

Bottom-Up Enforcement? Legal Mobilization as Law Enforcement in the PRC

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## ABSTRACT

In 1994 the National People's Congress of the People's Republic of China passed the first national labor law since the founding of the republic in 1949. The 1994 Labor Law was an important legislation step in the unification of the bifurcated transitional economy, divided between the plan and the market. The law liberalized labor markets, established a new system of contract employment, and set up some basic rights and responsibilities of employers and employees. In the decade that followed the passage of this law, Chinese labor legislation and implementation of laws and regulations tended to expand employer autonomy and control at the expense of workers' rights and security. Protective efforts emanating from the central government were weakened at the local legislative and implementation stages due to regional competition for foreign direct investment and close ties between state officials and enterprise owners and managers.

In 2007, the National People's Congress passed three important labor laws that significantly enhanced workers' rights and employment security. The legislative process was marked by lively public debate about the laws and increased public participation in the legislation. The passage of these laws seems to mark the beginning of a new era of labor legislation in which workers are more knowledgeable about legal protections and the central government is more aggressive in pushing a development model that is not solely oriented around growth.

In the period since the laws' passage, labor disputes in China have doubled with major manufacturing centers like the Yangtze and Pearl River Deltas seeing dispute increases up to 300%. With the severe impact of the global economic crisis on China's export sectors, workers responded to layoffs and other employment changes with a wave of filings against their employers. As China's economy recovered in 2009-10, workers continued to act contentiously, with a spate of strikes in foreign-invested enterprises and pressure on companies to raise wages and improve conditions.

This paper examines the post-2007 period of more stringent labor legislation through an examination of the local responses to central government attempts to enhance workers' rights. We argue that the Global Financial Crisis, local competition for investment, and close ties between employers and local governments reduced the state's ability to implement and enforce the new protections promulgated in 2007. However, workers' heavy use of the legal system for dispute resolution points to a new kind of "bottom-up enforcement" of labor laws in which legal action by workers reinforces central government attempts to improve local implementation of central laws. We hypothesize that fear of worker-initiated litigation leads to changes in firm behavior in regions with high

rates of disputes. Firms adjust to the new protections offered by the law by increasing protection for some kinds of workers and reducing protections for other kinds of workers. The paper highlights the inequality of legal protections at the workplace in China, both across region and across types of workers.

In 1994 the National People's Congress of the People's Republic of China passed the first national labor law since the founding of the communist state in 1949. The 1994 Labor Law was an important legislative step in the unification of the bifurcated transitional economy, divided between the plan and the market. The law liberalized labor markets, established a new system of contract employment, and set up some basic rights and responsibilities of employers and employees. In the decade that followed the passage of this law, Chinese labor legislation and implementation of laws and regulations tended to expand employer autonomy and control at the expense of workers' rights and security. Protective efforts emanating from the central government were weakened at the local legislative and implementation stages due to regional competition for foreign direct investment and close ties between state officials and enterprise owners and managers.

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The laws went into effect shortly before the onset of the global financial crisis, which had a severe impact on China's export sectors. Local governments, worried that the new laws would negatively impact China's economic recovery, responded with lackluster implementation measures and local regulations that weakened some of the laws' main protections. Workers, emboldened by the legislative debate and the media attention to the new laws, responded to layoffs and workplace violations related to the crisis with a wave of filings against their employers. In 2008, labor disputes in China doubled; major manufacturing centers in the Yangtze and Pearl River Deltas saw disputes grow by nearly 300%.

The post-2008 stage of labor law implementation and enforcement is, potentially, strikingly different from the first iteration of central law/local implementation pattern seen after the passage of the first national labor law in 1994. During the previous period, local governments prioritized economic growth over labor protection. Many of the main protections of the 1994 law were ignored or selectively enforced, leading to widespread criticism of the Chinese government and multinationals for the sweatshop conditions in many Chinese factories. Given the lack of independent trade unions, weak civil society, and abundant labor surplus in the countryside, workers had little power to resist these trends. The social context of the 2008 laws is quite different. There have been reports of labor shortages in coastal manufacturing centers since 2004, media and public attention to

working conditions has increased dramatically, and NGOs organized to protect workers' legal rights thrive in many major cities.

Our main theoretical focus is to explore the effects of increased participation and legal knowledge of workers in changing implementation and enforcement measures at the local level. Workers' heavy use of the legal system for dispute resolution points to a new kind of "bottom-up enforcement" of labor laws in which legal action by workers reinforces central government attempts to improve local implementation of central laws. Using qualitative interview data from Shanghai, we describe how worker-initiated litigation can lead to changes in firm and government behavior. In other words, even in the absence of effective government enforcement of labor regulations, bottom-up enforcement can be achieved if workers have access to legal and/or administrative institutions for redress.

We also hypothesize that firm strategies to mitigate more rigid labor regulations will have diverse effects on the workforce. The heightened protections offered in China's new labor laws may have little positive effect on workers without the requisite economic and social capital to pursue the legal option. These protections may also be leading to an expansion of the informal sector as firms reduce the number of formal workers protected by these laws.

Our preliminary conclusions, drawn from firm interviews and analysis of dispute trends in Shanghai, will be tested in later drafts of this paper using

more comprehensive data from social surveys and government statistics reporting labor disputes and labor inspections by region.

