

A close-up, profile view of an elderly man with a weathered face, looking towards the left. He is wearing a light blue button-down shirt. The background is a soft, out-of-focus grey.

Who Will Represent China's Workers?

Lawyers, Legal Aid, and
the Enforcement of Labor Rights

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Acknowledgements

The author is grateful to the many people who provided support in the preparation of this report, whether by helping to arrange interviews, locate information, or comment on the manuscript. While each of them cannot be named here, the author wants to thank at least the following individuals: Ira Belkin, Ricky Blum, Jerome Cohen, Paul Dalton, Manfred Elfstrom, Cynthia Estlund, Susan Finder, Hualing Fu, Mary Gallagher, Seth Gurgel, Jamie Horsley, Leping Huang, Thomas Kellogg, Benjamin Liebman, Kevin Lin, Joan Liu, Sida Liu, Carl Minzner, Ross Perlin, Cessa Qian, Mark Selden, Fang Wang, Kan Wang, Xiaolei Yang, and Mingxin Ye. A special thanks is owed to Katherine Wilhelm and her colleagues at the Ford Foundation not only for making this study possible, but also for their critical contributions from its inception to completion.

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Executive Summary

China's rapid economic and social changes over the last few decades have fundamentally transformed labor relations in the country. As marketization has moved forward, working people—and particularly those migrating to the cities from the countryside—have encountered new forms of abuse and new legal challenges. In response, China has made considerable progress in legislating new legal protections for workers, facilitating access to labor arbitration and courts, and expanding government-operated legal aid programs. Nonetheless, as in other countries, there remains insufficient research concerning the precise scope of workers' current legal needs, the landscape of legal service providers, the nature or quality of those providers' services, and the size of the "representation gap" between legal needs and services. This report, commissioned by the Ford Foundation's China office, is an effort to better understand these issues and assist in developing appropriate responses.

After the Introduction, Section II describes seven prevalent work-related legal issues facing Chinese workers: (1) a lack of written labor contracts; (2) the use of labor dispatch and subcontracting arrangements; (3) unpaid wages; (4) employers' failure to make pension or social insurance contributions; (5) the prevalence of workplace injuries and occupational disease; (6) difficulties in collecting judgments; and (7) pregnancy discrimination. The list is not exhaustive but provides a sample of the problems that workers face and for which they might seek legal help. Section III of the report then introduces China's legal mechanisms for addressing these issues, the growing number and variety of labor disputes, and how workers fare in this system. Section IV describes and evaluates the various providers of legal services for workers, including private lawyers, government-sponsored legal aid, legal aid through the trade union, pro bono legal services, "barefoot lawyers," basic-level legal workers, law school clinics, bar associations, and non-governmental organizations (NGOs). Section V then discusses the representation gap in legal services that remains, including an original analysis that quantifies how many workers are unrepresented in court litigation. Section VI proposes a series of strategies to narrow the representation gap by either reducing violations of workers' rights in the first place or improving the availability and accessibility of legal services. Section VII concludes by identifying potential areas for further research.

There is now a consensus, it should be noted, that the political climate for those working on labor issues in China, including lawyers, NGOs, and academics, is now more tense than ever before. This was highlighted by the crackdown in December 2015, in which public security authorities in Guangdong interrogated over 20 individuals affiliated with labor rights NGOs, detained seven of them, charged four with crimes (convicting three thus far), and ran a national media campaign announcing the various alleged wrongdoings of the NGO activists. The implications of this tightening environment and its chilling effect on many civil society actors are also considered.

Key Findings

1. The number and diversity of labor disputes is rising. Strikes and other labor-related collective protests that never enter the formal legal system are increasing, with some sources reporting over 10,000 such incidents in 2015. Enforcement efforts by China's labor inspectorate, although largely complaint-driven and rarely resulting in the fining of the employer, recover more and more backpay for workers each year. Similarly, the number of labor disputes handled by either a mediation organization or filed at a labor dispute arbitration committee (LDAC) mushroomed from 875,000 in 2009 to 1.55 million in 2014, and increased another 10% in 2015 to 1.72 million. The courts handled 483,000 labor dispute cases in 2015, a 32% increase from two years prior, and an additional 162,000 contract disputes involving labor issues. Cases concerning unpaid wages and social insurance remain most prevalent nationally, but some localities are seeing more disputes about termination, severance, overtime, and other issues.

2. Workers are often unsuccessful in litigation. Although workers are increasingly filing cases at the LDACs and courts, they often fail to achieve a successful outcome. Since 2007, workers have become less likely to "totally win" and more likely to only "partially win" in labor arbitration. As for court, an original analysis of publicly available decisions revealed that only 58% of workers partially or totally prevailed. Workers' limited understanding of the substantive law and legal process as well as employers' malicious litigation tactics contribute to this phenomenon.

3. Mediation has become the predominant means of resolving labor disputes. Since 2010, more cases are resolved informally by mediation institutions each year than get filed with

the LDACs; even for cases that enter litigation, more are disposed of through mediation than by arbitral awards or judicial decisions. While workers benefit from mediation's relative quickness and settlements that are more likely to be implemented, in mediation workers are vulnerable to being coerced into settlement. Very few workers have legal representation in mediations that occur before a formal complaint is filed: one Beijing mediator estimates that only 5% of such workers have counsel.

4. Private lawyers are often reluctant to represent workers. The reasons for this reluctance include the sometimes complicated and lengthy procedures that labor disputes involve, the small size of the available fees (particularly for low-income workers), the difficulty in collecting a judgment from the employer or a fee from the client, and the potential political sensitivity of labor cases. A formal ban on contingency fees also discourages lawyers from representing workers who cannot pay for their services upfront. The difficulty of bringing cases on a collective or class basis means representing people with small claims is not economical for lawyers. In Jilin Province, private lawyers represented workers in only 18% of the labor disputes litigated in court. Moreover, recent legislative amendments have made it harder for non-lawyers to represent workers in litigation.

5. Government-sponsored legal aid for workers has increased dramatically, but the quality of representation is often poor. The availability of civil legal aid in China has greatly expanded over the last decade, particularly for migrant workers with claims for unpaid wages or work injury compensation. By 2013, nearly one-third of the over 900,000 civil legal aid cases involved labor remuneration claims, and migrant workers constituted one-third of the 1.2 million individuals represented through legal aid. An additional one million migrant workers receive free legal consultations annually. Furthermore, the official trade union provides legal aid to workers in over 38,000 labor cases each year. While the government reports providing civil legal aid to virtually all eligible applicants, others estimate that only one in four such applicants receive a lawyer. Certain categories of workers are considered ineligible to receive representation in some localities or simply have far more trouble getting help: workers lacking a "labor relationship," such as domestic workers, students, or retirees; independent contractors; those without a written contract or strong evidence; and workers with more sensitive or complex claims. In the major cities, most cases that the government accepts for legal aid are assigned to private law firms or other legal service providers, who receive a fixed stipend well below the market rate for those services regardless of the outcome. As a result, firms often assign their most inexperienced lawyers to these cases. Furthermore, the attorneys are interested in resolving the matters as quickly or with as little effort as possible.

6. There is significant regional variation in the number and work of labor rights NGOs. A number of NGOs providing legal assistance to workers have been able to operate in Beijing, including two organizations staffed by lawyers who provide legal aid, conduct impact litigation, and do policy advocacy work. Shanghai, by contrast, is perceived as being quite unwelcoming of

labor NGOs. The one NGO providing legal aid to workers there, which recently stopped operating, never received government support and only handled a few dozen cases per year. Over half of China's labor rights NGOs are in Guangdong, and half of those are in Shenzhen. Whereas many groups there previously provided legal aid to workers, both heightened restrictions on non-lawyers using the "citizen agent" provisions to represent parties in litigation and frustration over a lack of progress in improving labor conditions caused some NGOs to focus instead on supporting collective bargaining. However, the December 2015 crackdown is generally having a chilling effect on labor NGOs and particularly on collective bargaining work.

7. Represented workers achieve better litigation outcomes, but a significant representation gap exists: four out of ten workers in court lack legal representation. There is a great deal of anecdotal evidence, and some empirical studies, showing that workers with a legal representative fare better in litigation. But many workers are unable to find representation. An original analysis of 30,000 labor dispute decisions from courts in major cities revealed that roughly 40% of workers had no legal representative. Studies of labor arbitrations and court proceedings in other localities found even lower rates. But these statistics that focus solely on litigated cases are only the tip of the iceberg of any representation gap, as they exclude workers who settle their disputes before filing a formal claim and workers who never raise a complaint because they are unable to find any legal help. One 2005 survey found that less than 8% of workers who experienced a labor dispute had some form of legal representative.

Future Strategies

Section VI identifies eight strategies for narrowing the representation gap. Some focus on increasing the "supply" of legal services and workers' access to them. The others seek to reduce the "demand" for legal services by decreasing workplace injuries or labor violations at the outset. The strategies are listed in no particular order. Given the current political climate, some of them may be more feasible than others.

1. Expanding worker education, training, and outreach. Labor advocates universally stressed the need to educate more workers about their legal rights and available legal services. If workers can identify labor violations, they may be able to resolve them informally before litigation is required; if not, it is important they know how to access legal help. Innovative models to teach workers about their rights and available services should be explored, such as expanding the use of "worker volunteers" or creating a free resource for WeChat, a Chinese social media platform.

2. Reducing occupational disease and increasing legal services for its victims. A multipronged strategy that prevents occupational disease and provides legal representation to infected workers is sorely needed. Private lawyers are reluctant to take occupational disease cases because they may span several years and are hard to win. Legal aid organizations that specialize in litigation and policy advocacy on these issues should be nurtured

and established in more cities. Furthermore, the development of a nationwide online resource to assist volunteer lawyers in handling these cases should be explored.

3. Fostering collective dispute resolution and collective negotiation. These practices can resolve disputes involving many workers without using litigation or may even prevent disputes in the first place. Despite the recent crackdown, it is worth exploring whether there may still be opportunities to conduct this work around less sensitive issues, such as workplace safety.

4. Strengthening anti-retaliation measures. Chinese workers often do not challenge legal violations due to a fear of retaliation, which further emboldens abusive employers. Employer retaliation is commonplace in part because existing law provides insufficient protections for workers who complain. A judicial interpretation or legislation that creates an explicit anti-retaliation provision could be a useful first step in helping to curb this problem.

5. Using administrative litigation. Labor advocates have used administrative litigation in creative ways, such as to compel the labor bureau to be more proactive in investigating and resolving violations. An analysis of these various experiences should be conducted to see what lessons can be learned or strategies developed for more effectively using this tool.

6. Encouraging the growth of a plaintiffs' bar. A motivated, entrepreneurial, private plaintiffs' bar could seriously narrow the representation gap for workers. Contingency fee arrangements, collective and class actions, and a reasonable fee-shifting scheme would encourage this development.

7. Establishing personal liability for employers and imposing criminal sanctions. Legislative changes to allow individuals (not just corporate entities) to be held liable for labor violations, and increasing the number and impact of criminal prosecutions of employers, would deter labor violations. Worker advocates should partner with local governments to bring more criminal cases and help publicize these prosecutions.

8. Engaging employers to reduce workplace injuries and labor violations. Several of the above strategies can be pursued through collaborations between worker advocates, multinational companies, and Chinese employers. Companies can be partners in improving workplace safety by developing trainings or encouraging worker-management dialogue and collective negotiation. They may also help to ensure that newly developed legal education tools or other resources actually make it into workers' hands.

I. Introduction

China's rapid economic and social changes over the last few decades have fundamentally transformed labor relations in the country. As marketization has moved forward, working people—and particularly those migrating to the cities from the countryside—have encountered new forms of abuse and new legal challenges. In 2015, China's workforce grew to 806 million people, including 277 million migrant workers.¹ In the last decade, China has made considerable progress in legislating new legal protections for workers, facilitating access to labor arbitration and courts, and expanding government-operated legal aid programs. Nonetheless, as in other countries, there remains insufficient research concerning the precise scope of workers' current legal needs, the landscape of legal service providers, the nature or quality of those providers' services, and the size of the “representation gap” between legal needs and services. This report, commissioned by the Ford Foundation's China office, is an effort to better understand these issues and assist in developing appropriate responses.

China is an enormous and diverse country that defies generalizations. While there are national laws and policy directives, the details are often filled in by each locality issuing its own regulations. Accordingly, great diversity can exist in how any particular law or regulation is implemented on the ground. However, it is precisely this “on the ground” understanding of how legal services are delivered that is needed to develop practical and strategic responses. Therefore, while analyzing national policies and trends, this study also attempts a more in-depth exploration of workers' legal needs and the available services in a select group of Chinese cities: Beijing, Shenzhen, and cities in the Yangtze River Delta, including Shanghai, Kunshan, Nanjing, and Suzhou. Each of these areas has a significant population of migrant workers, but important differences exist in the services available to them.

The report contains seven sections. After this Introduction, Section II discusses several of the more prevalent, work-related legal issues faced by Chinese workers. Section III introduces the components of the formal labor dispute resolution system, including administrative mechanisms, mediation, and litigation;

describes the growing number and variety of labor disputes; and discusses how workers fare in the formal dispute resolution system. Section IV describes and evaluates the various providers of legal services for workers, including private lawyers, government-sponsored legal aid, legal aid through the trade union, pro bono legal services, “barefoot lawyers,” basic-level legal workers, law school clinics, bar associations, and non-governmental organizations (NGOs), while also noting any local variations that exist. The next part, Section V, discusses the remaining representation gap in legal services for Chinese workers, including an original analysis of publicly available court decisions that seeks to quantify how many workers are unrepresented in court. Section VI then presents eight strategies for narrowing the representation gap for worker advocates to consider. Finally, Section VII concludes by identifying some potential areas for further research.

This study draws upon the author's nearly ten years of fieldwork and research on Chinese labor issues. This particular project also involved an extensive review of relevant public and non-public written materials, including but not limited to academic works by scholars inside and outside of China, laws and regulations, government statistics and reports, materials produced by NGOs, and news reports. In addition, the author interviewed over 100 individuals inside and outside of China in 2015 and 2016, visited worksites, talked with workers, and observed legal proceedings.²

A word of caution is in order concerning the large number of Chinese government statistics discussed in this report. The government itself has acknowledged that certain data is unreliable because the local officials who produce it are also evaluated for promotions based on these figures.³ Authorities in Beijing may also manipulate statistics in order to fit the government's official narrative.⁴ One municipal-level official interviewed for this report expressly disbelieved the number of successfully mediated cases reported to her by a district-level office. Problems also exist due to a simple lack of central guidance on how to define

¹ “Data: Labor force, total,” THE WORLD BANK, Apr. 11, 2016 (labor force statistics); Nat'l Bureau of Statistics (国家统计局), *2015 Monitoring Report on Migrant Workers* (2015年农民工监测调查报告), Apr. 28, 2016 (migrant worker population). This statistic includes both “local migrant workers” (本地农民工), who find work within the same township (乡镇) as their household registration, and “outward migrant workers” (外出农民工), who work outside of that township, such as in other counties, cities, or provinces.

² This is the number of interviews conducted primarily in connection with this study. The author's total number of interviews or conversations in 2015–2016 concerning labor relations in China, which also inform this study, is far greater.

³ *Inflated Statistics Wreak Havoc on Economies of Northeast China*, GLOBAL TIMES, Dec. 14, 2015.

⁴ Jacob N. Koch-Weser, *The Reliability of China's Economic Data: An Analysis of National Output*, U.S.–CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, Jan. 28, 2013; see also Jeremy Wallace, *Here's Why it Matters that China is Admitting that its Statistics are 'Unreliable'*, WASH. POST, Dec. 28, 2015 (noting that “China's non-democratic government wants to control the flow of information about itself...”).

or measure certain items. In some instances, local governments use such different methods to calculate legal aid statistics that comparison between them is almost meaningless. That being said, the statistics are still somewhat useful in illuminating what is happening in China and identifying trends. Nonetheless, it may be appropriate to approach them with a skeptical eye.⁵

In order to supplement the government statistics, the author collaborated with the Chinese company, Legal Miner, to perform an original data analysis in connection with this report.⁶ A dataset was created from the court decisions that have been made publicly available through the database China Judgments Online (中国裁判文书网). The dataset consists of all first-instance (一审) court decisions in labor cases issued from January 1, 2014 to December 31, 2015 in Beijing, Shanghai, and Shenzhen—totaling 30,571 published decisions. Legal Miner then analyzed this dataset to determine the rates of legal representation for workers, the types of legal representation (lawyers versus other providers), success rates in litigation, and the length of the proceedings. The results are discussed in the relevant sections below.

It should be noted that much of the fieldwork for this report was conducted in the summer of 2015, at a time when the situation for labor NGOs was already tense. In December 2015, public security authorities interrogated over 20 individuals affiliated with four labor rights NGOs in Guangdong and detained seven of them on criminal charges. Four were formally charged with crimes, three of whom have been convicted. The government also ran a national media campaign that accused one of the labor activists of “inciting” workers to strike and protest, purposefully “disturbing social order,” and engaging in immoral personal behavior, such as maintaining multiple mistresses and sending vulgar sexual messages.⁷ Although NGO staff working on labor or discrimination issues have been harassed, detained, or arrested for several years, they universally report that the current climate is the worst they can remember.⁸ Lawyers and university professors working on labor issues have also felt the increased scrutiny and pressure. In the past two years, a labor law clinic in Suzhou and a labor research center at a university in Guangzhou were both forced to close. In June 2016, the police detained Lu Yuyu, a labor activist who collects and documents strikes and other public protests in China. Furthermore, this is within the context of a much wider crackdown against lawyers and other civil society groups.⁹ This climate has had a palpable chilling

effect on lawyers and civil society groups doing labor or other rights-defense work. More fundamentally, these events create some uncertainty as to the extent to which labor NGOs will be able to continue operating, let alone initiate innovative programs.

The most recent economic slowdown has also raised broader questions about the future direction of labor rights in China. In a surprising February 2016 statement, China’s Minister of Finance suggested that workers already enjoy too much protection and warned against any expansion of collective bargaining.¹⁰ Leading experts then repeated this critique that China’s labor standards are too high. In April 2016, the central government instructed localities to decrease the social insurance premiums employers are required to pay.¹¹ And plans for significant layoffs in the state-dominated coal and steel sectors, potentially involving millions of workers, have been announced.¹² Furthermore, there are reports that the *Labor Contract Law* will be amended to reduce worker protections and increase the flexibility of employers. In sum, things may get worse for China’s workers before they get better.

⁵ See Tom Orlik, *Lies, Damned Lies, and Chinese Statistics*, FOREIGN POL’Y, Mar. 20, 2013 (acknowledging problems with China’s economic data but arguing it is “increasingly reliable”).

⁶ The analysis was performed in July 2016. It has not been published, but is on file with the author and will be referenced hereinafter as “*Legal Miner 2016 Report*.”

⁷ Sui-Lee Wee, *Chinese State Media Accuse Detained Labour Activists of Incitement*, REUTERS, Dec. 23, 2015.

⁸ See Tom Mitchell, *End of China’s Migrant Miracle—Toil and Trouble*, FIN. TIMES, June 7, 2015 (noting a report that police intervened in 150 worker protests and arrested 69 people, mostly protesting workers and activists, in 2012–2013); Committee to Support Chinese Lawyers, *Plights and Prospects: The Landscape for Cause Lawyers in China*, 19, 28, 31–32, 54–55 (2015) (discussing the crackdown on Yirenping, Chang Boyang, and the Feminist Five); Tom Mitchell, *China Drops Charges Against Labour Activist Wu Guijun*, FIN. TIMES, June 9, 2014 (discussing the case of Wu Guijun, who was charged with leading a labor protest that disrupted public order and spent over one year in jail); “*Hungry Workers Sleep on Street, Protest After Shenzhen Toy Factory Boss Absconds*,” RADIO FREE ASIA, Nov. 10, 2015 (discussing detention of labor activist Liu Shaming).

⁹ See *China’s New Crackdown on Civil Rights*, WASH. POST, July 15, 2015 (noting that “police had detained and interrogated at least 159 human rights lawyers, activists and their relatives in 24 cities and provinces” in a week-long crackdown).

¹⁰ Xing Yun, *Lou Jiwei: The Next Step is to Amend the Labor Contract Law* (楼继伟:下一步要修改劳动合同法), CAIJING NET, Feb. 19, 2016.

¹¹ *Notice on Temporarily Decreasing Social Insurance Rates* (人力资源社会保障部 财政部关于阶段性降低社会保险费率的通知) (promulgated by Ministry of Human Resources and Social Security (MOHRSS) and Ministry of Finance, Apr. 14, 2016).

¹² Chris Buckley & Javier C. Hernandez, *China Seeks to Avoid Mass Layoffs While Cutting Production*, N.Y. TIMES, Mar. 16, 2016.

II. Legal Issues Faced by Workers

This section seeks to identify and describe some of the prevalent legal issues facing Chinese workers. In order to keep the scope manageable, the focus is on work-related issues, such as legal rights granted to workers that are frequently violated or obstacles to enforcing these rights.

China's issuance of the *Labor Law* (1994) marked its transition from a labor relations system dictated by policy in a planned economy to a system based on contracts between employers and workers. Employers were to conclude written contracts with workers, thus creating a "labor relationship," and the terms of employment were not to fall below the minimum standards set forth in the *Labor Law* for the payment of wages, limits on working hours, rules on work holidays, and caps on overtime. Technically, this system was to apply both to the urban residents who previously worked at state-owned enterprises as well as to the increasing number of migrant workers—rural residents who came to find jobs in the cities. Nonetheless, violations of basic labor rights were rampant and enforcing them often difficult, particularly for migrant workers who lacked education, knowledge of the law, and social capital in the cities where they worked. Common violations and problems, to name just a few, included the failure or sometimes refusal by employers to pay wages, the classification of workers as independent contractors instead of employees to skirt legal obligations, excessive overtime and failure to pay overtime premiums, non-payment of social insurance contributions, and frequent workplace injuries and occupational disease. Attempts to enforce worker rights through the formal legal system or official government channels met with numerous obstacles.¹³

China sought to address several of these issues with the passage of the *Labor Contract Law* and the *Labor Dispute Mediation and Arbitration Law*, which both took effect in 2008. The former is a "substantive law" (实体法) that modified or built upon the labor standards set forth in the *Labor Law*.¹⁴ The latter is a "procedural law" (程序法) that altered the rules for processing labor disputes by the country's mediation bodies, labor dispute arbitration committees (LDACs; 劳动争议仲裁委员会), and courts. The issuance of these laws provides a useful starting point for evaluating how

various problems afflicting workers have improved, morphed, or remain unchanged until now.

1. Labor Contracts

The *Labor Law* required employers to conclude written labor contracts with their workers, but offered no penalties for the failure to do so. These contracts are important for a number of reasons. They make employees aware of their rights and the details of their employment, such as the rate of pay or work schedule. The contracts also provide evidence that a labor relationship exists with the employer, as opposed to an independent contractor or other relationship, and thus the statutory protections afforded employees are applicable. More fundamentally, a written contract can prevent an employer from simply denying that an individual ever worked there. Prior to 2008, very few migrant workers had a written contract, and even fewer in industries like construction. The *Labor Contract Law* made monetary damages available in cases where employers failed to conclude a contract with their workers. A storm of litigation ensued after this law took effect. While this significantly increased the percentage of workers with written contracts, the overall rate of coverage remains unimpressive. For instance, one study found that in 2008, 7.3% of migrant workers seeking legal aid in Beijing had a written contract, but from 2009 to 2014, still only 21.9% of such workers had contracts.¹⁵ Government data for 2015 showed that 36% of migrant workers nationwide had labor contracts, but this is still only half of the percentage of local resident workers with contracts.¹⁶

Even if more contracts are being concluded, new problems with labor contracts have arisen. The first is that employers will sometimes retain the only copy of the contract, meaning that workers do not have the benefit of learning their rights or evidence when they need to prove the labor relationship. The second is that employers will ask workers to sign blank contracts and then fill out the information afterwards, again without providing a copy to the worker. A report on labor litigation in the Beijing courts discovered widespread use of false evidence, including employers forging employees' signatures on labor contracts.¹⁷ These practices

¹³ See, e.g., Aaron Halegua, *Getting Paid: Solving the Labor Disputes of China's Migrant Workers*, 26 BERKELEY J. INT'L L. 254, 263–83 (2008) (explaining the difficulties migrant workers faced in using the formal legal system to address wage violations).

¹⁴ For a thorough discussion of the history of China's labor relations system up through and including the passage of these two laws, see SEAN COONEY, SARAH BIDDULPH & YING ZHU, *LAW AND FAIR WORK IN CHINA* 1–111 (2013).

¹⁵ Beijing Zhicheng Migrant Worker Legal Aid and Research Center, *Investigation Report on 10 Years of Migrant Worker Legal Aid Work* (农民工法律援助十年变迁调研报告), Sept. 15, 2015 (hereinafter, *Zhicheng 2015 Report*).

¹⁶ 2015 *Monitoring Report*, *supra* note 1 (data for 2015); XIE ZENGYI, *LABOR LAW IN CHINA: PROGRESS AND CHALLENGES* 83 (2015) (reporting on 2010 study finding that only 34% of migrant workers had labor contracts but 71% of local workers had labor contracts).

¹⁷ *Opinion on the Trial Situation, Issues, and Remedies concerning 2012–2013 Labor Dispute Cases in the Beijing Courts* (北京市法院2012年至2013年度劳动争议案件的审理情况、问题和对策意见) (no date).

make it difficult for workers to establish in arbitration or court that they labored at a workplace when seeking compensation for a work injury or for the nonpayment of wages—that is, when employers have large incentives to deny having employed the worker. Thus, the labor contract is not only beneficial to the worker in and of itself, but also important for enforcing other rights.

Another development is that companies are increasingly signing “labor service” contracts with workers. These contracts seek to define the worker not as an employee but as an independent contractor who lacks a labor relationship and is thus not entitled to the protections of the labor laws. While some workers are genuinely independent contractors, in other situations employers seem to be willfully mislabeling the worker so as to evade rules on wages and hours, social insurance, and other rights.

2. Labor Dispatch and Subcontracting

Another common tactic to avoid establishing a labor relationship with workers is for a company, instead of hiring workers directly, to contract with a labor dispatch agency (劳务派遣公司) that then provides it with workers. In such cases, the worker is an employee of the dispatch agency instead of the “user company” (用人单位). This practice allows the company to avoid the responsibilities owed to employees, such as social insurance and severance, and instead leave those to the dispatch agency, which may be a smaller, under-capitalized, and comparatively judgment-proof firm. While there are exceptions, dispatched employees often receive lower wages and fewer benefits than normal employees. In order to avoid the legal rule that converts workers who had successive short-term contracts with the same employer into non-fixed term (permanent) employees, some workers have been required to sign a contract with a different dispatch company each year. The *Labor Contract Law* sought to further regulate labor dispatch and reduce its use, such as by requiring dispatch agencies to meet minimum capital requirements and establishing joint liability in certain circumstances. However, despite these new rules, the stricter employee protections in the *Labor Contract Law* made dispatch arrangements even more attractive, causing the number of dispatch workers to double after the law’s passage.¹⁸

The Chinese government has again attempted to reign in labor dispatch. Amendments to the *Labor Contract Law* in 2012 and implementing regulations issued in 2013 limit dispatch workers to certain types of positions—“provisional, auxiliary, or substitute positions”—and mandate that they comprise no more than 10% of an employer’s workforce.¹⁹ There is skepticism

Thirty-six percent of
migrant workers nationwide
have labor contracts, only
half of the percentage for
local resident workers.

about how successful these provisions will be in combatting the problem because several key ambiguities remain.²⁰ Furthermore, many companies are replacing dispatch by simply “outsourcing” or “subcontracting” for a task to be performed—that is, hiring a company that will bring its own workers to perform a given function.²¹ For example, instead of the dispatch

company providing a factory with cooks and dishwashers to work in its kitchen, the factory will pay a subcontractor to provide all catering services. Many of the same problems faced by workers assigned through dispatch agencies still exist for those employed by subcontractors. The difference is that it is now even more difficult to establish the liability of the user company for any legal violations. Nevertheless, there have been several recent examples of workers protesting their employers’ efforts to outsource their jobs.²²

3. Unpaid Wages (Wage Arrears)

The problem of wage theft, often termed “unpaid wages” or “wage arrears” in China, is enormous. This may occur when an employer simply does not pay an employee or, more commonly, pays only a portion of what is owed while promising to pay the remainder at a later date. In the early 2000s, some estimated that half of migrant workers had experienced payment default; others put the figure at 70%.²³ This problem was particularly poignant in the construction industry, where the routine practice was for the employer to provide housing and meals to workers but only pay wages at the completion of the project or at the end of the year before they returned home for the Chinese New Year.

The government has taken numerous regulatory measures to combat wage arrears over the last decade, but the problem persists and, by some measures, is worsening. An official government survey found that 1% of all migrant workers (over 2.7 million people) experienced a wage arrears problem in 2015, an increase of 0.2% over the year prior. The rate among construction workers (2%) was twice as high. The average amount of arrears per worker was RMB 9,788, an increase of RMB 277 since 2014.²⁴ (In June 2016, one U.S. dollar was equal to roughly RMB 6.6.) But other groups estimate that the problem is far more severe. China Labour Bulletin reports that in 2013, only 20% of construction workers, and only 5% of those in Beijing, were being paid on a regular monthly basis.²⁵ Construction workers were reported to account for roughly one-third of all strikes in 2015.²⁶ Indeed, the State Council issued an *Opinion* in January 2016 specifically to address the problem of wage arrears for migrant workers,

20 XIE, *supra* note 16 at 86–87 (pointing out the shortcomings of the new regulations).

21 See *Beijing Courts 2012–2013*, *supra* note 17 (noting the increased use of subcontracting arrangements by employers to avoid the restrictions on using labor dispatch).

22 See *China’s Workers Organize Simultaneous Protests in Multiple Cities*, CHINA LABOUR BULLETIN, Apr. 7, 2016 (describing such protests by workers at Neutrogena and China Unicom).

23 Halegua, *Getting Paid*, *supra* note 13 at 258.

24 *2015 Monitoring Report*, *supra* note 1.

25 *Wages and Employment*, CHINA LABOUR BULLETIN (last accessed July 14, 2016).

26 *Wage Arrears Protests Erupt at Wanda Plazas across China*, CHINA LABOUR BULLETIN, Nov. 13, 2015.

18 See Virginia E. Harper Ho & Huang Qiaoyan, *The Recursivity of Reform: China’s Amended Labor Contract Law*, 37 *FORDHAM INT’L L.J.* 973, 996 (2014); see also XIE, *supra* note 16 at 79–80 (noting a report by the All-China Federation of Trade Unions (ACFTU) that the percentage of dispatch workers in the economy increased after the passage of the *Labor Contract Law*).

19 *Temporary Regulations on Labor Dispatch (劳务派遣暂行规定)* (promulgated by MOHRSS, 2013), Art. 4.

particularly those on government-financed construction projects, which it noted “has not been fundamentally resolved” despite years of government efforts.²⁷ The problem of wage arrears is also becoming more widespread in the manufacturing, extractives, and other industries, as acknowledged by the Ministry of Human Resources and Social Security (MOHRSS), and the problem grows worse during economic downturns.²⁸ While employers sometimes fail to pay weeks or months of salary, other tactics are subtler. For instance, factories in the Pearl River Delta will lay off workers when they enter their slow season or as business decreases, but without paying them for the days worked between their last paycheck and the date of the layoff.

4. Pensions and Social Insurance

Employers are legally required to make contributions to five types of social insurance for their workers: pension, unemployment, medical, work injury, and maternity. Workers also make contributions to the first three of these. There is also a “housing fund” (住房公积金) to which both parties are to contribute. For the pension, a worker must have participated in the scheme for 15 years in order to receive a benefit at retirement. But relatively few migrant workers qualify. Employers have obvious incentives not to make pension contributions or to pay less than they should under the law, which is roughly 20% of wages. Many migrant workers also do not want to contribute their share (roughly 8%) both because they prefer to keep the cash and their skepticism that they will be able to collect their pension when they retire in their hometown. Although the percentage rises each year, official government statistics for 2014 reported that still only 16.7% of migrant workers had a pension.²⁹ The coverage levels for migrant workers were similarly low for the other types of mandated insurance—26.2% covered by work injury insurance, 17.6% by health insurance, 10.5% by unemployment insurance, and 7.8% by maternity insurance—and housing fund contributions were only made for 5.5% of migrant workers.³⁰ But as more and more migrant workers approach the retirement age, they are realizing that employers have not made the requisite pension contributions and are taking action in response.³¹ Migrants in Beijing are also increasingly demanding that social insurance contributions be made because it may be necessary for purchasing a car or home, or for their children to enroll in school.³²

One of the largest strikes in China's recent history, involving 40,000 employees at the Yue Yuen shoe factory in Dongguan, was primarily motivated by a discovery that the company was underpaying its pension contributions. A Foxconn employee recently alleged that the company has been making inadequate social insurance contributions for 100,000 workers for years by basing contributions on employees' base salary, not their total

Although the percentage rises each year, official government statistics for 2014 reported that still only 16.7% of migrant workers had a pension.

wages.³³ In addition to strikes, workers are also using the courts to seek redress for these underpayments. Several basic-level courts in Beijing report that over half of all labor disputes involved social security claims.³⁴ Similarly, 64% of the labor disputes in the intermediate-level court in Guangzhou involved social security matters.³⁵ Whereas many believed that workers could only request that underpayments in the most recent two years be supplemented, a Shenzhen court recently overruled the decision of a local social security bureau applying this two-year limit.³⁶ Consequently, there may be increased opportunities to use litigation to address the rampant underpayment of pension contributions by employers. However, in other localities, such as Beijing, the LDACs and courts have limited the private right of action for certain social insurance claims, instead requiring workers to file claims with the labor bureau.³⁷

5. Workplace Injuries and Occupational Disease

In 2012, the State Administration for Work Safety (国家安全生产监督管理总局) reported roughly 72,000 work-related deaths, nearly 200 deaths per day.³⁸ While this number had dropped significantly from its peak in 2002 (240,000 deaths), and continued to do so up through 2015 (66,000 deaths), it is still far higher on an absolute and per capita basis than countries such as the United States, which reported just over 4,600 deaths in 2012, or the United Kingdom.³⁹ The year 2015 alone witnessed several workplace accidents resulting in high casualties, such as the explosions in Tianjin and Shandong, and there were far more workers who suffered from non-fatal but serious injuries.⁴⁰ One clear cause of these injuries is

33 Liu Jiayi, *Foxconn Could Owe Insurance to 100k People, According to Dismissed Workers*, ZDNET, Sept. 15, 2015.

34 *Beijing Courts 2012–2013*, *supra* note 17 (noting that because the social security department cannot accept contributions for periods prior to the implementation of the *Social Security Law* in 2011, Beijing courts would order any contributions owed for those periods to be paid directly to the worker and contributions for later periods to be delivered to the social security department).

