

Is There New Hope in Labor Rights Protection for Chinese Migrant Workers?

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I. INTRODUCTION

Since China's reform and opening up started about three decades ago, a special social group has been born. This group is the surplus rural labor force that migrates to urban areas to work, usually called the "floating population" or "migrant workers." China now has over 200 million migrant workers,¹ which is about 15% of the total population or 27% of the rural population. Most of these workers are doing low-paying manual jobs in big cities.

The following two hypothetical scenarios epitomize the daily lives of these migrant workers. Wang, thirty-five years old, works at a construction site in Beijing, while his family stays at a remote village in Western China. Wang tries his best to keep up with the much younger fellows competing with him in this backbreaking job. He just wishes that the contractor would not delay his payment so that he could send the money home on time to pay his mother's medical bills and his daughter's pending tuition.

In Shenzhen, nineteen-year-old Ling works twelve hours per day and six days per week at a manufacturing factory. Recently, she often feels dizzy and several coworkers have also complained about similar symptoms. Last week, factory management fired Ling's best friend due to a worsening medical condition. Lin suspects that their shared illness is related to the foul-smelling gas they are exposed to during work each day, but she knows nobody who could help her in the unfamiliar big city.

¹ Migrant Worker Issues Study and Document Drafting Group, Research Office of State Council, *Zhongguo nong min gong wen ti yan jiu zong bao bao* [Report on the Problems of Chinese Farmer-turned Workers], REFORM, Vol. 5 (2006) [hereinafter Migrant Worker Report], available at <http://www.gjmy.com/html/zhuanjiaguandian/2007/03/6502.html>. The Migrant Worker Report gave the 200 million estimate in 2006. The most recent statistical estimate by the National Statistical Bureau of China is 225 million migrant workers. See China's Migrant Workers Top 225 Million, CHINA ECONOMIC NET, Mar. 26, 2009, http://en.ce.cn/National/Politics/200903/26/t20090326_18617045.shtml.

Desperately struggling to survive in the cities, migrant workers like Wang and Ling exemplify the cheap labor force that supports China's booming economy. However, these migrant workers' labor rights have been disregarded and abused for a long time.² This paper examines the current legal protection of migrant workers' labor rights in China. It will be argued that the newly amended Chinese labor law framework, exemplified by the enactment of Labor Contract law, Employment Promotion Law, and the Law on Labor Disputes Mediation and Arbitration, brings new hope for migrant workers who are eligible for labor rights protection; although the implementation of the new laws may be a double-edge sword that hurts migrant workers before benefiting them.

Part II introduces the context of the migrant worker issue, including the definition, statistics, changing government policy, common abuses against migrants' labor rights, major barriers in the enforcement of law, and comparison to the condition of international migrant workers. Part III focuses on the eligibility of labor rights protection and applicability of existing Chinese labor laws to migrant workers. Part IV analyzes whether the current law can protect migrant workers from abusive practices. Finally, in Part V, this paper discusses what needs to be done to improve the system for migrant workers.

II. THE CURRENT STATUS OF LABOR RIGHTS PROTECTION FOR MIGRANT WORKERS

A. *An Overview of Migrant Workers in China*

The term "migrant worker" has different official meanings and connotations in different parts of the world. In China, migrant workers usually refer to workers who hold rural household registration but migrate to cities or towns to be employed to do non-agricultural work and rely on wages as their main income source.³ This paper especially focuses on migrant workers who work in the cities.

Migrant workers are crucial to keeping China's economic development on track. During the past two decades, migrant workers have contributed 16% of China's GDP growth according to a conservative estimate from UNESCO and the Chinese Academy of Social Sciences.⁴

² See, e.g., Ben Blanchard, *China's Migrant Workers Face Widespread Abuse*, REUTERS, Mar. 1, 2007, <http://www.reuters.com/article/worldNews/idUSPEK22194120070301>; Joseph Kahn, *Chinese Economy's Underside: Abuse of Migrants*, NEW YORK TIMES, Aug. 26, 2003, available at <http://www.nytimes.com/2003/08/26/international/asia/26MIGR.html>.

³ See Guo wu yuan guan yu jie jue nong min gong wen ti de ruo gan yi jian [Some Opinions on Dealing with Migrant Worker Issues by State Council], available at http://www.gov.cn/jrzq/2006-03/27/content_237644.htm [hereinafter State Council Opinion]; see also Migrant Worker Report, *supra* note 1.

⁴ *Migrant Workers Contribute 16% GDP Growth*, CHINA DAILY, June 12, 2006, <http://www.china.org.cn/english/China/171033.htm>.

Migrant workers dominate the labor force in dirty, dangerous, and demanding industries: 70% of construction workers, 68% of manufacturing employees, and 80% of coal miners are migrant workers.⁵

1. Profile of Migrant Workers

Migrant workers are the relatively younger and better-educated labor force in rural China. They generally have more education than rural non-migrants but less than urban workers.⁶ In 2004, the average age of migrant workers was 28.6 years old and 61% of migrant workers were between the ages of sixteen to thirty.⁷ Sixty-six percent of migrant workers received the mandatory nine-year education while another 24% had received various work skill trainings.⁸

Public service plays a very limited role for migrant workers in their search for employment. Instead, they rely on social networks to get job information. The 2004 statistics shows that about 88% of migrant workers find their jobs through relatives or friends while only 12% find their jobs through government assistance or public agencies.⁹ In 2003, only an estimated 40% of migrants obtained either a temporary or permanent resident permit in the cities, while the remainder migrated, resided, and worked through informal and unregulated channels.¹⁰

The National Bureau of Statistics of China carried out a special survey on the life quality of migrant workers in cities in 2006.¹¹ The

⁵ Alexandra Harney, *Migrants are China's "Factories Without Smoke,"* CNN NEWS, <http://edition.cnn.com/2008/WORLD/asiapcf/02/01/china.migrants/index.html> (last visited Feb. 22, 2009).

⁶ CINDY C. FAN, *Migration, Hukou, and the City, in CHINA URBANIZES: CONSEQUENCES, STRATEGIES, AND POLICIES* 76 (Shahid Yusuf & Anthony Saich eds., The World Bank 2008).

⁷ Migrant Worker Report, *supra* note 1.

⁸ *Id.* The national percentage of the working population that received the mandatory nine-year education (i.e., middle school) or higher is 63.4%, while the percentage for the urban working population is 80.3%. See NATIONAL BUREAU OF STATISTICS OF CHINA, 2006 CHINA STATISTICAL YEARBOOK, *available at* <http://www.stats.gov.cn/tjsj/ndsj/2006/indexeh.htm> (calculation based on data in Table 4-12 and Table 5-2). Also, the 2005 National Population 1% Sampling Statistical Survey by the National Bureau of Statistics of China shows that percentages of working population with middle school or higher education are: national-63.0%, urban-84.1%, town-72.9%, rural-51.3%.

⁹ Migrant Worker Report, *supra* note 1.

¹⁰ U.N. Country Team China, *Common Country Assessment 2004: Balancing Development to Achieve an All-Round Xiaokang and Harmonious Society in China*, 28 (2004), *available at* <http://www.un.org.cn/cms/p/resources/30/311/content.html> (citing Ministry of Labor & Social Security 2003 data).

¹¹ Cheng shi nong min gong sheng huo zhi liang diao chao bao gao [Survey report on the life quality of migrant workers in cities], National Bureau of Statistics (2006), *available at*

survey shows that about 81% of migrant workers have relatively stable jobs in the cities.¹² Sixty-five percent of migrant workers are male and 35% are female.¹³ About 62% of migrant workers are married, but the ratio of families that migrate together is low, with 24 million children left behind with relatives in the rural areas.¹⁴ On average, a migrant worker makes about RMB ¥966 yuan (USD \$141) per month.¹⁵ The average worker spends 43% of his wages on rent and food and sends 39% of his income back home to support his family.¹⁶ Regarding future plans of life, 55% of migrant workers wish to stay in the cities and settle down, while 29% of them want to go home when they make some money or learn certain specialized work skills.¹⁷

Although the job opportunities and favorable wage-differential are key driving forces for migration to urban areas, economic gain is not the only incentive behind migration.¹⁸ Second-generation migrant workers, who know little about farming and have higher education levels than their parents,¹⁹ tend to be more influenced by expected earning opportunities, personal development aspirations, and urban lifestyle; whereas first-

http://www.stats.gov.cn/was40/gjtjj_outline.jsp?page=2&channelid=33728 [hereinafter Life Quality Report]. The sample size of the survey is 29,425. *Id.* The survey targeted migrant workers within the 16-65 age range working in 12 industries. *Id.* The sampling process took into account the relative distribution of migrant workers in eastern, central and western China, as well as the appropriate spread of sex, age, and education level. *Id.*

¹² *Id.*

¹³ *Id.* A 2006 ILO report used data showing the male to female ratio is 51:49. See Max Tunon, *Internal Migration in China: Features and Responses* 8 (2006), www.ilo.org/public/english/region/asro/beijing/download/training/lab_migra.pdf. The substantial increase of female migrant workers is attributed to the demand for young women in manufacturing. *Id.*

¹⁴ Life Quality Report, *supra* note 11. See also *Law Ensures Migrant Workers' Children of Education Right*, XINHUA NEWS AGENCY, Sept. 1, 2006, <http://china.org.cn/english/government/179798.htm>.

¹⁵ Life Quality Report, *supra* note 11. Another study by Research Office of State Council showed that nearly 30% of migrants earn an average monthly wage of between RMB ¥300-500 (USD \$44-73) nearly 40% between RMB ¥500-800 (USD \$73-117) and about 28% earn more than RMB ¥800 (>USD \$117). All US-China currency exchanges in the article use the exchange rate of 6.84 yuan per dollar on April 1, 2009. Qiu Quanlin, *Rural-Urban Income Gap Continues to Widen*, CHINA DAILY, Apr. 17, 2006, http://www.chinadaily.com.cn/china/2006-04/17/content_569054.htm.

¹⁶ Life Quality Report, *supra* note 11.

¹⁷ *Id.*

¹⁸ Tunon, *supra* note 13, at 26.

¹⁹ Bi Mingxin, *Young Migrants Settle for Life in the City*, CHINA DAILY, Feb. 26, 2008, http://news.xinhuanet.com/english/2008-02/26/content_7671827.htm.

generation migrant workers are driven more by land shortage or difficult living conditions in the countryside.²⁰

2. Changing Government Policy

Government policy on migrant workers evolved from “restrict migration” to “control and administer migration” then to “facilitate migration.”²¹ In 1958, China introduced the hukou household registration system to prevent unauthorized rural-urban flows and to promote political stability.²² Until the economic reform in the late 1970s, the hukou system effectively chained Chinese farmers to the land.²³ With the changing market condition and widening rural-urban economic gap, peasants subsequently began to “illegally” move to the cities and managed to survive. In April 1983, the State Council passed regulations allowing peasants to work in towns while retaining their rural household registration.²⁴ Two years later, migrant workers were able to register for temporary residence permits in cities.²⁵

Although the hukou system has been relaxed in recent years, it still poses a barrier to labor rights protections for migrant workers. The State Council approved a pilot scheme in 1997 to grant urban hukou to rural migrants who held stable jobs and had resided in selected towns and small cities for more than two years.²⁶ After testing the scheme in 450 towns and small cities, the State Council approved plans to expand hukou reform in 2001 and issued a 2003 directive affirming the rights of rural migrants to work in the cities.²⁷ However, hukou reform has been minimal in most

²⁰ Tunon, *supra* note 13, at 6.

²¹ *Id.* at 18.

²² FAN, *supra* note 6, at 66. Under the 1958 Regulations on Household Registration in the People’s Republic of China, every Chinese citizen is assigned a “hukou” location and a rural or urban classification. *Id.* A rural hukou provides access to farmland use; an urban hukou provides access to jobs, housing, food, and state-sponsored benefits. *Id.* The hukou location specifies where a worker belongs. Until the mid-1980s, it was extremely difficult for rural Chinese to survive in the cities without an urban hukou. Rural workers did not have access to the necessities of life, which were all centrally controlled and allocated. *Id.*

²³ Ling Li, *Towards a More Civil Society: Mingong and Expanding Social Space in Reform-Era China*, 33 COLUM. HUM. RTS. L. REV. 149, 156 (2001).

