

Chinese Labor Law Reform: Guaranteeing Worker Rights in the Age of Globalism

Earl Brown

Chinese Labor Law Reform: Guaranteeing Worker Rights in the Age of Globalism

By Earl Brown

The New York Times on October 12, 2006 featured an article describing fierce opposition by some US investors and employers in China to modest improvements to Chinese labor legislation. I have just visited China with labor lawyers and industrial relations experts who have worked to advance these proposed changes in China's employment law. The labor law reformers paint a vivid picture of the imbalance to the detriment of workers in Chinese industrial relations and the resulting abuses of employees, and of the urgent need to redress this imbalance if China's social and investment environment is to remain stable.

The controversy over reforms to China's labor law affords a glimpse into the labor dynamics of a China whose much-hyped economy has been growing at rates of 8-12 percent annually. This growth is led by a private sector only 25 years

old that has overtaken the centralized state and collective sectors. In this transition, the Chinese worker has ended up with the short end of the stick.

Faced with a labor law system that does not seem capable of correcting even the most basic of worker rights violations, such as the widespread employer practice of failing to pay wages due and owing on time and in full, Chinese workers are increasingly hitting the streets, and, in some cases, resorting to violence to get their due. [1] Without industrial institutions to systematically speak for workers in trouble, and a legal framework promoting such representation and fostering conflict resolution and rights enforcement, it is doubtful that China can attain its own form of "democracy" or even stability. At the same time, however, legal space has opened up for the representation of workers in contesting for their rights. Legal aid to enforce worker rights is now an entrenched if contested feature of the Chinese legal system. In addition, many Chinese industrial relations and labor law academics, worker rights advocates and practitioners, and

the Chinese union, have proposed reforms in Chinese labor law to address glaring abuses, such as widespread wage arrears and unconscionable industrial injury and disease rates.



Workers at a Guangdong garment factory walk out after a reduction in piece rates.

As a modest first step, they propose to improve the enforceability of employment contracts, to protect temporary and “dispatched” workers from being indefinitely casualized and deprived of protections as regular employees, to limit the employer’s right to fire at will, to enhance severance pay and to require transparent, negotiated work place rules. But some employers, including a few US employers in China, complain that even these modest steps to protect employees are intolerable.

These opponents of reform have gone so far as to threaten a flight of capital if these basic improvements become law. Using more moderate language, the American Chamber of Commerce in China has filed lengthy objections to the reforms with the legislature, insisting that

even these modest improvements designed to protect workers from casualization and arbitrary firings will “...adversely impact the country’s economy...” [2]

Just 25 years ago, labor relations inside China were simple within China’s lifetime industrial employment system. Wages and benefits, including retirement, housing and medical care, were anchored in the danwei, the work unit. If you needed housing, the danwei allocated space. If you were sick, you went to the danwei clinic or a health care facility sponsored by the danwei. Got a new job? Well, you had to get permission from your prior danwei. Move to the big city? Not without a danwei to allow you in and anchor you. Government set wages, hours and working conditions. Direct state edicts to the danwei’s managers, a group including the work unit’s party and union leadership, settled many of these issues.

Now millions of foreign and domestic employers independently determine wages, hours, and working and living conditions in China’s huge factories and factory dormitories, as millions of peasants continue to migrate to its cities and millions of young workers enter the job market each year. The uniformity and control and the basic stability inherent in labor relations anchored in the danwei are a memory.

China has resorted to the individual employment

contract as the legal framework to replace danwei-based industrial relations in a system that was long dominated by state enterprise and the planned economy. The basic employer-employee relationship is now theoretically captured in the individual employment contract, which by law must contain certain minimal labor protections. But many Chinese employers won't even give their employees contracts and routinely ignore the basic worker rights set by law. Chinese courts are too often trapped by a perversely pedantic view of law and will not imply a contract or enforce minimal standards if the employee cannot present a signed contract because the employer refuses to sign one. Thus the employer's illegal refusal to give a contract became a ticket to immunity! [3]

As labor lawyers know, if the state doesn't effectively balance the asymmetry between employers and employees through decent and effective labor laws, then the employer ends up with all the cards. The result is an unbalanced system of industrial relations in which workers' grievances are ignored and abuses flourish—a lawless environment hardly consistent with the social stability that foreign investors, even those now opposed to redressing these imbalances, require.

