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The Recursivity of Reform: China's Amended Labor Contract Law

Virginia Harper Ho*

Huang Qiaoyan†

*University of Kansas School of Law

†Sun Yat-sen (Zhongshan) University School of Law

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ARTICLE

THE RECURSIVITY OF REFORM: CHINA'S
AMENDED LABOR CONTRACT LAW

*Virginia Harper Ho** & *Huang Qiaoyan*⁺

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⁺ Lecturer & Head of the Legal Aid Clinic, Sun Yat-sen (Zhongshan) University School of Law. Many of the observations of current practice and firm responses to the reforms are drawn from this author's experience in the Sun Yat-sen Legal Aid Clinic, in practice, and as a policy advisor and active commentator on the recent reforms.

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INTRODUCTION

In December 2012, China’s legislature took the unprecedented step of amending its Labor Contract Law (“LCL”)¹ only four years after its enactment.² The amendments, which took effect in 2013, are limited in scope and address only a few provisions of the LCL—those governing the use of workers sourced from labor services agencies and the regulation of those agencies (referred to herein as “temp agencies”).³ The reforms are important in part because they deepen long-term trends in China toward tighter regulations and higher labor costs. Curiously, though perhaps not surprisingly, they are also intended, in part, to secure protections that have been a focus of Chinese labor law reform since China’s first nation-level Labor

1. Zhonghua Renmin Gongheguo Laodong Hetong Fa (中华人民共和国劳动合同法) [Labor Contract Law (P.R.C.)] (promulgated by the Standing Comm. Nat’l. People’s Cong., June 29, 2007, effective Jan. 1, 2008) STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.) [hereinafter LCL]. The law is also translated alternatively as the “Employment Contract Law” or “ECL”.

2. Zhonghua Renmin Gongheguo Laodong Hetong Fa (2012 Xiuzheng) (中华人民共和国劳动合同法(2012修正)) [Labor Contract Law (P.R.C.) (2012 amendment)], (promulgated by the Standing Comm. Nat’l. People’s Cong., Dec. 28, 2013, effective July 1, 2012) STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.) [hereinafter LCL Amendments].

3. See *infra* Part III. (discussing these provisions). As discussed below, the term “dispatched workers” (*laowu paiqian yuangong* 劳务派遣员工) under the LCL actually includes three separate categories of positions: “temporary,” “auxiliary,” and “substitute.” LCL, *supra* note 1, art. 66. The Chinese term, *laowu paiqian* (劳务派遣) is frequently translated as “labor dispatch” and the sourcing agencies are often referred to as the dispatching employer, “intermediary employment agencies”, or simply as “temp agencies”.

Law took effect in 1995,⁴ including “equal pay for equal work,” employment on the basis of employment contracts, minimum labor standards for all workers, and basic rules on length of service, termination, and severance.⁵ The LCL amendments are, therefore, the latest attempt to close implementation gaps that have been a hallmark of labor law reform since its inception.

The persistence of implementation gaps—the divide between the law on the books and the law in practice—in the face of continued legislative and regulatory reforms is a consistent focal point of regulatory scholars in law, sociology, and public administration,⁶ as well as observers of China’s reform path.⁷ The 2013 amendments offer a renewed opportunity to examine this fundamental question as it plays out in labor and employment law. In short, why have two major legislative reforms, the 1995 Labor Law and the 2008 reforms that introduced the LCL and related legislation, as well as numerous implementing measures adopted by courts, legislatures, and regulators at the national and subnational levels, failed to change basic labor practices? Given this history, is this most recent effort likely to succeed?

4. Zhonghua Renmin Gongheguo Laodong Fa (中华人民共和国劳动法) [Labor Law (P.R.C.)], (promulgated by the Standing Comm. Nat’l. People’s Cong. (P.R.C.), July 5, 1994, effective Jan. 1, 1995) STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. (P.R.C.) [hereinafter Labor Law].

5. See, e.g., Labor Law, art. 46 (requiring equal pay for equal work); *id.* ch. 3 (regarding labor contracts); *id.* chs. 5–6 (regarding working conditions and occupational safety and health); *id.* arts. 20–32 (regarding contract term, termination, and dissolution). For a more complete comparison of the Labor Law and the LCL, see *infra* Part II.B.

6. See generally, e.g., FIONA HAINES, CORPORATE REGULATION: BEYOND “PUNISH OR PERSUADE” (1997); IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); Lesley K. McAllister et al., *Reorienting Regulation: Pollution Enforcement in Industrializing Countries*, 32 LAW & POL’Y 1 (2010) (assessing approaches to environmental law enforcement).

7. See generally, e.g., IMPLEMENTATION OF LAW IN THE PEOPLE’S REPUBLIC OF CHINA (Jianfu Chen et al. eds., 2000); Sean Cooney, *Making Chinese Labor Law Work: The Prospects for Regulatory Innovation in the People’s Republic of China*, 30 FORDHAM INT’L L. J. 1050 (2006) (surveying challenges to labor law enforcement); Benjamin van Rooij & Carlos Wing-Hung Lo, *Fragile Convergence: Understanding Variation in the Enforcement of China’s Industrial Pollution Law*, 32 L. & POL’Y 14 (2010) (identifying similar challenges to environmental law enforcement).

Theories of legal recursivity, developed initially by Terence Halliday and Bruce Carruthers,⁸ offer a useful framework for understanding the dynamic interplay between law and its implementation. They observe that legal change proceeds through iterative cycles of lawmaking and implementation that are kept in tension by four drivers or mechanisms: the indeterminacy of law, the ideological and structural contradictions internalized in law, “diagnostic” struggles among competing actors involved in the legislative process, and mismatches between the actors involved in lawmaking and those tasked with implementation.⁹ At their most basic, these recursive cycles move from statutes or court decisions to practice to new statutes or further decisions, or from regulation to compliance experience to further regulations.¹⁰ In addition to factors endogenous to the recursive cycle itself, exogenous factors, such as triggering events or global pressures, also shape the process of legal change.¹¹

As detailed in Part II below, the new amendments represent the latest stage of a recursive reform process. They also respond to a phenomenon widely observed by academics and policymakers over the past several decades—a near-universal increase in the nonstandard workforce worldwide.¹² Despite the

8. These theories were developed initially in studies of global commercial lawmaking and draw heavily on neo-institutional perspectives of legislative reform. See BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, *RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES* 45–62 (1998); Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 *AM. J. SOC.* 1125 (2007).

9. *Id.* at 1149–53. See Sida Liu & Terence C. Halliday, *Recursivity in Legal Change: Lawyers and Reforms of China’s Criminal Procedure Law*, 34 *LAW & SOC. INQUIRY* 911, 913–14 (2009) (elaborating on the theory).

10. Halliday & Carruthers, *supra* note 8, at 1144.

11. *Id.* at 1145–46.

12. For a comprehensive review of these trends, see Arne L. Kalleberg, *Nonstandard Employment Relations: Part-time, Temporary and Contract Work*, 26 *ANN. REV. SOC.* 341, 341 (2000) (defining “nonstandard work arrangements” as “part-time work, temporary employment, and contract work”). On US trends, see, for example, AMERICAN STAFFING ASSOC., *AMERICAN STAFFING 2012: STRUCTURAL SHIFT?, STAFFING SUCCESS* 10 (2012), available at http://www.americanstaffing.net/statistics/pdf/AmericanStaffingAnnualAnalysis_2012.pdf (observing a 45% increase in temp agency employment since 2009, following a 38% decline during the financial crisis); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 *BERKELEY J. EMP. & LAB. L.* 251 (2006)

many labels used to describe them,¹³ all of these arrangements lack one or more of the hallmarks of standard employment: full-time work for an indefinite period that is performed at the employer's place of business under the employer's direction.¹⁴ Hiring through temp agencies and other intermediaries has contributed significantly to these trends, as employers look to reduce their regulatory burden, outsource responsibility for human resources functions, lower labor and benefit costs, and gain the flexibility they need to quickly respond to shifts in market demand.¹⁵ In many jurisdictions, the growth of the labor services industry has been spurred by deregulatory policies intended to facilitate its use as a catalyst for job creation and increased productivity.¹⁶

Strictly speaking, of course, workers sourced through temp agencies need not in fact be temporary. Such workers are employed under an employment contract with a labor services agency, typically for a fixed term, and then assigned to perform

[hereinafter Stone, *Atypical Employees*]; Katherine V.W. Stone, *Flexibilization, Globalization, and Privatization: Three Challenges to Labour Rights in Our Time*, 44 OSGOODE HALL L.J. 77 (2006); Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L.J. 503 (1997); Richard S. Belous, *The Rise of the Contingent Work Force: The Key Challenges & Opportunities*, 52 WASH. & LEE L. REV. 863, 867 (1995). In 2005, the *Comparative Labor Law & Policy Journal* devoted a symposium issue to the topic. See Symposium, *Bridging The Past and the Future: A Symposium on Comparative Labor Law*, 27 COMP. LAB. L. & POL'YJ. 1 (2005).

13. Common terms include "nonstandard employment relations," "alternative work arrangements," "market-mediated arrangements," "nontraditional employment relations," "flexible staffing arrangements," "flexible working practices," "atypical employment," "vagrant or peripheral employment," "vulnerable work," "precarious employment," and "disposable" or "contingent" work. See Kalleberg, *supra* note 12, at 341 (reviewing the literature).

14. *Id.*

15. See, e.g., RICHARD CARLSON & SCOTT A. MOSS, *EMPLOYMENT LAW* 8 (3d ed. 2013) (discussing some of the common drivers of growing demand for dispatched workers and increases in other outsourcing practices).

16. See, e.g., Bernd Waas, *A Quid Pro Quo in Temporary Agency Work: Abolishing Restrictions and Establishing Equal Treatment—Lessons to Be Learned from European and German Labor Law?*, 34 COMP. L. & POL'YJ. 47–51 (2012) (discussing the deregulation of temporary agency work across Europe and under the 2008 European Union Directive on Temporary Agency Work); Gyeongjoon Yoo & Changhui Kang, *The Effect of Protection of Temporary Workers on Employment Levels: Evidence from the 2007 Reform of South Korea*, 65 INDUS. & LAB. REL. REV. 578, 580–83 (2012) (discussing the rationale for expansion of temporary hiring and similar trends in South Korea); Masanori Kuroki, *The Deregulation of Temporary Employment & Workers' Perceptions of Job Insecurity*, 65 INDUS. & LAB. REL. REV. 560 (2012) (analyzing the impact of deregulation in Japan).

services, which may be on a short-term or longer basis, for another firm (i.e. the “using” or “receiving” firm) under the terms of a labor services contract between that firm and the temp agency.¹⁷ At the same time, the term “temporary workers” includes those hired directly by an employer on a contingent or part-time basis. Accordingly, although the term “temp workers” is a convenient shorthand for all workers sourced from a temp agency, this Article uses the more literal terms “labor dispatch” and “dispatched workers” to avoid the impression that all such workers are in temporary positions.¹⁸

For employees, temp agency hiring can offer flexible work arrangements and the prospect of transitioning to long-term employment, as well as the opportunity to gain experience and skills.¹⁹ However, hiring through intermediaries generally offers employees lower wages and benefits, lower wage stability, and greater risk of workforce reductions in an economic downturn.²⁰ Prior empirical work also confirms that labor dispatch creates structural disincentives to training investments,²¹ and that high rates of short-term employment, including some forms of labor dispatch, can worsen high turnover rates, increase employee vulnerability, and further weaken the mutual commitment of employers and their workers.²² Other studies have demonstrated a correlation between the use of labor dispatch and other nonstandard work with heightened workplace accident rates.²³ The social effects of an over-reliance on labor dispatch and

17. For a detailed description of these arrangements, see *infra* Part II.C.

18. See *supra* note 3 (regarding variations).

19. See, e.g., Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective on Contingent Work*, 24 *BERKELEY J. EMP. & LAB. L.* 153, 161 (2003) (discussing incentives for contingent work arrangements).

20. TIMOTHY P. GLYNN ET AL., *EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS* 28 (2d ed. 2011). See Luo et al., *The Expanding Role of Temporary Help Services from 1990 to 2008*, *MONTHLY LAB. REV.*, Aug. 2010, at 4, 12 (measuring volatility of losses and gains in the labor services sector during the recession and following); MARION G. CRAIN ET AL., *WORK LAW: CASES AND MATERIALS* 67 (2d ed. 2010) (discussing disparities and uncertain application of employment laws).

21. Timothy J. Bartkiw, *Baby Steps? Toward the Regulation of Temporary Help Agency Employment in Canada*, 31 *COMP. LAB. L. & POL'Y J.* 163, 175 (2009) (surveying the literature).

22. See Arturo Bronstein, *Trends and Challenges of Labour Law in Central Europe*, in *GLOBALIZATION & THE FUTURE OF LABOUR LAW* 191, 207 (John D.R. Craig & S. Michael Lynk eds., 2006) (discussing the negative impacts of temporary work).

23. *Id.*

other nonstandard forms of employment on gender imbalances, employee productivity, and morale are equally troubling.²⁴ These factors are not conducive to innovation or the development of the highly trained yet nimble workforce that China and other nations hope to produce.

The growth of the labor services industry and the expansion of the nonstandard workforce more broadly therefore raise difficult legal questions about: (i) the permissibility of disparities in the terms and conditions of employment for standard and nonstandard workers; (ii) the allocation of responsibility for compliance with labor and employment laws between the sourcing and the requesting firm; and (iii) more fundamentally, how “employer” and “employee” should be defined and interpreted under regulatory regimes designed with standard employment relationships in mind.²⁵ In China, as in other jurisdictions, the resolution of these questions is critical to the effective implementation of protective legislation that benefits all workers, not only just dispatched workers.

China’s reforms must be understood in a broader global context. In the United States, legislatures and courts have largely sought to adapt existing labor and employment law and regulations to address nonstandard employment, with mixed success.²⁶ More expansive reforms are being introduced in emerging markets. In the past five years, Mexico, South Korea, and governments in Europe have adopted new legislation that

24. The disproportionate impact of informalization on gender disparities in the workplace is well-documented. See, e.g., Jonathan P. Hiatt, *Policy Issues Concerning the Contingent Workforce*, 52 WASH. & LEE L. REV. 739, 744 (1995). Empirical evidence also substantiates the profound negative attitudinal and social impacts created by heterogeneity in employment arrangements among employees of a common employer. See Joseph P. Broschak & Alison Davis-Blake, *Mixing Standard Work & Nonstandard Deals: The Consequences of Heterogeneity in Employment Arrangements*, 40 ACAD. MGMT. J. 371, 372 (2006) (investigating the impact of disparities between standard and temporary work arrangements among workers at two US locations of a multinational financial services firm).

25. See Befort, *supra* note 19, at 153, 158–60, 164–71 (discussing these challenges within the US regulatory framework). On the limits of status-based employment legislation, see generally Richard R. Carlson, *Why the Law Still Can’t Tell an Employee When it Sees One and How it Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295 (2001).

26. See generally Stone, *Atypical Employees*, *supra* note 12 (surveying the application of U.S. employment laws to temp agency hired and other nonstandard workers); Befort, *supra* note 19, at 164–70 (same).

explicitly addresses legal protections for workers hired through temporary agencies.²⁷ These reforms follow similar changes in the early 2000s introduced in many Latin American countries that by some estimates represent a “reversal of the trend towards informality,” with new measures that limit temporary contracts, regulate subcontracting, and restore or create minimum wage standards.²⁸

China’s first major step in the same direction began with the enactment in 2008 of the LCL itself, which contained new provisions on labor dispatch and other forms of nonstandard work.²⁹ Recent empirical studies offer evidence of the effectiveness of the LCL in promoting longer-term employment relationships, improved compliance with labor contracting mandates, and broader public awareness of legal protections for workers.³⁰ However, other evidence indicates that while these impressive gains may have improved legal protections for standard workers, the LCL’s passage has in fact deepened the informalization of the Chinese workforce.³¹ This evidence

27. On recent reforms in Mexico and South Korea, see *infra* Part V. On European reforms, see generally Waas, *supra* note 16. See also Bronstein, *supra* note 22, at 207–10 (discussing efforts to address the problems caused by temp agency hiring and the challenges of outsourcing to independent contractors who are in fact dependent on the hiring firm).

28. Simon Deakin, *The Contribution of Labour Law to Economic & Human Development*, in *THE IDEA OF LABOUR LAW* 156, 167–70 (Guy Davidov & Brian Langille, eds. 2011).

29. LCL, *supra* note 1.

30. See generally Mary Gallagher et al., *China’s 2008 Labor Contract Law: Implementation and Implications for China’s Workers* (Inst. for the Study of Labor Discussion Paper No. 7555 2013), available at <http://ssrn.com/abstract=2318736> (presenting the results of a longitudinal study based on urban household survey data and a national survey of 1600 manufacturing firms conducted by the People’s Bank of China); see also Cheng Yanyuan & Yang Liu, “Laodong Hetongfa” Shishi Dui Woguo Qiye Renli Ziyuan Guanli de Yingxiang: Jiuyu Renli Ziyuan Jingli de Guandian [*The Impact of the Labor Contract Law’s Enforcement on Chinese Enterprises’ Human Resources Management – Based on the Perspective of HR Managers*], 7 *JINGJI LILUN YU JINGJI GUANLI* [ECON. THEORY & BUS. MGMT.] 66 (2010) (finding that the LCL has led to an increase in the use and term of written contracts and the number of indefinite-term contracts, as well as to greater care in recruiting and hiring decisions); Fan Cui et al., *The Effects of the Labor Contract Law on the Chinese Labor Market*, 10 *J. EMPIRICAL LEGAL STUD.* 462 (2013) (concluding that the LCL resulted in higher wage and benefit growth and greater labor market rigidity).