²⁴ *Id.* at 157.

²⁵ FAN, *supra* note 6, at 66. During the late 1980s to mid 1990s, many city governments sold “blue-stamp” hukou at high prices to rural migrant elites that met high skill requirements and were able to make sizable investments in the cities. *Id.* The legacy of blue-stamp hukou still persists today in the big cities.

²⁶ *Id.* at 67.

²⁷ *Id.* at 68.

large cities.²⁸ A 2007 report by the Ministry of Public Security affirmed local governments' discretion over hukou reform.²⁹ Although the rural-urban hukou distinction is no longer as important as it once was, hukou continues to bar migrant workers' employment opportunities and access to social security, as well as other public resources in the cities. In this sense, some scholars considered Chinese migrant workers as "foreigners within the cities of their own country."³⁰

Enduring the unfair discrimination and treatment brought by the dualistic hukou system, migrant workers also bring with them social problems. For example, cities with large populations of migrant workers experience increasing crime rates and bear the risk of potential social unrest.³¹ In 2006, the Chinese government proposed a Five-Year Plan about building a harmonious society with more social balance.³² The State Council issued an official opinion that requires local governments to pay special attention to the migrant worker issue.³³ On March 31, 2006, Ministry of Labor and Social Security ("MOLSS")³⁴ set up a Joint Committee on Migrant Workers to report on the progress of relevant

²⁸ *Id.* Very large cities like Beijing, Guangzhou, and Shanghai have been especially resistant to hukou reform. Although a number of large and medium-sized cities, such as Shijiazhuang, Nanjing, Xi'an, and Zhuhai, have relaxed their criteria for granting hukou, some provinces and city governments choose to tighten the policy at their discretion.

²⁹ *Id.* at 69.

³⁰ Ling Li, *supra* note 23, at 156.

³¹ See Howard W. French, *China Success Story Chokes on Its Own Growth*, NEW YORK TIMES, Dec. 19, 2006, available at <http://www.nytimes.com/2006/12/19/world/asia/19shenzhen.html>; THOMAS LUM, SOCIAL UNREST IN CHINA, CRS REPORT FOR CONGRESS 6 (2006), available at www.fas.org/sgp/crs/row/RL33416.pdf (providing detailed information on social unrest caused by migrant workers); *Nong min gong zi nv fan zui lv shang sheng, nan yi rong ru cheng shi zhi xin li pian cha* [Crime Rate of Migrant Workers' Children Go Up, Marginalized in Cities Leading to Psychological Problems], LIAO WANG NEWS WEEK, Oct. 17, 2006, http://news.xinhuanet.com/legal/2006-10/17/content_5214183.htm (providing a report on increasing crime rates among second generation migrant workers in cities); *infra* note 61 (providing a detailed discussion on social discrimination); see also Joseph Kahn & David Barboza, *An Unrest Rises, China Broadens Workers' Rights*, NEW YORK TIMES, June 30, 2007, available at <http://www.nytimes.com/2007/06/30/world/asia/30china.html?ex=1340856000&en=11e3c6f4c6445e93&ei=5088&partner=rssnyt&emc=rss>.

³² Ling Zhu ed., *Communique of the Sixth Plenum of the 16th CPC Central Committee*, XINHUA NEWS AGENCY, Oct. 11, 2006, http://news.xinhuanet.com/english/2006-10/11/content_5191071.htm.

³³ State Council Opinion, *supra* note 3.

³⁴ MOLSS was reorganized and renamed the Ministry of Human Resources & Social Security in March 2008.

ministries in their specific duties regarding migrant workers.³⁵ In 2007, the Chinese media even began to promote changing the official reference to migrant workers from “peasant worker” to “new urban citizen.”³⁶ This change of wind in government policy combined with the newly amended legal framework that will be discussed later has far-reaching implications for migrant workers’ labor rights protection.

B. *The Common Practice against Migrant Workers’ Labor Rights*

1. Underpayment & Wage Default

Underpayment and wage default are very common among migrant workers. The average wage of migrant workers increased little from the 1990s to 2003, but it has gradually increased in recent years following labor shortages in certain coastal regions.³⁷ According to a survey by MOLSS, migrant workers’ wages, as a portion of GDP, have decreased from 16% in 1989 to 12% in 2003.³⁸ A migrant worker receives only about one-quarter the wage of an urban worker for the same work.³⁹ According to incomplete data from the All-China Federation of Trade Unions (“ACFTU”), by mid-November 2004, the wage arrears of all migrant workers in China reached RMB ¥100 billion (USD \$14.6

³⁵ Tunon, *supra* note 13, at 18. For the first time, a single body has been empowered to conduct a holistic examination of the conditions of migrants, holding consultations and drafting policy recommendations based on their findings.

³⁶ Paul French, *Asia-Pacific: China’s Mobile Workforce – Goodbye Migrant Workers, Hello New Urban Citizens*, ETHICAL CORPORATION, available at <http://www.ethicalcorp.com/content.asp?ContentID=4846>.

³⁷ Zhuan ti bao gao 2: nong min gong gong zi wen ti fen xi [Special Report II: Analysis on Migrant Workers’ Wages], Ren kou yu lao dong lv ping shu [Green Book of Population and Labor] (2007), available at http://www.china.com.cn/aboutchina/zhuanti/rkyld/2007-08/02/content_8620896.htm. From 2003 to 2006, the average monthly wage of migrant workers increased from ¥781 yuan to ¥953 yuan. The annual increase rates were: 2.8% in 2004, 6.5% in 2005, and 11.5% in 2006. *Id.*

³⁸ Migrant Worker Report, *supra* note 1. Underpayment seems to be a common issue for workers in China. A report by Chinese Academy of Social Sciences, workers’ wages as a proportion of GDP have decreased from 53.4% in 1990 to 41.4% in 2005, even though the economy has grown four times larger and the corporate profit share, by contrast, increased from 21.9% to 29.6%. Carol Divjak, *Soaring Inflation Sparks Social Unrest in China*, WORLD SOCIALIST WEB SITE, Dec. 28, 2007, <http://www.wsws.org/articles/2007/dec2007/chin-d28.shtml> (last visited Mar. 22, 2009). Similarly, a 2005 ACFTU survey found that from 2002 to 2004, 81.8% of workers earned below the average wage in their local regions, 34.2% earned half the average, and 12.7% received less than the minimum wage. Chinese workers are especially sensitive to inflation due to the wholesale destruction of public housing, healthcare, education, and pensions in 1990s. *Id.* Personal consumption significantly contracted from 48.8% of GDP in 1991 to 38.2% in 2005. *Id.*

³⁹ Migrant Worker Report, *supra* note 1.

billion).⁴⁰ The payment delay time ranged from one month to eight years.⁴¹ Only 48% of migrant workers were able to draw their salaries on time in 2006.⁴²

2. Long Work Hours but Almost No Overtime Payment

Most migrant workers have to work long hours, but they rarely get overtime pay. The 2004 State Council Research Report showed that working eleven hours per day and twenty-six days per month are the norm of migrant workers' life.⁴³ Over 46% of migrant workers work seven days a week and over 36% work six days a week,⁴⁴ while 76% of them never enjoy overtime payment even when working on holidays.⁴⁵

3. Lack of Work Safety Protection

Poor safety facilities, lax safety rules, and a lack of proper training make migrant workers the most vulnerable group in terms of work safety.⁴⁶ About 127,000 people in China died in workplace accidents in 2005 and there were 73 incidents with death tolls exceeding 10.⁴⁷ Almost 80% of accidents occurred in the industries where most employees are migrant workers.⁴⁸ Based on the survey by State Administration of Work Safety, migrant workers accounted for 56% of the workforce in the coal mining, metal, dangerous chemicals and fireworks industries.⁴⁹ Coal

⁴⁰ *China's Catch 22: When It Costs More to Claim Wage Arrears than the Wage Arrears Are Worth*, CHINA LABOUR BULLETIN, Oct. 5, 2005, <http://www.clb.org.hk/en/node/17585>.

⁴¹ Migrant Worker Report, *supra* note 1.

⁴² *Chinese Delegation Walks Out of Human Rights Dialogue*, CHINA LABOUR BULLETIN, June 8, 2007, <http://www.china-labour.org.hk/en/node/45553> (citing data in a report by the Research Office of State Council).

⁴³ Migrant Worker Report, *supra* note 1. Due to the sampling difference, the 2006 Life Quality Survey of Migrant Workers by National Bureau of Statistics used in *infra* note 11, showed the average daily work hours for migrant workers is 8.93, with 26% migrant workers working 9-10 hours per day, 11% working 11-12 hours per day, and 3% working over 12 hours per day. Life Quality Survey, *supra* note 11.

⁴⁴ Life Quality Report, *supra* note 11.

⁴⁵ Migrant Worker Report, *supra* note 1.

⁴⁶ *Migrant Workers to Get Injury Insurance*, XINHUA NEWS AGENCY, Nov. 22, 2006, http://en.chinagate.com.cn/news/2006-11/22/content_2449335.htm [hereinafter *Injury Insurance*].

⁴⁷ *US\$60 Bln to Reduce Industrial Accidents*, XINHUA NEWS AGENCY, Aug. 29, 2006, http://en.chinagate.com.cn/news/2006-08/29/content_2448577.htm.

⁴⁸ *Working Safety for Migrant Workers in Risky Industries Stressed*, XINHUA NEWS AGENCY, Sept. 30, 2006, http://en.chinagate.com.cn/povertyreduction/2006-09/30/content_2448884.htm.

⁴⁹ *Id.*

mining, with 1 death every 7.4 days, is the most deadly job in China.⁵⁰ Almost all workers at small and state-owned collieries are migrant workers.⁵¹ By the end of 2005, China recorded 665,043 cases of occupational illness, including 606,891 cases of pneumoconiosis, a chronic disease of the lungs resulting from long-term inhalation of dust that primarily affects miners, sandblasters and metal grinders.⁵² Despite large numbers of injured and ill workers, they have limited access to healthcare. For governmental supervision, each provincial occupational healthcare institute was in charge of 8,385 enterprises with toxics and harmful production and each occupational health professional had to serve 4,713 workers.⁵³

4. Insecure in Social Security System

The majority of migrant workers are unable to enjoy basic social security. Social security is tied to hukou location, and rural residents were not included in the social security system until the establishment of special rural pension and medical insurance programs in recent years.⁵⁴ At the end of 2006, 14.17 million migrants (7.1% of the total migrant population) joined in rural pension insurance, 23.67 million migrants (11.8%) participated in rural medical insurance, and 25.37 million migrants (12.7%) were covered by work injury insurance.⁵⁵ By contrast, 32.5% of urban workers enrolled in pension plans and 27.3% had medical insurance in 2006.⁵⁶ In 2006, national average enrollment rates of unemployment and work injury insurances were 8.5% and 13.4%, respectively.⁵⁷ As the

⁵⁰ Zhao Xiaohui & Jiang Xueli, *Coal Mining: Most Deadly Job in China*, CHINA DAILY, Nov. 13, 2004, http://www.chinadaily.com.cn/english/doc/2004-11/13/content_391242.htm.

⁵¹ *Injury Insurance*, *supra* note 46.

⁵² *China's Workers at Greater Risk of Illness, Injury on Job*, XINHUA NEWS AGENCY, July 17, 2006, http://en.chinagate.com.cn/news/2006-07/17/content_2448104.htm.

⁵³ *Id.*

⁵⁴ Bing Wang & Jun Zhang, *Economic Analysis of Social Security System in Today's China's Countryside*, 17 CHINA POPULATION, RESOURCES AND ENV'T 14, 17 (2007).

⁵⁵ NATIONAL BUREAU OF STATISTICS OF CHINA, STATISTICAL COMMUNIQUÉ ON LABOR AND SOCIAL SECURITY UNDERTAKINGS IN 2006 (2007), http://www.stats.gov.cn/English/newsandcomingevents/t20070524_402406436.htm. Participation rates vary according to the sector in which migrant workers work and the provinces in which they live.