This research contributes to the debate over the effect of labor regulations on firms and macroeconomic conditions, such as growth and unemployment.<sup>1</sup> The current literature on labor regulations focuses overwhelmingly on “law on the books” while overlooking variation in implementation and enforcement. In the Chinese context and in many developing countries, enforcement of labor regulations is lax and uneven.<sup>2</sup> Many protections on the books are not realized in reality. Taking this gap between promulgation and implementation as a given, we examine how “laws on the books” can be invoked by workers to press for protections that are guaranteed in writing but rarely achieved in practice. Can worker-initiated litigation substitute for weak state implementation and enforcement? If litigation is effective, how does the threat or existence of litigation change firms’ behavior? Does litigation-driven enforcement of more rigid labor regulations have negative consequences for some workers, such as driving some workers into the informal sector as firms reduce the number of formal employees covered by the more protective legislation?

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<sup>1</sup> Simeon Djankov and Rita Ramalho, «Employment Laws in Developing Countries,» *Journal of Comparative Economics* 37 (2009), 3-13; Horst Feldmann, «The unemployment effects of labor regulation around the world,» *Journal of Comparative Economics* 37 (2009), 76-90.

<sup>2</sup> Almeida and Carneiro examine actual state enforcement. See Rita Almeida and Pedro Carneiro, «Enforcement of Labor Regulation, Informal Labor, and Firm Performance,» World Bank Policy Research Working Paper 3756, October 2005.

The paper proceeds as follows. In the first section, we detail the changing social context of Chinese labor legislation from the first national labor law in 1994 to the most recent supplementary legislation in 2007, including the most significant changes in the Labor Contract Law. In particular we focus on two aspects of significant change: the changes to the labor contract system in the laws themselves and changes to the legislative process that has expanded public participation and media attention. In the second section, we examine the implementation period of the new law, which was nearly simultaneous with the onset of the global financial crisis in the summer of 2008. In this section we detail the local government regulatory responses to the central law, arguing that after the crisis deepened in the fall of 2008, there were clear signals from the government to weaken implementation of the Labor Contract Law and to side with employers in disputes as much as possible through emphasis on mediated outcomes. The third section details how disputes intensified in number and complexity in the wake of the new law and the crisis. Despite the state attempts to establish «harmonious labor relations», disputes continued to increase in 2008 and 2009. The last section and conclusion sets out our key preliminary findings. Worker-initiated litigation and complaints are changing how firms structure their workforce as firms preemptively try to avoid the risks of litigation.

## **I. From the Labor Law to the Labor Contract Law**



By the time that the labor law was passed in 1994, many controversial issues of economic reform in the 1980s had been resolved clearly in favor of the reformist camp. Therefore, despite the many protections offered by the law, the law's general principles leaned toward greater employment flexibility and enterprise autonomy (from state intervention). Two examples make this point clearly. First, the labor law made a radical break with the past by regulating employment relations across ownership sectors that previously had been treated separately and differently. One could say that state sector employees saw their workplace rights reduced through the law, while employees in the foreign and private sectors saw their rights clarified and expanded. Secondly, the law heralded the end of the "iron rice bowl" system of lifetime employment by legislating into law the labor contract system as the basic mode of employment relations in the PRC. An experiment that had begun in 1986 with the *Temporary Regulations on the Labor Contract System* now had the force of law.

The social context of the labor law's legislative journey was very different from the current environment. The passing of the labor law in 1994 was motivated by two different concerns of the government. The first was how to increase managerial autonomy and efficiency of state-owned and urban collective enterprises (at the time these enterprises still employed the vast majority of the urban workforce). The second concern was how to increase oversight and regulation of the still small, but rapidly growing, foreign-invested and private sectors that were concentrated along the coast.

High-profile strikes had already occurred in development zones in the south, mainly in Korean and Japanese-invested factories and the regime had begun to grow concerned about the lack of institutional capacity to address labor problems in the non-state sector. The law's major changes reflect these divergent goals. The new flexibility accorded to firms through the labor law and other changes in the economy (expanding labor markets and large-scale rural-to-urban migration) was well-timed as the state moved to privatize and restructure the state sector more radically in 1997. The legal changes in the 1994 law made it easier for firms to layoff workers and to sign new short-term contracts with new entrants in the later 1990s. While it is estimated that at least 30 million urban workers were laid-off during the restructuring, many more millions of workers saw their employment relations transformed as the "iron rice bowl" was replaced by "contract relations."

Since the heyday of SOE reform and restructuring in the late 1990s and the first few years of this century, much has changed in the landscape of employment relations. First, most Chinese workers are now employed in private companies.<sup>3</sup> Second, rural-to-urban migration has continued unabated and many labor-intensive industrial sectors rely almost totally on migrant labor for production level workers. Third, because many millions of laid-off and unemployed workers from the public sectors are not employable in the new labor markets which value skills, education, and youth, large

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<sup>3</sup> Shahid Yusuf, Kaoru Nabeshima, & Dwight H. Perkins, *Under New Ownership: Privatizing China's State-Owned Enterprises* (Washington, D.C.: Stanford University Press and the World Bank, 2006).

numbers of urban workers have found unstable and temporary work in the informal sectors of the economy.<sup>4</sup> Fourth, rates of labor disputes and labor conflict continue to increase annually despite repeated attempts by the government to reduce conflict, mediate tensions, and channel disputes more effectively toward quick resolution. (See chart 1.) Fifth, given China's much increased participation in the global economy and in particular global production networks, China's labor conditions are important to and monitored by many groups and actors outside of China.

The social context of the labor contract law, then, is quite different from the period before the promulgation of the national labor law in 1994. These trends of increased flexibility, marketization, privatization, and informalization are extremely disturbing to most legislators and government officials in charge of shepherding this draft to its eventual passage by the NPC. The yearly increases in mass incidents and signals of rising social instability are at least partly attributed to the lack of legal protections afforded most Chinese workers.<sup>5</sup> As one academic expert involved in the legislative publicly noted, "China's recent economic growth and success has been at the expense of its workers. They have been sacrificed."<sup>6</sup> These voices have strengthened and found greater reception because the political context

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<sup>4</sup> Park, Fang, and Giles estimate urban informal employment to be close to 50%.