31. See *infra* Part II. These trends are explored further in Albert Park & Fang Cai, *The Informalization of the Chinese Labor Market*, in *FROM IRON RICE BOWL TO*

indicates that many employers in China have substituted dispatched workers for standard hires on a wholesale basis precisely to avoid the perceived risks and costs of compliance with employment laws and regulations.³² The extent of this substitution effect has not been fully accounted for in prior studies on the LCL's impact precisely because of the many barriers to identifying the scale and scope of the nonstandard workforce.³³ By allowing labor dispatch to be used as a means of creative compliance and continued evasion, the LCL has in fact limited the degree to which the standards originally set by the Labor Law and the LCL are realized across the Chinese economy.

This Article draws on theories of legal recursivity to analyze the LCL amendments and new implementing rules that took effect in March 2014, which represent the latest stage of China's decades-long project of labor law reform.³⁴ Part I begins with an introduction to the recursivity framework and the protections already available to dispatched employees under the LCL. Integrating findings from the literature on regulatory compliance, it observes that the incentive structures embedded in the LCL and what we refer to as the "regulatory distance"—

INFORMALIZATION: MARKETS, WORKERS, AND THE STATE IN A CHANGING CHINA 17 (Mary E. Gallagher et al., eds., 2011).

32. For empirical evidence of the substitution effect of temp hires, see *infra* Part II.C. Similar motivations also affect employers in the United States. See Befort, *supra* note 19, at 158–60, 164–71 (calling contingent work a regulatory “black hole” because such workers fall outside the safety net that the regulations provide for employment relationships).

33. The most comprehensive study of the LCL's implementation of which we are aware is the study by Gallagher, et al., *supra* note 30. Its authors acknowledge the limitations of their survey instrument in distinguishing standard and dispatched employees. *Id.* at 16 n.9. They also recognize that the employment effects of tougher LCL implementation may have been muted since firms are evading the LCL's requirements by expanding hiring through labor dispatch. *Id.* at 30. The lack of any formal registration requirement for temp agencies in China prior to the recent amendments has also impeded accurate evaluation of the true scale of labor dispatch in China since 2008. See *infra* note 37 and accompanying text (acknowledging the lack of precise figures).

34. A draft of the implementing rules was released for public comment on August 7, 2013, with the final version issued in early 2014. PRC Ministry of Human Resources and Social Security (“MOHRSS”), Laowu Paiqian Zanzing Guiding (劳务派遣暂行规定) [Interim Provisions on Labor Dispatch] (promulgated by the Ministry of Human Resources and Social Security (P.R.C.), Jan. 24, 2014, effective Mar. 1, 2014) [hereinafter Labor Dispatch Provisions], available at www.mohrss.gov.cn.

that is, how far the demands of the new legislation diverge from current norms in the target population—have deepened the informalization of the workforce in China, despite the contrary goals of the LCL. We argue that these new dimensions of recursive legal reform might enrich the existing theoretical framework. Part III proposes further implementing measures that, if adopted at the national or local level, might better advance the amendments' stated goals and “wind down” the recursive cycle. The Article adopts a comparative perspective throughout, particularly with reference to relevant aspects of US law, and concludes by placing China's ongoing labor reform experiment in the context of recent efforts by governments in both emerging and developed economies to address the regulatory challenges created by the informalization of labor.

I. *RECURSIVE LEGAL REFORM & THE INFORMALIZATION OF LABOR*

The informalization of the Chinese workforce in its many forms can be traced back to the early years of the reform period.³⁵ Hiring through temp agencies, a key part of this informalization, has itself been an established employment model since the 1970s, when foreign representative offices were first required to hire exclusively through third-party agencies.³⁶ However, as we explain below, labor dispatch has expanded dramatically since the passage of the LCL.

According to the most recent estimates by the All-China Federation of Trade Unions (“ACFTU”), more than 60 million, or one-fifth, of China's 300 million urban employees are now

35. See Park & Cai, *supra* note 31, at 17, 20 (defining “informal” employment as work that is “often temporary, lacks a formal contract, and does not provide social insurance benefits or other worker protections”).

36. This requirement was formalized in the *Zhonghua Renmin Gongheguo Guowuyuan Guanyu Guanli Waiguo Qiye Changzhu Daibiao Jigou de Zanxing Guiding* (中华人民共和国国务院关于管理外国企业常驻代表机构的暂行规定) [Interim Regulations of the People's Republic of China Concerning the Control of Resident Representative Offices of Foreign Enterprises] (promulgated by the State Council, Oct. 30, 1980, effective Oct. 30, 1980) (P.R.C.), and by *Guanyu Waiguo Qiye Changzhu Daibiao Jigou Dengji Guanli Banfa* (关于外国企业常驻代表机构登记管理办法) [Administrative Measures for the Registration of Resident Representative Offices of Foreign Enterprises] (promulgated by the State Administration for Industry & Commerce, Mar. 15, 1983, effective Mar. 15, 1983) art. 11 (P.R.C.).

dispatched workers.³⁷ By comparison, the percentage of all nonstandard workers in the United States, of which labor services hires are a subset, is currently around twenty percent of the workforce.³⁸ Although temp agency hiring has nearly doubled since the 1990s, it still accounts for less than two percent of total employment in the United States.³⁹

Before the recent reforms took effect in 2013, dispatched workers accounted for anywhere from one-third to as high as seventy percent of the workforce for many firms, including state-owned enterprises (“SOE”) and foreign-invested firms alike.⁴⁰

37. Accurate estimates are hard to come by. These figures come from a widely cited report of the Economic Observer quoting the results of a 2011 study of labor dispatch by China’s national labor union, the All-China Federation of Trade Unions (“ACFTU”). See Jiang Wenzhang, *Quanwei Baogao Cheng “Laowu Paiqian” Da 6000wan Ren QuanZong Jianyi Xiugai Laodong Hetongfa* (权威报告称“达6000万人全总建议修改《劳动合同法》) [Authoritative Report Says “Labor Dispatch” Workers Reach 60 Million, ACFTU Recommends Amending the Labor Contract Law], JINGJI GUANCHANG (经济观察网) [ECONOMIC OBSERVER] (Feb. 25, 2011). The ACFTU report analyzed data obtained in 2010. More conservative estimates by the MOHRSS for 2009 reported only 27 million dispatched workers.

38. The Bureau of Labor Statistics reported that as of September, 2013, the total part-time workers and those employed in temporary help services accounted for approximately 20% of the employed workforce. Bureau of Labor Statistics, *The Employment Situation* (Sept. 2013), www.bls.gov/news.release/pdf/empisit_10222013.pdf [hereinafter 2013 BLS Employment Report]; Befort, *supra* note 19, at 159 (citing sources from the 1990s putting the figure near thirty percent).

39. As of September, 2013, employment in “temporary help services” accounted for a seasonally-adjusted 1.2% of the employed labor force. 2013 BLS Employment Report, *supra* note 38. This figure is similar to 2008 levels, which take into account disproportionate job losses among temp agency hires in 2007 and 2008. Luo et al., *supra* note 20, at 4, 12. The number of workers sourced via staffing agencies has continued to grow in recent years, accounting for upwards of fifty percent of newly created positions. Ben Baden, *Larger Temporary Workforce Could be the New Normal*, U.S. NEWS & WORLD REP. (Nov. 7, 2011), <http://money.usnews.com/money/careers/articles/2011/11/17/larger-temporary-workforce-could-be-new-normal> (citing the Bureau of Labor Statistics on the size of the temporary workforce from 2009 to 2011). These figures represent the number of contingent, contractual, seasonal, freelance, just-in-time or “temp” workers who are hired under contract with a staffing agency that supplies them to a requesting firm. Luo et al., *supra* note 20, at 1 (following the definition of the “temporary help services industry” used by the Bureau of Labor Statistics).

40. See *In China, a Growing Demand for Temps*, BUS. WK., Mar. 12, 2012, at 16 (citing sources estimating that 70% of the workforce of some state sector employers, including Sinopec and China Telecom, are temp workers) [hereinafter *Growing Demand*]; *China Tightens Loophole on Hiring Temporary Workers*, REUTERS (Dec. 28, 2012), <http://www.reuters.com/article/2012/12/28/us-china-labor-idUSBRE8BR04120121228>. (citing estimates placing temp hiring levels in foreign-invested firms at one-third to half); see also Jiang Yunzhang, *Labor Contract Law to Be*

Indeed, SOEs and other public employers, such as state agencies, universities, public hospitals, and financial institutions, have relied the most heavily on labor dispatch.⁴¹ Clearly, the phenomenon is not limited to low-skilled manufacturing labor. In fact, according to the ACFTU report, dispatched workers have been more heavily employed in service industries such as medicine, banking, finance, and telecommunications.⁴² Underemployed college graduates accounted for nearly half of all dispatched workers surveyed in one study by the Guangdong Provincial Federation of Trade Unions in 2012.⁴³

Macroeconomic shifts offer a partial explanation for these numbers. Labor costs in China have risen exponentially over the past decade, driven in part by labor shortages in traditional urban manufacturing centers, tougher grassroots demands from a new generation of migrant workers, and changing development policies that require increased domestic purchasing power to offset weakness in foreign export markets.⁴⁴ As in the West, labor dispatch has enabled many employers to reduce the cost of social insurance and other benefits.⁴⁵ Increased demand for flexible, cost-effective hiring models has also contributed to informalization, as employers attempt to keep up with seasonal consumer demand and just-in-time inventory practices. But understanding the rapid growth of labor dispatch and its connection to the compliance gaps that continue to drive scandals and protest requires a closer look at the path of Chinese labor law reform itself.

Revised, ECON. OBSERVER (Mar. 27, 2012) (reporting that sixty percent of companies in the finance industry use seconded workers).

41. See Jiang, *Authoritative Report*, *supra* note 37 (reporting on industry trends contained in the ACFTU survey).

42. *Id.*

43. INTERNATIONAL LABOR UNION CONFEDERATION HONG KONG LIAISON OFFICE, ACFTU MADE SECOND APPEAL TO THE NPC TO REGULATE AGENCY WORK (2012), available at <http://www.ihlo.org/LRC/ACFTU/010312.html> [hereinafter IHLO Report].

44. See, e.g., Gordon Feng & Kay Cai, *Delays Ahead: Why New Labour Rules Raise Stress Levels*, 26 CHINA L. & PRAC. 7 (June 2012) (“Many provinces and cities announced [a] double salary plan in 2010 targeted at doubling employees’ average income within five years, or a 15% increase each year” in order to spur consumption-driven growth).

45. See, e.g., CARLSON & MOSS, *supra* note 15, at 8 (observing that contingent workers in the United States commonly receive reduced benefits). On the Chinese context, see *infra* notes 126–31 and accompanying text.

A. Recursivity & Legal Reform

The LCL amendments are only the latest in a series of legislative reforms over the past decade, some quite innovative, that have, on balance, strengthened legal protections and remedies available to Chinese workers.⁴⁶ Nonetheless, as discussed below, these most recent reforms, and in fact the LCL itself, in many respects only reemphasize and reinforce requirements found in pre-existing labor and employment law: “equal pay for equal work,” hiring by written contract, basic labor standards, and rules on dismissals and severance.⁴⁷

Halliday and Carruthers’ theory of recursivity offers a way to understand why reforms may fail to “take” initially and also helps identify factors that might raise the chance of success for later reforms. Their theory sees the relationship between formal law—the law on the books—and implementation—law in action—not as a simple linear or causal relationship, but as a dynamic, recursive social process.⁴⁸ Accordingly, law in practice is both an outcome of the legislative process and a catalyst for future lawmaking.⁴⁹

Recursive cycles of legal change can be explained, they posit, by four primary drivers or mechanisms that produce gaps between formal law and its implementation that then necessitate and shape the direction of further reforms. *Indeterminacy* refers to the inherent ambiguity, vagueness, and gaps in legislation, as well as conflicts with other regulations, statutes, or cases.⁵⁰ *Contradictions* refers to underlying economic, political, or ideological divides (collectively, “ideological contradictions”) and “structural contradictions” among competing lawmaking or implementation organizations within the state.⁵¹ Recursivity is also caused by *diagnostic struggles* in the process of lawmaking or implementation among contesting parties who disagree about

46. See *infra* Part II (surveying some of these changes). A full treatment of these reforms is beyond the scope of this article. Many are detailed in RONALD C. BROWN, UNDERSTANDING LABOR & EMPLOYMENT LAW IN CHINA (2008).

47. See *supra* note 5.

48. Halliday & Carruthers, *supra* note 8, at 1142; Liu & Halliday, *supra* note 9, at 912.

49. See Halliday & Carruthers, *supra* note 27, at 1146.

50. See Liu & Halliday, *supra* note 9, at 914; Halliday & Carruthers, *supra* note 8, at 1149.

51. See Halliday & Carruthers, *supra* note 8, at 1149.

the appropriate identification of the problem at hand and therefore, about its solution.⁵² Finally, legal change can be stymied by *actor mismatch*, which occurs when there is a wide disparity between the actors involved in lawmaking and those involved in its implementation, resulting in resistance or distortion in the implementation phase by those excluded from the law-making process.⁵³ Of course, law-making is generally undertaken by legislatures, courts, and administrative agencies, while implementation involves a broader range of actors and includes statutory interpretation, the daily work of legal professionals, the function of enforcement agencies and other authorities, and the response of individuals and entities to whom the law is applied.⁵⁴

Halliday and Carruthers also observe that exogenous factors, such as pressure from international actors and trading partners or triggering events, such as a scandal or crisis, can start the reform cycle and affect its progress.⁵⁵ Exogenous factors are particularly salient in labor and employment law reform, since labor and employment is inextricably linked to the health of local and global markets, demographic and social changes, and political shifts. Indeed, observers note that the history of labor law reform in the West, and more recently, in Latin America, Eastern Europe, and Asia, is evidence that “the principal institutions of labour law—the individual employment relationship, collective bargaining and social insurance—have evolved in parallel with the emergence of labour markets in market economies.”⁵⁶ Recursive cycles of national law reform

52. *Id.* at 1150–51.

53. *Id.* at 1152–53.

54. Liu & Halliday, *supra* note 9, at 914.

55. Halliday & Carruthers, *supra* note 8, at 1146–47 (discussing these factors as both contextual and stimulative). This comports with the observations of scholars in political science and public administration on the drivers of policy cycles. *See, e.g.*, James L. True et al., *Punctuated Equilibrium Theory: Explaining Stability and Change in Public Policymaking*, in *THEORIES OF THE POLICY PROCESS* 155, 160 (Paul A. Sabatier ed., 2d ed. 2007) (explaining major policy shifts or policy “punctuations” as the product of both endogenous and exogenous triggers).

56. *See* Deakin, *supra* note 28, at 162, 167–71 (tracing reforms in Latin America and Eastern Europe) (citation omitted); *see also* Bob Hepple, *Factors Influencing the Making and Transformation of Labour Law in Europe*, in *THE IDEA OF LABOUR LAW*, *supra* note 28, at 37–40 (examining the influence of labor movements and civil society in shaping labor law in Europe).

may also be strongly influenced by global efforts at norm construction that can affect the momentum, content, and trajectory of domestic legal reform.⁵⁷

Comparative labor and employment law offers numerous examples of the dynamics Halliday and Carruthers observe. Indeed, their work was inspired by studies of a series of 19th century reforms known as the English Factory Acts that were enacted and replaced in turn as the initial attempts to address the sweatshop factory conditions of the Industrial Revolution were defeated by limited regulatory capacity or active resistance.⁵⁸ Employment discrimination law in the United States, which began with early executive orders, carried through until the 1964 Civil Rights Act, and ultimately, led to the implementation of Title VII, offers another example of recursive reform.⁵⁹ Although neither we nor Halliday and Carruthers espouse any notion of evolutionary development paths as an outcome of recursive reform, there are many resemblances between the cycles of reform experienced in the West and the ongoing reform of Chinese labor and employment law.

The recursive reform model emphasizes that the legislative goals reflected in the early stages of a reform cycle may be redefined as the law is implemented, and that recursive cycles are in fact a process of norm formation rather than a linear path toward a fixed goal; reinterpretations or reformulations of existing norms, not all of which are necessarily explicit in law, may emerge in practice and may ultimately be incorporated formally by legislation later in the cycle (or not).⁶⁰ Thus, it may be difficult to observe without the benefit of hindsight what the outcome or end point of a given cycle might be. This is particularly true in the Chinese case where the reform process spans decades and is shaped by changes in national and subnational leadership and policy priorities.

57. See Halliday & Carruthers, *supra* note 8, at 1173.

58. *Id.* at 1144.

59. *Id.*

60. As originally conceived, Halliday and Carruthers explored the intersections of global norm-making at the international level among states and institutions and state-level legislation. See *id.* at 1137–38, 1141–43 (surveying the literature on the intersections of legal change and normative or social change).

