investment enterprises, art. 2). (On Nov. 17, 1981, the Interim Provisions for Labor and Wage Management in Enterprises in the Special Economic Zones in Guangdong Province, which were repealed by the 1988 Regulations, also dealt with labor relations in SEZ enterprises.)

281. Subsequently, Shenzhen promulgated the Provisional Regulations of the Shenzhen Special Economic Zone on Labor Management for Foreign Investment Enterprises, Aug. 1, 1987, *reprinted and translated in* 1 SPECIAL ZONES, *supra* 279, ¶ 73-544 and the Rules of the Shenzhen Special Economic Zone on Laborers, June 22, 1993, *reprinted and translated in* 1 SPECIAL ZONES, *supra* note 279, ¶ 73-541. Since this article focuses more on general regulations applicable to SEZ enterprises in Guangdong Province, these two provisional regulations will not be discussed. However, for purposes of comparison, this article will also refer to the Regulations on Labor Management in the Xiamen Special Economic Zone, July 14, 1984 [hereinafter Xiamen Regulations], *reprinted and translated in* 1 SPECIAL ZONES, *supra* note 279, ¶ 76-506.

First of all, employment relationship in the Guangdong SEZs is based on a labor contract.<sup>282</sup> Moreover, a labor-service company is to be established in each of the SEZs.<sup>283</sup> Basically, SEZ enterprises may recruit on their own in the locality, and if this does not meet their personnel needs, they can recruit from other places with the consent of a local labor bureau.<sup>284</sup>

In addition, the wage form, wage standards, and measures for wage distribution of staff and workers of SEZ enterprises are to be determined by the enterprises themselves, subject to a minimum wage set by local government.<sup>285</sup> However, enterprises must distribute wages at least once a month, and fines for wages in arrears are set at 1 percent, starting from the sixth day.<sup>286</sup> Maximum working hours of six days a week and eight hours a day are set forth, while overtime limits and compensation are also provided.<sup>287</sup> Like foreign-funded enterprises in other areas, SEZ enterprises are required to pay severance pay of one month's wages for each year of service.<sup>288</sup> Specifically, enterprises and workers must participate in labor insurance for medical, work injury, unemployment, and retirement.<sup>289</sup>

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282. Labor Regulations on SEZs, *supra* note 280, arts. 3 & 9. See also Xiamen Regulations, *supra* 281, art. 5.

283. SEZ Regulations, *supra* note 279, art. 19.

284. Labor Regulations on SEZs, *supra* note 280, art. 19. See also Xiamen Regulations, *supra* note 281, art. 4. The provisions of obtaining consent with the local labor bureau is inconsistent with the Autonomy Implementation, *supra* note 186, arts. 1 & 3. Since the activities of SEZ enterprises are governed by national laws and SEZ regulations, it is logical to conclude that SEZ enterprises should obtain consent.

285. Labor Regulations on SEZs, *supra* note 280, arts. 37-39. However, the basic amount of the total wages of state-owned enterprises, their adjustment proportions, and the standards for income distribution are to be determined by the administration department in charge of the enterprise. *Id.* art. 37.

286. Labor Regulations on SEZs, *supra* note 280, art. 40.

287. *Id.* arts. 30-33. Overtime work cannot exceed four hours after shift or 48 hours per month. *Id.* art. 31. Overtime pay is either 150 percent or 200 percent of a worker's average daily or hourly wages in that month. *Id.* art. 32. In addition, the Xiamen Regulations also require that overtime be not longer than 12 hours a week, extra pay not be lower than 150 percent of the wages of the workers, and extra pay for those who work on holidays be not lower than 200 percent of their wages. Xiamen Regulations, *supra* note 281, art. 11.

288. Labor Regulations on SEZs, *supra* note 280, art. 26. A worker who has worked less than one year is entitled to receive one month's wages, and a worker who has worked less than six months can receive a half month's wages. *Id.* See also Xiamen Regulations, *supra* note 281, art. 14 (one month's wages for every year of service, but one-and-a-half months' wages for the eleventh month and subsequent year).

289. Labor Regulations on SEZs, *supra* note 280, art. 52. The Xiamen Regulations state that enterprises shall contribute 25 percent of the total wages of Chinese workers to a social labor insurance fund every month. Xiamen Regulations, *supra* note 281, art. 8. In addition, Xiamen requires an employer to take out an employer liability policy to cover on-the-job injuries, disabilities, deaths, and occupational diseases of staff and workers. Xiamen Regulations, *supra* note 281, art. 10.

Based on the severity of the case, SEZ enterprises may discipline workers or discharge those who have not changed after education and administrative punishment.<sup>290</sup> If an enterprise terminates a labor contract, it should promptly notify the trade union and report to the local labor bureau.<sup>291</sup> On the other hand, employees of SEZ enterprises can submit their resignations for such reasons as jobs not allowing employees to utilize skills, personal insults, nonpayment of wages for two consecutive months, failure of the enterprise to perform the labor contract, adverse working conditions, etc.<sup>292</sup> Regarding dispute resolution, the same pattern of consultation/mediation, arbitration, and lawsuit is applicable to SEZ enterprises.<sup>293</sup>

Lastly, staff and workers of SEZ foreign-funded enterprises *may/have the right to* form trade unions and participate in unions.<sup>294</sup> In particular, a labor-capital consultative meeting system shall be set up in a sole foreign investment enterprise.<sup>295</sup> The tasks of trade unions in SEZs are similar to those of the trade union in a joint venture.<sup>296</sup> In case of dispute between an enterprise and a union, the parties can resolve the dispute first through mutual consultation, then by mediation, and finally in the people's court.<sup>297</sup>

As a result, the contents of the regulations in the SEZs are very similar to those applicable to foreign-funded enterprises in other areas of the country. On one hand, many SEZ enterprises have disregarded the law in instances identical to those of joint ventures and wholly foreign-owned

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290. Labor Regulations on SEZs, *supra* note 280, arts 50 & 24. See also Xiamen Regulations, *supra* note 281, art. 18 (no specific reference to education and administrative punishment).

291. Labor Regulations on SEZs, *supra* note 280, art. 13; Guangdong Trade Union Regulations, *supra* note 280, art. 14. See also Xiamen Regulations, *supra* note 281, art. 14 (notifying the worker, trade union, and labor-service company). However, in case of discharge for violating labor discipline, enterprises should inform the worker, trade union, and labor bureau in writing. *Id.* art. 18.

292. Labor Regulations on SEZs, *supra* note 280, art. 25. See also Xiamen Regulations, *supra* note 281, art. 15.

293. Labor Regulations on SEZs, *supra* note 280, arts. 58 & 59. See also Xiamen Regulations, *supra* note 281, art. 19.

294. Guangdong Trade Union Regulations, *supra* note 280, art. 4 ("may"); Labor Regulations on SEZ's, *supra* note 280, art. 57 ("have the right"). The Labor Regulations on SEZs were enacted later in time, but the Guangdong Trade Union Regulations are specific regulations. The Xiamen Regulations state that workers *have the right* to form grassroots trade unions. Xiamen Regulations, *supra* note 281, art. 13. As discussed later in this article, the Trade Union Law of 1992 gives workers in enterprises within Chinese territory the right to organize trade unions, so workers in SEZ enterprises should have the right to set up unions.

295. Guangdong Trade Union Regulations, *supra* note 280, art. 13.

296. *Id.* arts. 6-12. See also Xiamen Regulations, *supra* note 281, art. 13.

297. Guangdong Trade Union Regulations, *supra* note 280, art. 22.

enterprises outside the SEZs.<sup>298</sup> On the other hand, operating in a labor market with constraints similar to those of joint ventures, SEZ enterprises must tackle such problems as shortage of skilled labor, scarcity of managerial personnel, and labor discipline.

#### B. *From 1991 to Present*

After more than a decade of legislation, China has gained experience to evaluate the effectiveness and the scope of its earlier statutes. From 1991 to 1993, China promulgated a number of labor statutes and regulations which have applicability nationwide.<sup>299</sup> Of these statutes and regulations, the Trade Union Law of the People's Republic of China (Trade Union Law),<sup>300</sup> the Regulations on Waiting-for-Employment [Unemployment] Insurance for Staff and Workers in State-Owned Enterprises,<sup>301</sup> and the Regulations of the People's Republic of China on Labor-Dispute Handling in Enterprises<sup>302</sup> merit most attention. Their highlights are as follows:

298. See *supra* notes 267-68, 270.

299. E.g. Jinzhi Shiyong Tonggong Guiding [Regulations on Prohibiting the Use of Child Labor], Jan. 18, 1991, *reprinted in* FALU DAQUAN, *supra* note 23, at 1338; Qiye Zhigong Shangwang Shigu Baogao He Chuli Guiding [Regulations on Reporting and Handling of Incidents of Injury and Death in Enterprises], Feb. 22, 1991, *reprinted in* FALU DAQUAN, *supra* note 23, at 1344; Quanmin Suoyouzhi Zhaoyong Nongmin Hetongzhi Gongren de Guiding [Regulations on Hiring of Peasants as Contract Laborers by Enterprises Owned by the Whole People], July 25, 1991, *reprinted in* FALU DAQUAN, *supra* note 23, at 1327.

300. The Trade Union Law of the People's Republic of China [hereinafter Trade Union Law], Apr. 3, 1992, *reprinted and translated in* 2 CHINA LAWS, *supra* note 3, ¶ 12-501. To implement the Trade Union Law, regional authorities, such as Beijing, Guangdong Province, and Hainan promulgated trade union regulations, respectively. 1995 CHINA LEGAL DEVELOPMENTS BULLETIN, Vol. 1, No. 4, at 27. The Implementing Measures of Guangdong Province for the Trade Union Law of the People's Republic of China were promulgated on Sept. 15, 1994. Noteworthy points are as follows: (1) trade unions can negotiate with foreign investment enterprises and other private companies to establish positions for union professionals when the number of union members exceeds 200, (2) if enterprises want to dismiss workers who are the chairs or vice-chairs of unions, the trade union at a higher level must be notified, and (3) when enterprises delay or reduce payment of union dues, trade unions may file a complaint with the court. *Id.* at 27-28.

301. Guoyou Qiye Zhigong Daiye Baoxian Guiding [Regulations on Waiting-for-Employment [Unemployment] Insurance for Staff and Workers in State-Owned Enterprises] [hereinafter 1993 Unemployment Insurance Regulations], Apr. 12, 1993, *reprinted in* FAGUI HUIBIAN 1043 (1993).