⁵⁶ NATIONAL BUREAU OF STATISTICS OF CHINA, 2007 CHINA STATISTICAL YEARBOOK, <http://www.stats.gov.cn/tjsj/ndsjsj/2007/indexeh.htm>. Pension and medical insurance systems are still urban-rural double track, *i.e.*, rural and urban residents get distinct treatments.

2006 National People's Congress ("NPC") promoted the new policy to improve the social security system for migrant workers, the migrants' 2007 enrollment rates in pension, medical, unemployment, and work injury insurances have seen obvious increases: 8.6%, 14.5%, 5.5% and 17.2%, respectively.⁵⁸

5. Discrimination in Employment Opportunities & Public Services

Discrimination in employment opportunities and public services is another issue facing migrant workers. Some local governments still have various discriminatory employment policies against migrant workers to integrate into the formal job market.⁵⁹ Many employers consider migrant workers as cheap, temporary work hands rather than formal employees and are thus reluctant to sign contracts with them. Only 12.5% of migrant workers had employment contracts in 2005.⁶⁰ Migrant workers are frequently portrayed negatively in the media and blamed by local residents for overcrowded public transportation, increasing crime rates, and race-to-the-bottom job competition against laid-off state-owned enterprise ("SOE") employees.⁶¹ Even public schools charge extra fees beyond tuition to enroll migrant workers' children who stay with their parents in the cities.⁶²

Each year local bureaus of labor and social securities carry out the "Spring Breeze Movement," which calls on public employment institutions to extend assistance to migrants free of charge,⁶³ and the "Warm Spring Campaign," which aims to help migrants' families by volunteering, donating, or enhancing the migrant workers' contract signing

⁵⁷ *Id.* Work injury and unemployment insurances have no discriminatory policy against migrant workers. See Ministry of Human Resources and Social Security of the People's Republic of China, *Zhongguo de gong shang bao xian zhi du [China's Work Injury System]*, http://w1.mohrss.gov.cn/gb/ywzn/2007-12/14/content_214164.htm (last visited Apr. 22, 2009); Ministry of Human Resources and Social Security of the People's Republic of China, *Shen me shi shi ye bao xian? Ta you na xie te dian? [What is Unemployment Insurance? What are its Features]*, http://w1.mohrss.gov.cn/gb/ywzn/2006-02/14/content_106491.htm (last visited Apr. 22, 2009).

⁵⁸ Jia Dong, *2007 Zhongguo She hui bao zhang fa zhan bao gao [2007 China Social Security Development Report]*, Mar. 27, 2008, http://www.china.com.cn/aboutchina/zhuanti/08zgshxs/2008-03/27/content_13695010_2.htm.

⁵⁹ Tunon, *supra* note 13, at 21.

⁶⁰ Migrant Work Report, *supra* note 1.

⁶¹ Daniel F. K. Wong et al., *Rural Migrant Workers in Urban China: Living a Marginalized Life*, 16 INT'L J. SOC. WELFARE 32, 36 (2007).

⁶² *Id.*

⁶³ Tunon, *supra* note 13, at 24.

rate.⁶⁴ However, these yearly events are insufficient for migrant workers who have the right to be treated equally as urban workers.

C. *The Major Barriers to Migrant Workers' Access to Legal Protection*

Besides the unfair restrictions caused by the hukou system and the overall poor enforcement of law in China, there are several special obstacles that block migrant workers' access to legal protection. First, migrant workers are less educated compared to urban workers, so their overall rights-consciousness is relatively lower. Second, the deeply rooted social discrimination against migrant workers exacerbates the unfair treatment in the workplace. Third, many employers refuse to sign employment contracts with migrant workers or forced migrant workers to waive their basic labor rights. For example, employers may force migrant workers to sign an illegal *sheng si zhuang* [liability waiver] to give up work injury compensation.⁶⁵ Fourth, migrant workers usually cannot afford the money and time to stop working, get legal counsel, and go through the complicated Chinese labor dispute resolution process. Fifth, the trade unions play a very limited role in helping migrant workers.⁶⁶ Finally, employers have nothing to lose when supervision and punishment for frequent violations are lacking. Many local government officials view migrant workers as troublemakers, and they choose to tolerate the abusive conduct of enterprises to avoid loss of capital investment and local revenue, which are important indexes for their promotions.

⁶⁴ See, e.g., *Zhuhai Launches Warm Spring Campaign Care for Migrant Workers*, ZHUHAI BROADCASTING STATION, Jan. 21, 2007, <http://www.zhtv.com/Article/ShowArticle.asp?ArticleID=55804>.

⁶⁵ *Sheng Si Zhuang* is a traditional deed in ancient China, by which one party totally disclaims liability for any consequences, even including the other party's wrongful death. This kind of "deed" is illegal under modern law, but this practice, which manipulates migrant workers' lack of legal knowledge and bargaining power, is still used sometimes in the operation of small collieries in remote areas.

⁶⁶ At the end of 2005, only 23 million migrant workers joined in the union, representing less than 12% of the total migrant labor force. Yan Liang, *Trade Union to See More Rural Migrant Workers Join*, XINHUA NEWS AGENCY, Oct. 15, 2006, http://english.gov.cn/2006-10/15/content_413766.htm. Among 758.25 million workers in 2005, 150.29 million (19.8%) are members of ACFTU. 2006 CHINA STATISTICAL YEARBOOK, *supra* note 8, at Table 23-4 and Table 5-2. Due to the State Council's emphasis on the role of trade unions in helping migrant workers, the trade union enrollment rate for migrant workers reached 20.5% at the end of 2006. See *Trade Union to Target Migrant Workers*, CHINA DAILY, Feb. 2, 2007, <http://www.10thnpc.org.cn/english/China/198600.htm>. The national workers' trade union enrollment rate in 2006 was 22.2%; 2007 CHINA STATISTICAL YEARBOOK, *supra* note 56, at Table 23-4 and Table 5-2.

D. *A Comparison to International Migrant Workers*

China's internal migration of the rural labor force is part of the big picture of international migration of labor, which is increasingly important in today's global economy. According to the statistics of the United Nations, 191 million people, representing 3% of the world population, lived outside of their country of birth in 2005.⁶⁷ Most of the migrants are economically active, laboring at the bottom of the occupational ladder.⁶⁸ A 2007 United Nations study revealed that migrant workers working in industrialized countries sent home more than \$300 billion to their families in 2006, surpassing the \$104 billion in foreign aid provided by donor nations to developing countries and the \$167 billion direct foreign investment in developing countries.⁶⁹ Given the global demographic transition—labor shortages and aging populations in developed countries juxtaposed with quickly expanding populations in developing countries—and given the economic gap between the developed and developing world, international migration is bound to increase in the future.⁷⁰

The International Labor Organization (“ILO”) is the United Nations agency with a constitutional mandate to protect migrant workers through a rights-based approach to labor migration and the promotion of tripartite participation.⁷¹ Non-discrimination in employment is one of the ILO core labor standards.⁷² On December 1, 2006, China ratified the

⁶⁷ U.N. Department of Economic and Social Affairs: Population Division, *International Migration 2006*, U.N. Doc. ST/ESA/SER.A/256 (Mar. 2006), available at http://www.un.org/esa/population/publications/2006Migration_Chart/Migration2006.pdf.

⁶⁸ International Labour Organization, International Labour Conference [ILC], *Report of the Committee on Migrant Workers*, ILC Doc. ILC92-PR22-269 (2004), available at <http://www.ilo.org/public/english/standards/realm/ilc/ilc92/pdf/pr-22.pdf>.

⁶⁹ *Migrants Sent Home Over \$300 billion in 2006, Finds UN Study on Remittances*, U.N. NEWS SERVICE, Oct. 18, 2007, <http://www.un.org/apps/news/storyAr.asp?NewsID=24326&Cr=migrant&Cr1=>.

⁷⁰ Peter McDonald & Rebecca Kippen, *Labor Supply Prospects in 16 Developed Countries, 2000-2050*, 27 *POPULATION & DEV. REV.* 1, 10-12 (2001).

⁷¹ ILO Office for International Labour Migration, <http://www.ilo.org/public/english/protection/migrant/> (last visited Mar. 25, 2009). Three international conventions—the Migration for Employment Convention of 1949 (No. 97), the Migrant Workers Convention of 1975 (No. 143), and the International Convention on the Protection of All Migrant Workers and their Families—define a comprehensive normative framework for the promotion and protection of migrant rights, but these conventions do not apply to internal migrants and China has not ratified them. They have been supplemented by the 2006 ILO Multilateral Framework on Labor Migration—a nonbinding framework negotiated within the ILO's tripartite structure comprising governments, employers, and workers organizations. *Id.*

⁷² The ILO Core Labour Standards, Jan. 10, 2003, <http://www.imfmetal.org/main/index.cfm?n=47&l=2&c=7799>.

C111 Discrimination (Employment and Occupation) Convention.⁷³ This fundamental ILO convention prohibits any distinction, exclusion, or preference made on the basis of social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.⁷⁴ With the existing hukou-based discrimination against migrant workers, China is unable to fulfill its commitment to eliminate employment discrimination based on social origin.⁷⁵

Although the Chinese rural migrant worker issue is national, it shares a lot of similarities with the international migrant worker issue, especially in the abuse of labor rights caused by the “strong capital, weak labor” reality.⁷⁶ The hukou system bars Chinese rural migrant workers’ equal employment opportunity and treatment just like immigration restrictions bar foreign migrant workers. Therefore, ILO guidelines on international migrant worker issues can be very helpful suggestions for Chinese decision makers.

III. MIGRANT WORKERS’ ELIGIBILITY FOR LABOR RIGHTS PROTECTION

Before analyzing whether the current legal framework can sufficiently protect migrant workers’ labor rights, this paper first deals with this issue: are migrant workers eligible for labor rights protection? The answer is yes.

A. Coverage and Applicability of the Existing Law

1. Labor Law

The Labor Law of 1994 was enacted in accordance with the PRC Constitution, under which each citizen of China has both the right and duty to work,⁷⁷ to protect the legitimate rights and interests of workers.⁷⁸

⁷³ See Ratifications, ILOLEX Database on International Labor Standards, <http://www.ilo.org/ilolex/english/docs/declworld.htm>.

⁷⁴ Convention on Discrimination in Employment and Occupation (C111), art. 1, adopted June 25, 1958, <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C111>.

⁷⁵ Ronald C. Brown, *China’s Employment Discrimination Laws During Economic Transition*, 19 COLUM. J. ASIAN L. 361, 393 (2006). Discrimination based on social origin is also recognized by the UN’s Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, both of which China has ratified. Concerning discrimination in respect of employment and occupation, article 1, paragraph 1(a) of the Convention (C111) defines “social origin” as “an individual’s membership of a class, socio-occupational category, or caste determines his or her occupational future, either because he or she is denied access to certain jobs or activities, or because he or she is only assigned certain jobs. Even in societies with considerable social mobility, a number of obstacles continue to prevent perfect equality of opportunity for the various social categories.” See also Tunon, *supra* note 13, at 31.

⁷⁶ *The Poor and the Rich*, NEW YORK TIMES, Jan. 23, 1915, at 10.

⁷⁷ XIAN FA [Constitution] art. 42 (1982) (P.R.C.).