35 *Guangzhou White Paper on Labor Disputes (2011–2013)* (广州劳动争议诉讼情况白皮书, 2011–2013), GUANGZHOU COURT NET (广州审判网), June 11, 2014.

36 *Shenzhen Man's Request to Supplement Social Insurance Denied; Wins Lawsuit Against City's Social Insurance Bureau* (深圳一男子申请补缴社保被拒, 告市社保局一审获胜), SZNEWS.COM, June 9, 2015. One lawyer in China suggested that there has now been a change in policy explicitly removing any limit on the number of years for which workers can obtain payment of past premiums. Interview with Liang Xiaohui, China National Textile and Apparel Council, in Beijing, China (May 2015).

37 *Zhicheng 2015 Report*, *supra* note 15 (noting a drop in the number of social insurance cases handled by this legal aid organization after Beijing instituted this policy).

38 *China's Social Security System*, *supra* note 31.

39 An Baijie, *Workplace Death Toll "Too High"*, CHINA DAILY, Mar. 11, 2015 (2002 statistic); Nat'l Bureau of Statistics, *Statistical Communiqué of the People's Republic of China on the 2015 National Economic and Social Development*, Feb. 29, 2016 (statistics for 2015, and noting “[w]ork accidents in industrial, mining and commercial enterprises caused 1,071 deaths out of every 100 thousand employees” in that year); U.S. Bureau of Labor Statistics, *Revisions to the 2012 Census of Fatal Occupational Injuries (CFOI) Counts*, Apr. 2014 (U.S. statistic); Daniel Bardsley, *China's Workplace Safety Scuttled in New Report Showing over 200 Deaths a Day*, THE NATIONAL, Dec. 5, 2011 (China's per capita work fatality rate is 21 times higher than that in the United Kingdom).

40 *Death Toll Continues to Rise as Full Extent of Tianjin Warehouse Disaster Emerges*, CHINA LABOUR BULLETIN, Aug. 22, 2015 (noting that in the first four months of 2015, there were 862,225 worker accidents and 16,243 deaths); Karen Cheung, *China Sees at least One Workplace Explosion per Week on Average, says NGO*, HONG KONG FREE PRESS, Sept. 4, 2015 (reporting that there is at least one explosion per week in China).

27 *Opinion on Comprehensively Controlling the Problem of Wage Arrears for Migrant Workers* (国务院办公厅关于全面治理拖欠农民工工资问题的意见) (promulgated by St. Council, 2016).

28 MOHRSS: *In the Last Three Quarters, Unpaid Wages to Migrant Workers caused 11,007 Mass Incidents* (人社部: 前三季度, 拖欠农民工工资引发11007起突发事件), XINHUA, Nov. 30, 2015.

29 Nat'l Bureau of Statistics, *2014 National Migrant Worker Monitoring Investigation Report (2014年全国农民工监测调查报告)*, Apr. 29, 2015, Table 14.

30 *Id.*

31 *China's Social Security System*, CHINA LABOUR BULLETIN (last accessed July 14, 2016) (reporting that in 2013, 144 million of the 269 million migrant workers in China were born before 1980).

32 *Zhicheng 2015 Report*, *supra* note 15.

a lack of training for new workers. NGOs working with migrants in industrial areas report that a large proportion of injured workers had been at their job for less than a month.⁴¹ Many companies also fail to comply with rules to provide safety equipment. Insufficient enforcement by the understaffed workplace safety authorities perpetuates this culture of lax safety procedures and minimal safety training by the factories. More recently, the government has also called attention to deaths resulting from overwork and work-related stress, of which it estimates there are 600,000 per year.⁴²

An additional problem is the difficulty workers have in obtaining appropriate compensation for their injuries. Under the law, employers are to contribute to a work injury insurance fund. Then when a worker establishes that he was injured in connection with his work and the degree of his injury is determined, the fund will pay for most medical-related expenses and ongoing disability payments based on the level of injury; the employer pays the employee's wages during the period of medical treatment. Where insurance contributions have not been made, the employer is responsible for all medical, disability, and other costs. But only about one-quarter of the entire workforce is covered by work injury insurance.⁴³ In this situation, if the employer does not pay, the local government is supposed to pay and then seek reimbursement from the employer; but few local governments will actually front the money. Thus, workers must use the legal system to try to collect what is owed to them directly from employers. The result is that employers vigorously contest workers' legal efforts to obtain work injury compensation: they allege they never employed the worker, challenge the severity of the injury, object that the injury is not work-related, and draw out the litigation process hoping the worker will give up or settle for a small amount. Indeed, facing a daunting legal gauntlet of administrative determinations, court trials, and appeals of both, many workers do end up settling.

Increased attention is also being paid to the prevalence of occupational disease among China's workforce. Similar problems exist with insufficient training, a lack of proper safety equipment, and a simple lack of concern by employers. Government authorities recorded 29,972 new occupational disease diagnoses in 2014, nearly 90% of which were for the deadly lung disease pneumoconiosis, and reported that a total of 700,000 people across China were living with this disease.⁴⁴ But these numbers likely grossly understate the problem. Other studies estimate that six million Chinese workers actually suffer from the disease.⁴⁵ Obtaining compensation for occupational disease is even harder than for work injury.⁴⁶ The disease often does not manifest until

after the worker has left the job, making it far harder to get evidence that the worker was employed by the factory, let alone evidence of what chemicals were being used during that time and caused the worker's current illness.⁴⁷ Statistics on occupational disease cases involving pneumoconiosis victims show that completing the legal process takes 23.5 months on average and the worker has to pay between RMB 7,000 to 70,000 in legal costs.⁴⁸

6. Collecting Judgments

Even if a worker is able to obtain an arbitration award or court judgment ordering compensation from the employer, the worker may still have trouble enforcing this award.⁴⁹ In many instances, the employer simply refuses to pay the judgment and the worker must petition the court to enforce its award. A legal aid NGO in Beijing reports that in the cases it litigated on behalf of nearly 2,000 workers, only 36% were voluntarily enforced by the employer, 7% were partially enforced, and court enforcement was sought for 57%.⁵⁰ A study of labor disputes filed in Jilin Province courts in 2014 showed that 30% of the cases were enforcement proceedings, as compared to 19% of civil cases generally.⁵¹ In other instances, the employer may have disappeared or transferred his assets before a judgment can even be awarded. There exists a mechanism in Chinese law for essentially freezing a defendant's assets before a judgment is issued (先予执行), but it is hard to use in practice.⁵² The largest obstacle is that the worker is often required to put up collateral in the amount of the requested judgment. Most migrant workers—and particularly those in court because they have not been paid, were recently terminated, or have sustained an injury—cannot afford this. This problem of enforcing judgments is not limited to labor matters and may be worsening: the number of court cases involving unsatisfied judgments rose from 3.4 million in 2013 to 4.8 million in 2015.⁵³ In January 2016, the central government issued a memorandum of understanding involving 44 government institutions to combat this issue.⁵⁴

7. Pregnancy Discrimination

While employment discrimination against many groups is a serious problem in China, many scholars, NGO activists, and lawyers in China have pointed to particularly troubling developments with pregnancy- or maternity-related discrimination.⁵⁵ Pregnant women and mothers are actually guaranteed significant legal protections. For instance, the *Labor Law* restricts the type

47 One worker rights group reported that each year the designated hospital in Kunshan screens nearly 140,000 workers for occupational disease, but an occupational disease diagnosis was only certified for 43 cases in 2011 and 22 cases in 2013. Nanjing University Legal Aid Program for Migrant Workers, *Investigation Report on Protecting the Occupational Disease Rights of Migrant Workers in Jiangsu Province* (江苏省农民工职业病权益保护状况调研) (no date) (unpublished report, on file with author).

48 Zhang Yu, *supra* note 44.

49 See generally Halegua, *Getting Paid*, *supra* note 13 at 269–70 (discussing the challenges of enforcing civil judgments in China and particularly in labor cases).

50 Zhicheng Migrant Worker Legal Aid Station, *Migrant Worker Unpaid Wages Research Report: (2) Problems in the Process of Migrant Workers Protecting Rights Concerning Unpaid Wages* (农民工工资拖欠问题研究报告: 二、农民工讨薪维权过程中存在的问题), Jan. 19, 2012.

51 Wang Shurong, *Big Data: Comprehensive Report on Practical Issues in the Trial of Labor Disputes* (大数据: 劳动争议案件审判实务问题全景分析报告), Jan. 1, 2016.

52 See *Civil Procedure Law* (中华人民共和国民事诉讼法) (promulgated by Nat'l People's Cong., 1991) (amended 2012), Ch. 9 (containing the rules for advance execution).

53 Cao Yin, *Courts Told to Enforce Judgments*, CHINA DAILY USA, Jan. 7, 2016.

54 Susan Finder, "Supreme People's Court & 43 Other Central Institutions Commit to Punishing Judgment Debtors," SUPREME COURT MONITOR, Apr. 27, 2016.

55 See *Workplace Discrimination in China*, CHINA LABOUR BULLETIN (last accessed July 14, 2016) (discussing various types of employment discrimination in China).

41 See *Zhicheng 2015 Report*, *supra* note 15 (reporting that in 358 of the work injury cases handled by the Beijing legal aid organization, over 53% of workers were injured in their first three months on the job, and three-fourths of those workers were injured during their first month).

42 Charmika Monet, *Working to Death in China*, THE DIPLOMAT, Mar. 26, 2014.

43 *China's Social Security System*, *supra* note 31. A 2010 study by a Beijing NGO found that 56.5% of workers do not know what work injury insurance is, and of those who do, 58.5% said that their company has not purchased this insurance and 24.2% were unsure. Yilian Labor Law Legal Aid and Research Center, *Beijing Labor Law Legal Aid and Research Center Investigation Shows: Over Half of Migrant Workers Unfamiliar with Work Injury Insurance* (北京义联劳动法援助与研究中心调查显示: 过半农民工不知道工伤保险), Aug. 27, 2010.

44 Zhang Yu, *Former Miners Suffer from Coal Nuggets in Their Chests*, GLOBAL TIMES, Feb. 4, 2016.

45 *China's Social Security System*, *supra* note 31.

46 See *Migrant Worker in Nanjing Cheated out of Compensation and Left to Die*, CHINA LABOUR BULLETIN, May 19, 2015 (describing the obstacles in obtaining compensation for occupational disease victims).

of work pregnant women can be assigned, prohibits prolonging their hours or assigning night shifts, grants maternity leave of at least 90 days, and provides protections while women are nursing.⁵⁶ Ironically, it is argued that these very protections are what encourage discrimination. Due to the real economic costs borne by employers when a woman becomes pregnant and gives birth, employers either resist hiring women who may soon become pregnant or pressure them to “voluntarily resign” when they do become pregnant.⁵⁷ Some employers even (illegally) include clauses in female employees’ labor contracts prohibiting them from becoming pregnant.⁵⁸ Moreover, some predict that discrimination against women will get worse due to the recent relaxation of the one-child policy.⁵⁹

While there are laws prohibiting discrimination based on sex, including the *Labor Law* and *Employment Promotion Law*, the statutory provisions and implementing rules are vague on many points. Many courts interpret anti-discrimination provisions as applying only to an existing labor relationship and thus inapplicable to discrimination in hiring, where no such relationship has yet been formed. Furthermore, the lawsuits that successfully challenge pregnancy discrimination generally allege that the changes to the woman’s terms and conditions of employment (designed to make her resign) were unjustified, not that they were motivated by illegal discrimination. An additional challenge is that Chinese women may be less willing than men to bring lawsuits against their employers. An analysis of labor dispute court cases in two Guangdong municipalities revealed that the plaintiff was male in 76% of cases in Zhuhai and 73% in Zhongshan.⁶⁰ A Beijing legal aid organization that represents migrant workers reported that only 20% of its clients from 2008 to 2014 were female, although this was an increase from under 6% in the three years prior.⁶¹

While this section describes some of the more common issues faced by workers, it is by no means exhaustive. For instance, this report does not directly address issues facing public sector employees. There are also serious problems involving sexual harassment of employees; excessive working hours by both blue- and white-collar workers; the lack of protections for retirees, domestic workers, student workers, or others not covered by the labor laws; low wages; the exploitation of student interns; the lack of freedom of association and collective bargaining; and other forms of discrimination.⁶² There are also many more.

For some of these issues, improvements to legislation or more precise rules are needed; for others, the laws on the books are quite good and the problem lies in the lack of compliance or enforcement. Accordingly, the next two sections examine the mechanisms through which workers can enforce their legal rights and the availability of legal assistance in making use of those mechanisms.

⁵⁶ *Labor Law* (中华人民共和国劳动法) (promulgated by Standing Comm. Nat’l People’s Cong., 1994), Arts. 61–63.

⁵⁷ See, e.g., *Pregnant Women Workers Struggle to Defend their Rights in China’s Factories*, CHINA LABOUR BULLETIN, Dec. 1, 2015 (describing case in which employer transferred a worker to another worksite across town after discovering she was pregnant).

⁵⁸ *Workplace Discrimination in China*, *supra* note 55.

⁵⁹ Shen Lu & Katie Hunt, *China’s One-Child Policy Goes but Heartache Remains*, CNN, Dec. 31, 2015.

⁶⁰ Jiang Jin & Li Ruone, *Big Data Report on Labor Disputes in Guangdong* (广东省劳动争议大数据报告), iCOURT, Aug. 5, 2015.

⁶¹ *Zhicheng 2015 Report*, *supra* note 13 (part of this change may be attributable to the declining percentage of cases involving construction workers, who are predominantly male).

⁶² See *Up to 70 Percent of Women Factory Workers in Guangzhou Sexually Harassed*, CHINA LABOUR BULLETIN, Dec. 6, 2013 (sexual harassment); *China’s Official Trade Union Takes a Holiday in Dreamland*, CHINA LABOUR BULLETIN, Aug. 28, 2015 (excessive working hours; denial of statutorily mandated holiday and vacation time); *Elderly Sanitation Worker’s Death Shows Need for Collective Action and Solidarity*, CHINA LABOUR BULLETIN, Dec. 14, 2015 (noting that workers over the official retirement age are not protected by the labor laws).

III. China's Labor Dispute Resolution System

This section introduces China's formal labor dispute resolution system. Specifically, it describes the legal mechanisms that exist in China for addressing labor violations and processing disputes, the growing number and types of disputes, and how workers fare in the dispute resolution system. This provides the necessary background to then explore the value of lawyers and other legal service professionals in helping workers to enforce their rights.

Prior to describing the formal legal channels for dispute resolution, however, it should be noted that workers are increasingly using “extra-legal” means to enforce their rights. This may include actions directed at employers, such as strikes or work stoppages, or actions directed at local governments, such as filing petitions (信访), blocking roads, or other forms of protest.⁶³ An official government report from 2014 warned of a general rise in large-scale “mass incidents” (a term used for protests), with labor disputes outpacing all other types in frequency.⁶⁴ The strike data collected by China Labour Bulletin shows the same pattern, recording 1,523 strike incidents in 2011–2012 (63 per month) and 1,793 in 2013–2014 (74 per month).⁶⁵ The number of incidents reported by China Labour Bulletin has skyrocketed since then: 2,774 incidents in 2015 (231 per month) and 1,452 in the first half of 2016 (242 per month). Those numbers may only be a fraction of actual strikes though.⁶⁶ One Chinese researcher that tracks collective actions recorded over 10,425 labor protests in 2015.⁶⁷ Furthermore, the government reported over 11,000 mass incidents just involving wage arrears owed to migrant workers in the first three-quarters of 2015, an increase of 34% over the year prior.⁶⁸ These “extra-legal” methods are sometimes more effective for workers than utilizing the legal process and constitute an important part of the dispute resolution landscape. A survey of 1,379 Chinese metal factory workers about the perceived utility of strikes as a strategy to protect their rights found that twice as many had a favorable view

of the tactic than a negative one.⁶⁹ Indeed, government concerns over strikes and protests have provided a powerful motivation for making the formal system more accessible. Nonetheless, these actions generally fall outside the scope of this report.

The Chinese trade union is also largely absent from the report's discussion of labor dispute resolution mechanisms because it plays such a limited role in that regard. China has a single, state-sponsored trade union: the All-China Federation of Trade Unions (ACFTU). Forming any alternative union is prohibited. The ACFTU is structured and operates like a government ministry. The headquarters is in Beijing and there are trade union federations or branches at the provincial, municipal, and district levels; grassroots unions exist within enterprises. Workers rarely elect higher-level union officials or even grassroots ones. Although the reality may be slightly more nuanced, generally speaking, the ACFTU has been ineffective in fostering any meaningful bargaining with employers or improving working conditions for its members. The union will not organize or support collective action by workers (and may even seek to suppress it), and most of its 280 million members feel little or no connection to it.⁷⁰ The aforementioned survey of metal factory workers found that over 11% of respondents had never heard the word “trade union” and over 98% had no idea what the term “collective negotiation” means.⁷¹ This report does discuss the trade union's legal aid program, however, as it provides at least some level of real, concrete assistance to Chinese workers.

1. Mechanisms for Handling Labor Violations and Disputes

In China, as in many countries, there are two main mechanisms for addressing labor rights violations: (1) the administrative enforcement agency, and (2) the dispute resolution system of mediation bodies, arbitration tribunals, and courts.

A. Administrative Enforcement Agency

In terms of administrative enforcement, MOHRSS, like its predecessor the Ministry of Labor and Social Security (MOLSS), has a “labor supervision” (劳动监察) department—essentially a labor inspectorate—that enforces labor standards protections.⁷²

⁶³ See generally CHING KWAN LEE, *AGAINST THE LAW: LABOR PROTEST IN CHINA'S RUSTBELT AND SUNBELT* (2007) (comparing protests and political mobilization by state-sector employees in China's northeastern provinces and migrant workers in southern China).

⁶⁴ Li Peilin, Chen Guangjin & Zhang Yi, *ANALYSIS AND FORECAST OF CHINESE SOC'Y* (这个社会形势分析与预测) (2015) 12–13 (further noting 52 labor protests involving over 1,000 workers were recorded in a nine-month period in 2014).

⁶⁵ *Report on Workers Movement, 2013–2014* (中国工人运动观察报告, 2013–2014), CHINA LABOUR BULLETIN, Apr. 2015, at 3.

⁶⁶ *Strike Map*, CHINA LABOUR BULLETIN (last accessed July 19, 2016). China Labour Bulletin's numbers may not capture all strikes because it only lists the ones it is able to confirm. Furthermore, the reported increase in strikes may be due in part to the fact that information on strikes is increasingly likely to be posted online or shared on social media, or the group's improved ability to find this information before it is censored.

⁶⁷ “Statistics for 2015” (2015年统计), WICKEDONNA, Jan. 5, 2016.

⁶⁸ MOHRSS: *Ensure the Payment of Migrant Workers' Wages before the Chinese New Year* (人社部: 春节前保障农民工工资支付), PEOPLE'S DAILY, Dec. 21, 2015.

⁶⁹ Ivan Franceschini, *Chinese Workers and the Law: Misplaced Trust?* 2 *MADE IN CHINA* 16–19 (2016).

⁷⁰ For a more detailed discussion of the Chinese trade union, see ELI FRIEDMAN, *INSURGENCY TRAP: LABOR POLITICS IN POSTSOCIALIST CHINA* (2014).

⁷¹ Franceschini, *Chinese Workers*, *supra* note 69.

⁷² See generally COONEY, ET AL., *supra* note 14 at 120–31 (discussing China's labor inspection system).

The majority of matters handled by the labor inspectorate involved wage arrears (54%); other disputes involved social insurance (17%), labor contracts (13%), and working hours (6%).⁷³ If the labor supervision agency finds a violation, agency officials can impose fines, order the employer to correct the problem or issue backpay to the employee, and sometimes mandate additional compensation in an amount of 50–100% of the backpay.⁷⁴ There is also a State Administration of Work Safety, which enforces certain laws and regulations concerning the safety of workplaces. Each of these entities has an office at every provincial-level, municipal-level, and district-level government.

Like labor inspectorates in most countries, the resources and staff of these offices are quite limited given the size of the Chinese workforce and number of workplaces. In 2013, China had 25,000 full-time inspectors covering over 769 million employees—a ratio of roughly one inspector for every 30,000 workers.⁷⁵ Some frequent criticisms of the labor inspectorate include that these officials are biased in favor of business, lack motivation to help workers, discriminate against migrant workers, and are unwilling to impose fines. Indeed, even the *People's Daily* recently reported that “local government departments still carry dismissive and defensive attitudes toward migrant workers’ demands for unpaid wages and tend to shirk responsibility.”⁷⁶ Nearly 90% of investigations stemmed from complaints, rather than being initiated by the inspectorate.⁷⁷ Of the over 418,000 matters resolved by the labor inspectorate in 2013, fines were imposed in only 3.4% of cases.⁷⁸ Part of the explanation may lie in the fact that a successful challenge of a sanction can result in the imposition of a penalty on the individual inspector.⁷⁹

Nonetheless, at the national level, the number of workers helped by the labor inspectorate is far greater than the number that use the formal dispute resolution process. One focus of the labor inspectorate is resolving group wage arrears cases. In 2013, labor inspectorates throughout China recovered an average of RMB 5,700 in backpay for 4.7 million employees as well as social security payments from 94,000 employers, while 880,000 workers

used labor arbitration.⁸⁰ This may not be true in all localities though. In 2014, the Beijing labor inspectorate is reported to have investigated 5,660 wage arrears cases involving migrant workers but only recovered wages for 33,000 of them, while labor arbitrations in Beijing involved over 65,000 workers in 2013.⁸¹

B. Labor Arbitration and Courts

As for the dispute resolution system, the *Regulations on Handling Labor Disputes in Enterprises* (1993) and *Labor Law* established a four-stage framework—consultation or negotiation (协商), mediation, arbitration, and court litigation—that remains largely intact today. Consultation and mediation are voluntary. However, “labor dispute” (劳动争议) cases, in which the worker has a labor relationship with the employer and thus receives the protections of the labor laws, must generally be filed with an LDAC. These are government bodies and the arbitrators are essentially labor bureau officials, not independent neutrals mutually chosen by the parties.⁸² If unsatisfied with the arbitral decision, a party

may file an appeal in court, which conducts a *de novo* review of the case.⁸³ The court decision can then be appealed as of right to a higher court.⁸⁴ Since at least 2010, roughly half of the cases that enter labor arbitration then proceed on to be filed in court.⁸⁵ Interestingly, while some Chinese commentators view this statistic as evidence of labor arbitration’s great utility in reducing the workload of courts, others believe it demonstrates that labor arbitration has generally failed in this regard and needlessly lengthens the litigation process.⁸⁶

Once labor disputes enter the courts, they are increasingly unlikely to be resolved after the first-instance trial. In Guangzhou, about 30% of first-instance court decisions are appealed to the higher court.⁸⁷ In Jilin, only 42% of all labor dispute cases handled by the courts are first-instance trials; the remainder are second-instance trials (appeals), re-trials, and enforcement actions. By comparison, 69% of all civil cases in Jilin are first-instance

Even the *People's Daily* recently reported that “local government departments still carry dismissive and defensive attitudes toward migrant workers’ demands for unpaid wages and tend to shirk responsibility.”

⁷³ 2014 LABOUR STATISTICAL Y.B. CHINA, Table 8–3 (providing data from 2013). The numbers for 2014 were similar, but an even larger proportion (65%) of cases concerned wage arrears. 2015 LABOUR STATISTICAL Y.B. CHINA, Table 8–3.

⁷⁴ XIE, *supra* note 16 at 125.

⁷⁵ *Id.* at 127. See COONEY, ET AL., *supra* note 14 at 123 (noting that the International Labor Organization benchmark for appropriate inspector staffing is 1 per 10,000 workers in developed countries, 1 per 20,000 in transitional economies, and 1 per 40,000 for developing economies).

⁷⁶ Chun Han Wong, *Desperate Measures: People's Daily Raps Local Officials over China Labor Unrest*, CHINA REAL TIME, Apr. 27, 2016.

⁷⁷ XIE, *supra* note 16 at 127–28. *But see* COONEY, ET AL., *supra* note 14 at 128 (noting significant local variations in the extent to which proactive investigations occur and the difficulty in interpreting official statistics in this area).

⁷⁸ *China's Labor Dispute Resolution System*, CHINA LABOUR BULLETIN (last accessed July 19, 2016) (fines were issued in 14,432 cases). Fewer cases (406,210) were resolved in 2014, but the percentage of matters resulting in fines remained just above 3%. 2015 LABOUR STATISTICAL Y.B. CHINA, Table 8–3.

⁷⁹ COONEY, ET AL., *supra* note 14 at 123.

⁸⁰ 2014 LABOUR STATISTICAL Y.B. CHINA, Tables 8–1, 8–4. *See also* 2015 LABOUR STATISTICAL Y.B. CHINA, Table 8–4 (labor inspectorates recovered an average of RMB 7,500 for 4.6 million employees in 2014).

⁸¹ Wu Wei, *Eight Bureaus in Beijing Jointly Inspect 1450 Enterprises for Payment of Wages to Migrant Workers* (北京八部门联合检查1450家企业支付农民工工资情况), XIN JING BAO, Jan. 22, 2015 (labor inspection numbers); 2014 LABOUR STATISTICAL Y.B. CHINA, Table 8–2 (labor arbitration numbers).

⁸² *See* XIE, *supra* note 16 at 139 (“Labor administrative agencies are responsible for the daily operations of labor dispute arbitration committees. Thus, the committees have a strong administrative flavor and lack full independence.”).

⁸³ In practice, some courts will defer to an extent to the factual findings or decision by the LDAC. For instance, the Supreme People’s Court (SPC) recently proposed that the court should not permit a party in a labor case to deny a fact previously admitted in arbitration. SPC, *National Civil Trial Worker Meeting Minutes (Draft for Comments)* (全国民事审判工作会议纪要 (征求意见稿)), Apr. 19–20, 2015, Art. 57. In many areas, however, the approaches of LDACs and courts to labor disputes, including the application of evidentiary burdens and interpretation of the law, differ significantly.

⁸⁴ The labor dispute resolution process is sometimes referred to as the “one arbitration, two trial” (一裁两审) system.

⁸⁵ XIE, *supra* note 16 at 138, 141; 2015 LABOUR STATISTICAL Y.B. CHINA, Table 8–1.

⁸⁶ *Compare* XIE, *supra* note 16 at 138 (“Evidently arbitration has been effective in preventing labor dispute cases from overwhelming courts.”) *with* *Guangzhou White Paper*, *supra* note 35 (noting that 52% of labor arbitration cases in Guangzhou were appealed to the courts and this is evidence of “arbitration’s limited utility as a filter” for cases).

⁸⁷ *Guangzhou White Paper*, *supra* note 35.

trials.⁸⁸ This also means that labor disputes are taking more time to resolve. Legal Miner's analysis of first-instance labor disputes in three major cities found that the time from the filing of the case in court to the issuance of the decision already averaged 98 days.⁸⁹ Deciding the appeal is likely to also require a significant amount of time.

The *Labor Dispute Mediation and Arbitration Law* sought to make the dispute resolution system more accessible to workers, as well as simplify and shorten the process for certain claims. For instance, the law eliminated filing fees for labor arbitration and extended the statute of limitations from sixty days to one year.⁹⁰ The law required LDACs to resolve ordinary cases within 45 days of accepting them and complex cases within 60 days.⁹¹ Employers were also prohibited from appealing arbitral decisions to court in two types of cases: (1) those related to labor remuneration, work injury, severance pay, or some other demand for an amount less than one year of the local minimum wage; and (2) claims related to the enforcement of national labor standards on working hours, rest days, leave, or social insurance.⁹² However, one Chinese commentator notes that the damages in most cases actually exceed the threshold set by these provisions, limiting the applicability of this scheme.⁹³ It is also worth noting that those cases in which a labor relationship does not exist, or is found not to exist, are not accepted by LDACs and thus proceed directly to court.

In work injury and occupational disease cases, there are several additional steps in the process. The standard procedure is: (1) diagnosis of the injury or disease; (2) verification that it is work-related (causation); (3) assessment of the worker's capacity to work or the degree of the injury; and (4) calculation of benefits and determination of liability. The diagnosis can only be provided by certain designated, government-run hospitals. A local government agency then determines whether a labor relationship existed between the worker and employer, if the work "caused" the injury, and the degree of the injury. An employer can appeal each of these administrative decisions, potentially dragging out this process for several months or even years. NGOs have calculated that a work injury case can involve up to 22 separate procedures, and one legal aid organization handled a case that lasted for over five years.⁹⁴ A legal aid NGO in Beijing reported that in the hundreds of work injury disputes it handled, the employer appealed through to the second trial in "almost every" case, and it took over a year from the time of injury until a final judgment was obtained in 60% of cases.⁹⁵

⁸⁸ Wang, *Big Data*, *supra* note 51.

⁸⁹ *Legal Miner 2016 Report*, *supra* note 6 (based on a sample of 11,001 cases).

⁹⁰ *Labor Dispute Mediation and Arbitration Law* (劳动争议调解仲裁法) (promulgated by Standing Comm. Nat'l People's Cong., 2007), Arts. 27, 53.

⁹¹ *Id.* at Art. 43.

⁹² *Id.* at Art. 47. The law actually does provide some limited rights to appeal. Employers can appeal on six enumerated grounds: an error in the application of the law; a lack of jurisdiction; a procedural violation; the decision was based on fabricated evidence; significant evidence was concealed; or the arbitrator accepted a bribe or committed some other violation. Employees can actually appeal the ruling to court on any grounds within 15 days. (Art. 49.)

⁹³ Xie, *supra* note 16 at 140.

⁹⁴ *Labor Dispute Resolution System*, *supra* note 78.

⁹⁵ *Zhicheng 2015 Report*, *supra* note 15.

C. Mediation

Perhaps the most significant development since 2008 is the government's enormous emphasis on mediation and the growth of its role in the labor dispute resolution landscape.⁹⁶ The government views mediation as a preferred method because disputes can be resolved early before the conflict intensifies and parties are seen as less likely to appeal a mediated solution than a judgment. More mediation would also reduce arbitration and court dockets. Numerous institutions now exist to mediate disputes before they enter the formal legal process, including mediation committees within enterprises, grassroots people's mediation committees in neighborhoods or at the local justice bureau, and mediation bodies at legal aid offices, trade unions, and elsewhere. Many LDACs and courts have also established mediation windows to try to resolve cases before a formal action is filed. While technically voluntary, Zhuang and Chen report that in some localities, such as Shenzhen, mediation has become "de facto mandatory" before a case is accepted for labor arbitration.⁹⁷ Indeed, since 2010, more cases have been processed by mediation organizations than by LDACs each year. By 2013, the two institutions combined accepted 1.49 million cases, of which 665,760 (44.6%) were handled by LDACs.⁹⁸

Even after the case is filed with the LDAC or court, attempts at mediation will continue. Some LDACs and courts assign personnel or use volunteer lawyers to mediate disputes before the first hearing. It is also common for the labor arbitrator or judge to seek a settlement before, during, and after a hearing. In fact, labor arbitrators and, until recently, judges were evaluated based on their success in mediating disputes.⁹⁹ While the proportion of LDAC cases decided by an arbitral award remained fairly consistent (between 41% and 45%) from 2007 to 2015, the percentage resolved through mediation rose from 35% to 45% in that period.¹⁰⁰ As shown in Figure 1, the number of LDAC cases resolved by mediation has been greater than that decided by a decision since 2011. But there is some regional variation in this regard. As Figure 2 shows, the percentages of cases resolved through mediation in

⁹⁶ See generally Wenjia Zhuang & Feng Chen, "Mediate First": *The Revival of Mediation in Labor Disputes Resolution in China*, 222 CHINA QUARTERLY 380-402 (June 2015) (describing the central government's push for greater mediation of labor disputes in the mid-2000s and local governments' receptivity to this); Yedan Li, Joris Kocken & Benjamin van Rooij, *Understanding China's Court Mediation Surge: Insights from a Local Court*, LAW & SOC. INQUIRY (forthcoming 2016) (discussing the various ways that courts and judges are involved in mediating labor disputes); see also *Opinions on Strengthening the Work of Labor Personnel Dispute Mediation* (关于加强劳动人事争议调解工作的意见) (promulgated by MOHRSS, MOJ, ACFTU, et al., 2009) (calling for the establishment of a web of various mediation institutions at different levels of government); *Opinions on Further Promoting Grand Mediation Work for Contradictions and Disputes* (关于深入推进矛盾纠纷大调解工作的指导意见) (promulgated by Central Committee for the Comprehensive Management of Social Stability, et al., 2011); *Opinions on Building Harmonious Labor Relations* (关于构建和谐劳动关系的意见) (promulgated by CPC Central Committee & St. Council, 2015), Art. 15.