302. Zhonghua Renmin Gongheguo Qiye Laodong Zhengyi Chuli Tiaoli [Regulations of the People's Republic of China on Labor-Dispute Handling in Enterprises] [hereinafter Labor-Dispute Handling Regulations], July 6, 1993, *reprinted in* FAGUI HUIBIAN 1054 (1993). An English translation is also provided in 2 CHINA LAWS, *supra* note 3, ¶ 12-618.

# 1. *Trade Union Law of 1992*

The basic provisions of the Trade Union Law of 1992 (Trade Union Law) are the same as those of the 1950 Trade Union Law. However, the following provisions are noteworthy:

Article 3 states that laborers doing physical and mental work in enterprises, institutions, and government organs within Chinese territory who earn their living primarily from wages *have the right to participate in and form unions*, irrespective of their nationality, race, gender, occupation, religious belief, or level of education.<sup>303</sup> In addition, trade unions of enterprises or institutions owned by the whole people and collectively owned shall organize its staff and workers to participate in democratic management and democratic supervision.<sup>304</sup> The staff-and-worker congress in an enterprise owned by the whole people is the primary organ through which staff and workers exercise their rights to democratic management, and the trade union committee is its working body responsible for conducting daily work and inspecting and supervising the implementation of the resolutions of the congress.<sup>305</sup> Hence, these provisions imply that staff-and-worker congresses are to be organized in state enterprises, but workers in foreign investment enterprises may be not able to participate in democratic management.

With respect to organization, trade unions at various levels shall be established in accordance with the principle of democratic centralism.<sup>306</sup> The establishment of a primary trade union, local various-level federation of trade unions, or a national or local industry-specific trade union must be reported to the trade union of the next highest level for approval.<sup>307</sup> In consequence, these provisions indicate that organized labor in China will be subject to close scrutiny because the formation of a union requires the approval of a union organization of a higher level, and the ACFTU, even though officially independent, must follow Party policies.

Moreover, state-owned or collectively owned enterprises, institutions, or government organs must pay two percent of their monthly total wages to trade unions as operating funds, whereas Sino-foreign equity joint ventures, Sino-foreign cooperative enterprises, or wholly foreign-owned enterprises shall allocate funds to their trade unions in accordance with relevant regulations.<sup>308</sup> Since the implementing regulations for the Joint Venture Law state that joint ventures are required to pay two percent of their total wages

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303. Trade Union Law, *supra* note 300, art. 3.

304. *Id.* art. 7.

305. *Id.* art. 30.

306. *Id.* art. 11.

307. *Id.* art. 13.

308. *Id.* art. 36.

as union funds,<sup>309</sup> the aforementioned provision suggests that foreign investors may be required to contribute different amounts as union funds, depending on their form of business.

Along with that, trade union committee members of a state-owned or a collectively owned enterprise, institution, or government organ who are released from regular work duties to act as full-time union personnel shall have their wages, bonuses, and allowances paid by the unit's administration.<sup>310</sup> This provision is a departure from that of the 1950 Trade Union Law, which states that the wages of these union personnel will be paid by the trade union.<sup>311</sup> Therefore, the 1950 provision may lead to some union independence, but the 1992 provision reaffirms the more administrative, less advocative, role of trade unions in China.

With respect to representation, the trade union may sign a collective contract with the enterprise or institution, the draft of which shall be submitted to the staff-and-worker congress or the entire body of staff and workers for discussion and adoption.<sup>312</sup> If the trade union believes that the enterprise's dismissal or punishment of a staff or worker is inappropriate, it has the right to *voice* its opinions.<sup>313</sup> In cases of expulsion or removal of name, the state-owned or collectively owned enterprise must notify the trade union of its reasons beforehand, and if the administration of the enterprise has violated laws, regulations, or the relevant contract, the trade union can *demand* that the case be investigated and handled anew.<sup>314</sup> Similarly, when a trade union discovers circumstances endangering the lives and safety of workers, it has the right to suggest that the workers abandon the dangerous site, and the enterprise's administration must promptly decide on a resolution.<sup>315</sup> Moreover, if stop-work or slow-down occurs, the trade union should negotiate a settlement with the enterprise's administration or other relevant authorities concerning the reasonable and resolvable demands of staff and workers so that the normal production process can be resumed as quickly as possible.<sup>316</sup> Hence, the trade union can intervene in cases of a dismissal in violation of the law, is empowered in situations involving worker health and safety, but has the duty to maintain continuous production.

As to matters concerning wages, welfare benefits, production safety, labor insurance, labor protection, and the rights and interests of staff and

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309. See *supra* text accompanying note 250.

310. Trade Union Law, *supra* note 300 art. 35.

311. See *supra* text and accompanying note 11.

312. Trade Union Law, *supra* note 300, art. 18.

313. *Id.* art. 19.

314. *Id.*

315. *Id.* art. 24.

316. *Id.* art. 25.



workers, trade union representatives in state-owned enterprises shall *participate* in meetings held to discuss such matters.<sup>317</sup> However, Sino-Foreign joint ventures and cooperative enterprises shall *listen* to the opinions of the trade unions on such matters,<sup>318</sup> while the trade unions of wholly foreign-owned enterprises shall *resolve such matters through consultation* with the enterprises' administration.<sup>319</sup> Therefore, depending on the ownership of an enterprise, the trade union will operate differently in connection with the matters mentioned above.

In sum, the Trade Union Law is very similar to the 1950 Trade Union Law. Neither does it enhance the power of the trade union, nor has it stressed the role of union as an advocate for workers. One article states that since the ACFTU continues under the command of the Communist Party, there have been reports of activities by underground trade unions, as well as attempts by the Chinese government to suppress them.<sup>320</sup> Actually, the Trade Union Law implies that the extent of participation by worker organizations in domestic and foreign enterprises is not quite the same.

## 2. *Unemployment Insurance Regulations and Labor-Dispute Handling Regulations*

In 1993, China promulgated two sets of regulations repealing the 1986 provisional regulations on unemployment insurance and labor-dispute resolution. Since the basic tenets of the former and current regulatory schemes are similar, the following will provide only the highlights.

With respect to unemployment insurance, an enterprise should contribute 0.6 percent of its total wages of staff and workers, but local governments can adjust the amount in case of deficiency or surplus in the unemployment insurance fund, subject to the maximum limit of 1 percent.<sup>321</sup> For a worker whose length of service is at least one year but less than five years, he/she is entitled to a maximum of twelve months of unemployment relief; for a worker whose length of service is five years or more, he/she is entitled to the maximum of twenty-four months.<sup>322</sup> In addition, unemployment relief is to be received monthly, and its amount should be equivalent to 120 to 150 percent of social relief in the locality.<sup>323</sup> Apart from disbursements for unemployment relief, medical care, funeral, and

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317. *Id.* art. 32.

318. *Id.* art. 33.

319. *Id.*

320. *Foreign Labor Trends*, *supra* note 272.

321. 1993 Unemployment Insurance Regulations, *supra* note 301, art. 5. *Cf.* text accompanying *supra* note 146.

322. *Id.* art. 12. *Cf.* text accompanying *supra* note 147.

323. *Id.* art. 13. *Cf.* text accompanying *supra* note 147.

direct lineal descendants, the unemployment insurance fund can also be used for retraining and production self-help.<sup>324</sup> Finally, the labor-administration department of the State Council will manage the country's unemployment insurance, while local unemployment insurance funds are to be administered by local labor-administration departments.<sup>325</sup>

Concerning labor disputes, the three-step procedure—mediation, arbitration, and adjudication—applies to enterprises within the territory of China.<sup>326</sup> The kinds of labor dispute can arise out of (1) expulsion, removal of name, dismissal of workers, or workers' resignation with or without approval; (2) enforcement of regulations relating to wages, insurance, welfare, training, and labor safety; and (3) performance of labor contract.<sup>327</sup> In addition, the mediation committee within the hiring unit will consist of representatives from staff and workers, the enterprise, and the trade union, and it will be chaired by the union representative.<sup>328</sup> The arbitration committee will be composed of representatives from the labor-administration department, the trade union, and the economic comprehensive management department as designated by the government, and it will be chaired by the person in charge of the labor-administration department.<sup>329</sup> Moreover, the parties can be represented by counsel or authorized persons during the arbitration.<sup>330</sup> Third parties whose interest will be affected by the outcome of the arbitration can also participate in the arbitration.<sup>331</sup> If one party does not attend the arbitration hearing without proper reasons or withdraws from the hearing without the approval of the arbitration tribunal, the plaintiff's case will be considered withdrawn or the arbitration will be made in the defendant's absence.<sup>332</sup>

As a result, the provisions on the establishment of an unemployment insurance fund and the broad scope of disbursement indicate that the government believe in the necessity of a social insurance program in a mobile labor market based on contract employment. In addition, the

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324. 1993 Unemployed Insurance Regulations, *supra* note 301, art. 10.

325. *Id.* art. 17. *Cf.* text accompanying *supra* note 145.

326. Labor-Dispute Handling Regulations, *supra* note 302, art. 2. *Cf.* Dispute Regulations, *supra* note 101 (applying only to state-owned enterprises). Under the Labor-Dispute Handling Regulations, the parties should first resolve the dispute by mutual consultation. If they do not want to go through mutual consultation or the consultation failed, the parties should seek mediation or directly seek arbitration. *Id.* art. 6. Since arbitration committee usually performs mediation first and the last step is to bring the dispute to the court, the resolution process generally consists of three steps. *Id.* arts. 27, 6.

327. *Id.* art. 2.

328. *Id.* arts. 7, 8.

329. *Id.* art. 13.

330. *Id.* art. 19.

331. *Id.* art. 22.

332. *Id.* art. 26.

extension of the Labor-Dispute Handling Regulations to all enterprises in China reflects the government's policy of having the same procedures applied to resolve labor disputes in both domestic and foreign-funded enterprises. Actually, the arbitration hearing is made formal by allowing the parties to have representatives, the third party to join, and the arbitration panel to enter default judgment. However, the provisions on the role of unions in mediation and arbitration reveal more the neutrality of unions than its representation of workers.