<sup>5</sup> Some of the largest labor protests in the history of the PRC occurred in the years following the massive layoffs in the state sector. For a detailed report on these protests, see Human Rights Watch, *Paying the Price: Worker Unrest in Northeast China* 14:6 (August 2002).

<sup>6</sup> "Chang Kai Explains the Policy of the Draft Labor Contract Law" (常凯解读劳动合同法草案政策) (13 January 2007, online: <<http://www.9ask.cn/blog/user/wr666/archives/2007/14953.html#top>>).

has also changed with the consolidation of political power by the Hu Jintao and Wen Jiabao administration. The central leadership's new commitment to reducing inequality, protecting the "weak" members of society, and cultivating social harmony has given the voices that advocate large and fairly radical changes in employment relations in China much greater confidence and influence. The labor contract law reflects this newfound interest in reducing inequality and enhancing social justice.

The labor contract law is one of many supplementary laws to the 1994 *National Labor Law* and its drafting went on for several years. Other important laws include the *Employment Promotion Law* (促进就业法), which was passed in August of 2007, the *Labor Dispute Mediation and Arbitration Law* (劳动争议调解仲裁法), which was passed in December of 2007, and the social insurance law (社会保险法), which is still in the drafting stage. Based on the texts of the three labor laws promulgated in 2007, these new laws are in a model of greater social protection and decreased flexibility. One of the most significant changes in the law involves the labor contract system.

#### *Changes to the Labor Contract System*

The 1994 *Labor Law* codified the use of the labor contract system to manage the labor relationship. All workers in China should have a written labor contract with one employer that establishes the basis for rights and responsibilities at the workplace: "the labor relationship" (劳动关系).

The 1994 *Labor Law* allowed either fixed-term or non-fixed term (open-ended) contracts between employer and employee. The law stated that employees with over ten years tenure at one employer have the right to request a non-fixed term contract, but this clause was difficult to enforce as the language seems to indicate joint agreement, which is often difficult to achieve. Under the 1994 law, labor contracts in China overwhelmingly tended to be fixed-term contracts. Production-level workers tended to have short contracts of one to two years. Technical workers and managers were more likely to have contracts of three to five years. Although early termination of contracts required showing cause and payment of severance compensation, an employer could freely decide to end employment upon expiration of the labor contract with no severance compensation required. Given that the switch to labor contracts was originally aimed at ending the lifetime employment guarantee of the system of public ownership under the planned economy, the quick shift to relatively short-term contractual employment is an indication of the reform's success. Indeed, some NPC officials and labor specialists have argued that this reform has been too successful, leading to widespread employment insecurity and seriously reducing the bargaining power of workers given that any worker can be let go upon expiration of the contract.<sup>7</sup>

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<sup>7</sup> Jie Xu, "The Second Draft of the Labor Contract Law: Chang Kai and Dong Baohua Battle Again" (劳动合同法草案二审常凯董保华再争锋) *China Economic Weekly* (中国经济周刊) (15 January 2007), reprinted online: SINA <<http://finance.sina.com.cn/review.20070115/03003245153.shtml>>.

The 2007 Labor Contract Law made significant changes to the labor contract system. First, it increased penalties for failure to establish a written labor contract. Second, it increased restrictions on the use of fixed-term contracts. Third, it set out severance compensation requirements for contract expiration.

The Labor Contract Law stipulates that an employer must enter into a written labor contract with an employee within thirty days of the employee's start date. Failure to do so leads to penalties of paying the employee double wages for any time served without a written labor contract. If an employee works for 12 months without a written contract, they are then entitled to sign a non-fixed term contract. These changes target the many employers in China who fail to enter into formal labor contracts with employees. The lack of a formal relationship may allow the firm to evade social insurance fees, to deny legal responsibility for occupational injury or disease, or to keep flexibility through a non-core workforce that can be easily dismissed. Official government surveys revealed the pre-2007 signage rate to be as low as 20%.<sup>8</sup>

In addition to these new requirements for a written labor contract, the Labor Contract Law placed new restrictions on the use of the fixed-term contract, which had become the norm for most workers. The 2007 law requires that employers must extend a non-fixed term contract upon the

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<sup>8</sup> «China won't revise labor contract law amid financial crisis: lawmaker,» Xinhua News Service, [http://news.xinhuanet.com/english/2009-03/09/content\\_10979130.htm](http://news.xinhuanet.com/english/2009-03/09/content_10979130.htm).

renewal of the second consecutive fixed-term contract. For example, an employer could sign two three-year contracts with an employee. Upon the expiration of the second contract (in the sixth year of employment), the company is required to extend an open-ended employment contract. Unlike the previous law, companies can no longer indefinitely enter into fixed-term contract agreements. This is a critical change because expiration of the fixed-term contract has been the main path for termination and layoffs. If implemented strictly, the 2007 law severely restricts labor flexibility.

Finally the 2007 law significantly increases the requirements for payment of severance compensation. Severance (calculated as one month's wage for each year worked) is now required if the employer terminates the contract with cause or if the employer allows the contract to expire.

Many other legal changes were put into place in 2007. The Labor Dispute Mediation and Arbitration Law, for example, extended the statute of limitations for a labor dispute from 60 days to one year. It also made labor arbitration free when it previously had cost a few hundred RMB on average. These changes also expanded the workplace rights of workers and encouraged more workers to come forward with grievances.