The remainder of this Part analyzes the LCL, its implementation, its amendment in 2012, and the amendments' recent implementing rules, as iterations in a recursive reform cycle. While recognizing the complex political and institutional forces behind the reform process, we nonetheless believe that each stage of formal legal reform in China can be viewed, at least since the passage of the Labor Law in 1994, as directed at conforming employment practice and accepted norms to the broad goals outlined at the start of this Section, which have remained largely constant over the past two decades. Applying a recursivity framework offers insights into why recent reforms appear to be largely covering old ground and suggests whether the most recent reforms are likely to affect employment practice.

As explored below, China's labor reform project can be partially explained in terms of the four mechanisms identified by Halliday and Carruthers. Although less explicit in the following discussion, exogenous factors also play a role. For example, global actors such as multinational corporations, transnational NGO networks, and international organizations, such as the International Labour Organization ("ILO"), exercise continued influence and have the opportunity to inform both the law-making and implementation sides of the equation. The global financial crisis has certainly impacted recent policy debates on labor reform in China,⁶¹ and each cycle of labor law reform has also been spurred by local scandals that directly shaped policy debates.⁶²

However, two critical drivers not captured in Halliday and Carruthers' model also appear to have perpetuated the recursive cycle. As explained in Part III, incorporating these factors into the recursivity model adds, we believe, both explanatory and predictive power to the framework. First, the LCL's tougher worker protections altered employer incentives by

61. The financial crisis sparked renewed attention within China and abroad to the need for a policy shift away from export-dependent growth and toward stronger domestic consumption. The latter approach requires sustained local incomes, which strengthens advocates of higher wages and benefits.

62. The passage of the LCL was spurred, in part, by a scandal over illegal forced labor at brick kilns in Shanxi Province. See Virginia E. Harper Ho, *From Contracts to Compliance? An Early Look at Implementation under China's New Labor Legislation*, 23 *COLUM. J. ASIAN L.* 35, 73 n.167 (2009).

simultaneously raising labor costs, increasing penalties for noncompliance, while it also expanded labor dispatch and other alternative hiring practices as a less costly means of formal compliance. Second, the “regulatory distance” between the standards set by the LCL and dominant compliance norms in the economy was wide, which produced a longer and more uncertain implementation phase.

We use the term “regulatory distance” to refer to a measure of the magnitude of change that must occur for compliance norms, as reflected by common understandings and practices in the relevant industry and jurisdiction, to conform to the letter and spirit of the new legal rule. It is therefore distinct from the concept of compliance gaps, which focuses on how far an individual firm’s conduct diverges from legal requirements. In this Article, we identify regulatory distance at a more general level.⁶³ Nonetheless, we suggest that it might readily be measured by using a combination of (i) objective factors, such as estimated compliance costs, the estimated length of time market actors anticipate will be required for average firms to achieve full compliance, and the frequency and severity of violations of *pre-existing* legal rules in the pre- and post-reform periods; and (ii) subjective factors, such as the level of opposition voiced by firms during the drafting process and the post-reform reaction voiced by compliance-minded firms. Future studies might examine how these and other factors might best operationalize regulatory distance as a construct. The following Part applies recursivity theory to examine how Chinese labor law itself has contributed to the informalization of labor and to consider the potential effect of the 2013 LCL amendments.

B. *The Labor Contract Law: Too Much Too Soon?*

The current regulatory framework of Chinese labor law was formally instituted at the national level in 1994 with the passage of the Labor Law.⁶⁴ However, in reality, the Labor Law replaced a vast body of administrative regulations adopted much earlier in the reform period, which are perhaps rightly viewed as the

63. We assume that regulatory distance will always exist if the reform is intended to change behavior.

64. Labor Law, *supra* note 4.

initial stage of labor law reform.⁶⁵ In 2008, the LCL and two related laws adopted in 2007 together marked a watershed as the first national effort to revamp labor and employment legislation since 1994.⁶⁶ Although each measure has been shaped by differing policy goals and new provisions have been introduced to respond to changing circumstances, it is striking how much of the content of the LCL and its amendments, discussed below, either repeat verbatim or are directed at shoring up requirements long established in the 1995 Labor Law, such as the written contract requirement, employer obligations to pay social insurance benefits,⁶⁷ limits on excessive overtime, prohibitions on abusive employment practices, and an “equal pay for equal work” mandate.⁶⁸

Many of the factors identified by Halliday and Carruthers offer a partial explanation for this recursive cycle. First, the Labor Law, like many national-level basic laws (*jiben fa* 基本法), was drafted in fairly broad terms and then fleshed out by later

65. *Id.* On this history, see generally HILARY K. JOSEPHS, *LABOUR LAW IN CHINA: CHOICE AND RESPONSIBILITY* (1990) (tracing the history of the reforms from the 1950s through the 1980s). Some of these rules were incorporated into the Labor Law and, as in other areas of Chinese legal reform, its drafters had the benefit of lessons obtained during the earlier, experimental phase before fundamental national-level legislation was adopted.

66. LCL, *supra* note 1. Zhonghua Renmin Gongheguo Laodong Zhengyi Tiaojie Zhongcai Fa (中华人民共和国劳动争议调解仲裁法) [Labor Dispute Mediation and Arbitration Law (P.R.C.)] (promulgated by the Standing Comm. Nat'l. People's Cong., Dec. 29, 2007, effective May 1, 2008) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.) [hereinafter Labor Arbitration Law]; Zhonghua Renmin Gongheguo Jiuye Cujin Fa (中华人民共和国就业促进法) [Employment Promotion Law (P.R.C.)] (promulgated by the Standing Comm. Nat'l. People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.)

67. China's social insurance system was instituted as part of the transition to market-based labor relations under the Labor Law. See Labor Law, *supra* note 4, ch. 9. The regulation and administration of social insurance benefits is now governed by the 2010 Social Insurance Law. Zhonghua Renmin Gongheguo Shehui Baoxian Fa (中华人民共和国社会保险法) [Social Insurance Law (P.R.C.)] (promulgated by the Standing Comm. Nat'l. People's Cong., Oct. 28, 2010, effective July 1, 2011) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (P.R.C.). Social insurance is partially funded by mandatory employer and employee contributions to five basic insurance funds based on withholding rates set at the local level: pension, health, disability and occupational injury, unemployment, and maternity insurance. Labor Law, *supra* note 4, at ch. IX; Social Insurance Law, *supra* chs. VII–VIII.

68. See, e.g., *supra* note 27 and accompanying text; see also Labor Law, *supra* note 4 at § 16 (written contracts); *id.* §§ 41–44 (limits on overtime); *id.* §§ 32, 50 (prohibitions on bonded labor and abusive practices); *id.* ch. IX (social insurance).

regulations. The indeterminacy of the Labor Law was complicated by the proliferation of regulations, judicial interpretations, and informal implementation practices at the local level, on top of prior authorities, much of which was neither transparent nor readily accessible to the firms and employees it governed.⁶⁹ In fact, an important contribution of the LCL, like the Labor Law before it, was its effort to codify prior administrative regulations and judicial interpretations, adding clarity and clout to existing law. This pattern is typical of legislative reform in China, which often begins with local experimentation and ad hoc administrative guidance, followed by a national legislative effort that in many respects codifies prior regulation, which itself then generates a new baseline for interpretative guidance to emerge.⁷⁰

Second, the Labor Law attempted to strike a balance between employers' need for flexibility, on the one hand, and consistent minimum protections for all workers in the economy, on the other. As Gallagher and Dong have observed, the Labor Law paved the way for state sector reform and the emergence of labor markets in the Chinese economy by freeing employers from the constraints of the command economy and the "iron rice bowl" of cradle-to-grave employment. While weighted on the side of employer autonomy, the law also sought to increase oversight of the burgeoning private sector. Accordingly, it established a new regulatory model built on contractual employment relationships.⁷¹ It said nothing about dispatched

69. For example, the resolution of labor disputes occupies one chapter of the Labor Law, but spawned a vast body of implementing authority, some conflicting. Labor Law, *supra* note 4, ch. X. For a survey of the related regulations, see VIRGINIA HARPER HO, LABOR DISPUTE RESOLUTION IN CHINA: IMPLICATIONS FOR LABOR RIGHTS & LEGAL REFORM 36–47, 55–81 (2004).

70. This pattern is widely recognized. See, e.g., ALBERT H.Y. CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 141 (4th ed. 2011) (acknowledging the role of local regulations as a precursor to national reform); Hilary K. Josephs, *Measuring Progress Under China's Labor Law: Goals, Processes, Outcomes*, 30 COMP. LAB. L. & POL'YJ. 373, 384 (2008) (citing examples from the LCL's provisions on severance pay and its codification of a 2006 judicial interpretation permitting direct litigation of certain unpaid wage claims).

71. On the goals and legislative history of the Labor Law and the LCL, see generally Mary E. Gallagher & Dong Baohua, *Legislating Harmony: Labour Law Reform in Contemporary China*, in FROM IRON RICE BOWL TO INFORMALIZATION: MARKETS, WORKERS, AND THE STATE IN CHANGING CHINA 36 (Sarosh Kuruvilla, Ching Kwan Lee & Mary E. Gallagher eds., 2011).

workers and little about other nonstandard employment relationships.⁷² The ACFTU and other labor advocates later challenged the Labor Law's approach as offering inadequate protection for employees, leading to calls for new legislation.⁷³ The inherent contradictions between the twin goals of the reform inevitably led to tensions and deficiencies in implementation, and ultimately triggered the next phase of the recursive reform process.

Although the “diagnostic struggles” that preceded the Labor Law's passage are not fully transparent, strong ideological differences clearly shaped the final form of the legislation.⁷⁴ In addition, “actor mismatch” between state-sector firms, the ACFTU, and officials involved in the drafting process, on the one hand, and the local officials and firms charged with its implementation, on the other, have contributed to the resistance, evasion, and outright conflict that hampered the success of the Labor Law as a vehicle for worker rights.⁷⁵

The drafting process of the LCL brought the diagnostic struggles of the late 1990s and early 2000s to the fore. Internal debate among the drafters centered on the extent to which the new law should favor employees or maintain a more neutral stance.⁷⁶ Two drafts of the legislation were released for public comment, attracting intense public debate and a record number of recommendations from foreign and domestic business organizations, trade union representatives, and labor advocacy groups.⁷⁷ While the final version responded to some of the concerns of the business community, other provisions that had faced strong opposition were retained. Most obvious among these were limits on terminations, new rules on indefinite (i.e. non-fixed term) contracts, and expanded severance

72. The Labor Law does contain provisions on probationary periods; it also encourages self-employment and the state's establishment of labor services agencies to aid job-seekers. See Labor Law, *supra* note 4, arts. 10, 11, 21 (self-employment, employment services, and probation).

73. On the competing interests represented in the LCL drafting process, see generally Gallagher & Dong, *supra* note 71.

74. See generally *id.*

75. See, e.g., CHING KWAN LEE, AGAINST THE LAW: LABOR PROTESTS IN CHINA'S RUSTBELT AND SUNBELT 20, 176–82 (2007).

76. See JOSEPHS, *supra* note 65, at 381–83 (citations omitted) (outlining the poles of the debate).

77. See generally Gallagher & Dong, *supra* note 71.

requirements.⁷⁸ The LCL, not surprisingly, bears the imprint of the competing “diagnoses” and reform visions expressed in the drafting process, which sowed the seeds for the most recent round of reforms.

In contrast to the Labor Law, which was designed to give employers new flexibility and promote workforce mobility,⁷⁹ the LCL was more clearly weighted toward employees.⁸⁰ It significantly strengthened formal protections for employees and reduced much of the indeterminacy created by the Labor Law and related implementing measures.⁸¹ The LCL emphasized contracts of unlimited duration by providing that failure to enter into a written contract would give rise as a matter of law to a contract for an unlimited term, entitling the employee to generous severance and added protections from termination.⁸² It also increased severance obligations, and provided that employees hired under two successive fixed-term contracts must be hired for an indefinite term.⁸³

The LCL also adopted a combined carrot-and-stick approach to incentivize employer compliance that has improved formal compliance with some of its basic mandates.⁸⁴ It toughened penalties for common violations, for example, by adding teeth to the existing rule requiring written labor contracts.⁸⁵ Its implementation mobilized workers to enforce the LCL, opening the door to stronger grassroots support for the

78. See Harper Ho, *supra* note 62, at 68–71 (discussing these provisions); Sean Cooney et al., *China’s New Labour Contract Law: Responding to the Growing Complexity of Labour Relations in the PRC*, 30 UNSW L. J. 788, 793–802 (2007) (same).

79. These features were seen as essential to promoting effective state sector reform. See Harper Ho, *supra* note 62, at 69 (discussing the goals of the Labor Law).

80. See generally Gallagher & Dong, *supra* note 71 (analyzing the drafting process and interest groups behind the LCL).

81. For a survey of the key changes, see generally Cooney et al., *supra* note 78.

82. LCL, *supra* note 1, art. 20.

83. *Id.* arts. 14(3), 46–47.

84. See Harper Ho, *supra* note 62, at 89–100 (discussing early impacts on implementation of the labor contract requirement). For more recent evidence, see generally Gallagher et al., *supra* note 30.

85. LCL, *supra* note 1, arts. 14, 82. The LCL provides that if an employer failed to sign a written employment contract with an employee within one year, the employee is entitled to punitive damages of twice the employee’s salary; thereafter, any employee without a written contract is deemed to have obtained an indefinite-term contract. *Id.* See also Harper Ho, *supra* note 62, at 73, 76–78 (discussing these provisions).

new rules, which further weakened actor mismatch between the legislative process and the implementation phase.

As a result of these changes, China's labor law is formally now stricter than in many developing countries.⁸⁶ At the time, the LCL was rightly hailed by labor advocates as a major step forward for China's workers. Employers decried the LCL as too much, too fast.⁸⁷ Many of the new measures inevitably raised labor costs, either by foreclosing avenues for cost-cutting non-compliance or by imposing new affirmative obligations.⁸⁸

The broader context of the LCL's passage—that is, factors exogenous to the lawmaking and implementation cycle—made its real and perceived burden on employers who were already under pressure even heavier. The ACFTU and its local branches had been working before 2008 to meet targets for organizing domestic and foreign-invested employers and initiating collective contract and wage negotiations.⁸⁹ Urban areas were already steadily raising the statutory minimum wage in response to persistent labor shortages and heightened worker expectations.⁹⁰ Pressure on employers mounted further in May

86. Gallagher et al., *supra* note 30, at 2 and sources cited therein.

87. See Harper Ho, *supra* note 62, at 89–93 (surveying early responses to the legislation).

88. Gallagher et al. have presented the first evidence of the widely anticipated cost impact on employers. See Gallagher et al., *supra* note 30, at 21–23.

89. See Harper Ho, *From Contracts to Compliance*, *supra* note 62, at 86–87 (discussing these efforts). After a hiatus in 2008 and 2009 during the financial crisis, these efforts resumed. See Feng & Cai, *supra* note 44, at 7 (reporting on the ACFTU's 2010 campaigns).

90. Shifting migration patterns are a primary cause of these labor shortages, as migrant workers increasingly seek opportunities inland. See Chong Qing & Jin Tang, *Changing Migration Patterns: Welcome Home*, *ECONOMIST*, Feb. 25, 2012, at 53–55; Jialu Liu et al., *Chinese Workers: Under Threat or a Threat to American Workers?* (Ind. Univ. Research Cntr. for Chinese Politics and Business Working Paper No. 2 2010), available at <http://ssrn.com/abstract=1673207>. Migrant worker ambitions and expectations, as well as rights consciousness, are also rising and increase upward pressure on wages and labor standards. See, e.g., Ouyang Juan, *Xin Shengdai Nongmingong de Jiazhi guan Yanjiu* (新生代农民工的价值观研究) [Research on the Worldview of the New Generation of Migrant Workers], 6 FAZHI YU SHEHUI [LAW & SOC'Y] 190 (2012); Zhang Min, *Xinshengdai Nongmingong Zhong de Butong Renqun: Dui Liyi Suqiu he Qunti Shijian de Taidu Fenxi* (新生代农民工中的不同人群: 对利益诉求和群体事件的态度分析) [A Different Group of New Generation Migrant Workers: Analysis of Attitudes toward Their Expectations and Collective Incidents], 2 ZHONGGUO QINGNIAN YANJIU [CHINA YOUTH RES.] 65 (2013). In China, the minimum wage is set at the provincial, rather than the national, level. On current trends, see *Growing Demand*, *supra* note 40, at 16 (reporting

2008, shortly after the LCL took effect, when a new national-level law on labor dispute mediation and arbitration lowered procedural and financial barriers, expanding employees' ability to pursue legal claims for violations of employment laws.⁹¹ The combined effect of the LCL and greater access to labor arbitration and the courts was an immediate exponential upsurge in labor disputes—in some jurisdictions, caseloads soared by as much as three hundred percent.⁹²

The timing could hardly have been worse for companies. By unhappy coincidence, the onset of the financial crisis compounded the effect of these dramatic changes, creating a “perfect storm” for local and foreign employers in China. Many companies went out of business, and trade and industry groups petitioned the central government to suspend enforcement of the LCL, although ultimately no formal action was taken to lessen its bite.⁹³ Not surprisingly, employers began to look for loopholes in the LCL, and they found them in the rules governing labor dispatch.