### 3. *Labor Unrest*

For the past several years, there have been numerous reports of labor unrest. In state-owned enterprises, the decline of living standards caused by high inflation has triggered urban workers to strike.<sup>333</sup> Moreover, the dismissal of surplus workers as a result of rationalization has contributed to abundant labor dissatisfaction.<sup>334</sup> Most importantly, ineffective state-owned enterprises on the verge of bankruptcy were not able to pay their workers.<sup>335</sup>

In foreign-owned enterprises, strikes were caused by unreasonable demands on unskilled workers,<sup>336</sup> administration of strict factory rules and

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333. Andrew Roche, *China's Trade Unions Open Congress amid Labor Discontent*, REUTERS LIB. REP., Oct. 22, 1988, available in LEXIS, World Library, ALLWLD File.

334. *Peking Alarmed at Incidents in Factories*, Central News Agency, May 29, 1992, available in LEXIS, World Library, ALLWLD File. Based on the South China Morning Post which also quotes Chinese sources, this article reveals that incidents involving demonstrations and destruction of equipment occurred in factories which had laid off workers in the course of efficiency drives. In addition, the state-owned Seagull Watch Factory in Tianjin had laid off almost half of its 4,000 or so workers, but the laid-off workers were entitled to only a fraction of their wages for about six months. Angry workers smashed equipment and clashed with the police which were called in to maintain order.

335. It has been reported that governments and banks in many cities have run out of money to pay workers, some of whom are owed several months' wages. The State Council has ordered banks and administrations to pay strikers' wage demands in state-owned factories, but they refused to pay because they have no money or do not want to print money to exacerbate inflation. Willy Wo-lap Lam, *Fear of Unrest as Money Runs Out*, SOUTH CHINA MORNING POST, May 17, 1994, § News, at 1, available in LEXIS, World Library, ALLWLD File.

336. Guy Dinmore, *China Reports Strikes in Joint-Venture Companies*, REUTER LIB. REP., July 29, 1988, available in LEXIS, World Library, ALLWLD File. This article cites the following case from the CHINA YOUTH NEWS: A Hong Kong-based toy manufacturer forced employees to work up to 18 hours a day with inadequate overtime pay and no time-off on Sundays. Thirty women went on strike after a pregnant woman fainted from exhaustion, but the management fired the ringleader as a warning. Similarly, workers in a Guangzhou joint venture went on strike after management forced them to work for two months without a single day off. Crothall, *supra* note 271 (citing CHINA DAILY). In addition, fines are imposed on workers under pretexts, such as sick leave and refusal to work overtime. *Massive Survey*, *supra* note 267.

disciplinary measures,<sup>337</sup> low pay,<sup>338</sup> poor and unsafe working conditions,<sup>339</sup> and breach of contract.<sup>340</sup> These kinds of abuses could be the product of corruption,<sup>341</sup> lack of enforcement of the law, and even lack of communication between management and labor.<sup>342</sup>

Nonetheless, one common cause of labor unrest exists in both the state and foreign sectors. That is, in a market-driven economy, in which the "iron rice bowl" system is to phase out, managerial prerogatives are emphasized, and accountability of profits and losses is the norm, weak representation of the interests of workers has contributed greatly to labor unrest. Of the more than 100 strikes in joint ventures in 1993, ninety percent of them occurred in enterprises that did not have a union or was only partially unionized.<sup>343</sup> Although trade unions exist in some foreign-funded enterprises, they are not really advocating the interests of workers.<sup>344</sup> Since trade unions have been given the mandate to provide a stable investment environment for foreign investors, increase productivity in enterprises, and arrange emulation and recreational activities for workers, they generally will not protest unreasonable or inappropriate management actions so long as the latter are in line with Party policies. In state-owned enterprises, many union officials are appointed because of their political

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337. See *supra* note 269.

338. The wage range in most labor-intensive enterprises is between 200 and 300 yuan a month, much lower than the wage level for workers doing the same kind of job abroad and slightly lower than the wage level for many state-owned enterprises. *Massive survey*, *supra* note 267.

339. See *supra* note 270.

340. Dinmore, *supra* note 336 (citing CHINA YOUTH NEWS: 70 percent of strikes in Shenzhen were caused by management's breach of contract). In some cases, two copies of labor contracts were prepared, one in Chinese and another in English, each consisting of different terms. Nick Driver, *China Reports Massive Labor Strife, To Unionize Foreign Ventures*, Proprietary to the UPI, Feb. 21, 1994, § International (citing CHINA DAILY), available in LEXIS, World Library, ALLWLD File.

341. In 1995, an anticorruption drive netted 779 cadres at or above the rank of county and section chiefs, and 39 cadres were at the level of head of department or bureau. Willy Wo-lap Lam, *War on Graft Nets 779 Cadres; Inquiries Reveal Corrupt Governor*, SOUTH CHINA MORNING POST, June 26, 1995, at 7, available in LEXIS, World Library, ALLWLD File.

342. Although foreign investors are attracted to the cheap labor force in China, expatriate managers must understand that labor is not a commodity and it is imperative to understand the needs of workers. In addition, they should tell workers what their expectations are. If management and workers understood their respective needs and had open communication, the current labor unrest could have been reduced.

343. Crothall, *supra* note 271.

344. *Id.* A union official made the following remarks: "In reality our unions are much more concerned with mediating between management and labor in a bid to secure the best deal for both sides," even though "[i]t is our job to make sure managers do not violate workers' rights and take that very job very seriously." *Id.*

affiliations,<sup>345</sup> so it is questionable whether they are competent enough to perform their job adequately and whether they give first priority to workers' interests.

Similarly, although staff-and-worker congresses in state-owned enterprises are designed to provide democratic management and supervision, their ultimate strength and effectiveness are questionable. In foreign-invested enterprises, labor-management committees, if allowed under progressive management or required by SEZ regulations, are nothing more than consultative bodies. Therefore, underground unions have been discovered in cities ranging from Beijing to Shenyang.<sup>346</sup> Since independent unions pose a threat to political incumbents of the country, their activities will be closely monitored.

In sum, labor unrest in the domestic sector has been caused mainly by the removal of the "iron rice bowl" system, high inflation generated by an overheated economy, and arrears of wages. In the foreign sector, labor unrest stems largely from violations of current laws and regulations, corruption of officials, and management's lack of understanding of its workforce. In both cases, it appears that the administrative role of trade union has deprived workers of sufficient representation so that they finally take their fate in their own hands.

#### 4. *The Labor Law of 1994*

Owing to the growing labor unrest, union leaders have long cried for the enactment of a labor code to protect the rights and interests of workers.<sup>347</sup> The draft of the Labor Law had been revised more than thirty times, and many years had passed before its final enactment.<sup>348</sup> It applies to (1) enterprises and individual economic units within Chinese territory (hiring units) and laborers who have employment relationship with the hiring

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345. Roche, *supra* note 333. This article states that according to Chinese sources, workers in several Peking factories staged unprecedented ballot-box rebellions by rejecting official candidates for union posts and writing on branch election ballot slips the names of workers with no affiliation to the authorities.

346. *Peking Alarmed at Incidents in Factories*, *supra* note 334 (citing SOUTH CHINA MORNING POST).

347. See e.g. Chris Yeung, *Union Leaders in Call for Labor Laws*, SOUTH CHINA MORNING POST, Mar. 25, 1993, § News, at 11, available in LEXIS, World Library, ALLWLD File.

348. See *China Law Seeks to Avert Social Chaos*, Agence France Presse, Mar. 2, 1994, § Financial, available in LEXIS, World Library, ALLWLD File. Apparently, no official reasons have been given for the delay. However, it is possible that the government needs to spend more time in resolving ideological problems (conflicting priorities of promoting economic growth and protecting workers), observing how the contract employment system has developed, and making sure that the Labor Law will not deter foreign investment.

units and (2) government organs, institutions, and public/social organizations and their respective laborers who have entered into labor contracts.<sup>349</sup> The significant provisions of the Labor Law are as follows.

(a) Labor Contract

An employment relationship is to be established through a labor contract,<sup>350</sup> which legally binds the parties.<sup>351</sup> However, a labor contract will be void *ab initio* if (1) it violates any laws and administrative regulations or (2) it is concluded by means of fraud or threat.<sup>352</sup> Even so, if a portion of the labor contract is void, the remainder of the contract will still be valid.<sup>353</sup>

In addition, a labor contract should be written and contain these mandatory provisions: the duration of the contract, job contents, labor protection, labor conditions, compensation, labor discipline, grounds for termination, and liabilities for breach.<sup>354</sup> The duration of a labor contract can be definite, indefinite, or job-specific.<sup>355</sup> When a laborer who has worked continuously for ten years or more in the same unit requests an indefinite contract at the time of contract renewal, the unit should make an indefinite contract.<sup>356</sup> Moreover, a labor contract can specify a probation period, which cannot last more than six months.<sup>357</sup> The parties can also stipulate provisions in the labor contract about maintaining the confidentiality of the hiring unit's trade secrets.<sup>358</sup>

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349. Labor Law, *supra* note 3, art. 2. "Institution" refers to those units dealing with education, science and research, arts, TV and radio news broadcasts, sports, social welfare, agriculture, forestry, water conservancy, etc., and their directive objective is not to accumulate capital for the country. BAIKE QUANSHU, *supra* note 119, at 648-49. The term "laodongzhe" literally means laborers. In the following discussion, "laborers" and "workers" are used interchangeably.

350. Labor Law, *supra* note 3, art. 16.

351. *Id.* art. 17.

352. *Id.* art. 18.

353. *Id.*

354. *Id.* art. 19.

355. *Id.* art. 20. For enterprises doing foreign business and trade, a definite contract can be short-term, medium-term, and long-term. In general, the hiring unit should sign long-term contracts with key business and management personnel. Duiwai Maoyi Jingji Hezuobu Guanyu Quanguo Wajingmao Qiye Quanmian Shixing Laodong Hetongzhi Youquan Wenti de Tongzhi [Notice of Ministry of Foreign Trade and Economic Cooperation Concerning Questions about the Full Implementation of the Labor Contract System by Foreign Business and Trade Enterprises throughout China] [hereinafter Notice on Labor Contract System], Dec. 15, 1994, reprinted in CHINA L. & PRAC.—CHINA L. LIB., Mar. 31, 1995, at 49.

356. Labor Law, *supra* note 3, art. 20. In addition, the hiring unit should also sign indefinite contracts upon request with workers who have worked for a longer time and will reach the retirement age within ten years. Notice on Labor Contract System, *supra* note 355.

