

HAS CHINA'S LABOR CONTRACT LAW CURTAILED ECONOMIC GROWTH?

WENWEN DING & J.H. VERKERKE[†]

ABSTRACT

As China reformed its economy during the past forty-four years, it experienced the fastest sustained expansion by a major economy in history with an annual rate of gross domestic product (GDP) growth averaging nearly 10% from 1978 to 2018. In the past decade, however, the rate of growth has noticeably slowed, falling to just under 7% in 2018, the year before the COVID-19 pandemic began. Though many nations might consider GDP growth over 6% admirable, in China it has sparked a debate about the causes of the slowdown. One suspect is China's 2008 Labor Contract Law (LCL), which provides workers with certain rights against firings and other adverse employment actions. Critics of the law claim its provisions threaten to stifle the Chinese economy by unduly restricting employers' ability to terminate unproductive workers and adjust their workforce to changing economic conditions. In the past, the Chinese government strongly supported the LCL. The issue today is whether that support should continue.

This Article provides the first detailed comparative study of the LCL and reveals that Chinese law imposes constraints no more restrictive than the average among Organisation for Economic Co-operation and Development (OECD) countries. This Article also challenges the contention that provisions of the LCL have caused slower growth and adversely affected Chinese labor markets. Theoretical models generate only ambiguous and inconsistent predictions concerning the effects of employment protections on labor market performance. And the available empirical evidence likewise fails to show any consistent pattern of adverse effects associated with employment protection laws. We argue that this economic literature casts considerable doubt on the causal claim that Chinese labor law has reduced the country's growth rate or depressed employment. Limited coverage and

[†] Wenwen Ding is an Assistant Professor at the China University of Political Science & Law and received an S.J.D. from the University of Virginia Law School of Law in 2019. J.H. Verkerke is the T. Munford Boyd Professor of Law and Director of the Program for Employment & Labor Law Studies at the University of Virginia School of Law. We gratefully acknowledge helpful comments on prior drafts from Kevin Cope, John Duffy, Michael Gilbert, George Rutherglen, Kathleen Sands, Pierre Verdier, and Mila Versteeg. Ding is grateful for financial support from the Program for Young Innovative Researchers at the China University of Political Science and Law. All errors and omissions are our own. Copyright © 2021 by Wenwen Ding and J.H. Verkerke. Most sources relied upon in this Article are primarily available in Chinese. All translations in this Article were done by the authors. The *Denver Law Review* utilized machine translations and a Staff Editor who is fluent in Chinese to verify assertions. Additionally, for sources not widely available in the United States, the *Denver Law Review* received copies from the authors.

under enforcement further diminish the likelihood that China's labor regulations have harmed the economy. Thus, the Chinese government should look skeptically on claims that reducing the employment protections in the LCL will reignite economic growth.

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INTRODUCTION

As China has reformed its economy over the past forty-four years, it has experienced astounding economic growth with an annual rate of gross domestic product (GDP) growth averaging nearly 10% from 1978 to 2018.¹ The World Bank described China's economic rise as "the fastest

1. *The World Bank, China Overview : Development News, Research, Data*, THE WORLD BANK (Mar. 29, 2021), <https://www.worldbank.org/en/country/china/overview>; World Bank Data-bank, *GDP Growth Rate*, <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG> (last visited Mar. 29, 2021).

sustained expansion by a major economy in history.”² Since the global economic crisis of 2007–2008, however, the country’s growth rate has fallen from a peak of 14.2% in 2007 to just under 7% in 2018, the year before the COVID-19 pandemic began.³ That recent economic slowdown (albeit slow only in comparison to China’s extraordinary recent growth rates) has once again propelled labor law reform into the country’s political agenda.

The primary focus of the debate—the Labor Contract Law (LCL)—is now more than a decade old. Since the LCL was first enacted in 2008, the law has been controversial.⁴ Critics claim its provisions unduly restrict employers’ ability to terminate unproductive workers and adjust their workforce in response to changing economic conditions.⁵ According to these arguments, the LCL increases labor costs, increases unemployment, reduces labor flexibility, deters business investment, and threatens to stifle the Chinese economy.⁶ Despite these concerns, the Chinese government strongly supported the LCL.⁷ Officials hoped that the law would reduce labor unrest and strike a better balance between economic growth and social equality.⁸

Just as the LCL took effect, however, the global economic downturn reached China, and the rate of GDP growth fell from 14.3% in 2007 to

2. WAYNE M. MORRISON, CONG. RSCH. SERV., RL33534, CHINA’S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES 2 (2019).

3. *Id.*

4. Mary Gallagher, John Giles, Albert Park, & Meiyang Wang, China’s 2008 Labor Contract Law: Implementation and Implications for China’s Workers, IZA Discussion Paper No. 7555, at 31 (2013).

5. See Randall Akee, Liqui Zhao, & Zhong Zhao, Unintended Consequences of China’s New Labor Contract Law on Unemployment and Welfare Loss of the Workers, IZA Discussion Paper No. 11705, at 2.

6. *Jingji Xuejia Zhang Weiyang: Laodong Hetongfa Sunhai Gongren Liyi, Jianyi Guoduan Tingzhi Zhixing* [Economist Weiyang Zhang: The Labor Contracts Law Harms Workers and Should be Repealed], FENGHUANG WANG [FENGHUANG NET] (Feb. 8, 2009), <http://finance.ifeng.com/news/hgjj/20090208/357150.shtml> (while this link does not consistently work in the United States, the *Denver Law Review* received a copy of this web page from the authors to verify the citation and assertion); Lin Liu, *Zhang Wuchang & Lang Xianping Fachu Fandui Shengyin: Xin Laodong Hetongfa Zaocheng Qiye yu Zhigong Shuangshu* [Steven Cheung and Lang Xianping Voiced Opposition: the Labor Contract Law Lead to No-win Situation for both the Firm and the Worker], FENGHUANG WANG [FENGHUANGNET] (Sept. 10, 2008, 8:38 AM), http://finance.ifeng.com/news/hgjj/200809/0910_2201_775688.shtml (while this link does not consistently work in the United States, the *Denver Law Review* received a copy of this web page from the authors to verify the citation and assertion); Dong Baohua, *Lun Woguo Wuguding Qixian Laodong Hetong* [About Indefinite-Term Contracts], 122 FASHANG YANJIU [L. BUS. REV.] 53, 55 (2007); Steven Cheung, *Zhang Wuchang Lun Laodong Hetongfa* [Steven Cheung Discusses the New Labor Law], in 1 FALV HE SHEHUI KEXUE [L. AND SOC. SCI.] 6, 32 (Su Li ed., 2009) [hereinafter Steven Cheung].

7. See Steven Cheung, *supra* note 6, at 2.

8. See, e.g., Xin Chunying, *Laodong Hetongfa de Fashehuixue Fenxi* [Analyzing the Labor Contract Law from a Socio-legal Perspective], Speech at Renmin University of China Law School (Jan. 17, 2009).

9.4% in 2009.⁹ In response, criticism intensified¹⁰ and many demanded immediate reform.¹¹ Business owners complained that the LCL legally mandated indefinite-term contracts for some workers and thus, revived the discredited “iron rice bowl” policy of the planned economy.¹² Some economists, including Steven Cheung and Zhang Weiyang, claimed that increased labor costs had triggered economic recession, corporate bankruptcies, and a rising unemployment rate; thus, Cheung called for the LCL to be repealed.¹³ Despite these critics’ strong opposition and the sharp decline in economic growth, the Chinese government was unmoved. Officials defended the law, arguing that the LCL “had not caused labor rigidity”¹⁴ and that the falling growth rate had nothing to do with its enactment.¹⁵

Starting in 2015, however, economic growth slowed further to less than 7% in 2015, 2016, 2017, and 2018—the lowest rate of the past thirty years. This persistent slowdown in growth has led members of the Chinese government to reconsider their support for the LCL.¹⁶ Some government officials have publicly criticized the law as being too restrictive. For example, Lou Jiwei, former Minister of Finance, claimed that the LCL greatly reduces labor market flexibility, increases firing costs, diminishes employment, harms labor productivity,¹⁷ and may discourage foreign

9. See WORLD BANK: GDP GROWTH (ANNUAL %) – CHINA, <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2009&locations=CN&start=2007&view=chart> (limiting data to China in 2007 and 2009).

10. See generally Hilary K. Josephs, *Measuring Progress Under China’s Labor Law: Goals, Processes, Outcomes*, 30 COMP. LAB. L. & POL’Y J. 373 (2009).

11. Renda Daibiao Liang Huixing: *Laodong Hetongfa Bixu yao Dagai* [Representative of National People’s Congress Liang Huixing: The Labor Contract Law Must be Substantively Modified], FENGHUANG WANG [FENGHUANG NET] (Mar. 10, 2009), <http://finance.ifeng.com/money/wealth/staff/20090310/432532.shtml> (while this link does not consistently work in the United States, the *Denver Law Review* received a copy of this web page from the authors to verify the citation and assertion); Zhang Xiaolei, *Bao Yujun: Laodong Hetongfa Sanfang dou Xu Buke* [Bao Yujun: Labor Contract Law, All Three Parties Need to Make up Lessons], SOHU WANG [SOHU NET] (June 26, 2008, 6:07 PM), news.sohu.com/20080626/n257765314.shtml.

12. You Xingyu, *Zhengxie Weiyuan Fuhao Zhangyin Jianyi Quxiao Wuguding Qixian Laodong Hetong* [China People’s Political Consultative Conference Member Zhang Yin Suggested Repealing the Non-fixed Term Labor Contract], XINHUANET (Mar. 2, 2008, 6:33 PM), <http://news.sohu.com/20080302/n255464035.html> (discussing the “iron rice bowl” system, which assigned workers to jobs at state-owned enterprises with a guarantee of lifetime employment regardless of performance).

13. LIN JIA, LAODONG FA DE YUANLI, & TIXI YU WENTI [THE THEORY, SYSTEM AND ISSUES OF LABOR LAW] 14 (2016).

14. Xu Yan, *Yin Weimin: Wo Burenwei Laodong Hetongfa Zaocheng le Yonggong Jizhi de Jianghua* [Yin Weimin: The Labor Contract Law Did Not Cause Labor Rigidity], RENMIN WANG [PEOPLE’S DAILY ONLINE] (Sept. 19, 2008, 3:39 PM), <http://npc.people.com.cn/GB/14957/53050/8077841.html>.

15. Renda Fagongwei Fuzhuren Xin Chunying: *Laodong Hetongfa Buhui Yinwei Weiji er Xiugai* [Xin Chunying: The Associate Director of the Legal Work Committee of the Standing Committee of the National People’s Congress: The Labor Contract Law Will Not be Modified Because of the Global Downturn], XUE XIN WANG [XUE XIN WEB] (Mar. 11, 2009, 10:04 AM), <https://www.chsi.com.cn/lh/jy/200903/20090311/18894477.html>.

16. See generally Xiao Er, *Zhongguo Caizhang: ‘Xianxing Laodong Hetongfa dui Qiye Yutangong Baohu Shiheng’* [Chinese Minister of Finance: Current Labor Law Imbalances the Protection of Employers and Employees], BBC CHINA (Mar. 7, 2016), https://www.bbc.com/zhongwen/simp/china/2016/03/160307_china_labor_law_regulation.

17. *Id.*

direct investment.¹⁸ Yin Weimin, the Minister of Human Resources and Social Security, abandoned his strongly supportive position and lamented that the LCL had brought higher labor costs and impeded workforce adjustments.¹⁹ He further stated that his department has been conducting research and developing potential reforms to address these issues.²⁰

These critical remarks reveal high-level dissatisfaction with the LCL's employment protection provisions. Prominent voices now advocate for greater labor market flexibility to cure what ails the Chinese economy.²¹ Critics' calls to relax labor regulations, or even to repeal the LCL entirely, have grown more insistent.²² In late 2017, the Chinese government responded by initiating a review of its labor policy and considering potential amendments to the LCL.²³ As of April 2022, no specific proposals have been made public. But a committee of the National People's Congress has called for research to determine whether the LCL has burdened employers and negatively affected labor flexibility.²⁴ And statements from the current Chinese government increasingly emphasize structural reform, flexibility, and an expanded role for market forces, subject as always to the constraint that freer markets must serve the interests of the ruling Communist Party.²⁵

China's recent focus on labor law reform is far from unique. Beginning in the 1980s, similar debates raged in Europe,²⁶ and during the

18. See generally Lou Jiwei *Huiying Laodong Hetong Fa dui Qiye de Baohu Shifen Buzu* [Lou Jiwei Responded to "Protection that the Labor Contract Law Provided to Enterprises is Far from Adequate"], XINHUA WANG [XINHUA NET] (Mar. 7, 2016, 10:53 AM), http://www.xinhuanet.com/politics/2016lh/2016-03/07/c_135162552.htm; see also Xiao Er, *supra* note 16.