⁹⁷ Zhuang & Chen, *supra* note 96 at 392. See also *Opinions on Further Professionalizing Labor Dispute Mediation Work* (关于加强专业性劳动争议调解工作的意见) (promulgated by MOHRSS & Central Committee for the Comprehensive Management of Social Stability, 2015) (instructing that where parties seek arbitration without having first gone through mediation, the LDAC may send them a notice recommending mediation).

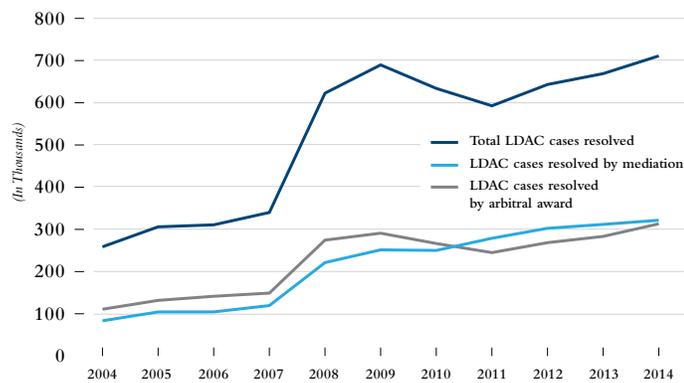
⁹⁸ 2014 LABOUR STATISTICAL Y.B. CHINA, Table 8-1 (cases by LDACs); 2014 *Human Resources and Social Security* (2014年度人力资源和社会保障事业发展统计公报), MOHRSS, May 28, 2015 (cases by both mediation organizations and LDACs).

⁹⁹ Zhuang & Chen, *supra* note 96 at 394-95. See also Carl Minzner, *China's Turn Against Law*, 59 AM. J. COMP. L. 935, 957-59 (2011) (explaining how Chinese judges are evaluated based on the percentage of cases they conclude through mediation); Yedan Li, et al., *Understanding China's Court Mediation Surge*, *supra* note 96 (describing how court mediation of labor disputes is carried out in practice and noting how this work is shaped by various, changing performance evaluation criteria). It is reported that due to reforms in 2014, however, mediation targets have been formally removed from the evaluation criteria for judges. E-mail from Yedan Li to author (Apr. 4, 2016) (on file with author).

¹⁰⁰ 2015 LABOUR STATISTICAL Y.B. CHINA, Table 8-1 (the remaining cases are classified as being resolved through "other" means).

Shanghai (28%) and Guangdong (35%) fall considerably below the national average, while Jiangsu greatly exceeded it (64%). One Chinese labor relations scholar suggests that this may be due to the workers in big cities and developed areas like Guangdong being relatively more contentious.¹⁰¹ As for the courts, national data on the mediation rates for labor disputes was not found. However, the Guangzhou courts resolved 68% of first-instance labor dispute cases through mediation in 2011, 60% in 2012, and 56% in 2013.¹⁰² Beijing's official court statistics for 2014 report that 50% of labor dispute cases were resolved by decision but only 23% by mediation.¹⁰³

Figure 1. Cases Resolved by LDACs (2004–2014)



Source: 2015 *Labour Statistical Yearbook China*, Table 8–1.

This emphasis on and growth of mediation has been criticized on a number of grounds, including that workers feel unduly pressured to settle their claims for less than they are entitled to under the law. Chinese survey respondents were more than twice as likely to view litigation as the most effective means of resolving disputes (44%) rather than mediation (17.9%), with some noting that the latter was about the “dissolution of contradictions, not [...] the representation of interests.”¹⁰⁴ This problem may be even more pronounced where the worker lacks a legal representative, which is often the case in mediation. One Beijing lawyer who mediates labor disputes for the local trade union estimates that only 5% of workers are represented in this process.¹⁰⁵ On the other hand, mediation may result in quicker resolutions that are also more likely to be enforced, two important concerns for workers. In addition, mediators report that this process allows them to appeal to employers on moral grounds or pressure them to offer a monetary settlement, even where the worker is unlikely to obtain anything in litigation due to a lack of evidence or weak legal claim.

2. The Growing Number and Diversity of Labor Disputes

Since the passage of the *Labor Contract Law*, there has been a consistent rise in workers' awareness of the law and willingness to use it to protect their rights. A number of factors contribute to this phenomenon, including the growth of mobile phone

and Internet usage, government campaigns to teach workers about their legal rights, the increased education level of migrant workers, the rise of the “new generation” of migrant workers, and the continued dissipation of the taboo around litigation.¹⁰⁶ The elimination of filing fees for labor arbitration and the reduction of the court filing fee to RMB 10 for all labor disputes have also encouraged workers to bring litigation.¹⁰⁷ A 2014 study by the Ministry of Justice (MOJ) found that 10% more migrant workers than in the year prior said they would like to seek legal assistance if their rights were violated.¹⁰⁸

This rise in worker consciousness is mirrored by a climb in the total number of formal labor disputes since the passage of the *Labor Contract Law*. According to MOHRSS statistics, the total number of disputes accepted by either a mediation organization or an LDAC has grown annually from 2009 (875,000) to 2014 (1.55 million). From 2014 to 2015, this number grew by over 10% to 1.72 million disputes.¹⁰⁹ While mediation cases rose steadily throughout this period, LDAC filings actually fluctuated slightly: the 2007 number (over 350,000) nearly doubled in 2008 (over 690,000) with the passage of the *Labor Contract Law*, then leveled off from 2009 to 2011, but has been climbing back up each year since—reaching over 665,000 cases in 2013 and 715,000 in 2014.¹¹⁰ From 2007 to 2013, the number of LDAC cases involving wages and compensation increased by nearly 100% and social insurance disputes rose by 70%.¹¹¹ The trend in the number of cases handled each year by the LDACs can be seen in Figure 1.

Although “collective disputes” (cases involving ten or more workers) constitute an increasingly small percentage of the cases filed at LDACs, they still account for a substantial percentage of the workers involved in labor arbitration.¹¹² In 2004, collective disputes constituted 7.4% of all cases and involved 62.5% of worker-litigants; however, by 2014, these numbers had declined to 1.1% and 26.7%, respectively.¹¹³ This trend is at least partly due to the increase in individual claims. These numbers may also reflect that more collective disputes are being resolved through mediation prior to being filed with LDACs. Interestingly, however, the average number of workers involved in the collective disputes that are filed at LDACs increased from 2007 (21 workers) in 2007 to 2014 (33 workers).¹¹⁴ This may reflect that the larger cases are harder to resolve through mediation.

¹⁰⁶ See, e.g., Mary E. Gallagher, *The Future of Work: China's Own Migrant Challenge*, PAC. STANDARD, Sept. 29, 2015, (discussing the “new generation” migrant workers who have more education than their parents and more awareness of their legal rights); see also Gallagher & Yang, *supra* note 104 (noting the success of government legal education campaigns; finding “the gap between urban residents and migrant workers in knowledge seems to be narrowing;” and reporting survey results showing 89.5% of migrants knew they were entitled to a labor contract and 77% knew the penalty for failing to conclude a contract); but see Ching Kwan Lee, *Precarization or Empowerment? Reflections on Recent Labor Unrest in China*, 72 JOURNAL OF ASIAN STUDIES, no. 2, 317–33, 324–29 (May 2016) (questioning the extent to which younger migrant workers are meaningfully different than members of the prior generation).

¹⁰⁷ XIE, *supra* note 16 at 140 (noting the court litigation fee can also sometimes be reduced, waived, or paid later for low-income workers).

¹⁰⁸ 1.39 Million Chinese Receive Legal Assistance, XINHUANET, Jan. 26, 2015.

¹⁰⁹ Human Resources and Social Security Statistical Bulletin (人力资源和社会保障事业发展统计公报), MOHRSS, various years.

¹¹⁰ 2015 LABOUR STATISTICAL Y.B. CHINA, Table 8–1.

¹¹¹ 2014 LABOUR STATISTICAL Y.B. CHINA, Table 8–1.

¹¹² See *Labor Dispute Arbitration Handling Measures* (劳动争议仲裁办案规则) (promulgated by MOHRSS, 2008), Art. 4 (defining “collective dispute”). However, it is not known for certain whether the definition of “collective dispute” may have changed at some point during this period.

¹¹³ 2015 LABOUR STATISTICAL Y.B. CHINA, Table 8–1.

¹¹⁴ *Id.*

¹⁰¹ E-mail from labor relations scholar to author (Oct. 11, 2015) (on file with author).

¹⁰² *Guangzhou White Paper*, *supra* note 35.

¹⁰³ 2015 BEIJING STATISTICAL Y.B., Table 21–22.

¹⁰⁴ Mary Gallagher & Yujeong Yang, *Getting Schooled: Legal Mobilization as an Educative Process*, LAW & SOC. INQUIRY (forthcoming 2016).

¹⁰⁵ Interview with lawyer, in Beijing, China (Dec. 12, 2015).

In Beijing and Shanghai, collective cases comprised an even smaller percentage (0.8% and 0.05%) of total LDAC matters in 2014, involved a smaller proportion of workers (16.7% and 1.4%) in labor arbitration, and had fewer workers per case (20 and 26) than the national average.¹¹⁵ One legal aid NGO in Beijing reports seeing fewer collective disputes in the past few years, and attributes this trend primarily to a reduction in wage arrears cases in the construction industry.¹¹⁶ Guangdong, by contrast, far exceeded the national averages: its 2,419 collective disputes comprised 2.6% of all LDAC cases, accounting for a stunning 53.3% of workers in labor arbitration, and involving 41 workers per case.¹¹⁷ This situation is likely due to the density of large manufacturing plants in Guangdong, higher legal consciousness of workers, and greater presence of labor NGOs. Indeed, Guangdong also has more collective actions and strikes than any other province or municipality.¹¹⁸

As for the types of cases filed at the LDACs, national statistics from 2011 to 2014 show a fairly consistent breakdown: disputes over wages and compensation comprise about one-third of all cases, social insurance claims account for one-fourth, and disputes over the modification or termination of labor contracts about one-fifth.¹¹⁹ The nature of claims within these broad categories may be shifting though. For instance, in addition to wage arrears cases, workers are bringing more actions for overtime, unpaid holidays, or compensation where an employer fails to conclude a labor contract. Social insurance cases are not only about compensation for workplace injuries, but also employers' failure to make pension or other social insurance contributions. Workers are also increasingly likely to bring multiple claims involving a variety of issues.¹²⁰

The relative proportion of each type of case also varies across localities. For instance, in Changsha County in Hunan, economic compensation was the primary claim in the majority of LDAC cases filed in 2014 and 2015.¹²¹ However, in Beijing, the majority of cases in 2015 concerned wages and 28% involved economic compensation. Beijing's data also showed that the vast majority of cases (89%) involved private domestic-invested firms (非公内资企业).¹²²

The number of labor disputes in the courts has also risen in recent years. Courts handled over 366,000 "labor dispute" cases in 2013, over 374,000 in 2014, and then over 483,000 in 2015—a 25% increase over the previous year.¹²³ The precise breakdown of the types of labor cases filed nationwide is not known, but it

was reported that the courts handled over 300,000 cases involving "wage arrears and other matters involving rural residents" in 2015—about 62% of all labor disputes that year.¹²⁴ Again, however, the proportion of wage arrears cases varies by region. For instance, in the Jilin courts, 83% of labor cases involved unpaid wages.¹²⁵ But a study of labor cases in Shanghai's courts found that 56% of disputes concerned termination and only about 25% involved wage issues.¹²⁶ An analysis of all labor dispute cases filed in Guangdong courts in 2014 showed that 34% involved termination issues and 31% involved unpaid wages.¹²⁷ These distinctions may reflect that workers in Guangdong and Shanghai are more aware of different types of employee rights than those in a less developed region like Jilin.

New types of labor disputes are also beginning to appear, particularly in the big cities. Some Beijing courts report that while wage arrears and termination-related compensation cases remain common, disputes regarding discrimination against dispatch workers in terms of pay, job training, and other benefits are also increasing. There are also more cases involving employees under 35 years old, enterprise managers, and workers in new types of industries, such as financial services, technology, car drivers, or delivery persons.¹²⁸

Like "labor dispute" cases, the number of "labor service contract dispute" (劳动合同纠纷) cases filed in the courts also increased by 38% to over 162,000 in 2015.¹²⁹ These cases involve workers who do not have a labor relationship and thus fall outside the protections of the labor laws, including independent contractors, retirees, and domestic workers. Construction workers hired by entities that are not properly registered as businesses also lack a labor relationship. These workers' claims are most often decided under the *Contract Law* or *General Principles of Civil Law*, which lack the pro-worker protections of the labor laws.¹³⁰

3. Litigation Outcomes and the Need for Representation

Legal advice or representation may be necessary, or at least beneficial, for workers using litigation to enforce their rights.¹³¹ During the mediation process, where the mediator and employer are often both pressuring the worker to settle, an unrepresented

¹¹⁵ *Id.*, Table 8–2.

¹¹⁶ Zhicheng 2015 Report, *supra* note 15 (reporting Zhicheng handled an average of 44 group cases (with five or more workers) per year through 2008 but under 27 per year from 2008 to 2011, and noting that construction cases constituted 85% of group cases in this earlier period but only 47% since 2008).

¹¹⁷ 2015 LABOUR STATISTICAL Y.B. CHINA, Table 8–2.

¹¹⁸ See *Strike Map*, *supra* note 66 (documenting 415 collective actions in Guangdong, 61 in Beijing, and 53 in Shanghai during 2015).

¹¹⁹ 2015 LABOUR STATISTICAL Y.B. CHINA, Table 8–1.

¹²⁰ Zhicheng 2015 Report, *supra* note 15 (noting a change beginning around 2008).

¹²¹ Li Jianjun, *Explanations and Strategies for the Rise in Labor Dispute Cases* (劳动争议案件剧增的原因及应对策略), CHINA LABOR AND SOCIAL SECURITY NEWS NET (中国劳动保障新闻网), Sept. 23, 2015.

¹²² Beijing Human Resources and Social Security Bureau, *Beijing Releases Ten Areas for Labor Dispute Risk Prevention* (北京市发布十个劳动人事争议风险防范点), Dec. 24, 2015.

¹²³ SPC Publishes Case Statistics, *Violent Crime Cases Decrease* (最高法院发布案件审判数据, 暴力犯罪案件下降), Mar. 18, 2016.

¹²⁴ SPC Work Report (2016) (最高人民法院工作报告, 2016), SPC NET, Mar. 13, 2016.

¹²⁵ Wang, *Big Data*, *supra* note 51.

¹²⁶ Chou Shaoming, *2014 Shanghai Big Data Research and Analysis Report on Labor Trials (Part I)* (2014上海市劳动法院审判大数据分析研究报告概述(上)), LONG AN LABOR LAW RESEARCH AND SERVICE CENTER, June 17, 2015.

¹²⁷ Jiang & Li, *Big Data Guangdong*, *supra* note 60.

¹²⁸ *Annual Observations on Labor Disputes in the Three Intermediate Courts 2015–2016* (三中院2015–2016劳动争议年度观察), FA YAN GUAN CHA (法眼观察), Apr. 28, 2016. In fact, significant variation even exists among districts within Beijing concerning the types of labor claims received. See Lantai Partners, *2015 Big Data Report on Labor Disputes in Beijing's Districts* (2015年度北京地区劳动争议大数据报告), LEGAL MINER, Mar. 2016 (discussing variations in districts).

¹²⁹ SPC Publishes Case Statistics, *supra* note 123.

¹³⁰ Susan Finder, "Data from the SPC on 2015 Labor/Employment Disputes," SUPREME COURT MONITOR, Mar. 27, 2016.

¹³¹ There is some research from the United States suggesting that workers obtain better results in litigation when they are represented. A series of chapters that touch on this issue are included in the edited volume: S. STREICHER & J. RADICE, eds., *BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA* (2016). See Russell Engler, *When Does Representation Matter?* 72–80 (reviewing the literature on whether represented parties perform better in litigation); Amy Myrick, Robert L. Nelson & Laura Beth Nielsen, *Racial Disparities in Legal Representation for Employment Discrimination Plaintiffs*, 107–08 (represented plaintiffs in employment discrimination cases perform better than pro se ones); David Yin, *The Unemployment Action Center: A Student-Driven Response to a Legal Need*, 132 (represented workers fare better in administrative hearings concerning unemployment benefits).

Figure 2. LDAC Case Resolution Methods and Outcomes (2013)

	National	Beijing	Guangdong	Jiangsu	Shanghai
Number of Cases Resolved	669,062	65,233	94,364	62,683	68,257
By Mediation	311,806 (47%)	32,474 (50%)	32,887 (35%)	39,789 (64%)	19,270 (28%)
By Arbitral Award	283,341 (42%)	27,346 (42%)	54,613 (58%)	13,232 (21%)	31,007 (46%)
Other	73,915 (11%)	5,413 (8%)	6,864 (7%)	9,662 (15%)	17,980 (26%)
Outcome					
Employee Wins	217,551 (33%)	4,800 (7%)	19,262 (20%)	21,908 (35%)	9,525 (14%)
Employer Wins	82,519 (12%)	10,906 (17%)	11,794 (13%)	5,791 (9%)	17,811 (26%)
Partial Win for Each	368,992 (55%)	49,527 (76%)	63,308 (67%)	34,984 (56%)	40,921 (60%)

Source: 2014 *Labour Statistical Yearbook China*, Table 8–2.

worker with insufficient knowledge of the law might be more easily intimidated or coerced.¹³² Despite efforts to make arbitration and litigation simpler, faster, and more worker-friendly, some of the substantive and procedural aspects of the labor law are quite complicated and, even where the law is quite straightforward, one may be disadvantaged without an understanding of local practices.¹³³

It is difficult to gauge precisely how successful workers have been in the litigation process in recent years. Several academic studies suggest that workers do not fare well, but much of this research focused on the period prior to the legislative reforms in 2008.¹³⁴ The official statistics on litigation outcomes are hard to interpret. Each year, MOHRSS reports the number of LDAC cases “totally won” by employers, “totally won” by employees, and “partially won” by each side. One Chinese labor scholar suggests that a “total win” is when a party prevails on 70% of its claims; if less than that, it is a “partial win.” This determination is wholly unrelated to the amount of money the party requests and is awarded.¹³⁵ From 2007 to 2014, employers consistently “totally won” 12–14% of labor arbitration cases each year. During the same period, the percentage of cases “totally won” by workers dropped from 46% to 35%, while the “partially won” matters rose from 39% to 53%.¹³⁶ As Figure 2 shows, Beijing, Shanghai, and

Guangdong all have a larger proportion of “partially won” cases and smaller number of matters “totally won” by workers than the national average. The number of cases “totally won” by employers (26%) in Shanghai is almost double the national average.

At least on the surface, these official statistics suggest that workers perform reasonably well before LDACs. They prevail on some, if not most of their claims in the vast majority of cases. One explanation for the growing percentage of “partial wins” for workers, instead of “total wins,” may be the growing number of cases resolved through mediation, which often strives to produce an outcome that both parties can accept. Another part of the explanation may lie in reports that workers are increasingly likely to bring multiple claims in each case, but that some claims may be unfounded or frivolous. This factor may be particularly pronounced in the big cities, where workers are often more aware of and more likely to bring various types of legal claims, even if they are not really well-founded. If this is indeed the reason that workers only obtain a “partial win” in most cases, then the reported success rates for workers suggest they fare quite well. But if almost all of workers’ claims are legitimate, then the fact that they obtain only a “partial win” in most cases is more troubling. Furthermore, even if workers prevail on many claims, the statistics do not reveal which types of claims they are losing or the amount of damages ultimately being awarded to them. Additionally, it is known that workers are responsible for many of the appeals of LDAC awards to the courts, suggesting that they are often unsatisfied with these “partial wins.”¹³⁷ Therefore, more research is needed in order to better understand these litigation outcomes.

The author was unable to find national data on court litigation outcomes for labor disputes, but there is some evidence

¹³² See Zhuang & Chen, *supra* note 96 at 382–83, 389–90 (describing how local officials, arbitrators, and judges push workers to accept less than the law guarantees during mediation in order to resolve cases).

¹³³ See Halegua, *Getting Paid*, *supra* note 13 at 271–72 (“Xiao Weidong, a legal aid lawyer in Beijing, found that there are 962 national-level laws and regulations relating to labor, in addition to countless local laws, regulations, and guidelines, all riddled with contradictions and inconsistencies between them. As Xiao explained, “[a] lawyer would need quite a considerable amount of time to become clear on all these rules, let alone a migrant worker.”).

¹³⁴ See, e.g., Mary E. Gallagher & Yuhua Wang, *Users and Non-Users: Legal Experience and Its Effect on Legal Consciousness*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CHINA 204 (M. Woo & M. Gallagher, eds., 2011) (noting that workers who go through the formal dispute resolution system often emerge unsatisfied with the results and “higher levels of disillusionment and more negative perceptions of the legal system’s effectiveness and fairness”); see generally Halegua, *Getting Paid*, *supra* note 13.

¹³⁵ Electronic communication from labor relations scholar (June 26, 2016) (on file with author). The author has been unable to confirm whether this is indeed the standard. Furthermore, it is unknown whether MOHRSS may have changed its classification standards at some point during this period.

¹³⁶ 2015 LABOUR STATISTICAL Y.B. CHINA, Table 8–1.

¹³⁷ Chou Shaoming, 2014 *Shanghai Big Data Research and Analysis Report on Labor Trials (Part II)* (2014上海市劳动法院大数据分析研究报告概述(下)), LONG AN LABOR LAW RESEARCH AND SERVICE CENTER, June 29, 2015 (finding that workers initiated 63% of first instance labor dispute cases). See also Wang, *Big Data*, *supra* note 51 (finding that workers in Jilin, despite obtaining a total or partial win in 72% of first-instance court decisions, still brought the majority of appeals (55%) and requests for retrials (79%)).

Employers engage in “malicious” litigation tactics, including making false representations, concealing evidence, fabricating evidence, or forcing current employees to give untruthful testimony.

that workers are less successful in court than arbitration. The analysis conducted by Legal Miner for this report revealed that only 58% of workers obtained a total or partial win in their case, even despite using a more liberal definition of success. Workers' litigation success rate was similar in Beijing (54%) and Shenzhen (55%), but a bit higher in Shanghai (64%).¹³⁸ A similar study of labor disputes in Jilin courts showed that workers there fared better, receiving a total or partial win in 72% of adjudicated cases.¹³⁹

There may be several explanations for why the success rate for workers in court is lower than in arbitration. First, LDACs in many localities are reported to have more worker-friendly policies that guide how cases are handled and to be less strict than courts in applying evidentiary rules. Indeed, a report on labor disputes in Shanghai found that the first-instance court overturned a strikingly large percentage (40%) of LDAC decisions, but the second-instance court only overruled a small fraction (4%) of the cases appealed from the lower court.¹⁴⁰ Second, employers who lose in arbitration may learn what evidence is needed to prevail and then have those materials ready when the case is tried in court. The study of labor disputes in Shanghai showed that the party with the burden of proof fared better at each successive stage of litigation, and it is usually the employer who bears this burden in labor cases.¹⁴¹ Third, workers may be less successful in court because their strongest cases may be least likely to ever enter the court. Although employers may appeal many arbitration awards simply to draw out the process, they should be comparatively less likely to file an appeal where the worker has strong evidence or obtained a total win. Finally, at least some of the disparity is likely attributable to differences in how these success rates were calculated. The statistics on LDAC outcomes seem to include cases resolved through mediation, in which plaintiffs likely obtain a total or partial win; however, the Legal Miner dataset on court outcomes only looks at adjudicated cases. Thus, many of the stronger court cases filed by workers may have been settled prior to a decision being rendered and therefore not be part of the dataset.¹⁴²

¹³⁸ *Legal Miner 2016 Report*, *supra* note 6. This analysis did not have a category for “partial wins.” If a plaintiff won on any of his claims, then he was considered to prevail; conversely, a defendant could only prevail if the plaintiff lost on every one of his claims. The analysis also showed that workers prevailed more often as plaintiffs (65%) than as defendants (47%).

¹³⁹ Wang, *Big Data*, *supra* note 51.

¹⁴⁰ Chou Shaoming, *2014 Shanghai Big Data Research (Part II)*, *supra* note 137.

¹⁴¹ Chou, *2014 Shanghai Big Data Research (Part I)*, *supra* note 126; Chou, *2014 Shanghai Big Data Research (Part II)*, *supra* note 137. In cases involving establishing a labor relationship, in which the worker has the burden of proof, employees were more successful at each successive stage of litigation.

¹⁴² Workers reportedly obtained partial or total wins in two districts of Beijing at higher rates than calculated by Legal Miner for the entire city. However, these differences may also be attributable to the local courts including mediated cases in their datasets. See *White Paper on Deciding Labor Disputes in Beijing Haidian District* (北京市海淀区劳动争议审判状况白皮书), 2014 (reporting that in Haidian, workers obtained a “total win” in 18% of cases, a “partial win” in 63% of cases, a “total loss” in 10% of matters, and the remaining 9% of cases were resolved through other means); electronic communication from Beijing court official (Nov. 3, 2015) (on file with author) (in 2012, 2013 and 2014, workers in the Chaoyang District received a “partial win” in roughly 55% of cases each year, but fewer “total wins” each year—dropping from 29% to 25% to 20%).

In examining the cases in which workers lose or partially lose, common reasons for these outcomes include both employers' litigation tactics as well as workers' own unfamiliarity with the legal process. The report on labor arbitrations in Changsha County notes some of the “malicious” tactics engaged in by employers, including: making false representations, concealing evidence, or fabricating evidence; forcing current employees to give untruthful testimony; having workers sign a labor contract with a “shell” company to evade liability; and other methods of delaying the litigation and increasing the litigation costs for workers.¹⁴³ A report from Guangzhou describes many of these same methods being used by employers in court litigation.¹⁴⁴ Employers are also simply becoming more aware of the law and sophisticated in how they violate it. For instance, when the *Labor Contract Law* was first passed, employers commonly fired workers without any reason and thus were ordered to pay severance. But they are now more likely to state some reason for the termination or to withhold a worker's last paycheck unless he signs a letter stating he voluntarily resigned.¹⁴⁵

Workers' lack of familiarity with the law and legal process is also an important reason that they are sometimes unsuccessful in litigation. This is evident from the Haidian court's list of common reasons that workers lose labor cases, which includes: the presentation of poor evidence or a lack of written evidence; failure to exhaust the arbitration requirement; not going through the necessary preliminary steps in work injury cases; confusion between a labor relationship and other working relationships; requesting tort remedies in labor cases; and bringing cases outside of the court's jurisdiction.¹⁴⁶ One would expect that many of these pitfalls could likely be avoided with legal advice or legal representation of a decent quality. Similarly, having legal representation would likely improve workers' ability to respond to at least some of the malicious litigation tactics used by employers.

Although empirical studies on the impact of legal representation are few in number, the data that is available suggests that workers fare better when they are represented. A study of labor arbitration cases in Chengdu found that workers with legal representation recovered all the compensation that they requested in 79% of cases, compared to only 23% of those

¹⁴³ Li Jianjun, *supra* note 121. The report also notes several types of “malicious litigation” engaged in by employees, including: refusing to sign a labor contract, but later suing the employer for failing to provide one; demanding an employer provide cash payments in lieu of social insurance contributions, but later using the failure to make contributions as a grounds for terminating a labor relationship and demanding economic compensation; and requesting the employer to attest to a salary higher than the worker earns, such as when the worker is applying for a mortgage, and then suing the employer for failure to actually pay that higher salary.

¹⁴⁴ *Guangzhou White Paper*, *supra* note 35.

¹⁴⁵ *Zhicheng 2015 Report*, *supra* note 15.

¹⁴⁶ *Haidian White Paper*, *supra* note 142. Another report on the Beijing courts' handling of labor cases in 2012–2013 also notes that the courts have imposed stricter time limits for parties to produce evidence, but many workers do not understand these new rules and often have trouble meeting the deadline. *Beijing Courts 2012–2013*, *supra* note 17.

who went forward without representation.¹⁴⁷ A similar effect was found for court outcomes: one analysis of civil court cases in which only one side had a lawyer found that the represented party won twice as often as the pro se party.¹⁴⁸ Of course, there is also anecdotal evidence of the efficacy of lawyers. For instance, during interviews about labor dispute litigation, LDAC arbitrators and judges in Beijing and Chengdu expressed strong opinions that workers with representation fared better.¹⁴⁹ Gallagher and Yang also found that workers in Shanghai who received high-quality representation reported more positive experiences with the legal process.¹⁵⁰ Accordingly, the following section examines the various legal service providers in China and how accessible (or inaccessible) they are to workers.

¹⁴⁷ JEFFREY BECKER, *SOCIAL TIES, RESOURCES, AND MIGRANT LABOR CONTENTION IN CONTEMPORARY CHINA* 163 (2014) (discussing a study conducted by the Sichuan Migrant Worker Legal Aid Station).

¹⁴⁸ *Big Data Tells You Whether it is Worthwhile to Hire a Lawyer* (大数据告诉你请律师到底有没有用), FA DOU SHI WANG (法斗士网), Oct. 19, 2015. This effect is even more pronounced in Shanghai, Guangzhou, and Shenzhen. However, in labor disputes, the represented party is only slightly more likely (53%) to prevail. The authors argue that this does not mean having a lawyer is less helpful in labor cases. Instead, it may be that the party appealing the arbitration decision to court is more likely to hire a lawyer, but also have a tougher case, thus explaining this below average success rate for represented parties.

¹⁴⁹ Wang Jianjun, *Written Survey on Labor Disputes of LDAC and Courts at Three Levels* (劳动争议仲裁院和三级人民法院书面访谈), 2011 (unpublished report, on file with author) (discussing Chengdu); Beijing University Research Group, *Report on Surveys Concerning an Attorneys' Fees-Shifting Scheme for Labor Disputes* (劳动争议案件律师费转付制度访谈报告), 2011 (unpublished report, on file with author) (discussing Beijing).

¹⁵⁰ Gallagher & Yang, *Getting Schooled*, *supra* note 104.

IV. Legal Service Providers

This section seeks to map out and evaluate the primary sources of legal advice and representation for workers. Specifically, it examines private lawyers, the formal legal aid system, legal aid provided by the trade union, pro bono services by law firms, barefoot lawyers, basic-level legal workers, law school legal clinics, bar associations, and labor rights NGOs. The various providers are discussed both as they operate generally and, to the extent the information is available, in the specific localities targeted by this study.

1. Private Lawyers

The number of Chinese lawyers has grown from a few thousand in the 1980s to 271,000 by the end of 2014.¹⁵¹ Nonetheless, workers still have a difficult time finding lawyers to represent them.¹⁵² Some of the barriers to workers obtaining representation are universal.¹⁵³ For instance, workers often cannot afford to pay the fees that lawyers charge. In the large cities, lawyers will demand at least RMB 3,000 for each stage of litigation (程序), and, more typically, at least RMB 5,000. A survey of migrant workers in Chengdu involved in labor disputes found that the legal fee paid in the vast majority of work injury cases exceeded RMB 5,000 and often exceed RMB 10,000; the fee ranged from RMB 2,000–5,000 in wage cases; and the worker paid from RMB 2,000–10,000 in most termination cases.¹⁵⁴ These amounts are more than many low-wage workers can pay or would be willing to pay, particularly if they are owed money by their employer or are no longer working due to an injury.¹⁵⁵ Labor cases may also be complicated and lengthy, involving multiple procedures. This is particularly true in occupational disease cases, where proving causation is difficult and the cases may go on for several years. Furthermore, lawyers' collection of their fee can be frustrated at two levels. Not only may it be difficult to collect the judgment from the employer (*see infra* Section II(6)), but workers sometimes

receive money and flee without paying their legal fees.¹⁵⁶ Lawyer Zhou Litai, who represented more than 12,000 injured workers in Shenzhen, mostly on a contingency basis, reported having 700 clients who owed him a total of RMB 5 million in fees.¹⁵⁷ An additional disincentive for handling labor cases is that because these matters are so crucial to the workers, they can be very emotional and hard to please. By contrast, representing employers has many benefits: they are able to pay larger fees; they are more likely to be repeat customers; they are less emotionally invested in the result of the case; and they are more likely to pay the legal fees they owe. Some law firms that generate significant business representing employers are now restricting their attorneys from representing workers.

There are also circumstances particular to China that make representing workers more difficult. The first is that contingency fee arrangements—by which the lawyer only collects fees if the client recovers money—are generally banned.¹⁵⁸ This means that a lawyer is required to collect a fee upfront, even if he were willing to forego doing so. A study of 200 labor disputes in Chengdu found that, in practice, lawyers collected fees in advance in 75% of all cases, but permitted the worker to pay after the case was resolved in about half of work injury disputes.¹⁵⁹ A second obstacle is that it is difficult to bring collective or class litigation in China.¹⁶⁰ In other countries, aggregating claims together into a single lawsuit makes it economically feasible for lawyers to represent workers who have claims that are individually low in value.