357. Labor Law, *supra* note 3, art. 21.

358. *Id.* art. 22.

Apart from that, an enterprise can make a collective contract with its staff and workers, and the draft of the contract is to be discussed and adopted by the staff-and-worker congress or the entire workforce.<sup>359</sup> The union should sign a collective contract on behalf of staff and workers, and if there is no union, the elected representatives of staff and workers will sign the contract.<sup>360</sup> A collective contract becomes effective after fifteen days of its receipt by the labor-administration department if no objections have been raised.<sup>361</sup> Since the hiring unit and the entire workforce are legally bound by the collective contract, any individual staff or worker cannot sign a labor contract with compensation and employment provisions lower than those of the collective contract.<sup>362</sup>

### (b) Remuneration and Benefits

The Labor Law reiterates the principles of "to each according to his work" and "equal pay for equal work."<sup>363</sup> Although the State will regulate the total amount of wages macroscopically and wage levels are to be raised gradually based on economic development,<sup>364</sup> the hiring unit can autonomously determine its methods of wage distribution and wage levels in accordance with its production and operations characteristics as well as economic performance.<sup>365</sup> In particular, provincial, autonomous regional, and municipal governments directly under the central government are to

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359. *Id.* art. 33.

360. *Id.* During consultation, each side has an equal number of representatives, ranging from three to 10. Laodongbu Guanyu Yinfa Jiti Hetong Guiding de Tongzhi [Notice of the Ministry of Labor Concerning the Printing and Distributing of "Collective Contract Regulations"] [hereinafter Notice Concerning Collective Contract], Dec. 5, 1994, art. 8, reprinted in CHINA L. & PRAC.—CHINA L. LIB., Mar. 31, 1995, at 51. The labor contracts of the representatives of staff and workers cannot be terminated within five years from the date they became representatives, unless a serious mistake has been committed. *Id.*, art. 11. If the parties cannot reach an agreement through consultation or unexpected problems arise, they can suspend their consultation, the duration of which cannot exceed sixty days. *Id.* art. 14.

361. Labor Law, *supra* note 3, art. 34. The duration of a collective contract may span from one to three years. Notice concerning Collective Contract, *supra* note 360, art. 16. If the parties decided to amend a collective contract, they should report it to the labor-administration department for examination within seven days of its revision. *Id.* art. 19. If any provisions of a collective contract are ineffective, the parties should amend those provisions and submit them within 15 days to the labor-administration department for reexamination. *Id.* art. 28.

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

363. *Id.* art. 46.

364. *Id.*

365. *Id.* art. 47.

establish minimum pay which will be reported to the State Council.<sup>366</sup> To determine minimum pay, the government concerned should comprehensively refer to the following elements: the minimum living expenses for the laborer and the average support of a family, the average wage level of society, the labor production rate, the employment situation, and any differences in economic development among regions.<sup>367</sup>

More importantly, wages are to be paid monthly in currency to workers, and any embezzlement or arrears of wages without cause are forbidden.<sup>368</sup> During legal holidays and leaves for wedding, funeral, or legally required participation of social activities, the hiring unit should pay wages in accordance with the law.<sup>369</sup> In addition, if the labor contract is

366. *Id.* art. 48. One report states that by August 1995, 28 provinces, autonomous regions, and municipalities directly under the central government had officially adopted minimum wage standards. *China Publishes "White Paper" on Human Rights* [hereinafter *Human Rights*], 1995 BBC Summary of World Broadcasts, Dec. 29, 1995, Pt. 3: Asia-Pacific, available in LEXIS, World Library, ALLWLD File (citing Xinhua News Agency). As of 1995, the minimum wage in the Zhuhai Special Economic Zone is 380 yuan per month, while Guizhou's minimum wage is 120 yuan. These wages do not include overtime pay or subsidies. Willy Wo-lap Lam, *Mainland in Push to Set Up Pay Minimum*, SOUTH CHINA MORNING POST (International Weekly), Jan. 7, 1995, at 1. In addition, the minimum wage in Shenzhen covers remuneration for normal labor during statutory working time, including basic wages, bonuses and subsidies or allowances paid in the form of wages, but excluding statutory labor insurance and welfare benefits, etc. 1995 CHINA LEGAL DEVELOPMENTS BULLETIN, at 29 (summarizing Regulations of the Shenzhen Special Economic Zone on Minimum Wage, Nov. 2, 1994).

367. Labor Law, *supra* note 3, art. 49. On November 24, 1993, the Ministry of Labor promulgated the Qiye Zuidi Gongzi Guiding [Notice on Regulations of Minimum Wage in Enterprises], reprinted in LAODONG SHOUCHE, *supra* note 22, at 330, which directs local authorities to establish a minimum wage. After the passage of the Labor Law, the Ministry of Labor promulgated another notice amending and supplementing the 1993 Notice. Specifically, food and housing allowances which are not currency income are not to be included in calculating the minimum wage. Laodongbu Guanyu Shishi Zuidi Gongzi Baozhang Zhidu de Tongzhi [Notice of the Ministry of Labor concerning the Implementation of Guaranteed Minimum Wage System], Oct. 8, 1994, reprinted in CHINA L. & PRAC.—CHINA L. LIB., June 27, 1995, at 21.

368. Labor Law, *supra* note 3, art. 50. In 1994, the Ministry of Labor issued the Provisional Regulations on the Payment of Wages, which require employers to record details of wages and hours worked (and the name and signature of the person entrusted to collect wages if the worker is unable to collect wages in person) and keep the records for two years. In addition, only individual income tax contributions, social insurance contributions, and support or other payments ordered by the court can be deducted from wages. If an employee causes damages to the employer, the latter may deduct not more than 20 percent of the employee's monthly wages as long as the remaining wages do not fall below the local minimum pay requirement. 1995 CHINA LEGAL DEVELOPMENTS BULLETIN, Vol. 2, No. 1, at 11-12 (summarizing the Provisional Regulations on the Payment of Wages, Dec. 6, 1994).

369. Labor Law, *supra* note 3, art. 51. Legal holidays are New Year, Spring Festival, International Labor Day, National Day, and any other days designated by laws and regulations. *Id.* art. 40.



terminated based on mutual agreement, inability to work after illness or nonwork-related injury, failure to become qualified, subsequent changes in objective circumstances, or reduction of workforce, the hiring unit must give its workers economic compensation pursuant to relevant State regulations.<sup>370</sup>

Furthermore, the State is to develop a social insurance system and establish a social insurance fund to enable laborers to obtain assistance and compensation under circumstances such as old age, sickness, work-related injury, unemployment, and childbirth.<sup>371</sup> The hiring unit and its workers must participate in social insurance and make social insurance

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370. *Id.* art. 28. The Ministry of Labor's Measures on Economic Compensation for Violation and Termination of Labor Contract provide the following: In case of termination based on mutual agreement, the hiring unit should pay one month's wages for each year of service, subject to a cap of 12 months, and one month's wages for service less than one year (art. 5.) In case of termination due to inability to work after illness or nonwork-related injury, the hiring unit should pay one month's wages for each year of service and a medical allowance of at least 6 months' wages (art. 6). For serious illness or terminal disease, an additional amount of 50 or 100 percent of the medical allowance should be paid, respectively (art. 6). In case of changes in objective circumstances or layoffs due to reorganization or serious difficulty in production or operations, the hiring unit should pay one month's wages for each year of service (arts. 8 & 9). The term "wages" mean the average wage of the worker for the preceding 12 months under the circumstances of normal production (art. 11). If the hiring unit does not pay economic compensation after the termination of a labor contract, it will have to pay an additional amount equal to 50 percent of the economic compensation (art. 10). Laodongbu Weifan he Jiechu Laodong Hetong de Jingji Buchang Banfa [Ministry of Labor's Measures on Economic Compensation for Violation and Termination of Labor Contract] [hereinafter Economic Compensation Measures], Dec. 3, 1994, reprinted in CHINA L. & PRAC.—CHINA L. LIB., June 27, 1995, at 31.

371. Labor Law, *supra* note 3, art. 70. It has been reported that reforms have been formulated for both the pension insurance system and the unemployment insurance system. Lijun Chen, *A New Model of Old-Age Pension Insurance Will Be Implemented*, CHINA LAW UPDATE, June 25, 1995, at 8. In March 1995, the State Council issued the Circular Concerning the Deepening of Reform of the Endowment Insurance System for Staff and Workers of Enterprises, establishing a pension insurance system that combines social overall planning and personal accounts. *Human Rights*, *supra* note 366. Under the new system, an enterprise will contribute 13 percent of its total wages, and the individual worker will contribute as much as 3 percent of his/her salary. The contribution by individuals will increase by around 1 percent every two years until it amounts to the portion required under unified social planning. The use of personal accounts reflects the level of wages and the difference between various kinds of work, thus creating a direct incentive to work efficiently. Owing to differences among various provinces, the State Council provides two programs which differ on the percentage of personal accounts for provinces to choose. Chen, *supra* note 371. In addition, the unemployment insurance will be extended to urban workers employed in enterprises of different forms of ownership and staff workers who have signed labor contracts with government agencies, institutions, and social organizations. The unemployment relief standards will be related to local minimum wage standards, and the duration of relief payment will vary with length of service and not exceed 24 months. *Id.*

contributions.<sup>372</sup> Although the criteria for receiving social insurance benefits are to be determined by laws and regulations, workers must be paid in full on time.<sup>373</sup> In addition, the hiring unit is encouraged to establish a supplementary insurance, while the laborer is encouraged to keep savings.<sup>374</sup>

(c) Maximum Hours and Overtime Work

Workers cannot work more than eight hours a day or forty-four [forty] hours a week<sup>375</sup> and must be guaranteed at least one day's [two days'] rest per week.<sup>376</sup> Any variations of these requirements must be approved by the labor-administration department.<sup>377</sup> For those who are paid on a piece-rate basis, the hiring unit should reasonably determine their labor quantity and the standards of piece-rate compensation in accordance with the eight-hour or forty-four-hour system.<sup>378</sup>

If the hiring unit has production or management needs, it should consult the union and its workers to extend the working hours.<sup>379</sup> Generally, overtime work cannot exceed one hour per day.<sup>380</sup> When special circumstances render it necessary to have longer overtime work, the hiring unit, having taken the health of workers into consideration, may ask workers to do overtime work for a maximum of three hours per day or thirty-six hours per month.<sup>381</sup> However, restrictions of overtime work can be disregarded if (1) natural disasters, mishaps, and any other situations threatening the lives, health, or property of laborers have occurred and need to be handled immediately, (2) the malfunction of

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372. Labor Law, *supra* note 3, art. 72. See *supra* note 371 for the required amounts of contribution.