#### *Participatory Legislation and Media Attention*

In addition to these important changes to the laws themselves, the 2007 legislative activity was consequential in how it was conducted. The draft labor contract was open to public deliberation and comment for a thirty

day period in the spring of 2006. Interested parties could write letters or post messages to the NPC to register their comments on the draft law. At the end of that period, the draft law had received over 191,000 comments, far exceeding public comments on previous laws and causing a media furor.<sup>9</sup>

Comments submitted by foreign business associations in China were publicly released and attracted significant attention in China and abroad.<sup>10</sup> Three groups, the American Chamber of Commerce in Shanghai, the US-China Business Council, and the European Chamber of Commerce all offered formal comments that were more or less public and circulated widely. The US-China Business Council's comments were posted on their website. The comments of the American Chamber of Commerce in Shanghai are indicative of the critical perspective emanating from foreign investors. As their comments state in length by way of conclusion, Am-Cham places its mostly negative stance on the law as part of the general "reformist" camp's emphasis on economic development (and employment growth):

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<sup>9</sup>"Collection of the Masses' Opinions on the Labor Contract Law (各地人民群众对劳动合同法草案的意见汇总). [www.xinhuanet.com](http://news.xinhuanet.com/newscenter/2006-04/06/content_4392500.htm), April 6, 2006, ([http://news.xinhuanet.com/newscenter/2006-04/06/content\\_4392500.htm](http://news.xinhuanet.com/newscenter/2006-04/06/content_4392500.htm)); "The Draft Labor Contract Law Public Solicitation for Opinions Yields 191,849." (劳动合同法草案公开征求意见共191849件.) [www.xinhuanet.com](http://news.xinhuanet.com/employment/2006-04/21/content_4457825.htm), April 21, 2006. ([http://news.xinhuanet.com/employment/2006-04/21/content\\_4457825.htm](http://news.xinhuanet.com/employment/2006-04/21/content_4457825.htm)); "Ten Focal Points of the Draft Labor Contract Law in the Eyes of the Masses" (群众眼中劳动合同法草案的十个焦点). [www.xinhuanet.com](http://news.xinhuanet.com/newscenter/2006-04/21/content_4458619.htm), April 21, 2006. ([http://news.xinhuanet.com/newscenter/2006-04/21/content\\_4458619.htm](http://news.xinhuanet.com/newscenter/2006-04/21/content_4458619.htm))

<sup>10</sup> See, for example, Christine Buckley, "Foreign Investors May Quit if China Tightens Up Labor Law." *The Times Online*, June 19, 2006, [www.business.timesonline.co.uk/tol/print.do?articleid=676240](http://www.business.timesonline.co.uk/tol/print.do?articleid=676240); Jiangtao Shi, "New Labor Law Would Bring Conflicts, European Firms Fear." *South China Morning Post*. April 22, 2006: pg 8; Toh Han Shih, "Labor Contract Law Draws Protest from Every Side." *South China Morning Post*. November 13, 2006: pg. 18; Geoff, Dyer, "China's Labor Debate Spurs War of Words for US Interests," *The Financial Times*. May 3, 2007: pg. 11; Andrew Batson, "China Toils over New Labor Law." *Wall Street Journal*. May 7, 2007: pg. 8.



China is still a developing country and its main focus at this stage is still economic development, as correctly pointed out by Premier Wen Jiabao. In making and revising laws, the starting point should be the specific circumstances of China, not good intentions and hastily-set goals...In the highly competitive global economy of today, the welfare of Chinese workers depends not only on protections afforded by labor law, but also depends on the survival and steady growth of the enterprises in which they work. It is not wise to kill the chicken to get the egg. The serious flaws in the Draft, if left uncured, would not help to resolve the problems in enforcement of the current Labor Law. On the contrary, they will bring chaos to the labor market, weaken the competitiveness of Chinese enterprises, and bring adverse consequences to the national economy.<sup>11</sup>

The controversy over the draft law and the attempts by foreign business associations to change key elements of the draft were reported widely in the domestic and then international media.<sup>12</sup> An article in the *New York Times* in October, nearly seven months after the period of public comment, ignited debate in the US.<sup>13</sup> Domestic and international labor advocacy groups picked up the debate and began to draw up public comments and reports on the drafting process and the role of foreign investors in it. Global Labor Strategies, a DC-based labor NGO, wrote a full report on the foreign investor response to the draft law.<sup>14</sup> Workers Rights

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<sup>11</sup> James Zimmerman, Letter submitted to the Standing Committee of the National People's Congress, Law Committee, Financial and Economic Affairs Committee, Legislative Affairs Commission (19 April 2006) The American Chamber of Commerce, People's Republic of China.

<sup>12</sup> See e.g. John Cremer, "New Clauses Worry Multinationals" *South China Morning Post* (8 June 2007) 2; Dan Cody, "New Rules to Protect Workers" *South China Morning Post* (6 February 2007) 5; and Sarah Schafer, "Now They Speak Out: If U.S. business is a quiet force for progress in China, as it claims, why is it protesting against labor reform?" *Newsweek International Edition* (28 May 2007).

<sup>13</sup> David Barboza, "China Drafts Law to Empower Unions and End Labor Abuse" *The New York Times* (13 October 2006) 1.