Article 3 of the Labor Law lists the statutory labor rights of workers: “[w]orkers shall have the right to be employed on an equal basis, choose occupations, obtain remuneration for their labor, take rest, have holidays and leaves, obtain protection of occupational safety and health, receive training in vocational skills, enjoy social insurance and welfare, and submit applications for settlement of labor disputes, and other rights relating to labor as stipulated by law.”⁷⁹

Article 2 of the Labor Law provides that this law applies to all enterprises and individual economic organizations within the boundary of the PRC, and workers who form a labor relationship therewith.⁸⁰ The Labor Law does not define “workers,” but Article 16 provides that “a labor contract shall be concluded where a labor relationship is to be established,” and Article 19 emphasizes that a labor contract shall be concluded in written form.⁸¹

MOLSS answered several questions in “Opinions on Several Questions about the Implementation of PRC Labor law” on Aug. 4th, 1995. According to the Opinion, migrant workers are included in the definition of “workers” and a clear oral agreement or other real performance can form a labor relationship even where there is no written labor contract.⁸² This opinion gave some relief to migrant workers but the vague language of “clear oral agreement or other real performance” brought evidentiary difficulties in labor dispute resolution.⁸³ Interestingly, housekeepers employed by families, which is a typical job for young female migrant workers, are explicitly excluded from the coverage of the Labor Law in the Opinion.⁸⁴

⁷⁸ Lao dong fa [Labor Law] (promulgated by the Standing Comm. Nat’l People’s Cong., July 5, 1994, effective Jan. 1, 1995) (P.R.C.) [hereinafter Labor Law]. Note, in some translations, “workers” is translated as “laborers” or “employees.”

⁷⁹ *Id.* art. 3.

⁸⁰ *Id.* art. 2.

⁸¹ *Id.* art. 16, 19.

⁸² Guan yu guan zhe zhi xing Zhonghua Renmin Gongheguo lao dong fa ruo gan wen ti de yi jian [Some Opinions on Several Questions about the Implementation of PRC Labor Law] (issued by MOLSS, Aug. 4, 1995), art. 4.

⁸³ See Guan yu que li lao dong guan xi you guan shi xiang de tong zhi [Notice on relevant issues concerning the establishment of employment relationships] (issued by MOLSS, May 25, 2005). Through this notice, MOLSS tried to deal with some of the evidentiary issues regarding establishment of labor relationship when there is no formal contract.

⁸⁴ *Id.* The dispute between families and the hired housekeepers are not labor disputes. Zui gao ren min fa yuan guan yu shen li lao dong zheng yi an jian shi yong fa lv ruo gan wen ti de jie shi [The Interpretations of the Supreme People’s Court concerning Several Issues regarding the Application of Law to the Trial of Labor Dispute Cases II] (issued by Supreme People’s Court, promulgated on Aug. 14, 2004, effective on Oct. 1, 2006), art. 7(4). Under both Article 2 of the Labor Law and Article 2 of the Labor

China's current legal system concerning employment was established with the promulgation of the 1994 Labor Law and its supplemental legislation.⁸⁵ While this foundational legislation has remained in place, China has continuously added new explanatory legislation at both the national and local levels.⁸⁶ The Labor Law supersedes its supplemental legislation in the event of conflict between the two.⁸⁷ More current legislation supersedes the conflicting dated provisions.⁸⁸

2. Labor Contract Law

China adopted a new Labor Contract Law in 2007 to improve the labor contract system.⁸⁹ In Article 7, the Labor Contract law provides "an employer's employment relationship with a worker is established on the date it starts using the worker."⁹⁰ Article 10 emphasizes that "in the event that no labor contract is concluded at the time of establishment of an employment relationship, a written labor contract shall be concluded within one month after the date on which the employer starts using the worker."⁹¹ Moreover, if an employer fails to conclude a written labor contract with a worker, the employer and the worker shall be deemed to have concluded an open-ended labor contract.⁹² Under the open-ended

Contract Law, the individuals that hire the housekeepers are not considered as enterprises, individually owned economic organizations, or private non-enterprise entities that could establish a labor relationship with. Thus, family housekeepers are not covered by the protection of either Labor law or Labor Contract Law. See Wang Yijun & Xing Baiying, *Lao dong fa bao hu bu liao xiao bao mu* [Labor Law cannot protect household workers] CHINA YOUTH, Mar. 9, 2006, http://news.xinhuanet.com/employment/2006-03/09/content_4278549.htm. In recent years, hiring housekeepers in the cities has been very popular and many young female migrants work as housekeepers. The total number of family housekeepers reached 15 million in 2007. See *Jia ting gu bao mu bu yong qian he tong* [Families hiring household workers don't need to sign contracts] GUANGZHOU DAILY, Jan. 31, 2008, <http://scisea.com/html/bolanzhoukan/fazhishijie/20080131/619.html>. Most of the housekeepers were females who had been laid-off by SOE or female migrant workers, although the relative breakdown into these groups could not be found.

⁸⁵ WILLIAM KELLER & TIMOTHY DARBY, INTERNATIONAL LABOR AND EMPLOYMENT LAWS 31-34 (2d ed., Cumulative Supplement, BNA) (2007).

⁸⁶ *Id.*

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ Lao dong he tong fa [Labor Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008) (P.R.C.) [hereinafter Labor Contract Law].

⁹⁰ *Id.* art. 7.

⁹¹ *Id.* art. 10.

⁹² *Id.* art. 14.

labor contract, the labor compensation shall be decided pursuant to the rate specified in the collective contract or equal pay shall be given for equal work.⁹³ Further, the Labor Contract Law shows its teeth in Article 82: “[i]f an employer fails to conclude an open-ended labor contract with a worker, it shall each month pay to the workers twice his wage, starting from the date on which an open-ended labor contract should have been concluded.”⁹⁴

The Labor Contract law, at least in theory, is a great blessing to migrant workers. It gives strong protection to workers without written labor contracts by clear provisions. By contrast, the Labor Law left a big hole to be filled by administrative and judicial discretion.

3. Employment Promotion Law

Employment Promotion Law is another new law adopted in 2007.⁹⁵ For the first time, the Chinese legislators gave special attention to the labor rights of 200 million migrant workers. Article 31 emphasizes that rural workers employed in cities shall enjoy labor rights equal to those of urban workers; no discriminatory restrictions may be set against rural workers seeking employment in cities.⁹⁶ Despite the inclusion of such favorable language, however, the Employment Promotion Law lacks detailed liability provisions and acts more like a guideline document for different levels of governments.

B. *Eligibility of Migrant Workers for Other Remedies*

Besides the protection provided by national labor and employment laws, migrant workers are also eligible for other remedies provided by the trade union, legal aid organizations, and local governments.

According to statistics by the ACFTU, China had more than 41 million migrant workers as union members as of 2006 and more than 66.74 million as of October 2008.⁹⁷ ACFTU has simplified the membership procedure, provided incentive policies, and helped migrant workers get legal advice.⁹⁸

⁹³ *Id.* art. 11.

⁹⁴ *Id.* art. 82.

⁹⁵ Jiu ye cu jin fa [Employment Promotion Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) (P.R.C.). [hereinafter Employment Promotion Law].

⁹⁶ *Id.* art. 31.

⁹⁷ *Trade Unions to Target Migrant Workers*, CHINA DAILY, July 2, 2007, <http://www.china.org.cn/english/China/198600.htm>; *More than 66 Million Migrant Workers Join Trade Unions*, XINHUA NEWS AGENCY, Oct. 14, 2008, http://en.chinagate.cn/news/2008-10/14/content_16611431.htm.

⁹⁸ *Id.* As an example of how the ACFTU has simplified membership procedures, migrant workers can now use a membership card to transfer to unions at different

Statistics from the Legal Aid Center under the Ministry of Justice reveal that, via legal aid, over 40,000 cases involving migrant workers were handled and about 90% of these cases were won.⁹⁹ The director of the Legal Aid Center said that they would “treat migrant workers as priority legal aid beneficiaries” and “take various measures” to offer them timely help.¹⁰⁰

Many local governments have also enacted special regulations or administrative orders for migrant workers. For example, a local regulation adopted by Jiangsu requires employers to provide their migrant workers with medical insurance and sets out detailed measures to ensure migrant workers get paid on time.¹⁰¹ The municipal government of Beijing ordered all development companies to insure migrant workers for industrial injuries before they start new construction programs.¹⁰² Shenzhen adopted a special medical insurance pilot scheme to solve the rising cost of medical care for low-income migrant workers, involving the

locations. *Id.* “Under the old rules, workers would have to ask their former employers to write letters of introduction for them before they could join a new union.” *Id.* “In some places, migrant workers can use their union cards to receive discounts at chain shops, cinemas, parks, barbers’ shops, hospitals and aboard buses.” *Id.*

⁹⁹ *Legal Aid Procedures for Migrant Workers Simplified*, XINHUA NEWS AGENCY, July 27, 2006, <http://en.chinagate.com.cn/english/48142.htm>. According to the vice minister of the Ministry of Justice, the central government spent RMB ¥310 million yuan (US \$38 million) in 2005 on legal aid. The Beijing legal aid station, jointly sponsored by China Legal Aid Foundation and All-China Lawyers Association, “received some 2,000 cases from migrant workers complaining about various kinds of unfair treatment” from September 2005 to January 2006. *Legal Aid Fund to Help Migrant Workers*, CHINA DAILY, Jan. 20, 2006, http://news.xinhuanet.com/english/2006-01/20/content_4075564.htm. “Among them, 259 cases have undergone legal procedures, with 85% relating to payment default.” *Id.* “The station has helped the workers get back more than 2 million yuan of wages owed to them . . .” *Id.*

¹⁰⁰ *Id.*

¹⁰¹ China CSR, *Jiangsu Issues Protection Rules for Migrant Workers*, Mar. 6, 2008, <http://www.chinacsr.com/2008/03/06/2153-jiangsu-issues-protection-rules-for-migrant-workers/>.

¹⁰² Ministry of Commerce of the People’s Republic of China, *Beijing Real Estate Companies Ordered to Insure Migrant Workers*, Dec. 14, 2006, <http://english.mofcom.gov.cn/aarticle/newsrelease/commonnews/200612/20061204029107.html>. In December 2006, MOLSS and Ministry of Construction jointly issued a notice to local governments to work better on the issue of work injury insurance for migrant workers in construction industry. Guan yu zuo hao jian zhu qi ye nong min gong can jia gong shang bao xian you guan gong zuo de tong zhi [Notice on Improving the Work on Migrant Workers’ Participation of Work Injury Insurance in the Construction Industry] (issued by Ministry of Construction and Ministry of Labor and Social Security, Dec. 5, 2006), available at http://www.molss.gov.cn/gb/zxwj/2007-01/19/content_160170.htm. Beijing’s order shows how local government can follow the central government’s general policy and has the discretion to adopt innovative experimental measures to better protect migrant workers.

collaboration of 5,500 companies, 1.2 million migrant workers, and 132 designated local medical centers.¹⁰³

Accompanying the new government policy and the amended legal framework, legislative coverage of migrant workers' civil rights has improved, which could in turn reduce the social discrimination against migrant workers and promote their labor rights. In March 2007, the NPC passed a draft resolution to set a quota for the election of migrant worker deputies in provinces where there are a large number of migrant workers.¹⁰⁴ This resolution will make sure migrant workers get represented in the NPC, which never happened before. On February 28, 2008, three migrant workers were approved for a five-year term as deputies to the 11th NPC as the first batch of "spokespersons" for China's 200 million migrant workers.¹⁰⁵ In addition, the All-China Women's Federation has set up a telephone hotline and shelter centers for female migrant workers in some cities, offering free, reliable, and anonymous advice on everything from reproductive health information to legal counsel.¹⁰⁶ The amended Compulsory Education Law also ensures the right to education for children of migrant workers, no matter where they live.¹⁰⁷

IV. THE CAPACITY OF CURRENT LAW TO COMBAT ABUSES AGAINST MIGRANT WORKERS

The previous analysis demonstrates that migrant workers' labor rights are eligible for legal protection. The newly adopted Labor Contract Law and Employment Promotion Law clarify the eligibility issue, which was not addressed by the 1994 Labor Law. However, the issue remains

¹⁰³ Du Jing ed., *Shenzhen Launches Pilot Scheme to Benefits Migrant Workers*, THE CENTRAL CHINESE GOVERNMENT'S OFFICIAL WEB PORTAL, Apr. 3, 2006, http://english.gov.cn/2006-04/03/content_243493.htm. Under the insurance scheme, an employer only pays ¥8 yuan per month for each migrant worker employee, while each employee contributes ¥4 yuan per month. *Id.* Insured migrant workers may see doctors at designated clinics or healthcare centers and are reimbursed if the charge for a single service is less than ¥90 yuan; hospital patients can claim back all of their medical bills, up to a maximum of ¥60,000 yuan. *Id.*

¹⁰⁴ *Migrant Worker Lawmaker Adapts to China's Legislative Life*, XINHUA NEWS AGENCY, Mar. 3, 2008, <http://english.people.com.cn/90001/90776/90882/6364435.html>.