C. Nonstandard Workers Under the Labor Contract Law

As early as 2007, many observers predicted that the legal restrictions and costs associated with the new rules, and particularly those surrounding termination and severance, would incentivize employers to expand part-time and labor dispatch hiring.⁹⁴ According to one survey of 417 employers in the Pearl River Delta conducted in 2007 and early 2008, about thirty percent of the respondents reported plans to rely more heavily on labor dispatch after the LCL took effect.⁹⁵ These early

that six provinces and a number of major cities have seen double-digit wage increases in recent years).

91. Labor Arbitration Law, *supra* note 66. On the Labor Dispute Mediation and Arbitration Law, see Harper Ho, *supra* note 62, at 67, 74–82.

92. See *id.* at 95–98 (discussing these trends). This surge declined to more modest levels after 2009. LAODONG TONGJI NIANJIAN 2012 [Labor Yearbook 2011] (2012), at 368, tbl. 9-1.

93. Harper Ho, *supra* note 62, at 87–89 and sources cited therein.

94. See, e.g., Cooney et al., *supra* note 78, at 798, 800 (“One of the strongest impacts of the [LCL] is likely to be felt in the use of labour hire or ‘dispatch’ . . . workers.”).

95. This survey was conducted by Job88.com, a human resource consulting service. Job88 Xin Laodong Hetong Fa Qiye Yingdui Qingkuang Diaocha Baogao (Job88 新劳动合同法企业应对情况调查报告) [Job88 Survey Report on Enterprise

estimates turned out to be extremely conservative—the estimated number of dispatched workers is now more than double the levels before the LCL took effect in 2008.⁹⁶ In Dongguan, a manufacturing center outside Guangzhou in south China, the number of temp agencies jumped over five hundred percent after 2008, not including unregistered firms.⁹⁷ According to the drafters of the amendments, strong concerns among employers about the risks presented by the LCL’s rules on long-term contracts, high demand for cost-effective alternatives, ambiguities in the LCL, and low barriers to entry in the nascent labor services industry have all contributed to the rapid expansion of labor dispatch.⁹⁸

There is a certain irony in the fact that the LCL, which was designed to advance worker rights—and which appears in fact to have motivated greater adherence to formal protections for many employees⁹⁹—has also directly facilitated both creative compliance and outright abuse of labor dispatch.¹⁰⁰ In contrast to the Labor Law, the LCL contains an entire section governing the use of dispatched workers,¹⁰¹ as well as specific provisions on other forms of non-standard labor—probationary and part-time

Responses to the New Labor Contract Law], <http://image3.job88.com/08/dcb20080114/index.html> (last visited Dec. 13, 2008).

96. *Growing Demand*, *supra* note 40, at 15.

97. A survey in 2010 conducted by the Dongguan labor bureau identified 512 labor service agencies, up from 100 in 2008. *151 Laowu Paiqian Jigou Jin Hei Mingdan* (151 劳务派遣机构进黑名单) [151 Labor Dispatch Agencies Blacklisted], DONGGUAN YANGGUANG WANG [DONGGUAN SUN NEWS], Nov. 24, 2010.

98. *See, e.g.*, Preamble, Zhonghua Renmin Gongheguo Laodong Hetong Fa Xiuzhengan (Caoan) [Draft Amendments to the Labor Contract Law (P.R.C.)], 11TH STANDING COMM. NAT’L PEOPLE’S CONG. (P.R.C.), 27th Session, released for public comment July 6, 2012, available at http://www.npc.gov.cn/npc/xinwen/lfgz/flca/2012-07/06/content_1729107.htm [hereinafter LCL Draft Amendment]. *6000wan Ren Laowu Paiqian Renyuan Quanyi Nan Baozhang* (6000 万劳务派遣人员权益难保障) [60 Million Temp Workers’ Rights are Hard to Protect], JINGJI RIBAO [ECON. DAILY], Feb. 28, 2011 [hereinafter *60 Million Temp Workers’ Rights*] (reporting that labor dispatch has become “abnormally prosperous”).

99. *See generally* Gallagher et al., *supra* note 30.

100. This connection is widely recognized. *See, e.g.*, Mei Lai & Yang Xin, *Lun Laowu Paiqianzhong Laodongzhe Quanyi Baohu – Guanyu “Laodong Hetong Fa Diaoyan Wenjuan” de Shizheng Fenxi*, 2 GUOJIA XINGZHENG XUEYUAN XUEBAO [NAT’L SCHOOL OF ADMIN. J.], Feb. 2011, 52–56 (tracing reactions to the LCL and assessing the LCL’s effect on dispatched workers).

101. LCL, *supra* note 1, ch. 5(2), arts. 57–67. The Labor Law references only “employees” and “employing units.”

work.¹⁰² In many respects, it also anticipates and forecloses obvious potential abuses. By creating an alternative framework for hiring nonstandard workers, the LCL also responded to strong concerns raised by the business community during the drafting process about the rigidity and costs they anticipated from its tougher rules on hiring and dismissal.¹⁰³

All of these factors should have short-circuited the recursive loop. However, the LCL's affirmation of labor dispatch and other forms of nonstandard work as an alternative to standard employment relationships, coupled with the indeterminacy of the new rules and a tougher enforcement environment, led to an over-expansion of labor dispatch and set the stage for the 2013 amendments. In this respect, China's experience is consistent with that of other jurisdictions that have seen an upsurge in outsourcing, hiring through intermediaries, and other forms of informal work when more protective legislation for standard hires is introduced. This Section introduces the key provisions of the LCL that addresses all forms of nonstandard work, with an emphasis on labor dispatch as a foundation for Part D's survey of employer responses to the LCL.

1. Probationary & Part-Time Work

Part-time and probationary work are among the forms of nonstandard employment that are afforded new protections under the LCL yet offer employers added flexibility. "Part-time labor use" (*feiquanrizhi yonggong* 非全日制用工) is defined as work that is generally compensated on an hourly basis and that does not exceed an average of 24 hours per week or 4 hours per day for the same employer.¹⁰⁴ Part-time workers must be paid at least the local minimum wage and cannot be subject to a probationary term.¹⁰⁵ However, they need not be hired under

102. *Id.* arts. 19–21, 68–72 (probationary and part-time workers, respectively).

103. *See* Cooney et al., *supra* note 78, at 796–800 (outlining the debate over indefinite-term contracting and termination rights for standard and nonstandard workers under the LCL).

104. LCL, *supra* note 78, art. 68. These rules replace earlier MOLSS interpretations that had offered expanded rights and defined part-time work as no more than 30 hours per week and 5 hours per day. RONALD C. BROWN, UNDERSTANDING LABOR & EMPLOYMENT LAW IN CHINA 30 (2008).

105. *Id.* art. 70 (prohibiting probation); *id.* art. 72 (minimum wage).

written contract and can be dismissed at will without severance.¹⁰⁶

As under the Labor Law, employees may be hired on a probationary basis for up to six months.¹⁰⁷ The LCL added new requirements that probationary employees cannot be terminated without cause.¹⁰⁸ They must be paid at least minimum wage and no less than eighty percent percent of the non-probationary rate.¹⁰⁹ The possibility of a trial period lowers employers' risk and cost even if the employee is ultimately retained. However, the time constraints on both part-time work and the use of probationary periods make them less useful to employers seeking to meet long-term, or even seasonal, hiring needs.

2. Labor Dispatch & the Regulation of Employment Agencies

Labor dispatch offers employers an opportunity to achieve greater flexibility and lower costs on a longer-term basis. Like workers hired through intermediaries in the United States, dispatched workers are formally employed by a labor services agency, which recruits workers and places them with requesting firms.¹¹⁰ The terms of this trilateral arrangement are governed by (i) a labor dispatch contract between the temp agency and the company using the dispatched workers¹¹¹ and (ii) a labor contract between the worker and the temp agency, which is considered the dispatched worker's direct employer.¹¹² Under the LCL, both the temp agency and the company using the employee's services have clear obligations toward the worker. In contrast to jurisdictions that place primary responsibility on either the temp agency or the labor-using firm, the LCL makes

106. *Id.* art. 69 (permitting oral contracts); *id.* art. 71 (requiring notice but no severance).

107. Article 19 of the LCL also permits a shorter probationary period for short-term contracts, but in all cases, no more than six months. LCL, *supra* note 1, art. 19. *Cf.* Labor Law, *supra* note 4, art. 21 (authorizing probationary terms up to six months).

108. LCL, *supra* note 1, arts. 21, 32(1) (prohibiting termination without cause but allowing probationary employees to resign at will).

109. *Id.* art. 20.

110. *Id.* art. 58.

111. Under Article 59 of the LCL, the labor dispatch contract between the temp agency and the hiring firm must specify, among other things, the compensation and insurance payments to which employees are entitled.

112. *Id.* art. 58.

the temp agency and the hiring firm jointly and severally liable for violations that harm dispatched workers.¹¹³

The temp agency is considered the formal employer and is therefore directly responsible for payment of wages and benefits; these funds are typically received from the labor-using entity under the terms of its contract with the temp agency, although the sourcing contract may stipulate which entity will actually disburse funds and provide specific benefits to dispatched workers.¹¹⁴ The LCL explicitly prohibits temp agencies from assessing fees of any kind from dispatched workers or retaining any portion of their wages.¹¹⁵ Consistent with the 1995 Labor Law,¹¹⁶ dispatched employees also have an explicit right to “equal pay for equal work” (*tonggong tongchou* 同工同酬), which is determined based on the compensation paid to standard employees of a comparable position in the labor-using firm.¹¹⁷

Although they may be assigned to a user firm on a temporary basis, dispatched workers must still be hired by the temp agency under a fixed-term labor contract for a minimum two-year term; they cannot be hired on a part-time basis.¹¹⁸ The temp agency is also responsible for paying dispatched workers at least the minimum wage during periods when they are not hired out, reducing the risk of downtime to the worker.¹¹⁹ They are also entitled to information about the “relevant content” of the

113. LCL, *supra* note 1, art. 92. This principle parallels the joint liability doctrine in the United States under which both the direct employer, such as the temp agency, and the unit for whom the employee works might share legal responsibility for purposes of the Fair Labor Standards Act if both are engaged in employment-related activities. See 29 C.F.R. § 791.2(a) (2012); see also Stone, *Atypical Employees*, *supra* note 12, at 259 (discussing relevant authorities).

114. LCL, *supra* note 1, art. 58.

115. *Id.* art. 60.

116. *Id.* art. 63. If the company does not have an employee in a comparable position, employees in the same locality can serve as the standard. *Id.*

117. *Id.* art. 63; cf. Labor Law, *supra* note 4, art. 46 (stating that wage payments shall follow the principle of equal pay for equal work). If the company does not have an employee in a comparable position, employees in the same locality can serve as the standard. LCL, *supra* note 1, art. 63.

118. *Id.*; *Zhonghua Renmin Gongheguo Laodong Hetong Shishi Tiaoli* (中华人民共和国劳动合同法实施条例) [*Regulation on the Implementation of the Employment Contract Law* (P.R.C.)] (promulgated by the State Council (P.R.C.), No. 535, Sept. 18, 2008, effective Sept. 18, 2008) [hereinafter LCL Implementing Regulations], art. 30 (prohibiting temp agency part-time hires).

119. LCL, *supra* note 1, art. 58.

labor services contract between the temp agency and its client firm and have the right to join the union of either the temp agency or the labor-using entity.¹²⁰ The labor-using entity, for its part, must provide working conditions that conform to national labor standards, inform temporary employees about their job requirements and compensation terms, pay overtime wages, bonuses, and benefits related to the position, and provide any necessary training.¹²¹ In addition, the LCL explicitly prohibits labor-using entities from using multiple short-term labor dispatch placement contracts to cover a continuous term of labor use,¹²² from subcontracting or redispacting temp employees sourced elsewhere, and from setting up an internal temp agency.¹²³ However, other provisions appear to contemplate long-term labor dispatch use, since they require that normal wage adjustment be applied “in cases of continuous labor dispatch.”¹²⁴

3. Independent Contractors

Hiring independent contractors is a third alternative to standard hiring that may reduce compliance risks and costs to the contracting firm. However, because the Labor Law and the LCL are directed at the parties to a labor relationship,¹²⁵ they do not apply to independent contractors. Similarly, in the United States, many companies that come under fire for evading tax obligations and employment laws attempt to classify individual employees as independent contractors.¹²⁶ In China, however, an individual employee cannot legally be a sole proprietor or independent contractor in their personal capacity without

120. *Id.* art. 60 (access to labor services contract content); *id.* art. 64 (right to join unions).

121. *Id.* art. 62.

122. *Id.* art. 59.

123. *Id.* arts. 62, 67 (banning redispact and in-house or “captive” temp agencies).

124. *Id.* art. 62.

125. Labor Law, *supra* note 4, art. 2; LCL, *supra* note 1, art. 2.

126. In 2013, for example, the US Department of Labor began an effort to crackdown on employers whom they believed were improperly classifying workers as independent contractors in order to avoid paying overtime and payroll taxes. Jennifer Smith, *Labor Crackdown Heats Up*, WALL ST. J., Mar. 4, 2013, at B6.

registering as a legal entity.¹²⁷ Nonetheless, outsourcing offers employers a ready alternative to labor dispatch that also involves hiring employees of a third party to perform services at the user firm. The blurred line between these two approaches has only recently been addressed in the implementing rules for the amended LCL, as discussed in Part III below.

As this brief summary shows, the LCL attempts to place dispatched workers on equal footing with standard employees with regard to the primary terms and conditions of employment. It also attempts to set clear rules to give employers the flexibility to hire dispatched workers. Nonetheless, the LCL's implementation has revealed challenges that have motivated the next stage of the labor reform cycle.

D. *Measures & Countermeasures: Understanding Recursive Cycles*

The core puzzle of post-2008 labor reform is why the LCL's efforts to promote compliance with long-standing legal rules have led so soon to the next phase of a recursive reform cycle that largely reemphasizes existing rules. An obvious response, of course, is that the LCL's provisions on labor dispatch were new and untested in 2008, making later revisions in the light of experience almost inevitable.¹²⁸ In addition, two key drivers of recursive cycles—ideological and structural contradictions and indeterminacy or ambiguities in the legislation itself—are readily apparent in the LCL rules that are the focus of the new amendments. The incentives created by the earlier legislation and the degree of regulatory distance it reflects are two further potential drivers of the reform process discussed below. While they are not part of Halliday and Carruthers' initial framework, they usefully explain post-2008 responses to the LCL's labor dispatch rules.

127. See Zhonghua Renmin Gongheguo Gongsi Fa (中华人民共和国公司法(2005修订)) [Company Law (2005 Revision) (P.R.C.)] (as amended by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) [hereinafter PRC Company Law], STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. arts. 58–64 (P.R.C.).

128. In Halliday and Carruthers' terms, new legal rules often have unintended consequences that may create indeterminacy and undermine the goals of the initial reform, driving a new recursive cycle. See HALLIDAY & CARRUTHERS, *supra* note 8, at 1149.

First, the LCL's core ambivalence over whether to limit or encourage labor dispatch reflects the ideological and structural contradictions that polarized the LCL drafting process and ultimately resulted in few real limits on labor dispatch or labor services agencies.¹²⁹ For example, Article 66 gives employers wide berth to expand their use of dispatched workers. It states that that "labor dispatch shall *generally* apply to *temporary, auxiliary, or substitute positions.*"¹³⁰ The use of the term "generally" implies that employers may use seconded workers beyond the "three conditions" listed in Article 66 and still be in compliance with the LCL. Moreover, neither "temporary," "auxiliary," or "substitute" are defined in the text. As a result, many employers have expanded their use of dispatched workers since 2008 in positions that were designed for (and in many cases also held by) direct hires or have even made temp hiring the base of their workforce.¹³¹

The ambiguity of the LCL's "equal pay for equal work" requirement has also driven employers' over-reliance on labor dispatch. This requirement was already included in the Labor Law, which, like the LCL, uses the term "compensation" (*chou* 酬) rather than "wages" (*gongzi* 工资).¹³² Although regulatory guidance from the Ministry of Finance requires employers to document many common fringe benefits, such as any monthly housing, transportation, or meal allowances, as "wages" (*gongzi* 工资),¹³³ neither the LCL nor its 2008 implementing rules clarify whether "equal pay for equal work" also requires equal benefits and overtime wages. As of 2013, local rules in some provinces, including Chongqing, Shanghai, and Tianjin require both pay and benefit equality to some extent, but this interpretation is by no means universal.¹³⁴

129. For evidence of this link, see Cooney et al., *supra* note 78.

130. LCL, *supra* note 1, art. 66 (emphasis added).

131. See Laowu Paiqian Lifa de Wudu ji Qi Wanshan (劳务派遣立法的误读及其完善) [Misinterpretations of the Labor Dispatch Law and a Response], GONGREN RIBAO [WORKERS' DAILY], Aug. 24, 2010 [hereinafter Misinterpretations].

132. Labor Law, *supra* note 4, art. 46.

133. *Caizhengbu Guanyu Qiye Jiaqiang Zhigong Fulifei Caiwu Guanli de Tongzhi* (财政部关于企业加强职工福利费财务管理的通知) [Notice Regarding Strengthening the Financial Management of Employee Benefits] (promulgated by the Ministry of Fin., No. 242, 2009) art. 2 [hereinafter Finance Regulations].