<sup>14</sup> Global Labor Strategies, "Behind the Great Wall of China: U.S. Corporations Opposing New Rights for Chinese Workers", online Global Labor Strategies <<http://laborstrategies.blogs.com>>. See also Costello, Tim, Brendan Smith, and Jeremy Brecher. 2007. "Labor Rights in China." *Foreign Policy in*

Consortium, an NGO fighting sweatshop conditions in university-licensed apparel also issued a lengthy report on the issue.<sup>15</sup> These NGOs have also been at least cautiously supportive of the expanded trade union role proposed in the later drafts of the law (in particular the March 2006 draft that was available for public comment). Despite their misgivings about the nature of the All China Federation of Trade Unions (ACFTU) as a distant approximation of a real trade union, these NGOs have thrown their support behind the draft law in the hope that the ACFTU will be transformed by new power and responsibilities.<sup>16</sup>

Domestic media attention focused on the attempts by foreign and Chinese business owners to weaken or change the draft law. The popular Internet news site, Sohu.com, ran a headline on the debate, “Why are foreign investors threatening China’s legislation?” Academics traded barbs and accusations in the media and at conferences. The National People’s Congress Legislative Affairs Bureau countered criticisms that the law would hurt China’s economy. In the wake of the global financial crisis and the actual stage of implementation and enforcement, these conflicts became more forceful and heated. It is safe to say that the Labor Contract Law has attracted more attention in China domestically than any other law in the last

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*Focus.* [www.fpif.org](http://www.fpif.org); Smith, Brendan, Jeremy Brecher, and Tim Costello. 2007. “An Emerging Chinese Labor Movement.” *New Labor Forum* (16:1): pp. 82.

<sup>15</sup> Scott Nova, “China Labor Law Reform.” Memo to Primary Contacts, WRC Affiliate Universities and Colleges (Workers’ Rights Consortium, 1 March 2007).

<sup>16</sup> For an example of this shift see Change to Win, “The Question Isn’t Why We Went to China – It’s Why Wouldn’t We?”, online: CtWconnect  
<[http://www.changetowin.org/connect/2007/06/th\\_question\\_isnt\\_why\\_we\\_went.html](http://www.changetowin.org/connect/2007/06/th_question_isnt_why_we_went.html)>.

decade, including other important laws such as the Property Law, the Civil Procedure Law, and the Bankruptcy Law.

## **II. Post-2008 Enforcement and Implementation**

Given the media attention and public debate over the draft law, supporters of the law had high expectations for its implementation and subsequent effects on Chinese workers. Critics of the law predicted dire consequences for employment and investment. A few high profile cases of pre-emptive layoffs by firms in late 2007 to avoid the new requirements of the law were telling signs that the law would have a significant impact on Chinese industrial relations.

2008 was a difficult year for Chinese industry, especially labor-intensive manufacturing, even before the onset of the global financial crisis in the fall. Lukewarm central government support for low-end manufacturing combined with rising costs (energy and wages, in particular) and a labor shortage to drive many firms to the brink of bankruptcy. The Labor Contract Law added to these costs and pressures, but was not the only reason for a large number of closures and disinvestment even prior to the export collapse that occurred as the crisis deepened in the West. The law was, however, one of the few variables that the government had some degree of control over. By the fall of 2008, there were numerous calls from Chinese businessmen, from local government officials, and from academics for the law to be rescinded or delayed. While the central government refused to stop the implementation of the law, the implementation and enforcement of the law did

change. Local governments, most concerned about the effects of rising unemployment and weak growth, moved first. The central government followed. These measures affected how the law was implemented and how disputes emanating from the law were handled by local administrative and judicial institutions.

Given the growing concern of local governments to maintain rapid economic growth and employment, many localities responded to the 2008 laws with local explanations and regulations that had the effect of weakening the employee friendly aspects of the national law. Local courts were the main conduit of these local regulations, issuing “explanations” and interpretations of the national law. Critics have argued that this phenomenon is leading to the “regionalization” and “loopholization” of national law.<sup>17</sup> Localities with large concentrations of foreign direct investment and labor-intensive manufacturing have been the most proactive in this regard with High Court explanations of the laws from Shanghai, Jiangsu, Zhejiang, and Guangdong.<sup>18</sup> A key notion in these post-2008 local responses is that

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<sup>17</sup> “Special Report on the Labor Contract Law,” [laodong hetongfa zhuan ti baodao] Xinhua, (online).

<sup>18</sup> These local explanations are: Regulations to Promote Harmonious Labor Relations in the Special Administrative Region of Shenzhen [Shenzhen jingji tequ hexie laodong guanxi cujin tiaoli], issued 23 September 08, effective 1 November 08 [hereinafter Shenzhen Regulations], Jiangsu High People’s Court and Jiangsu Labor Dispute Arbitration Committee Circular on the Use of the PRC Law on Mediation and Arbitration in Labor Disputes [jiangsu sheng gaoji renmin fayuan jiangsu sheng laodong zhengyi tiaojie zhongcai weiyuanhui yinfa guanyu shiyong zhonghua renmin gongheguo laodong zhengyi tiaojie zhongcaifa ruogan wenti de yijian de tongzhi], issued 10 October 08 [hereinafter Jiangsu Circular]; Jiangsu High People’s Court Guiding Opinion on the Handling of Labor Dispute Cases in Economic Crisis [jiangsu sheng gaoji renmin fayuan guanyu zai dangqian hongguan jingji xingshi xia tuoshan shenli laodong zhengyi anjian de zhidao yijian], issued 27 February 09 [Jiangsu 2009 Guiding Opinion]; Circular on Fujian’s Improvement of Standardized Measures to Handle the Establishment, Modification, Dissolutions, and Cancellation of Enterprise Labor Contracts [guanyu yinfa fujian sheng jinyibu guifan qiye laodong hetong dingli biangeng jiechu he zhongzhi de banfa (shixing) de tongzhi], issued 10 April 08 [hereinafter Fujian Circular]; Guangdong High People’s Court and Guangdong Province Labor Dispute Arbitration Committee Guiding Opinion on

protection of *both* workers' rights and employers' lawful rights and interests are essential to maintain stable labor relations and to continue with industrial and economic development.<sup>19</sup> This language is a marked change from a year or two earlier when the central government spoke of industrial upgrading and leaving poor quality jobs behind.<sup>20</sup> The Supreme People's Court issued a guiding opinion in July 2009 that reiterated this more ambivalent stance toward the protection of newly enshrined rights in the Labor Contract Law.