19. See generally *Guowuyuan Xinwenban Jiuye he Shehui Baozhang Zhuanti Xinwen Fabu Hui* [State Council Information Office Press Conference on Employment and Social Security], RENLI ZIYUAN HE SHEHUI BAOZHANGBU WANGZHAN [MINISTRY OF HUM. RES. & SOC. SEC. NET] (Feb. 29, 2016), http://www.mohrss.gov.cn/zcyjs/gongzuodongtai/201603/t20160310_235121.html.

20. See generally *id.*

21. Steven Cheung, *Qudi Xianyou Laodong Fa, Zhongguo Jingji cai you Kewei* [China's Labor Contract Law Should be Abandoned for the Sake of the Economic Development], XINLANG WANG [SINA NET] (Jan. 25, 2016), <http://finance.sina.com.cn/zl/china/2016-01-25/zl-ifxnuvxc1919561.shtml>.

22. *Laodong Hetong Fa Sunhai Gongren Liyi, Jianyi Guoduan Tingzhi Zhixing* [Economist Zhang Weiying: The Labor Contract Law Hurts Workers' Rights and Interests], Fenghuang Wang [PHX. FIN. NEWS] (Feb. 8, 2009), <http://finance.ifeng.com/news/hgj/20090208/357150.shtml> [Editor's note: While this link does not consistently work in the United States, the *Denver Law Review* received a copy of this web page from the authors to verify the citation and assertion]; Cheung, *supra* note 21.

23. Wang Shu, *Xiugai Laodong Hetong Fa? Quanguo Renda Shejianwei: Jianyi Kaizhan Diaoyan Lunzheng* [Amend the Labor Contract Law? The National People's Congress Social Construction Committee: Suggested Investigation and Demonstration], XINJING BAO [BEIJING NEWS] (Oct. 27, 2019, 5:39 PM), <http://www.bjnews.com.cn/news/2019/10/27/642324.html>.

24. *Id.*

25. See generally *10 ge Yaodian Dudong Xi Jinping Zongshuji Qiangdiao de Xin Fazhan Geju* [10 Points to Understand the New Development Pattern Emphasized by the General Secretary of China Communist Party Xi Jinping], PEOPLE'S DAILY ONLINE (Oct. 6, 2020, 8:00 AM), <http://theory.people.com.cn/n1/2020/1006/c40531-31883602.html>.

26. Benoit Freyens & J.H. Verkerke, *Mapping Employment Dismissal Law: A Leximetric Investigation of EPL Stringency and Regulatory Style*, 5–6 (Jan. 6, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2989848 (draft).

following decades many nations embraced legal reforms intended to increase labor market flexibility.²⁷ More recently, the aftermath of the 2007–2008 global recession saw severe unemployment and declining job stability throughout both the developed and the developing worlds.²⁸ In response to this economic downturn, some nations enacted legal reforms that significantly reduced the stringency of their workers’ protections against unfair dismissal.²⁹ By increasing labor market flexibility, legislators hoped to boost job creation and reduce unemployment.³⁰ China now appears to be considering a similar path.

This Article examines whether the available evidence supports these calls to reform Chinese law. Advocates for greater flexibility rely on two central claims: (1) that the LCL is unusually stringent (the stringency claim) and (2) that this stringency caused economic growth to decline in China (the causal claim). We aim to challenge both claims.

Critics argue first that Chinese labor law is far more stringent than employment protection law (EPL) in other countries.³¹ We challenge this stringency claim by carefully analyzing the employment protection provisions of the LCL and comparing those restrictions to analogous employment regulations in the United States and prominent European countries. Contrary to the contentions of the Organisation for Economic Co-operation and Development (OECD) and World Bank analysts, we find that the stringency of Chinese law does not rank at the top but instead, in the middle of this distribution.³² And if the LCL is not unusually stringent, then the argument for greater flexibility loses an essential pillar of support.

Even if we assume, for the sake of argument, that China’s employment protection law is very restrictive, advocates for reform must also establish a causal relationship between stringent EPL and bad economic outcomes. Contrary to the reasoning behind this “causal claim,” however, economic theory produces only ambiguous and inconclusive predictions about how EPL affects the labor market. Although legal constraints on firing likely increase employers’ labor costs and thus, perhaps diminish

27. See generally GØSTA ESPING-ANDERSEN & MARINO REGINI, WHY DEREGULATE LABOUR MARKETS? (2000).

28. IMF Survey: Sharp Rise in Unemployment from Global Recession, INT’L MONETARY FUND, (Sept. 2, 2010), <https://www.imf.org/en/News/Articles/2015/09/28/04/53/sonew090210a>.

29. See OECD, OECD EMPLOYMENT OUTLOOK 2013 93 (2013) [hereinafter OECD EMPLOYMENT OUTLOOK 2013], https://read.oecd-ilibrary.org/employment/oecd-employment-outlook-2013_empl_outlook-2013-en#page1; see also Werner Eichhorst, Paul Marx, & Caroline Wehner, *Labor Market Reforms in Europe: Towards More Flexicure Labor Markets?*, 51 J. FOR LAB. MKT. RSCH. 1, 5–7 (2017).

30. See Eichhorst et al., *supra* note 29, at 5–7.

31. *Labor Contract Law and Supply-Side Reform Academic Seminar Held in Tianze*, TIANZE ECON. RSCH. INST. (July 27, 2016) (discussing the attendance and speech of Associate Professor Li Lingyun from East China University of Political Science); Dong Baohua, *Laodong Hetong Fa de Shida Shiheng Wenti [Ten Imbalance Issues in the Labor Contract Law]*, 318 TANSUO YU ZHENGMIN [EXPL. & FREE VIEWS] 10, 11 (2016).

32. See *infra* Section I.C.

their demand for workers, those same constraints make jobs more secure.³³ Workers value job security and are likely to increase their labor supply as a result.³⁴ Productivity also may rise as both firms and workers invest more heavily in this comparatively secure employment relationship. The net effect of these competing influences makes the predicted effect of EPL on employment and wages profoundly uncertain.³⁵

Currently available empirical evidence also casts doubt on critics' causal claim. Innumerable studies have investigated whether EPL helps or hurts employment.³⁶ But this considerable body of work has failed to identify a robust and consistent relationship between EPL and labor market outcomes.³⁷ Further, the causal claim fails to consider the restricted coverage and limited enforcement of the LCL in China.³⁸ These factors reduce the effective stringency of China's LCL and thus, diminish its probable influence on the labor market. Other factors—such as the declining comparative advantage of Chinese labor and the 2007–2008 financial crisis—have also affected China's economic growth.³⁹ Thus, policymakers should question the causal claim that the stringency of the LCL has been a primary driver of China's depressed economic growth and reduced employment.

Our argument is not that the current level of employment protection provided by the LCL is appropriate for a developing country like China, nor do we aim to determine the optimal stringency of China's labor regulations. Further, we do not intend to suggest that the LCL has no effect on economic outcomes, nor do we attempt to quantify its impact. These are challenging and important questions, but they are beyond the scope of this Article. Instead, we focus our attention on critics' central claims and challenge them through a detailed analysis of the core provisions of the LCL and a careful review of the available empirical evidence on these questions.

This Article proceeds in three parts. Part I introduces the basics of EPL and challenges critics' stringency claim that the LCL is unusually restrictive by conducting a comparative analysis of EPL in China and

33. J. H. Verkerke, *Discharge*, in 2 LABOR AND EMPLOYMENT LAW AND ECONOMICS 447, 453 (Kenneth G. Dau-Schmidt, Seth D. Harris, & Orly Lobel eds., 2009).

34. *Id.* at 458.

35. *Id.* at 448.

36. SIMON DEAKIN, RESEARCH HANDBOOK ON THE ECONOMICS OF LABOR AND EMPLOYMENT LAW 330–31 (Michael L. Wachter & Cynthia L. Estlund eds., 2012).

37. *Id.* at 331; Emiliano Brancaccio, Fabiana De Cristofaro, & Raffaele Giammetti, *A Meta-Analysis on Labour Market Deregulation and Employment Performance: No Consensus around the IMF-OECD Consensus*, 32 REV. POL. ECO. 1, 2 (2020).

38. Christopher John Yee Coyne, *All Bark and Not Bite: How Attorney Fee Shifting Can Solve China's Poor Enforcement of Employment Regulations*, 39 BROOK. J. INT'L L. 1145, 1155 (2014).

39. See Hongbin Li, Lei Li, Binzhen Wu, & Yanyan Xiong, *The End of Cheap Chinese Labor*, 26 J. ECON. PERSP. 57, 57, 63–64 (2012) (discussing how wage increases have impacted Chinese labor costs); Linyue Li, Thomas D. Willett, & Nan Zhang, *The Effects of the Global Financial Crisis on China's Financial Market and Macroeconomy*, ECON. RSCH. INT'L, Mar. 27, 2012, at 2 (examining how the 2007–2008 global financial crisis impacted China's annual GDP).

various OECD countries. Part II questions the causal claim that China's EPL negatively affects the labor market. Part III discusses the development of the labor market flexibility approach and its implications for China's labor law reform. We conclude that advocates for greater flexibility have failed to establish their case.

I. THE STRINGENCY CLAIM

We ask first whether China's LCL as written is unusually stringent. Numerous Chinese scholars⁴⁰ and some Chinese government officials⁴¹ have claimed that the LCL is more stringent and imposes more restrictive standards than equivalent laws in many other countries, including some European countries.⁴² One scholar has gone so far as to claim that with regard to unfair discharge rules, China's LCL is the most stringent of any country in the world.⁴³ But scholars making this claim mainly rely on their assumptions or instincts; few have provided strong evidence to support it. What is the best evidence on which critics can rely to investigate the comparative stringency of China's LPL? It would probably be the OECD EPL index, which ranks China's legislation as the most protective one for regular employment among forty-three countries in its 2013 survey of EPL.⁴⁴ Besides, some critics have used the 2013 OECD employment outlook survey to make their claim.⁴⁵ For reform advocates, it follows that China should adopt more flexible labor regulation in order to spur economic growth.

The OECD survey was one of the first comprehensive efforts to analyze and compare the degree of employment law stringency across countries. Beginning in the early 1990s, it attempted to quantify the laws of almost thirty OECD member states and more recently added laws from some developing countries.⁴⁶ However, our careful comparative examination of China's LCL and labor regulations in other countries shows instead that the OECD's assessment dramatically overstates the stringency of Chinese law.

40. *Labor Contract Law*, *supra* note 31 (discussing the OECD ranking in 2013); Dong, *supra* note 31; see also Xie Zengyi, *Laodongli Shichang Linghuoxing yu Laodong Hetongfa de Xiugai* [*Labor Market Flexibility and the Amendment of Labor Contract Law*], 233 FAXUE YANJIU [CHINESE J. L.] 95, 98–99 (2016).

41. For example, the aforementioned former Minister of Finance Lou Jiwei. See Chun Han Wong, *China May Rein in Wage Increase to Boost Economy*, WALL ST. J. (Mar. 10, 2016, 8:31 AM), <https://www.wsj.com/articles/china-may-rein-in-wage-rises-to-boost-economy-1457616686>.

42. See sources cited *supra* notes 40–41; see also Pete Sweeney, *China's Labour Law Under Fire as Restructuring Threatens Jobs*, REUTERS (Mar. 11, 2016, 5:04 AM), <https://www.reuters.com/article/uk-china-economy-labour-idUKKCN0WD19W>.