¹⁵⁶ Wang Minxia, *Who Should Pay the Lawyer Fees in a Work Injury Case* (工伤案件律师费该由谁买单), May 28, 2015 (describing problems faced by lawyers in collecting fees).

¹⁵⁷ Feng Shu, *Soliciting Justice*, GLOBAL TIMES, Nov. 9, 2012.

¹⁵⁸ Interestingly, Article 24 of the *Guangdong Province Operational Guidelines for Lawyers Handling Labor Disputes* (广东省律师办理劳动争议案件操作指引) (promulgated by Guangdong Lawyers' Association, 2014), lists several types of labor disputes for which a contingency fee arrangement is not permitted, but states that in other cases, so long as the plaintiff has been advised of relevant regulations, a contingency fee of 30% or less is allowed. However, the claims for which contingency fees are not permitted include many of the most common types of labor cases: requests for social insurance benefits; work injury compensation; labor remuneration; and collective or sensitive claims. Accordingly, there appears to be little room for contingency fees in labor cases. Indeed, during the author's interviews in Guangdong, this provision permitting contingency arrangements in certain cases was never mentioned.

¹⁵⁹ Sichuan Migrant Worker Legal Aid Station, *supra* note 154.

¹⁶⁰ Fu Hualing, *Human Rights Lawyering in Chinese Courtrooms*, 2 THE CHINESE JOURNAL OF COMPARATIVE LAW, no. 2, 270–88, 281 (2014) (“There is no class action in practice, and workers' collective grievances are broken down into individual cases when they are accepted by courts.”). More recently though, there have been some reports that the number of collective labor dispute cases in Chinese courts is increasing. E.g., Wang, *Big Data*, *supra* note 51 (observing an increase in labor cases involving ten or more plaintiffs in Jilin's courts and noting that some cases involve nearly 100 workers); *Guangzhou White Paper*, *supra* note 35 (reporting that 2,487 collective labor cases were filed in Guangzhou courts in 2013, constituting over 20% of all labor cases). See also Yang Shuxin & Lin Xida, *Encountering a Collective Labor Dispute after 20 Years, Guangzhou Legal Aid Speedily Resolves the Matter in 15 Days* (20年一遇特大群体性劳资纠纷广州法律援助15天快速应急成功化解), GUANGZHOU LEGAL AID BUREAU (广州市法律援助处), Feb. 4, 2016 (describing a case in which six legal aid lawyers represented over 500 workers in a labor arbitration).

¹⁵¹ Li Wanxiang, *MOJ Releases Statistics: Lawyers Nationwide Grows to 271,000* (司法部发布数据: 全国律师队伍发展到27.1万人), CHINA ECONOMIC WEB, Apr. 9, 2015.

¹⁵² See Ethan Michelson, *The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work*, 40 LAW & SOC'Y REVIEW, no. 1, 1–38 (2006) (analyzing the reasons that Chinese lawyers are reluctant to take on labor dispute cases, including the low value of the cases, difficulties collecting fees, and lawyers' perceptions about the character of workers).

¹⁵³ See, e.g., Lewis Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F.L. REV. 105, 106–07 (2003) (reporting an estimate that at least 95% of the workers who seek help from the plaintiffs' employment bar in the United States are turned away).

¹⁵⁴ Sichuan Migrant Worker Legal Aid Station, *Investigative Report on Attorneys' Fees Shifting in Labor Dispute Cases* (劳动争议案件中律师费转移支付调查报告), 2011 (unpublished report, on file with author).

¹⁵⁵ The monthly minimum wage in Shanghai and Shenzhen is just over RMB 2,000 per month. A report by a district court in Hangzhou in 2013 showed that 62.5% of the labor dispute cases filed there involved claims for less than RMB 10,000 and 91.6% of cases involved under RMB 100,000. *Investigation and Reflections on the Trial of Labor Disputes* (关于劳动争议案件审理情况的调查与思考), Dec. 15, 2015.

Another disincentive to representing workers is that doing so may entail some political risk for the lawyer. While ordinary, individual labor disputes are generally not politically sensitive, cases involving a group of workers, and particularly those affiliated with grassroots NGOs, may be. This danger has been highlighted by the crackdown on rights-protection lawyers in the summer of 2015 and then the arrests of labor NGO staff later that year (*see supra* Section I). But there have actually been numerous government measures over the last few years to monitor attorneys' work and deter them from taking sensitive cases. For instance, lawyers must report their involvement in any "mass cases," meaning those with ten or more plaintiffs, to the local government and bar association.¹⁶¹ Some localities even have special rules for labor cases. In Guangdong, bar association rules warn that in handling collective or sensitive labor cases lawyers are to follow professional ethics and not intensify the conflict; they are not to provoke workers to petition (信访), engage in a protest, or otherwise disrupt social order; and they should report the "possibility" of a petition, protest, work stoppage, or strike to the relevant authorities.¹⁶²

In an effort to address the cost issue as a barrier to representation, Shenzhen began an experiment in 2008 that permitted "fee shifting" in labor disputes. Specifically, where a worker "wins" a case in litigation, the employer may be ordered to pay the worker's attorneys' fees up to RMB 5,000. Shenzhen NGOs report that the impact of this measure in expanding workers' access to lawyers is limited, however. Due to the restriction on contingency fee arrangements in most cases, technically speaking, the worker must still pay the lawyer fee upfront. The way the "fee shifting" works in practice is that the court is presented with a receipt for the fees already paid at the end of the case. The design of the system also discourages lawyers from bringing less-than-certain claims. Arbitrators and judges use the percentage of a worker's total claims that were actually awarded in the lawsuit to determine the percentage of the fee request to award. In other words, if the lawsuit sought RMB 50,000 and RMB 25,000 was awarded, then only RMB 2,500 will be awarded upon a fee request for RMB 5,000. In addition, due to the low cap on the maximum fee award, the rule still does not deter employers from filing meritless appeals or willfully drawing out the litigation process.

2. Government Legal Aid through the Ministry of Justice

A. National Level

China has a government-operated legal aid system. While the central government began encouraging provinces to set up legal aid centers in the late 1990s, a more formal legal foundation for this system was established in 2003 when the State Council issued

the *Regulation on Legal Aid*.¹⁶³ The *Regulation* provides that legal aid shall be available to individuals facing "financial hardship" (经济困难) who have legal needs in any of six specified areas, including demands for the payment of labor remuneration.¹⁶⁴ However, provincial-level governments are also permitted to make supplementary provisions concerning what matters will be accepted for legal aid and to set their own financial hardship standards.¹⁶⁵ For instance, many localities define financial hardship using "subsistence-level income" standards, but an increasing number are using slightly higher "low income" standards. Indeed, many of the implementation details are left to local governments, which are instructed to "take active measures to promote the work of legal aid, provide financial support to legal aid, and to ensure that legal aid progresses in coordination with the economy and social progress."¹⁶⁶

The MOJ and the local justice bureaus (司法局) are in charge of China's legal aid system. At the national level, two entities within the MOJ share oversight of the system: the Department of Legal Aid and the Legal Aid Center. Paul Dalton, an expert on Chinese legal aid, states that the former has 10 or fewer staff members and primarily handles policy and legislative matters, while the latter has 20–25 people and essentially deals with everything else.¹⁶⁷ These national offices and the provincial-level legal aid offices do not get involved in specific cases, but instead set policies and guide legal aid work by lower-level offices. Justice bureaus at the municipal level both arrange for the provision of some legal aid as well as supervise the district-level justice bureaus, which arrange the delivery of the vast majority of legal aid services.

In some instances, the local justice bureaus have staff that provides legal aid consultations or representation itself. However, in urban areas or more economically developed rural regions with more lawyers, it is more common that the justice bureau staff will determine the individual's eligibility for legal aid and then refer the case to a private law firm or other legal service provider.¹⁶⁸ While the *Lawyers Law* (1996) includes a vague obligation for lawyers to engage in legal aid work, and some cities have required attorneys to perform a certain number of cases each year, most law firms or lawyers will not provide legal aid services unless there

¹⁶³ See Congressional Executive Commission on China (CECC), *Legal Aid* (no date) (referencing the notices on legal aid issued by the MOJ in 1996 and 1997). Earlier legislation also had some provisions concerning the provision of legal aid to individual disputants, including the *Lawyers Law* (中华人民共和国律师法) (promulgated by Standing Comm. Nat'l People's Cong., 1996) and *Criminal Procedure Law* (中国人民共和国刑事诉讼法) (promulgated by the Nat'l People's Cong., 1979) (amended 1996). See also Mark Jia, *Legal Aid and the Rule of Law in the People's Republic of China*, 1 MARYLAND SERIES IN CONTEMPORARY ASIAN STUDIES, Art. 1, 7–10 (2011) (providing an overview of legal aid in China since the Republican period); Benjamin L. Liebman, *Legal Aid and Public Interest Law in China*, 34 TEX. INT'L L.J. 211, 215–21 (1999) (same).

¹⁶⁴ *Regulation on Legal Aid* (法律援助条例) (promulgated by St. Council, 2003), Art. 10.

¹⁶⁵ *Id.* at Arts. 10, 13. See also Telephone interview with Paul Dalton, British Council (Oct. 23, 2015) (reporting that MOJ statistics reveal that 27% of civil cases accepted for legal aid are in categories outside of those enumerated in the 2003 *Regulation*).

¹⁶⁶ *Regulation on Legal Aid*, *supra* note 164 at Art. 3.

¹⁶⁷ Paul Dalton Interview, *supra* note 165. See also MOJ Legal Aid Center, *Legal Aid in China* (unpublished report, on file with author) (stating that the Department of Legal Aid sets the "development plan, supervises the management of legal aid staff and gives advice and instruction to social organizations and volunteers," while the Center handles "legal aid publicity and training, evaluates case quality, organizes international exchanges and cooperation projects, manages the national '12348' legal aid hotline and develops academic research").

¹⁶⁸ *Regulation on Legal Aid*, *supra* note 164 at Art. 21 ("The legal aid institutions may designate a law firm to arrange for lawyers or any other staff of the law firm to handle the legal aid case; it may also arrange for its own staff to handle the legal aid case as required by any other social organization.").

¹⁶¹ *Guiding Opinions on Lawyers Handling Mass Cases* (中华全国律师协会关于律师办理群体性案件指导意见) (promulgated by All-China Lawyers Association, 2006), Arts. 1–3; *Plights and Prospects*, *supra* note 8 at 50–51.

¹⁶² See *Guangdong Province Operational Guidelines for Lawyers*, *supra* note 158 at Arts. 5, 105.

Figure 3. National Legal Aid Statistics (2011–2014)

	2011	2012	2013	2014
Legal Aid Organization				
Legal Aid Offices 法律援助机构数	3,239	3,236	3,249	3,263
Legal Aid Staff 法律援助工作人员	14,150	14,330	14,548	14,533
Legal Aid Workstations 法律援助工作站	61,326	63,710	65,069	68,225
Legal Aid Cases & Consultations				
Total Cases 法律援助案件	844,624	1,022,015	1,158,876	1,243,075
Civil Cases 民事法律援助案件	726,826	882,839	931,027	997,058
Criminal Cases 刑事法律援助案件	113,717	133,677	222,200	240,480
Administrative Cases 行政法律援助案件	4,081	5,499	5,649	5,804
Consultations 法律援助咨询	5,334,383	5,760,418	6,273,469	6,795,963
Legal Aid Recipients				
Total 受援人	946,690	1,145,671	1,279,202	1,388,356
Migrant Workers 农民工	313,427 (33.1%)	402,033 (35.1%)	434,491 (33.9%)	476,799 (34.4%)

Source: *National Legal Aid Statistics* (全国法律援助统计数据), MOJ LEGAL AID CENTER, various years.

is an explicit request from the justice bureau.¹⁶⁹ In fact, for the 800,000 legal aid cases handled in 2012, lawyers were not the largest service provider: 38.5% were handled by basic-level legal workers, 33.1% by private lawyers, 21.8% by legal aid staff, 4.4% by social organization staff, and 2.2% by registered volunteers.¹⁷⁰ In most localities, the provider of legal aid will receive a stipend in an amount determined by the local justice bureau.¹⁷¹ In 2013, the MOJ reports that the average such stipend for private lawyers (RMB 835) was nearly double that paid to legal aid staff workers (RMB 439) or basic-level legal services workers (RMB 438).¹⁷² Article 8 of the 2003 *Regulation* also encourages “mass organizations” (社会团体), such as local branches of the ACFU or All-China Women’s Federation, “public institutions” (事业单位), and other “social organizations” (社会组织), to use their own resources to provide legal aid.

Since the introduction of the legal aid system, its size, sophistication, and impact have continuously grown. Official statistics state that in 2003 China had over 9,000 legal aid workers and the system handled over 166,000 cases.¹⁷³ By 2014, there were

nearly 3,700 legal aid offices staffed by over 14,500 staff at the provincial, municipal, and county levels, and another 68,000 legal aid workstations (法律援助工作站) below them.¹⁷⁴ Of this staff, the MOJ reports that a significant percentage has some specialization in law, such as a university degree in law, and over 5,900 are licensed lawyers.¹⁷⁵ In 2014, the legal aid system handled over 1.24 million cases, including 997,058 civil matters and 5,804 administrative matters, and provided over 6.79 million legal consultations.¹⁷⁶ The total number of cases grew to 1.32 million in 2015.¹⁷⁷

The nearly 70,000 legal aid workstations do the vast majority of the legal consultations and forward applications for legal representation to the justice bureau offices.¹⁷⁸ The workstations are located in a variety of places, including but not limited to townships, local communities, women’s federation offices, senior citizen offices, trade union offices, and inside courts or arbitration tribunals. Approximately 40% of legal aid workstations exist “outside” the MOJ system: they are set up by social organizations, universities, or other civil society organizations and have their own sources of funding.¹⁷⁹ Legal consultations by the workstations

¹⁶⁹ See *Lawyers Law* (promulgated by Standing Comm. Nat’l People’s Cong., 1996) (amended 2012), Art. 42 (“Lawyers and law firms shall perform their obligations of legal aid according to the state provisions, provide the aided persons with standard legal services, and protect the legal rights and interests of the aided persons.”); Liebman, *supra* note 163 at 229 (noting that Beijing was the first city to explicitly require each attorney “to handle at least one pro bono case per year” pursuant to a 1993 regulation); *id.* at 262 (noting other localities, such as Pudong and Hangzhou, have also instituted such requirements).

¹⁷⁰ 2012 LEGAL AID Y.B. CHINA 215–16.

¹⁷¹ *Regulation on Legal Aid*, *supra* note 164 at Art. 24 (“[T]he legal aid institution shall pay subsidies to the lawyers or the staff of the social organization that handled the case. The subsidy rate shall be determined by the administrative justice department [at the relevant government level].”).

¹⁷² 2013 LEGAL AID Y.B. CHINA 205.

¹⁷³ *10 Years of Legal Aid Statistics Review* (数字回顾法援十年), LEGAL DAILY, Sept. 12, 2012.

¹⁷⁴ Zhao Yan, *Vulnerable Groups to get Free Legal Aid*, CHINA DAILY, July 3, 2015 (number of legal aid offices and staff); *10 Years of Legal Aid Statistics Review*, *supra* note 173 (number of legal aid stations).

¹⁷⁵ 2012 LEGAL AID Y.B. CHINA 214 (reporting that in 2012, of the 14,330 staff, 6,265 had some formal legal professional qualification or lawyer license); Li, *MOJ Releases Statistics*, *supra* note 151 (number of legal aid lawyers).

¹⁷⁶ 2013–2014 *National Legal Aid Statistics* (2013–2014年全国法律援助统计数据), MOJ LEGAL AID CENTER (Aug. 31, 2015).

¹⁷⁷ *Last Year 1.32 Million Legal Aid Cases Handled Nationwide* (去年全国办理法律援助案132万件), LEGAL DAILY, Jan. 25, 2016.

¹⁷⁸ *1.39 million Chinese*, *supra* note 108; MOJ Legal Aid Center, *Legal Aid in China—the National Report*, 2 (2013).

¹⁷⁹ 2012 LEGAL AID Y.B. CHINA 213.

Figure 4. Legal Aid Budget Breakdown (2013)

	Amount (RMB)	Percentage
Total Legal Aid Budget	1.628 billion	
Budgetary allotments 财政拨款	1.607 billion	98.7%
Local government budget allocations 同级财政拨款	1.06 billion	66.2%
Central government supplements to local government for case handling 中央补助地方法律援助办案专款	300 million	18.7%
Provincial legal aid resources 省级法律援助专项资金	101 million	6.3%
Central government lottery public interest program (Legal Aid Foundation) 中央专项彩票公益金法律援助项目资金	100 million	6.2%
Politics and law supplement from central, provincial levels 中央、省级政法转移支付资金	41 million	2.6%
Society and industry contributions 社会捐助、行业奉献等	21 million	1.3%

Source: 2013 *Legal Aid Yearbook China*, p. 204.

are provided through a range of methods, including in-person meetings, over the telephone, or via the Internet. Generally, no financial hardship or other screening test is applied for the provision of legal advice.

A crucial issue for any legal aid system is the level of available funding—and this is no less true in China. In 2014, the MOJ reports that funding for legal aid reached RMB 1.7 billion, an increase of 4.8% over the prior year.¹⁸⁰ In 2013, RMB 1.628 billion was budgeted for legal aid nationwide and Figure 4 presents the breakdown of the source of these funds. The 2003 *Regulation* essentially instructs local governments to fund legal aid work themselves, and this is indeed the largest source of legal aid funding. In recent years, though, the national government has made increasing financial contributions. In particular, the China Legal Aid Foundation was created in 2009 and receives money from the national lottery as well as other sources. In its first two years, this entity only invested RMB 50,000 in legal aid.¹⁸¹ But by 2013, the Legal Aid Foundation controlled over RMB 100 million, including RMB 30 million raised from society and industry sources.¹⁸² This money then funds legal aid in 14 designated areas, one of which is assisting migrant workers, by supporting various legal aid offices, university legal clinics, and legal education efforts.¹⁸³ In addition, several provinces have now established local legal aid foundations, with some distributing over RMB 10 million per year.¹⁸⁴ Most of this money is spent on

delivering legal services. The MOJ reports that 32% of legal aid funds go to personnel costs and 59% are spent on handling cases, providing legal consultations, and publicity activities.¹⁸⁵

The precise number of legal aid applicants that are deemed eligible but not provided representation is unclear. Some sources report that legal aid is only provided to one in four or one in three eligible applicants.¹⁸⁶ But the MOJ reports that 95% of civil legal aid applicants, 79% of administrative legal aid applicants, and 73% of criminal legal aid applicants are approved—a far higher approval rate for civil legal services than reported by the United States, Taiwan, or Hong Kong.¹⁸⁷ Indeed, several local legal aid officials report never turning down “qualified” applicants. However, when unable or unwilling to provide legal assistance to someone, such as those with insufficient evidence or an otherwise weak case, officials admit to discouraging them from applying or persuading them to withdraw their request for representation. For instance, a legal aid official in Nanjing stated that all eligible and “qualified” individuals receive legal aid, but then estimated that two applicants are deemed unqualified for every one that is approved.¹⁸⁸

¹⁸⁵ 2013 *LEGAL AID Y.B. CHINA* 205.

¹⁸⁶ China Legal Information Center, *Legal Aid: Development*, June 9, 2015 (“It is estimated that the country will see more than 700,000 cases requiring legal assistance annually but aid will be provided in only less than a fourth of those cases.”); CECC, *supra* note 163 (same); Fu Hualing, *Access to Justice in China: Potentials, Limits, and Alternatives*, in *LEGAL REFORMS IN CHINA AND VIETNAM: A COMPARISON OF ASIAN COMMUNIST REGIMES* 163–87, 172 (J. Gillespie and A. Chen, eds., 2010) (reporting that MOJ officials revealed that the legal aid provided in 2005 only met one-third of the legal needs of China’s poor).

¹⁸⁷ 2012 *LEGAL AID Y.B. CHINA* 214. See Legal Services Corporation, “Who We Are” (last accessed July 19, 2016) (reporting that the grantees of the Legal Services Corporation, the independent federal agency that is the largest provider of civil legal aid funding in the United States, turn away 50% or more of eligible applicants); Nathan Koppel, *More Strapped Litigants Skip Lawyers in Court*, WALL ST. J. (July 22, 2010) (noting that the Legal Aid Society in New York City is only able to help one in nine individuals who seek its help); Wei-Shyang Chen, *National Report from Legal Aid Foundation, Taiwan for International Legal Aid Group Conference*, 4 (2015) (reporting that the Legal Aid Foundation in Taiwan granted applications for legal aid in 60% of civil cases and 74% of family dispute cases); Legal Aid Services Council, “National Report” for *International Legal Aid Group Conference 2015*, 7 (2015) (stating that this Hong Kong organization granted 46% of applications for non-criminal legal aid in 2014).

¹⁸⁸ Interview with legal aid official, in Nanjing, China (Dec. 16, 2015).

¹⁸⁰ Zhao Yan, *supra* note 174.

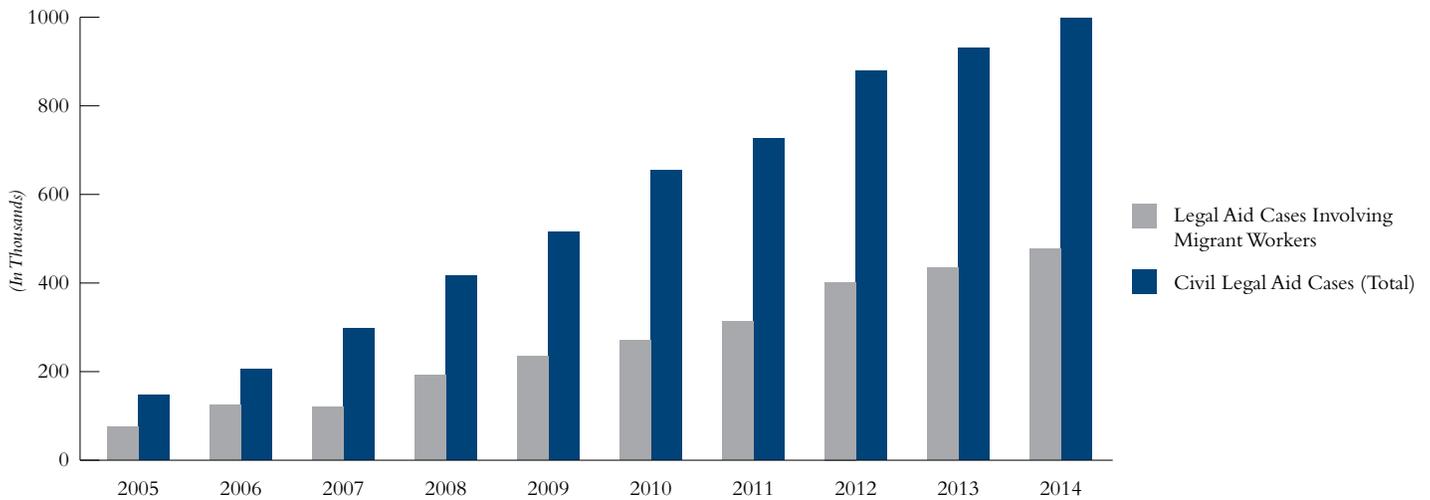
¹⁸¹ *Legal Aid in China—the National Report*, *supra* note 178 at 2–3.

¹⁸² 2013 *LEGAL AID Y.B. CHINA* 204 (total of RMB 100 million); *id.* at 146–47 (reporting a RMB 3 million donation from the China National Tobacco Corporation and RMB 1 million donations from companies such as the Chinese Agricultural Development Bank, China Telecom Group Corporation, and China Hua Neng Corporation).

¹⁸³ *Legal Aid in China—the National Report*, *supra* note 178 at 2–3.

¹⁸⁴ 2013 *LEGAL AID Y.B. CHINA* 205; 2012 *LEGAL AID Y.B. CHINA* 216; see also Yin Pumin, *Aid Matters*, BEIJING REVIEW, Aug. 6, 2015 (reporting that China has established five legal aid foundations, including one at the national level and one in Beijing).

Figure 5. Migrant Workers Receiving Legal Aid and Total Civil Legal Aid Cases (2005–2014)



Source: *National Legal Aid Statistics* (全国法律援助统计数据), MOJ LEGAL AID CENTER, various years.

In Guangdong, officials frequently employ a provision that permits withholding legal aid from applicants in “cases that are simple, or the amount in controversy small”—terms that are vague and left undefined—to deny applicants who might otherwise qualify for legal aid.¹⁸⁹

It is clear, however, that migrant workers with labor claims now constitute a significant portion of legal aid recipients. Previously, it was quite difficult for migrant workers to access this system because local governments often limited legal aid to residents with a local *hukou* (household registration) and the financial hardship cutoff was often below what even an unskilled migrant worker would earn.¹⁹⁰ This situation began to change drastically with the issuance of the State Council’s *Opinions on Solving the Problems of Migrant Workers* (关于解决农民工问题的若干意见) in 2006, which followed several years of national-level policy documents calling attention to the hardships faced by this group.¹⁹¹ Article 29

¹⁸⁹ *Guangdong Regulation on Legal Aid* (广东省法律援助条例) (promulgated by Standing Comm. Guangdong Provincial People’s Cong., 1999) (amended 2016), Art. 18 (“[In] cases that are simple, or the amount in controversy small, legal aid organizations can instruct applicants to proceed unrepresented.”).

¹⁹⁰ Every Chinese citizen has a *hukou* (household registration) assigning that person to a certain locality and an urban or rural designation. Those with rural *hukou*, or *hukou* from another city, may be unable to access certain social services or benefits in the city where they actually reside. See Halegua, *Getting Paid*, *supra* note 13 at 282 (describing migrant workers’ difficulties in obtaining legal aid); Fu Hualing, *Access to Justice in China*, *supra* note 186 at 172–73 (noting that the financial hardship standard limits legal aid to the “poorest of the poor” and that “[m]ost quite genuinely impoverished people in China do not qualify”). See also Liebman, *supra* note 163 at 244–45 (noting that, although exceptions were made on occasion, regulations in several localities, including Deyang, Guangzhou, and Pudong, limited the provision of legal aid to local residents).

¹⁹¹ See, e.g., *Notice on Performing Work on Managing and Serving Migrant Workers Entering the City to Find Work* (国务院办公厅关于做好农民工进城务工就业管理和服务工作的通知) (promulgated by St. Council General Office, 2003); *Notice on Perfecting the Work of Improving the Environment for Migrant Workers Entering the City to Seek Work* (国务院办公厅关于进一步做好改善农民工进城就业环境工作的通知) (promulgated by St. Council General Office, 2003); *Notice on Solving the Problem of Unpaid Wages in the Construction Sector* (国务院办公厅关于切实解决建设领域拖欠工程款问题的通知) (promulgated by St. Council General Office, 2003); *Solving the Problem of Construction Industry Enterprises Failing to Pay Migrant Workers’ Wages* (劳动保障部、建设部关于切实解决建筑业企业拖欠农民工工资的问题) (promulgated by MOLSS & Ministry of Construction, 2003); *Solving Problems of Delayed Payment of Construction Fees and Worker Salaries in the Construction Area* (司法部、建设部关于解决建设领域拖欠工程款和农民工工资问题提供法律服务和法律援助的通知) (promulgated by MOJ & Ministry of Construction, 2004); *Notice on Developing Specialized Inspection Activities Concerning Wage Payments to Migrant Workers* (劳动保障部办公厅、建设部办公厅、中华全国总工会办公厅关于开展农民工工资支付情况专项检查活动的通知) (promulgated by General Office of MOLSS, General Office of the Ministry of Construction & the General Office of the ACFTU, 2004); *Notice on Solving the Problem of Unpaid Wages for Migrant Workers* (劳动保障部、建设部、监察部等九部委关于进一步解决拖欠农民工工资问题的通知) (promulgated by MOLSS, Ministry of Construction, Ministry of Supervision, et al., 2005); *Some Opinions on Promoting the New Socialist Countryside* (国务院关于推进社会主义新农村的若干意见) (promulgated by St. Council, 2005).

states that legal aid should emphasize helping migrant workers and the process for obtaining legal aid should be simpler and faster. Critically, the *Opinions* order that the financial hardship evaluation is to be waived for migrant workers with claims for unpaid wages or work injury compensation. Accordingly, this document has unified the rules for legal aid eligibility for the vast majority of labor cases—namely, those brought by migrant workers for unpaid wages or work injury compensation.

After this policy change, the number of migrant workers receiving legal aid grew dramatically. Whereas in 2005 just under 76,000 migrant workers received representation through legal aid, this number nearly doubled to 125,000 in 2006 and then steadily climbed to over 476,000 by 2014—constituting well over one-third of all legal aid recipients.¹⁹² An additional one million migrant workers receive legal consultations through the legal aid system each year.¹⁹³ This shift also resulted in employment claims becoming the most common type of civil case handled by the legal aid system.¹⁹⁴ In 2013, the legal aid system provided representation in over 900,000 civil cases, of which over 300,000 were claims for unpaid wages.¹⁹⁵ Labor issues also became the most common topic of legal consultations. Of the 5.7 million consultations provided in 2012, over 988,000 (17%) involved labor remuneration and over 350,000 (6%) concerned workplace injuries.¹⁹⁶

Despite the expansion of legal aid described above, however, there are still many workers who have difficulty obtaining legal aid. The specific eligibility rules and practices, as well as the general funding and operation of the legal aid system, varies between provinces, municipalities, and, in some places, even districts. Therefore, the following subsection examines Beijing, Shanghai, several cities in Jiangsu, and Shenzhen individually.

¹⁹² *National Legal Aid Statistics*, various years, *supra* note 176 (official statistics from the MOJ’s Legal Aid Center showing that migrant workers constituted 39% of legal aid recipients in 2012, 37% in 2013, and 38% in 2014).

¹⁹³ *Last Year Administrative Justice Bureaus Nationwide Expanded Legal Aid Coverage for Migrant Workers* (全国司法行政机关去年积极扩大农民工法律援助覆盖面), LEGAL DAILY, Feb. 7, 2013.

¹⁹⁴ 1.39 million Chinese, *supra* note 108; Zhao Yan, *supra* note 174 (noting that other common types of civil disputes involved marriage, domestic affairs, and traffic accidents).

¹⁹⁵ 2013 LEGAL AID Y.B. CHINA 200–01.

¹⁹⁶ 2012 LEGAL AID Y.B. CHINA 215.

B. Local Practices

As a preliminary matter, there seems to be a fair deal of confusion among the lawyers and NGO staff interviewed for this report about the precise eligibility requirements for legal aid in any given locality. Lawyers have reported that even justice bureau officials misapply the eligibility rules, resulting in inconsistent practices within a municipality. Therefore, this subsection strives to present the eligibility requirements both as stated in local regulations and as actually implemented in practice. As for the performance of local legal aid systems, there is unfortunately a lack of standardized provincial- or municipal-level data that is regularly compiled and published.¹⁹⁷ Accordingly, this report relies on a variety of sources in an effort to understand the services available to workers in each place. In addition, this subsection highlights notable aspects of the legal aid system in each of these locations.

Beijing

The *Beijing Regulation on Legal Aid*, issued in 2008, is the foundation of the legal aid system there. The types of cases eligible for legal aid track those in the national *Regulation*.¹⁹⁸ While most applicants must meet a financial hardship requirement to receive aid, consistent with State Council dictates, an exception to that requirement is made for migrant workers seeking payment of labor remuneration or compensation for work-related injury.¹⁹⁹ This greatly simplifies the process for workers with rural *hukou*. However, legal aid providers report that there are also many individuals from other smaller cities with urban *hukou* who come to Beijing to work. These workers still need to demonstrate financial hardship to receive legal aid. Beijing is one of a growing number of localities that do not set the financial hardship standard at the subsistence-level income, but instead uses a “low-income family standard” (低收入家庭认定标准) that is currently set at RMB 930 per family member per month.²⁰⁰ Article 18 of the *Beijing Regulation* requires legal aid applicants to obtain a “certificate of financial hardship” from the local government of the township in which the applicant resides. Acquiring this certificate from some local government offices can be a challenge.

The legal aid program in Beijing, unlike many Chinese municipalities, has not simply expanded each year. The most striking statistic, as shown in Figure 6, is that the number of legal consultations was well over 200,000 per year from 2011 to 2013, but then dropped to 131,000 in 2014. As for legal representation, the number of cases handled generally increased from 2011 to 2015, but also dropped in 2014 before rebounding the next year. The author has been unable to determine whether there was a change in statistical methodology in 2014 or there is some other explanation. Nevertheless, the data for 2015 shows that the number of legal consultations and case representations has started to climb again; however, the number of legal aid personnel

dropped significantly in that year. Once again, the cause of this change is unknown.