In addition to the downgrading of strict implementation of the law, and in the wake of rapidly increasing numbers of labor grievances, the central and local government pushed dispute measures that ended in mediated or negotiated settlements. The 2008 PRC Law on Mediation and Arbitration of Labor Disputes (which lower barriers to sue) had already emphasized the need to first exhaust all consultation, negotiation, and mediation avenues to resolve labor disputes.<sup>21</sup> As disputes climbed in 2008, the reliance on mediation increased. Mediation was pursued not only as a way to reduce the pressure on arbitration committees and courts, but also to allow for a greater degree of compromise. In most cases, this

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Questions about the Use of the Labor Dispute Mediation and Arbitration Law and the Labor Contract Law [guangdong sheng gaoji renmin fayuan guangdong sheng laodong zhengyi zhongcai weiyuanhui guanyu shiyong laodong zhengyi tiaojie zhongcaifa laodong hetongfa ruogan wenti de zhidao yijian], issued 23 June 08 [hereinafter Guangdong Guiding Opinion]; Shanghai High People's Court Circular on the Guiding Opinion on Labor Dispute Procedural Questions [shanghai shi gaoji renmin fayuan guanyu yinfa guanyu laodong zhengyi jiufen ruogan chengxu wenti de yijian de tongzhi], issued 8 July 08; Shanghai High People's Court Circular on Questions about the Use of the Labor Contract Law" [shanghai shi gaoji renmin fayuan guanyu yinfa guanyu shiyong laodong hetongfa ruogan wenti de yijian de tongzhi], issued 3 March 09 [hereinafter Shanghai Contract Circular].

<sup>19</sup> This is particularly highlighted in the MOHRSS Guiding Opinion and Jiangsu 2009 Guiding Opinion.

<sup>20</sup> See, e.g., "Reflection on Implementation of the Labor Contract Law," [shishi 'laodong hetong fa' de sikao], Guangming Daily, 4 August 08.

<sup>21</sup> PRC Law on Mediation and Arbitration of Labor Disputes, enacted 29 December 07, effective 1 May 08, arts. 4-5 (on negotiation and the application for mediation and arbitration), and 10 (on organizations that provide mediation).

means that the aggrieved workers give up or reduce some of their claims. These two shifts after the law's promulgation – local regulations to weaken the law and dispute resolution processes that de-emphasized the law – were both responses to mitigate the effects of the law at a time of economic fragility and uncertainty. However, neither response could effectively control the number of workers who might choose to invoke the law.

### **III. Dispute Trends**

The publicity and debate surrounding the Labor Contract Law in the domestic media meant that many workers had at least a vague sense that their rights have been increased and that the state was generally sympathetic toward their plight. As part of a long tradition of “legal dissemination” campaigns during the reform era, this law was another “legal weapon” that Chinese workers could use against unjust employers. In response to layoffs and terminations in the wake of rising costs and then rapidly declining export orders, Chinese workers responded with a wave of filings against their employers. Disputes in 2008 reached nearly 700,000, double the rate of 2007. Individual cities and development zones with large manufacturing sectors reported increases up to 300%. Guangzhou City had over 80,000 labor disputes in 2008, a 264% increase from 2007 (GZ Labor Bureau 2009). Local governments and courts struggled to meet the caseload and delays of up to one year were not uncommon. In 2008, some Shanghai cases took close to two years to reach resolution in the courts.

In addition to the large increases in arbitrated cases, Chinese courts were also deluged with labor cases. These suits included contested arbitration decisions and disputes that never reached arbitration as arbitrators' heavy caseload led them to pass some suits directly to the courts. (Arbitration is compulsory for some labor disputes, but is not binding and can be appealed in court by either side.) The Supreme Court of China reported a 97 percent increase in labor cases over the course of 2008. In 2009 this trend continued with nearly 170,000 cases in the first half of the year, an increase of 30 percent from the 2008 high.<sup>22</sup> The President of the Guangdong Provincial Higher Court reported that the Guangdong courts received over 76,000 new labor cases in 2008, up 157 percent from the same period last year.<sup>23</sup> The basic level court in the industrial zone of Tangxia in Dongguan city reported that by November 2008, each judge had received over 1,000 cases. More than half of the annual caseload is made up of labor disputes, most often migrant workers asking for workers compensation, overtime pay, or severance compensation.<sup>24</sup> Courts in Jiangsu Province, outside of Shanghai, reported similarly high increases; in Jiangyang city labor cases at the court increased 300 percent. Court officials called for new measures to handle disputes earlier and to manage

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<sup>22</sup> "Last Year Provincial Courts' Labor Disputes Increase 157.43%," [quansheng fayuan qunian laodongzhengyi anjian tongbi zengzhang 157.43%], Nanfang News Network (Online), 15 February 09; "Cases Soar as Workers Seek Redress," The China Daily (Online), 22 April 09.