43. See Dong, *supra* note 31, at 11.

44. See OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 78–79.

45. See *Labor Contract Law*, *supra* note 31.

46. OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 66.

A. Primer on EPL

EPL typically includes unfair dismissal laws and laws relating to layoffs and redundancy.⁴⁷ These laws constrain employers' ability to fire employees at will and thus, impose a cost on employers who discharge workers without some legally adequate justification.⁴⁸

The International Labour Organization (ILO) Convention No. 158 (the Termination of Employment Convention) provides a basic model of the structure of EPL that exists in different national systems.⁴⁹ The following rules can be found in most countries that adopt EPL:

- Permissible Grounds for Termination: "The employment of a worker shall not be terminated unless there is a valid reason for such termination"⁵⁰
- Prohibited Grounds for Termination: Workers cannot be dismissed because of union membership; filing a complaint against the employer; discrimination based on race, sex, marital status, religion, and other factors; and absence from work during maternity leave.⁵¹
- Procedural Protections: The employer needs to give workers an opportunity to defend their behavior before discharge and must grant the discharged employee the right to the assistance of a representative.⁵²

47. See DEAKIN, *supra* note 36, at 330.

48. Christoph F. Buechtemann, *Introduction: Employment Security and Labor Markets*, in *EMPLOYMENT SECURITY AND LABOR MARKET BEHAVIOR: INTER-DISCIPLINARY APPROACHES AND INTERNATIONAL EVIDENCE* 8–9 (Christoph F. Buechtemann, ed., 1993).

49. See INT'L LAB. ORG., *EMPLOYMENT PROTECTION LEGISLATION: SUMMARY INDICATORS IN THE AREA OF TERMINATING REGULAR CONTRACTS (INDIVIDUAL DISMISSALS)* 1–2, (2015); DEAKIN, *supra* note 36, at 331.

50. International Labour Organization, *Termination of Employment Convention* art. 4, June 22, 1982, C158 [hereinafter *Termination of Employment Convention*]. To date, thirty-six countries have ratified the *Termination of Employment Convention* at various times since its proposal, and Brazil is the only nation to denounce its adoption after ratification. See *Ratifications of C158 – Termination of Employment Convention, 1982*, INT'L LAB. ORG., https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303 (last visited Mar. 29, 2022). For example, French labor law provides that any dismissal must be made for a serious and genuine reason. See *Code Du Travail [C. Trav.] [Labor Code]* arts. L. 1232-1 (Fr.). For example, in Italy, employees can only be lawfully dismissed in the presence of a "just-cause" or "justified grounds." See *L. n. 604/1966 (It.)*, art. 1.

51. *Termination of Employment Convention, supra* note 50, art. 5. For example, in Germany, Section 15 of the *Termination Protection Statute* protects members of a company's works council, election committee members, and candidates for works council election against arbitrary termination; the *Maternity Protection Statute* protects women during their pregnancy and the first four months following childbirth; the *Federal Data Protection Act* protects employees who have been appointed as data protection officers against arbitrary termination.

52. *Id.* art. 10 (5); *id.* art. 7. While the *Termination of Employment Convention* did not formally adopt the right to representative assistance, the ILO did include this provision in its formal recommendations corresponding to the convention. See ILO, *Termination of Employment Recommendation* § 9, June 22, 1982, R166 (advising an employee engaged in a defense procedure should be entitled to assistance in accordance with C158 art. 7). For example, French labor law requires the employer to set up a pre-termination meeting to hear the employee's explanation and the employee can find a fellow employee to represent him during the meeting. See *Code Du Travail [C. Trav.] [Labor Code]* arts. L. 1232-2, 1232-3, 1232-4 (Fr.).

- Advance Notice: Unless there is serious misconduct, the employer must give the worker advance notice or compensation in lieu of notice.⁵³
- Special Restrictions on Dismissal for Economic, Technological, or Structural Reasons: The employer must consult with workers' representatives⁵⁴ and notify the relevant authority about the termination.⁵⁵ When selecting workers for dismissal, the employer must consider the ability, skills, and qualifications of the affected employees, their seniority, and their family circumstances.⁵⁶
- Remedies: The discharged worker has the right to appeal the termination to an authorized body within a reasonable period of time.⁵⁷ The Termination of Employment Convention imposes certain remedies if the labor authority affirms that the employer's termination was unfair.⁵⁸
- Coverage: A member country may exclude several categories of workers from some or all these provisions.⁵⁹

53. Termination of Employment Convention, *supra* note 50, art. 11. In Belgium, for example, the employer must give the employee a written advance notice unless the employee is dismissed for serious cause. Serious cause includes: theft, dishonesty, or violence; (intentional) gross negligence; repeated unjustified absences; and inexcusable insubordination. Incompetence, lack of productivity, and occasional absences do not constitute serious cause. See WILLIAM L. KELLER, INTERNATIONAL LABOR AND EMPLOYMENT LAWS (Timothy J. Darby ed., 4th ed.), 3-27, 3-44, & 3-45.

54. Termination of Employment Convention, *supra* note 50, art. 13. For example, in Norway, Art. 15-1 of the Working Environment Act states that prior to the dismissal with notice the employer shall, to the extent that it is practically possible, discuss the matter with the employee and the employees' representatives, unless the employee opposes such consultations.

55. Termination of Employment Convention, *supra* note 50, art. 14. For example, in Austria, prior notification to and consultation with the works council is needed. See Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act] § 105 (2) (Austria).

56. See Termination of Employment Convention, *supra* note 50, art. 15. For example, in Germany, the following factors should be considered when terminating an employee due to technological or structural reasons: employee's length of service with the employer; the employee's age's maintenance obligations; and his or her severe disability. Older longer service employees enjoy priority over those with shorter service; employees with more dependents deserve more protection. See KELLER, *supra* note 53, at 5-112-13. The ILO's recommendation that certain criteria should guide a workforce reduction decision appeared in its 1963 employment termination recommendations. See ILO, Termination of Employment Recommendation § 15, June 26, 1963, R119. However, the 1983 adoption of C158 and R116 superseded the recommendations made in R119. See *Termination of Employment Recommendation, 1963, INT'L LAB. ORG. (2017)*, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312457.

57. Termination of Employment Convention, *supra* note 50, art. 8. For example, in Luxemburg, employees can sue in the labor court for unfair dismissal. See Labour Code, art. L 124-11 (2) (Lux). In Portugal, the discharged employee need to sue in the labor courts, which have exclusive jurisdiction over dismissal cases. Besides, any legal action challenging the regularity and the fairness of an individual dismissal shall be brought within 60 days of receipt of the dismissal decision or of the date of termination of the contract. See Código do Trabalho [Labor Code], art. 387.

58. Termination of Employment Convention, *supra* note 50, art. 10. For example, in Luxemburg, the judge can prescribe reinstatement if requested by the worker and approved by the employer. Labour Code art. L 124-12 (2) (Lux).

59. Termination of Employment Convention, *supra* note 50, art. 2. For example, in Italy, the Workers' Statute excludes employers with less than fifteen employees (or less than five in the agricultural sector) from specific aspects related to union rights. See Legge 20 maggio 1970, n.300 art. 35 (It.).

In addition to the ILO Termination of Employment Convention's legal framework, European countries also distinguish between indefinite-term contracts and fixed-term contracts, which affect employers' freedom to fire workers.

B. International Comparisons

In this Section, we compare the stringency of Chinese employment protection regulations to both the ILO Termination of Employment Convention and laws from a representative subset of OECD countries. China first enacted EPL provisions in the 1994 Labor Law and enhanced worker discharge protection in the 2008 LCL.⁶⁰ The general structure of Chinese EPL closely follows both the ILO Termination of Employment Convention and the provisions of European legislation.

As described, some critics rely on the 2013 OECD survey to support their stringency claim. This survey is by far the most comprehensive and influential measure of EPL available. Thus, in the comparison that follows, we consistently compare our results to the rankings the OECD has generated. We evaluate the stringency of China's EPL as compared to discharge laws in twenty-two of the European countries in OECD⁶¹ and to those of the United States. Each Subsection below focuses on one aspect of employment protection. Our detailed comparisons use the ILO Convention, European law, and U.S. law as benchmarks to assess China's LCL. We conclude that, far from being an exceptionally restrictive outlier, Chinese law is no more stringent than the rules that prevail in most European countries.

1. Permissible Grounds for Dismissal

The ILO Termination of Employment Convention⁶² and about one-third of the European countries studied include a general standard that to discharge a worker, an employer needs just cause.⁶³ Half of the European

60. Zhonghua Renmin Gongheguo Laodong Hetong Fa (中华人民共和国劳动合同法) [Labor Contract Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2007, effective Jan. 1, 2008), 2007 FALŪ HUIBIAN 59, 68 (China), [hereinafter Nat'l People's Cong., Labor Contract Law]; see also Dan Harris, *China's New Labor Law: It's a Huge Deal*, HARRIS BRICKEN (Nov. 11, 2007), <https://harrisbricken.com/chinalawblog/chinas-new-labor-law-its-a-huge-deal/>.

61. These countries include Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Norway, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. See OECD, DETAILED DESCRIPTION OF EMPLOYMENT PROTECTION LEGISLATION, 2012–2013: OECD COUNTRIES 1 (2013) [hereinafter OECD EMPLOYMENT PROTECTION LEGISLATION]. Several countries lay out the discharge rules in their national collective bargaining agreements, which are legally binding and apply to almost all workers. See OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 99, 101–02, 104, 124, 126. Thus, collective bargaining agreements are considered laws under this circumstance.

62. Termination of Employment Convention, *supra* note 50, art. 4.

63. These countries then define the standard through case law and each country varies in the stringency of its interpretation of the standard. The statistical and comparative assertion is based on our own calculation. We refer to the OECD and the ILO EPL databases for the EPL of the twenty-

countries in our survey provide a list of permissible grounds for termination, and five countries⁶⁴ require no legal justification.⁶⁵ Whether the law provides a general standard or a list of permitted grounds for termination, just cause generally falls into three categories: workers' conduct; workers' capacity; and the economic, technical, or operational needs of the employer⁶⁶ (which some countries call "redundancy").⁶⁷

Employee misconduct is the most typical reason for termination in all countries, but what constitutes misconduct varies across countries. In China, the first and most frequently invoked justification allows employers to fire workers for serious violations of company rules.⁶⁸ As a practical matter, this category of justification gives employers great flexibility to discharge workers. For example, they can broaden the scope of justified grounds by carefully drafting broad work rules. Thus, this permissible ground for dismissal does not substantially limit employers. Other permitted justifications include workers' gross negligence (or willful misconduct) that causes severe damage to the employer,⁶⁹ workers under investigation for criminal offenses,⁷⁰ or workers having a second job.⁷¹ These three reasons are not commonly enumerated in most other countries, but including them in the LCL in no way makes the law more stringent in its regulation of termination.

three comparative countries (Twenty-two European countries and the United States). The countries included in the survey are Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Norway, Portugal, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. For the detailed description of employment protection legislation for the twenty-three countries, see OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 6–10, 17–41, 50–53, 59–61, 64–66, 70–72, 76–104. See also *EPLex: Browse by Country*, INT'L LAB. ORG. (2020), <https://eplex.ilo.org/#browse-by-country-section> [hereinafter *EPLex*] (cataloging the valid and prohibited grounds for dismissal by country for twenty-two of our statistical analysis nations; the Czech Republic is not included in the *EPLex* database). Unless specified, we mainly refer to the employment protection legislation from the ILO and the OECD databases.

64. See *EPLex*, *supra* note 63. (These countries include Austria, Denmark, Greece, Switzerland, and the United States) (Accessible under the "valid and prohibited grounds for dismissal" tab for the countries of Austria, Denmark, Greece, Switzerland, and the United States).

65. *Id.*

66. Termination of Employment Convention, *supra* note 50, art. 4

67. *What is Redundancy in the Workplace?*, INDEED, <https://www.indeed.com/hire/c/info/what-is-redundancy> (last visited Mar. 30, 2022) ("In the workplace, redundancy refers to the process when employers have to let go of one or more employees due to circumstances unrelated to job performance or behavior.")