Law firms in Beijing are paid RMB 2,000 per procedure for legal aid cases, regardless of the outcome or of the actual time or money expended.²⁰¹ Some districts in Beijing have taken steps towards ensuring the quality of legal aid provided. For instance, legal aid cases in Chaoyang District are only assigned to attorneys with at least three years of practice experience; but in Fengtai District, which is less economically developed and has fewer lawyers, no such standards exist.²⁰² Fengtai does, however, permit legal aid recipients to choose a lawyer from a roster as opposed to simply assigning an attorney without input from the client.²⁰³

Article 6 of the *Beijing Regulation*, like the national one, encourages mass organizations, public institutions, and other social organizations to supplement the legal aid provided by the justice bureaus. In Beijing, the women’s federation, trade unions, NGOs, and universities have established such programs, for which they generally provide their own financial resources. In 2012, the Beijing Justice Bureau reported that there were approximately 100 such social organizations in the city that provided 22% of all legal consultations and handled 15% of all civil and administrative legal aid cases.²⁰⁴ These providers, who are not under the direct control of the justice bureau, may also be free from certain rules limiting the scope of who may receive legal aid.²⁰⁵ In addition, volunteer lawyers in Beijing staff a 24-hour legal aid hotline and respond to Internet requests, performing 200,000 consultations per year.²⁰⁶

Migrant workers are the primary recipients of legal aid services in Beijing. In 2013, the number of cases involving migrant workers (13,761) was over 87% of the total number of civil cases (15,760).²⁰⁷ In addition to assigning cases to commercial lawyers, the city established the first “legal aid station for migrant workers” and supports two legal aid NGOs focused on helping workers: Zhicheng Migrant Worker Legal Aid and Research Center (“Zhicheng”) and Yilian Labor Law Legal Aid and Research Center (“Yilian”).²⁰⁸ Like private law firms, these organizations are compensated RMB 2,000 for each phase of litigation. However, these NGOs not only receive cases assigned from the justice bureau, but may do their own intake (in accordance with the relevant standards and regulations) and then send the paperwork to the justice bureau to receive their stipend.

There are also organizations in Beijing providing legal aid services to migrant workers by using money granted directly from

²⁰¹ Pursuant to a Beijing regulation, where a law firm handled the preceding labor arbitration, it should only receive 50% of the RMB 2,000 stipend for the subsequent court procedures in that same case. *Beijing Legal Aid Stipend Measures* (北京市法律援助补贴办法) (promulgated by Beijing Bureau of Finance & Beijing Bureau of Justice, 2011), Art. 10. Nonetheless, it seems that in practice the firm receives the full amount for each procedure.

²⁰² Interview with lawyer, in Beijing, China (May 22, 2015).

²⁰³ E-mail from NGO staff in Beijing, China to author (Mar. 21, 2016) (on file with author).

²⁰⁴ Hou Zaifeng, *Situation and Measures for Beijing Social Forces Participating in Legal Aid* (北京市社会力量参与法律援助现状与对策), BEIJING JUSTICE BUREAU, July 31, 2012.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ 2013 LEGAL AID Y.B. CHINA 9.

²⁰⁸ *Investigative Report on Construction of the Legal Aid System in Beijing* (北京市关于健全法律援助制度的调研报告), in COLLECTION OF RESEARCH REPORTS FOR LEGAL AID SYSTEM IMPROVEMENT (健全法律援助制度调研报告汇编) 7 (MOJ Legal Aid Office, ed., 2014).

¹⁹⁷ For instance, the *China Legal Aid Yearbook* includes a narrative summary of the work in each province or directly administered municipality, but the statistics provided by each locality differ.

¹⁹⁸ *Beijing Regulation on Legal Aid* (北京市法律援助条例) (promulgated by Standing Comm. Beijing Municipal People’s Cong., 2008), Art. 9.

¹⁹⁹ *Id.* at Arts. 10, 11.

²⁰⁰ See *id.* at Art. 10 (the standard for “financial hardship” is to be set in accordance with the national and municipal “low-income family standard”); *Beijing Raises Sustenance Level Standard; Urban-Rural Gap Narrowed to RMB 40* (北京上调低保标准, 城乡差距缩小至40元), XINHUA NET, Feb. 12, 2015 (noting the new low-income family standard).

Figure 6. Beijing Legal Aid Statistics (2011–2015)

	2011	2012	2013	2014	2015
Professional Lawyers	22,100	22,796	23,761	24,467	25,542
Legal Aid Organization					
Legal Aid Organizations 法律援助机构	28	26	26	26	29
Legal Aid Staff 法律援助工作人员	237	209	260	286	215
Legal Aid Lawyers 法律援助律师	43	61	60	65	111 ²⁰⁹
Legal Aid Cases & Consultations					
Total Cases 法律援助案件	15,066	17,419	20,205	18,273	21,532
% change	-0.53%	+15.62%	+15.99%	-9.56%	+17.84%
Civil Cases 民事法律援助案件	11,688	13,804	15,760	15,420	18,229
Criminal Cases 刑事法律援助案件	3,357	3,587	4,421	2,822	3,256
Administrative Cases 行政法律援助案件	21	28	24	31	47
Consultations 法律援助咨询	226,328	259,739	234,951	131,560	168,119
% change	-7.31%	+14.76%	-9.54%	-44.01%	+27.79%

Source: Beijing Municipal Justice Bureau, *Annual Statistics and Analysis* (全年统计数据及分析), various years.

the national Legal Aid Foundation. One advantage of these funds is that they can be used for any type of “labor dispute” involving a migrant worker, not only labor remuneration and work injury cases.²¹⁰ At least in the case of Yilian, it is provided an annual budget of RMB 1.5 million and may select its own cases pursuant to the Legal Aid Foundation’s criteria. The stipends for these cases are also higher: legal aid providers normally receive RMB 2,800 per civil or administrative procedure, but may get up to RMB 5,000 if the case is complex or spans multiple districts.²¹¹ If the legal aid provider loses the case, it is reported that the Legal Aid Foundation will reduce the stipend to roughly RMB 1,400–2,000.²¹²

Shanghai

The *Shanghai Provisions on Legal Aid* was issued in 2006. In terms of scope, the *Provisions* incorporates the categories of cases enumerated in the national *Regulation*, but also includes work injury cases and disputes stemming from the signing, implementation, change, termination, or conclusion of a labor contract.²¹³ In 2011, the Shanghai government expanded the scope of legal aid to also include any “dispute stemming from employment” (因劳动用工纠纷), which seems to imply that a labor contract between the parties is not necessarily required.²¹⁴

As in most cities, the financial hardship standard is waived for migrant workers with labor remuneration or work injury claims. Shanghai, like Beijing, uses a standard linked to the income levels of low-income families, not a subsistence-level income, which was set at a per capita average monthly income of RMB 1,588 in 2013.²¹⁵ This is still far below the minimum wage in Shanghai (RMB 2,020 per month), let alone the average monthly salary of a Shanghai worker (over RMB 5,400).²¹⁶

Shanghai had actually established 20 legal aid centers—one at the municipal level and 19 in the districts and townships—as early as 2001.²¹⁷ Shanghai has also established a “12348” legal aid hotline targeted at helping migrant workers.²¹⁸ Legal aid windows offering free consultations exist at LDACs and courts, and some districts have set up “migrant worker legal aid stations.”²¹⁹ Like the national *Regulation*, the *Shanghai Provisions* also encourages social organizations to provide legal aid on their own.²²⁰

Several districts have set their own standards concerning which lawyers are eligible to perform legal aid, how they are selected, and the stipend they receive. For instance, Pudong provides RMB 1,800–2,000 for a case that is either mediated, tried before a single arbitrator, or litigated using a “simplified procedure” in court. If the case is tried before a panel of arbitrators or litigated in a standard court proceeding, then the stipend is

²⁰⁹ In prior years, the Beijing Justice Bureau reported the number of “government lawyers” (公职律师) and “legal aid lawyers” (法律援助律师). In 2015, only a single number for “government lawyers” was published, which seems to incorporate the individuals previously counted as “legal aid lawyers.”

²¹⁰ *Temporary Measures on Implementing Central Specialized Lottery Legal Aid Program* (中央专项彩票公益金法律援助项目实施与管理暂行办法) (promulgated by the Ministry of Finance & MOJ, 2009), Art. 6(11) (listing “labor disputes” (劳动争议) and “labor contract disputes” (劳动合同纠纷) as categories for which these funds can be used).

²¹¹ *Id.* at Art. 28(3).

²¹² E-mail from lawyer in Beijing, China to author (Dec. 14, 2015) (on file with author).

²¹³ *Shanghai Provisions on Legal Aid* (上海市法律援助若干规定) (promulgated by Standing Comm. Shanghai Municipal People’s Cong., 2006), Art. 5(1)–(2).

²¹⁴ *Notice on Adjusting the Financial Hardship Standard for Legal Aid Recipients and Expanding the Scope of Legal Aid* (上海市人民政府关于调整法律援助对象经济困难标准和扩大法律援助事项范围的通知) (promulgated by Shanghai People’s Gov’t, 2011).

²¹⁵ 2013 LEGAL AID Y.B. CHINA 41 (reporting that Shanghai adjusted this number to RMB 1,588 in 2013).

²¹⁶ *Notice on Adjusting the City’s Minimum Wage* (关于调整本市最低工资标准的通知) (promulgated by Shanghai Bureau of Human Resources and Social Security, 2015); *Notice on Workers’ Average Wage Levels in 2014* (关于本市2014年职工平均工资有关事宜的通知) (promulgated by Shanghai Bureau of Human Resources and Social Security, 2015).

²¹⁷ See *Shanghai Legal Aid* (上海法律援助), baike.com (last accessed July 14, 2016).

²¹⁸ *Shanghai Adjusts Standards for Legal Aid, Appeals Included in Scope* (上海拟调整法律援助相关标准 将申诉纳入范围), SHANGHAI FAZHI BAO, Aug. 24, 2015.

²¹⁹ *Id.*

²²⁰ *Shanghai Provisions*, *supra* note 213 at Arts. 8, 17.

RMB 2,000–2,200.²²¹ Pudong has also adopted a practice of allowing workers to apply directly to law firms for legal aid services, cutting out the screening and referral process done by the justice bureau. The Pudong justice bureau website provides a list of such firms and their contact information.²²² The Putuo District in Shanghai, in an effort to ensure a degree of quality, has set minimum standards for the private attorneys who can perform legal aid: they must have a lawyer license; three years of practice experience; no incidents of discipline by the judicial bureau; and be under 60 years old and in good health.²²³ Interestingly, Article 15 of the *Shanghai Provisions* also permits legal aid providers to seek any litigation costs, such as “expenses for traveling, printing, transport and communication, fact–investigation and translation,” from the LDAC or court. However, nobody interviewed by the author in Shanghai was aware of this provision.

One interesting legal aid model in Shanghai is the Fumin Legal Service Center, established in 2013, which appears to be operated by sixteen private lawyers from various firms. An article in the *Shanghai Daily* reports that the founders established the center after working with legal aid officials.²²⁴ As a lawyer there noted, “There are limitations of time and caseload in the governmental legal aid programs [...]. And some people doubt the impartiality of lawyers from government programs in cases involving government agencies.” By contrast, these lawyers are considered more “impartial and sympathetic than government agency officials.” Two or three lawyers provide advice at the center each day. In 2014, the center had 997 requests for help, many from migrant workers, and successfully mediated 59 cases.²²⁵ The emphasis of the center appears to be on mediation; it is unclear whether they also represent parties in litigation. While the article presents the organization as an alternative to government legal aid, its relationship with the justice bureau and its funding sources are unclear.

Shanghai’s legal aid program has grown quickly in recent years and now handles many labor cases involving migrant workers. In 2010, Shanghai’s legal aid system handled over 12,000 legal aid cases, provided 90,000 legal consultations, and answered 160,000 calls made to its “around-the-clock” hotline.²²⁶ By 2015, the legal aid budget of the Shanghai justice bureau was over RMB 7.9 million and the number of cases had doubled to over 24,000.²²⁷ This included 14,700 civil and administrative cases, of which a staggering 91% involved employment-related disputes. Nearly 60% of legal aid recipients were not Shanghai natives (外来人员) and over 35% were migrant workers (农民工).²²⁸ In Pudong though, only three-quarters of cases (73%) were employment related but far more (84%) involved migrant workers.²²⁹

221 *Pudong New District Legal Aid Stipend Standard* (浦东新区法律援助办案补贴标准) (promulgated by Pudong New District Justice Bureau, 2011).

222 Available here: http://www.pdsfzj.com.cn/sfweb/wsbw/wsbw_fyz.aspx?menu=57 (last accessed Mar. 30, 2016).

223 Bai Ping, *Practice on Legal Aid Quality Assurance in China*, June 2015 (presentation at the International Legal Aid Group (ILAG) Conference in Edinburgh, Scotland) (on file with author).

224 Yang Meiping, *Free Legal Services Center Gives Residents Petitioning Alternative*, SHANGHAI DAILY, Mar. 9, 2015.

225 *Id.*

226 Chen Qide, *Measures Taken to Push Forward Free Legal Aid Service*, CHINA DAILY, Nov. 17, 2011.

227 Shanghai Justice Bureau, *Shanghai Justice Bureau 2015 Budget* (2015年上海市司法局部门预算), Apr. 1, 2015 (legal aid budget); 2015 *Shanghai Municipal Justice Bureau Legal Aid Work Statistics and Analysis* (2015年上海市法律援助工作数据分析报告), Feb. 2, 2016 (number of cases).

228 2015 *Shanghai Legal Aid Work Statistics*, *supra* note 227.

229 *Investigative Report on Construction of the Legal Aid System in Shanghai’s Pudong District* (上海市浦东新区关于健全法律援助制度的调研报告), in *COLLECTION OF RESEARCH REPORTS*, *supra* note 208 at 321.

Jiangsu

The *Jiangsu Regulation on Legal Aid* is largely similar to those in other provinces and municipalities. Local governments are to link the financial hardship standard to their minimum subsistence level.²³⁰ The scope of acceptable cases largely tracks the national *Regulation*, including claims for the payment of labor remuneration, but also allows claims for severance or economic compensation stemming from a labor relationship.²³¹ In 2013, migrant workers received 113,000 legal aid consultations and were represented in over 47,000 cases, which constituted 53% of all legal aid cases in the province.²³² The Jiangsu Legal Aid Foundation, which funded over 1,300 cases in 2014, planned to spend RMB 7 million in 2015 and fund over 1,400 cases.²³³

The *Nanjing Legal Aid Implementing Measures* was issued in 2002.²³⁴ Disputes over labor remuneration, work injury, and illegal dismissal by the employer are all eligible for legal aid.²³⁵ Nanjing has also laid out a more specific obligation for its lawyers to perform legal aid. Each lawyer or legal service worker is required to do one to two cases per year, but performing legal consultations for four workdays is treated as equivalent to handling one case.²³⁶ In practice, however, legal aid officials report that this requirement is not enforced.²³⁷ Nanjing has also tried to set certain rules to ensure the quality of legal aid services. For instance, in the criminal context, lawyers are forbidden from having assistants or paralegals visit clients in custody or appear in court on their own.²³⁸ The 2015 budget of the Nanjing Municipal Justice Bureau specifically includes RMB 1.3 million for handling legal aid cases and RMB 350,000 for mediation programs.²³⁹ Private lawyers performing legal aid are usually given a stipend of RMB 1,500 per procedure.²⁴⁰

Nanjing has made particular efforts to provide legal aid to migrant workers, including by establishing centers specifically for this purpose. In 2013, the Andemen District Migrant Worker Legal Aid Station, located at a labor market, provided over 10,000 legal consultations, handled 186 cases, and referred 528 cases.²⁴¹ A 2015 justice bureau report listing important legal aid cases performed by law firms in Nanjing shows that a significant number are labor disputes, including claims for unpaid wages, overtime, economic compensation, social insurance, establishing the labor relationship, and work injury compensation.²⁴² A Nanjing legal aid official stated that roughly 100,000 legal consultations and 7,000

230 *Jiangsu Regulation on Legal Aid* (江苏省法律援助条例) (promulgated by Standing Comm. Jiangsu Province People’s Cong., 2001) (amended 2005), Art. 13.

231 *Id.* at Art. 10(5).

232 2013 LEGAL AID Y.B. CHINA 45.

233 *Jiangsu Legal Aid Plans to Spend RMB 7 Million to Support 1400 Cases* (江苏法律援助计划支出700万元资助1400个案件), REN MIN WANG, May 8, 2015.

234 *Nanjing Legal Aid Implementing Measures* (南京市法律援助实施办法) (2002).

235 *Nanjing Practical Rules for Implementing Legal Aid for Individuals in Financial Hardship* (南京市对困难群体实行法律援助的实施细则) (promulgated by Nanjing Municipal Justice Bureau, 2005), Art. 11.

236 *Nanjing Legal Aid Implementing Measures*, *supra* note 234 at Arts. 4, 5.

237 Interview with Nanjing legal aid official, *supra* note 188.

238 *Nanjing Legal Aid Implementing Measures*, *supra* note 234 at Art. 17.

239 Nanjing Justice Bureau, *Nanjing Justice Bureau 2015 Annual Budget* (南京市司法局2015年部门预算).

240 Interview with Nanjing legal aid official, *supra* note 188.

241 *Chairman Wang Xialin Strengthens Construction of the Brand; Investigation of Andemen Migrant Worker Legal Aid Work Station* (王霞理事长等就加强项目品牌建设: 赴安德门农民工法律援助工作站调研), JIANGSU PROVINCE LEGAL AID FOUNDATION, Sept. 18, 2014.

242 *Public Report on First Group of Cases Funded by Jiangsu Province Legal Aid Foundation in 2015* (江苏省法律援助基金会2015年度第一批资助案件公告), JIANGSU PROVINCE LEGAL AID FOUNDATION, June 1, 2015.

civil legal aid cases occur each year and the vast majority of them (approximately 4,000–5,000 cases) involve labor issues.²⁴³

In Kunshan and Suzhou, as elsewhere, migrant workers with a rural *hukou* qualify for legal aid without demonstrating financial hardship. Law firms in both cities have been involved in providing legal aid in several collective cases to recover unpaid wages and other labor cases.²⁴⁴ In Kunshan, over RMB 1 million is spent on legal aid annually, with lawyers earning RMB 1,000–1,200 per case.²⁴⁵ A labor rights NGO staffer there reports that the formal legal aid system is largely insufficient to meet migrant workers' huge demand for legal services. He estimated that over 10,000 labor disputes are filed in Kunshan courts annually, but legal aid is provided in about 1,000 arbitration and court cases per year.²⁴⁶ In Suzhou, the legal aid system reportedly handles 1,215 labor cases per year and maintains a hotline to provide legal advice and consultations.²⁴⁷ It is further reported that the municipal Legal Aid Foundation will invest an additional RMB 100,000 in legal aid programs, particularly those that serve individuals who fall outside the scope of the national eligibility guidelines or may fail to meet the financial hardship standard.²⁴⁸

Shenzhen

The *Shenzhen Regulation on Legal Aid*, issued in 2008, established a system with several innovations.²⁴⁹ The only criterion for receiving legal aid services is the financial hardship standard. Legal aid is not limited to certain types of cases and an applicant need not have local *hukou*, which is very significant given that 10 million of the city's 13 million residents are not native to Shenzhen.²⁵⁰ However, the income cutoff has generally been set very low, making it difficult for any working people to qualify. For instance, as of 2013, only families with an average monthly income under 1,000 RMB per person qualify for legal aid—the same level it had been at since 2006.²⁵¹ There are reports that the standard has since been raised to an average monthly income of RMB 2,030 per family member, which is equivalent to the local minimum wage.²⁵² Nonetheless, even when an applicant meets this threshold, obtaining the necessary documentation is sometimes difficult.²⁵³

The Shenzhen government recognized that there was still a significant group of people who earned more than the financial hardship cutoff but could not pay the RMB 3,000 or 5,000 to

retain a lawyer. Accordingly, the *Shenzhen Regulation* also created a “supplementary legal aid” (辅助性法律援助) system. Specifically, the eligibility requirements are: (1) the family's per capita income is less than the average monthly employee wage, (2) the case concerns one of several enumerated categories, and (3) the dispute involves at least RMB 30,000.²⁵⁴ If a case for supplementary legal aid is accepted, the individual is to pay RMB 600 at the outset of the representation; if the person recovers money, he is to pay 8% of the recovery to the legal aid organization, or 5% if the case is resolved through a settlement.²⁵⁵ However, while this system of discounted legal services presents a novel solution to filling the representation gap, both Shenzhen lawyers and officials report that the system does not really function in practice. Some lawyers speculate that this may be due to legal aid officials not understanding the system, workers being suspicious of the system and thus unwilling to pay a fee, or workers simply being unable to afford the fee.²⁵⁶ But legal aid officials suggest the reason is that most people seeking legal aid are actually able to obtain a certificate stating that they meet the financial hardship threshold to receive free legal aid.

Shenzhen's legal aid system, according to official statistics, has expanded quickly. Shenzhen handled 17,000 civil legal aid matters in 2013, over 18,000 in 2014, and 26,000 in 2015.²⁵⁷ (In comparing these statistics to those in Beijing or Shanghai, it must be noted that only Shenzhen counts matters handled through the “people's mediation” system administered by the local justice bureaus as civil legal aid cases.) Funding for legal aid has grown by over 41% from 2012 (RMB 7.2 million) to 2013 (RMB 10.2 million). Lawyers who provide legal aid receive a stipend of RMB 3,000 for a single case, which both lawyers and the government recognize is quite low for Shenzhen. The government also arranges for lawyers to staff legal aid workstations and provide legal consultations, but only pays RMB 100 for an eight-hour shift.²⁵⁸

Shenzhen has strived to make legal aid more accessible in labor cases, particularly for migrant workers. Legal aid officials state that the financial hardship requirement is waived for anyone with a non-Shenzhen *hukou* (migrant workers) applying for legal aid in an unpaid wage or work injury case. And, pursuant to the 2016 amendments to the *Guangdong Regulation on Legal Aid*, the financial hardship requirement should be waived for any person, regardless of *hukou*, with such claims.²⁵⁹ The government has also tried to raise migrant workers' awareness of legal aid by distributing 50,000 handbooks about this government service and establishing legal aid workstations inside arbitration tribunals and courts.²⁶⁰

²⁴³ Interview with Nanjing legal aid official, *supra* note 188.

²⁴⁴ *Public Report*, *supra* note 242.

²⁴⁵ *Kunshan Raises Legal Aid Stipend Standard* (昆山大幅提高法律援助补贴标准), KUNSHAN LEGAL AID NET, June 9, 2013.

²⁴⁶ E-mail from Kunshan NGO director to author (Aug. 25, 2015) (on file with author).

²⁴⁷ *Suzhou Legal Aid Center Handles 1215 Labor Rights Protection Cases* (苏州法律援助中心办理劳动维权案件1215件), XINHUA NET, June 10, 2015.

²⁴⁸ *Suzhou Expands Legal Aid Funding Scope* (苏州市扩大法律援助基金资助范围), PROVINCIAL JUSTICE BUREAU WEBSITE, July 9, 2015.

²⁴⁹ *Shenzhen Regulation on Legal Aid* (深圳市法律援助条例) (promulgated by Standing Comm. Shenzhen People's Cong., 2008).

²⁵⁰ *Id.* at Art. 12.

²⁵¹ *Shenzhen Legal Aid Report*, 8, 17 (2014) (on file with author). The source is a non-public report on the delivery of legal aid in Shenzhen. The name of the author and title of the report are purposefully withheld.

²⁵² See “Legal Aid Applications” (申请法律援助), NANSHAN GOVERNMENT ONLINE (last accessed July 19, 2016) (listing procedures for processing legal aid applications). However, some legal aid officials still believe that the standard was RMB 1,000.

²⁵³ The *Shenzhen Regulation*, *supra* note 249, lists four types of documents that can be used to establish an applicant's economic status, most of which are provided either by a government bureau or the applicant's employer, and may thus be hard to obtain (Art. 24). Specifically, the *Regulation* permits the use of: (1) a certificate issued by the local civil affairs bureau that the individual qualifies for minimum subsistence payments; (2) an income certificate from the applicant's employer; (3) an economic status certificate issued by a residents' committee or villagers' community; or (4) another certificate stipulated by law or regulation (Art. 24).

²⁵⁴ *Id.* at Arts. 3, 45–46 (under Article 46, the categories of eligible cases include compensation for work injuries, demands for social insurance, and labor remuneration cases).

²⁵⁵ *Id.* at Arts. 48–49. This practice appears to be in tension potentially with the general restrictions on contingency fee arrangements and on legal aid offices taking money.

²⁵⁶ *Shenzhen Legal Aid Report*, *supra* note 251 at 15–16.

²⁵⁷ Shenzhen Municipal Justice Bureau Legal Aid Department, *Investigative Report on Construction of the Legal Aid System in Shenzhen* (深圳市关于健全法律援助制度的调研报告) (no date) (unpublished report, on file with author) (statistics for 2011, 2012, and 2013); *All 641 Neighborhoods in Shenzhen have a Legal Consultant* (深圳641个社区全有法律顾问), SOUTHERN DAILY, Aug. 26, 2015 (statistics for 2014); *Shenzhen Legal Aid Work Summary for 2015* (2015年深圳法律援助工作总结) (no date) (unpublished report, on file with author) (statistics for 2015).

²⁵⁸ *Investigative Report on Legal Aid in Shenzhen*, *supra* note 257.

²⁵⁹ *Shenzhen Regulation*, *supra* note 249 at Art. 14; *Guangdong Regulation on Legal Aid*, *supra* note 189 at Art. 21(10).

²⁶⁰ *Shenzhen Legal Aid Work Summary for 2015*, *supra* note 257.

Figure 7. Legal Aid Eligibility and Lawyer Stipends by City

	Beijing	Shanghai	Shenzhen
General financial hardship standard (average monthly income per family member)	Below RMB 930	Below RMB 1,588	Below RMB 2,030
Financial hardship standard for migrant workers with wage arrears or work injury claims	Exempt	Exempt	Exempt
Other employment claims for which legal aid available	None	Any “dispute stemming from employment”	All
Lawyer stipend	RMB 2,000	Varies by district	RMB 3,000

The precise number of civil legal aid cases involving labor disputes is not available, but reports suggest that they constitute a large portion of the cases in Shenzhen. Interviews with 21 legal aid workers in six urban districts revealed that most of the cases they handled were labor disputes, such as claims for unpaid wages, work injury compensation, or involving labor contracts.²⁶¹ Migrant workers are also reported to be the biggest recipients of legal aid in Shenzhen. In the two districts of Bao’an and Longgang, which account for 14,047 (66%) of all the legal aid cases in Shenzhen, virtually all legal aid recipients are migrant workers. Even in other counties, migrant workers can account for 60–70% of legal aid cases.²⁶²

C. Shortcomings of the Legal Aid System

While many migrant and other workers receive assistance with their labor claims through the legal aid system, there are many more who do not for a variety of reasons. First, migrant workers may simply not know what legal aid is, let alone that they are eligible for this service despite lacking local *hukou*. For instance, a survey conducted of 163 migrant workers in Nanjing revealed that 38% had either never heard of “legal aid” or were unclear what it is, and 85% did not know where to go to apply for legal aid.²⁶³ Similarly, a 2008 survey of 10,000 citizens by the State Statistical Bureau found that over 40% of migrant worker respondents had not heard of legal aid.²⁶⁴ Second, many workers, particularly migrant workers, are skeptical of any government-run legal aid program, believing that the government will be biased in favor of the employer. Third, legal aid staff may be unfamiliar with the eligibility rules and turn down people who actually qualify. For instance, an NGO report on legal aid found that some legal aid officials still (wrongly) assume that someone must have Shenzhen *hukou* to receive legal aid and therefore turn away migrant workers.²⁶⁵ Fourth, a worker may be turned away due to the nature of his case. In some localities, if the worker does

not have an unpaid wage claim or work injury compensation claim, or does not have a labor relationship with an employer, he may fall outside the scope of legal aid. Even in Shenzhen, where there is no limitation on the type of case that may qualify for legal aid, some legal aid staff still mistakenly believe that the case must fall into the categories set forth in the national *Regulation*.²⁶⁶ Fifth, certain workers may be ineligible because their economic earnings are too high, they have an urban *hukou* from another city, or they are unable to obtain documentation of their eligibility.

In other instances, even workers who are eligible for legal aid may be denied assistance. Legal aid officials often turn away individuals who do not have adequate evidence and a strong legal case, preferring instead to authorize cases that will have successful outcomes.²⁶⁷ As evidence of this fact, observers note that official statistics for 2012 report that 88.7% of civil legal aid cases were either won or settled.²⁶⁸ Legal aid officials may also be reluctant to get involved in collective or other potentially sensitive disputes.²⁶⁹

Legal aid recipients and worker advocates also complain about the quality of the representation, particularly that provided by commercial lawyers, who are said to lack motivation or competence, or be too focused on settling cases as soon as possible.²⁷⁰ Indeed, even lawyers themselves have acknowledged problems with the system, “comment[ing] privately that many lawyers seek to avoid legal aid work, that lawyers often do not take such work seriously, and that law firms often assign it to young or retired lawyers.”²⁷¹ In fact, in a study about legal services in a city in western China, judges rated the performance of full-time legal aid lawyers as superior to commercial lawyers doing legal aid cases.²⁷²

²⁶⁶ *Id.* at 15.

²⁶⁷ See Huang Dongdong, *The Quality of Legal Aid Cases: Issues, Constraints and Responses—Based on a Survey of C City* (法律援助案件质量: 问题、制约及其应对—以C市的调研为基础), 4 LAW AND BUS. RESEARCH (法商研究), 54–62 (2015) (noting the development of a saying in Chinese that means “legal aid will only be provided when the case can be won” (“能胜诉才提供援助”)).

²⁶⁸ *Id.* (quoting 2012 statistics for civil legal aid cases showing that 58.4% of cases were won, 4.9% were lost, 30.3% were mediated, and 5.8% were withdrawn); see also 2012 LEGAL AID Y.B. CHINA 215 (official statistics showing a nationwide win rate in civil legal aid cases of 92%).

²⁶⁹ See, e.g., *Guangdong Regulation on Legal Aid*, *supra* note 189 at Art. 52 (requiring those providing legal aid to report to the government legal aid office any case involving a collective incident (群体性事件) or that may have a large social impact (有重大社会影响)).

²⁷⁰ Sida Liu tells the story of a “lawyers into communities” campaign sponsored by the MOJ that sought to have commercial lawyers provide legal advice to ordinary citizens. Due to the inability of these groups to communicate effectively, the program was deemed a complete failure and cancelled. Sida Liu, *Lawyers, State Officials and Significant Others*, 206 CHINA QUARTERLY 276–93, 289 (June 2011).

²⁷¹ Liebman, *supra* note 163 at 263.

²⁷² Huang Dongdong, *supra* note 267.

²⁶¹ *Shenzhen Legal Aid Report*, *supra* note 251 at 13.

²⁶² *Id.* at 11, 13.

²⁶³ Wang Chen, *Investigation on Rights Protection for Migrant Workers in Nanjing* (南京市农民工维权状况调查), May 22, 2013. The survey also revealed that only 26% of workers knew that legal aid provided individuals with a legal representative; 35% simply did not know what legal aid does; 73% did not know who could receive legal aid; and 76% did not know the legal aid hotline number. See also Wang Minxia, *supra* note 156 (noting that many migrant workers in Shanghai are unaware of the legal aid system).

²⁶⁴ 2008 LEGAL AID Y.B. CHINA 226, 228.

²⁶⁵ *Shenzhen Legal Aid Report*, *supra* note 251 at 14.

Lawyers often try to spend as little time and money on legal aid cases as possible without getting into trouble with the justice bureau. Firms will also assign their youngest and least experienced attorneys to these matters.

But these full-time legal aid attorneys are the subject of criticism too: Tong Lihua, a licensed lawyer and the founder of several legal aid NGOs, commented that “the level of their professionalism is also much lower than market-oriented lawyers.”²⁷³ This seemingly widespread criticism raises questions about the official statistics that report very high satisfaction rates among legal aid recipients.²⁷⁴

Allegations about the poor quality of representation are not surprising given lawyers’ motivations and incentives for performing legal aid work. Most law firms and lawyers only do legal aid because the government requires it, not out of a commitment to public service.²⁷⁵ Furthermore, in most localities, law firms or lawyers still receive a fixed stipend for doing a legal aid case, regardless of the result achieved or time spent on the case. Some attorneys even lose money on the case due to out-of-pocket expenses. Therefore, lawyers often try to spend as little time and money on the case as they can without getting into trouble with the justice bureau.²⁷⁶ Legal aid officials note that law firms also regularly assign their young and inexperienced lawyers to handle the legal aid cases since their time is the least valuable, or sometimes even assign the work to their assistants.²⁷⁷ Quality issues also arise from the fact that many of the lawyers performing legal aid may not specialize in labor law or have any experience in the field. Thus, even where young lawyers might be content with the compensation for a legal aid case, their lack of experience can create problems.²⁷⁸

Supervision over legal aid cases is also inadequate. It is inherently difficult to effectively monitor or gauge the quality of legal representation. While regulations exist stating that oversight should occur, there are few details as to how it should be done or what the criteria should be.²⁷⁹ To the extent that there is any supervision, the justice bureau in most localities only performs a paper-based evaluation of the representation quality.