<sup>23</sup> "Labor Dispute Cases Suddenly Erupt in the First Half of 2009" [shangbannian zhongguo laodongzhengyi anjian cheng jingpen taishi], Caijing (online), 134 July 09; "Explosion in Disputes," Beijing Review (Online), 22 January 09.

large, spontaneous protests that occur when factories suddenly close or initiate mass layoffs.<sup>25</sup>

#### **IV. Effects of Worker-Initiated Litigation on Firm Behavior**

In interviews with managers and directors of companies based in Shanghai, companies report undertaking serious internal reforms in order to comply with the new labor laws and reduce the threat of worker-led litigation or government inspection. Even companies that did not personally experience a lawsuit reported changing practices and internal rules to comply with the law and avoid workers' lawsuits or complaints to the government. The office manager of a Swiss apparel buyer reports, *"We are now more law-abiding. We have changed our company policies to avoid labor disputes. We want to guard against workers. We need a system to control them and give them a fixed limit. We have also hired legal consultants to improve our company work rules. But overall, the labor [contract] law has really increased our labor costs, risk and workload in dealing with workers. Even by rewriting our company policies, we cannot write such detailed policy to guard against all circumstances. It's impossible. Hence, we live with the increased risk that our workers can misinterpret our company policy or find loopholes in it to file a labor dispute against us."*

A Korean clothing company reports little increase in labor costs, but similar to above, managers focus on the increased risks that the new laws have brought to

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<sup>24</sup> Zhao Lei, "The Busiest Courtroom in China," [zhongguo zuimang de fatingyuan], *Southern Weekend*, December 4, 2008 (Online).

<sup>25</sup> "New Characteristics of Labor Disputes During the Financial Crisis" [jinrong weiji beijingxia laozi jiufen anjian de xin tedian], *Dongfang Fayan* (Online), 6 May 09.



their operations. *"The firm has to be more careful about labor relations. The media and propaganda on the labor [contract] law have been intense. Workers know that they can call 12333 [Shanghai government hotline to report labor infractions] anytime of the day. Workers' legal consciousness has definitely been increased...Our company is more formalized now, it is taking labor more seriously now. The firm is afraid of inspections and penalties. Workers can now sue us, the government can now inspect us. As a result, our risk of being sued is much higher than before."*

A German manufacturing company similarly reports concrete HR areas affected by the new law and employees' rising rights consciousness, *" Definitely our HR workload has increased. We have been rewriting and rewriting our company policies ever since the new law passed. Our firing costs have definitely increased. Previously, the production supervisor would just dismiss an employee. Now, HR will have to look over his contract and devise a plan to dismiss him to avoid any disputes...Right now we are rushing to sign contracts with all our employees. Depending on the workers, we have 1 year, 2 year, 3 year, and a non-fixed term contract. Previously, if we forgot to sign a contract with an employee it wasn't a big deal. Now it is a big deal because employer-employee relations have become tense. Both parties feel that they have to protect their rights and guard against the other."*

A legal consultant for a large Chinese electronics company claims that trends experienced by large firms like his own are being felt by smaller firms as well. *«It's not just large firms that are hiring lawyers. Small firms are also hiring lawyers to review their labor practices because there is a push from labor. Small firms are not*

*afraid of one or two disputes, but when those one or two workers win a settlement, other workers see that the legal process works in their favor and bring more cases against the same employer. The employer gets scared...This is especially the case in Shanghai because all the workers know that they can call 12333 for legal advice. They don't have to spend any money and they get information on labor laws.»*

These adjustments on the part of employers are often in reaction to the perception that disputes are increasing rapidly as rights-conscious workers find any opportunity to claim grievances against their employers. Managers often refer to the general social atmosphere and the important role of the media in shaping behavior. Company compliance and HR reforms often seem to be *preemptive* strategies to reduce risk and to thwart the possibility of worker-initiated litigation or complaint. This leads us to hypothesize that compliance with labor laws is more likely in localities with high rates of disputes. Firms in areas where lawsuits are more frequent and workers are more proactive are more likely to respond to new legislation.

While labor disputes rose rapidly nationally in 2008, it is still the case that they are highly concentrated in just a few provinces and provincial-level municipalities. In 2008, six provinces (and provincial level cities) accounted for two-thirds of all disputes. (See chart 2.) Disputes were most common in Shanghai, Guangdong, Jiangsu, Beijing, Zhejiang, and Shandong. These are all coastal areas with high levels of development and/or concentrated labor-intensive manufacturing. Disputes per 1,000 workers far exceed the national average in most

of these areas. (See chart 3). Rather than interpreting high rates of disputes as an indication of low compliance, we argue that high rates of disputes is part of a "legalizing" dynamic between workers and companies. Rights-conscious workers sue their employers based on new laws and information in the media that touts the protective aspects of legislation. Companies respond with increasingly detailed HR practices that are designed to comply with the law as much as possible while still realizing their own performance and profit goals. Compliance with key aspects of the Labor Contract Law may be more likely in municipalities/provinces that report high rates of labor disputes.