68. Wang Qian, *Woguo Guocou Jiegu Zhidu de Buzu jiqi Gaijin—Jianlun "Laodong Hetong Fa" di 39 tiao de Xiugai* [*The Insufficiency and Improvement of Our Country's Unjust Dismissal System—the Revision of Article 39 of the "Labor Contract Law"*], 113 HUADONG ZHENGFA DAXUE XUEBAO [J. EAST CHINA U. POL. SCI. & L.] 116, 119 (2017).

69. See Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 39(3) ("[C]ausing major losses to the employing unit due to serious dereliction of duty or engagement in malpractices for personal gain."). In this instance, workers cause severe damages to employers through seriously neglecting duties or by seeking private benefits.

70. *Id.*

71. *Id.*

Lack of capacity is another permitted reason for termination in all the countries we studied.⁷² More than half of these countries allow the discharge of incapable workers only after they have been retrained or reassigned new positions and are still proved to be incompetent.⁷³ Similarly, Chinese employees who are judged incompetent after a probationary period must first be given retraining or job adjustment before they can be fired.⁷⁴

Discharge is also permitted in China for what other countries deem “economic, technological, or organizational” reasons.⁷⁵ The LCL similarly provides for termination when “the objective situation on which the conclusion of the labor contract was based has changed so considerably that the employee cannot fulfill his labor contract and, even after the employer and the employee negotiate, they cannot agree on changing the terms of the labor contract.”⁷⁶ Thus, the employer must first negotiate with the worker to avoid termination.⁷⁷ The employer can only dismiss the worker when an agreement between the two parties cannot be reached.⁷⁸ Economic redundancy is also a permitted reason for termination in the countries that we surveyed. And, like China, six of them require some negotiation with workers before termination.⁷⁹

In both the countries that have a general just-cause standard and those that provide a list of justified causes for termination, courts can consider additional, unlisted reasons for termination according to the particulars of a given case.⁸⁰ Although Chinese courts may only consider the statutorily enumerated reasons, which ostensibly makes the regulation more stringent than those of other countries, the permitted enumerated ground of committing a “serious violation of employers’ rules” gives Chinese employers considerable flexibility.⁸¹ Thus, on balance, China’s statutory regulation of justified reasons for termination is neither extremely stringent nor as flexible as the relatively unfettered U.S. standard. It is roughly comparable

72. See *EPLex*, *supra* note 63. (Accessible under the “valid and prohibited grounds for dismissal” tab for each country referenced).

73. *Id.* (Accessible under the “procedures for individual dismissal” tab for the countries of Austria, Finland, Germany, Hungary, Portugal, and Slovenia).

74. Nat’l People’s Cong., Labor Contract Law, *supra* note 60, art. 40.

75. *Id.*

76. *Id.* (translation done by authors).

77. *Id.*

78. *Id.* art. 40(3).

79. See *EPLex*, *supra* at note 63 (Accessible under the “procedures for individual dismissal” tab for the countries of Austria, Finland, Germany, Hungary, Portugal, and Slovenia).

80. See OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61; see also *EPLex*, *supra* note 63 (Accessible under the “procedures for individual dismissal” tab for the countries of Austria, Finland, Germany, Portugal, and Slovenia) (Accessible under the “valid and prohibited grounds for dismissal” tab for the countries of Austria, Belgium, Denmark, Estonia, Germany, Greece, Italy, the Netherlands, Norway, Portugal, Switzerland, Turkey, the United Kingdom, and the United States).

81. Nat’l People’s Cong., Labor Contract Law, *supra* note 60, art. 39. The three articles that enumerate the justified reasons for termination do not include a clause that allows employers to fire an employee based on any other unlisted reasons. See Wang, *supra* note 68, at 119.

to most European countries.⁸² Table 1-A below summarizes this initial stage of the comparison: Chinese law generally follows the legal framework about permissible grounds for dismissal of the ILO Termination of Employment Convention and follows the average stringency level of the European law but is much more stringent than U.S. dismissal law.

ILO Convention	European Laws	U.S. Laws
Generally Follows < 0 >	Follows Average < 0 >	Much More Stringent ++

TABLE 1-A. *Chinese Law Concerning Justified Grounds for Termination*

2. Prohibited Grounds for Dismissal

The ILO Termination of Employment Convention and all OECD countries that we studied take a similar approach to identifying specific prohibited grounds for dismissal.⁸³ Chinese law also prohibits termination based on certain reasons, including pregnancy, maternity leave, temporary work injury or illness, age,⁸⁴ trade union membership and activities,⁸⁵ marriage,⁸⁶ ethnic origin, race, sex, religion, and disability.⁸⁷ Most other countries in our survey include more prohibited reasons than are found in Chinese law. For example, almost all the countries prohibit termination based on fulfilling family responsibilities, filing a complaint against the employer, color, sexual orientation, political opinion, social origin, and taking parental or adoption leave.⁸⁸ Furthermore, more than half of the countries include state of health or performing military or civil service as prohibited

82. See *EPLex*, *supra* note 63 (Accessible under the “valid and prohibited grounds for dismissal” tab for all European countries).

83. See Termination of Employment Convention, *supra* note 50, art. 5. For a list of the twenty-three countries in the study, see *EPLex*, *supra* note 63.

84. Nat’l People’s Cong., Labor Contract Law, *supra* note 60, art. 42.

85. Zhonghua Renmin Gongheguo Gonghui Fa (中华人民共和国工会法) [Trade Union Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 3, 1992, effective Apr. 3, 1992; amended by the Standing Comm. Nat’l People’s Cong., Oct. 27, 2001, effective Oct. 27, 2001; amended by the Standing Comm. Nat’l People’s Cong., Aug. 27, 2009), art. 52(2) (2009).

86. Zhonghua Renmin Gongheguo Funü Quanyi Baozhang Fa (中华人民共和国妇女权益保障法) [The Law of the People’s Republic of China on the Protection of Women’s Rights and Interests] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 3, 1999, effective Apr. 3, 1992; revised by the Standing Comm. Nat’l People’s Cong., Aug. 28, 2005, effective Aug. 28, 2005; Oct. 26, 2018, effective Oct. 26, 2018) art. 27 (2005), (China).

87. Zhonghua Renmin Gongheguo Jiuye Cujin Fa (中华人民共和国就业促进法) [The Law on Employment Promotion Protection of Rights and Interests of Women] (promulgated by the Standing Comm. Nat’l People’s Cong., Apr. 3, 1992, effective Apr. 3, 1992; rev’d by the Standing Comm. Nat’l People’s Cong., Aug. 28, 2005) art. 27 (2005), art. 3 (2008), http://www.gov.cn/flfg/2007-08/31/content_732597.htm (China).

88. *EPLex*, *supra* note 63 (Accessible under the “valid and prohibited grounds for dismissal” tab for each country referenced).

grounds for termination.⁸⁹ Some countries even bar termination based on language, genetic information, birth, property, and financial status.⁹⁰

All the OECD countries in our survey prohibit termination on more grounds than China does.⁹¹ Further, the legal force of these prohibited grounds has been typically elaborated in well-developed antidiscrimination laws and judicial decisions in these countries.⁹² In contrast, China has yet to develop significant legal constraints on employment discrimination.⁹³ Thus, China's prohibited grounds for termination are much less restrictive than those of the other countries under comparison.

The OECD index completely omits prohibited grounds for termination as an indicator of stringency.⁹⁴ As demonstrated in the next Subsection, the OECD's "fair or unfair dismissal" indicator purports to measure grounds for termination. However, this indicator considers only the permitted—but not the prohibited—grounds for termination.⁹⁵ Similarly, other indicators in the OECD index exclude prohibited grounds as an indicator of stringency.⁹⁶ This omission leads to an overstatement of the stringency of China's EPL by failing to measure a feature of employment protection in which Chinese law is markedly less developed. Table 1-B below summarizes how China's law compares to the ILO Termination of Employment Convention and rules in other countries.

ILO Convention	European Laws	U.S. Laws
Generally Follows < 0 >	Much Less Stringent --	Much Less Stringent --

TABLE 1-B. *Comparing Chinese Law Concerning Prohibited Grounds for Termination*

89. *Id.* (Accessible under the "valid and prohibited grounds for dismissal" tab for the countries of Austria, Belgium, Estonia, Finland, France, Greece, Hungary, the Netherlands, Norway, Slovakia, Slovenia, Sweden, and Switzerland).

90. *Id.* (Accessible under the "valid and prohibited grounds for dismissal" tab for the countries of Belgium, Finland, France, Hungary, Portugal, Slovakia, Slovenia, Turkey, the United States).

91. *Id.* (Accessible under the "valid and prohibited grounds for dismissal" tab for each country referenced).

92. For example, the U.S. anti-discrimination legal system is one of the most developed systems around the globe. For European countries, see ISABELLE CHOPIN & CATHARINA GERMAINE, A COMPARATIVE ANALYSIS OF NON-DISCRIMINATION LAW IN EUROPE 2019 11–33 (2019).

93. See Yan Tian, *Chongsi Zhongguo fan Jiuye Qishifa de Dangdai Xingqi* [Rethinking the Modern Origins of China's Anti-Discrimination Legislation], 24 ZHONGWAI FAXUE [PEKING U. L. J.] 560, 577 (2012).

94. See OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 74–75; see also OECD, CALCULATING SUMMARY INDICATORS OF EPL STRICTNESS: METHODOLOGY, tbl.1 (2014) [hereinafter CALCULATING EPL (2014)].

95. *Id.*; see also OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 74.

96. *Id.* at 74–75.

3. Special Protections for Certain Groups of Employees

In addition to prohibited grounds for dismissal, countries also provide special protections to certain groups of workers. Take pregnancy as an example. If included under “prohibited grounds,” a woman cannot be discharged because of her pregnancy, but she can be terminated for other valid reasons. However, when a pregnant woman is enjoying special protections, she cannot be dismissed during her pregnancy either because of her pregnancy or because of some valid reason. In China, for example, the LCL also enumerates four groups of employees who employers cannot terminate even for incompetency or redundancy:⁹⁷ (1) pregnant women and women on maternity leave, (2) workers who entirely or partially lose their capacity to work due to a work-related or non-work-related illness or injury during a legally prescribed period of medical treatment, (3) workers who are suspected of having an occupational disease, and (4) employees who have been working for the same employer continuously for no fewer than fifteen years and are within five years of the legal retirement age.⁹⁸ The European countries that we examined (except for the United Kingdom) offer similar protection.

The first above listed group of specially protected workers is also specially protected in nearly all the studied European countries,⁹⁹ and the second are protected in most of the countries¹⁰⁰ we analyzed. The last two groups are rarely protected in other countries. But most other countries provide special protections to other groups of workers, including workers’ representatives,¹⁰¹ workers with family responsibilities (for parental or nursing care), workers performing military or civil service, or workers with disabilities. Most European countries grant special protection to three or four groups.¹⁰² In terms of the contents of protection, the Chinese law follows the most typical practice and does not offer unusually strict protections. Therefore, regarding special protection for certain groups of workers, the stringency of Chinese law is comparable overall to relevant European countries.

97. Nat’l People’s Cong., Labor Contract Law, *supra* note 60, art. 42.

98. *Id.*

99. See *EPLex*, *supra* note 63. Note that the United States provides minimal protection to pregnant women and women on maternity leave. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2612(a)(1), 2614(a)(1), 102 (a)(1), & 104 (1)(a).

100. *EPLex*, *supra* note 63; see also OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 3, 27, 65, 73, 85.

101. OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 20, 32, 37, 39, 43, 45, 57, 63, 71, 90, 94, & 101. Most countries provide at least notice to worker representatives during a collective dismissal while other countries require the employer to work with employee representatives before collective dismissal. See generally *id.* Only the United States, the United Kingdom, Denmark, Norway, and Georgia also do not give special protection to this group of workers. *Id.*

102. See *EPLex*, *supra* note 63.

ILO Convention	European Laws	U.S. Laws
N/A	Follows Average < 0 >	Much More Stringent ++

TABLE 1-C. *Comparing Chinese Law Concerning Special Protection for Certain Groups*

The OECD index uses “fair or unfair dismissal” as the indicator of substantive requirements for dismissal.¹⁰³ It assigns four levels of protection (the higher the score, the more stringent the protection):¹⁰⁴

- 0 – when worker capability or redundancy of the job are adequate and sufficient grounds for dismissal;
- 1 – when social considerations, age, or job tenure must be considered as possible influences on the choice of which worker(s) to dismiss;
- 2 – when prior to dismissal, an employer must offer transfer, retraining, or both, to help the worker adapt to different work;
- 3 – when worker capability cannot be grounds for dismissal.¹⁰⁵

Following this rule, the OECD assigned nine of the countries in our survey the score of zero.¹⁰⁶ This means that when making firing decisions, an employer must only take worker capability or redundancy into account, but not any of the other considerations. The OECD assigned Norway a score of one, the highest score among all the countries in our survey.¹⁰⁷ China, along with eight other countries,¹⁰⁸ received the second highest score—0.8.¹⁰⁹ Five other countries¹¹⁰ received a score between zero and 0.8.¹¹¹ No country in our survey reached the highest level of stringency. Thus, the OECD index assessed Chinese law as imposing constraints far more stringent than the average European country.

In contrast, our analysis of dismissal laws in all the relevant countries suggests that the OECD survey does not accurately reflect the degree of strictness of China’s EPL. Table 1-ABC below shows our analysis of how China’s LCL stands under the three factors outlined in the 2013 OECD

103. See OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 98; see also CALCULATING EPL (2014), *supra* note 94, at 1–2.

104. See CALCULATING EPL (2014), *supra* note 94, at 1–2.

105. *Id.* (translation done by the authors).

106. See OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 83 fig.2.3 (raw data can be found by using the Stat Link located next to the figure). The countries within our survey with a zero score include Switzerland, the United States, Great Britain, Denmark, Turkey, Hungary, Belgium, the Slovak Republic, and the Czech Republic. For a full list of the countries included in the survey, see *supra* note 63.

107. OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 83 fig.2.3.

108. These countries from our survey include Slovenia, Estonia, Spain, Sweden, Italy, Finland, France, and Germany. *Id.*

109. *Id.*

110. These countries from our survey include the Netherlands, Luxembourg, Austria, Portugal, and Greece. *Id.*

111. *Id.*

survey—justified grounds, prohibited grounds, and special protection of certain groups of workers.

Category	ILO Convention	European Laws	U.S. Laws
Justified Grounds	< 0 >	< 0 >	++
Prohibited Grounds	< 0 >	--	--
Special Protection	N/A	< 0 >	++

TABLE 1-ABC. *Comparing Chinese Law Concerning Protection Against Termination*

Table 1-ABC suggests that China’s dismissal law is roughly average based on justified grounds and special protection groups, but it is much less restrictive based on prohibited grounds than most of the countries in our survey. Thus, with respect to what is deemed fair or unfair dismissal, China’s level of protection is somewhat less stringent than the average level of protection in European countries. By omitting prohibited grounds, the OECD survey inflates the relative stringency of China’s LCL. In other words, China’s labor regulations are not as stringent as the OECD survey asserts when it comes to fair or unfair dismissal.

4. Indefinite-Term Employment Contracts

One of the most debated provisions of the LCL requires employers to form an “indefinite-term contract” with workers under specific circumstances.¹¹² Some scholars and members of the business community have objected that these rules revive the discredited “iron rice bowl” style of permanent employment.¹¹³

This LCL provision requires an employer to offer an indefinite-term labor contract to any employee who meets the following criteria:

- Has already worked for the employer for ten full, consecutive years;
- Has concluded two consecutive fixed-term labor contracts of any length with the employer, and there is no just cause for firing the employee; or
- Has failed to sign a written labor contract after a year of service.¹¹⁴

112. Nat’l People’s Cong., Labor Contract Law, *supra* note 60, art. 14.

113. Steven Cheung, *supra* note 6, at 7; Dong Baohua, *supra* note 6, at 55; Zhengxie Weiyuan Fuhao Zhang Yin Jianyi Quxiao Wuguding Qixian Laodong Hetong [Member of Chinese People’s Political Consultative Conference Zhang Yin Recommending Invalidating Indefinite Term Contract], SOHU WANG [SOHU NET] (Jan. 30, 2021), <http://news.sohu.com/20080302/n255464035.shtml> [hereinafter *Souhu Wang News*].

114. Nat’l People’s Cong., Labor Contract Law, *supra* note 60, art. 14.

These requirements were not mandatory under the 1994 Labor Law.¹¹⁵ In order to promote stable, long-term employment relations,¹¹⁶ however, the LCL now requires an indefinite-term contract whenever one of these conditions exists.¹¹⁷ The business community has strongly criticized this mandate.¹¹⁸ However, all the European countries we surveyed provide that indefinite-term contracts are the standard form of employment contract.¹¹⁹ These laws presume that the employment relationship will persist unless there is just cause for termination.¹²⁰ In other words, employers are bound by an indefinite-term labor contract in all the surveyed European countries even without any of the above requirements. Thus, China's EPL is less stringent than average among European countries with respect to the requirement of indefinite-term contracts.

In Europe, the principal reason for imposing indefinite-term contracts is to prevent the abusive use of fixed-term contracts.¹²¹ In fact, most European countries place stringent restrictions on the use of fixed-term contracts.¹²² More than half of the European countries we studied require the employer to have objective and material justifications for using fixed-term contracts.¹²³ These laws also permit employers to renew fixed-term contracts no more than two to four times.¹²⁴ Moreover, nearly all these countries impose restrictions on the maximum cumulative duration of fixed-term contracts (twenty-four or thirty-six months).¹²⁵ Although China's LCL does not require any special justification for using a fixed-term contract, it limits the maximum number of successive contracts to two.¹²⁶ However, the maximum cumulative duration in China is ten years,¹²⁷ much longer than most of the European countries that we studied. Thus, China's regulation of fixed-term contracts is less stringent than the rules we find in the average European country.

To summarize, Chinese law regulates indefinite-term labor contracts less stringently than most European countries. China imposes such

115. Zhonghua Renmin Gongheguo Laodong Fa (中华人民共和国劳动法) [Labor Law of the People's Republic of China] (promulgated by the Standing Comm. 8th Nat'l People's Cong., Jul. 5, 1994, effective Jan. 1, 1995), art. 20 (1995).

116. YUAN LI, ZHONGHUA RENMIN GONGHEGUO LAODONG HETONG FA LUJIE YU SHIYONG [INTERPRETATION AND APPLICATION OF THE LABOR CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA] 37-41 (2007).

117. Nat'l People's Cong., Labor Contract Law, *supra* note 68, art. 14.

118. *Souhu Wang News*, *supra* note 113.

119. OECD EMPLOYMENT PROTECTION LEGISLATION *supra* note 61; *see also EPLex*, *supra* note 63; Council Directive 1999/70, gen. consideration 6, 1999 O.J. (L 175) (E).

120. PER SKEDINGER, EMPLOYMENT PROTECTION LEGISLATION: EVOLUTION, EFFECTS, WINNERS AND LOSERS 20 (Laura A. Wideburg trans., 2010).

121. Council Directive 1999/70, *supra* note 119, at cl. 1(b).

122. OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 88 fig.2.7 (raw data can be found by using the Stat Link in the figure to show 20 European countries total have a one or less ranking in valid cases for use of standard fixed-term contracts).

123. *Id.*

124. *Id.*

125. *Id.*

126. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 14(3).

127. *Id.* art. 14(1).

contracts only when certain requirements are met. Moreover, the LCL allows employers to hire fixed-term contract workers for any reason and permits a much longer cumulative duration for those contracts. In contrast to our findings, the OECD's assessment of this factor ranks China in an intermediate position. Once again, we observe that the OECD index overstates the stringency of Chinese EPL.

ILO Convention	European Laws	U.S. Laws
N/A	Much Less Stringent --	N/A

TABLE 1-D. *Comparing Chinese Law Concerning Indefinite-Term Employment Contracts*

5. Collective Redundancy

The LCL specifies that collective redundancy occurs when an employer terminates twenty or more employees or 10% of the total number of employees due to economic or technological reasons.¹²⁸ Most European countries define collective redundancy solely based on the number of employees fired.¹²⁹ However, only five among the twenty-three surveyed countries require employers to specify the reasons for termination—economic, technological, or structural.¹³⁰ Thus, the definition of collective redundancy in China is slightly less stringent than the average country in our survey.

Under the LCL, at least thirty days before laying off workers, an employer must consult either the labor union or the company's employees.¹³¹ All the countries that we studied, except the United States, also require advance consultation with the trade union or workers' representatives.¹³² Most countries impose a notice period of thirty days though some require as much as ninety days' notice.¹³³ In China, after the consultation process, the firm must report its employee-reduction plan to the local labor administrative department.¹³⁴ This requirement also appears in all of the countries that we studied.¹³⁵ Neither the Chinese law nor most of the other

128. *Id.* art. 41.

129. Council Directive 98/59, art. 1, 1998 O.J. (L 225) 16, 21 (EC).

130. OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 4, 17, 30, 80, 88.

131. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 41.

132. *EPLex*, *supra* note 63 (expand "Procedures for collective dismissal" tab).

133. *Id.*; *see also* OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61 (protection for four-year tenured employees).

134. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 41.

135. *See* OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 4, 7, 10, 13, 16, 19, 21, 25, 28, 32, 35, 37, 39, 41, 43, 45, 48, 52, 55, 57, 60, 63, 66, 69, 71, 74, 81, 83, 87, 90, 94, 97, 99, 101, 103. Note that in the United States, the Worker Adjustment and Retraining Notification Act of 1988 only imposes on employers of over 100 employees an obligation to provide sixty days' notice in writing to the State Rapid Response Dislocated Worker Unit and to the appropriate unit of local government in cases of plant closure or mass layoffs that meet the statutory definitions. *See* 29 U.S.C. § 2102(a).

countries surveyed require any administrative or judicial body to approve a company's layoffs.¹³⁶ For all these provisions, China's LCL follows the average among European countries.

The LCL also mandates that certain groups of employees receive priority protection.¹³⁷ One-third of the other countries we studied have similar provisions though they prioritize different groups of workers.¹³⁸ Additionally, Chinese law requires companies to give previous employees priority if they rehire within six months of a collective redundancy.¹³⁹ Around 40% of the countries that we studied have similar rules. These provisions push China slightly in the direction of more restrictive EPL.

ILO Convention	European Laws	U.S. Laws
Generally Follows < 0 >	Follows Average < 0 >	More Stringent + +

TABLE 1-E. *Comparing Chinese Law Concerning Collective Dismissal*

On balance, the Chinese regulation of collective redundancy roughly tracks the average European country. The OECD survey similarly places China in the middle of its ranking for this factor. In this case, we agree with the OECD's assessment.

6. Advance Notice

China's LCL requires that unless the discharged employee has committed misconduct, the employer must provide thirty days' advance written notice before termination or pay the employee an extra month's salary.¹⁴⁰ In the United States, there is no comparable requirement. In the European countries we studied, however, it appears for no-fault individual dismissals.¹⁴¹ About one-tenth of the European countries that we studied adopt a fixed period of notice; this period is either fifteen days or two months.¹⁴² Four-fifths of the countries base the notice period, which can range from one-and-a-half weeks to seven months, on the length of the employee's job tenure.¹⁴³

136. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 41; *see, e.g., EPLex: Spain*, INT'L LAB. ORG. (2020), <https://eplex.ilo.org/country-detail/?code=ESP&yr=2012> (under "Procedures for Collective Dismissal").

137. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 41.

138. *See, e.g., EPLex: Spain*, *supra* note 136.

139. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 41.

140. *Id.* art. 40.

141. OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 23, 25; *EPLex*, *supra* note 63.

142. These countries include the Czech Republic and Spain. OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 17; *EPLex: Spain*, *supra* note 136 (under "Procedures for Collective Dismissal").

143. These countries include Estonia, Finland, France, Germany, Hungary, Luxembourg, the Netherlands, Norway, Portugal, Sweden, Switzerland, Turkey, the United Kingdom, Greece,

Compared to other countries, China's protection for short-term employees is moderate, but for medium- and long-service employees it is much weaker. As in almost all the European countries, there is a requirement for advance written notice.¹⁴⁴ Additionally, like most European countries that we studied,¹⁴⁵ China allows payment to replace advance notice.¹⁴⁶ On balance, the LCL offers a slightly less stringent level of protection.