This view is born out fully in China's hypercapitalistic labor market. In that brutal labor competition, China's "peasant-workers",

who migrate by the millions from rural areas to new urban and suburban industrial zones and construction sites, bear an additional burden. They are not enfranchised in their new urban work places because they are not legal residents. Only residents of urban areas are legally entitled to access education, housing and other social services. This second-class status gives employers even more power over vulnerable migrant workers.

China's industrial relations law has to date been a helter-skelter affair, full of inconsistent regulations and more often than not irrelevant, because labor laws, including the laws on employment contracts, are too often simply ignored by the millions of autonomous employers all seeking to drive down the price of labor. Even if an employer wanted to comply with labor laws setting standards, he or she would be immediately placed at a competitive disadvantage as most competitors ignore the law and thus have lesser labor costs. Thus, China appears to be in the grip of a downward "race-to-the bottom"—which has no effective floor, and seriously threatens social peace.

This is heaven for individual employers hoping to profit by endlessly depressing labor costs. No rights for employees, no restrictions on employers and, best of all, no pesky union. That this non-system has enshrined a complete imbalance in power favoring the employers and

has allowed for pervasive abuses should surprise no one. Nor should the ensuing internal impetus for reform. China has now begun to develop a legal framework to redress some elements of the imbalance as the state seeks to deflect worker anger from the streets to the courts, and to address some of the most flagrant abuses in new legislation.

The government and labor law experts have commenced a process to reform labor law. The scope of this proposed employment contract law is limited—innumerable laws, regulations and judicial decrees govern industrial relations in China. The Trade Union Law does not cover employment contracts but rather the basics of forming unions. Yet other laws and rules address health and safety and social security. Thus, this contract law draft is limited in scope and hardly cures the twin inadequacies of Chinese labor law—its failure to provide for free trade unions to give voice to its workers, and the pervasive lack of enforcement of basic labor standards.

That said, within its scope, this proposed law provides a solution to some vexing enforcement problems and a start on addressing some of the imbalances that burden China's workers. Here are its most important features:

- It covers most industrial employees, replacing a confusing welter of laws, regulations and decrees that left many workers unprotected. It

covers migrant workers.

- It clearly puts on the employer the burden of proving any deviation from the labor standards imposed by law. If the employer fails to give a contract, one containing all the protections of the law will be imposed.

- To correct a tendency of courts to automatically favor employers—a tendency hardly limited to China—the draft law requires the court (or arbitrator) to enforce the employee's view of the labor agreement in the event of a dispute with an employer unless the employer can present contrary evidence beyond his or her word. Only then can the court (or arbitrator) deviate from the employee's version of the terms of the contract.

This rule aims to redress the imbalance in resources between employer and employee and will aid migrant workers. The employers, after all, have clerical resources. If they can't produce a document rebutting the employee why should their naked "say-so" prevail?

- The law strictly limits tacking on probationary periods during which the employer can arbitrarily terminate an employee. This feature is designed to overcome an abusive practice that deprives employees of protections from arbitrary discharge and requires "just cause" before an employee is dismissed.

- This proposed law regulates for the first time the new industry of labor brokers or "labor dispatchers", which has grown up to furnish export industries with "just-in-time" workers who have dubious legal status as employees

under the law and therefore are often unprotected. The current arrangements are rife with abuses of workers, so this is a much-needed correction.