134. Local rules in several provinces clarify that dispatched workers are entitled to receive equal pay and benefits, and, in some cases, mandate the use of equivalent wage

Many employers have enjoyed significant cost savings through technical compliance with the equal pay requirement in terms of base wages, while offering limited or no benefits to dispatched workers.¹³⁵ This has created major disparities between dispatched and standard workers.¹³⁶ In addition, until quite recently, companies could hire dispatched workers from agencies in cheaper jurisdictions to take advantage of lower social insurance withholding rates.¹³⁷

allocation methods. See *Tianjinshi Renli Ziyuan he Shehui Baozhangju, Tianjinshi Gongshang Xingzheng Guanliju, Tianjinshi Laowu Paiqian Guanfa* (天津市劳务派遣管理办法) [Regulations on the Administration of Labor Dispatch of Tianjin Municipality] (promulgated by the Tianjin Human Res. & Soc. Sec. Bureau & Tianjin Admin. for Indus. & Commerce, No. 76, Sept. 16, 2011, effective Sept. 20, 2011 to Sept. 20, 2016) art. 9 [hereinafter *Tianjin Labor Dispatch Regulations*] (requiring equal wages and benefits); *Chongqingshi Zhigong Quanyi Baozhang Tiaoli* (重庆市职工权益保障条例) [Chongqing Regulation on the Protection of the Rights and Interests of Employees] (promulgated by the Standing Committee of the Tianjin People's Cong., No. 8, Mar. 25, 2011, effective July 1, 2011) art. 28 [hereinafter *Chongqing Regulations*]; cf. *Liaoning Sheng Zhigong Laodong Quanyi Baozhang Tiaoli* (辽宁省职工权益保障条例) [Liaoning Regulations on the Protection of the Rights and Interests of Employees] (promulgated by the Liaoning People's Cong., June 3, 2013), available at <http://npc.people.com.cn/n/2013/0603/c14576-21719165.html> (requiring employers to apply the same wage allocation method but not mandating equal benefits). This issue has now been addressed by the Labor Dispatch Provisions, discussed *infra*, Part II.B.

135. The amendments' drafters formally acknowledged the sometimes wide disparities in benefits and social insurance coverage of temp workers in the Draft Amendment of the LCL (supplemental explanation). See LCL Draft Amendment *supra* note 98, para. 3.

136. *Dangqian Woguo Laowu Paiqian Yonggong Xiankuang Diaocha* (当前全国劳务派遣用工现状调查) [Investigation of the Situation of Today's Dispatched Workers], 2012 CHINA LABOR 5, 24 [hereinafter *ACFTU Investigation*] (reporting findings from local trade union surveys). Tax regulations limit benefits to no more than fourteen percent of wages. *Zhonghua Renmin Gongheguo Qiye Suode Shuifa Shishi Tiaoli* (中华人民共和国企业所得税法实施条例) [Enterprise Income Tax Law Implementing Regulations (P.R.C.)] (promulgated by the State Council, No. 512, Dec. 6, 2007, effective Jan. 1, 2008) (P.R.C.), art. 40.

137. Disparities in social insurance withholding rates have been eliminated by the LCL amendments. See Labor Dispatch Provisions, *supra* note 34, art. 28 (requiring social insurance to be based on the user firm's jurisdiction). These gaps had already diminished by 2013 as local governments implemented the 2011 Social Insurance Law with local rules targeting this problem. See, e.g., *Guangdong Sheng Qiye Zhigong Jiben Yanglao Baoxian Shengji Tongdeng Shishi Fangan* (广东省企业职工基本养老保险省级统筹实施方案) [Guangdong Province Enterprise Workers' Basic Pension Insurance Uniform Provincial Implementation Measures] (promulgated by the Guangdong Provincial People's Government, No. 15, Feb. 25, 2009, effective Feb. 25, 2009 (P.R.C.) (requiring withholding rates across Guangdong to converge to a uniform standard as of 2012); see also Tianjin Labor Dispatch Provisions, *supra* note 134, art. 7 (requiring social insurance payments to be based on the applicable rate for the labor-using firm).

The expansion of the labor services industry has also advanced largely in technical compliance with the LCL. Under its original terms, the only requirements to establish a labor services agency were a standard business registration and registered capital of RMB¥500,000 (about US\$81,000), both of which could be easily met.¹³⁸ No regulatory authorization was required.¹³⁹ Skyrocketing demand for temp hires and the profitability of the sector combined with a lack of formal oversight mechanisms to fuel an explosion in the number of temp agencies.¹⁴⁰ In Guangdong, for example, recent estimates put the number of temp agencies in the province at over 3000, with over 2 million dispatched workers.¹⁴¹ Since 2008, the need for heightened regulation of the industry has become readily apparent and has helped to motivate the recent amendments.

Beyond the factors identified by Halliday and Carruthers, the literature on regulatory compliance suggests new dimensions of the recursivity model that go further in explaining why and when a new cycle of reform might arise. Bardach and Kagan's work observes, first, that when the demands of new legislation are high relative to current business practice, avoidance, evasion, and outright resistance are more likely, particularly when regulated firms' ability or will to comply is low.¹⁴² In other words, the degree of regulatory distance the

138. LCL, *supra* note 1, art. 57. At the time, the general registered capital requirement for a limited liability company under the PRC Company Law was RMB¥30,000 (US\$4,900). PRC Company Law, *supra* note 127, art. 26.

139. Prior to 2010, local regulations in Shandong Province did impose an additional permitting requirement. Guanyu Guifan Laowu Paiqian Qiye Dengji Guanli Youguan Wentide Tongzhi (关于规范劳务派遣企业登记管理有关问题的通知) [Notice Regarding Problems in the Scope of Labor Dispatch Registration Management] (promulgated by the Shandong Province Human Resources and Social Security Bureau, Shandong Province Administration for Industry and Commerce, No. 690 (Oct. 18, 2010) (rescinding the rule).

140. See, e.g., *Guifan Laowu Paiqian Kaoyan Lifa Zhihui* (规范劳务派遣考验立法指挥) [Regularizing Labor Dispatch Tests Legislative Wisdom] (June 26, 2012), available at www.worker.cn.cn (linking the rapid growth of labor dispatch to the passage of the LCL).

141. *Yonggong Danwei Laowu Paiqiangong Zhongshu Bu De Chaoguo 3 Cheng* (用工单位劳务派遣工总数不得超过3成) [Temp Hires Cannot Exceed 30 Percent of the Workforce], DONGGUAN RIBAO [DONGGUAN DAILY], Apr. 18, 2012.

142. See EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 93–119 (1982) (identifying some of the negative effects of tough regulations and aggressive enforcement). Bardach and Kagan also note that when tough regulations are directed at only a minority of firms, the rules

reform represents can directly affect its legitimacy and impact. Ayres and Braithwaite, among others, also stress that the mix of positive and negative incentives incorporated in the reform can directly affect how successfully it will be adopted, and that the choice between alternative incentives may depend on whether the target population is compliance-minded or resistant.¹⁴³ The implementation of the LCL bears out these observations.¹⁴⁴

One area where the regulatory distance between the LCL's standards and firm practice has been particularly wide are in the LCL's rules governing the choice of contract term. Historically, most employment contracts in China, particularly in manufacturing, have been for one- or two-year terms. In order to foster stable employment relationships, the LCL adopted controversial provisions that favor contracts for an indefinite term. Such contracts can be created as a matter of law by the renewal of two fixed-term contracts of any length.¹⁴⁵ They also give rise to severance benefits based on years of service and can only be terminated on grounds provided for in the LCL.¹⁴⁶ Through labor dispatch, in contrast, an employer can simply return the worker to the temp agency if their services are no longer needed without liability for severance.¹⁴⁷

At the same time, labor dispatch incentivized employers to attempt to shift the risks and costs of the LCL's tough regulatory obligations to temp agencies. Although the original terms of the

may promote resentment and resistance from compliance-oriented firms. *Id.* at 92, 112–16.

143. See, e.g., AYRES & BRAITHWAITE, *supra* note 6; Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 LAW & SOC'Y REV. 41 (2004); Clifford Rechtschaffen, *Deterrence vs. Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998).

144. On the early implementation of the LCL, see Harper Ho, *supra* note 62, at 83–98.

145. See *supra* note 83 and accompanying text.

146. Employers widely perceive such contracts as difficult and expensive to terminate. See *Laowugong Lanyong Zhi Jiti Zhengyi Anjian Daliang Zengjia* (劳工工滥用致集体争议案件大量增加) [*Disputes Arising from the Abuse of Labor Dispatch Soar*], FAZHI RIBAO (法制日报) [LEGAL DAILY] (Feb. 27, 2012).

147. Under the LCL, only the legal employer is responsible for severance payments and consideration for any noncompete obligations imposed, although a labor services agreement could contractually impose costs on a user firm that returns a dispatched worker. LCL, *supra* note 1, art. 47. The 2014 implementing rules now require temp agencies to provide severance to dispatched workers in accordance with the LCL. See Labor Dispatch Provisions, *supra* note 34, arts. 14–17.

LCL impose clear obligations on the labor-using firm, China's labor and employment laws, like those in the United States, are based on employment status. As a result, temp agencies bear greater legal responsibility for dispatched workers than the labor-using firm as a practical reality, and many employers saw labor dispatch as a way to push workplace injury compensation costs or other legal obligations to the temp agency as the primary employer; some of these would ultimately, if not legally, be passed on to the employee.¹⁴⁸ This reality, coupled with the fly-by-night nature of many temp agencies, which were largely unregulated, shielded labor-using firms but often left workers unable to pursue legal claims in the event a violation occurred.

The unintended effects of other regulatory mandates can also expand regulatory distance and, in the employment context, can drive firms to rely more heavily on labor dispatch and other forms of nonstandard employment. For example, in the United States, many employment mandates, including the Family Medical Leave Act ("FMLA"), Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act ("ADA"), only apply to firms who have more than a specified threshold number of employees or employees who work for a specified period of time; because only direct employees are counted, outsourcing and part-time hiring can help some employers remain exempt from these requirements.¹⁴⁹ Anecdotal evidence suggests that many US employers may be relying more heavily on temp hires and part-time employees to avoid the added health insurance costs required by the 2010 Patient Protection and Affordable Care Act for firms employing more than fifty people who work more than thirty hours per week.¹⁵⁰ Similarly,

148. See Misinterpretations, *supra* note 131 (arguing that temp hiring under the LCL does not create cost savings). Although contractual risk shifting from the statutory employer to the *user firm* has been authorized by certain local regulations, as in Shanghai, contractual provisions cannot contravene statutory mandates. See, e.g., Shanghai Laodong Hetong Tiaoli (上海市劳动合同条例) [Shanghai Labor Contract Regulations] (promulgated by the Shanghai Mun. People's Cong., Nov. 15, 2001, effective May 1, 2002), arts. 25, 28 (P.R.C.).

149. 42 U.S.C. §§ 1981a(b)(3), 2000e(b) (2012) ("[E]mployer' means a person . . . who has fifteen or more employees . . ."). For further discussion of these limits, see Stone, *Atypical Employees*, *supra* note 12, at 256–80; Befort, *supra* note 19, at 164–70.

150. Patrice Hill, "Obamacare" Benefits Mandate Could Further Phase Out Full-Time Work, WASH. TIMES, June 16, 2013, <http://www.washingtontimes.com/news/2013/jun/16/obamacare-benefits-mandate-could-further-phase-out/?page=all>; Will

in China, a key reason why China's major SOEs and other large firms, who typically are under far less cost pressure to do so, have been the most dependent on labor dispatch is because it allows firms to more easily satisfy reporting requirements and performance targets that are measured with reference to standard employees.¹⁵¹ This strategy has also allowed these firms to use the resulting cost savings to expand benefits and salaries for executives and other standard employees.¹⁵²

The prevalence of practices that are explicitly illegal under the LCL is further evidence of the wide regulatory distance between the LCL's standards and existing compliance norms. These include paying dispatched workers lower base wages than direct hires doing the same work,¹⁵³ charging management or placement fees to dispatched employees,¹⁵⁴ using successive short-term contracts to mask a long-term employment relationship as a "temporary" labor dispatch position,¹⁵⁵ and creating in-house temp agencies to transfer responsibility from the parent company for workers in fact "dispatched" back to the parent.¹⁵⁶ Not surprisingly, labor dispatch and other forms of

Obamacare Destroy Jobs?, ECONOMIST (Aug. 24, 2013), <http://www.economist.com/blogs/democracyinamerica/2013/08/health-reform-and-employment>.

151. These include, for example, workplace safety measures and per capita production targets. See *Guowuyuan Guoyou Zichan Jiandu Guanli Weiyuanhui Guanyu Yinfa 2013 Niandu Zhongyang Qiye Yusuan Baobiao de Tongzhi* (国务院国有资产监督管理委员会关于印发 2013 年度中央企业预算报表的通知) [*SASAC Notice Regarding the 2013 Centrally Administered SOEs Budget Reporting Form*], No. 156, Sept. 25, 2012.

152. Ma Hanqing, *Laowu Paiqian Tiekongzi, Qiye Yue Sheng 20wan*, YANGCHENG WANBAO [GUANGZHOU NIGHTLY REP.], Mar. 7, 2011.

153. See, e.g., *Growing Demand*, *supra* note 40, at 16 (reporting that temps at Nokia's factory in Dongguan, Guangdong are paid about seventy-five percent of a direct Nokia employee's wage and are not permitted to join the union or live in the employee dormitory).

154. *Id.* at 15 (reporting typical placement fees paid by workers in 2012 at around RMB¥200 (US\$30)); cf. LCL, *supra* note 1, art. 60 (prohibiting such fees).

155. All of these practices have been widely reported by Chinese media sources and labor activists. They are also acknowledged by authorities who promise to crack down as part of the implementation of the LCL amendments. See, e.g., *ACFTU Investigation*, *supra* note 136, at 24; *China Tightens Loophole on Hiring Temporary Workers*, REUTERS (Dec. 28, 2012), www.reuters.com/article/2012/12/28/us-china-labor-idUSBRESBR04120121228 (discussing the common practice of hiring from an internal "temp agency"). In 2012, the vice chairman of the Standing Committee of the National People's Congress promised increased inspections to catch violators who split long-term contracts into shorter ones to justify a "temporary" position. *Id.*

156. See generally *ACFTU Investigation*, *supra* note 136. See also IHLO Report, *supra* note 43; China Labour Bulletin, *Amendments to the Labour Contract Law of the*

nonstandard work have led to a rise in labor conflict, both in the courts and on the streets.¹⁵⁷

In sum, the LCL's tougher standards, coupled with heightened enforcement efforts by labor authorities post-2008, represented a high degree of regulatory distance from prior firm practice. Because the excessive reliance on labor dispatch observed today is not clearly prohibited by the LCL, employers were quick to take advantage of its benefits. From one perspective then, the rapid expansion of labor dispatch offers some evidence that the law works, motivating employers to take advantage of legal cost-cutting opportunities. At the same time, the LCL over-incentivized other firms to illegally expand their reliance on dispatched workers.

The overuse of dispatched workers to fill what are essentially regular employee positions, whether legally or illegally, has undermined the stated goals of the LCL in a number of ways. First, the dual responsibility of temp agencies and labor-using firms should have given dispatched workers added protections, but has in fact produced a reality where neither assumes responsibility.¹⁵⁸ Even though the LCL clearly identifies the temp agency as the legal employer and creates clear legal obligations for both the labor-using firm and the temp agency, the triangular nature of the relationship and the potential for contractual risk-shifting can create ambiguity about where responsibility for the employee lies. For example, temp agencies may fail to remit social insurance premiums, but the funds are ultimately the legal obligation of the labor-using employer, which should be specified in its contract with the

People's Republic of China (Draft): Comments and Recommendations, par. 13 (Aug. 22, 2012), *available at* <http://www.clb.org.hk/en/sites/default/files/File/labour%20contract%20law%20ammedments.pdf>.

157. See *Diaoyan Laowu Paiqian Zhidu* [An Investigation of the Dispatch Labor System], ZHONGGUO XINWEN ZHOUKAN [CHINA NEWS WEEKLY], June 30, 2011 (reporting on findings of the Shanghai Huangpu district court and on threatened suicides of labor dispatch workers in Guangzhou); *Laowu Gong Lanyong Zhi Jiti Zhengyi Anjian Daliang Zengjia* [Collective Disputes Challenging the Abuse of Labor Dispatch Workers Increases Significantly], LEGAL DAILY, Feb. 27, 2012.

158. The most widely cited media source on the extent of labor dispatch observes that because "the recruiter doesn't use the worker and the hiring firm doesn't recruit . . . dispatch workers find themselves in a situation where neither one monitors (*liangbuguan* 两不管)." See Jiang, *Authoritative Report*, *supra* note 34.

temp agency.¹⁵⁹ Employees are often unfamiliar with these rules. Second, as a result of high turnover, short-term contracting, and labor dispatch, employees are rarely able to accumulate the years of service upon which severance depends.¹⁶⁰ These common practices have undermined the LCL's stated goal—promoting stability by encouraging indefinite- and long-term contracts.