ILO Convention	European Laws	U.S. Laws
Generally Follows < 0 >	Slightly Less Stringent -	Much More Stringent ++

TABLE 1-F. *Comparing Chinese Law Concerning Advance Notice*

As we noted, the advance notice period in China is shorter than in most countries in our comparison, especially for medium- and long-service employees. China follows the path of most European countries regarding the written requirement and in allowing payments to replace advance notice. Overall, China's law is slightly less stringent. But the OECD survey somewhat overestimates the stringency of China's EPL because it ranks China at a medium level.

7. Severance Pay

Following the ILO Termination of Employment Convention¹⁴⁷ and the typical practice of European countries,¹⁴⁸ the LCL mandates severance pay when employers discharge workers for reasons other than misconduct.¹⁴⁹ Under the LCL, employers must make severance payments when they discharge workers due to lack of capacity; for economic, technological, or operational reasons;¹⁵⁰ and for collective redundancy.¹⁵¹ In China, workers who have been on the job for less than a year receive one month's wages.¹⁵² Workers employed for more than a year receive one month's wages for each year of service.¹⁵³ Thus, discharged workers receive one

Denmark, Austria, Slovakia, and Slovenia and distinguish between economic and noneconomic dismissal. *See, e.g.*, OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 29 (France).

144. OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61; *see also* EPLex, *supra* note 63 (under "Procedures for Individual Dismissal" for each country).

145. *See, e.g.*, OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 37 (Greece). The following countries do not allow such replacement: Austria, the Czech Republic, Denmark, Germany, Hungary, Norway, Portugal, Sweden, Switzerland, and the United Kingdom. *See, e.g., id.* at 34 (Germany).

146. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 40.

147. Termination of Employment Convention, *supra* note 50, art. 12.

148. *See, e.g.*, OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 8.

149. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 46.

150. *See id.* art. 46(3), (4).

151. *See id.* art. 46(4), (6).

152. *Id.* art. 47.

153. *Id.*

month's salary for one year of service and five months' salary for five years of service.

Like China, half the countries under comparison require that employees receive severance payments for both incompetency and redundancy dismissals.¹⁵⁴ Six countries only require severance payments in redundancy dismissals,¹⁵⁵ and five have no severance payment obligation.¹⁵⁶ Thus, the severance payment obligation in China is no broader than in the average European country in our study.

The size of the severance payment is based on job tenure in all the countries that have such a mandate.¹⁵⁷ The lowest amount in these countries ranges from 0.2 to two months' wages, at which point the worker reaches the minimum job tenure requirement.¹⁵⁸ The highest amount typically ranges from 1.5 to twelve months' salary, when workers have been working for twenty years or more. The OECD average is about 4.2 months (6.2 months if we exclude countries with no mandatory payments).¹⁵⁹ In comparison, China's protection for short-term workers is moderate. However, the severance pay in China can easily reach this average number as long as workers work for more than four years. Besides, the number of payments can reach twenty months' salary when an employee works for twenty years. Thus, the size of payments is smaller, especially for medium- and long-term employees, in the OECD countries under comparison than it is in China.

ILO Convention	European Laws	U.S. Laws
Generally Follows < 0 >	Much More Stringent ++	N/A

TABLE 1-G. *Comparing Chinese Law Concerning Severance Pay*

Chinese regulations prescribe an average level of severance pay obligations, and the amount of severance pay is moderate for short-term employees but larger than the average European country for medium-term and long-term employees. On balance, the Chinese law of severance pay

154. See, e.g., *EPLex: Spain*, *supra* note 136 (under "Redundancy and Severance Pay"). Note that Denmark only recognizes individual redundancy and only its white-collar workers enjoy severance payments. See OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 20.

155. These countries include the Czech Republic, Estonia, Slovakia, the United Kingdom, Germany, Portugal. See, e.g., *EPLex: Germany*, INT'L LAB. ORG. (2020), <https://eplex.ilo.org/country-detail/?code=DEU&yr=2012> (under "Redundancy and Severance Pay").

156. In the Netherlands, terminations must be in front of the court, and only the court may order severance payments. *EPLex: Netherlands*, INT'L LAB. ORG. (2020), <https://eplex.ilo.org/country-detail/?code=NLD&yr=2012> (under "Redundancy and Severance Pay"). Italy and the Netherlands provide certain types of payments under their social plans. See, e.g., *id.*; see also OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61; *EPLex*, *supra* note 63.

157. Two countries (the Czech Republic and Estonia) have fixed severance payments of one month's and three months' salary respectively. See OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 17, 23.

158. *Id.* at 29; see also *EPLex*, *supra* note 63.

159. OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 79.

offers a somewhat more stringent level of protection than the average European country, but it does not provide the highest level of protection among all countries under comparison. Thus, the OECD's assessment overestimates China's protection in terms of severance pay because it places China as the highest in its ranking for this factor.

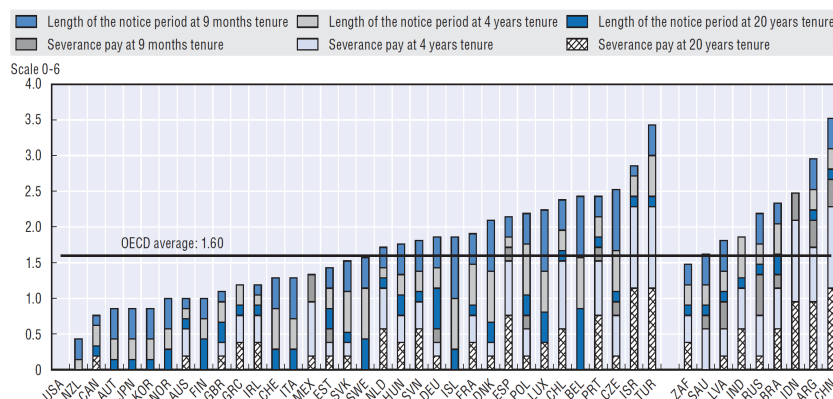


FIGURE 1. *Protection of Permanent Workers Against Individual Dismissal*¹⁶⁰

The figure above shows that the OECD report aggregates severance pay and advance notice as one indicator because these two mandates are typically quantifiable and calculated based on job tenure.¹⁶¹ In this chart, a higher score means that the rules are more restrictive. China's total score is the highest among all forty-three countries included. However, our analysis above shows that, compared with an average European country, Chinese law is slightly less restrictive in terms of advance notice and more stringent concerning severance pay. Thus, overall, China's law is only slightly more stringent. The OECD survey greatly overestimates the stringency of China's EPL by placing China in the highest position among all countries under investigation.

8. Remedies

The Chinese LCL and almost all the countries¹⁶² that we surveyed require reinstatement as a remedy for unfair dismissal unless the employee (or both parties) refuses or the continuation of the labor contract is impossible.¹⁶³ In fact, China and slightly more than half of countries regard reinstatement as the primary remedy, while fewer than half of countries impose restrictions on awarding this remedy. For example, in Belgium, only workers' representatives and members of the safety council can be

160. *Id.* at 78 fig.2.1 ("Notice and severance pay for no-fault individual dismissal.").

161. *See id.* at 78-79.

162. Excluding Denmark, Finland and Switzerland. Compare OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 18 (the Czech Republic), with *id.* at 96 (Switzerland).

163. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 48.

reinstated.¹⁶⁴ China's rule thus is moderate compared with other countries under investigation.

Under the LCL, if an employee does not bring a reinstatement claim or if reinstatement is impossible, the employer must pay compensation equal to twice the rate of severance pay.¹⁶⁵ Other countries also award compensation if reinstatement is not provided or is inapplicable, though the amount awarded varies.¹⁶⁶ More than half of the countries award compensation based on the circumstances of the case or the special conditions¹⁶⁷ of both parties.¹⁶⁸

Minimum compensation ranges from three weeks' to five months' wages with a maximum ranging from six to thirty months' wages. A couple of countries only award actual loss of earnings from the date of dismissal to the date of the court's ruling and limit the amount of compensation to six months' pay.¹⁶⁹ Several other countries award actual loss of earnings (or severance payments) plus compensation.¹⁷⁰ The minimum compensation ranges from two to six months' wages while the maximum reaches thirty-two months' wages.¹⁷¹

The OECD report finds that China's law regarding compensatory damages is the second most strict.¹⁷² The LCL requires twice the rate of severance pay as compensation, an approach that is similar to awarding severance payments plus compensation.¹⁷³ The minimum amount is one month's salary, which is at the lower end or, at most, in the middle of the typical range for short-term contract workers.¹⁷⁴ However, there is no limit on the maximum amount awarded, so compensation could reach ten months' salary with five years of service, twenty months' salary with ten years of service, or even forty months' salary with twenty years of service.¹⁷⁵ Thus, the amount of compensation for medium- and especially long-term workers is higher than that for workers in most other countries in our study.

164. *EPLex: Belgium*, INT'L LAB. ORG. (2020), <https://eplex.ilo.org/country-detail/?code=BEL&yr=2012> (located under "Redress").

165. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 87.

166. *See, e.g., EPLex: Belgium*, *supra* note 164 (located under "Redress").

167. For employees, the conditions include job tenure, family responsibilities, pregnancy, maternity leave, being a workers' representative, etc. *See, e.g., id.* (Belgium); OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61, at 96 (Switzerland). For employers, the condition usually includes the size of the firm. *See, e.g., OECD EMPLOYMENT PROTECTION LEGISLATION*, *supra* note 61 at 96 (Switzerland).

168. *Id.* (Switzerland).

169. *See, e.g., id.* at 6.

170. *See, e.g., id.* at 27.

171. *See OECD EMPLOYMENT OUTLOOK 2013*, *supra* note 29, at 82.

172. *Id.* at 83.

173. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 87.

174. For the statistical and comparative assertion, see OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 79 and Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 47.

175. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 87.

In summary, China's EPL regarding remedies is very likely to be more stringent than that of the average country in our sample, mainly because the compensation offered for medium- and long-term employees is higher than that in an average country in our sample. Nonetheless, the rule on reinstatement is moderate and the compensation for short-term employees is lower. In China, discharged workers can bring cases based on much more limited grounds—especially in terms of prohibited grounds for dismissal—than other countries.¹⁷⁶ This restricts workers' ability to file an unfair discharge claim and thus, makes the Chinese EPL less strict overall. Thus, ranking it as the second most strict country is inaccurate.

ILO Convention	European Laws	U.S. Laws
Generally Follows < 0 >	Much More Stringent ++	N/A

TABLE 1-H. *Comparing Chinese Law Concerning Remedies*

C. Overall Assessment of International Comparisons

In summary, we compared eight aspects of EPL between China and twenty-three OECD countries. We also contrasted our assessment of the stringency of Chinese law with the OECD rankings. We found that:

- Concerning the indicator of fair or unfair dismissals (in our study, this indicator includes justified grounds, prohibited grounds, and special protection for certain groups of workers), China's protection is less stringent than the average level of protection in European countries. However, due to the omission of prohibited grounds, the OECD survey inflates the relative stringency of China's LCL.
- In terms of indefinite-term labor contracts, the OECD index overstates the stringency of Chinese EPL by ranking China in an intermediate position.
- Regarding collective redundancy, we agree with the OECD's assessment of placing Chinese law in the middle of its ranking for this factor.
- The OECD survey estimates advance notice and severance pay together and puts Chinese law at the highest place in its ranking. However, our analysis shows that regarding advance notice, China's law is slightly less stringent than the average European country. Additionally, although the rules on severance pay in China are more stringent than in the average European country, they do not provide the highest level of protection among all countries under comparison.

176. See *supra* Section I.B.

- China's EPL regarding remedies is very likely more stringent than that of the average country in our sample. However, the OECD's decision to rank China as the second most strict country is overstated. As Table 1 below demonstrates, Chinese law exceeds the stringency of European law in only two categories. However, the LCL is less stringent in three categories and similar in three others.