This lack of lawyer motivation and government supervision can manifest in a variety of ways. Workers often feel that not

enough time is spent to understand their side of the story. Similarly, workers may be discouraged from pursuing, or the lawyer may simply refuse to pursue, those claims that are harder to prove, such as for overtime or unpaid social insurance contributions.²⁸⁰ Lawyers may pressure workers to settle, in order both to reduce the time and effort they must spend on the case and to maintain their own good relationships with mediators, arbitrators, judges, or other officials. There have also been reports of legal aid lawyers trying to get money from the worker, for instance, by requiring them to reimburse travel costs, meals, or other expenses.²⁸¹ NGO staffers sometimes complain that the initial mistakes made by a legal aid lawyer can create obstacles for when the worker later seeks out better-quality legal representation.²⁸²

D. Recent Reforms

In light of the aforementioned critiques of legal aid, there has been much attention focused on the need to improve and expand the system. In April 2014, Xi Jinping called for improving the quality of legal aid, expanding coverage, strengthening supervision, and making the system more user-friendly for citizens.²⁸³ More recently, in June 2015, the general offices of the State Council and Central Committee of the Chinese Communist Party (CCP) issued an *Opinion on Perfecting the Legal Aid System*.²⁸⁴ The document instructs that key demographic groups, including migrant workers and laid-off workers, are to be covered by legal aid. The *Opinion* also reiterates that the financial hardship test should not be applied to migrant workers with claims for labor remuneration or work injury compensation. It further calls for addressing many of the problems with the legal aid system outlined above, such as improving the way cases are assigned, the quality of representation, the supervision and evaluation of services provided, offering more reasonable stipends, and making it easier for legal aid recipients to complain about poor performance.²⁸⁵ This has spurred some local governments to take action. By February 2016, Guangdong Province had amended its legal aid regulation to adopt several of these reforms, including permitting *any* type of case to qualify for legal aid, eliminating the need for *any* worker (not just migrants) with a claim for unpaid wages or work injury compensation to demonstrate financial hardship, and permitting arbitration tribunals or courts to order that the litigation costs incurred by legal aid recipients be paid by the other party.²⁸⁶ It has also been reported that there are efforts underway to draft a *Legal Aid Law*.²⁸⁷

273 Yin Pumin, *Aid Matters*, *supra* note 184.

274 See Shanghai Pudong: Lower Legal Aid Barriers for Disadvantaged Masses (上海市浦东新区降低法律援助门槛普惠困难群众), LEGAL DAILY, Sept. 1, 2015 (reporting a 95% satisfaction rate with legal aid services in the Pudong District of Shanghai, but without providing any details on how this figure was calculated).

275 Fu Hualing, *Access to Justice in China*, *supra* note 186 at 171–72 (arguing that lawyers are technically obligated to provide legal aid required by the government pursuant to Article 42 of the *Lawyers Law*, but that firms actually engage in legal aid primarily to maintain good government relations or for public relations purposes).

276 Huang Dongdong, *supra* note 267.

277 *Investigative Report on Construction of the Legal Aid System in Jiangsu Province's Nanjing City* (江苏省南京市关于健全法律援助制度的调研报告), in COLLECTION OF RESEARCH REPORTS, *supra* note 208 at 336 (young and inexperienced lawyers); *Investigative Report on Construction of the Legal Aid System in Guangdong Province* (广东省关于健全法律援助制度的调研报告), in COLLECTION OF RESEARCH REPORTS, *supra* note 208 at 186–87 (cases assigned to assistants).

278 See Fu Hualing, *Access to Justice in China*, *supra* note 186 at 172 (young lawyers sometimes compete for legal aid cases where a stipend is available).

279 See *Regulation on the Procedures for Handling Legal Aid Cases* (办理法律援助案件程序规定) (promulgated by MOJ, 2012), Art. 6; *Regulation on Legal Aid*, *supra* note 164 at Art. 4.

280 Interview with Shenzhen labor activist, in Shenzhen, China (Summer 2014).

281 Interview with Guangzhou labor activist, in Beijing, China (June 2015).

282 *Id.*

283 See MOJ Issues Notice to Carefully Study the Spirit of General Secretary Xi Jinping's Important Guidance (司法部发出通知要求认真学习贯彻落实习近平总书记重要指示精神), May 12, 2014.

284 *Opinion on Perfecting the Legal Aid System* (关于完善法律援助制度的意见) (promulgated by St. Council & CCP Central Comm., 2015).

285 *Id.*

286 *Guangdong Regulation*, *supra* note 189 at Arts. 11, 21(10), 33, 49.

287 *China Plans Legislation on Legal Aid*, XINHUA, July 23, 2015.

The MOJ has also issued its own policy documents on better serving migrant workers, making specific reference to improving legal aid work.²⁸⁸ Many of the instructions to local justice bureaus focus on providing more and better quality legal services, including: building a team of public interest lawyers with knowledge of labor issues, purchasing legal services from social organizations (社会组织), and encouraging law firms to provide free or discounted legal services to those who do not qualify for legal aid. At the same time, the documents call for making legal aid more accessible by relaxing the financial hardship test, making consultations more readily available, and streamlining the approval process in some cases, including by beginning to provide legal aid before screening of the applicant is totally completed. The documents also seek to increase and improve mediation services to provide workers with a fast, low-cost option for resolving disputes.

What these policies lack, however, is sufficient detail on how these goals are to be achieved. This work is largely left to local governments, whose efforts will determine the ultimate success in reforming the legal aid system. But some interesting local experiments are already underway. In terms of making legal aid more accessible, for instance, the “green path” intake system operating in several localities allows a migrant worker’s case to be accepted and assigned to an outside lawyer in the same day.²⁸⁹ To address the quality issue, in Qingdao, where labor disputes account for over half of legal aid cases, a district justice bureau partnered with a law firm to set up a specialized team with expertise in labor law.²⁹⁰ Some localities, including districts in Beijing, have introduced an element of competition amongst lawyers by adopting a “selection of aid system” (点援制), which allows the party to choose his or her lawyer instead of simply being assigned one.²⁹¹ Another approach to improving quality has been to strengthen the monitoring and evaluation of legal aid providers. For instance, legal aid offices in Shanxi are directed to set up quality evaluation organizations consisting of legal aid staff, hired experts and scholars, practicing lawyers, judges, prosecutors, and arbitrators to regularly review legal aid cases.²⁹² After years of pilots, it was also reported that in 2015 MOJ developed criteria to be used in a peer review system for ensuring quality in civil legal aid cases.²⁹³ Shenzhen has begun to experiment with such a system. The impact of these efforts may be worthy of further study.

3. Legal Aid through the Trade Union

The 2003 State Council *Regulation on Legal Aid*, in Article 8, encourages “mass organizations” (社会团体), such as the trade union,

to also provide legal aid. And, in 2008, the ACFTU issued the *Trade Union Legal Aid Measures*. This document instructs unions to offer free legal services to employees, trade union workers, and trade union entities as a “necessary supplement” to the government’s legal aid program.²⁹⁴ Workers are eligible for legal aid if they either (1) meet the local financial hardship standard, or (2) do not meet that standard but their legitimate rights and interests have been “seriously infringed upon” (严重侵害).²⁹⁵ Migrant workers with claims for labor remuneration or work injury compensation need not demonstrate financial hardship, however.²⁹⁶ The *Measures* stipulates that local unions may provide legal aid by joining with the justice bureau to establish worker legal aid workstations or by contracting with law firms or other agencies.²⁹⁷ The ACFTU reported that between 2011 and 2015 it had provided free legal representation to workers in arbitration or litigation in 250,000 cases and participated in the mediation of 1.5 million labor disputes.²⁹⁸

Local trade unions have engaged in both establishing workstations and contracting with law firms, in some cases long before the 2008 *Measures*. Generally, the workstations are funded by the trade union and operate independently of the justice bureau.²⁹⁹ By the end of 2014, trade unions nationwide had established 14,000 legal aid service centers that handled 62,000 labor dispute cases.³⁰⁰ The trade union’s legal aid centers seem particularly focused on trying to resolve cases through mediation, perhaps even more so than those operated by the justice bureaus. In addition to mediation and representation services, local trade unions also provide legal advice to workers through hotlines, web forums, and in person at the legal aid centers.³⁰¹

The number of actual cases handled by the trade union legal aid offices seems quite low in light of the reported number of personnel, however. The official statistics for 2012, as shown in Figure 8, state that over 36,000 staff, including 3,537 credentialed lawyers and over 55,000 volunteers, only handled 66,000 cases. This means less than two cases per staff member and less than 11 labor dispute cases per lawyer each year. It also raises questions about what this large number of legal aid volunteers is doing.

The Beijing trade union has lawyers who staff various legal aid workstations, provide legal advice to workers, and try to mediate disputes.³⁰² Private lawyers also serve as mediators in labor disputes and sometimes receive a small stipend when the case is successfully resolved. Private lawyers or NGOs, pursuant

²⁹⁴ *Trade Union Legal Aid Measures* (工会法律援助办法) (promulgated by ACFTU, 2008), Art. 2.

²⁹⁵ *Id.* at Art. 10.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at Art. 6.

²⁹⁸ *Fulfilling the Commitment of Legal Aid to Every Worker* (履行好职工法律援助的每一项承诺), WORKERS’ DAILY, Oct. 17, 2015.

²⁹⁹ *Trade Union Legal Aid Measures*, *supra* note 294 at Art. 22 (“...the local trade union at or above the county level shall incorporate the funds for the legal aid work of the trade union into the budget of the trade union...”); Dalton, Introduction, *supra* note 293 at 20 (noting that the justice bureau may sometimes provide oversight of trade union legal aid).

³⁰⁰ *Trade Unions Bringing Legal Aid and Rights Protection Services to Workers*, ACFTU, June 3, 2015. There were actually fewer cases in 2015 than in 2012, when the trade union accepted 67,000 legal aid cases and provided consultation, document drafting, and other legal services for workers in 129,000 instances. ACFTU Research Office, *2012 Public Report of Statistics on Developments in Trade Union Organization and Work* (2012年工会组织和工会工作发展状况统计公报), Mar. 15, 2013.

³⁰¹ *Trade Unions Bringing Legal Aid*, *supra* note 300.

³⁰² See *Beijing Trade Union Resolves Collective Labour Dispute in 20 Days*, ACFTU, Sept. 10, 2014 (describing mediation of a case involving 27 workers).

²⁸⁸ E.g., *Notice on Performing Well the MOJ System’s 2016 Work for Migrant Workers* (司法部关于做好2016年司法行政系统农民工工作的通知) (promulgated by MOJ, 2016); *Opinion on Performing Well the Work of Servicing Migrant Workers* (司法部关于切实做好为农民工服务工作的意见) (promulgated by MOJ, 2015); *Notice on Performing Well Wage Recovery, Rights Protection, and Other Work to Serve Migrant Workers* (司法部办公厅关于切实做好农民工讨薪、维权等服务工作的通知) (promulgated by MOJ, 2014).

²⁸⁹ Xie Ruiting, *Wuhai Continues to Strengthen its Legal Aid Work* (乌海市继续加强农民工法律援助工作), NEIMENGGU CHEN BAO, Aug. 10, 2015.

²⁹⁰ *Shandong’s Qingdao City Laoshan District sets up Labor Dispute Legal Aid Specialized Service Team* (山东青岛市崂山区成立劳动争议法律援助专业化服务队伍分享), QINGDAO CAIJING RIBAO, Sept. 15, 2015.

²⁹¹ *Legal Aid “Selection of Aid System” Fully Promoted* (法律援助“点援制”全面推行), BEIJING DAILY, Feb. 11, 2014; Huang Dongdong, *supra* note 267 (noting calls for introducing competition into the legal aid system).

²⁹² Bai Ping, *supra* note 223.

²⁹³ *Id.* (discussing the pilots in Hangzhou and Nanjing); Paul Dalton, A Brief Introduction to the Chinese Legal Aid System, Sept. 2015 (unpublished report, on file with author).

Figure 8. Trade Union Legal Aid Statistics (2012)

	Staff in Legal Aid Offices	Staff with Lawyer Credential	Volunteers	Total Cases Accepted	Labor Dispute Cases Accepted	Labor Dispute Cases per Staff with Lawyer Credential
National	36,146	3,537	55,803	66,676	38,257	10.8
Beijing	977	79	1,035	6,331	6,162	78.0
Guangdong	2,757	237	6,576	2,246	1,340	5.6
Jiangsu	4,584	326	8,331	2,792	2,021	6.1
Shanghai	1,440	101	1,344	3,134	2,548	25.2

Source: 2013 Trade Union Yearbook, pp. 151–52.

to contracts with the trade union, generally handle any litigation work after the union has screened the case. A cooperation program with Zhicheng was the first example of the union purchasing the legal services of lawyers.³⁰³ This program has since been expanded to include private law firms and the union pays RMB 2,000 per procedure. The ACFTU reports that there are also a number of lawyers who volunteer to provide legal aid. In one such case, the lawyers helped 500 migrant workers in Beijing to obtain over RMB 50 million in compensation for an occupational disease claim.³⁰⁴

In Shanghai, the trade union established its own legal aid centers in the early 2000's. In 2014, the union legal aid program helped prepare 205 legal documents, conduct 3,367 negotiation and mediation cases, and handle 272 arbitration cases and 54 litigation cases.³⁰⁵ Like Beijing, Shanghai is reported to have formed a team of 100 volunteer lawyers that will provide legal advice and represent workers in mediation, arbitration and litigation.³⁰⁶ The Shanghai trade union is also increasing the number of attorneys that it has on staff. It was reported in 2015 that the Shanghai union had 19 lawyers, but was looking to add 10 more so as to ensure that each district had at least one lawyer.³⁰⁷ The union's goal is to have a lawyer in each street office and township by the end of 2016.³⁰⁸ In purchasing services from law firms, a practice which it has been engaged in since at least 2006, the trade union has set fairly detailed standards for the stipends to be paid. A 2012 notice advises that attorneys are to be paid RMB 1,500 for a standard procedure, RMB 1,800 if more than three workers are involved, and RMB 2,250 for a particularly complicated case. If the case is resolved through mediation, the attorney earns either RMB 300 or, if it involves over three people, RMB 500; if the case is not resolved, the attorney is only paid RMB 100. The relevant standards also call for providing RMB 200–300 for the preparation of legal documents and RMB 30–50 per hour for a legal consultation.³⁰⁹

303 Trade Unions Bringing Legal Aid, *supra* note 300.

304 *Id.*

305 Wang Minxia, *supra* note 156.

306 Decision on Establishing "Shanghai Federation of Trade Unions Worker Legal Aid Rights Protection Volunteer Service Team" (关于成立"上海工会职工法律援助维权志愿服务团"的决定) (promulgated by Shanghai Municipal Federation of Trade Unions, 2012).

307 Shanghai Trade Unions Empowering Government Lawyers as First Line of Rights Defense (上海工会助力公职律师活跃维权一线), ACFTU, May 18, 2015.

308 *Id.*

309 Guidance Standards on Stipends for Worker Legal Aid Cases (本市职工法律援助办案补贴指导标准) (promulgated by Shanghai Municipal Federation of Trade Unions, 2012).

Trade unions in all of the three Jiangsu cities examined—Nanjing, Suzhou and Kunshan—are engaged in providing legal aid to workers, although to different degrees. From 2010 to 2014, trade unions throughout the province reportedly handled 219,000 labor disputes, including providing advice or preparing legal documents in 5,900 matters, resolving 189,000 disputes through mediation, and providing legal representation in arbitration or litigation in 9,500 cases.³¹⁰ The stipends for private lawyers who perform legal aid cases are less than those provided to Shanghai lawyers. For cases handled in the city where the lawyer lives, the range is RMB 300–1,200 per case; for cases outside their home city, it is RMB 600–1,500; and for cases outside the province, RMB 800–2,000. Lawyers are also provided RMB 50–100 per day to staff a legal aid center and provide advice.³¹¹ However, these levels seem to function as minimums, as the Nanjing trade union reportedly pays lawyers RMB 3,000 for a civil case—twice what the justice bureau pays.

As of 2011, the Nanjing trade union had established 114 legal aid centers that were supported by 162 lawyers and processed about 1,900 cases per year, the vast majority of which (over 1,500) were mediated.³¹² As for representation in litigation, the Nanjing union reported handling 394 such cases in 2012, recovering RMB 7.5 million for workers.³¹³ The legal aid centers also conduct worker trainings, organize study sessions, and publicize information to workers.³¹⁴ The trade union in Kunshan, despite the large number of migrant workers there, is reported to be far less active than the one in Nanjing. Little public information exists about the activities of the Kunshan union. However, in 2012, the union announced plans to establish a legal team with five lawyers, two of whom would specialize in receiving workers who call or visit the legal aid center.³¹⁵

310 Publication of Ten Important Trade Union Legal Aid Cases in the Province (我省发布工会法律援助十大典型案例), ZHONG GONG WEN HUA, Jan. 5, 2015.

311 Jiangsu Province Federation of Trade Unions Legal Aid Funding Guarantee and Implementing Measures (江苏省工会法律援助经费保障和使用办法) (promulgated by Jiangsu Provincial Federation of Trade Unions, 2014), Art. 5.

312 All Communities Throughout the City Build Union Legal Aid Stations (全市所有园区都将建立工会法律援助站), NANJING DAILY, Mar. 14, 2012.

313 *Id.*

314 Chung Yousun & Chung Sunwook, *Societal Push for Labour Protection: The Emerging Role of Labour Watchdogs in Nanjing*, 14 CHINA: AN INTERNATIONAL JOURNAL, no. 2, 71 (May 2016).

315 Kunshan City, Jiangsu Province: Contribute to Achieving Decent Work, Allow Millions of Workers to Avoid a Troubled Fate (江苏省昆山市: 推动实现体面劳动, 让百万职工岁末年初少了去留烦恼), WORKERS' DAILY, June 1, 2012.

The trade union in Shenzhen has built up a sizeable program of paying law firms to provide legal aid to workers. Attorneys are paid a stipend of RMB 3,000 per case and more for a group case.³¹⁶ In 2008, the union had a budget of RMB 3 million and contracted with seven firms to provide legal aid in approximately 400 labor disputes. The program continued to grow, and from 2008 to May 2011 the union spent over RMB 500 million and funded 2,589 legal aid cases.³¹⁷ Some reports state that in 2012 the trade union handled 2,038 legal aid cases involving 7,697 workers; however, other sources suggest the number of cases is about half of that.³¹⁸ According to a former Shenzhen union official, the trade union now contracts with roughly 20 law firms to perform this legal aid work.³¹⁹

The issues and criticisms faced by the trade union legal aid system largely mirror those of the justice bureau legal aid system: (1) the lack of awareness of many workers that this service exists or that they, even as migrants or non-union members, might be eligible; (2) the ineligibility of certain workers for these services; (3) a lack of trust of government-sponsored legal aid; (4) the preference for easy cases over challenging ones; (5) lawyers pressuring their clients to mediate; (6) lawyers seeking to spend as little time as possible on the case; (7) the youngest, least qualified lawyers often doing the representation; and (8) the lawyers lacking specific experience doing labor cases. Like the justice bureaus, local trade unions are making efforts to respond to these problems. For instance, some trade unions have sought to partner with NGOs, which are more trusted by workers, to perform the outreach and intake functions. At least one legal aid center in Beijing has adopted new measures to monitor the quality of the services provided by lawyers, including asking workers to report back to the center after the case is concluded and observing the lawyers' work.³²⁰

4. Pro Bono Legal Services

As discussed above, the obligation for lawyers and law firms to perform legal aid is generally vague or unenforced, except when the justice bureau specifically requests a law firm to handle a case. This subsection examines "pro bono legal services," meaning the voluntary provision of legal services outside of that system and without receiving any fee or stipend. On the whole, such work is by no means widespread. The structure of Chinese law firms, in which most lawyers do not receive a pure salary but are paid based on the cases they bring in to the firm, provides little time

and few rewards for pro bono work.³²¹ Indeed, many lawyers already try to evade legal aid work, which includes at least some financial stipend.

Nonetheless, in recent years, at least some Chinese lawyers have shown a growing interest in pro bono work. A few of the larger firms have established pro bono programs or committees, although their clients seem to primarily be large non-profit organizations operating in China.³²² There are also a few examples of "clearinghouses" that match lawyers looking to do pro bono work with domestic NGOs that need assistance. For instance, Zhicheng has such a program in Beijing, which had 24 law firms and 18 NGOs participating as of May 2014.³²³ Similarly, the Shanghai Legal Service Center for NGOs (ForNGO) (上海复恩社会组织法律服务中心) was created in 2012 to provide legal training and legal services to NGOs.³²⁴ In Suzhou, the BLH Law Service Center (苏州百老惠法律服务中心) provides legal consultations and representation in a variety of areas, including assisting migrant workers with unpaid wages or work injury matters.³²⁵

In Shenzhen, the NGO Wider functions as a legal aid office, policy advocacy organization, and pro bono clearinghouse to help private lawyers represent individual clients, including workers.³²⁶ The group reports having a network of over 400 volunteer lawyers and, in 2015, 289 lawyers from 104 law firms contributed nearly 5,000 volunteer hours (up from 1,500 in 2014) and handled 112 cases.³²⁷ But Wider claims to be transforming from simply a platform to link clients with pro bono attorneys into a more professional public interest organization that designs and implements its own programs. The size of Wider's staff has also grown in recent years, reaching eight full-time employees by the end of 2015.

Wider has focused on the issue of occupational disease for several years, both litigating individual cases and doing policy work. As described above, very few private lawyers are willing to take such cases, let alone decide to specialize in this area. In fact, Wider's staff reported that it was initially difficult even to find volunteer lawyers to take occupational disease cases, as they prefer domestic violence or other public interest cases. Nonetheless, in the two years since starting this work in June 2014, Wider has arranged over 500 legal consultations and free representation in 57 occupational disease cases. The group also plans to build an online platform to enhance its ability to provide legal advice to workers. In terms of policy, Wider has been advocating for the Shenzhen courts to adopt the legal interpretation of Guangzhou and Huizhou courts, which allows occupational disease victims to

³¹⁶ *Ten Percent of Shenzhen Federation of Trade Unions Budget to Buy Legal Services* (深圳总工会一成预算购买维权服务), 21 CENTURY ECON. REPORT, Apr. 18, 2008.

³¹⁷ *Shenzhen Federation of Trade Unions Launches "Peaceful Action"* (深圳市总工会启动"平安行动"), RENMIN WANG, July 29, 2011.

³¹⁸ Luo Li, Chairman, Shenzhen Municipal Trade Union, *Work Report of the Fifth Committee of the Tenth Plenary Meeting of the Shenzhen Federation of Trade Unions*, (在深圳市总工会第五届委员会第十次全体(扩大)会议上的工作报告), Mar. 7, 2013 (reporting 2,038 legal aid cases performed in 2012); but see Tang Tingfen, ed., *SHENZHEN LABOR RELATIONS DEVELOPMENT REPORT* (2013) (深圳劳动关系发展报告, 2013) 177 (reporting that the trade union legal aid program accepted 1,812 cases in 2012); E-mail from former Shenzhen trade union official to author (Feb. 26, 2016, Feb. 28, 2016) (on file with author) (stating that just over 1,000 cases were accepted in 2012 and that the larger reported numbers may include legal aid cases performed by other entities).

³¹⁹ Interview with former Shenzhen trade union official, in Shenzhen, China (Dec. 22, 2015).

³²⁰ *Upgraded Supervision of Beijing Legal Aid* (北京市总法律援助监管升级), WORKERS' DAILY, Nov. 6, 2014.

³²¹ Michelson, *supra* note 152 at 14 (noting that lawyers in Chinese firms "are under enormous economic pressure and receive scant institutional support to protect the rights of the most vulnerable members of society," which makes engaging in pro bono very difficult). See also Jin Dong, *Do Institutional Variations Impact Chinese Lawyers' Attitudes on Pro Bono?* (unpublished manuscript, on file with author) ("In the data set [of 1,155 Shanghai lawyers working in private firms], a large number of lawyers are working in small law firms, and most of them are still so challenged by their regular work they are less likely to participate in pro bono work.").

³²² Jin Dong, *supra* note 321 ("Large firms represent large organizations, while small firms focus on individuals[.]").

³²³ My Khanh Ngo, *Pro Bono with "Chinese Characteristics": Painting the Pro Bono Landscape in Mainland China* (2014) (unpublished report, on file with author).

³²⁴ The organization's website is: <http://www.forngo.org/>.

³²⁵ The organization's website is: <http://bailaohui.szgyy.net/>.

³²⁶ The organization's website is: <http://www.probonochina.com/en/>.

³²⁷ "New Year Speech 2016," WIDER (last accessed July 19, 2016).

not only collect compensation pursuant to the defined schedule for work-related injuries but also sue the employer for additional compensation under the tort law. Wider wants to expand its policy work in this area.

Wider also launched a program in 2015 to promote collective negotiations in Shenzhen. The organization recognized the difficulty that individual workers face enforcing their rights and that “uniting together” offers the best chance to negotiate over workplace practices.³²⁸ Wider hired a long-time labor bureau official from another province to spearhead this work. At the outset, the project consisted primarily of training union officials on collective negotiations. For the next phase, Wider has established a cooperation with the Futian District and Nanshan District trade unions in which 36 volunteer lawyers will receive training and then work under the unions’ guidance to help workers negotiate collectively with their employers.³²⁹ This is an interesting pilot project, but its impact remains to be seen.

5. Barefoot Lawyers

The term “barefoot lawyers” generally refers to people who lack a license to practice law but nonetheless provide legal services, such as advising, drafting documents, negotiating settlements, and representing parties in arbitration or court. While some barefoot lawyers provide their services pro bono, many take a fee and treat this work as their profession. Their comparatively low cost, willingness to operate on a contingency fee, and superior ability to communicate with workers made barefoot lawyers very popular—particularly for labor cases, given the difficulty workers faced in retaining licensed lawyers. Many of these individuals were former workers who gained experience with the legal system through their own legal battles against employers. Barefoot lawyers were also often hired to bring administrative litigation cases against the government, which licensed lawyers are more reluctant to do, and represented plaintiffs in up to one-third of all such cases in some localities.³³⁰

The Pearl River Delta is the area best known for having a large number of barefoot lawyers handling labor cases. Around 2009, the Guangdong Provincial Party Committee of Politics and Law suggested that 500 barefoot lawyers were operating in Guangdong, while the ACFTU estimated that 10,000 such individuals were working throughout the Pearl River Delta.³³¹ One judge in a suburban Shenzhen court with a large number of labor disputes involving migrant workers estimated that at one point barefoot lawyers represented nearly half of all plaintiffs in civil cases.³³² The intermediate court in the city of Zhongshan reported that barefoot lawyers appeared in 25% of labor cases in 2013; the Chaoyang District court in Beijing reported that they were involved in 50% of cases there in 2011.³³³ In Nanjing, some estimate that when the city had 150,000 registered lawyers, there

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were 100,000 additional barefoot lawyers there.³³⁴ Of course, the accuracy of such statistics is inherently limited by the unlicensed, unregulated status of these individuals and the difficulty in defining precisely who is a barefoot lawyer.

At a time when several countries, such as the United States, are seeking to expand the role of non-lawyers in order to meet the demand for legal services, however, China’s recent legislative reforms are making it more difficult for barefoot lawyers to represent workers in arbitration or court.³³⁵ Previously, pursuant to the relevant “citizen agent” (公民代理) provisions in the *Civil Procedure Law* and *Administrative Procedure Law*, a party in China could choose any citizen to represent him in any proceeding so long as no fee was paid. However, these two laws were amended, the former in 2012 and the latter in 2014, so that barefoot lawyers could only appear in court as a legal representative in two instances: (1) when the representative is the party’s close relative, or (2) the representative has obtained a recommendation letter from either the party’s employer, the residents’ or villagers’ committee where the party lives, or a “social organization.”³³⁶ But employers will not issue such letters that encourage suits against themselves, and obtaining letters from the other quasi-governmental committees or organizations has sometimes proven difficult.

Several barefoot lawyers report that these new restrictions are making it impossible for them to continue their work. Indeed, certain arbitration tribunals and courts in Shenzhen had already been cracking down on barefoot lawyers, requiring them to produce evidence that they had not taken a fee or that they were the litigant’s relative.³³⁷ Some advocates reported being blacklisted from representing workers. Judges from Shenzhen also confirm that the new legislative amendments are being strictly enforced. In late 2014, one Shenzhen lawyer, himself a former barefoot

³²⁸ Chung & Chung, *supra* note 314.

³²⁹ See Richard Zorza & David Udell, *New Roles for Nonlawyers to Increase Access to Justice*, 41 *FORDHAM URB. L.J.* 1259 (2014) (describing efforts to use more non-lawyers in the United States).

³³⁰ *Civil Procedure Law*, *supra* note 52 at Art. 58; *Administrative Procedure Law* (中华人民共和国行政诉讼法) (promulgated by Nat’l People’s Cong., 1989) (amended 2014), Art. 31.

³³¹ In 2009, the Guangdong Provincial Committee on Politics and Law issued a notice describing these “professional citizen agents” as a threat to social stability because they exacerbate labor conflicts and disrupt social order. The notice reports that courts and other agencies were already taking steps to restrict barefoot lawyers from operating and calls upon local authorities to take further action in this regard. *Investigative Report of Guangdong Province on the Question of “Professional Citizen Legal Agents”* (issued by the Guangdong Provincial Comm. on Politics and Law of the Chinese Communist Party, Jan. 2009), translated version available through [China Labor News Translations](#).

³³² *Id.*

³³³ *Id.*

³³⁴ Aaron Halegua, *China’s Restrictions on Barefoot Lawyers could Backfire, Leading to More Unrest*, *S. CHINA MORNING POST*, Mar. 30, 2015, A13.

³³⁵ BECKER, *supra* note 147 at 158–59.

³³⁶ Interview with judge, in Shenzhen, China (Dec. 8, 2014) (noting that employers also sometimes hired barefoot lawyers to represent them in labor or other cases).

³³⁷ Tan Shuye, *Contingency Fees in Labor Disputes* (关于劳动争议案件的律师风险代理), *CHINA LAW NET* (华律网), June 11, 2015 (Zhongshan); *The Labor Dispute Market for “Professional Citizen Agents” Should be Standardized* (劳动争议“职业公民代理人”市场亟待规范), *LEGAL DAILY*, Apr. 27, 2011 (Chaoyang).

Whereas Shenzhen had over 100 barefoot lawyers focused exclusively on labor cases a few years prior, by the end of 2014, it was hard to find even one.

lawyer, stated that whereas a few years ago there were over 100 barefoot lawyers in the city handling labor cases, now it is hard to find even one.³³⁸ Interviews with individuals in Beijing and Nanjing also show that courts are making it very difficult for barefoot lawyers to operate. Furthermore, LDACs are restricting who can represent parties in labor arbitration to the same categories of individuals as in court litigation.³³⁹ While some advocates have found creative ways around the restrictions, on the whole, opportunities for such representation are decreasing. On top of these restrictions, barefoot lawyers also had to compete with increasingly available legal aid services. While some workers remained wary of a government-provided service, many others preferred representation that was entirely free.

The obvious impact of these reforms is that one less resource will be available to workers in need of legal assistance. But it is also worth noting certain qualitative differences between how barefoot lawyers and licensed lawyers operate. The former were less accountable to the bar association or government and less concerned with maintaining good relations with the arbitrators or judges. Accordingly, barefoot lawyers were generally more willing to resist mediation, bring difficult or aggressive legal claims, take sensitive cases such as collective actions, and even use extra-legal means to obtain a better result for their client.³⁴⁰ For instance, one barefoot lawyer from Shenzhen recounts the story of a worker who lacked any documentary evidence of his employment. So before bringing an overtime lawsuit, the barefoot lawyer encouraged the worker to pick a quarrel at work, which caused the police to come and prepare a report. The report then served as evidence of his employment at that workplace. Particularly as restrictions on and scrutiny of both licensed lawyers and NGOs increase, the loss of this group of advocates will exacerbate the shortage of highly motivated and aggressive legal advocates for workers.

6. Basic-Level Legal Workers

Between licensed lawyers and unlicensed barefoot lawyers are China's "basic-level legal workers" (基层法律工作者).³⁴¹ Like lawyers, these individuals are regulated by the MOJ and local justice

³³⁸ Interview with lawyer, in Shenzhen, China (Dec. 8, 2014).

³³⁹ E.g., *Zhejiang Regulation on Labor Dispute Mediation and Arbitration* (浙江省劳动人事争议调解仲裁条例) (promulgated by Standing Comm. Zhejiang People's Cong., 2015), Art. 19 (further stipulating that only lawyers and basic-level legal workers, but not barefoot lawyers, are permitted to collect fees for their representation).

³⁴⁰ While anecdotal evidence exists, the author is unaware of any empirical studies comparing outcomes achieved by barefoot lawyers and licensed lawyers or other legal services providers.

³⁴¹ See generally CHEN YI, RESEARCH ON THE SITUATION AND DEVELOPMENT OF CHINA'S BASIC-LEVEL LEGAL WORKERS (我国基层法律服务工作者现状与发展对策研究) (2015); Fu Hualing, *Away from Grass-Roots? The Irony of Rural Legal Services in China* (May 20, 2012), University of Hong Kong Faculty of Law Research Paper No. 2012/26 (discussing the history of legal service workers).

bureaus and are authorized to provide legal services including court representation. In other ways, however, they resemble barefoot lawyers. For instance, licensed lawyers complain that the basic-level legal workers lack legal knowledge and that they hold themselves out as lawyers. Yet basic-level legal workers note that, like barefoot lawyers, they charge less than licensed lawyers, have warmer attitudes, and have closer ties to local communities. Indeed, many disputants are unable to distinguish between these individuals and barefoot lawyers.³⁴² In 2000, MOJ issued several new measures regulating basic-level legal workers: the *Administrative Measures for Basic-Level Legal Service Offices* (基层法律服务所管理办法) and *Administrative Measures for Basic-Level Legal Workers* (基层法律服务工作者管理办法). Thereafter, the number of these individuals dropped from nearly 122,000 in 1999 to just 77,000 in 2006, as many chose to simply become unauthorized practitioners (barefoot lawyers) or join legal consulting firms regulated by the bureau of industry and commerce.³⁴³

Basic-level legal workers nonetheless remain an important part of China's overall legal landscape. According to official statistics, in 2013, the over 70,000 basic-level legal workers handled 837,000 litigation cases and 605,000 non-litigation matters nationwide. (That year, there were 250,000 licensed lawyers who handled 2.5 million litigation matters and nearly 1 million non-litigation matters.)³⁴⁴ These basic-level legal workers generally play a larger role in rural areas and less economically developed cities or districts.³⁴⁵

These legal workers also are playing a substantial role in the legal aid system. It is reported that basic-level legal workers performed 38.5% of all legal aid cases in 2012.³⁴⁶ Since these legal workers are prohibited from appearing in criminal cases, they are presumably handling an even larger percentage of the civil legal aid cases.³⁴⁷ Therefore, although rarely mentioned in the fieldwork for this study, basic-level legal workers are also presumably representing a significant number of workers in labor disputes as part of these legal aid cases.