The LCL's promise of equality for labor dispatch workers has not been fully realized, in part because labor law reform has created a dynamic cycle of action and reaction. Supporters of the new amendments hope they will promote the original goals of the LCL—encouraging stable, longer term employment relationships, while offering flexibility to employers. Part II surveys the improvements made in the 2013 amendments and their implementing rules and considers their potential to restore a more balanced role for dispatched labor in the Chinese economy.

II. THE AMENDED LABOR CONTRACT LAW: REFORM REPRISE

The significance of the LCL amendments is evident from the drafting process, which attracted over 550,000 online responses—a new record—during a month-long public comment period, as well as widespread attention from foreign and domestic employers in China, academics, and labor advocacy groups.¹⁶¹ The amendments were spearheaded by the ACFTU and drew on proposals by the legal inspection commission of the National People's Congress' Standing

159. LCL, *supra* note 1, art. 58. See Amendments to the Labor Contract Law of the PRC (Draft): Comments & Recommendations, CHINA LAB. BULL. (raising this concern).

160. See *60 Million Temp Workers' Rights*, *supra* note 98 (citing the 2011 ACFTU report); Jiangxi: *Duangonghua Xianxiang Tuisheng* “Xingong Huang” [Jiangxi: Phenomenon of “Short-Term Work” Gives Rise to “New Labor Shortage”], JIANGXI DAILY, Feb. 8, 2012 (reporting survey results showing that the average worker stays in the same position about two years and many for far less).

161. Chen Xin & Zhao Yanan, *Revised Labor Law Attracts Public Attention*, CHINA DAILY, Aug. 7, 2012, http://usa.chinadaily.com.cn/epaper/2012-08/07/content_15649439.htm (noting that the LCL itself set new records for online feedback when first drafted, attracting nearly 190,000 submissions). These figures do not include written submissions.

Committee, investigations conducted by the Ministry of Human Resources and Social Security (“MOHRSS”) and the ACFTU, and various reports from local union federations into the use of dispatched labor.¹⁶² In addition, a number of provincial-level governments had passed specific local rules to respond to the rise in labor dispatch hiring, some of which influenced the substance of the amendments.¹⁶³ The implementing rules for the new amendments also reflect strong controversy; over 30,000 comments were received in the first month, and the comment draft was substantially revised before release in final form.¹⁶⁴ The final product appears to be a compromise that strictly limits labor dispatch, but stops short of key enforcement innovations that were present in the initial draft.

Like early labor law reforms in the United States,¹⁶⁵ the amended LCL is intended primarily to promote social stability

162. See IHLO Report, *supra* note 43 (reporting on the legislative background of the proposed amendments). The results of these investigations are documented, in part, in ACFTU Investigation, *supra* note 128.

163. These jurisdictions include: Chongqing, Shanghai, Tianjin, Jilin, Guangdong (draft), Liaoning, and Yunnan. See *Chongqing Regulation*, *supra* note 134; Shanghai Dept. of Human Resources and Social Security, Shanghai Federation of Trade Unions, Shanghai Assoc of Enterprises, and Shanghai Administration of Industry and Commerce, [Guidance on Regulating the Administration of Labor Dispatch in Shanghai Municipality] (promulgated May 26, 2011); Guanyu Guifan Benshi Laowu Paiqian Yonggong Guanli de Ruogan Yijian (关于规范本市劳务派遣用工管理的若干意见) [Several Opinions on Regulating the Administration of Labor Dispatch in Shanghai Municipality (Trial Implementation)] (promulgated Feb. 26, 2012, effective Feb. 26, 2012–Dec. 31, 2013); Tianjinshi Laowu Paiqian Guanli Banfa (天津市劳务派遣管理办法) [Regulations on the Administration of Labor Dispatch] (promulgated by Tianjin Human Resources and Social Security Bureau and the Tianjin Administration of Industry and Commerce, Sept. 16, 2011, effective Sept. 20, 2011–Sept. 20, 2016); Jilinsheng Laowu Paiqian Guanli Banfa (吉林省劳务派遣管理办法) [Regulations on the Administration of Labor Dispatch of Jilin Province], No. 98 (promulgated by the Jilin Provincial Human Resources and Social Security Bureau on Nov. 22, 2011, effective Jan. 1, 2012); Guangdongsheng Laowu Paiqian Guanli Guiding (Zhengqiu Yijia Gao) (广东省劳务派遣管理规定 (征求意见稿)) [Rules on the Administration of Labor Dispatch of Guangdong Province (Comment Draft)], Guangdong Provincial People’s Government, Feb. 1, 2012, available at www.fzb.gd.gov.cn (last visited May 1, 2014); Liaoning Labor Regulations, *supra* note 131.

164. *Renshibu Laodong Guanxisi Fuze Tongzhi Jiu “Laowu Paiqian Zanxing Guiding” Youguan Wenti Da Jizhe Wen* (人事部劳动关系司负责同志就《劳务派遣暂行规定》有关问题答记者问) [*MOHRSS Labor Relations Division Representative Answers Reporters’ Questions on the Labor Dispatch Interim Provisions*] (Jan. 26, 2014).

165. For example, some commentators note that when Congress adopted the 1935 Wagner Act, which governs collective bargaining, it did so “[not out of] a conception of social justice, [but rather] tied its observations on inequality to economic

and further current economic reform goals. According to the official commentary that accompanied the initial draft amendments, their specific objectives were:

- (i) To bring into strict order the use of labor dispatch workers [so that] they do not become the primary mode of employment; (ii) to protect the status of the working class and guarantee the rights of labor dispatch workers, including the . . . right to “equal pay for equal work”; (iii) to strengthen labor dispatch agency management and the regulatory responsibility of the labor bureau; (iv) to regulate labor dispatch and necessary delegation, and appropriately handle problems that have emerged in the implementation of the [LCL] . . . and to achieve a stable transition.”¹⁶⁶

Together with their implementing rules, the amendments support these goals by tightening some of the broad concepts contained in the LCL amendments and setting clearer limits on the permitted scope of labor dispatch use. The implementing rules also respond to some of the key concerns of the business community by carving out from the labor dispatch rules an exemption for international secondment and secondment to perform services for a family or individual.¹⁶⁷ The amendments took effect on July 1, 2013, and the implementing rules on March 1, 2014, although affected companies have until March 1, 2016 to come into compliance with the most stringent requirements.¹⁶⁸

A. *Labor Dispatch the Exception, Not the Rule*

As noted above, the primary goal of the LCL amendments is to restrict labor dispatch in order to increase stable employment and ensure that existing protections apply broadly across the economy. These concerns arise in the United States as

concerns,” such as reducing strikes and industrial unrest. THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW—CASES AND MATERIALS 10–11 (Roger Blanpain et al. eds., 2007).

166. See LCL Draft Amendment (supplemental explanations), *supra* note 98, para. I (explaining the goals of the amendments).

167. Labor Dispatch Provisions, *supra* note 34, art. 36.

168. LCL Amendments, *supra* note 2 (providing, however, that existing labor services agencies have until July 1, 2014 to comply with its registration requirements); Labor Dispatch Provisions, *supra* note 34, art. 28 (creating a two-year transition period for compliance with the new ten percent limit on labor dispatch hires).

well; employers have often relied on nonstandard workers precisely because they may lie beyond the bounds of existing statutory schemes.¹⁶⁹ This is possible under US federal law because the degree to which dispatched and other nonstandard workers enjoy the same protections as employees of the user firm is treated somewhat differently under the Fair Labor Standards Act (“FLSA”),¹⁷⁰ which establishes wage, hour, and overtime standards, the Occupational Safety and Health Act (“OSHA”),¹⁷¹ the Employee Retirement Income Security Act (“ERISA”),¹⁷² the National Labor Relations Act (“NLRA”),¹⁷³ and federal anti-discrimination law.¹⁷⁴ Most of these statutory regimes turn on whether an individual is properly considered an “employee,” and because no single definition or legal test has emerged, the determination of whether an individual is entitled to protection under the statutes may vary depending on the applicable standard.¹⁷⁵

Similarly, employers in China have been able to capitalize on the ambiguities inherent in the LCL’s labor dispatch rules. Accordingly, one of the most significant changes introduced in the 2013 amendments is the amendment of Article 66, which had stated that labor dispatch shall “generally” (*yiban* 一般) be used for “temporary” (*linshixing* 临时性), “auxiliary” (*fuzhuxing* 辅助性), or “substitute” (*daitixing* 代替性) positions. A new clause deletes the word “generally” and emphasizes that “[direct] contract-based employment is the basic employment model of the PRC” and that “[l]abor dispatch is supplemental and shall *only* be used” for these three types of positions.¹⁷⁶

169. MARION G. CRAIG ET AL, *WORK LAW: CASES & MATERIALS* 67 (2010).

170. 29 U.S.C. §§ 201–219 (2012).

171. §§ 651–678.

172. Pub. L. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 29 U.S.C.) .

173. §§ 151–169 .

174. The primary federal anti-discrimination laws are the Equal Pay Act of 1963, 29 U.S.C. §§ 201, 206 (2012); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2012); and the Age Discrimination in Employment Act of 1967 (“ADEA”), 29 U.S.C. §§ 621-634 (2012).

175. See Befort, *supra* note 19, at 166–69 (surveying the primary tests for determining employment status—the control test, the “economic realities” test applied under the FLSA, and the hybrid common law test that has been applied in Employee Retirement Income Security Act (“ERISA”) cases).

176. LCL Amendments, *supra* note 2, para. 3 (amending LCL, art. 66) (author’s translation).

The revised LCL also narrows the scope of these so-called “three conditions.” Revised Article 66 specifies that “temporary” positions are those with a term of no more than six months, “auxiliary” positions are those that are not the primary business of the company but that serve positions within the primary business of the company, and “substitute” positions are those that replace standard employees while they have taken a leave of absence for full-time training, vacation, or other reasons.¹⁷⁷ Although the LCL’s implementing rules largely reiterate these definitions, the rules now follow an earlier approach adopted in Shanghai that allows the scope of “auxiliary” positions to be determined by collective consultation on an “equal” basis (*pingdeng xieshang* 平等协商) with worker representatives or the union.¹⁷⁸

Interestingly, the amendments leave unchanged potentially contradictory language in Article 62 of the LCL, which states that “in the case of continuous labor dispatch, the firm using dispatched labor shall implement a normal wage adjustment mechanism.”¹⁷⁹ Some commentators had recommended that this provision be deleted to clarify that any non-temporary position must be reserved for a direct hire.¹⁸⁰ The lack of any change to this clause suggests that “auxiliary” or “substitute” positions are not subject to the new six-month limit and that employers may legally use seconded workers for ongoing positions.

The most dramatic step toward reducing the level of labor dispatch under the amended LCL is the introduction of

177. LCL Amendments, *supra* note 2, para. 3. This provision is consistent with Article 4 of the LCL, *supra* note 1, which requires employer rules concerning the interest of employees to be adopted only upon collective consultation with employee representatives. The final implementing rules no longer contain proposed language that would have limited labor-dispatch to full-time positions.

178. Labor Dispatch Provisions, *supra* note 34, art. 3. Guanyu Jinyibu Guifan Shi Guoziwei Xitong Guoyou Qiye Laowu Paiqian Yongong de Zhidao Yijian (关于进一步规范市国资委系统国有企业劳务派遣用工的指导意见) [Guiding Opinion on Progress toward Regulating Labor Dispatch Hiring by Municipal SOEs under SASAC Administration] art. 2, (promulgated by Shanghai State-owned Assets Supervision and Administration Commission, No. 191, May 30, 2011) (authorizing municipal state-owned enterprises to define the scope of the “three conditions” by collective negotiation).

179. LCL, *supra* note 1, art. 62(5).

180. See, e.g., China Labour Bulletin, *supra* note 156.

aggressive objective limit on labor dispatch, a concept that had been urged by the ACFTU during the drafting process. Under the amended LCL, firms must “strictly limit” the use of dispatched workers and keep hiring levels within a percentage of the total workforce that has now been set by the implementing rules.¹⁸¹ Although prior local rules had set limits nearer a 30 percent threshold, the implementing rules now state that employers the total number of dispatched workers in any position cannot exceed ten percent of the workforce.¹⁸² Firms have two years to comply with the new limits, and preexisting labor contracts and dispatch contracts will remain effective during this transition.¹⁸³ Although proposed rules would have deemed workers in excess of the limits to be standard employees of the user firm, the final rules depend on administrative enforcement and simply state that no new dispatch hires can be made until this limit is met.¹⁸⁴ The objective limits do not apply to foreign representative offices, which are required by law to hire exclusively through intermediaries, or to foreign secondment by domestic entities.¹⁸⁵

B. *Equal Pay for Equal Work*

Another major change introduced in the LCL amendments and related implementing rules promotes pay parity for dispatched workers. In the United States, pay parity between

181. LCL Amendments, *supra* note 22, para. 3 .

182. Labor Dispatch Provisions, *supra* note 34, art. 4. The prior draft of the implementing rules had set a limit only for auxiliary positions; the present version is perhaps, more consistent with the underlying LCL amendments. LCL Amendments, *supra* note 2, para. 3. Prior local rules had limited all forms of labor dispatch to no more than thirty percent of the workforce. For example, Chongqing allowed temp workers to account for up to fifty percent of the workforce but required notice to the labor bureau if the percentage exceeded thirty percent. *See* Chongqing Regulation on the Protection of the Rights and Interests of Employees, *supra* note 134, art. 28. In Guangdong’s draft labor dispatch rules, the maximum was thirty percent, but notice was required if more than twenty persons or ten percent of the total workforce were temp workers. *See* Regulations on the Administration of Labour Dispatch of Guangdong Province, *supra* note 164, art. 12. To the extent existing limits do not conflict with those set nationally, they remain in effect.

183. *See* Labor Dispatch Provisions, *supra* note 34, art. 28.

184. The latter restriction will be extremely difficult to enforce in practice.

185. *See* Labor Dispatch Provisions, *supra* note 34, arts. 25–26 (detailing general exceptions to the labor dispatch rules and further exemptions to the hiring limitations).

nonstandard workers and traditional employees has been proposed by academics, but is not yet a reality as a matter of law.¹⁸⁶ In China as well, “equal pay for equal work” is a basic promise of the Labor Law that has proven difficult to enforce.¹⁸⁷ Interestingly, the LCL amendments simply repeat the original requirement in Article 63 of the LCL that dispatched workers receive “equal pay for equal work” and that the labor-using firm’s employees in similar positions must serve as the basis of comparison.¹⁸⁸ As amended, Article 63 does add a requirement that both the labor contract entered into between a temp agency and a dispatched employee, and the sourcing services agreement entered into by the temp agency and the user firm, explicitly state that the promised compensation conforms to the statutory requirement.¹⁸⁹ In addition, amended Article 63 requires employers to adopt the same compensation allocation method for temp hires as for direct employees.¹⁹⁰ These requirements may help ensure that any distinctions will be based not on status, but on a consistent and therefore more equitable methodology.

The more significant change appears in the amendments’ implementing rules. Previously, approaches taken by local rules differed on whether “equal pay” required equal benefits as well. In addition, the finance rules mentioned earlier distinguish cash benefit payments, considered within the scope of “wages,” from social insurance withholding or other non-cash benefits.¹⁹¹ The implementing rules do not redefine “equal pay for equal work” or mandate equal benefits. However, they now clearly provide that the user firm must “provide dispatched workers benefits

186. See, e.g., Nancy Segal et al., *Full-Time Rights for Part-Time Workers: Parity in Wages, Benefits, and Advancement Opportunities*, 10 J. INDIV. EMP. RTS 245 (2002-03).

187. Labor Law, *supra* note 4, art. 46.

188. The implementing rules also base employee benefits on the user firm’s jurisdiction, reducing the risk of a “race to the bottom” across provinces. See Labor Dispatch Provisions, *supra* note 34, art. 18.

189. LCL Amendments, *supra* note 2, para. 2.

190. This requirement was absent in the initial draft amendments. See Draft Amendments, *supra* note 98.

191. See also Finance Regulations, *supra* note 133 (requiring employers to account for bonuses, overtime wages, and other cash awards as wage expenses). There is some statutory support for this in the language of the LCL itself, which refers to wages and benefits in separate clauses. LCL, *supra* note 1, art. 62(2)–62(3).

related to their position without discriminating against them.¹⁹² Given the rules' omission of a direct "equal benefits" requirement and the difficulty of litigating employment-related discrimination claims generally, employers may still enjoy cost savings by differentiating between standard employees and dispatched employees in terms of labor-related benefits and other incentives. However, the prohibition on discriminatory treatment makes such practices, if unjustified, a risk for the employer and may reduce the attractiveness of labor dispatch.

C. Labor Contracts & Employment Stability

Further changes to the LCL shore up existing rules that require hiring under a written employment contract. However, many labor dispatch agencies have not complied, and lack of guidance on the temp agency's right to terminate dispatched workers returned by the user firm has also undermined the LCL's goals of promoting stable, longer-term employment. These implementation gaps have prompted a new phase of the recursive reform loop in the implementing rules of the amended LCL.