On average, the legal framework of China's EPL follows the international standards of the ILO Termination of Employment Convention and its European counterparts. In its 2013 report, the OECD ranked China as the most protective country in terms of regular contracts.¹⁷⁷ But this ranking failed to include important provisions (i.e., prohibited grounds) and, by simplifying legal rules for each indicator, neglected important characteristics of the LCL. After comparing China's EPL with those of most European countries, we conclude that the overall stringency of Chinese LCL is roughly comparable to, and in some areas, even less stringent than the European countries in our study. Therefore, at least regarding EPL, scholars overstate their claim that China's LCL is more stringent than European countries' laws. A closer examination shows that Chinese EPL falls in the broad middle range of the countries we studied. We thus, reject the critics' stringency claim.

Category	ILO Convention	European Laws	U.S. Laws
Justified Grounds	< 0 >	< 0 >	++
Prohibited Grounds	< 0 >	--	--
Special Protection	N/A	< 0 >	++
Indefinite Term K	N/A	--	N/A
Collective Dismissal	< 0 >	< 0 >	++
Advance Notice	< 0 >	-	N/A
Severance Payments	< 0 >	++	N/A
Remedies	< 0 >	++	+

TABLE 1. *Summary of Chinese Law Comparison Concerning All Employment Protections*

177. OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 87.

II. THE CAUSAL CLAIM

Even assuming, contrary to the evidence we presented in Part I, that Chinese employment regulation is unusually stringent, advocates for reform would still need to demonstrate their claim that China's LCL has caused slower economic growth. Steven Cheung and several other economists have claimed that the LCL increases labor costs, deters investment, causes unemployment to rise, decreases labor productivity, and threatens the booming economy.¹⁷⁸ Contrary to these assertions, however, a careful reading of the available theoretical and empirical literature reveals no persuasive evidence that EPL harms labor markets or impedes economic growth.¹⁷⁹ Specific studies of China's LCL likewise have produced inconclusive results and have failed to show a causal link between Chinese labor regulation and any negative outcomes.¹⁸⁰ Even focusing narrowly on how the LCL affected firing costs relative to the prior status quo, we found provisions that both increase and decrease those costs. Finally, almost none of the dire economic consequences that Cheung foretold have come to pass.

A. Theoretical Ambiguity

Scholars have long used economic theory to predict how EPL will affect employment levels, labor productivity, innovation, and wages.¹⁸¹ The resulting literature has explored two competing influences on each of the above factors and thus, offers only ambiguous evidence of EPL's economic impact.

From a theoretical perspective, more stringent EPL is likely to produce two competing effects on the employment level within a jurisdiction.¹⁸² Obviously, stricter EPL makes it harder to terminate workers and imposes an additional cost on employers. However, anticipating these additional firing costs and facing uncertainty about applicants' abilities and other qualities, employers may become less willing to hire more workers. Thus, the net effect on employment levels is uncertain. If the EPL mandate increases employers' total labor costs, then conventional economic theory predicts reduced employment in the long run.¹⁸³ But the employment level at any moment in the business cycle depends on which of the two effects—the reduced flow into or out of employment—dominates in practice.

178. Steven Cheung, *supra* note 6.

179. *See infra* note 201.

180. *See infra* note 200.

181. *See* SKEDINGER, *supra* note 120, at 57–65; *Discharge*, Verkerke, *supra* note 33, at 448, 455–58.

182. SKEDINGER, *supra* note 120, at 58; *Discharge*, Verkerke, *supra* note 33, at 457.

183. Daniel S. Hamermesh, *Employment Protection: Theoretical Implications and some U.S. Evidence*, in *EMPLOYMENT SECURITY AND LABOR MARKET BEHAVIOR* 126, 126–47 (Christoph F. Buechtman ed., 1993).

Other scholars observe that the impact of greater employment protections on overall employment also depends on the phase of the business cycle.¹⁸⁴ During an economic expansion, employment levels tend to increase more slowly because companies that anticipate higher firing costs will hire fewer employees.¹⁸⁵ During an economic downturn, however, stronger EPL makes companies less likely to fire employees, thus, preserving jobs and raising employment. Moreover, with few employers hiring, the law has a weaker deterrent effect on new hiring.¹⁸⁶ Thus, employment levels should be higher compared to the unregulated situation.

Similarly, theoretical EPL models produce contradictory predictions concerning labor productivity. On one hand, a more stringent EPL might improve labor productivity. It could motivate workers to invest in firm-specific skills because they feel more secure in their jobs.¹⁸⁷ This increased accumulation of human capital would enhance labor productivity. On the other hand, with a lower risk of being fired, workers might put less effort into their jobs.¹⁸⁸ Therefore, the impact of EPL on labor productivity is also theoretically indeterminate.

When it comes to innovation, theoretical analysis fares no better. To avoid paying higher firing costs, employers might be willing to make investments to increase productivity and thus, increase the pace of innovation.¹⁸⁹ Additionally, productivity might increase. This is because employees might feel more secure in their jobs and thus, are more willing to attain firm-specific skills.¹⁹⁰ The increased human capital accumulation enhances productivity.¹⁹¹ However, when facing the risk of increased firing costs, employers might be more careful experimenting with new technologies to avoid additional uncertainty.¹⁹² Also, employees might feel less inclined to put extra effort into their work due to a lower risk of being fired.

In terms of wage levels, on one hand, employers can reduce wages to offset higher firing costs.¹⁹³ In this case, total labor costs might not increase with employment protection and thus, employment would not be affected. On the other hand, employers might feel compelled to increase wages because of the improved bargaining power that EPL offers

184. *Id.* at 128.

185. SKEDINGER, *supra* note 120, at 58–59.

186. *Id.*

187. Michèle Belot, Jan Boone, & Jan van Ours, *Welfare-Improving Employment Protection*, 74 *ECONOMICA* 381, 395 (2007).

188. SKEDINGER, *supra* note 120, at 62.

189. Winfried Koeniger, *Dismissal Costs and Innovation*, 88 *ECON. LETTERS* 79, 79–82 (2005).

190. Giuseppe Bertola, Tito Boeri, & Sandrine Cazes, *Employment Protection in Industrialized Countries: The Case for New Indicators*, 139 *INT'L LAB. REV.* 57, 60 (2000).

191. SKEDINGER, *supra* note 120, at 62.

192. *Id.*

193. Edward P. Lazear, *Job Security Provisions and Employment*, 105 *Q. J. ECON.* 699, 700, 704 (1990).

employees relative to employers.¹⁹⁴ Employment protection can help create so-called insiders, who have a protected position relative to employees who only hold temporary jobs or workers who are outside of the firm.¹⁹⁵ EPL can improve the position of these insiders and therefore, increase their bargaining power.¹⁹⁶ As a result, these employees can negotiate higher wages.¹⁹⁷

Taken together, the only certainty about the influence of employment protection is that over the business cycle, labor turnover decreases because the flow of workers in and out of firms is smaller.¹⁹⁸

B. Empirical Evidence of EPL's Economic Impact

As demonstrated, theoretical arguments produce ambiguous predictions about how EPL affects economic outcomes. Empirical studies have generated similarly equivocal evidence. A number of studies observe a decrease in employment rates¹⁹⁹ while other studies indicate no effect at all,²⁰⁰ and still others find increased employment.²⁰¹ In fact, a recent meta-analysis study systematically reviewed fifty-three empirical papers published between 1990 and 2019.²⁰² According to its calculation, 51% of papers report that EPL positively affects employment levels, while only

194. Assar Lindbeck & Dennis J. Snower, *Insiders Versus Outsiders*, 15 J. ECON. PERSPS. 165, 165–69 (2001).

195. *Id.* at 165–66.

196. *Id.* at 165.

197. *Id.*

198. *Discharge*, Verkerke, *supra* note 33, at 458.

199. Stefano Scarpetta, *Assessing the Role of Labour Market Policies and Institutional Settings on Unemployment: A Cross-Country Study*, 26 OECD ECON. STUD. 43, 52, 58–59, 60–61, 63–64 (1996); Olivier Blanchard & Justin Wolfers, *The Role of Shocks and Institutions in the Rise of European Unemployment: The Aggregate Evidence*, 462 ECON. J. 1, 12–18, 20 (2000); Juan C. Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, *The Regulation of Labor*, 119 Q. J. ECON. 1339, 1339, 1358, 1376–77 (2004); Tito Boeri & Juan F. Jimeno, *The Effects of Employment Protection: Learning from Variable Enforcement*, 49 EUR. ECON. REV. 2057, 2057–60, 2071 (2005); James J. Heckman & Carmen Pagés, *The Cost of Job Security Regulation: Evidence from Latin American Labor Markets* 1, 2, 14, 17, 20, 35, 38 (Nat'l Bureau of Econ. Rsch., Working Paper No. 7773, 2000); Stephen Nickell & Richard Layard, *Labor Market Institutions and Economic Performance*, 3 HANDBOOK LAB. ECON. 3029, 3053, 3062–63 (1999).

200. Giuseppe Bertola, *Job Security, Employment and Wages*, 34 EUR. ECON. REV. 851, 851, 863, 865 (1990); Lucio Baccaro & Diego Rei, *Institutional Determinants of Unemployment in OECD Countries: Does the Deregulatory View Hold Water?*, 61 INT'L ORG. 527, 527–28, 532 (2007); Rachel Griffith, Rupert Harrison, & Gareth Macartney, *Product Market Reforms, Labour Market Institutions and Unemployment*, 117 ECON. J. 151, 153–54, 157–58 (2007); Zoe Adams, Louise Bishop, Simon Deakin, Colin Fenwick, Sara Martinsson Garzelli, & Giudy Rusconi, *The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990–2013*, 61 INT'L LAB. REV. 1, 4, 16–17, 20 (2018). See generally SANDRINE CAZES & ALENA NEŠPOROVÁ, *FLEXICURITY: A RELEVANT APPROACH IN CENTRAL AND EASTERN EUROPE* (2007).

201. Bruno Amable, Lilas Demmou, & Donatella Gatti, *Employment Performance and Institutions: New Answers to an Old Question*, IZA Discussion Paper No. 2731 (Apr. 2007), <https://ssrn.com/abstract=982131>; Pietro Garibaldi & Giovanni L. Violante, *The Employment Effects of Severance Payments with Wage Rigidities*, 115 ECON. J. 799, 814 (2005) (noting that job security provisions can reduce unemployment); Michele Belot & Jan C. van Ours, *Does the Recent Success of some OECD Countries in Lowering their Unemployment Rates Lie in the Clever Design of Their Labor Market Reforms?*, 56 OXF. ECON. PAPERS 621, 622 (2004).

202. Brancaccio et al., *supra* note 37, at 3–4.

28% support the claim that EPL negatively affects employment.²⁰³ The remaining 21% of studies show inconclusive results.²⁰⁴ Thus, there is no academic consensus on the relationship between EPL and labor market outcomes.²⁰⁵

OECD economists have also modified their conclusions on this issue over time. Early studies by Stefano Scarpetta,²⁰⁶ Jørgen Elmeskov, and John P. Martin²⁰⁷ found that stricter employment protection contributed to a higher unemployment rate. However, since 1999, the OECD has changed its position and stated that EPL has no correlation with the level of unemployment and has no strong connection with employment.²⁰⁸ In its most recent report, the OECD claims that a number of the studies show that EPL does not significantly affect aggregate employment and unemployment.²⁰⁹ The OECD's modification of its position suggests that EPL's employment effect might be small or insignificant and one should be careful before blaming EPL for unemployment.

In terms of labor productivity, cross-country studies have produced conflicting results. For example, Simon Deakin and Prabirjit Sarkar found positive correlations between regulation and labor productivity in France and Germany but no such relationship in the United Kingdom.²¹⁰ Andrea Bassanini, Luca Nunziata, and Danielle Venn studied OECD countries, and the results of empirical studies revealed that, in industries in which the layoff restrictions are usually more binding, mandatory dismissal regulations negatively impacted productivity.²¹¹ This effect was based on permanent employment.²¹² In comparison, they discovered that temporary contract regulations did not affect productivity.²¹³ Scarpetta, Philip Hemmings, Thierry Tressel, and Jaejoon Woo found that more stringent EPL significantly reduces productivity, "especially when these costs are not offset by lower wages and/or more internal training."²¹⁴

One study used the Labour Regulation Index (LRI) from the Center for Business Research to understand the impact of EPL changes on

203. *Id.* at 5.