¹⁰⁵ Du Guodong ed., *Three Rural Migrant Workers Enter China's Top Legislature*, XINHUA NEWS AGENCY, Feb. 28, 2008, http://news.xinhuanet.com/english/2008-02/28/content_7687361.htm.

¹⁰⁶ Tunon, *supra* note 13, at 14.

¹⁰⁷ *Law Ensures Migrant Workers' Children of Education Right*, XINHUA NEWS AGENCY, Sept. 1, 2006, <http://french.china.org.cn/english/government/179798.htm>. More than 6.4 million rural children at school age moved to cities with their parents by the end of 2004, while 24 million rural children remained in their rural homes. *Id.*

whether the current labor laws can effectively combat the abusive practices against migrant workers. In this section, this paper will deal with the following questions: Do the new laws provide stronger protection to migrant workers than before? Will the new laws be actually enforced as weapons for the migrant workers' labor rights protection or be left dormant as paper documents? Will the implementation of the new laws be beneficial to migrant workers' rights and interests?

A. *The New Laws Provide Stronger Labor Rights Protection*

1. Timely Full Payment

Wage default is among the most common labor abuses in China and migrant workers are particularly vulnerable to wage arrears.¹⁰⁸ In many cases, the wage problems occur not because of employers' economic difficulties but because of the fraudulent and manipulative conduct on the part of debtor employers.¹⁰⁹ The 1994 Labor Law provides that the wages shall not be deducted or delayed without justification.¹¹⁰ The "justification" wording leaves much maneuvering room for employers, especially those contractors or subcontractors in the construction industry.

To close this loophole, the Labor Contract Law provides in Article 30 that employers shall pay their workers labor compensation on time and in full; and if the employer falls into arrears with the payment of the labor compensation or fails to make payment in full, the worker may apply to the local People's Court for an order to pay and the People's Court shall issue such order in accordance with the law.¹¹¹ This provision abolished the "without justification" language used in the 1994 Labor Law, but it raised disputes on whether an underpayment or wage default case could be filed directly in court without going through the required arbitration procedure.¹¹² Fortunately, the new Law on Labor Disputes Mediation and Arbitration deals with this issue.

¹⁰⁸ See Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People's Republic of China*, 30 *FORDHAM INT'L L.J.* 1050, 1054 (2007).

¹⁰⁹ *Id.* at 1053.

¹¹⁰ Labor Law, art. 50.

¹¹¹ Labor Contract Law, art. 30.

¹¹² Ronald C. Brown, *Recent Developments: China's New Labor Contract Law*, 3 *CHINA L. REP.* 4, 11 (2007). The issue will be further discussed in the later section regarding labor dispute resolution. See *supra* Part VI.A.7. An order to pay (warrant for payment) is a civil procedure for hastening debt recovery. In April 2008, the first batch of wage default cases involving payment orders were heard by Shanghai Jinshan People's Court. Thirteen migrant workers got back their ¥137,000 yuan defaulted wages within 13 days. See Feng Yuting, *Shanghai Jinshan fa yuan zhi jie shou pi tao xin zhi fu ling an jian [Shanghai Jinshan trial court Issued the first batch of order to pay defaulted wage]*, *CHINA RADIO NETWORK*, Apr. 24, 2008, http://www.cnr.cn/2004news/society/200804/t20080424_504771554.html.

Further, the Labor Contract Law provides that if a contractor hires a worker in violation of this law, and the worker suffers harm as a result thereof, the organization that employs such contractor shall be jointly and severally liable with the contractor for the worker's damage.¹¹³ This article seems to be the solution for migrant construction workers whose wages are often defaulted while the subcontractors blame the main contractors or the developers for falling in arrears of payment.

2. Work Hours & Overtime Pay

Under the 1994 Labor Law, workers "shall work for no more than eight hours a day or no more than [forty-four] hours a week on average."¹¹⁴ "In case of laborers working on the basis of piecework, the employer shall rationally fix quotas of work and standards on piecework remuneration."¹¹⁵ The employers may extend working hours due to the requirement of its production or business, but the Labor Law sets three hour per day and thirty-six hour per month ceilings for these extensions, except in exempted situations.¹¹⁶ Also, the Labor Law requires the overtime payment rate be no less than 150% of the normal wages, 200% for days of rest, and 300% for holidays.¹¹⁷ However, these provisions did not work well to protect migrant workers. The reality is that employers usually set very high work quotas, but the piecework remuneration is relatively low.¹¹⁸ Thus, migrants have to tolerate the long working hours or otherwise lose their jobs.¹¹⁹

The Labor Contract Law provides that "employers shall strictly implement the work quota standards and may not compel or in a disguised manner compel workers to work overtime. If an employer arranges for a worker to work overtime, it shall pay him overtime pay."¹²⁰ Article 85 provides that if the employer arranges overtime without paying overtime pay, the labor administration authority shall order it to pay within a certain time limit.¹²¹ If the employer fails to comply within the time period, "the

¹¹³ Labor Contract Law, art. 94.

¹¹⁴ Labor Law, art. 36.

¹¹⁵ *Id.* art. 37.

¹¹⁶ *Id.* art. 41, 42. In case of emergency or rush repair, the extension is not subject to the ceilings' restriction.

¹¹⁷ *Id.* art. 44.

¹¹⁸ Li Qiang, *Xue xi shi bao: nong ming wen ti diao cha [Study Daily: Work Report on Migrant Worker Issues]*, XINHUA NEWS AGENCY, Jan. 18, 2006, http://news.xinhuanet.com/politics/2006-01/18/content_4066810.htm.

¹¹⁹ *Id.*

¹²⁰ Labor Contract law, art. 31.

¹²¹ *Id.* art. 85.

employer shall be ordered to pay” damages to the worker at a rate “of not less than 50% and not more than 100% of the payable amount.”¹²² The shift of legislative focus from limiting working hours in the Labor Law to quota-disguised overtime and enforcing overtime payment in the Labor Contract Law is a boon for migrant workers, given the reality of “strong capital, weak labor.”

3. Work Safety & Health

The Labor Contract Law enhances the work safety protection for workers by clarifying the rights of workers and the obligations of employers.¹²³ Article 32 of the Labor Contract Law stipulates that “workers shall not be held in breach of their employment contract if they refuse to perform dangerous operations that are instructed in violation of regulations or peremptorily ordered by management staff of the employer.”¹²⁴ Further, in Article 42, the law prohibits employers from terminating a labor contract if: (1) the worker is engaged in operations exposing him to occupational disease hazards and has not undergone a pre-departure occupational health check-up; (2) the worker is suspected of having contracted an occupational disease and is being diagnosed or under medical observation; or (3) the worker has been confirmed as having lost or partially lost his capacity to work due to an occupational disease or a work-related injury sustained with the employer.¹²⁵ In the case of wrongful termination, the employer shall pay twice the rate of severance pay as determined by the worker’s tenure with an employer.¹²⁶

Special safety regulations for migrant workers play an important role in dealing with the work safety issue. MOLSS emphasized that migrant workers are eligible to enjoy work injury insurance,¹²⁷ and issued special guidelines for dangerous industries like mining and construction.¹²⁸ The State Council promoted “National Planning for

¹²² *Id.*

¹²³ The old legal framework, Law of PRC on Work Safety, promulgated by Standing Committee of NPC on June 29, 2002, focused more on providing guidelines for local supervisory authorities and setting standards for different industries.

¹²⁴ Labor Contract Law art. 32. Article 56 of the Labor Law also provides that workers have the right to refuse to operate if the management personnel of the employer command the operation in violation of rules and regulations or force workers to run risks in operation.

¹²⁵ *Id.* art. 42.

¹²⁶ *Id.* art. 87. Article 47 of the Labor Contract Law defines the rate of severance pay owed under Article 87.

¹²⁷ Guan yu nong min gong can jia gong shang bao xian you guan wen ti de tong zhi [Notice on Question about Migrant Workers Participating in Work Injury Insurance] (issued by MOLSS, June 1, 2004) (P.R.C.).

¹²⁸ Guan yu shi shi nong min gong “Ping An Ji Hua” jia kuai tui jin nong min

Training of Migrant Workers during 2003-2010” and “Sunny Project for Rural Labor Transfer Training,”¹²⁹ in which work safety training was specially emphasized.¹³⁰

4. Social Security

China has no specific statute on social security issues. Article 73 of Labor Law provides that all workers shall enjoy social insurance benefits under the circumstances of retirement, illness or injury, disability caused by work-related injury or occupational disease, unemployment, and child rearing.¹³¹ Article 49 of the Labor Contract Law provides that the State shall take measures to establish a comprehensive system to ensure that workers’ social security relationship can be transferred from one region to another and can be continued after the transfer.¹³² Article 17 specifies social security as one of the requisite terms in a labor contract. Article 38 allows a worker to terminate his labor contract if the employer fails to pay the social security premiums for the worker in accordance with the law.

The current Chinese social security system is still tied to hukou with great discrimination against rural residents. The highly fragmented urban-rural double track pension and medical insurance, with its corruption and inefficiencies, are left primarily to local governments’ discretion and are not freely transferable among different regions. Consequently, the legal provisions on social security will still need further government action for migrant workers to realize their legitimate rights.

gong can jia gong shang bao xian gong zuo de tong zi [Notice on Implementing “safety Plan” to Accelerate Migrant Workers’ Participation of Work Injury Insurance] (issued by MOLSS, May 17, 2006) (P.R.C.).

¹²⁹ Xu Jingyue, *Nong ye bu: yang guang gong cheng jiang pei xun 3500 wan nongmin gong* [Ministry of Agriculture: Sunshine Project will Train 35 million migrant workers], XINHUA NEWS AGENCY, Apr. 7, 2004, http://news.xinhuanet.com/zhengfu/2004-04/07/content_1406441.htm.

¹³⁰ Guan yu jia qiang nong min gong an quan sheng chan pei xun gong zuo de yi jian [Opinions on Improving Work on Migrant Workers’ Safety Production Training] (jointly issued by National Safety Production Supervision and Management Bureau, National Mining Safety Supervision Bureau, Ministry of Education, MOLSS, Ministry of Construction, Ministry of Agriculture, and ACFTU, Oct. 27, 2006) (P.R.C.).

¹³¹ Labor Law, art. 73.

¹³² Labor Contract Law, art. 49. In many cities, migrant workers who participate in pension plans have to choose to withdraw from the plans when they move to other places to work due to the non-transferability of pension benefits. City governments only give back migrant workers their contribution when they withdraw but keep the part of contribution from employers. See Zhang Ran & Chen Mei, *Tui bao rong yi zhuan bao nan, yang lao bao xian bei hou de li yi lian* [Easy to Withdraw, Hard to Transfer, Chain of Interest behind the Pension System], XINHUA NEWS AGENCY, Apr. 2, 2008, http://www.xj.xinhuanet.com/2008-04/02/content_12860388.htm. This article of Labor Contract Law seems to be a promise to deal with the issue of pension plans.

In the 2007 Government Work Report, Premier Wen Jiabao promised to establish a social safety net targeted at rural migrant workers in cities, with the focus on work injury insurance and medical insurance.¹³³ MOLSS also vowed to make work injury insurance cover all migrant workers involved in highly dangerous industries by the end of 2008.¹³⁴ These government policies enable the migrant workers to maintain their hope in gaining equal treatment on social security benefits.