In addition to setting new bounds on labor dispatch hiring, the implementing rules reiterate that dispatched workers must be hired under two-year written contracts and limit any probationary period to one term.¹⁹³ They also promote clarity regarding compensation, other primary terms of the dispatch arrangement, and the allocation of responsibility by stipulating the minimum content of the labor services agreement with the user firm

However, the rules seek to reduce arbitrary return of workers by user firms, clarifying that dispatched workers can only be returned to the temp agency in limited circumstances as provided under the LCL and that they are covered by existing provisions of the LCL that restrict dismissal for occupational disease or injury or certain other stated conditions.¹⁹⁴ Under the LCL, employee terminations must be for cause, and the

192. Labor Dispatch Provisions, *supra* note 34, art. 9.

193. *Id.* arts. 5–6. This provision may make dispatched workers who are reassigned to a new user firm less attractive than first-time dispatched workers.

194. *Id.* arts. 12–13.

implementing rules confirm that dispatched workers are covered by these rules and are also entitled to the same severance rights as standard workers if terminated.¹⁹⁵ The rules also protect dispatched employees from termination if, upon return by a user firm, the temp agency can only offer work at a new user firm under lower terms and conditions.¹⁹⁶ Unfortunately, the final rules omit proposed language that would have confirmed dispatched workers' right to indefinite-term contracts.¹⁹⁷ Nonetheless, these other measures are important steps to improve the job security originally promised to dispatched workers under the LCL.¹⁹⁸

D. Enforcement & Temp Agency Regulation

Finally, the LCL amendments strengthen implementation by facilitating litigation by dispatched workers to challenge illegal practices as well as greater administrative oversight by local labor bureaus. Until the LCL amendments, no cases, to our knowledge, brought by labor dispatch employees succeeded in challenging either their unequal status at the workplace or the terms of employment. Courts could rely on the fact that employees had contractually agreed to serve as dispatch employees, and the LCL's use of the term "generally" effectively barred any argument that the labor-using firm had exceeded statutory limits on labor dispatch. The lack of any formal registration for the labor services sector meant that regulators had no easy way to police violators or even to identify firms in the industry.

195. *Id.* art. 17

196. *Id.* art. 15

197. *Id.* art. 8. As a result, some user firms have targeted long-term dispatched workers, some of whom had served for decades, for dismissal prior to the effective date of the new rules. *Guangtie Jituan Zhongzhi Laowugong Xuqian Fengbo: Xuduo Ren Yi Gongzuo Shinian* (广铁集团终止劳务工续签风波: 许多人已工作十年) [*Guangzhou Railway Group Ends Dispatched Worker Contract Renewal Onslaught: Many Had Already Worked Ten Years*], CCTV, Jan. 8, 2014. This gap does, however, leave space for local rules to adopt a different interpretation and extend this right to dispatched workers.

198. See, e.g., LCL, *supra* note 1, art. 58 (requiring a two year labor contract with the labor dispatch agency and minimum wage when no work is available).

1. Private Enforcement

Private enforcement by employees via litigation is complicated in every jurisdiction by the triangular contractual relationships inherent in hiring via an intermediary, unless applicable law clarifies the allocation of legal responsibility between the intermediary and the user firm. In the United States, for example, the Supreme Court has held that under the FLSA, the definition of “employer” and “employee” must be construed broadly, making it more likely that at least one, if not both, of the firms involved will bear legal liability for violations affecting temporary workers.¹⁹⁹ In some cases, user firms and intermediaries may be deemed “joint employers” and thus jointly and severally liable for FLSA violations.²⁰⁰

Article 92 of the LCL already stipulates that both the temp agency and the labor-using entity are jointly and severally liable for any harm to “the rights and interests” of temp hires. The amendments’ implementing rules now limit opportunities for contractual risk-shifting by the temp agency and user firm by more clearly delineating the obligations of labor dispatch firms toward dispatched workers, particularly with regard to occupational disease or injury.²⁰¹ They also create the potential for compensatory damages if firms illegally hire dispatched workers.²⁰² Unfortunately, as discussed below, the final rules eliminate proposed mechanisms that would have more directly incentivized labor using firms to comply with the law and to monitor temp agency compliance.²⁰³

199. Fair Labor Standards Act of 1963, 29 U.S.C. §§ 201–219 (2012) (defining employer as “*any person* acting directly or indirectly in the interest of an employer in relation to an employee” (emphasis added)); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (holding that the terms “employer” and “employee” must be construed expansively under the FLSA). Courts define these terms by applying a four-factor “economic reality” test. *Baker v. Flint Eng’g & Const. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998). The factors are “whether the alleged employer (1) has the power to hire and fire employees, (2) supervises and controls employee work schedules or conditions of employment, (3) determines the rate and method of payment, and (4) maintains employment records.” *Id.* at 1440.

200. See Stone, *Atypical Employees*, *supra* note 12, at 259 (discussing this common law gloss on the FLSA).

201. Labor Dispatch Provisions, *supra* note 34, arts. 8–10, 20 (discussing temp agency and user firm obligations).

202. *Id.* at 22.

203. These provisions are discussed *infra*, Part III.C.

2. Regulatory Oversight & Administrative Enforcement

The LCL amendments also toughen standards for establishing a temp agency and to some extent raise the penalties for violations. The most important change in temp agency oversight is the requirement that all temp agencies obtain an administrative license from the labor bureau and register as a temp agency with the local office of the Administration of Industry and Commerce (“AIC”).²⁰⁴ This rule should enable local labor bureaus to distinguish legal and illegal temp agencies and exercise closer administrative oversight.

The amended LCL also raises the registered capital requirements for temp agencies to RMB¥2 million, double what was proposed in the draft amendments. These rules are intended to ensure that sufficient funds have been invested to enable the company to cover the basic obligations associated with its business.²⁰⁵ All temp agencies must also have a fixed place of business and implement a labor dispatch management system.²⁰⁶ The fact that these basic business practices had to be mandated by law hints none-too-subtly at the cavalier way that many temp agencies have been operating.

Article 92 now authorizes labor bureau authorities to confiscate any illegal income generated by an unlicensed temp agency and, in addition, to impose a fine of between one and five times any income generated, or up to RMB¥50,000 (US\$8155) for those without illegal income. The potential fines that can be imposed on a temp agency or the firm that uses dispatched workers have also been raised from RMB¥1000–5000 per employee to between RMB¥5000 and RMB¥10,000. Ultimately, a temp agency can, in addition to a fine, lose its labor dispatch license for serious violations.²⁰⁷ Consistent with China’s Administrative Penalties Law, however, penalties are

204. LCL Amendments, *supra* note 2, para. 1. The permitting regulations have already been issued by the MOHRSS. MOHRSS, Guanyu Zuohao Laowu Paiqian Xingzheng Xuke Gongzuo de Tongzhi (关于做好劳务派遣行政许可工作的通知) [Notice on the Effective Implementation of Labor Dispatch Administrative Permit Work], (promulgated. June 21, 2013, effective. July 1, 2013).

205. LCL Amendments, *supra* note 2, art. 92.

206. Similar rules have been adopted by Mexico in its revised Ley Federal de Trabajo [hereinafter Federal Labor Law], *amended* by Diario Oficial de la Federación [DOF], Nov. 30, 2012 (Mex.).

207. LCL Amendments, *supra* note 2, art. 92.

only imposed if the firm fails to correct the violation when ordered to do so. Moreover, a temp agency operating illegally would be able to retain its business license and continue provide other services besides labor dispatch, such as consulting, within its approved scope of business. This rule strikes a reasonable compromise between tougher oversight of temp agencies and tailoring the penalty in a way that minimizes collateral impact on the labor services industry.

III. *WINDING DOWN RECURSIVE CYCLES: MAKING LABOR LAW WORK*²⁰⁸

As Part II explains, the LCL amendments to no small extent retrace familiar territory, closing loopholes that have created a two-tiered system of regulation—one for standard hires and one for dispatched workers. They allow employers to rely on labor service agencies to make more efficient adjustments to production capacity but reaffirm that basic wage and contract protections should apply to all workers, regardless of status. Since it is now at least the third time that some of these basic requirements have made their way into national legislation, an obvious question is whether the prospects for a shift in employer practice are any better. In other words, will the reform “work,” or will it lead to another attempt down the road?

The theory of recursivity articulated by Halliday and Carruthers offers a basic framework for understanding what might constitute a “successful” reform cycle. To be sure, their work emphasizes the cyclical process itself as the key to norm formation rather than a particular outcome. However, where, as here, the basic goals for the reform are fairly constant over time from the standpoint of the state (and of employees), a successful reform cycle should narrow regulatory distance by producing new (subjective, internalized) norms that better conform external behavior to the “law on the books.” As a result, later legislative reforms would be focused more on marginal, rather than fundamental changes, and would no longer need to introduce new penalties or other incentives for the same conduct unless the underlying policy goals or substantive rules

208. This heading is inspired in part by Sean Cooney’s 2006 survey of labor law enforcement challenges. Cooney, *supra* note 7.

change. The reform would in essence “wind down,” with fewer, and more narrowly focused, reform iterations.

Since the implementation phase for the LCL amendments is only beginning at the time of this writing, our goal here is to consider the likelihood of the amendments’ success in winding down the recursive cycle based on an expansion of Halliday and Carruthers’ model. The factors they identify as part of the recursive process point to an initial hypothesis: *to the extent that the reforms succeed in reducing (i) indeterminacy, (ii) ideological and structural contradictions among those charged with making and implementing the law, (iii) diagnostic difference, and (iv) actor mismatch, they are likely to “wind down” the recursive cycle by narrowing its scope, frequency, and length.*

However, as discussed above, the literature on regulatory compliance suggests that two other features are important in explaining or perhaps predicting the potential length and scope of recursive cycles: (i) the compliance motivations of those whose behavior is targeted by the new measures, such as employees, temp agencies, and user firms; and (ii) regulatory distance—again, the gap between the law on the books and the norms of conduct that are evident at the start of a reform cycle in the target communities. As reforms proceed, changing compliance motivations will, of course, shift dominant norms and set a new starting point against which the regulatory distance of later recursive cycles will be measured. Ayres’ and Braithwaites’ seminal research on incentive structures and compliance suggests that a mix of regulatory approaches will ultimately be more successful than either compliance-oriented or deterrence-oriented approaches, applied in isolation, in incentivizing compliance and reducing regulatory distance in later reform cycles.²⁰⁹

Adding compliance incentives and regulatory distance to the mix suggests a second hypothesis: *recursive cycles will increase in number, length, and scope, taking longer to wind down, if (x) regulatory distance at the start of a given reform cycle is large, (y) compliance motivations are weak, or (z) Halliday and Carruthers’ four primary mechanisms result in greater regulatory distance as reform cycles proceed.* Where these factors pull in different directions, we

209. See generally AYRES & BRAITHWAITE, *supra* note 6.

might expect to see recursive loops expanding and contracting, lengthening or shortening, over time.

This Part draws on these hypotheses to frame an analysis of the likely impact of the reforms. We conclude that the LCL amendments make clear strides toward reducing indeterminacy, incentivizing compliance, and engaging relevant actors in the law-making and implementation phase. All of these improvements should wind down the recursive process; however, they are unlikely to end the cycle, given remaining ideological and structural contradictions and the continued indeterminacy of some of the rules themselves. This Part concludes by proposing measures that might further reduce indeterminacy and wind down the recursive cycle if incorporated into new national and local rules.²¹⁰

A. *Contradictions & Diagnostic Struggles*

Each phase of labor reform thus far reflects the resolution of deep diagnostic struggles and ideological contradictions that played out during the drafting process. These unresolved tensions are the most significant factor likely to hamper the impact of the LCL amendments and drive a new reform cycle. Terence Halliday and legal sociologist Sida Liu's empirical work anticipates this. They suggest that the four core recursivity drivers or mechanisms may be temporally linked in stages of legal change: underlying ideological and structural contradictions produce ambiguities and inconsistencies in the law, and the resulting indeterminacy leads to conflicting interpretations and diagnostic struggles among those charged with implementation or compliance, driving further indeterminacy later in the recursive process.²¹¹

210. One of the authors has previously presented some of these recommendations in Huang Qiaoyan, Xianyou Faluxia Xihua Laowu Paiqian Yonggong Fangshi de Guifan Yaoqiu (现有法律下细化劳务派遣用工方式的规范要求) [*A Call for More Detailed Regularization of Labor Dispatch Under Current Law*], *CHINA LABOR*, June 2012, at 29–31. The fact that the implementing rules have been designated as “provisional” does not mean that further revisions are imminent. However, local regulations may be revised and can impose tighter limits or create compliance incentives not present at the national level.

211. See generally Liu & Halliday, *supra* note 9, at 943 (applying the recursivity framework to the ongoing reform of China's Criminal Procedure Law).

Admittedly, the adoption of new rules at the national level in the Labor Law, the LCL, and the recent amendments can be expected to reduce ideological contradictions by communicating the policy priority placed on the reforms. The opportunity for public participation during the comment process might also be expected to improve the quality of the reforms and reduce actor mismatch, again, the gap between lawmakers and those charged with implementation.

Unfortunately, structural contradictions pose greater problems. Local labor bureaus are already hampered by long-standing institutional and capacity constraints, in some respects not unlike those faced by their US counterparts.²¹² The recent explosion in the sheer number of temp agencies and dispatched workers has only exacerbated these limits.²¹³ Many of the widespread abuses of labor dispatch could be addressed simply by enforcing the existing mandates in the LCL, so changes in enforcement practice are essential if the amendments are to have any impact.

However, tough enforcement of the amendments is likely to be complicated by the competing views of agencies within the state bureaucracy on the seriousness of the problem and by the challenges of transitioning improperly hired dispatched workers and those hired above the ten percent authorized maximum into standard positions.²¹⁴ Of particular concern is the opposition of the State-owned Assets Supervision and Administration Commission (“SASAC”), the administrative agency that oversees state enterprises, to the draft amendments,

212. See David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 COMP. LAB. L. & POL'Y J. 59, 82 (2005) (identifying limits of the United States' complaint-driven enforcement of wage and hour and occupational safety and health laws).

213. On enforcement challenges generally, see Cooney, *supra* note 7, at 789. Media reports continue to document their persistence. See, e.g., *Zhongguo Laodong Jiancha Zhifa Quanli Xiangdang Weiruo, Yuanyuan Ganbushang Chengguan* (中国劳动监察执法权力相当微弱, 远远赶不上城管) [*China's Labor Inspection Enforcement Authority is Particularly Weak and Can't Match the Public Order Authority*], LIAOWANG XINWEN ZHOUKAN [OUTLOOK WEEKLY], Feb. 26, 2011.

214. See IHLO Report, *supra* note 43 (citing MOHRSS regulations that encourage state-owned enterprises and other public institutions to establish regularization plans but reporting that these have not been widely followed). The new implementing rules require firms to file such a transition plan with the relevant labor bureau. See Labor Dispatch Provisions, *supra* note 34, art. 28.

which were backed by the ACFTU,²¹⁵ and the state sector's heavy dependence on labor dispatch. The MOHRSS itself was not a strong supporter of the ACFTU's positions because the ministry also oversees its own employment service agencies, such as the various Foreign Enterprise Service Corporations. The embeddedness of the labor administration as a market player in the labor services sector and SASAC's resistance to the changes mean that local labor authorities are likely to tread softly in implementing the new rules. Although the new permitting rules should enable local labor bureaus to exercise better oversight, enforcement of the labor dispatch rules will likely continue to depend largely on employee self-help and individual or collective litigation.

B. *Reducing Indeterminacy*

Another key reason why recursivity is to some extent inevitable with respect to regulations on labor dispatch is the inherent ambiguity of the dispatched labor model. As one commentator writing on temporary labor in Canada put it, "the triangular nature of the relationship . . . creates a structural tendency toward under-enforcement of existing standards, given the potential for confusion, conflict, or outright obfuscation concerning the division of [legal] responsibilities between the client user and the agency."²¹⁶ And of course, laws of general applicability cannot foreclose every potential area of ambiguity or anticipate every potential variation in circumstance—nor would it necessarily be desirable to do so.²¹⁷ Implementation therefore requires some degree of deference to the discretion of firm managers and enforcement authorities.

Examples in the LCL are the terms "equal pay," "discrimination" with regard to benefits, and the definition of "equivalent position" for purposes of the equal pay

215. Opposition from the State-owned Assets Supervision and Administration Commission ("SASAC") because of the heavy reliance of SOEs on temp workers reportedly slowed the drafting process of the LCL amendments. *See Growing Demand*, *supra* note 40, at 16; IHLO Report, *supra* note 43.

216. Bartkiw, *supra* note 21, at 173.

217. *See* BARDACH & KAGAN, *supra* note 142, at 58-77, 84-89 (discussing variation among regulated enterprises, the difficulty of calibrating regulations to avoid over- or under-inclusiveness, and the inevitability of compliance gaps).

requirement, all of which are still open to broad construction by the employer. With regard to the latter, it is difficult to envision how a narrower standard might be drafted that could apply broadly across the economy. Many employers have responded to the amended LCL by segregating temp and direct hire positions in different work units to reduce the number of positions for which an exact equivalent can be found. The amendments also fail to respond to abusive practices that exploit part-time and probationary workers,²¹⁸ so tougher limits on labor dispatch may cause employers to stretch the definition of probationary or part-time work as limits on labor dispatch tighten.