373. Labor Law, *supra* note 3, art. 73. See also *supra* note 371.

374. *Id.* art. 75.

375. *Id.* art. 36. In March, 1995, the State Council authorized the adoption of a five-day work week. Regulations of the State Council governing Working Hours for Workers [hereinafter Working Hours Regulations], Mar. 25, 1995, art. 3, *reprinted and translated in* 2 CHINA LAWS, *supra* note 3, ¶ 12-622. If an enterprise or institution has difficulties in implementing these regulations, they may defer implementation (the latest day for institutions is January 1, 1996, and the latest date for enterprises is May 1, 1997). Working Hours Regulations, *supra* note 375, art. 9. Officials said that the new system will boost productivity and create one million new jobs. *China Marks May Day by Adopting Five-Day Work Week*, Agence France Presse, May 1, 1995, § Int'l News, available in LEXIS, World Library, ALLWLD File.

376. Labor Law, *supra* note 3, art. 38. Since workers work eight hours a day and 40 hours per week, most of them will probably have two days off.

377. *Id.* art. 39.

378. *Id.* art. 37.

379. *Id.* art. 41.

380. *Id.*

381. *Id.*

production facilities, communications and transportation lines, or public utilities has affected production and public interest so that immediate repair must be done, or (3) any situations determined by laws or administrative regulations.<sup>382</sup>

In addition, overtime pay rate is set forth as follows: 150 percent of the normal-hour wages for overtime work after regular hours, 200 percent for overtime work done in the rest day when no other day can be arranged for rest, and 300 percent for overtime work done during legal holidays.<sup>383</sup> Laborers who have worked for more than one year are entitled to annual vacation with pay, and the details will be established by the State Council.<sup>384</sup>

#### (d) Occupational Safety and Health

The hiring unit must establish and perfect a labor protection and health system, vigorously carry out labor safety and health regulations and standards, educate workers on labor safety and health, prevent accidents during the labor process, and reduce occupational hazards.<sup>385</sup> On one hand, the hiring unit must provide its workers with labor safety and health conditions established by the State and necessary labor-protection articles, as well as regularly check the health of workers who are engaged in work with occupational hazards.<sup>386</sup> On the other hand, workers must strictly observe safety rules during the labor process,<sup>387</sup> while they have the rights (1) to refuse to carry out orders that violate safety rules and force them to experience risks and (2) to criticize, report, and file charge against behavior endangering their lives and safety.<sup>388</sup> In any event, injuries, deaths, and occupational diseases are to be reported for the purposes of compilation of statistics and risk management.<sup>389</sup>

#### (e) Training

Laborers who want to engage in special operation must go through special training and obtain qualifications for the special operation.<sup>390</sup> Workers who will engage in technical work must receive training before

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382. *Id.* art. 42.

383. *Id.* art. 44.

384. *Id.* art. 45.

385. *Id.* art. 52.

386. *Id.* art. 54.

387. *Id.* art. 56.

388. *Id.*

389. *Id.* art. 57.

390. *Id.* art. 55.

assumption of their duties.<sup>391</sup> In addition, local governments at various levels should include occupational training in their economic development plans.<sup>392</sup> The hiring unit should establish a system of occupational training and withdraw funds from the training budget in accordance with State regulations to provide laborers with occupational training.<sup>393</sup> Last of all, a system of certification will be implemented for acquisition of occupational skills.<sup>394</sup>

(f) Termination

The parties to a labor contract can terminate it after reaching an agreement through consultation.<sup>395</sup> Moreover, the hiring unit can terminate a labor contract if (1) the worker is proved to be unqualified for employment during the probation period, (2) the worker has seriously violated labor discipline or the rules and regulations of the hiring unit, (3) the worker has seriously neglected job duties or has committed jobbery and fraud, causing great damage to the interests of the hiring unit, or (4) the worker is being criminally prosecuted.<sup>396</sup> Likewise, the worker can terminate a labor contract at any time if (1) he/she is on probation, (2) the hiring unit uses violence, threat, or illegal restraint of freedom to force labor, or (3) the hiring unit has not paid compensation or has failed to provide the employment conditions pursuant to the labor contract.<sup>397</sup>

In addition, a hiring unit can terminate a labor contract with a written notice given thirty days in advance if (1) the worker cannot resume the original job or perform another job arranged by the hiring unit after the treatment period for sickness or nonwork-related injury has passed, (2) the worker is unable to perform his/her job, even after training or change of post, or (3) substantial changes in objective circumstances have subsequently occurred, which render the performance of the contract impossible, causing the parties to fail to reach any new agreement after consultation.<sup>398</sup> Similarly, a worker can terminate a contract by giving a thirty-day written notice, even though the law is silent as to whether he/she must provide proper reasons.<sup>399</sup>

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391. *Id.* art. 68.

392. *Id.* art. 67.

393. *Id.* art. 68.

394. *Id.* art. 69.

395. *Id.* art. 24.

396. *Id.* art. 25.

397. *Id.* art. 32.

398. *Id.* art. 26.

399. *Id.* art. 31.

Most of all, when it becomes necessary to retrench workers during the period of reorganization pending bankruptcy or serious difficulties in production and operations, a hiring unit can lay off workers if it has given a thirty-day notice to the trade union or the entire workforce, has listened to its opinions, and has reported to the labor-administration department.<sup>400</sup> However, if the hiring unit wants to hire workers within six months of the dismissal, it must first hire those who have been laid off.<sup>401</sup> Regarding the termination of a labor contract, the union can voice its opinions if it deems the decision inappropriate, or it can demand the case to be handled anew if there have been any violations of laws or regulations or breach of contract.<sup>402</sup> If the worker requests arbitration or files a lawsuit, the union should give its support and assistance.<sup>403</sup>

Nevertheless, in the following situations, the hiring unit cannot terminate a labor contract based on such reasons as inability to resume work, lack of qualifications, change in objective circumstances, or reduction of workforce: (1) the worker has suffered occupational disease or work-related injury and has been affirmed of having lost or partially lost work ability, (2) the worker is on sick leave for illness or injury, (3) the female worker is being pregnant, giving birth to a baby, or nursing a baby, and (4) any other circumstances mandated by laws and administrative regulations.<sup>404</sup>

#### (g) Unionization and Worker Participation

Laborers have the rights to participate in and organize unions, which represent and protect laborers' legal rights and interests as well as conduct activities independently in accordance with the law.<sup>405</sup> Laborers, through staff-and-worker congresses or some other forms of representation, participate in democratic management or consult with the hiring unit to protect their legal rights and interests.<sup>406</sup>

#### (h) Dispute Resolution

Generally, whenever a labor dispute arises, the parties can either resolve it through mutual consultation or request mediation, arbitration, and adjudication in accordance with the law.<sup>407</sup> Moreover, a labor dispute should

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400. *Id.* art. 27.

401. *Id.*

402. *Id.* art. 30.

403. *Id.*

404. *Id.* art. 29.

405. *Id.* art. 7.

406. *Id.* art. 8.

407. *Id.* art. 77.

be resolved based on the principles of lawfulness, justice, and promptness.<sup>408</sup> The parties to a labor dispute can request mediation by the labor-dispute mediation committee in the hiring unit.<sup>409</sup> If mediation proves unsuccessful, one party can ask for arbitration from the labor-dispute arbitration committee.<sup>410</sup> One party can also directly request arbitration from the labor-dispute arbitration committee, and if it does not accept the arbitral decision, it can bring a legal action.<sup>411</sup>

In particular, if a labor dispute arises out of the formation of a collective labor contract, the parties can resolve it through mutual consultation, and if consultation fails, the local labor-administration department can coordinate the parties concerned to resolve the dispute.<sup>412</sup> Moreover, in case of a labor dispute arising out of the performance of a collective labor contract, the parties can request arbitration if consultation fails.<sup>413</sup> If one party does not accept the arbitral ruling, it can sue in court within 15 days of the receipt of the arbitration decision.<sup>414</sup>

The mediation committee within the hiring unit will consist of representatives from staff and workers, the hiring unit, and the trade union, and it will be chaired by the union representative.<sup>415</sup> The arbitration committee will be composed of representatives from the labor-administration department, same-level trade union, and the hiring unit, and it will be chaired by the labor-administration department's representative.<sup>416</sup> Arbitration should be requested in writing within sixty days of the labor dispute, and arbitration decision should generally be given within sixty days of the receipt of the arbitration application.<sup>417</sup> If one party objects to the arbitral award, it can bring a legal action within fifteen days of the receipt of the arbitration decision; if one party does not carry out the arbitral ruling

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408. *Id.* art. 78.

409. *Id.* art. 79.

410. *Id.*

411. *Id.*

412. *Id.* art. 84. If the labor-administration department decided to handle a dispute regarding the signing of a labor contract, it should resolve the dispute within 30 days; for complicated cases, the labor-administration department can extend it up to 15 days. Notice Concerning Collective Contract, *supra* note 360, art. 35. In addition, enterprises cannot terminate employment relationship with representatives of staff and workers during the dispute period. *Id.*, art. 36.

413. Labor Law, *supra* note 3, art. 84. If a dispute arises out of the performance of a contract, it must be resolved in accordance with the Labor-Dispute Handling Regulations. Notice Concerning Collective Contract, *supra* note 360, art. 39.

414. Labor Laws, *supra* note 3, art. 84.

415. *Id.* art. 80.

416. *Id.* art. 81.