7. Law School Clinics

Beijing, Shanghai, Nanjing, Kunshan, and Suzhou all have—or until recently had—law school legal clinics of some form providing free legal legal advice and representation to workers. The author is unaware of any such clinic in Shenzhen, but at least one exists in Guangzhou at Sun Yat-sen University. Some of the existing clinics focus exclusively on assisting workers; others are more general clinics that do labor cases in addition to other

³⁴² Sida Liu, *supra* note 270 at 284–89.

³⁴³ *Id.* at 284–85 (noting that prior to 2000, these individuals were called "township legal workers").

³⁴⁴ *China Reaches 250,900 Lawyers* (我国执业律师人数增至25.09万), LEGAL DAILY, Mar. 10, 2014.

³⁴⁵ See *Administrative Measures for Basic-Level Legal Service Offices* (promulgated by MOJ, 2000), Art. 7 (providing that basic-level legal services offices "shall" be established in rural townships and "may" be established in urban districts "as needed," but there should not be more than one in a single urban sub-district).

³⁴⁶ 2012 LEGAL AID Y.B. CHINA 215–16. This makes sense in light of the close relationship between justice bureau officials, who oversee legal aid, and basic-level legal workers. In many localities, especially more rural ones, these individuals may even share an office. There have also been reported instances of the same person simultaneously serving in the roles of justice bureau official, basic-level legal worker, and people's mediator.

³⁴⁷ See *Criminal Procedure Law* (promulgated by Nat'l People's Cong., 1979) (amended 2012), Art. 32 (enumerating the three categories of people who are permitted to represent criminal suspects in court, which does include basic-level legal workers).

civil matters. In the past, clinics generally made use of the same citizen-agent provision that barefoot lawyers invoked, allowing (unlicensed) law school students to represent clients in court. The aforementioned legislative amendments created difficulties for many of these programs. Some have since found ways to overcome this obstacle, such as through cooperation with local justice bureaus or legal aid offices.

The largest concentration of law school clinics is in Beijing. The programs at Peking University and Tsinghua University are general civil legal aid clinics, which therefore only do a handful of labor cases each year. The Tsinghua clinic has handled cases involving failure to conclude a labor contract, illegal termination, and unpaid wages. The clinic only takes on cases in Haidian District, where Tsinghua is located. After the changes to the rules for citizen agents, the clinic's students have been able to continue representation in the LDAC and courts by presenting a recommendation letter obtained from the Haidian legal aid center.

The Peking University clinic has approximately 20–25 students per semester and handles around 20 cases per year, including civil and some administrative matters. The citizen agent restrictions resulted in students being unable to continue representing clients in 20–30% of the cases they had taken on previously. Thereafter, once an interpretation of the new legislative provisions further explained the conditions under which a citizen agent could represent a party, the clinic was able to continue court representation for those clients who successfully obtained a referral letter from a residents' committee or villagers' committee in their hometown.

The China University of Political Science and Law (CUPL) established a labor law clinic back in 2005. The clinic previously received funding from the Ford Foundation and Oxfam, but today relies solely on an RMB 500 internship fee collected from each of the roughly 50 student participants in a given semester. The clinic has six faculty advisors, including one director, but no full-time staff. Roughly 70% of their cases involve migrant workers with claims for unpaid wages or work injury compensation; the remainder involve Beijing residents with illegal dismissal, overtime, or social insurance claims. The clinic's director states that most Beijing residents can afford the RMB 5,000 or so necessary to hire a lawyer, and given a choice between a lawyer and a student, people will choose the former. The clinic has used the same method as Tsinghua to represent clients in Haidian, but sometimes encounters problems in other parts of Beijing. The clinic provides representation in roughly 50 cases per year and performs over 1,000 legal consultations annually, while also providing information to migrants about their legal rights through public events, lectures, and by answering questions on the phone or Internet. CUPL has an administrative law clinic too, which focuses on providing legal advice but also handles some cases, including work injury disputes for migrant workers.

The Beijing Aerospace University Law School has operated a public interest legal services center since 2002, which seems to function as a law school clinic. According to its website, the center

provides legal advice, drafts legal papers, and represents clients, including migrant workers with labor disputes. The center has received money from the China Legal Aid Foundation and reports handling over 400 cases in the last five years.³⁴⁸ This organization may be worth investigating further.

Suzhou University Law School had a labor law clinic for many years that was supported by foreign funding. In early 2014, however, the university closed down the clinic. There are institutions in Nanjing, Kunshan, and Shanghai that fall somewhere in between law school clinics and NGOs; they are discussed below in the subsection on NGOs.

8. Bar Associations

In 2006, the All-China Lawyers Association issued an opinion calling upon every provincial-level government to establish an organization that harnessed the strength of lawyers to provide legal aid to migrant workers.³⁴⁹ As of 2015, it was reported that 35 such organizations were established, employing 150 full-time lawyers, and having handled 35,000 cases involving migrant workers since 2006. However, the extent to which these offices are actually distinct from other justice bureau legal aid offices is unknown, as these offices also handle cases involving minors, women, the elderly, and other disadvantaged groups.³⁵⁰ But several local bar associations do report organizing legal aid activities targeted at workers. For instance, the Shanghai bar association offered free consultations to workers in a public square during the May Day holiday. In Nanjing, the bar association cooperated with the municipal legal aid center to send lawyers to a construction site, where 40 legal consultations were performed and 600 informational brochures were distributed.³⁵¹ An NGO lawyer in Beijing also reported that the bar association there provides free legal consultations to workers. There is not, however, a great deal of information available about these efforts.

9. Non-Governmental Organizations (NGOs)

There are a variety of NGOs operating in Chinese cities that provide some sort of aid to working people or migrant workers.³⁵² This section, however, is limited to those that are providing services directly related to the enforcement of workers' legal rights. Therefore, NGOs that entertain migrant workers, operate schools for migrants' children, or teach daily life skills are outside the scope of this section. (This does not mean that these organizations are irrelevant to the topic; they can be a very important avenue for accessing workers, getting information to them, or learning about the issues that workers are facing.) This section will discuss each region separately because, as one Chinese scholar notes, the local government "plays a more important role than the central

³⁴⁸ See *Beijing Aerospace University Law School Public Interest Law Center Actively Expands Legal Aid* (北航公益法律服务中心积极开展法律援助), LEGAL DAILY, May 27, 2015.

³⁴⁹ *Zhicheng 2015 Report*, supra note 15 (referencing the *Opinion on Promoting Legal Aid for Migrant Workers* (关于推动农民工法律援助工作的意见)).

³⁵⁰ *Id.*

³⁵¹ *Nanjing Lawyers' Association Legal Aid and Public Interest Committee Begin "Lawyers Send Law to Front Line, Legal Aid Enters the Construction Site" Activity* (市律协法律援助和社会公益委员会开展律协法律援助和社会公益委员会开展"律师送法上一线、法律援助进工地"活动), May 29, 2015.

³⁵² This section is not limited to organizations that are formally registered with the bureau of civil affairs as NGOs (民办非企业组织), a status that, ironically, has been very difficult to obtain for groups without close government connections. Many of these groups are registered as a business with the bureau of industry and commerce.

Chinese state” in determining the extent to which NGOs are tolerated.³⁵³

Labor NGOs across China have always experienced a degree of harassment since they sprouted up two decades ago.³⁵⁴ But this has intensified in the last year. In February 2015, Li Yufu, a top ACFTU official, accused labor “rights defense” groups of being used by foreign organizations to compete with the trade union and break the solidarity of the working class.³⁵⁵ The repression then reached a new height in December 2015 with the crackdown in Guangdong (*see supra* Section I). Labor activists in Beijing, Wuhan, and elsewhere have also been subject to increased pressure and harassment. Most labor groups have chosen to “lay low” since then, not speaking to foreign media or meeting with foreigners, canceling worker trainings, and not getting involved in collective bargaining. How the crackdown advances will be an important factor in determining how much space NGOs have to operate and the feasibility of the strategies proposed in Section VI below.

Beijing

Beijing is home to numerous labor rights NGOs. The two most established organizations are Zhicheng and Yilian. As mentioned above, each of these organizations is referred cases by the local justice bureaus and trade unions in Beijing, but this only accounts for a portion of their work. They also engage in impact litigation, policy research, and legislative advocacy. Both organizations conduct programs to educate workers, the public, and officials about labor law.

There are a few important aspects of these organizations that differentiate their work from most government-funded legal aid in Beijing. The lawyers at Zhicheng and Yilian focus solely on labor cases and thus are very expert on those issues. The quality of service they provide is also likely better as the lawyers are paid a salary and have some commitment to the organization’s mission; cases are not viewed as a distraction from the revenue-generating work. These organizations are also not entirely funded by the local government, but get money from the Legal Aid Foundation, foreign foundations, and other sources. This allows them to do some cases that formal legal aid offices could or would not, including cases for plaintiffs who do not meet the criteria for legal aid, impact cases outside of Beijing, or more sensitive cases, such as collective disputes or cases involving government employers or against government agencies. However, these organizations note that they must be careful in how they do this work.³⁵⁶ Yilian and Zhicheng are also more willing to take difficult cases that the private bar or formal legal aid offices will not, such as occupational

disease claims.³⁵⁷ Thus far, these two organizations have not reported any significantly heightened pressure or interference with their work in Beijing.

Both Yilian and Zhicheng have felt the impact of the rise of government legal aid, though. Despite the increased number of labor disputes filed in Beijing’s LDACs and courts from 2013 to 2015, Yilian reported that the number of requests received for litigation assistance dropped from 1,427 in 2013 to 1,096 in 2014 and 759 in 2015.³⁵⁸ In 2014, Yilian handled less than 1,000 cases for the first time in many years. Staff there attribute this in part to a reduction in construction projects inside the city and the movement of factories to Hebei, but also in part to the growing availability of government legal aid services. Zhicheng reports a similar pattern—it handled over 1,000 labor cases each year from 2010 to 2013, but then 871 in 2014 and only 535 in 2015—and also sees the expansion of government legal aid to migrant workers as one reason for this trend.³⁵⁹

The Migrant Women’s Club (打工妹之家), founded in 1996, also provides legal services as part of its mission of empowering female domestic workers in Beijing. This is a particularly vulnerable population because domestic workers are excluded from the protections of China’s labor laws and their situation is inherently precarious—that is, living inside someone else’s home with limited contact with people outside.³⁶⁰ The organization previously had a lawyer on staff and handled 50 legal aid cases in 2009 and 40 in 2010.³⁶¹ The organization reportedly now cooperates with five law firms who take turns sending a lawyer to the NGO’s office to do legal consultations; if litigation is necessary, the lawyer’s firm may do the case. Employing a somewhat similar model, the Facilitators cooperate with a handful of private lawyers to provide legal consultations and legal representation to workers. The organization reports that roughly ten lawsuits are brought each year and that most of them are administrative cases (against the government), such as challenging an LDAC’s decision not to accept a case for arbitration.

Little Bird focuses primarily on using mediation to help workers resolve unpaid wage cases, the majority of which involve construction workers but also sometimes factory or service workers. The organization sees mediation as the preferred method because of the time and costs involved in litigation as well as the difficulties with collecting judgments. Little Bird generally first contacts an employer by phone; if this is unsuccessful, they will go—invited or not—to the workplace to attempt to mediate in person. Little Bird tries to use law as a tool in the mediation: they often bring along lawyers who can explain to employers the

³⁵³ Kan Wang, *The Changing State-NGO Relations and Development of Social Media Strategies* (Sept. 2012) (unpublished manuscript, on file with author).

³⁵⁴ See Jade Howell, *Shall we Dance? Welfarist Incorporation and the Politics of State-Labour NGO Relations in China*, 223 CHINA QUARTERLY 702 (2015) (noting that “state-NGO relations have been characterized by periods of harassment and muted tolerance,” with the former “rang[ing] from impromptu inspection visits to cutting off utility supplies, eviction and outright brutality”).

³⁵⁵ Ivan Franceschini, *Revisiting Chinese Labour NGOs: Some Grounds for Hope?* 1 MADE IN CHINA 17 (2016).

³⁵⁶ For instance, in reporting that it handled 304 group cases over ten years, Zhicheng also pointed out that there was not a single instance in which its clients went to block a road or file a petition with the local government. *Zhicheng 2015 Report*, *supra* note 15.

³⁵⁷ For more detailed information about how these organizations operate and handle cases, *see generally* Halegua, *Getting Paid*, *supra* note 13. Although that paper is based on research conducted nearly a decade ago, the methods for delivering services have not changed significantly.

³⁵⁸ In 2015, Beijing LDACs accepted 63,000 cases and courts accepted 29,990 labor disputes. *Beijing Releases Ten Areas*, *supra* note 122 (arbitration cases); *Beijing High-Level People’s Court 2016 Work Report* (2016年北京市高级人民法院工作报告), Jan. 27, 2016 (court cases); Beijing Yilian Labor Legal Aid and Research Center, *Legal Aid Monitoring Report* (法律援助监测报告), various periods.

³⁵⁹ E-mail from Zhicheng staff to author (Mar. 10, 2016; Mar. 14, 2016) (on file with author).

³⁶⁰ Ma Dan, *Analysis of the Labor Process for Domestic Workers in Beijing* (北京市住家家政工的劳动过程分析), CHINA WORKER 18–22 (2015) (analyzing the domestic work industry in China; noting there were roughly 300,000 domestic workers in Beijing in 2007 and 400,000 by 2010).

³⁶¹ Migrant Women’s Club, *Migrant Women’s Club Attorneys’ Fees-Shifting Project Report* (打工妹之家律师费转付项目报告), 2011 (unpublished report, on file with author).

violations they have committed and legal liabilities they will face. In this process, Little Bird also leverages its status as a government-recognized People's Mediation Committee. Where the mediation is unsuccessful, the workers may decide to retain one of Little Bird's volunteer lawyers or find legal assistance elsewhere, but Little Bird is no longer involved at that stage.³⁶² Little Bird now has offices in Beijing, Shanghai, Shenyang, and Shenzhen as well as a new project in Chongqing. In addition to mediation, the offices provide legal consultations by phone and distribute information to workers. In 2013, these offices together received over 10,000 calls and 3,000 visitors, while also handling 511 cases involving 3,122 migrant workers—the majority of which were likely done in Beijing.³⁶³ In the following year, Little Bird reported receiving 9,458 phone calls and 3,674 visitors in its five offices; handling 480 rights protection cases in Beijing, Shenyang, and Shenzhen; training over 2,000 migrant workers; and distributing 43,000 informational pamphlets. The organization also reported involving 100 volunteer lawyers in its work in 2014.³⁶⁴

Another Beijing NGO, OnAction, takes a slightly different approach. This organization's original office was in downtown Beijing, where it engaged in a variety of activities to empower workers, including operating a legal advice hotline staffed by volunteer lawyers. This office was closed in late November 2015, after operating for three years, due to pressure from the landlord. All operations are now out of its office in the more suburban Daxing County, where large numbers of migrants work in small garment factories, almost all without any labor contract or social insurance and frequently without being fully paid or paid on time. When a labor dispute breaks out, the organization seeks to help the workers select representatives, develop demands, and negotiate with the employer, often with the help of a volunteer lawyer. The organization reports that half of the approximately 30 cases handled by the office in the last year settled.³⁶⁵ While the model looks similar to Little Bird's, the group's director emphasizes that it is more focused on building unity and a collective consciousness among workers and hopes to eventually engage in collective bargaining with employers. However, in the current environment, the group has had to scale back even the dispute resolution work that it was already performing.

Shanghai

While the Beijing government seems to be generally more tolerant of NGOs, Shanghai, by contrast, is known for being particularly unwelcoming of such groups. As one Chinese academic put it, writing years prior to the 2015 crackdown, while Beijing or the Pearl River Delta were a relatively open and free space for NGOs, in “the Yangtze River Delta [...] the local governments literally force labor organizers to leave or put them under severe watch.”³⁶⁶ Little Bird, for instance, has had an office in Shanghai for many years but has been unable to get any recognition from the local

government for their mediation work and is thus essentially limited to doing worker trainings.

Shanghai also lacks any legal aid organizations on the same scale as Zhicheng or Yilian. The closest thing was the Labor Law Service Center at the East China University of Political Science and Law (ECUPL), founded by the famous labor law scholar Professor Dong Baohua. The center provided both legal advice and representation. Students and volunteers had provided representation pursuant to the citizen agent provisions, but after their amendment, all legal representation work in the LDACs or courts was performed by the attorneys at Professor Dong's law firm. From April 2012 to December 2014, the center provided consultations to over 3,400 workers but handled only 45 cases. Unlike most other NGOs or clinics, the recipients of its services were largely Shanghai residents—only about one-quarter are migrant workers. The center's director attributed this to the lack of legal consciousness among migrant workers in the region. In addition to legal consultations and representation, the center also conducted trainings, hosted seminars, published articles and books on labor law, and did outreach events for workers. The center never received any public funds for its work. It had never formally cooperated with the justice bureau, and the trade union ended its limited cooperation after establishing its own legal aid centers.³⁶⁷ However, even this lone center in Shanghai ceased operations in 2015 because its funding was discontinued.

Jiangsu

The most notable labor rights organization in Jiangsu is a legal aid center affiliated with Nanjing University. The center maintains two offices: the one in Nanjing functions as a clinic for law students but also has full-time staff; the Kunshan office relies primarily on staff. The center provides advice and consultations to roughly 5,000 workers and representation in 100–150 cases annually—including several cases against government entities and numerous collective disputes. The center also provides legal education and training to workers, asking workers to attend a series of classes over several weeks, instead of one-off sessions. The center estimates that four or five of the cases it litigates each year involve workers who attended their training. The center has also produced several policy reports on labor law issues, such as social insurance, by having students conduct large-scale surveys of workers.

One of the center's more innovative programs is its creation of a team of “worker volunteers.” The center identifies a group of committed workers to partake in advanced trainings and team-building activities, and then provides them with “volunteer” certificates. These workers help the center in its public education activities and by introducing other workers to the center. The Kunshan office director estimates that worker volunteers refer 20% of the cases ultimately litigated each year.

The Nanjing office has received some support from the local trade union, but was never assigned cases by the justice bureau.

³⁶² For a fuller description and some examples of Little Bird's mediation tactics, see Halegua, *Getting Paid*, *supra* note 13 at 299–308.

³⁶³ Little Bird, *Annual Report of Little Bird Mutual Aid Hotline for Migrant Workers in 2013* (unpublished report, on file with author).

³⁶⁴ Little Bird, *Little Bird Hotline 2014 Annual Work Report* (小小鸟热线 2014年度工作简报) (unpublished report, on file with author).

³⁶⁵ Interviews with NGO staff, in Beijing, China (Summer 2015; Winter 2015).

³⁶⁶ Kan Wang, *supra* note 353.

³⁶⁷ E-mails from NGO staff to author (Sept. 14, 2015; Sept. 22, 2015; Sept. 24, 2015) (on file with author).

In Kunshan, there is no formal cooperation with the trade union. The justice bureau previously assigned some cases but stopped doing so in 2014. The center staff was unsure why this modest level of cooperation ended.

Other than the center, there does not appear to be any other NGO in Kunshan working on labor rights issues. In Nanjing, the Facilitators have a branch that, like the one in Beijing, refers some workers to lawyers for legal consultations and representation. Migrant Workers' Home, which primarily performs music for migrant workers, may also provide some limited amount of legal counseling to workers in Nanjing.³⁶⁸

In Suzhou, the climate for labor NGOs is reported to be very inhospitable. To the author's knowledge, the closing of a university labor law clinic left only one organization in the city focused on labor rights advocacy, aside from the pro bono clearinghouse mentioned above. The staff of this group reports being closely monitored by the local government and being forced to move offices several times within a short period. Despite its initial hopes of facilitating collective negotiations, the office is limited to providing some legal rights trainings to workers and giving legal advice via telephone and QQ, an online instant messaging service.

Shenzhen

Guangdong Province is home to roughly one-third of China's migrant workers and more than half of its labor rights NGOs. Two academics have estimated there are approximately 50 labor rights NGOs in the Guangdong region, more than half of which are in Shenzhen.³⁶⁹ One scholar found that 17 of these Shenzhen groups operating in 2013–2014 were engaged in some form of rights-protection work beyond legal training.³⁷⁰ The relationship between the labor NGOs and local government has fluctuated over time, including periods of only mild surveillance, times where the Shenzhen trade union actively sought to coopt the NGOs and their staff, and, more recently, what seems to be more active suppression and harassment.³⁷¹ In the past few years, several NGOs have reported visits by the police or security officials, occasional temporary detentions, and the early termination of their office leases. Zhang Zhiru, the director of Spring Wind, had to move offices ten times in a single year.³⁷² Nonetheless, as discussed above, NGO staff reports that the latest wave of repression is the most serious yet.

Several of the NGOs in the region previously provided legal aid to migrant workers by relying on the citizen agent provisions in the law. As with barefoot lawyers, the difficulty of finding private lawyers or government legal aid created a high demand

for these services. Some NGOs reported doing over 300 legal aid cases per year.³⁷³ Kan Wang, an expert in the field of Chinese labor NGOs, noted that “[i]n Guangdong Province, labor NGOs represented workers in more labor dispute cases than those of the official legal aid centers and trade unions [put] together.”³⁷⁴ Similarly, the Shenzhen-based Laowei Law Firm, founded by Duan Yi, employed 30 lawyers who were almost entirely focused on litigating various labor claims for workers, free of charge.³⁷⁵

In the past few years, though, a notable shift has been occurring among some of these labor rights NGOs—namely, moving away from providing legal aid in litigation and towards a focus on building collective identity and assisting with collective negotiations. On the one hand, as described above, it became harder for NGOs to continue representing workers in litigation due to the tightening of the citizen agent provisions and competition from government legal aid. But, on the other hand, Laowei and the NGOs also recognized that the exploitation they had combated for years—unpaid wages, worker injuries, excessive overtime—did not seem to be improving, and felt a new strategy was needed.

Laowei, in cooperation with several Guangdong NGOs, came to focus almost exclusively on promoting worker mobilization and collective negotiation.³⁷⁶ The process usually began with an NGO educating an aggrieved worker on the benefits of collective action over litigation. Although each case is slightly different, Laowei and the partner NGO would generally then help the workers to select representatives, send a demand letter to the company, assist the workers in negotiating, and strategize about the appropriate timing of a strike or work stoppage. Laowei lawyers often participated in the actual negotiations with employers. By the end of 2014, Laowei had worked with seven NGOs that were involved in over 70 collective negotiation cases; Laowei itself was involved in 20 cases.³⁷⁷ During this transition, the size of Laowei's staff shrunk to seven lawyers and four staff by the summer of 2015. The only litigation work it performed was to assist workers who were terminated, detained, or arrested as a result of participating in a collective action.³⁷⁸ Advocates suggest that the retaliatory firing of worker representatives occurs in nearly every such case, and one study found that workers were detained or arrested in nearly 20% of 42 collective protests.³⁷⁹ Laowei also promoted collective bargaining by publishing a journal, maintaining a website, and hosting conferences on this topic.

There are nonetheless still groups in Shenzhen doing rights-protection work that are not exclusively focused on collective

³⁷³ Yi Xu, *supra* note 369 at 248.

³⁷⁴ Kan Wang, *supra* note 353.

³⁷⁵ Chunyun Li, *supra* note 369 at 24.

³⁷⁶ See Fu Hualing, *Human Rights Lawyering*, *supra* note 160 at 283–88 (2014) (discussing Duan Yi's transition from legal aid to supporting collective action and providing a description of those activities).

³⁷⁷ Chunyun Li, *supra* note 369 at 23–38.

³⁷⁸ E.g., *Shenzhen Authorities Drop Charges Against Labour Activist Wu Guijun*, CHINA LABOR BULLETIN, June 9, 2014 (describing representation by Laowei's founder Duan Yi of labor activist Wu Guijun, who was charged with gathering a crowd to disrupt public order after taking part in a worker demonstration).

³⁷⁹ Chunyun Li, *supra* note 369 at 85; see also Elaine Hui, *Chinese Bike Light Strikers Occupy Factory, Face Firings and Arrests*, LABOR NOTES, May 20, 2015 (describing how nine workers were arrested by police after a work stoppage to protest unpaid wages).

³⁶⁸ See Bernice Chan, *The Musician who became a Champion of Migrant Workers*, S. CHINA MORNING POST, July 1, 2014 (describing the history and work of Migrant Workers' Home).

³⁶⁹ Yi Xu, *Labor Non-Governmental Organizations in China: Mobilizing Rural Migrant Workers*, 55 J. OF INDUSTRIAL REL., no. 2, 243–59, 246 (2013); Chunyun Li, *Unmaking the Authoritarian Labor Regime: Collective Bargaining and Labor Unrest in Contemporary China* 45 (unpublished dissertation, on file with author).

³⁷⁰ Interview with Chunyun Li, Assistant Professor, London School of Economics and Political Science, in Newark, New Jersey (Mar. 18, 2016).

³⁷¹ See Yi Xu, *supra* note 369 at 254–55 (describing this fluctuation); see also Howell, *supra* note 354 (analyzing the relationship between labor NGOs and the state in Beijing, Guangdong, and elsewhere in China).

³⁷² Li Qian, *How Zhang Zhiru Became one of China's Top Defenders of Labor Rights*, GLOBAL TIMES, Sept. 19, 2014.

action or negotiation. For instance, one organization located in Songgang, a small township populated with metal manufacturing plants, primarily focuses on helping workers who have suffered work injuries. It gets 80% of its cases by distributing literature to workers at local hospitals. The NGO provides a few hundred consultations per year. It also prepares workers to conduct arbitration and litigation hearings on their own, but encourages other workers to go observe the hearings to build the plaintiff's confidence. In explaining this pro se model, the director contends that once a "work injury" has been certified, it is not so much a question of whether the worker will get compensation as it is a question of how much; therefore, workers can perform adequately on their own. Nonetheless, this practice also seems motivated, at least in part, by the restrictions on citizen agents and consistently bad experiences with both private lawyers and legal aid lawyers. The director does believe that legal representation is necessary in occupational disease cases, however, but notes that lawyers are particularly unwilling to take them on. He referred a few such cases to Wider, which was unable to take them, prompting him to comment that it would be great to have an organization like Yilian in Shenzhen providing high-quality, free legal services. In fact, Yilian had an office in Shenzhen for a short period of time, but eventually abandoned the endeavor after sensing that the political environment was not right.

V. Assessing the Representation Gap

While the previous section described the various legal services available to aggrieved workers in China, many are still unable to find legal help and a representation gap remains in the locations studied in this report. But the precise size of this gap is difficult to gauge. Little information was found concerning the percentage of workers litigating at LDACs who had legal representation, let alone the breakdown of the various types of advocates. However, one study that randomly selected 200 cases filed at the LDAC in Chengdu found that only 72 workers (36%) had a legal representative.³⁸⁰ As for the courts, the author found one analysis of over 2,200 labor disputes handled by the Jilin courts in 2014, which showed that only 52% of workers had some form of legal representative. Of these representatives, 36% were lawyers, 25% were legal aid lawyers, 24% were basic-level legal workers, 13% were citizen agents (barefoot lawyers), and 2% were legal volunteers (法律志愿者).³⁸¹

This report makes an original contribution towards quantifying the representation gap for Chinese workers. The analysis of court decisions performed in collaboration with Legal Miner revealed that 59% of workers had legal representation for their first-instance court case. By way of comparison, a study of employment discrimination claims in the United States federal courts found that a higher percentage of plaintiffs (78%) had a lawyer throughout the litigation; but the rate of representation for workers is far lower in other forums, such as administrative hearings.³⁸² In terms of regional variation within China, the total percentage of workers with legal representation was only slightly greater in Beijing (55%) and Shenzhen (53%) than Jilin (52%), while Shanghai's (65%) was notably higher.³⁸³ The breakdown of the type of legal representatives in these cities differed from Jilin's though. Private lawyers and lawyers working for legal aid offices constituted 77% to 84% of workers' legal representatives in the three cities studied, compared to 61% in Jilin.³⁸⁴ There were extremely few basic-level legal workers among the legal

representatives in Beijing (4%) and Shenzhen (under 1%), and none in Shanghai's over 12,000 cases, but they comprised 24% of the legal representatives in Jilin. This makes sense in light of the higher concentration of lawyers, and relative lack of basic-level legal workers, in large, economically developed metropolises like Beijing, Shanghai, and Shenzhen. More surprising, however, is that the percentage of legal representatives that were citizen agents in Shanghai and Shenzhen (14%) was similar to that in Jilin (13%), and was even slightly higher (19%) in Beijing. This may be explained in small part by the larger number of law school clinics in Beijing that use this means to represent workers. However, it would be interesting to know the identity of the other citizen agents.

Figure 9. Workers with Court Representation by City

	Represented Workers	Sample Size (cases)
Beijing	55%	15,601
Jilin	52%	2,257
Shanghai	53%	12,088
Shenzhen	65%	2,882

While the Legal Miner data shows that a significant representation gap still exists, plaintiffs in a formal court proceeding are only the tip of the iceberg in terms of workers who need legal assistance.³⁸⁵ For instance, some workers never receive legal advice about their rights and thus are unaware that they even have a legal claim in the first place. Others do not know where to look for help. Some portion of workers will engage in collective action or petition the government (信访), rather than pursue mediation or litigation, to resolve the problem. There are also workers who seek but cannot find legal representation and therefore decide to forego their claims.³⁸⁶ Furthermore, private lawyers are sometimes not only unwilling to represent workers, but may even act as an "obstacle to justice" by discouraging them from bringing the claims at all.³⁸⁷ Other workers may apply for government or trade union legal aid but be deemed ineligible or turned away because

³⁸⁰ Sichuan Migrant Worker Legal Aid Station, *supra* note 154.

³⁸¹ Wang, *Big Data*, *supra* note 51. The same study found that where the employer was a legal person or other organization, 64% had a legal representative. See also Jiang & Li, *Big Data Report*, *supra* note 60 (finding that in labor cases in the Zhongshan or Zhuhai courts, with the exception of state-owned enterprises, all categories of employers had a lawyer in over 60% of cases and foreign-invested enterprises had lawyers in 80% of cases).

³⁸² Myrick, et al., *supra* note 131 at 108–09 (employment discrimination study); but see Yin, *supra* note 131 at 127, 132 n.41 (reporting estimates that only 5–10% of claimants are represented in administrative hearings concerning eligibility for unemployment insurance benefits in New York).

³⁸³ *Legal Miner 2016 Report*, *supra* note 6 (the sample included 15,601 cases for Beijing, 12,088 for Shanghai, and 2,882 for Shenzhen).

³⁸⁴ *Id.*

³⁸⁵ See Michelson, *supra* note 152 at 4 (noting that a study only examining disputants who entered the formal legal system would be "seriously deficient" and that one must "consider the extent of attrition as grievances escalate to claims and ultimately to disputes in the legal system") (internal quotations and citations omitted).

³⁸⁶ See Migrant Women's Club, *supra* note 361 (finding that half of migrant workers interviewed in Beijing said they would not pursue their legal claim if they could not find or afford a satisfactory legal representative).

³⁸⁷ See Michelson, *supra* note 152 at 31.

the case is too complicated (*see supra* Section IV(2), (3)). Even NGOs that provide legal aid might decline to represent workers who are located far from the city center, such as in Miyun or Pinggu of Beijing, unless the case is particularly compelling. Indeed, Gallagher and Yang report on a 2005 survey that found only 7.3% of respondents who experienced a labor dispute had some form of legal representative.³⁸⁸

The rate of representation found by Legal Miner's analysis of court cases also likely understates the size of the representation gap even for workers who do raise a formal complaint. As described above, a growing number of labor disputes are resolved by mediation organizations prior to a claim being filed with the LDAC, let alone appealed to court, and workers are often unrepresented in this process. As for the labor disputes that enter litigation, a large number are still resolved through mediation, not adjudication.³⁸⁹ It is therefore important to understand the relationship between legal representation and the likelihood that a case will be settled prior to adjudication. It may be that workers with stronger cases are both more likely to find legal representation and to resolve their claims through mediation. However, it may also be that unrepresented parties are more susceptible to pressure to settle their claims and thus do so at a higher rate. If this were the case, then a large number of unrepresented workers who file court cases would not enter the Legal Miner sample, causing the number of represented workers to be overstated. Accordingly, further research into which cases are getting resolved through mediation and which through adjudication is necessary.

While the presence of a legal representative is an important part of the access to justice discussion, it is not the only one. As the experience with China's legal aid system shows, the quality of this representation must also be considered. Accordingly, the Legal Miner data will be further analyzed to determine the relative impact that various types of legal service providers have on the outcome of litigation. The results will likely be published in a future study.

While the Legal Miner data shows that a significant representation gap still exists, plaintiffs in a formal court proceeding are only the tip of the iceberg in terms of workers who need legal assistance.

³⁸⁸ Gallagher & Yang, *Getting Schooled*, *supra* note 104.

³⁸⁹ *See, e.g., Guangzhou White Paper*, *supra* note 35.