Finally, the legislature proposed a draft law on social security to safeguard operation of an extensive social security system for both rural and urban residents in 2007.¹³⁵ The social security draft law was issued to gather public opinions.¹³⁶ One of the major focuses of the public response is on allowing migrant workers to participate in specialized pension plans.¹³⁷ Although migrant worker still will not enjoy equal treatment as urban residents, the social security draft law clearly defines the methods of transferring pension payments among different regions.¹³⁸ This is no doubt good news for migrant workers, who face great difficulty in transferring their social security payments when they move about.¹³⁹

5. Equality in Employment Opportunities & Services

Newly issued regulations are meant to eliminate discrimination against migrant workers in employment services. MOLSS enacted Provisions on Employment Services and Employment Management

¹³³ *Peasant Worker: Talk with Premier Changed His Life*, XINHUA NEWS AGENCY, Mar. 5, 2008, http://www.chinadaily.com.cn/china/2008npc/2008-03/05/content_6509610.htm. By the end of March 2008, 33.61 million migrant workers participated in medical insurance plans. See MINISTRY OF HUMAN RESOURCE AND SOCIAL SECURITY, 2008 NIAN YI JI DU JIU YE HE SHE HUI BAO ZHANG GONG ZUO QING KUANG [2008 FIRST QUARTER EMPLOYMENT AND SOCIAL SECURITY WORK SUMMARY] (2008), http://www.gov.cn/gzdt/2008-04/29/content_957205.htm [hereinafter 2008 First Quarter Summary].

¹³⁴ *Job-related Insurance to Benefit 46 mln Chinese Rural Migrant Workers*, XINHUA NEWS AGENCY, Feb. 20, 2008, http://news.xinhuanet.com/english/2008-02/20/content_7637985.htm. In 2007, work-related injury insurance only covered 39.66 million migrant workers. By the end of March 2008, the number of migrant workers covered by work injury insurance reached 40.88 million. See 2008 First Quarter Summary, *supra* note 133.

¹³⁵ *Law Drafted to Safeguard Operation of Social Security System*, XINHUA NEWS AGENCY, Dec. 24, 2007, http://en.chinagate.cn/socialsecurity/2007-12/24/content_9423192.htm.

¹³⁶ *Public Opinion on Social Security Law*, CCTV, Feb. 17, 2009, http://www.china.org.cn/video/2009-02/17/content_17287818.htm.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

according to Employment Promotion Law in 2007.¹⁴⁰ Article 5 of this regulation emphasizes that rural workers coming into cities shall enjoy the same employment rights as their counterparts in towns and cities, and also prohibits municipal governments from setting discriminatory restrictions against the rural workers coming to cities for employment.¹⁴¹ Article 25 requires all public employment service agencies to provide services for workers free of charge.¹⁴²

Migrant workers may even be eligible for unemployment insurance. Specifically, Article 63 allows rural workers coming to cities for employment, who have been employed for consecutive six months at the place of their usual residence, may make unemployment registration at the place of their usual residence.¹⁴³ Under Article 64, registered unemployment persons shall enjoy public employment services and support policies, and those meeting relevant requirements may apply for unemployment insurance.¹⁴⁴ The eligibility for unemployment insurance would be of great help for migrant workers with a high job turnover rate.

6. Trade Union & Collective Bargaining

The new Labor Contract Law shifts collective bargaining emphasis from enterprise-level negotiations to industry-wide or area collective contracts in industries such as construction, mining, and catering services.¹⁴⁵ These industries are where most migrant workers work. The law also enhances the role of trade union in collective negotiations, in arbitration, and in policing and enforcing the law.¹⁴⁶ With more and more migrant workers becoming trade union members, this law also helps the labor rights protection for migrant workers.¹⁴⁷

¹⁴⁰ Jiu ye fu wu yu jiu ye guan li gui ding [Provisions on Employment Services and Employment Management] (promulgated by MOLSS Oct. 30, 2007, effective Jan. 1, 2008) (P.R.C.) [hereinafter Employment Service Provisions].

¹⁴¹ *Id.* art. 5.

¹⁴² *Id.* art. 25.

¹⁴³ *Id.* art. 63. The unemployment registration referred to here is distinguished from the hukou system. The former procedure gives unemployed persons access to unemployment related services and the opportunity to enjoy unemployment insurance. This registration does not change a person's hukou. Until recent years, unemployment insurance was only available to urban unemployed persons. This new regulation seems to affirm the eligibility of migrant workers to enjoy unemployment insurance.

¹⁴⁴ *Id.* art. 64.

¹⁴⁵ Brown, *supra* note 112, at 8; *see also* Labor Contract Law, art. 53.

¹⁴⁶ Brown, *supra* note 112, at 10.

¹⁴⁷ Some scholars still doubt that ACFTU, which is not independent from the party and state, can actively defend workers' interests in negotiations with management. *See* Han Dongfang, *Labor Law Strengthens Chinese Unions*, ASIA TIMES ONLINE, Jan. 18, 2008, http://www.atimes.com/atimes/China_Business/JA18Cb01.html.

7. Labor Dispute Resolution

As previously noted, the cost of time and money in labor dispute resolution has been one of the major barriers for migrant workers to access legal protection. Many migrant workers do not know that there is a time limitation for applying for arbitration.¹⁴⁸ Further, many migrant workers find it difficult to understand the complicated mediation, arbitration, and trial procedures.¹⁴⁹ They cannot afford to hire legal counsel, and the legal aids are far from enough to satisfy migrant workers' demand.¹⁵⁰

The Law on Labor Disputes Mediation and Arbitration will help many migrant workers. Article 53 provides that labor arbitration shall be free.¹⁵¹ Article 27 extends the old six-month time limitation to one year for application for labor dispute arbitration.¹⁵² More importantly, when a dispute arises from the delayed payment of labor remuneration during the period of existence of a labor relationship, an employee's application for arbitration shall not be subject to the time limitation.¹⁵³ This gives a great relief to migrant workers facing frequent wage arrears.

Further, Article 16 stipulates that where a mediation agreement is reached on a matter of delayed payment, medical expenses for a work injury, economic indemnity, or compensation, and the employer fails to execute it within the period of time prescribed in the agreement, the employee may apply to the people's court for a payment order based on the mediation agreement.¹⁵⁴ Upon a finding in favor of the employee, the people's court issues a payment order according to law.¹⁵⁵ Under Article

¹⁴⁸ *Nong ming gong wei quan: Cheng xu za bu neng jian hua [Why the Labor Dispute Resolution Procedures Can't be Further Simplified for Migrant Workers?]*, CHONGQING LEGAL DAILY, Dec. 9, 2007, http://www.cqfzbs.com/platform/news_view.asp?newsid=459.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Lao dong zheng ji tiao jie zhong cai fa [Law on Labor Dispute Mediation and Arbitration]* (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008) (P.R.C.).

¹⁵² *Id.* art. 27.

¹⁵³ *Id.*

¹⁵⁴ *Id.* art. 16.

¹⁵⁵ *Id.* If the employers fail to submit written objection within fifteen days, the payment order will enter into force. Xiao Chengchi, *Ru he zheng que yun yong zhi fu ling [How to Correctly Use Payment Order]*, Nov. 14, 2005, <http://www.chinacourt.org/html/article/200511/14/185400.shtml>. Under Article 194 of Civil Procedure Law of PRC, a payment order (pay warrant) can be easily stopped by written objection submitted by the debtor (employer in wage default cases). Also, under Article 132 of Opinions of the Supreme People's Court on Some Issues Concerning the Application of the Civil Procedure Law, an application fee of ¥100 yuan for a pay warranty needs to be paid for each case. If the procedure of hastening debt recovery is

44, for such cases, an arbitral tribunal may render an award of prior execution and transfer the case to the people's court.¹⁵⁶ An award of prior execution requires an application to the tribunal by one of the parties, clear rights and obligations between the parties, and a serious effect on the applicant without prior execution.¹⁵⁷

The Law on Labor Dispute Mediation and Arbitration greatly simplifies the labor dispute resolution procedure. However, workers with a labor dispute still cannot directly sue in the court.¹⁵⁸ Most migrant workers' cases are related to wage default or work injury compensation. Now, workers can get a mediation agreement with the help of a trade union,¹⁵⁹ and then apply for a payment order in court if the employer fails to fulfill the agreement in time. Alternatively, they could apply for a free arbitration and get prior execution in court if the need for remedy is urgent.

Article 7 provides "where a labor dispute involves more than [ten] employees and the employees have a same claim, they may recommend their representatives to participate in the mediation, arbitration or litigation."¹⁶⁰ This seems to provide the possibility for a class action, but class action procedures are usually not encouraged in China. So, it is still unclear how this provision will work.

Following the enactment of the Law on Labor Dispute Mediation and Arbitration, arbitration will probably become the most popular way for labor dispute resolution. Article 43 restricts the arbitration award to be rendered within forty-five days from the receipt of application and sixty days for complicated cases, which will significantly expedite the process.¹⁶¹ The law for the first time makes the arbitration commission's rulings in routine cases legally binding and gives a great procedure advantage to aggrieved workers.¹⁶² Article 47 provides that an arbitral

finalized due to the objection of the debtor, the application fee shall be borne by the applicant; if the debtor does not bring forward any objections, the application fee shall be borne by the debtor. *Id.*

¹⁵⁶ Law on Labor Dispute Mediation and Arbitration, art. 44.

¹⁵⁷ *Id.* art. 44.

¹⁵⁸ *Id.* art. 5. Where a labor dispute arises, a party may apply to mediation or apply directly to arbitration, but only a party disagreeing to an arbitral award may bring an action in the people's court. For wage default cases, the workers now can directly apply for the payment order (debt recovery hastening procedure without going through trial). *See* Labor Contract Law, art. 30.

¹⁵⁹ *Id.* art. 4.

¹⁶⁰ *Id.* art. 7.

¹⁶¹ *Id.* art. 43.

¹⁶² *Labor Arbitration Law Welcome but Systemic Change Investment Needed*, CHINA LABOUR BULLETIN, Apr. 23, 2008, <http://www.clb.org.hk/en/node/100243> [hereinafter *Labor Arbitration Law Welcome*]

award shall be final when the labor dispute is over recovery of labor remunerations, medical expenses for a work injury, working hours, breaks and vacations, social insurance, economic indemnity, or compensation in an amount not exceeding the twelve month local monthly minimum wage level.¹⁶³ An employee who disagrees with an arbitral award may directly bring an action in court;¹⁶⁴ however, an employer has to apply for revocation of the arbitral award to the intermediate court where the labor dispute arbitration commission is located.¹⁶⁵

B. *Local Governments' Efforts on Enforcement are Crucial*

No matter how favorable laws may be, the ultimate impact on migrant workers' labor rights protection hinges on whether the laws can be forcefully implemented. Local governments' efforts on enforcement are crucial for the nationwide implementation of these new labor laws. The following two cases provide insight on how local governments can use their discretion to adopt innovative methods to actually enforce the protected labor rights of migrant workers.

1. Beijing's multi-functional ID for migrant construction workers

In 2006, Beijing's construction companies defaulted RMB ¥1.628 billion (USD \$238 million) in migrant workers' wages.¹⁶⁶ To deal with this issue, the Beijing Municipal Construction Committee announced in 2007 that it would issue migrant workers at construction sites 600,000 free multi-functional identity cards to prevent wage defaults and facilitate workforce management.¹⁶⁷ The identity cards can be used for banking, as an identity document for insurance purposes, training courses, and as a work attendance record.¹⁶⁸ It can also provide information to the public security and labor departments so they can keep abreast of the wage defaulting situation.¹⁶⁹ According to the Committee, projects that have a construction area of more than five thousand square meters or cost more

¹⁶³ Law on Labor Dispute Mediation and Arbitration, art. 47.

¹⁶⁴ *Id.* art. 48.

¹⁶⁵ *Id.* art. 49.

¹⁶⁶ Li Fangchao, *Better Protection for Migrant Workers in Beijing*, CHINA DAILY, Apr. 26, 2007, <http://www.npfpc.gov.cn/EN/en2007-04/news20070426.htm>. Beijing has about 800,000 migrant workers working at construction sites each year and the number rises to about 1 million during the peak season. Jiang Yanxin, *Beijing shi jian wei fu ze ren: nogn min gong ao yun shi bu hui qiang zhi quan fan* [Beijing Construction Committee Leader: Migrant Workers Won't be Forced out of Beijing during Olympics], CHINA NEWS, Apr. 8, 2008, <http://www.chinanews.com.cn/olympic/news/2008/04-08/1213825.shtml>.