417. *Id.* art. 82.

and does not sue within the legal time limit, the other party can apply to the court for enforcement.<sup>418</sup>

(i) Protection for Women and Minors

The Labor Law states that laborers will not receive employment discrimination on the basis of nationality, race, gender, and religious belief.<sup>419</sup> More specifically, women are to receive equal employment opportunities, and employers cannot refuse to hire women or raise the qualifications for female applicants, except for jobs or positions designated by the State to be unsuitable for women.<sup>420</sup> With respect to minors, hiring units are forbidden to hire anyone under the age of sixteen, except for artistic, sports, and special craft units that have obtained State approval and guaranteed the rights of minors to receive education.<sup>421</sup> For those who are at least sixteen but younger than eighteen, hiring units must not arrange them to engage in such jobs as mining and poisonous/hazardous work and should have them receive regular physical check-up.<sup>422</sup>

(j) Implementation

The labor-administration departments at the county level or above are empowered to supervise and inspect the compliance of labor regulations and to stop or order hiring units to correct their illegal behavior.<sup>423</sup> The labor inspector can enter the hiring unit to check compliance, read necessary materials, and inspect the workplace, but in doing so, he/she must show identification and follow relevant regulations.<sup>424</sup> In addition, the trade unions at various levels and the relevant departments of local governments at the county level or above can supervise the hiring unit's compliance with

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418. *Id.* art. 83.

419. *Id.* art. 12.

420. *Id.* art. 13. In fact, protective measures for women include prohibition of work in mines; restriction of work under high altitude, low temperature, and cool water during menstruation period; and prohibition of overtime and night work for women who are over seven-month pregnant or who are nursing babies less than one year old. Moreover, maternity leave must be at least 90 days. *Id.* arts. 59-63.

421. *Id.* art. 15.

422. *Id.* arts. 64, 65.

423. *Id.* art. 85. In September, 1995, two national inspection teams checked on the enforcement of the Labor Law in 15 cities and provinces, and the Ministry of Labor sponsored a two-month inspection which would visit enterprises and employment services in such areas as Heilongjiang, Liaoning, Jilin, Jiangsu, Shanghai, Zhejiang, Fujian, and Hebei. Cao Min, *China: Firms Face Labor Team Inspection*, REUTER TEXTLINE CHINA DAILY, Sept. 23, 1995, available in LEXIS, World Library, ALLWLD File.

424. Labor Law, *supra* note 3, art. 86.

labor laws and regulations.<sup>425</sup> Lastly, any organization or individual can report and file charge against behavior in violation of labor laws and regulations.<sup>426</sup>

### (k) Sanctions

In general, if the labor rules of a hiring unit violate labor laws and regulations, the labor-administration department can give warnings and order it to make corrections, or hold it liable for damages incurred by its workers.<sup>427</sup> If a hiring unit obstructs labor supervision and inspection without cause or retaliate against informers, either fines will be imposed or criminal liability be pursued.<sup>428</sup> Specifically, different types of sanction are spelled out for different kinds of violation under the Labor Law,<sup>429</sup> and the

425. *Id.* arts. 87 & 88.

426. *Id.* art. 88.

427. *Id.* art. 89.

428. *Id.* art. 101.

429. Labor Law, *supra* note 3, arts. 90-100, 102-04. The following is a summary of these provisions:

#### *Wages, Overtime, and Social Insurance*

The labor-administration department can order the hiring unit to pay wages or economic compensation, and damages under these circumstances: (1) embezzlement or arrears of wages without cause, (2) refusal to pay overtime wages, (3) paying wages below the local minimum pay standard, and (4) nonpayment of economic compensation after the termination of a labor contract. If there are violations of overtime provisions, the labor-administration department can give a corrective warning and impose a fine. If the hiring unit does not pay social insurance without cause, the labor-administration department can order it to pay by a certain date and can impose a delay penalty for not paying within by designated time.

#### *Labor Safety and Health*

If there are violations of the provisions on labor safety and health, the labor-administration department or other departments concerned can order the hiring unit to rectify the situation and impose a fine, or apply to local governments at the county level or above for suspension of production in serious cases. If the hiring unit does not adopt policies to deal with accidents or hidden dangers, which results in serious accidents causing loss of lives or property damage, the responsible person(s) will be prosecuted for criminal liability. If the hiring unit forces workers to perform dangerous work in violation of rules and regulations and serious injuries or deaths result, the responsible person(s) will be prosecuted for criminal liability.

#### *Protection for Women and Minors*

If the hiring unit employs anyone who is younger than 16, the labor-administration department can order it to take corrective actions and impose a fine, or have the industry-and-commerce-administration department revoke its business license. In case of violations of the protective measures for women and workers who are at least 16 but younger than 18, the labor-administration department can order it to take corrective actions and impose a fine, or have it pay compensation to those who have suffered damage.

#### *Forced Labor*

The security department can detain responsible persons for less than 15 days and impose a fine, or warn if they (1) use violence, threat, or illegal restraint of freedom to force labor or



measures of "economic compensation,"<sup>430</sup> "administrative penalties,"<sup>431</sup> and

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(2) insult, administer bodily punishment, beat, illegally search, or detain its workers. Any of the preceding conduct can amount to a crime, in which case the responsible person will be prosecuted for criminal liability.

*Violation of Labor Contract*

If the hiring unit causes a worker to incur losses as a result of an invalid labor contract, it should compensate the worker. Moreover, if the hiring unit terminates a labor contract in violation of the Labor Law or intentionally delays signing a labor contract, the labor-administration department can order it to take corrective actions or have it compensate the worker if there has been any damage. If a hiring unit employs someone whose labor contract has not been terminated and has caused economic losses to the original unit, it should be jointly responsible for compensation. If the worker terminates a labor contract in violation of the Labor Law or in breach of his/her duty not to disclose confidential information, which has caused economic losses to the hiring unit, he/she should be responsible for compensation.

*Misconduct of Public Officials*

If the personnel of the labor-administration department or other departments concerned abuse their power, neglect their duty, and commit jobbery and fraud, they will be prosecuted for criminal liability if such conduct amounts to a crime, or they will receive administrative punishment if such conduct does not amount to a crime. If any government official or agent of social-insurance organs embezzles social insurance funds and such conduct amounts to a crime, he or she will be prosecuted for criminal liability.

430. It appears that economic compensation is to be given when: (1) the labor contract is terminated upon mutual agreement or due to inability to work, change in objective circumstances, or layoffs, *see* Economic Compensation Measures, *supra* note 370, or (2) the provisions of labor statutes and regulations have been violated. For instance, if the hiring unit embezzles wages or delay payment of wages without cause, or refuses to make overtime pay, it must pay the total amount of wages owed plus a 25 percent as economic compensation. Economic Compensation Measures, *supra* note 370, art. 3. If the hiring unit pays below the minimum wage, it must pay the difference between the minimum wage and what has been paid plus a maximum amount of 25 percent as economic compensation. *Id.* art. 4.

431. Specific administrative penalties for violation of the Labor Law have been reported as follows: (1) employers who force workers to work overtime without consulting the union or workers are subject to a corrective warning and a fine of up to RMB 100 for each hour of overtime work; (2) employers who embezzle or hold back wages without cause, refuse to pay overtime wages, pay wages below the local minimum pay, or fail to pay economic compensation upon termination of labor contracts will be ordered to pay the remuneration and economic compensation plus an amount equal to one to five times the total; (3) if employers do not pay social insurance fees on behalf of their workers, they will pay a daily penalty of 0.2 percent of the outstanding amount; (4) if employers do not meet safety standards, they may be ordered to take corrective action within a time limit and be fined up to RMB 50,000 for noncompliance; (5) employers who violate regulations and cause accidents such as acute poisoning, serious injury, or death may be fined up to RMB 10,000 for each case; (6) employers who violate the rights of women and those who are at least 16 but younger than 18 may be fined up to RMB 3000 per person per infringement; and (7) repeated offenders may be fined up to five times the normal fines. 1995 CHINA LEGAL DEVELOPMENTS BULLETIN, Vol. 2, No. 1, at 12-13 (summarizing Measures concerning Administrative Penalties for Violations of the Labor Law of the People's Republic of China, Dec. 26, 1994).

damages<sup>432</sup> are supplemented by subsequent administrative rules.

(1) Discussion

To a certain extent, the Labor Law is a recapitulation of existing labor statutes and regulations.<sup>433</sup> However, it has also filled in gaps left by these statutes and regulations. For instance, the provisions on allowing the parties to stipulate a trade-secret confidentiality clause in the labor contract and permitting the hiring unit to seek damages for economic losses<sup>434</sup> will enable employers to protect their business know-how, while the provisions on maximum hours and overtime pay<sup>435</sup> will provide local authorities with uniform standards to follow.

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432. In the Weifan Laodongfa Youguan Laodong Hetong Guiding de Peichang Banfa [Measures on Damages for Violating the Labor Contract Provisions of the Labor Law], May 10, 1995, arts. 3-6, *reprinted in CHINA L. & PRAC.—CHINA L. LIB.*, Sept. 13, 1995, at 19, the following damages are enumerated: (1) work-related injury (25 percent of the medical costs) (medical treatment paid by the hiring unit also); (2) injury to the bodily health of women and workers who are at least 16 but younger than 18 (25 percent of medical costs) (medical treatment paid by the hiring unit also); (3) the laborer's termination of a labor contract in violation of regulations or the labor contract (recruitment costs, training costs, direct economic losses to production and operations, and any other damages stipulated in the labor contract); (4) hiring of a laborer whose employment contract has not been terminated (joint liability being not lower than 70 percent of the total economic losses to the original unit); (5) disclosure of confidential information, causing economic losses to the hiring unit (article 20 of the Against Improper Competition Law will apply), etc.

433. See e.g. Implementation Regulations, *supra* note 101, art. 2 (duration of a labor contract); *Id.* art. 8; Labor Management Regulations, *supra* note 186, art. 2; Labor Management Implementation Provisions, *supra* note 186, art. 5 (contents of a labor contract); Implementation Regulations, *supra* note 101, art. 12 (circumstances under which the enterprise can terminate a labor contract); *Id.* art. 14; Labor Management Implementation Provisions, *supra* note 186, art. 7 (circumstances under which the enterprise cannot terminate a labor contract); Implementation Regulations, *supra* note 101, art. 31; Labor Management Regulations, *supra* note 186, art. 14 (dispute resolution); Dismissal Regulations, *supra* note 101, art. 5 (protesting dismissal); Labor Management Implementation Provisions, *supra* note 186, art. 7 (one month's advance notice for dismissal); Labor Management Regulations, *supra* note 186, art. 4; Autonomy Regulations, *supra* note 186, art. 1(iv) (lay-offs permissible due to changes in production and technological condition); Labor Management Implementation Provisions, *supra* note 186, art. 3 (probationary period); *Id.* art. 17 (reporting industrial accidents); Female Workers Protection Regulations, *supra* note 23, arts. 3, 5-8, 10 (protection of female staff and workers); Female Rights Law, *supra* note 275, arts. 22, 24 (no discrimination in hiring and promotion on the basis of gender); Trade Union Law, *supra* note 300, art. 19 (trade union to voice its opinions and demand a dismissal case to be handled anew).