VI. Future Strategies

The previous sections examined some of the more prominent legal problems facing China's workers and the persisting representation gap in terms of legal services. This section discusses strategies to narrow that gap. Some focus on increasing the "supply" of legal services and workers' access to them. The others seek to reduce the "demand" for legal services by decreasing workplace injuries or labor violations at the outset, such as through educating workers about their rights or deterring certain employer behavior. The strategies are listed in no particular order. The political feasibility of each one must also be considered at any given time.

1. Expanding Worker Education, Training, and Outreach

Since the *Labor Contract Law* was issued in 2007, both the government and labor rights advocates have engaged in extensive "know your rights" campaigns, and this remains an important part of many labor NGOs' work. Nonetheless, labor advocates almost universally stress the need to do more legal education and greater outreach on existing services. A worker can only know that his legal rights have been violated if he knows what those rights are in the first place. For instance, a worker who is unaware of an employer's obligation to pay overtime or a housing subsidy, or to make social insurance contributions, will never scrutinize these items on his paystub. If violations are identified early, workers may be able to resolve the issue with their employer informally, before litigation becomes necessary. If not, it is important that workers know what legal service providers exist so that they can access this assistance.

There may be opportunities to conduct training and education in novel ways. Many worker advocates stress that once one worker learns of his rights, the worker himself often becomes the most effective means of transmitting knowledge to coworkers, neighbors, friends, and relatives.³⁹⁰ The "worker volunteers" model in Nanjing and Kunshan, which invests in educating a group of workers and then encourages them to recruit and assist their peers, effectively employs this strategy. In light of the difficulties many migrants face upon arrival in the cities, some advocates also recommended finding ways to provide migrants with more information before they leave their hometown. At least some migrant-sending regions have already shown a

³⁹⁰ See BECKER, *supra* note 147 at 168–75 (describing the crucial role that referrals play in migrant workers' learning about legal and other services).

willingness to undertake such efforts.³⁹¹ In addition, workers are now increasingly active on micro blogs, Internet discussion boards, and other social media. Many are more tech-savvy than the NGOs or other entities seeking to assist them. Therefore, how legal service providers can better employ these new forms of media to provide workers with information about their rights and available services should be explored. For instance, creating a free resource with such information for WeChat (微信), a social media platform, might be an effective tool.

2. Reducing Occupational Disease and Increasing Legal Services for its Victims

A multipronged strategy is necessary to combat the prevalence of workplace injuries and epidemic of occupational disease. One component of the strategy must be to reduce the number of injuries and instances of occupational disease in the first place. Indeed, even the Chinese government's recognition of the pneumoconiosis crisis has reached a new level: in January 2016, ten central government departments issued a joint notice specifically concerning the prevention and treatment of the disease.³⁹² Some proposals for doing so are discussed below (*see infra* Section VI(3), (5), (7), (8)). Another prong involves attacking the supply side of the enormous representation gap faced by occupational disease victims. Private lawyers are reluctant to take these cases. While Yilian provides free legal assistance to occupational disease victims on a significant scale, the author is unaware of any group outside of Beijing that does so at a comparable level. Yilian attempted to establish a presence in Shenzhen but ultimately withdrew. Wider is interested in continuing to grow its program of finding volunteer lawyers to represent occupational disease victims and should be supported in doing so.

One particular measure to consider is the creation of an online resource center for lawyers who represent occupational disease victims. The website could provide these lawyers with sample court filings, relevant laws and regulations, practical litigation tips, and a platform for lawyers to post questions to other lawyers. A worker advocacy nonprofit in the United States

³⁹¹ One county justice bureau in northeastern China provided outbound migrants with a card informing them that they qualified for legal aid and containing the phone number to call to receive legal advice (from their home county legal aid center) should an issue arise. *Heilongjiang Suihua City Qingfeng County: Legal Aid Service Card Aids Migrant Workers* (黑龙江绥化市青冈县: 法律援助联系卡服务农民工), SUI HUA DAILY, Sept. 1, 2015. See also Paul Dalton Interview, *supra* note 165 (reporting that in a village in rural Henan provides out-bound migrants with a card containing the phone number to access legal aid services in approximately twenty major Chinese cities).

³⁹² Zhang Yu, *supra* note 44.

operates such a platform for attorneys that litigate wage and hour cases.³⁹³ A Chinese equivalent for occupational disease cases could encourage more volunteer lawyers to handle these cases, increase their effectiveness in doing so, and potentially facilitate oversight of the volunteer lawyers' work by staff attorneys at places like Wider. Furthermore, the platform could later be expanded to provide information to workers themselves about occupational disease and how to access various legal services in their city.

In addition to finding more private lawyers to take individual cases, more full-time public interest lawyers are also needed to work on policy issues and impact litigation in this field. A problem of this scale will require systemic solutions. For instance, where an employer has not purchased work injury insurance, the law requires the government to pay out compensation to the injured worker and then seek repayment of that money from the employer. But this rarely occurs in practice. Yilian and Zhicheng have brought impact cases in various cities throughout China seeking to compel local governments to follow this law and compensate injured workers. Furthermore, Yilian has also submitted numerous policy recommendations in the occupational disease field that have been adopted. More lawyers doing this work are necessary to assist the Chinese government in adopting the best possible policies and to ensure local governments are implementing them.

Another idea proposed during the author's interviews involves providing for the needs of injured or sick workers after they return home to the countryside. Several NGO advocates noted that injured workers' requests for tort compensation often arise after having returned home and spent all of the compensation obtained for their work injury or occupational disease. This raises the larger question of how injured or sick workers fare upon their return to the countryside: What legal problems do they face there? Are they able to access various benefits for handicapped persons or other social insurance? The general lack of legal services in the countryside is well known. So what options do these workers have? This is an area worthy of further inquiry.

3. Fostering Collective Dispute Resolution and Collective Negotiation

Prior to the December 2015 crackdown, some of the most interesting labor rights work was happening in the field of collective negotiations and collective dispute resolution. The cases, mostly in Guangdong, generally involved strikes or collective actions arising from violations of the workers' legal rights ("rights disputes"), a threat by management to move operations, or some other employer action that would negatively impact workers. Labor NGOs would intervene to assist the workers in choosing representatives, formulating demands, and negotiating with employers (*see supra* Section IV(9)). These negotiations, if successful, decrease the demand for legal services by resolving the legal problems confronting a large number of workers. Given the frequency of such disputes in China,

fostering more collective dispute resolution of this sort would be of great value to workers.³⁹⁴ However, the criminal prosecutions stemming from the crackdown are based upon those activists' involvement in resolving collective disputes, during which the government alleges that they incited workers to strike, protest, and disrupt social order.³⁹⁵ This suggests that NGOs may have limited room to perform even this reactive work of settling "rights disputes" in the near future. Although one NGO in Shenzhen has resumed its collective negotiation work, many others remain hesitant to resume these activities.³⁹⁶

The resolution of rights disputes described above differs from what is traditionally thought of as "collective bargaining" over "interest disputes," in which workers and management negotiate a forward-looking collective contract to govern the terms of employment. This future-oriented form of collective bargaining has great potential to reduce the demand for legal services by fostering agreements on contentious issues so as to preempt disputes and by establishing internal mechanisms to process any grievances that do arise. For instance, employers and workers could agree on wage rates or how overtime hours are assigned and compensated. Chinese law actually provides for such a process of bargaining over interest disputes, which it calls "collective consultation" or "collective negotiation" (集体协商). However, in practice, substantive negotiations rarely occur as part of this process. Moreover, parts of the Chinese government have recently demonstrated a lack of appetite to make pre-dispute collective negotiation more meaningful. For example, the Guangdong government watered down successive drafts of a regulation on collective negotiation that took effect in 2015 and a high-level Chinese official recently called for limiting the scope of any collective negotiations.³⁹⁷

Despite the challenges, it is worth exploring whether some progress can be made in this area. For instance, there may be more space for some form of collective consultation or building informal worker committees in the health and safety field. Recent tragedies in Kunshan, Tianjin, and Shandong might help create some room for more meaningful worker involvement in identifying and preventing hazards. Amendments to the *Workplace Safety Law*, which took effect in December 2014, also provide for a greater role by the trade union in ensuring safe conditions.³⁹⁸ Given the large proportion of workers that are injured soon after starting a job, the need to monitor whether employers fulfill their training obligations is critical. Practical experiments in this area,

³⁹⁴ In many cases, although the past violation may have been the impetus for bargaining, workers often then used this platform to negotiate for benefits above and beyond what the law requires. Thus, these collective negotiations over rights disputes may lay the groundwork and strengthen the push for the more traditional forms of collective negotiation discussed below. See Manfred Elfröm & Sarosh Kuruvilla, *The Changing Nature of Labor Unrest in China*, 67 ILR REVIEW, no. 2, 453 (Apr. 2014) (describing a nascent but growing trend in China of more "offensive" strikes for better conditions as opposed to just defensive strikes in response to rights violations).

³⁹⁵ Wee, *Chinese State Media*, *supra* note 7.

³⁹⁶ *Shenzhen Labour Activists and Trade Union Help Workers Secure Compensation*, CHINA LABOUR BULLETIN, June 13, 2016.

³⁹⁷ See Aaron Halegua, *Strike a Balance*, S. CHINA MORNING POST, Feb. 26, 2015, A15 (describing differences between initial drafts and the final version of the Guangdong regulation); Xing Yun, *Lou Jiwei*, *supra* note 10 (Finance Minister Lou Jiwei stated that collective negotiations at the enterprise level could be positive but that regional or industry-based bargaining should not occur).

³⁹⁸ Steven Elsinga, *China Enacts New Work Safety Law in Wake of Lethal Accident*, CHINA BRIEFING, Mar. 10, 2015.

³⁹³ The website for the National Employment Law Project's (NELP) National Wage and Hour Clearinghouse is: <http://www.just-pay.org>.

or projects to study past attempts at establishing worker committees in order to identify best practices, would be useful endeavors.³⁹⁹ Advocates may also explore whether there are more progressive individuals within the ACFTU who can be partners for cooperation, as Wider is attempting to do in Shenzhen. Finally, this is also an area where collaborations with multinational companies and Chinese employers may be possible (*see infra* Section VI(8)). Improved safety measures at workplaces, and the resulting drop in worker accidents and injuries, would curb the demand for legal services.

4. Strengthening Anti-Retaliation Measures

Retaliation against workers who raise complaints has become commonplace.⁴⁰⁰ In the context of collective actions and collective disputes, worker representatives are almost invariably terminated or otherwise retaliated against by employers, making workers unwilling to take on such roles. For instance, China Labour Bulletin identified 126 incidents in the first nine months of 2015 in which a worker was arrested.⁴⁰¹ The same problem exists in individual disputes, where many workers are unwilling even to bring claims while still working for their employer due to a fear of retaliation. Indeed, a 2012 survey of migrant workers in Guangzhou found that over 80% of respondents feared losing their job if they sued their employer.⁴⁰² If workers are too afraid to complain or protest, employers will continue violating the law with relative impunity. The current law only provides explicit protection from retaliation to union officers.⁴⁰³ For other workers, their only protection is that an employer cannot terminate their employment without cause. However, this latter protection has proved insufficient.

In the case of striking workers, employers regularly terminate employees pursuant to Article 39 of the *Labor Contract Law* on the basis that they violated a workplace regulation or rule, either by stopping work or some other act. A study of court decisions in such retaliation cases revealed that judges do not look at whether the employer's stated reason for terminating the worker is pretextual, but merely evaluate whether the grounds were sufficient under the *Labor Contract Law*. Wang Tianyu identified 308 court decisions between 2008 and 2014 involving the termination of workers involved in a collective action and found that the employer's dismissal decision was upheld in two-thirds of the cases. In the other third, the dismissal was generally voided due to insufficient evidence that the relevant employer rule was appropriately promulgated or insufficient evidence about the violation itself. In other words, the courts generally did not question whether it was appropriate to terminate an employee because he engaged in a work stoppage of some sort.⁴⁰⁴ The unwillingness

³⁹⁹ Efforts at establishing worker health and safety committees and other such programs have been attempted in the past, but have not always met with great success. See Chris King-chi Chan, *Community-Based Organizations for Migrant Workers' Rights: The Emergence of Labour NGOs in China*, 48 CMY. DEV. J., no. 1, 8–9 (2012) (noting that in 2006, five Hong Kong-based NGOs withdrew from such a program with the Ethical Trade Initiative (ETI), complaining about its ineffectiveness).

⁴⁰⁰ See generally Aaron Halegua, *Allow Workers to Protest Without Fear of Reprisals*, S. CHINA MORNING POST, Apr. 20, 2016, A11.

⁴⁰¹ *Guangdong's Workers Mobilize to Protect Leaders from Arrests and Reprisals*, CHINA LABOUR BULLETIN, Oct. 13, 2015.

⁴⁰² Zhuang & Chen, *supra* note 96 at 398.

⁴⁰³ *Trade Union Law* (中华人民共和国工会法) (promulgated by Standing Comm. Nat'l People's Cong., 1992) (amended 2001), Art. 51.

⁴⁰⁴ Wang Tianyu, *Is There a 'Right to Strike' in China? A View from the Courts and from Overseas* (unpublished manuscript, on file with author).

A 2012 survey of migrant workers in Guangzhou found that over 80% of respondents feared losing their job if they sued their employer. If workers are too afraid to complain or protest, employers will continue violating the law with relative impunity.

of courts to overturn these terminations in most cases, and the small amount of compensation owed even if they do, means that there is hardly any deterrent for employers. They can generally fire without consequence any workers who complain or protest rights violations.

Labor advocates should consider legislative and other reforms to protect workers from retaliation. The concept of an explicit anti-retaliation provision already has a precedent not only in China's *Trade Union Law*, but the *Labor Law* also prohibits retaliation against workers who complain to or assist the labor inspectorate.⁴⁰⁵ Restrictions on retaliating against witnesses also exist. A draft Guangdong regulation on collective negotiation actually contained an anti-retaliation clause, but it was ultimately excised. Most recently, fairly robust anti-retaliation provisions to protect whistleblowers were promulgated, including a broad list of activities that constitute retaliation and detailed instructions to government agencies on how to process retaliation complaints.⁴⁰⁶ Duan Yi has proposed that an anti-retaliation provision could be implemented through a judicial interpretation of the *Labor Contract Law*, which sets the rules for termination; furthermore, some labor experts believe this law may soon be amended.⁴⁰⁷ An anti-retaliation provision was also included in an "experts draft" of an anti-discrimination law.⁴⁰⁸ Labor rights advocates can discuss the best strategy for moving forward on this issue.

5. Using Administrative Litigation

Worker advocates have used administrative litigation in creative ways to challenge government decisions or to prompt government action. Some of this litigation has successfully resolved workplace safety issues before injuries occur. For instance, groups in both Beijing and Shenzhen sued the government bureau responsible for workplace safety for failing to respond to worker complaints. In both cases, the lawsuit resulted in the bureau doing an onsite workplace inspection and, in the Shenzhen case, prohibiting further use of a dangerous machine. Section VI(2) described lawsuits to compel labor bureaus to cover the expenses of injured workers whose employers did not purchase work injury insurance. Other lawyers have used administrative litigation to bring about

⁴⁰⁵ *Labor Law*, *supra* note 56 at Art. 101.

⁴⁰⁶ Zhuang Pinghui, *New Rules to Protect China's Workplace Whistle-Blowers*, S. CHINA MORNING POST, Apr. 9, 2016.

⁴⁰⁷ Jeffrey Wilson, *Finance Minister Indicates Possible Revisions to Labor Contract Law*, EMPLOYMENT LAW ALLIANCE, Feb. 26, 2016.

⁴⁰⁸ The draft legislation can be accessed at: <http://www.fanqishi.com/detail.asp?ID=183>.

a government investigation of a workplace in order to document a worker's employment there, which can then provide evidence to establish a labor relationship when pursuing other claims. Some administrative litigation has been interesting but failed. For instance, with the assistance of an NGO in Guangzhou, taxi drivers there had been individually filing complaints with the labor inspectorate about an illegal fee being collected by their employer. The inspectorate would issue a violation in relation to the individual employee who filed a claim but refused to investigate the employer's general practice or order the company to return fees to all drivers. The NGO brought an administrative lawsuit against the inspectorate to compel them to do so, but it was ultimately unsuccessful. Nonetheless, the inspectorate should be encouraged to adopt a practice of investigating an employer's whole workforce even when only an individual worker complains. Labor bureaus in other countries operate in this manner because more violations involving more workers can be resolved while expending only marginally more resources.⁴⁰⁹ These are just a few examples of administrative litigation that could help to either curb labor violations or resolve more of them without litigation by the individual worker, thus reducing the representation gap. Labor advocates should synthesize past experiences to see what lessons can be learned or strategies developed for more effectively using this tool.

6. Encouraging the Growth of a Plaintiffs' Bar

The growth of a private bar of Chinese lawyers committed to representing workers, and which is not motivated by or reliant on government stipends, would make a serious dent in the representation gap. If the compensation structure were properly aligned, these attorneys would likely be more entrepreneurial and zealous in developing and pursuing workers' claims. As referenced above, some of the obstacles to making the legal representation of workers into a profitable pursuit are universal. In the United States, contingency fee arrangements, aggregate litigation, and fee-shifting provisions have greatly facilitated making worker-focused legal practices viable. If instituted in China, these policies could have a similar impact.

Contingency fee arrangements might allow attorneys to earn more money in cases where there are sizeable recoveries. It would also allow more workers who have strong cases but are unable or unwilling to pay legal fees up front to find representation. Class or collective litigation mechanisms allow small individual claims to be litigated together so that the recovery will justify the time spent. For instance, one NGO report found that workers at an Apple supplier were required to attend a 15-minute uncompensated meeting each day, which adds up to US \$11.85 million in unpaid overtime for the factory's 70,000-person workforce over a two-month period.⁴¹⁰ Suing on behalf of one such worker is probably not worthwhile for a lawyer, but if a single lawsuit could be brought on behalf of the whole workforce—or even

As one Chinese scholar writes,
the unsatisfactory level of labor law
implementation has a lot to do
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liability for employers.

a significant portion of it—then the recovery could certainly justify the effort. Finally, fee-shifting rules, if structured properly, would allow lawyers to be compensated based on the time they spend on a case, even if the recovery is relatively small. This also deters employers from drawing out litigation, such as by filing meritless appeals. In addition, fee-shifting rules benefit workers because the attorneys' fees are paid by the employer instead of paid out of the plaintiff's recovery.

The fact that such a fee-shifting rule and practice exists for labor disputes in Shenzhen could be a useful entry point into further studying the issue, proposing revisions, and promoting improved versions for adoption in other places. In addition, China has made attorneys' fees and litigation costs available to prevailing plaintiffs in environmental protection suits and courts have made such awards.⁴¹¹ As for contingency fees, regulations in Guangdong already permit such fees in certain types of labor dispute cases, which could provide an opening for further exploring that topic.⁴¹²

7. Establishing Personal Liability for Employers and Imposing Criminal Sanctions

Worker advocates believe that one reason for the prevalence of labor violations is the lack of a significant deterrent for employers. Unlike in the United States, an individual (natural person) does not have the capacity to be an "employer" under Chinese labor law.⁴¹³ This means that in civil litigation or administrative actions, generally, only the corporate entity that employs the worker is liable for paying compensation to the worker. Therefore, even if the corporate entity does not pay a court judgment, the employer need not fear that his personal assets will be at risk. As labor law scholar Xie Zengyi writes, "The current unsatisfactory labor law implementation has a lot to do with the situation where the liability of illegal act[s] is limited to the company employer, without individual accountability."⁴¹⁴ Therefore, amending the law to permit personal liability for employers could provide a useful deterrent.

⁴¹¹ Karl Bourdeau & Dan Schulson, *Citizen Suits: A Watershed Moment in Environmental Litigation?* CHINA BUS. REV., May 13, 2016.

⁴¹² *Guangdong Province Operational Guidelines for Lawyers*, *supra* note 158 at Art. 24.

⁴¹³ In the United States, federal law and many state laws make both the corporate entity and individual owners—and sometimes even certain managers or supervisors—liable for wage and hour violations. Obtaining a judgment directly against the individual eliminates the need for the extra step of piercing the corporate veil before enforcing that judgment against an employer's personal assets. Accordingly, in litigation, plaintiffs will often list both the corporate entity and individual owners as defendants.

⁴¹⁴ XIE, *supra* note 16 at 17. China has procedures for "piercing the corporate veil," but this is difficult to do in practice.

⁴⁰⁹ See Aaron Halegua, *United States*, in *RESOLVING INDIVIDUAL LABOUR DISPUTES: A COMPARATIVE OVERVIEW* (M. Ebisui, S. Cooney & C. Fenwick, eds., forthcoming) (discussing how the United States Department of Labor and New York State Department of Labor will investigate an entire workplace in response to a complaint from a single individual).

⁴¹⁰ China Labor Watch, *Study Casts Doubt on Apple's Ethical Standards*, 5, 20 (Feb. 24, 2016).

Another way to increase deterrence is through criminal prosecutions of labor violations, which have begun to happen in China. The 2011 amendments to the *Criminal Law* established criminal penalties for the malicious non-payment of wages.⁴¹⁵ Specifically, Article 276 makes it a crime to “transfer assets, hide assets, or otherwise evade payment of labor remuneration to workers or to have the ability to pay labor remuneration but not do so” where a “comparatively large sum” is involved and the relevant department has ordered payment. Article 276 also instructs that an entity guilty of this crime shall pay a fine, but the penalties for a “directly responsible individual” shall include “imprisonment of not more than 3 years or criminal detention and/or a fine; and if there are serious consequences, [...] imprisonment of not less than 3 years but not more than 7 years and a fine.” The Supreme People’s Court (SPC), in its *Interpretation on Some Issues in Trying Criminal Cases for the Malicious Nonpayment of Wages* (2013), has further clarified this provision.⁴¹⁶ Article 2 lists other behaviors that could be considered evading payment, such as falsely declaring bankruptcy or destroying payroll records. The term “comparatively large sum” is also defined in Article 3 to mean a failure to pay three months of wages that either total RMB 5,000–20,000 in a case involving one worker or RMB 30,000–100,000 in a case involving 10 or more workers. Each provincial-level people’s court can set its own specific minimums based on the level of economic development.

The Chinese government appears to be increasingly focused on criminally prosecuting employers for wage arrears violations.⁴¹⁷ In 2014, the government reported that 753 people had been criminally prosecuted for failure to pay wages.⁴¹⁸ This number increased by 58% in 2015 to nearly 1,200 cases.⁴¹⁹ Indeed, employers in each of the cities examined in this report have been prosecuted under this law.⁴²⁰ In 2014, Shenzhen brought 93 such cases resulting in 69 people being imprisoned.⁴²¹ Worker advocates generally view this as a positive trend, but believe there should be more prosecutions.⁴²² For instance, Beijing did not bring its first prosecution until 2013 and one interviewee reports that only about 40 prosecutions are occurring there annually.⁴²³

⁴¹⁵ *Criminal Law* (中华人民共和国刑法) (promulgated by the Nat’l People’s Cong., 1979) (amended 2011), Art. 276.

⁴¹⁶ *Interpretation on Some Issues in Trying Criminal Cases for the Malicious Nonpayment of Wages* (最高人民法院关于审理拒不支付劳动报酬刑事案件适用法律若干问题的解释) (promulgated by SPC, 2013).

⁴¹⁷ See *Notice on Strengthening the Connection Between the Investigation and Punishment of Suspected Criminal Cases for Refusal to Pay Labor Remunerations* (最高人民法院、最高人民检察院、人力资源和社会保障部、公安部关于加强涉嫌拒不支付劳动报酬犯罪案件查处衔接工作的通知) (promulgated by SPC, Supreme People’s Procuratorate, MOHRSS & Ministry of Public Security, 2014) (encouraging better coordination between the relevant departments in prosecuting wage arrears crimes); see also *Two Typical Cases Involving the Failure to Pay Labor Remunerations* (最高人民法院公布2起拖欠劳动报酬典型案例) (promulgated by SPC, 2015) (instructing courts on how to handle these cases).

⁴¹⁸ *SPC Work Report (Summary)* (最高人民法院工作报告(摘要)), XINHUA, Mar. 13, 2015.

⁴¹⁹ Susan Finder, “Takeaways from the Supreme People’s Court 2015 Work Report,” SUPREME COURT MONITOR, Mar. 15, 2016.

⁴²⁰ See, e.g., *Nanjing’s First Refusal of Payment Case: Sentenced to One Year and RMB 300,000 Fine* (南京首例拒不支付劳动报酬案: 判1年缓刑3万), NANJING DAILY, Aug. 11, 2013 (Nanjing); *Suzhou Red Knitting Limited Liability Company, Wang Chunlin Case of Refusing to Pay Labor Remuneration* (苏州市一抹红针织有限公司、王春林拒不支付劳动报酬案), ZHEJIANG HENGLIAN LAW FIRM, Feb. 14, 2013 (Suzhou); *Announcement of Verdict Against Mr. Li in Refusal to Pay Wages Case, Relatives Satisfied with the Result* (李某拒不支付劳动报酬案今日宣判, 家属满意判决结果), KUNSHAN LAWYER WANG TUANJI NET (昆山王团结律师网), May 7, 2015 (Kunshan); MOHRSS Announced the Third Installment of Criminal Cases Involving the Refusal to Pay Wages (人社部公布第三批拒不支付劳动报酬罪案例), Feb. 9, 2015, MOHRSS (Shanghai).

⁴²¹ *Shenzhen Strikes Against Unpaid Wages: 69 Arrested for Failure to Pay Wages* (深圳重拳打击欠薪: 69人因拒不支付劳动报酬被拘), XINHUA NET, Jan. 20, 2015.

⁴²² See *Wage Against the Machine: Deadbeat Employers to Face Fines in Guangdong*, WALL ST. J., June 19, 2015 (reporting China Labour Bulletin’s opinion that enforcement of the labor-related crimes added to the *Criminal Law* in 2011 have been inadequate).

⁴²³ *Beijing’s First Prosecution for Failure to Pay Labor Remuneration* (北京市首例拒不支付劳动报酬案审查起诉), XIN JING BAO, Dec. 18, 2014.

One strategy is for worker advocates to refer more cases to the relevant authorities for criminal prosecution, which already happens to a considerable degree in some parts of the United States.⁴²⁴ As a preliminary point, many more wage arrears cases would be eligible for criminal prosecution if there were not a precondition that the labor inspectorate must have issued an order that was disobeyed. In an interview, a SPC official stated that a failure to comply with an arbitral award or civil judgment could also satisfy this standard; however, most lawyers seem unaware of this fact (which is not made explicit in the text of the judicial interpretation).⁴²⁵ This would mean that advocates with unenforceable judgments could refer those cases for criminal prosecution, potentially causing employers to make payment in order to avoid criminal sanctions. If the understanding of the court official is in fact the law, then advocates should be made aware of this fact; if it is not, then advocacy to amend the law or relevant regulations might be part of worker advocates’ strategy in this area.

Another piece of this strategy to increase the number of criminal prosecutions is to train lawyers and advocates on what prosecutors look for in such cases and what type of evidence is needed from workers. In the aforementioned interview, the SPC official stated that prosecutions are difficult because of the poor evidence that workers bring to the labor inspectorate. Lawyers or NGOs could be more active in helping workers to better package these cases and then bring them to the relevant authorities. It may be worth consulting with environmental lawyers to see how criminal prosecution is being used in that context and what lessons, if any, can be learned.

Worker advocates may also be able to help develop media strategies to better publicize any criminal prosecutions. As the government has realized, criminal prosecutions can only deter employers who know about them. In June 2016, MOHRSS issued a draft regulation that would require local labor bureaus to publicize information about employers who commit “major” (重大) labor violations, including the name of any legally-responsible individuals.⁴²⁶

Finally, advocates should explore what role they can play in promoting more prosecutions related to work safety issues. For instance, when several hundred workers in an artificial diamond plant contracted pneumoconiosis, they filed a case with the local police encouraging prosecution of the employer for failing to protect the workers. Although it took two years, the police eventually launched an investigation in 2013.⁴²⁷ Officials have also called for greater use of criminal prosecutions in the workplace

⁴²⁴ See Janice Fine, *Co-Production: Bringing Together the Unique Capabilities of Government and Society for Stronger Labor Standards Enforcement*, 19 (2015) (describing examples of worker centers cooperating with law enforcement agencies, such as the collaboration between the Worker Defense Project and Austin Police Department to combat wage theft).

⁴²⁵ *SPC Judicial Interpretation on the Crime of Malicious Nonpayment of Wages Sets Threshold for Incrimination* (最高法院司法解释释恶意欠薪入罪门槛), ZHONGGUO GUANGBO WANG (中国广播网), Jan. 22, 2014. The text of the *Interpretation* states that the element of the crime is satisfied when “the [labor] bureau or other relevant government bureau (政府其他有关部门) issues a corrective order, administrative processing decision, or other document (等文书) ordering payment to the laborer of unpaid wages by a certain date.” SPC, *Interpretation, supra* note 416 at Art. 4 (emphasis added). Therefore, the SPC official may be implying that these “other documents” would include arbitration or court orders.

⁴²⁶ MOHRSS: *Eight Types of Major Illegal Labor Activities Must be Publicized* (人社部: 八大重大劳动保障违法行为必须公布), CHINA NEWS NET (中国新闻网), June 22, 2016.

⁴²⁷ *Police Launch Criminal Investigation into Foshan Pneumoconiosis Case*, CHINA LABOUR BULLETIN, Dec. 31, 2013.

safety context. Indeed, Shenzhen's Deputy Mayor noted that, although an amended *Workplace Safety Law* with heightened penalties against enterprises and individuals went into effect in December 2014, there is little evidence that the new provisions have been used to convict or even prosecute business owners anywhere in China.⁴²⁸ The *Criminal Law* also has provisions criminalizing certain behaviors related to work safety that could potentially be used against negligent or reckless employers.⁴²⁹ Some of the strategies outlined above concerning prosecutions for the nonpayment of wages could also be used in the workplace safety context.

8. Engaging Employers to Reduce Workplace Injuries and Labor Violations

Collaborations between worker advocates and Chinese employers or multinational companies sourcing from China can be an effective means of pursuing several of the above strategies. Many of these entities share an interest in improving working conditions in China. A large number of multinationals have made commitments to ensuring safe conditions and labor rights protections for workers in their supply chain. Domestic employers also benefit from the increased productivity and decreased fines and litigation costs that result from creating safer, more compliant workplaces. Furthermore, working collaboratively with employers likely involves relatively little political risk for NGOs, lawyers, or other advocates.

Improving workplace health and safety may be a particularly fertile ground for collaboration. This is the area in which corporate social responsibility and compliance programs of the multinationals have generally been more effective at improving supplier factory conditions.⁴³⁰ Labor advocates and multinationals could cooperate to develop effective trainings and programs to limit workplace injuries or occupational disease. These programs could first be implemented in the multinational's supplier factories and then introduced to other Chinese employers. Another strategy to pursue, as discussed above, is fostering more worker-management dialogue and collective negotiation around health and safety issues. Programs that decrease workplace accidents and injuries can generate cost-savings for employers because they reduce interruptions to production, payments to injured workers, and the time and cost of recruiting new workers.

Multinationals and employers may also be engaged on some of the other proposed strategies. For instance, they can help ensure that workers are made aware of or even receive training on any useful legal education tools or social media resources that are developed. Employers who invest in safer, compliant workplaces should also support administrative litigation to make China's enforcement agencies more proactive, which may result in increased fines and penalties for their competitors who fail to comply with their legal obligations.

⁴²⁸ *Shenzhen Vows to Get Tough on Bosses Who Put Workers Lives at Risk*, CHINA LABOUR BULLETIN, July 8, 2015.

⁴²⁹ *Criminal Law*, *supra* note 415 at Arts. 134–36.

⁴³⁰ See RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN THE GLOBAL ECONOMY* 174–75 (2013). Of course, however, the track-record is still far from perfect, as evidenced by the 2013 building collapse at Rana Plaza in Bangladesh in which over 1,000 workers perished.

VII. Conclusion

This report is premised on the idea that a deeper understanding of the issues facing workers and efforts to combat them will produce better strategies for addressing those problems. While this report helped illuminate certain aspects of Chinese workers' legal needs and the availability of legal services, much is still unknown and more research is needed.

One ripe area for further study is how workers fare in the litigation system. As the number of mediated disputes grows, what kinds of settlements are being reached in these cases? Official statistics report that most arbitration and court cases are a “partial win” for each side, but does this mean workers are getting most of what they are entitled to or just a small portion of it? As referenced above, another question is precisely how legal representation impacts these outcomes. In what situations is legal representation most important? Do different legal advocates—private lawyers, legal aid attorneys, basic-level legal workers, and law clinic students—obtain different results for their clients?

More research must also be done on the actual size of the representation gap. There are virtually no official statistics available as to how many workers are going unrepresented in the mediation or litigation process—a deficiency that also exists in the United States.⁴³¹ The Chinese government should be encouraged to track this information and make it available. Academics should also strive to obtain a better understanding of the scope of this problem and develop solutions to it.

While further research is ongoing, however, worker advocates should also be refining and implementing strategies to better enforce the legal rights of workers. Such efforts are particularly important at this juncture in time, when China seems prepared to roll back even some of the labor protections and rights previously granted to workers.

⁴³¹ See Koppel, *supra* note 187 (“There are no comprehensive statistics on how many people represent themselves in court [in the United States.]”); *but see* BEYOND ELITE LAW, *supra* note 131 (describing several, more limited studies and statistics that do exist).



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