¹⁶⁷ Li Fangchao, *supra* note 166.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

than five million yuan and a construction period of more than six months must ensure that more than 95% of the migrant workers have the card.¹⁷⁰ Migrant workers can inform the committee by calling if their company refuses to apply for the cards and the committee will expose the companies which do not pay wages on time in the media.¹⁷¹

By the end of November 2007, 530,364 migrant construction workers received the free multi-functional ID.¹⁷² In 2007, the number of Beijing migrant workers' wage default cases also declined by 11% from 2006 in the construction industry—the first decline in default cases in recent years.¹⁷³ In 2007, Tianjin, another big city with large number of migrant workers, followed Beijing's lead in managing migrant construction workers.¹⁷⁴ Such innovative local measures not only efficiently manage the floating population in the cities but also effectively deal with migrant workers' real-life problems.

2. Shanghai's insurance scheme for migrant workers

Shanghai is one of the pioneers in dealing with migrant workers' insurance issues. The payment of the monthly management fee used to be the main interaction between migrant workers in Shanghai and the municipal government. According to Luo Renyong, an official at the local Labor Bureau, the migrant management fees were, in essence, a parasitic way of funding welfare programs for the growing number of laid-off SOE employees in Shanghai before 2002.¹⁷⁵

In September 2002, Shanghai introduced the Interim Regulations on Out-of-Town Employees' Comprehensive Insurance to provide insurance for migrant workers.¹⁷⁶ This experimental insurance system is separate from Shanghai's main insurance system, which still remains divided into two different schemes for rural and urban residents. China's

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Sun Xiaosheng, *Beijing you 53 wan duo ming jian zhu ye nong min gong ling dao shi ming zhi gong zi dan* [Over 530,000 migrant workers got wages under Real Name ID system in Beijing], XINHUA NEWS AGENCY, Nov. 28, 2007, http://news.xinhuanet.com/newscenter/2007-11/28/content_7162844.htm.

¹⁷³ See BEIJING BUREAU OF LABOR AND SOCIAL SECURITY, 2007 NIAN BEIJING SHI LAO DONG BAO ZHANG GONG ZUO CHENG JI HUI GU [2007 BEIJING LABOR AND SOCIAL SECURITY WORK REPORT] (2008), available at http://www.bjld.gov.cn/zxxz/rdgz/t20080121_402247266.htm.

¹⁷⁴ Zhang Xinmin, *Tian jian jiang dui nong min gong shi xing shi ming zhi* [Tianjian will use real name ID system for migrant workers], TIANJIN DAILY, Mar. 22, 2007, http://w1.mohrss.gov.cn/gb/zt/2007-03/22/content_170211.htm.

¹⁷⁵ Michelle Chen, *Shanghai Insurance Scheme Adds Insult to Injury*, ASIA TIMES ONLINE, June 10, 2004, <http://www.atimes.com/atimes/China/FF10Ad08.html>.

¹⁷⁶ *Id.*

two largest private insurance companies, Ping An and Pacific, have been commissioned by the Labor Bureau to administer the new insurance plan.¹⁷⁷ Shanghai has therefore employed an unprecedented method of using non-state insurance companies to cut across provincial boundaries, transplanting insurance funds earned in the city back to the local insurance accounts of individuals at their home provinces.¹⁷⁸

Under the plan, an employer pays a monthly premium of about RMB ¥158 (USD \$23) per migrant worker.¹⁷⁹ Sixty percent of the premium goes towards medical insurance, while the remainder accumulates in a retirement fund, to be paid in a lump sum when the migrant returns to his officially registered residence.¹⁸⁰ In addition, the plan sets the schedule for the payment of premiums every three months to pressure migrant workers to stick with one employer.¹⁸¹ All employees and employers that meet certain requirements must take part in the insurance plan.¹⁸² However, the plan does not cover migrant workers in informal businesses or the underground economy, and families that hire migrant housekeepers can voluntarily choose to purchase another special medical insurance plan.

At the end of 2005, there were 2.47 million migrant workers who have been enrolled in the Shanghai comprehensive insurance plan.¹⁸³ In February 2008, the municipal government announced that over 3.3 million people are now covered by this insurance, which is about 80% of the migrant worker population in Shanghai.¹⁸⁴ Although this insurance plan is far from perfect in solving migrant workers' social security problems and its implementation unavoidably brings some negative impacts, many migrant workers in Shanghai are now in a much better position when they get sick.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Qian Peijian, *Shanghai 247 wan nong min gong xi huo zong he bao xian* [2.47 Million Migrant Workers Got Comprehensive Insurance in Shanghai], *WORKERS' DAILY*, Apr. 10, 2006, http://www.nmpx.gov.cn/quanyiweiwu/weiquanshili/t20060410_42918.htm.

¹⁸⁴ Wang Zhenghua, *Better Care for City's Migrants*, *CHINA DAILY*, Feb. 13, 2008, http://www.chinadaily.com.cn/china/2008-02/13/content_6450348.htm.

C. *The Implementation of the New Laws and its Consequences to Migrant Workers*

Earlier analysis showed how the newly enacted labor laws can give more protection to the labor rights of migrant workers, at least in theory. However, will the new laws be effectively implemented? What are the potential consequences to the migrant workers? This section will discuss these two questions based on reports of recent social repercussions regarding the enforcement of the new laws.

The Law on Labor Disputes Mediation and Arbitration entered into effect on May 1, 2008. Labor dispute arbitration cases have greatly increased since the new law went into force.¹⁸⁵ With the extension of time limits for applications, abolishment of arbitration fees, binding force of arbitration rulings, and prior execution in court procedure for wage default and work injury cases, migrant workers now have a greater opportunity to resolve labor disputes by arbitration in the future. The key to ensuring the enforcement of labor laws is to invest sufficient financial and human resources to local level arbitration institutions,¹⁸⁶ enhance the role of trade union, and improve legal aid services for migrant workers to raise their rights consciousness and help them go through the legal procedures when disputes arise.

Both the Labor Contract Law and Employment Promotion Law became effective on January 1, 2008. The latter simply declares the principle that migrant workers shall enjoy equal labor rights as urban workers, but provides no specific liability for violation of the law. Therefore, we will focus on the implementation of Labor Contract Law.

At the time of this writing, the new Labor Contract Law has been in force for over fourteen months. The number of labor disputes has risen sharply since the introduction of the Labor Contract Law,¹⁸⁷ and there are many heated discussions on the implementation of the law in media reports. Based on one newspaper report, owners of over one hundred South Korean enterprises in Shandong abandoned their factories and escaped during the Spring Festival to avoid paying the defaulted wages.¹⁸⁸

¹⁸⁵ Zhan Lisheng, *Labor Arbitration Cases Soaring in Guangzhou*, CHINA DAILY, Dec. 11, 2008, http://www.chinadaily.com.cn/china/2008-12/11/content_7292345.htm; *Labor Arbitration Cases Soaring*, CHINA DAILY, Dec. 11, 2008, <http://english.people.com.cn/90001/6551417.html>.

¹⁸⁶ *Labor Arbitration Law Welcome*, *supra* note 162.

¹⁸⁷ CHINA LABOR BULLETIN RESEARCH REPORTS, HELP OR HINDRANCE TO WORKERS: CHINA'S INSTITUTIONS OF PUBLIC REDRESS (2008), *available at* http://www.clb.org.hk/en/files/share/File/research_reports/Help_or_Hindrance.pdf. The Guangzhou Daily reported on Mar. 25, 2008 that LDAC cases in most city districts had risen three to five-fold since Jan. 1, with cases in one district rising fifteen-fold. *Id.* The head of the city's labor arbitration office told the newspaper that the number of cases filed in the first two months of 2008 equaled the total for the whole of 2001. *Id.*

¹⁸⁸ *Han qi che li bu hui ying xiang Zhongguo jing zheng li* [*The Korean*

In Dongguan, where 10% of the world's shoes are manufactured, more than 500 Taiwanese enterprises have chosen to relocate their factories by January 21, 2008.¹⁸⁹ Research by Asian Footwear Association showed that about 1,000 of the 5,000-6,000 shoemaking factories closed or moved out of the Pearl River Delta region in 2007, with 25% of the factories setting up in Southeast Asian countries, 50% moving to the inland area of China, and the rest 25% choosing to wait and see.¹⁹⁰ Most of these factories were small to medium-sized and about 150,000 to 200,000 workers were laid off.¹⁹¹ Similar shutdowns also happened in other labor-intensive manufacturing industries.¹⁹²

Although the implementation of Labor Contract Law is not the only factor that caused the migration of these factories, it is definitely one of the most important causes. Zhang Wuchang, a famous Hong Kong economist, became the leader in the wave of launching fierce attacks on the Labor Contract Law, which was labeled the biggest failure during China's economic reform.¹⁹³ Many small or medium-sized labor-intensive enterprises have complained about the increasing labor costs brought by the new law.¹⁹⁴ Some NPC representatives even told the media that they

Enterprises' retreat won't affect China's Competitiveness], SOUTH CHINA MORNING POST, Feb. 16, 2008, available at <http://cn.ibtimes.com/articles/20080225/hanguoqiye.htm>.

¹⁸⁹ Li Weiguo, *500 yu jia tai qi ban li Dongguan, zi chuang pin pai zhu gong nei di* [Over 500 Taiwanese enterprises Left Dongguan, Targeting China Mainland and Promoting Their Own Brands], NANFANG CITY DAILY, Jan. 21, 2008, available at <http://news.163.com/08/0121/02/42MR6T670001124J.html>. The total number of Taiwan enterprises in Dongguan is 5600 and the total investment value exceeds \$4 billion dollars, which takes about one-third of the foreign investment in Dongguan.

¹⁹⁰ *Shoe Makers in Pearl River Delta Face Crisis*, CHINA DAILY, Dec. 12, 2007, http://www.chinadaily.cn/china/2007-12/12/content_6315753.htm. See also Olivia Chung, *Last Call for Guangdong Shoemakers*, ASIA TIMES ONLINE, Feb. 5, 2008, http://www.atimes.com/atimes/China_Business/JB05Cb01.html.

¹⁹¹ Chen Hong, *Shoe Industry Remains Strong*, CHINA DAILY, Feb. 20, 2008, http://www.chinadaily.com.cn/bizchina/2008-02/20/content_6468833.htm.

¹⁹² See, e.g., *Nearly 1,000 Toy Exporters Shut Down in S. China in 2008*, XINHUA NEWS AGENCY, Jan. 17, 2009, http://www.chinadaily.com.cn/china/2009-01/17/content_7406553.htm.

¹⁹³ Cheng Gang, *Lao dong he tong fa jiang cu jin er bu shi hui diao zhong guo jing ji* [Labor Contract Law will Promote the Economy of China], Feb. 1, 2008, <http://acftu.people.com.cn/GB/6848917.html>.

¹⁹⁴ Chinastakes.com, *New Labor Contract Law Raises China's Labor Costs*, <http://www.chinastakes.com/story.aspx?id=206>. The small and medium-sized labor intensive enterprises surveyed in Jiangsu and Zhejiang province did not pay social security premiums for all their employees. The new law's requirement on social security premium and overtime wages will add costs and increase potential risks for labor-capital disputes. Employers claim that government is attempting to shift its social responsibility onto private businesses and the unfair rule isn't suitable for China's current situation with the high mobility of migrant workers and the social security system not yet unified

would submit bills to request an amendment to the newborn law.¹⁹⁵ Facing such huge pressure, will the Chinese government maintain its political will to enforce the Labor Contract Law?

Stronger protection of workers by the Labor Contract Law passed at the same time as new uniform corporate income tax rates for domestic enterprises and foreign investment enterprises, as well as a new anti-monopoly Law.¹⁹⁶ This package of legal reform shows China's change of focus on foreign investment from quantity to quality. With the increasing international pressure on the monetary appreciation of yuan and Chinese trade policy, China has to make a life choice: to continue to play the role as the world's sweatshop factory or to try to climb up the ladder of global trade structure.