434. Labor Law, *supra* note 3, arts. 22 & 102.

435. *Id.* arts. 36 & 41.

In addition, the Labor Law uses the word "unemployment" rather than "waiting for employment."<sup>436</sup> In a way, this change of wording indicates that the government has accepted unemployment as one aspect of labor in a socialist market economy. Nonetheless, while the Labor Law allows managers to lay off workers, it also requires them to offer dismissed workers employment if they recruit within the following six months.<sup>437</sup> Hence, the government also tries to ensure that workers will not be arbitrarily dismissed. As a matter of fact, some provisions of the Labor Law reflect the veracity of the alleged abuses of workers. For example, the prohibition of using violence, threat, or restraint of freedom to force laborers to work<sup>438</sup> and the empowerment of the security department to detain or fine violators<sup>439</sup> indicate the truthfulness of the news reports regarding innovative and strict labor discipline.<sup>440</sup> Likewise, the provisions on maximum hours, overtime work, and monthly payment of wages<sup>441</sup> confirm the reports about excessive overtime work and arrears of wages.<sup>442</sup> Moreover, the sanction against the hiring of workers whose contracts have not terminated<sup>443</sup> reflects the government's concern for the current phenomenon of poaching employees among foreign-funded companies<sup>444</sup> and between private and foreign-owned enterprises.

Most of all, the Labor Law provides a range of sanctions for different types of noncompliance,<sup>445</sup> even though its provisions are still broad guidelines, giving the labor-administration department much discretion to determine the exact penalties. To a certain extent, the inclusion of penalties in the Labor Law is a significant step of China's efforts in regulating labor and employment. Of the major statutes and regulations discussed above, the phrases "administrative liability" and "administrative penalty" are commonly used.<sup>446</sup> Owing to their vagueness, these regulations are devoid of deterrent effect. In contrast, the Labor Law contains a large section on sanctions, ranging from warnings, orders to take corrective actions, fines, suspension of production, revocation of

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436. *Id.* arts. 70 & 73.

437. *Id.* art. 27.

438. *Id.* arts. 32 & 96.

439. *Id.* art. 96.

440. *See supra* note 269.

441. Labor Law, *supra* note 3, arts. 36, 41, 50.

442. *See supra* notes 335 (overdue payment of wages) & 337 (excessive overtime work).

443. Labor Law, *supra* note 3, art. 99.

444. *See supra* note 206.

445. Labor Law, *supra* note 3, arts. 91, 100 (wages, overtime, & social insurance); 92, 93 (labor safety and health); 94, 95 (protection for women and minors); 96 (forced labor); 97-99, 102 (violation of labor contract); 103-04 (misconduct of public officials).

446. *See e.g.* Hiring Regulations, *supra* note 101, art. 13; Autonomy Implementation, *supra* note 186, art. 8.

license, compensatory damages, to criminal liability.<sup>447</sup> As discussed above, the Ministry of Labor has already issued implementing measures on economic compensation and administrative penalties to supplement the Labor Law. Hence, violators now will not disregard the law without first considering the consequences of his or her actions.

On the whole, the basic provisions of the Labor Law reflect the government's industrial policies. For instance, the provisions on labor contract<sup>448</sup> reveal the government's intent to establish a labor market based on employment contract which will eliminate lifetime tenure,<sup>449</sup> increase labor mobility, and reduce worker lethargy. To accomplish this objective and maintain social stability, there must also be a social insurance fund which will provide for the unemployed and the retired workers. The Labor Law not only requires both the hiring unit and the laborer to contribute to the social insurance fund, but also encourages the hiring unit to establish a supplementary insurance and the laborer to keep savings.<sup>450</sup> These provisions reflect the government's intent to establish a mobile labor market buttressed by an administratively managed social insurance system to which enterprises and workers contribute.

Similarly, to increase technical competency and promote economic development, the government emphasizes occupational training and industrial peace. Regarding occupational training, the Labor Law contains provisions on the development of training programs, certification of occupational skills, and establishment of job services.<sup>451</sup> To promote industrial peace, the Labor Law not only reiterates the progressive pattern of consultation, mediation, arbitration, and lawsuit to resolve labor disputes, but also sets forth specific time limits to expedite the resolution process.<sup>452</sup>

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447. Labor Law, *supra* note 3, arts. 89-104.

448. *Id.* arts. 16-20.

449. One exception is that if the worker has worked consecutively for 10 or more years, he/she can request a labor contract with an indefinite duration. *Id.* art. 20.

450. *Id.* arts. 72, 75.

451. *Id.* arts. 10-11, 66-69.

452. *Id.* arts 77-84. By the end of June, 1995, about 92 percent of local counties had established labor-arbitration committees. Cao Min, *China: New Labor Law Worked On*, REUTER TEXTLINE CHINA DAILY, July 5, 1995, available in LEXIS, World Library, ALLWLD File (quoting Labor Minister Li Boyong). Moreover, in 1994, labor-arbitration committees at all levels accepted and handled a total of 19,098 cases, an increase of 6,740 cases from the previous year. The settlement rate was 94 percent. *Labor Ministry Issues Data on Employment in 1994*, 1995 BBC Summary of World Broadcasts, June 27, 1995, Pt. 3: Asia-Pacific, available in LEXIS, World Library, ALLWLD File (citing RENMIN RIBAO). The disputes concentrated on minimum wage and welfare; in Guangdong, more than 40 percent of the disputes happened in foreign-funded enterprises or joint ventures, most of whose outcome favored employees. *China to Launch Campaign to Publicize Labor Law* [hereinafter *Launch Campaign*], 1995 Xinhua News Agency, June 10, 1995, available in LEXIS, World Library, ALLWLD File.

Other than that, the principle of "equal pay for equal work"<sup>453</sup> evidences the government's policy of eliminating discrimination against women and equalizing the pay packages of Chinese and expatriate managers. The sanction against disclosing trade secrets<sup>454</sup> reveals the government's intent to protect businesses from losing competitiveness. In addition, even though the government allows enterprises to have increased autonomy in making wage decisions, it will regulate wages at the macroeconomic level.<sup>455</sup> These provisions reflect the government's intent to oversee wage reforms in order that economic and social stability will not be disturbed. Despite the legislative intent behind the enactment of the Labor Law, several areas of labor and employment in China are still unresolved. In the first place, it appears that the union is not given more power to advocate the interests of workers. As analyzed above, the Trade Union Law requires foreign-funded enterprises to listen to the opinions of the union, while strikes as an economic weapon are not a right of workers. Hence, despite the passage of the Labor Law, unions in China still have limited power and thus cannot fully advocate the interests of workers even if they choose to do so.

Likewise, article 80 of the Labor Law provides that the trade union's representative will chair the mediation committee.<sup>456</sup> Therefore, the role of the trade union is more neutral, not advocating the interests of workers. However, article 81 also suggests that the trade union's representative will represent the worker in the arbitration committee.<sup>457</sup> These provisions have certainly generated confusion. In any event, it is reasonable to conclude that using the American ideology to analyze unions in China may not be appropriate. If the role of Chinese trade union is administrative, the protection of workers will totally depend on market forces as well as protective legislation and its enforcement.

Apart from union representation, wage reform is another area of labor and employment left unresolved by the Labor Law. As discussed above, wage reforms have been implemented so that the practice of egalitarian distribution will end, reward will be linked to performance, and workers will be more motivated. However, since China has a population of more than one billion, must constantly create new jobs, and still has a relatively backward economy,<sup>458</sup> its wage reform can be accomplished only gradually and within these national constraints. In addition, since China is a socialist country, it must also resolve

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453. Labor Law, *supra* note 3, art. 46.

454. *Id.* art. 102.

455. *Id.* arts. 46-47.

456. *Id.* art. 80.

457. *Id.* art. 81.

458. *Wage Reform*, *supra* note 50.

ideological issues in its efforts to reform the wage system. That is, when China tries to eliminate the practice of egalitarian distribution gradually and adhere to the principle of distribution according to work, it must also avoid excessive differences in income.<sup>459</sup> Since wage reform is a very significant component of labor reform in China, the enactment of the Labor Law is only part of the overall efforts.

More importantly, the problems of surplus workers and unemployment need to be resolved. It has been reported that many Chinese enterprises are overstaffed by as much as 30 percent in some state-owned enterprises, and almost five million people were jobless.<sup>460</sup> Although the five-day work week has been adopted to create additional jobs, some bosses will simply organize rosters rather than hire new employees.<sup>461</sup> Therefore, other solutions must be designed to reduce unemployment and worker redundancy.

In conclusion, the Labor Law is a basic, national law, delineating government policies, providing uniform standards, and leaving details for implementation to local authorities. The Ministry of Labor has promulgated a number of rules and regulations to provide more guidance concerning certain provisions of the Labor Law.<sup>462</sup> Nonetheless, problems relating to weak union representation, wages, surplus workers, and unemployment still need to be resolved.

##### 5. *The Regulations on Labor Management in Foreign Investment Enterprises*

Since the Labor Law applies to all enterprises and economic units located in China,<sup>463</sup> the distinction between domestic and foreign-funded enterprises should be either abolished or narrowed. Therefore, this gesture will result in the equal treatment of domestic and foreign enterprises. Nevertheless, the subsequent Regulations on Labor Manage-

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459. *Id.*

460. *China: Weekend Win for China's Workers*, SYDNEY MORNING HERALD, May 10, 1995, available in LEXIS, World Library, ALLWLD File.

461. *Id.*

462. The supplementary rules and regulations to the Labor Law include special protection for minors, working hours, minimum wage and payment of wages, collective contract, economic compensation for violation or termination of a contract, lay-off for economic reasons, sick leaves or medical treatment period for nonwork-related injuries, on-the-job training, etc. *Supportive Regulations Issued for Labor Law*, Xinhua News Agency, Feb. 3, 1995, available in LEXIS, World Library, ALLWLD File. Several of these supplementary rules have been discussed in the foregoing sections.