#### *Worker-Initiated Litigation and Effects on Employment*

The Labor Contract Law of 2007 put into place new restrictions on fixed-term contracts and increased the costs of terminations significantly for most employers. As employment concerns grew after the Global Financial Crisis in late 2008, however, both local and central government units weakened implementation of the law and encouraged more generous treatment of employers. Despite lax formal implementation, this move toward more protective legislation has impacted employers through worker-initiated suits and complaints. While this mode of bottom-up enforcement may be improving employment security and working conditions for those currently employed, the onerous new legal requirements may also be encouraging firms to delay new hiring or hire subcontracted workers instead of expanding their core workforce. Lu Zhang's study of the auto industry's adjustment to the Labor Contract Law finds that most large assemblers have

resorted to «dispatched» workers over expansion of the formal workforce. In 2008 the number of dispatched workers increased from 17 million to 27 million nationally, accounting for more than 15% of the total workforce in the secondary and tertiary sectors.<sup>26</sup>

Formal compliance with the law may be concomitant with strategies to avoid the law's most onerous burdens. Therefore, we may see both an increase in compliance with an increase in more informal modes of employment, including the use of dispatched or subcontracted workers who are formally employed through employment agencies. A study by Renmin University researchers found expanded use of labor subcontracting, outsourcing, and lengthened work hours for current workers as main firm strategies to avoid the new requirements of the LCL.<sup>27</sup>

### **Conclusion: Worker-Initiated Litigation as a Substitute for Enforcement**

Worker-initiated lawsuits or inspections as a form of «bottom-up enforcement» of controversial new labor laws is a model of regulatory enforcement that may improve the working conditions of some workers but not others. This paper has explored possible trends across different localities and different types of workers. In the absence of strict state-led enforcement, localities with high rates of disputes may be moving more quickly toward effective implementation of the law as firms struggle to avoid

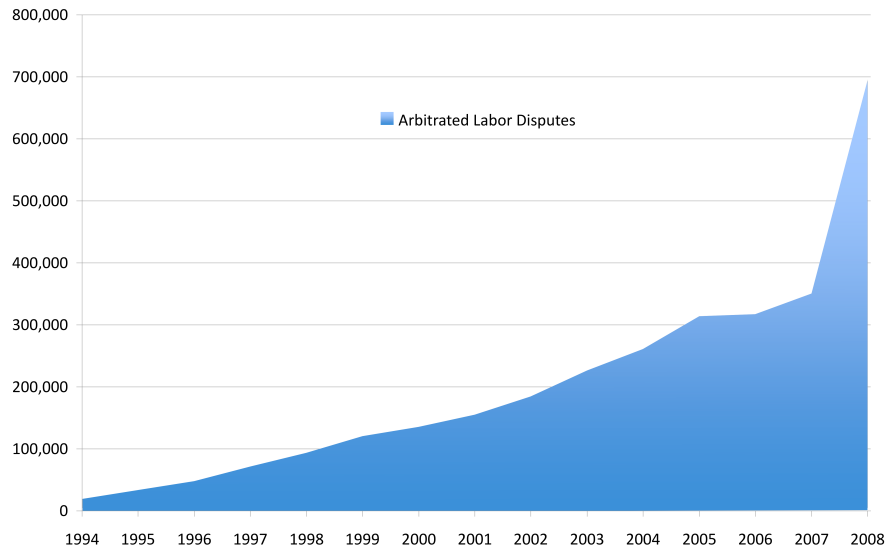
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<sup>26</sup> Lu Zhang, «Labor Force Dualism, Countermovement, and Dynamics of Changing Labor Relations in Reform China: The Case of the Automobile Industry. Paper prepared for delivery at the 2010 Annual Meeting of the Association of Asian Studies, Philadelphia, PA, March 26-29, 2010: 39

<sup>27</sup> Cheng Yanyuan and Wang Fuxi, «The Effect of the Labor Contract Law on HR Management of Chinese Enterprises.» Paper presented at the 2010 Conference China Trade Union Law and Labor Law: Review and Prospects, Beijing Normal University, August 18-19, 2010.

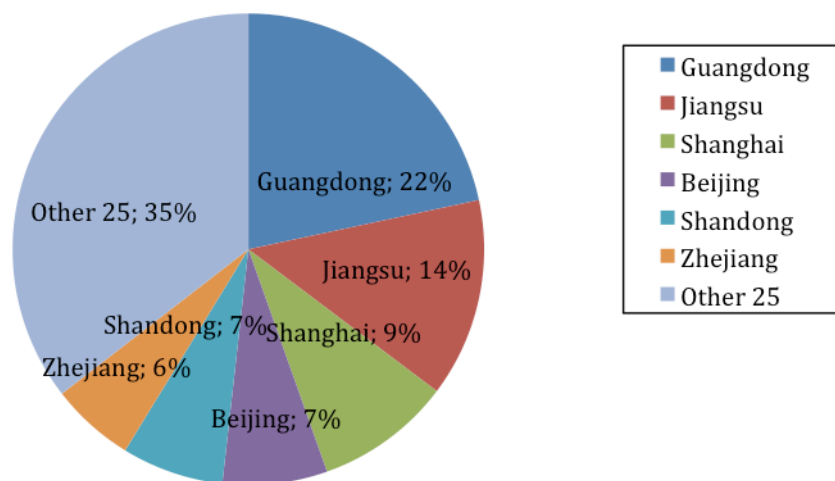
the economic and reputational costs of worker-initiated lawsuits. Firms may be insulating themselves from the higher costs of employment by complying with the law for their core workforce but at the same time expanding the proportion of the workforce that falls outside these new requirements. In both cases, these trends indicate that working conditions are improving for the better-off first. More developed, wealthier provinces on the coast may be more likely to be in compliance with new protective laws. Better-educated, skilled workers are more likely to be retained as core workers and receive the benefits of the new legislation while migrant and/or less-skilled workers are more likely to be subject to the vagaries and weaker protections of temporary employment.

**Chart 1: Arbitrated Labor Disputes,  
1994 -2008**



**Chart 2: Number of Disputes by Province,  
2008**

Labor Statistical Yearbook, 2009



**Chart 3: Disputes Per 1,000 workers,  
2008**  
**Labor Statistical Yearbook, 2009**