C. Incentives & Regulatory Distance

Although missing from recursivity theory as originally developed, the experience of Chinese labor law suggests that the compliance incentives before and after a recursive cycle and the regulatory distance reflected by the reform will also determine the length and extent of the next recursive loop. For example, if current reforms improve compliance incentives and succeed in shifting norms closer toward the letter and spirit of the new reforms, later reform cycles may be narrower in scope and more acceptable to the target population, that is, they may exhibit a shorter regulatory distance from the reality on the ground. This virtuous cycle will then be more likely to wind down rather than extend the cycles of recursive reform.

The relative cost of labor dispatch and standard hiring is one of the most important determinants of employers' compliance incentives, and tighter regulatory limits will almost certainly make labor dispatch more expensive. Most obviously, the ten percent cap on the proportion of labor dispatch hires and the prohibition on discriminatory benefits is likely to increase employer costs, perhaps significantly.²¹⁹ Even with the two-year phase-in period, the cap also represents a high degree of regulatory distance and may be difficult for many employers to meet. It is also likely that, at least in the short term, the new

218. See Harper Ho, *supra* note 62, at 92 (discussing illegally extended probationary terms as a response to the LCL).

219. Any impact will of course be greatest in those sectors where the implementing rules cap is set substantially lower than actual pre-amendment temp hiring levels.

requirements for temp agencies will push some out of the market entirely, increasing market concentration and reducing competition. Notwithstanding the benefits to workers from the exit of “gray market” temp agencies (and the benefits to government-affiliated temp agencies of reduced competition), consolidation could raise the cost of temp hiring.²²⁰

Whether these shifts will increase standard employment, and the ultimate effect on total employment, are, as yet, unknown. However, a recent study by Gallagher et al. has found that aggregate employment levels in China since the LCL’s passage in 2008 have proven quite robust in the face of its tough new standards and tightened enforcement.²²¹ Empirical evidence from a study of similar reforms enacted in South Korea in 2007 also suggests that restricting labor dispatch may lead to sustained declines in temp hiring without a long-term adverse effect on total employment levels across the economy.²²² However, some of the findings of these studies may be explained both as the result of employers learning to adjust to the new rules and, more pessimistically, of employers finding new avenues to evade them.²²³

Another reason why a dramatic shift in current practice (which might narrow the regulatory distance of future reforms) may, however, not emerge has to do with what is *not* included in the amendments. For example, the final implementing rules do not include proposed language that would have required employers to count dispatched workers as employees for regulatory purposes. Although this was perhaps deemed unnecessary in light of the ten percent cap on labor dispatch, the omission gives some firms continued incentive to use labor dispatch to improve firm performance measures. Second,

220. Industry consolidation has been predicted by a number of commentators. See, e.g., Andy Yeo, Duncan A.W. Abate, Hong Tran, & Helen Liao, *Proposed Amendments to the PRC Employment Contract Law* (Mayer-Brown Client Alert, Nov. 20, 2012).

221. See Gallagher et al., *supra* note 30, at 23.

222. See generally, Yoo & Kang, *supra* note 16, at 592. This study found that trends in temp and standard hiring followed U-shaped curves; an initial decline in temp hiring persisted two years after the reforms began, and that an initial parallel increase in standard hires and overall employment in the first few years was not sustained, but did not decline either. *Id.*

223. *Id.* at 579–80, 598–02.

tougher objective standards initially proposed by the ACFTU²²⁴ would have moved beyond the aggregate cap on labor dispatch and entirely banned the use of dispatched workers in certain sectors, such as coal mining, that are inherently hazardous. Similar measures in the European Union allow member states to adopt bans on the use of short-term or dispatched workers in positions that pose a danger to safety or health.²²⁵ This type of restriction would reduce ambiguity and would not be likely to increase regulatory distance; in fact, the rule would better conform to measures that have already been adopted by some provincial governments.²²⁶ Industries that require professional qualifications or permits from a professional organization or agency, such as law, medicine, journalism, and accounting, also should not be allowed to use dispatched workers.²²⁷ Ethical concerns about client confidentiality, the challenge of confirming professional licensure for dispatched employees, the negative impact of short-term positions and high turnover on service quality, and the fact that temp agencies are simply not qualified to bear the responsibility, as the legal employer, for such professionals, all support clear bans on temp hires in these sectors. Future regulations should consider such limits for certain industries.

The implementing rules' drafters realized that the impact of the amendments is likely to be moderated by the availability of outsourcing as an alternative model if employers simply contract out work previously performed by dispatched workers. Outsourcing is attractive because it allows employers to enjoy

224. There is some evidence to suggest that political compromise between the ACFTU, their primary backer, and strong interests in the state sector and even in the labor administration might have prevented some of these more comprehensive reforms from being adopted. *See* IHLO Report, *supra* note 43 (noting the ACFTU had previously proposed such a change).

225. *See* Bronstein, *supra* note 22, at 208 (discussing the negative impacts of temporary work).

226. *See, e.g.*, Shanxisheng Meikuang Gongyeju Guanyu Meikuangjing Xia Yanjin Shiyong Laowu Paiqian Renyuan de Tongzhi (山西省煤矿工业局关于煤矿井下严禁使用劳务派遣人员的通知) [Shanxi Coal Mining Industry Bureau Notice on Strictly Prohibiting the Use of Labor Dispatch for Mine Workers] (No. 1529, promulgated Jan. 23, 2010).

227. The initial LCL implementing rules issued in 2008 confirm that the labor dispatch rules extend to these fields. LCL Implementing Provisions, *supra* note 118, art. 3.

many of the same cost and risk-shifting advantages as indirect hiring via a temp agency, and many Chinese companies have already responded to the LCL amendments by substituting outsourced workers for those previously sourced through labor service agencies.²²⁸ Although empirical evidence on the magnitude of any shift is not yet available, the amendments' implementing rules attempt to curtail this trend by bringing independent contracting and other outsourcing relationships within the scope of the labor dispatch rules if the company uses a "labor dispatch hiring model"; in other words, if the direct employer is not the firm for which the worker provides services.²²⁹ Of course, this concept itself is likely to foster competing interpretations, which may limit its effectiveness.

In addition, the amendments' implementing rules fail to include proposed provisions that would have put a heavier burden on user firms to monitor temp agencies. For example, the proposed rules would have stipulated that the user firm would be deemed the legal employer of the worker in the event the labor services agency failed to enter into an employment contract with the dispatched worker or if the user firm hired dispatched workers in excess of the legal limits on labor dispatch.²³⁰ Innovative incentives for self-regulation like these are already part of the LCL itself and can be credited for its success in motivating employers to comply with the employment contract mandate. This approach was also adopted in Mexico's recent labor law reform,²³¹ and in China, as well, by local governments in Liaoning and Chongqing.²³² If other local governments were to follow suit, employers would incur

228. This observation is based on the personal experience of one of the authors.

229. Labor Dispatch Provisions, *supra* note 34, art. 27.

230. Aug. 8, 2013 Draft Labor Dispatch Regulations, arts. 14, 23, 37.

231. See Federal Labor Law, *supra* note 206, art. 13-16 (putting the burden on the firm hiring outsourced workers and independent contractors to monitor any contractor or temp agency's legal compliance by making both firms jointly and severally liable for any violation; the hiring firm may also risk the outsourced workers' being considered standard full-time employees of the firm).

232. Liaoning Labor Regulations, *supra* note 134, art. 30 (deeming dispatched employees to be direct hires if the user firm fails to execute a contract with the temp agency). *C.f.* with Chongqing Labor Regulations, *supra* note 4, art. 30. Chongqing modifies this list to include circumstances where the labor-using firm hires more than fifty percent of its workforce via labor dispatch or uses temp hires for longer than two years. *Id.*

additional monitoring costs, but overall compliance would be expected to improve significantly. The rule would also encourage dispatched workers to play an active role in enforcing the LCL through litigation, which has proven to be a powerful force motivating changes in employer practice since the initial passage of the LCL.²³³ Concerns about the additional burden on employers and the courts may explain why this rule was not adopted in the new implementing rules,

Of course, some level of evasion of the LCL is perhaps inevitable because many of the underlying challenges require a normative shift and are less susceptible of a legislative solution. One example is the heightened registered capital requirement. The LCL's initial registered capital requirement (RMB¥500,000) was already a substantial increase over the pre-LCL level of RMB¥30,000 (then, the default under the Company Law). However, labor dispatch agencies were able to meet the new standards by borrowing funds in order to register the business and then draining the funds to repay the loan, leaving an empty shell.²³⁴ Without concentrated efforts by local authorities, or the introduction of some type of regulatory bonding or capital maintenance rule (itself presumably difficult to police), these practices are unlikely to change even though the new threshold has again been dramatically increased.

Collective representation offers a potential solution to the limits of top-down implementation but one that is constrained in the Chinese context. Expanding avenues for active representation of temp agency workers through unionization, employee representative congresses, or participation in collective bargaining agreements have in fact been advanced by China's national and local authorities in recent years. For example, rules issued in 2012 require both state and non-state employers to establish employee representative congresses ("ERC") under existing trade unions. These rules reinforce

233. See Gallagher et al., *supra* note 30, at 9–10 (reporting some evidence that managers perceive enforcement to have toughened since 2008 and linking improved compliance in part to the heightened risk of employee litigation). One of the great successes of the LCL, for example, was the strong incentives it created for employers to enter into written employment contracts by stipulating that a worker serving without one could be entitled to double damages and ultimately, deemed an indefinite term hire as a matter of law.

234. *60 Million Temp Workers' Rights*, *supra* note 98.

existing provisions on workplace representation under China's Company Law and local rules, and they require, for the first time, that the ERC include representatives of dispatched workers.²³⁵

However, because these measures depend on the viability of the union itself, they have been seen as more of a public policy statement than a firm requirement, and dispatched workers, as well as many standard employees, do not yet have effective avenues for workplace participation and collective voice. As in the West, unionization levels are low for temporary workers, and in China, some have been illegally barred from joining the trade union of the labor-using firm.²³⁶ Some provincial trade union federations are working to expand temp agency unionization with aggressive targets.²³⁷ The ACFTU is also increasing efforts to expand collective consultation at the regional and industry level that would cover temp agencies and labor dispatch workers. However, efforts to transform existing unions into true vehicles for worker voice continue to meet strong resistance from employers and skepticism by employees.²³⁸

D. *The Benefits of Recursivity*

The implicit assumption behind our discussion thus far has been that recursivity should be reduced or eliminated. While this would mean that employer practice has begun to conform

235. See ACFTU et al. *Qiye Minzhu Guanli Guiding* (企业民主管理规定) [Provisions on the Democratic Management of Enterprises] art. 9 (issued and effective Feb. 13, 2012). The ERC is a separate body from the trade union, which is responsible for its operation.

236. See IHLO Report, *supra* note 43 (citing statistics from a 2011 study of the Shanghai Municipal Federation of Trade Unions, the China Enterprise Council (CEC), and the MOHRSS reporting that only forty percent of all temp agencies are unionized); *Growing Demand*, *supra* note 40, at 16 (reporting on the use of temp workers at a Nokia factory in Dongguan, a major manufacturing center in Guangdong); cf. Waas, *supra* note 16, at 59 (reporting that the unionization rate of temporary workers in Europe is low); Danielle D. van Jaarsveld, *Overcoming Obstacles to Worker Representation: Insights from the Temporary Agency Workforce*, 50 N.Y.L. SCH. L. REV. 355 (2005-06) (surveying barriers to temporary worker organization in the United States).

237. See DONGGUAN DAILY, *supra* note 142 (reporting on sixty-five percent unionization rate targets in Guangdong).

238. See Cooney et al., *supra* note 78, at 795-96 (discussing opposition of the business community to provisions in the draft LCL that might have given unions veto power over workplace rules).

more closely to the demands of positive law, the continuation of recursive cycles also offers a number of hidden benefits that should be emphasized. First, the repetition of provisions contained in earlier legislation during later recursive cycles brings to light elements of the earlier reform that require renewed policy emphasis and enforcement focus. As has been widely recognized in the literature, the expressive effect of law can be a powerful force in reshaping compliance incentives over time, and the reiteration of existing standards serves this function.²³⁹

Second, longer recursive cycles can give time for regulatory distance to narrow.²⁴⁰ Policy tools that promote incrementalism, such as transition periods, grandfathering, and phase-ins, are all valuable policy tools for this reason.²⁴¹ The two-year phase-in period for the ten percent limit on dispatched workers is an obvious example in the amendments' implementing rules and was intended to reduce the immediate impact of the rules on unemployment, production levels, and labor relations.²⁴² Of course, longer recursive cycles may also reflect deficiencies in the underlying legislation and offer opportunity for retrenchment, feeding the next recursive cycle. However, the recursive nature of this process allows regulators and regulatees to adjust to the requirements; successive expressions of the rule will then respond to changes in the enforcement context and in dominant norms among regulatees.

The history of labor law reform in China illustrates many of the benefits of recursivity, despite the obstacles to implementation that have been amply documented over the past several decades. For example, many firms initially ignored the Labor Law's basic contracting rules and flaunted its

239. On the expressive function of law, see, for example, Cass R. Sunstein, *Law, Economics, & Norms: On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 938–39 (1991).

240. Certainly, if reforms are ineffective, recursive cycles may create greater opportunity for evasion and resistance to build.

241. The LCL amendments provide that preexisting contracts will remain valid but must be amended to conform to the equal pay requirement. Employers already using dispatch workers and temp agencies who lack the required permit or business license have one year from the effective date to comply with the new requirements. LCL Amendments, *supra* note 2.

242. See MOHRSS, *supra* note 164.

prohibitions on abusive workplace practices, but a decade later, by the time the LCL was passed, regulatory distance had begun to narrow. Rising awareness of legal rights, space for bottom-up enforcement, changes in public enforcement priorities, political dynamics, and shifting market conditions with the LCL's passage all shaped this process, and all of these factors go some way in explaining the progress that has been achieved in the implementation of the LCL. Similarly, in 2008, labor dispatch gave "breathing room" for firms pressed by the financial crisis and a more litigious workforce to adjust. Now, the LCL amendments foreclose labor dispatch as an automatic alternative to full compliance, measures that would have represented a vast regulatory distance if adopted during the earlier recursive cycle and might have driven more overt resistance from the business community. With greater clarity of legal responsibility and a narrower regulatory distance at the present time, prospects for effective implementation of the new rules on labor dispatch may be brighter.

CONCLUSION

China is only one of many governments to introduce new measures on dispatched workers in the past decade, reforms that represent a clear retreat from the wholesale deregulation and expansive approach toward nonstandard workers that characterized earlier eras. Most have been put into place since the start of the financial crisis. The 2008 European Union Directive on Temporary Agency Work, for example, is designed to "ensure the protection of temporary agency workers . . . by ensuring that the principle of equal treatment [extends] to temporary agency workers, and by recognizing temporary work agencies as employers."²⁴³ South Korea enacted its reforms in 2007,²⁴⁴ and Mexico passed a major reform of its Federal Labor

243. Directive 2008/104/EC of the European Parliament and of the Council on Temporary Agency Work, Nov. 19, 2008, 2008 O.J. (L237) 9, 11. *See generally*, Waas, *supra* note 16 (analyzing the Directive).

244. *See generally* Yoo & Kang, *supra* note 16 (analyzing the reform's effect on dispatched hiring).

Law in 2012 that includes many of the limits now incorporated in the amended LCL.²⁴⁵

In the United States, as well, current debates over the future of health care and immigration reform, underemployment, and outsourcing have highlighted the importance of nonstandard employment in the economy. They have also sparked renewed attention among academics and policymakers to the social costs and benefits of nonstandard work.²⁴⁶ Similar debates have engaged many governments around the world in the past decade, each having to adapt outdated legal forms to respond to the informalization of the workplace.

The history of Chinese labor reform (and similar reforms in the West as well)²⁴⁷ suggests that when new rules have attempted to push companies to make significant changes far beyond the level of current practice, decades may be required for the reforms to take root. The LCL Amendments and their implementing rules represent at least the third iteration in this incremental process, and the lengthy transition period for their implementation recognizes this reality. This most recent experience underscores the utility of recursivity theory in describing the complexity and dynamism of cycles of lawmaking and implementation. It also emphasizes the relevance of new concepts—underlying incentive structures and regulatory distance—that might usefully be incorporated into future research on legal reform cycles.

From a practical standpoint, the success of the latest reforms is particularly important at this point in China's reform path as it works to develop a knowledge-driven, innovation-based economy and deal with vast socio-economic disparities that may pose a political threat to its leadership. Although the LCL amendments cannot entirely foreclose future avenues of evasion nor eliminate implementation barriers, the renewed effort to

245. Although it now gives employers the ability to retain workers on the basis of seasonal or short-term contracts, the revised Federal Labor Law mandates written employment contracts, prohibits firms from hiring an entire workforce through intermediaries, and establishes other standards intended to make contracts for an indefinite term the predominant form. See Federal Labor Law, *supra* note 198.

246. See, e.g. *Will Obamacare Destroy Jobs? Health Reform May Make Americans Work Less*, *ECONOMIST*, Aug. 24, 2013; Hill, *supra* note 151.

247. For a few obvious examples, see *supra* notes 56–59 and accompanying text.

restore equality to dispatched workers and promote standard hiring is a clear step forward in addressing these concerns. Even if the amendments do not wind down the recursive cycle, they can at least narrow the regulatory distance that will confront the next phase of the reform process. They may also suggest lessons for legislators and policymakers elsewhere who will shape the future of labor and employment law to fit the needs of today's changing workforce.