463. Labor Law, *supra* note 3, art. 2.

ment in Foreign Investment Enterprises (FIE Regulations) have once again cast doubt on this development.<sup>464</sup>

To a certain extent, the FIE Regulations appear to reinstate the distinction between domestic and foreign-funded enterprises and take back some autonomy already granted to foreign investors by the Labor Law and previous regulations. For instance, the FIE Regulations require foreign-funded enterprises to obtain prior approval from the local labor-administration department if they want to recruit directly or from other areas.<sup>465</sup> In addition, if a foreign investment enterprise wants to terminate a labor contract with a thirty-day advance notice, it must obtain the consent of the trade union.<sup>466</sup>

Similarly, the FIE Regulations require employers to pay a livelihood allowance in three cases.<sup>467</sup> The amount of allowance is one month's actual wages for every year of service, but in the event of termination due to inability to work, the FIE must also pay a medical subsidy equal to three months' actual wages for service under five years, or six months' pay for service of five years or more.<sup>468</sup> The basis for computing the amounts of livelihood allowance and medical subsidy is the average monthly wages for six months preceding the termination of the labor contract.<sup>469</sup> Hence, these provisions are different from those stated in the Measures on Economic Compensation for Violation and Termination of

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464. The Regulations on Labor Management in Foreign Investment Enterprises [hereinafter FIE Regulations], Aug. 11, 1994, *reprinted and translated in 2 CHINA LAWS*, *supra* note 3, ¶ 12-626. This set of regulations was promulgated by the Ministry of Labor and the Ministry of Foreign Trade and Economic Cooperation.

465. *Id.* art. 5. *Cf.* Autonomy Implementation, *supra* note 186, arts. 1, 3.

466. FIE Regulations, *supra* note 464, art. 12. However, article 26 of the Labor Law does not mention the consent of the trade union. Labor Law, *supra* note 3, art. 26.

467. The FIE Regulations require an enterprise to pay a livelihood allowance in these situations: (1) the parties agree to terminate the contract; (2) the employee terminates the contract because the employer has used violence, threat, or confinement to force labor or has infringed upon his/her rights; (3) the enterprise terminates the contract due to the employee's inability to work after illness or nonwork-related injury, employee's failure to be qualified after training or change of post, change in objective circumstances rendering performance of the contract impossible, or other legal requirements. FIE Regulations, *supra* note 464, arts. 11, 12 & 19. However, if an enterprise declares its dissolution or if parties agree after consultation to terminate the labor contract, the enterprise must pay a lump sum for living expenses and social insurance premium to the social insurance organ if one of the following also applies: (1) the employee has work-related injury or suffers occupational disease, and has been certified by hospital to be undergoing medical treatment, (2) the employee after medical treatment has been certified to have lost completely or partially his/her work ability, (3) the employee who has died as a result of work-related injuries has dependents, (4) a female employee is pregnant, on maternity leave, or nursing a baby, or (5) the employee is not covered by any type of social insurance. *Id.* art. 21.

468. *Id.* art. 20.

469. *Id.*

Labor Contract (Economic Compensation Measures) subsequently promulgated by the Ministry of Labor.<sup>470</sup> Moreover, the amount of compensation for paying wages below the minimum pay is the difference between what has been actually paid and the minimum pay plus an amount equal to 20 to 100 percent of the difference,<sup>471</sup> while the Economic Compensation Measures set it at a maximum rate of 25 percent.<sup>472</sup> Therefore, the question is whether the Economic Compensation Measures are designed to supersede the FIE Regulations or the government intends to apply different measures to foreign-funded enterprises.

The conflicting provisions of the Labor Law and FIE Regulations suggest either that the respective drafters have not coordinated their efforts, or that the subsequent, more specific statute is what the government intends. Since the FIE Regulations were promulgated by administrative agencies while the Labor Law was passed by the National People's Congress, the Labor Law should take precedence.<sup>473</sup> However, one may also argue that a more specific statute prevails over a general law. How about the conflicting provisions on medical subsidy and compensation below minimum wage subsequently issued by the Ministry of Labor? Nonetheless, even though the FIE Regulations take a somewhat reverse stance, it does not appear that China wants to provide a restrictive, instead of hospitable, environment for foreign investment.

### III. CONCLUSION

On one hand, the enactment of a national labor law will enable workers to have more protection and allow management to have more specific guidelines in making personnel decisions. Moreover, a uniform labor law can reduce inconsistent and *ad hoc* decisions by courts and agencies at various levels and in different places.

On the other hand, the passage of the Labor Law will not necessarily relieve workers from their plight or facilitate management in its personnel decisions, because the mere existence of a piece of legislation is ineffectual if it is not enforced. If the existing legal regulations had been conscientiously enforced, there should not been so

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470. See *supra* note 370.

471. FIE Regulations, *supra* note 464, art. 29.

472. See *supra* note 430.

473. However, the FIE Regulations explicitly state that conflicting provisions in all the previous regulations regarding labor management in foreign-funded enterprises will be superseded. FIE Regulations, *supra* note 464, art. 36.



much labor unrest in the first place.<sup>474</sup> In 1994, a dozen provinces and almost 1,000 cities and counties established labor supervisory organizations to monitor compliance with the law.<sup>475</sup> Certainly, this kind of programs will expedite enforcement efforts. Hence, China needs not only a comprehensive labor law replete with sanctions, but also its vigorous enforcement by all groups concerned.

In addition, the successful implementation and enforcement of the Labor Law entails both administrative commitment and judicial independence. As discussed above, corruption among officials has been rampant. Meanwhile, the judiciary is subject to the Party's influences and administrative control.<sup>476</sup> To achieve the purposes of the Labor Law, China must also carry out reforms to eliminate corruption and strengthen its judiciary. Likewise, laws must be accessible in order to be effective. To assist workers in understanding their legitimate rights and the importance of observing the law, they should be educated as to what the law provides for them and requires of enterprises.<sup>477</sup> Once workers know

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474. It has been reported that local officials side with foreign businesses for fear of losing investment. Sheila Tefft, *Restive Workers, Not Students, Vex Beijing*, CHRISTIAN SCIENCE MONITOR, June 1, 1994, § World, at 1, available in LEXIS, World Library, ALLWLD File. In addition, an October 1995 report states that many Sino-foreign joint ventures in Shanghai forced employees to work overtime, did not give them contracts, and did not pay insurance. An inspection of 450 joint ventures by the city's labor bureau revealed that 9,820 out of 38,844 workers had no contract, 7,764 workers had not gone through proper employment procedures, and 3,224 migrant workers were illegally employed. A Sino-Japanese joint venture forced its employees to work 80 hours of overtime in July, and the labor bureau fined the joint venture 3,000 yuan and ordered it to obey the rules on work time. *Joint Ventures in Shanghai Break Labor Laws*, Reuters World Service, Oct. 4, 1995, available in LEXIS, World Library, ALLWLD File. The report does not clearly state whether all of these violations occurred in 1995 or some happened before the passage of the Labor Law.

475. *China Survey Reveals Labor Abuses*, UPI, Nov. 1, 1994, available in LEXIS, World Library, ALLWLD File. Statistics from 15 provinces covered by the inspection reveal that enterprises had retroactively signed contracts with 2.62 million of their employees and rectified 789,000 cases of irregularities in labor relations, and that employers paid \$39.5 million in overdue wages and said they would stop forced overtime in 9,000 firms. *Id.*

476. Currently, judicial independence is lacking in China, because (1) the judges or members of the collegiate bench who hear a case in open court do not have full power to decide the case, (2) judges do not enjoy any security of tenure and, as judicial cadres, may be transferred away or removed, (3) courts are not adequately funded, and (4) it is difficult to enforce judgments. ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 119-23 (1992).

477. In October, 1994, the Ministry of Labor and the ACFTU organized activities to spread knowledge about the Labor Law. *Beijing Consulting Services on Labor Law*, Xinhua News Agency, Oct. 9, 1994, available in LEXIS, World Library, ALLWLD File. Another report states that the Ministry of Labor was going to launch a week-long drive in July 1995 to publicize the Labor Law. *Launch Campaign*, *supra* note 452.

their rights, they will be able to tell whether their rights and interests have been infringed.<sup>478</sup> Actually, trade unions can play a rather significant role in implementing the objectives of labor laws, a role they have already assumed.<sup>479</sup>

As analyzed above, many labor-management problems encountering China today are the legacy of past decades, and social problems generated by recent economic reforms necessitate the formulation of new policies and measures. Labor laws and regulations embody these new policies. The passage of the Labor Law and its supplemental regulations is a commendable move. Nonetheless, their effectiveness in alleviating the conditions of abused workers and easing the difficulties of managers remains to be seen. Apart from effective enforcement of the law, judicial independence, elimination of corruption, and knowledge of one's legal rights, labor reforms depends on the success of wage reforms, reduction of housing shortage, and establishment of a social insurance program.

In conclusion, the preceding legislative analysis of labor and employment in China is somewhat panoramic. However, it does provide the reader with a basic understanding of the Chinese labor and employment laws and various concomitant issues. Given the past and present economic, social, and political environments in which Chinese laborers have lived, it is no wonder that there exists a divergence between law theory and practice.<sup>480</sup> The purpose of this article—to understand China's labor and employment in its own light and the role of legislation in such a context—is therefore achieved. Hopefully, the Chinese model and its future developments may provide policymakers in other countries with insights into their own labor reform efforts.

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478. The recent increase of labor disputes has been attributed to the passage of the Labor Law. *Labor Disputes on the Rise in Chinese Capital*, Deutsche Presse Agentur, May 31, 1995, § Financial Pages, available in LEXIS, World Library, ALLWLD File (citing CHINA DAILY).

479. It has reported that some trade unions set up legal advisory groups for workers, which gave lectures on laws, rendered consulting services, offered legal assistance in lawsuits, and ran law courses for workers. *Other Reports: Trade Union Leader on Strengthening the Legal System*, BBC Summary of World Broadcasts, June 18, 1983, Pt. 3: The Far East, available in LEXIS, World Library, ALLWLD File. In fact, the Labor Law empowers unions to supervise the compliance of labor statutes and regulations. Labor Law, *supra* note 3, art. 88.

480. *E.g.*, In 1995, Wei Jiangxing, Chairman of the ACFTU, admitted that there would be difficulties in carrying out the Labor Law, especially when the social insurance system was still immature and money-losing enterprises were still great in number. *Trade Union Chief Admits "Difficulties" in Carrying Out Labor Law*, 1995 BBC Summary of World Broadcasts, July 24, 1995, Pt. 3: Asia-Pacific, available in LEXIS, World Library, ALLWLD File.