- If employers keep using a temporary employee for more than one short-term contract period, the law would view that employee as a permanent employee ending the practice of casualising employment unduly.
- This draft law regulates abuses of “non-compete” clauses, whereby employers saddle skilled workers in IT and other sectors with excessive restrictions on who they can work for in the future and severely hamper future job mobility. Some US employers vehemently oppose this correction. These employers want the unfettered right to fire and casualize employees. In the same breath, they want to tie down their skilled labor with legal entanglements (“non-competes”), which restrict workers from working for competitors and thus limit the job mobility of Chinese workers. In short, they want their selfish advantages, regardless of consistency or sound policy.
- To correct a predisposition in Chinese courts and among labor arbitrators to exalt form over substance and facts, the proposed changes make the facts and realities of the employment relationship the key. Courts and arbitrators are enjoined to look at the facts as a whole and not to focus on the clerical details; whether a contract is in exactly proper form, or whether the employee has dotted every “i” and crossed every “t” is no

longer decisive. Employees would no longer be confronted with the dilemma of enforcing a contract where the employer has illegally withheld one. This is a very much-needed reform to obviate the literalism of some Chinese legal discourse, and to force decision-makers to look at the facts on the ground.

As noted, some US employers in the American Chamber of Commerce in China have responded to these simple proposals with extreme rhetoric. A group claiming to represent the American Chamber of Commerce—now disavowed by AmCham--burst into a scholarly meeting of labor law reformers held in Shanghai this April 2006 threatening to withdraw from China if the bill passed. “It is like going 20 years backward, instead of moving forward,” they complained.



China's draft Labor Contract Law will significantly strengthen employee rights, but also add a range of new restrictions for employers nationwide. This response to the draft labor contract law posted at the American Chamber of Commerce, Shanghai.

The principal complaint of American employers

is that they, as employers who largely comply with Chinese labor and employment laws, will be placed at a competitive disadvantage by the changes. They will comply; their Chinese and Asian foreign investor competitors will not and will thus gain an advantage in labor costs. But the obvious response to this concern is to spread labor law compliance to all sectors of China, not to further tolerate defective laws that fuel widespread non-compliance.

It is important to rescue China's workers from the "race-to-the-bottom" in labor standards—important for the quality of life of working families everywhere. China is setting global labor standards. Workers in South East Asia, in Europe and in the US are being drawn into a downward spiral in wages, occupational health and safety and in social protections that is being justified by employers by reference to "more competitive" Chinese labor conditions. Chinese workers and their allies in the trade union, in the labor bar and in academia are beginning to seek to reverse this spiral. Worker rights advocates, and persons concerned with social justice in America, Asia and throughout the globe, should support these changes by urging foreign employers in China to withdraw their opposition.

[1] A recent ILO study shows that 50% to 80% of employers in Guangdong cities illegally retain wages. This practice is so prevalent it is justified

as "local custom." Greenfield and Pringle, "The Challenge of Wage Arrears in China" in Valesco (ed), *Paying Attention to Wages* (2002). According to one ACFTU survey, only 15.8% of private enterprises comply with working hour regulations. Most workers, according to this study, work a 50-hour week. See (http://www.chinadaily.com.cn/en/doc/2003-08/14/content_254678.htm).

[2] American Chamber of Commerce, People's Republic of China, "Comments on Draft Labor Contract Law submitted to the Standing Committee of the National People's Congress, Law Committee, Financial and Economic Affairs Committee, Legislative Affairs Commission," April 19, 2006 (on file with author).

[3] In this respect, Chinese courts show the same "spirit of mutilating narrowness" in construing worker rights that Justice Felix Frankfurter discerned and condemned in US courts. See, e.g., *U.S. v. Hutcherson*, 312 US 219, (1941).

Earl V. Brown Jr. has represented U.S. trade unions and employees in labor law and civil rights cases since 1976. A Fellow of the American College of Labor and Employment Law, he is Labor and Employment Law Counsel for the American Center for International Labor Solidarity. He previously served as General Counsel to the International Brotherhood of Teamsters.

Earl Brown wrote this article for Japan Focus. It was posted on November 21, 2006. (http://laborstrategies.blogspot.com/global_labor_strategies/2006/11/us_congress_tak.html#more)

For other reports on Chinese labor rights, see this report from Global Labor Strategies. Chinese Trade Union at a Crossroads (See also Anita Chan *Organizing Wal-Mart: The Chinese Trade Union at a Crossroads* (<http://japanfocus.org/products/details/2217>))