Strengthening the labor rights of workers is an unavoidable issue for China's future development. The Pearl River Delta region, where most of the labor-intensive manufacturing industries are located, started to experience migrant labor shortage from 2004.¹⁹⁷ The labor shortage continued and spread to other areas in later years, although the enterprises tried to raise the wages according to government-mandated minimum wage rates.¹⁹⁸ On the one hand, the labor shortage was caused by increasing rural residents' income, from strong economic growth, and favorable government policies on agriculture.¹⁹⁹ On the other hand, the second-generation migrant workers are more knowledgeable and modern-minded than their parents and are less tolerant of harsh working conditions

nationwide. *Id.* The incremental labor costs may not be completely shifted to the product price due to the low technical content and fierce competition in labor-intensive industries. Despite the constant increase in raw materials and labor costs caused by labor shortage, the majorities of these companies try to offset these costs by improving productivity and are operating within merger profit margins.

¹⁹⁵ Xu Chen, Zhang Jun, & Chen Xiaoxuan, *Duo wei wei yuan jian yi qu xiao wu ding qi he tong [Several Legislators Suggest Cancellation of Open-ended Contracts]*, Mar. 3, 2008, http://www.ycwb.com/ycwb/2008-03/03/content_1811989.htm.

¹⁹⁶ Wang Qishan, Vice Premier of the State Council of the P.R. China, Speech at the International Investment Forum 2008 (Sept. 10, 2008), *available at* <http://english.mofcom.gov.cn/aarticle/speech/200809/20080905773688.html>.

¹⁹⁷ *Labor Shortage Emerges in Guangdong*, CHINA DAILY, Aug. 8, 2004, http://www.chinadaily.com.cn/english/doc/2004-08/08/content_363159.htm.

¹⁹⁸ *South China Feels Acute Labor Shortage*, XINHUA NEWS AGENCY, Mar. 3, 2005, <http://china.org.cn/english/2005/Mar/121578.htm>. *See also* David Barboza, *Labor Shortage in China May Lead to Trade Shift*, Apr. 3, 2006, <http://www.nytimes.com/2006/04/03/business/03labor.html?pagewanted=print>; Olivia Chung, *Booming Chinese Province Faces Labor Shortage*, ASIA TIMES ONLINE, Mar. 9, 2007, http://www.atimes.com/atimes/China_Business/IC09Cb02.html.

¹⁹⁹ Liu Shinan, *All Hail China's New Job-Seekers*, CHINA DAILY, Feb. 27, 2008, http://news.xinhuanet.com/english/2008-02/27/content_7676883.htm.

and low pay.²⁰⁰ The one-child policy in China also exacerbated the labor shortage problem, which is evidenced by the decreasing percentage of younger laborers in recent years.²⁰¹ It is hard to imagine how China can maintain its current cheap labor advantage when the current generation of migrant workers become too old.²⁰² The social instability caused by 200 million rural senior citizens without any social security would be a horrible nightmare for the government.

Still, the global financial crisis has also greatly affected China's labor market.²⁰³ The implementation of these new labor laws has been temporarily placed below economic stimulation on the Chinese government's priority list, although some government officials tried to emphasize the consistency between the two tasks.²⁰⁴ Meanwhile, the current financial crisis has led to high numbers of company closures and large-scale redundancies, which cause a surge in labor dispute cases. If the Chinese government withstands the harsh test on its enforcement force, the new labor laws will become timely safeguards for migrant workers, who are greatly affected by the mass layoff waves.²⁰⁵

Assuming that the enforcement of Labor Contract Law is much better than ever before in China, would this benefit the migrant workers? In the short term, unemployment rate of migrant workers may see an increase due to the closing of small or medium-sized manufacturing

²⁰⁰ *Id.*

²⁰¹ China Labor Watch, *Labor Shortage: Opportunity or Crisis*, <http://www.chinalaborwatch.org/2006%20Editorials/07-07-2006%20labor%20shortage.htm> (last visited Mar. 27, 2009). "A study conducted by the Chinese Social Science Institute in 2005 demonstrates that the annual labor supply appeared to decrease for the first time in 2004." *Id.* The study estimated that by 2011, the labor supply will no longer increase, and the total annual labor supply will begin decreasing from 2021.

²⁰² See Parija Kavilanz, *China Labor Pains and Holiday Woes*, CNN NEWS, Aug. 9, 2006, http://money.cnn.com/2006/08/09/news/international/china_labor/index.htm. China's one child policy has altered the population structure, and the supply of young laborers is decreasing. *Id.* "A July report from the Congressional Joint Economic Committee backs that view, saying China's working-age population (15-64) will peak in 2015 and then begin to shrink." *Id.*

²⁰³ *Global Financial Crisis Spills Over to China's Labor Market*, CHINA DAILY, Nov. 2, 2008, http://www.chinadaily.com.cn/bizchina/2008-11/02/content_7166354.htm.

²⁰⁴ Duncan Mavin, *China's Economic Crisis Puts Labor Reform on Hold*, FINANCIAL POST, Feb. 2, 2009, available at <http://www.financialpost.com/magazine/story.html?id=1245227>; Xiong Tong ed., *Spokesman: China's Labor Contract Law Helps Combat Crisis*, http://news.xinhuanet.com/english/2009-03/04/content_10941430.htm (last visited Mar. 27, 2009).

²⁰⁵ Xiong Tong ed., *China Focus: Economic Woes Entrench China's Migrant Workers in Hard Times*, XINHUA NEWS AGENCY, Mar. 2, 2009, http://news.xinhuanet.com/english/2009-03/02/content_10926847.htm.

factories relying on exploitation of cheap labor. However, in the long term, stronger labor rights protection will greatly benefit migrant workers. Enhanced labor rights protection will improve the larger rural residents' buying power, and thus boost China's potential consumer market. Those companies that chose to leave early may have lost a great advantage over those companies that made a strategic decision to stay in China. Large enterprises are largely unaffected by the new law because their usual business practices have been legal. The new Labor Contract Law will level the playing field for law-abiding enterprises and the enterprises that gained the unfair advantage of low labor costs by violating labor laws. Migrant workers in manufacturing industries may also find new opportunities elsewhere or in other sectors of the economy.²⁰⁶ Many migrant workers benefit from the increases in the minimum wage, the prevention of wage defaults,²⁰⁷ and the special attention paid to their social security issues.

Admittedly, this paper's point of view is rather optimistic. The more detailed implementing regulations on the Labor Contract Law were passed to guide the actual enforcement of these laws.²⁰⁸ "No legal reform will definitely close the gap between the letter of labor law and workplace practice. Deficient implementation of and compliance with labor law is universal."²⁰⁹ The tension between capital investment and labor rights is always a delicate balance that is hard to make. For rural migrant workers, gaining the labor right of equal employment opportunity and treatment itself will be a monumental progress in Chinese history.

V. SUGGESTIONS & CONCLUSION

The Chinese government should consider taking further steps to ensure the effective implementation of the new laws in order to improve the labor rights for migrant workers and fight against discrimination against migrant workers in employment. First, it is important to improve the legal aid and other public interest legal services to help migrant workers in labor dispute resolution.²¹⁰ Interviews with migrant workers showed that many migrant workers were ignorant of the provision of the

²⁰⁶ Ding Qingfen, *Moving Inland*, CHINA DAILY, Feb. 25, 2008, http://www.chinadaily.com.cn/bw/2008-02/25/content_6480234.htm.

²⁰⁷ Within three months of the implementation of the Labor Contract Law, relevant local authorities helped 935,000 migrant workers get back defaulted wages valued at ¥1.1 billion yuan. 2008 First Quarter Summary, *supra* note 133.

²⁰⁸ Lao dong he tong fa shi shi tiao li [Regulation on the Implementation of the Labor Contract law] (promulgated by State Council, Sept. 18, 2008) (P.R.C.).

²⁰⁹ See Cooney, *supra* note 108.

²¹⁰ See Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L.J. 211 (1999); see also Margret Y.K. Woo, et al., *Migrant Access to Civil Justice in Beijing*, 4 LOY. U. CHI. INT'L L. REV. 167 (2007).

new law and their lawful labor rights after the implementation of the Labor Contract Law.²¹¹ In contrast, employers paid the most attention to the details of the new law. Further, class action should be encouraged in arbitration or court to ease the workload of legal aid and give more migrant workers access to free legal support. Besides increasing the budget and allowing other fundraising for legal aids, frequent violators should be fined and publicized, and the fines put into the public trust for legal aid.

Second, the government should enhance the role of trade unions in helping migrant workers with the signing of labor contracts, education on labor rights consciousness, communication with legal aid, and collective bargaining, especially in certain migrant worker concentrated industries. Also, public employment service agencies should provide special services to migrant workers in seeking job market information, registration and record keeping, consultation, and collaborating with labor administration agency, trade union or legal aid.

Third, to fulfill the goal of anti-discrimination against migrant workers and realize equal opportunities, the government should further reform the hukou system to allow those migrant workers, with competent work skills who want to stay in the cities, enjoy equal treatment as urban citizens. The central government has to provide both “carrots and sticks” to local government officials to effectively enforce the new labor laws.

Fourth, although the government has already begun encouraging development of townships in rural areas, it must continue to reduce regional economic imbalances as part of the ultimate solution for migrant worker issues. It can consider establishing reward policies to enterprises that create local employment opportunities for peasants in rural areas. Another way is to protect agriculture, reduce the burden of peasants, and encourage migrant workers who want to set up their own small business in their hometown through tax or loan benefits.

Last but not the least, the government should untie the social security system with the household registration and create a unified national system based on personal identity. This challenging task is now a hot issue on debate.²¹² The portability of social security is dealt with by

²¹¹ See *Rang nong ming gong dui lao dong he tong fa bu zai sheng shu* [Help Migrant Workers Familiarize with the Labor Contract Law], WORKERS' DAILY, Feb. 18, 2008, http://news.xinhuanet.com/politics/2008-02/18/content_7622669.htm; see also Pan Wei, *Nong min gong he yi dui xin lao dong he tong fa bu zai hu* [Why Migrant Workers are Indifferent to the New Labor Contract Law], FARMERS' DAILY, Apr. 25, 2008, http://www.farmer.com.cn/sh/dg/shgz/200804/t20080425_389320.htm.

²¹² Zhang Tingting, *Nationwide Applicable Social Security System Urged*, Mar. 4, 2008, http://www.china.org.cn/government/NPC_CPPCC_sessions2008/2008-03/04/content_11546057.htm. Social security mechanisms vary widely in different regions because reforms have been carried out locally. “Such disparities have brought about many difficulties in transferring social security benefits to single transient people.” *Id.* “The difficult task of cross-regional transfer management has imposed negative

the new draft Social Security Law, which was issued to accept public comments.²¹³

In conclusion, Chinese migrant workers are eligible for labor rights protection under Chinese labor and employment law. However, their labor rights have been disregarded and abused for a long time. The newly amended Chinese labor law framework, especially the adoption of the Labor Contract Law, the Employment Promotion Law, and the Law on Labor Disputes Mediation and Arbitration, brings new hope for migrant workers to get stronger labor rights protection, equal opportunities, and equal treatment in employment.

Although the impact of these new laws will still be compromised by arduous implementation, the Chinese government's strong political will in the current social and economic context is likely to ensure the enforcement is better than before. Admittedly, the implementation of these new laws may be a double-edged sword that hurts migrant workers in the short term. However, in the long run, Chinese migrant workers will greatly benefit from the stronger protection of labor rights and equal opportunities and treatment in employment brought by the new labor law framework.

effects on the collection and dispersal of social security funds." *Id.* The current social security system does not cover vast rural areas and the rights and obligations regarding payment of funds and refunds are unbalanced. Also, a special law directing the course of China's social security is still absent.

²¹³ Zhao Tingting, *China Expected to Promulgate Social Security Law*, CHINA DAILY, Mar. 4, 2009, http://www.chinadaily.com.cn/bizchina/2009npc/2009-03/04/content_7536839.htm; see also *Zhonghua Renmin Gongheguo she hui bao xian fa (cao an) [PRC Social Security Law (Draft)]*, XINHUA NEWS AGENCY, Dec. 28, 2008, available at http://news.xinhuanet.com/employment/2008-12/28/content_10570503.htm.