204. *Id.*

205. *Id.*

206. Scarpetta, *supra* note 199, at 45.

207. Jørgen Elmeskov, John P. Martin, & Stefano Scarpetta, *Key Lessons for Labour Market Reforms: Evidence from OECD Countries' Experience*, 5 SWED. ECON. POL'Y REV. 205, 217 (1998).

208. OECD, OECD EMPLOYMENT OUTLOOK 1999 79 (1999).

209. OECD, OECD EMPLOYMENT OUTLOOK 2021: NAVIGATING THE COVID-19 CRISIS AND RECOVERY 109–10 (2021).

210. Simon Deakin & Prabirjit Sarkar, *Assessing the Long-run Economic Impact of Labour Law Systems: A Theoretical Reappraisal and Analysis of New Time Series Data*, 39 INDUS. REL. J. 453, 453 (2008).

211. Andrea Bassanini, Luca Nunziata, & Danielle Venn, *Job Protection Legislation and Productivity Growth in OECD Countries*, 24 ECON. POL'Y 349, 392 (2009).

212. *See id.*

213. *Id.* at 393.

214. Stefano Scarpetta, Philip Hemmings, Thierry Tressel, & Jaejoon Woo, *The Role of Policy and Institutions for Productivity and Firm Dynamics: Evidence from Micro and Industry Data 2* (OECD Econ. Dep't. Working Papers, Paper No. 329, 2002).

patenting activity in France, Germany, the United Kingdom, and the United States.²¹⁵ The results of a difference-in-differences analysis indicated that greater employment protection was positively associated with innovative employee input into new products and manufacturing processes.²¹⁶ In studies using the OECD index, Winfried Koeniger found that EPL could promote productivity through enhancing investments by incumbent firms in order to avoid downsizing.²¹⁷ However, the net effect on innovation and productivity growth is unclear because more stringent EPL may also deter entry of innovative firms.²¹⁸

Smarzynska Javorcik and Mariana Spatareanu discovered that stronger EPL reduced the flow of foreign direct investment (FDI) into the host country.²¹⁹ In contrast, another study found no evidence to suggest that EPL had any relationship with FDI, even though investments tended to go to countries that have low labor costs.²²⁰

Very few studies have examined the effects of EPL on economic growth. Among those that did, one identified an inverse U-shape relationship between the strictness of a country's EPL and its economic growth.²²¹ If a country had a low level of EPL protection, then an increase in that protection led to increased GDP per capita, while a high level of protection indicated reduced economic growth.²²² However, other studies found no such relationship. For example, one study found a negative effect on growth in countries with a coordinated wage bargaining system.²²³

Despite a large body of empirical work on this issue, empirical evidence offers only equivocal conclusions about how EPL affects employment levels, labor productivity, innovation, the flow of foreign direct investment, and economic growth. In other words, empirical evidence cannot prove that more stringent EPL tends to negatively affect the labor market.

215. Viral V. Acharya, Ramin P. Baghai, & Krishnamurthy V. Subramanian, *Labor Laws and Innovation*, 56 J. L. & ECON. 997, 999 (2013).

216. *See id.* at 1000.

217. Koeniger, *supra* note 189, at 79.

218. *Id.*

219. *See* Beata Smarzynska Javorcik & Mariana Spatareanu, *Do Foreign Investors Care about Labor Market Regulations?*, 141 REV. WORLD ECON. 375, 380–88 (2005).

220. Markus Leibrecht & Johann Scharler, *How Important is Employment Protection Legislation for Foreign Direct Investment Flows in Central and Eastern European Countries?*, 17 ECON. TRANSITION 275, 293 (2009).

221. Belot et al., *supra* note 187, at 382.

222. *Id.* at 394.

223. *See* Gayle Allard & Peter H. Lindert, *Euro-Productivity and Euro-Jobs Since the 1960s: Which Institutions Really Mattered?* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 12460, 2006). The coordinated wage bargaining system is that the determination of wage settlements is actively coordinated across the economy by trade unions and employer organizations. For background on collective bargaining and arrangements in OECD and EU countries, see generally OECD, *How do Collective Bargaining Systems and Workers' Voice Arrangements Compare Across OECD and EU Countries?*, OECD.ORG, <https://www.oecd.org/employment/ictwss-database.htm> (last visited Mar. 31, 2022).

C. Does the LCL Increase Firing Costs?

Since the Chinese legislature enacted the LCL, employers have complained about increased labor costs—especially firing costs—and strongly advocated for its repeal.²²⁴ Many scholars have agreed that the law increases employer costs.²²⁵ Based on our comparison of the LCL and earlier labor laws, Part I showed that the provisions of the law are not as stringent as many critics have supposed. Table 2 below illustrates how the LCL most likely affected firing costs as compared to earlier labor laws and regulations.

Category	Increases Costs	Reduces Costs
Grounds for Firing ²²⁶	Adds two prohibited grounds for discharge	Adds two permitted grounds for discharge
Indefinite-Term Contracts ²²⁷	Imposes mandatory indefinite-term contracts when certain requirements are met	N/A
Collective Dismissal ²²⁸	Requires that certain employees receive priority protection because of collective redundancy	Provides no protection unless the employer fires more than twenty employees or more than 10% of workforce
		Adds two instances in which employers can make collective redundancy dismissals

224. *Souhu Wang News*, *supra* note 113.

225. Chunyun Li, *Laodong Hetong Fa dui Qiye Jiegu Chengben de Yingxiang Fenxi* [“Labor Contract Law” on Enterprises Analysis of the Impact of Dismissal Costs], 10 *DANGDAI JINGJI* [CONTEMP. ECON.] 40–42 (2008).

226. These two added situations include: “(1) the employee is engaging in operations exposing him to occupational disease hazards and either has not undergone an occupational health check-up before he leaves his position, or is suspected of having an occupational disease and has been diagnosed or under medical observation; (2) the employee has been working for the employer continuously for not less than 15 years and is less than five years away from his legal retirement age” Nat’l People’s Cong., Labor Contract Law, *supra* note 60, art. 42 (translation done by authors).

227. *Id.* art. 14. For a detailed explanation, see *infra* Part II

228. The priority protection is given to the following groups of employees: those who have concluded long fixed-term labor contracts; those employed under indefinite term labor contracts; and those whose family has no other employee and has elderly or minor individuals to support. *See* Nat’l People’s Cong., Labor Contract Law, *supra* note 60, art. 41. The previous Labor Law contained no limitation on collective dismissal and omitted two additional permitted grounds for collective dismissal. *See id.*

Category	Increases Costs	Reduces Costs
Severance Payments ²²⁹	Adds instances in which employers must make severance payments	Reduces the size of payments for workers who have worked for less than six months
	Deletes capping severance payments to mutual agreement or for employees' lack of capacity	Caps severance payments at three times average local wages based on twelve years of employment
Remedies ²³⁰	Requires reinstatement as primary remedy and mandates compensation regardless of damage to the employee	N/A
Advance Notice ²³¹	N/A	Allows employer to pay wages in lieu of notice
Medical Compensation ²³²	N/A	Eliminates medical compensation for employees who are injured or ill for nonwork reasons

TABLE 2. *How the LCL Affects Firing Costs*

The LCL also imposed the following additional labor costs: (1) penalties against employers who do not sign written labor contracts with their employees;²³³ (2) penalties against employers who do not sign indefinite-term contracts with their employees when certain requirements are met;²³⁴ and (3) penalties against employers who fail to meet the local labor administrative department's requirements on time, including paying wages, making overtime payments, and meeting minimum wage standards.²³⁵ However, the LCL formally introduced and regulated the use of

229. See Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 36, 46 (new severance requirements); *id.* art. 47 (limits on size of payments); Weifan he Jiechu Laodong Hetong de Jingji Buchang Banfa (违反和解除劳动合同的经济补偿办法) [Measures for Economic Compensation for Violating and Terminating Labor Contracts] (promulgated by the Dept. of Lab., effective May 1, 1995), art. 5 (1994) [hereinafter Measures for Economic Compensation] (provisions concerning caps on severance payments).

230. Labour Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1994, effective January 1, 1995), art. 98, P.R.C. LAWS (China).

231. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 40.

232. Measures for Economic Compensation, *supra* note 229, art. 6.

233. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 82.

234. *Id.*

235. *Id.* art. 85.

labor dispatch and part-time employment, which gave employers an option that would counterbalance the new requirements and reduce labor costs.²³⁶

Most scholars have concluded that the LCL substantially increased labor costs, including firing costs.²³⁷ Table 2 shows, however, that compared to the 1994 Labor Law and earlier labor regulations, firing cost reductions could easily offset higher costs produced by other provisions. Moreover, the protective provisions of the LCL likely increase workers' sense of job security and thus, increase effective compensation without increasing wage costs.²³⁸ Critics have uniformly ignored these offsetting benefits in their analyses of the law's effects.²³⁹ Therefore, based on the law, it is uncertain whether the net labor costs are increased or not, and we need to turn to empirical evidence to seek an answer.

Although there is no official data on the status of labor costs, many institutions and scholars have conducted studies that seem to confirm the increase of labor costs in the past decade. For example, Geran Tian and Weixing Wu studied the impact of the LCL on both labor-intensive and non-labor-intensive publicly listed firms and found that the LCL led to the increase of accrued payroll, especially in labor-intensive firms.²⁴⁰ Further, the China Institute for Income Distribution (CIID) carefully studied the increased costs of ten manufacturing enterprises from 2006 to 2016.²⁴¹ They found that the enterprises' total costs grew nearly threefold and labor costs rose even faster—40% higher than the total costs during this period.²⁴²

What caused these increased labor costs? Do they result from more stringent labor laws or is there some other cause? CIID found that wages and social security premiums, which are irrelevant to the LCL, accounted for a large proportion of the labor costs and that they too rose quickly during this period.²⁴³

Wages were increasing due to the rising minimum wage and the rising average annual wages.²⁴⁴ In each of the twelve years from 2008 to 2019, the annual increase rate of average wages for workers in urban non-

236. See *id.* arts. 57–72.

237. *Laodong Hetongfa De Jingji Houguo* [The Economic Consequences of Labor Contract Law], JINGJI JINRONG WANG [EFNCHINA.COM], <http://news.efnchina.com/show-123-68115-1.html> (last visited Mar. 31, 2022).

238. Lin, *supra* note 13, at 21.

239. See, e.g., Steven Cheung, *supra* note 6, at 15; Dong, *supra* note 31.

240. Geran Tian & Weixing Wu, *Employment Protection, Production Flexibility and Corporate Capital Spending*, AUST. ECON. PAP., Apr. 2021, at 1, 2.

241. Li Shi, *Dui Woguo Laodongli Chengben De Jiben Panduan* [The Basic Judgments of Our Country's Labor Costs], ZHONGGUO GAIGE LUNTAN WANG [CHINA REFORM NET] (last visited Apr. 14, 2022).

242. *Id.*

243. See *id.*

244. INT'L LAB. ORG., *Wages, Productivity and Labour Share in China*, at 1, 3 (Apr. 2016).

private firms was over 8%.²⁴⁵ Because local governments were required to adjust minimum wages at least once every two years,²⁴⁶ the vast majority of provincial-level divisions²⁴⁷ increased their minimum wage annually by more than 10% from 2008 to 2018 (except in 2009).²⁴⁸

The LCL does not directly regulate minimum wage.²⁴⁹ Actually, one study has shown that in the five years before the LCL took effect, the growth rate of average annual wages was 106%, but from 2008 to 2014, that rate of increase dropped to 78%.²⁵⁰ Wage increase is more likely to be driven by the market forces of labor supply and demand.²⁵¹ Labor shortages appeared in some areas as early as 2004, and the supply has been relatively insufficient in the past decade.²⁵² In 2012, the labor force population (age fifteen to fifty-nine) declined for the first time in China's modern history, and it has continued to decline since then.²⁵³ According to the

245. See NAT'L BUREAU OF STATS. OF THE MINISTRY OF HUM. RES. & SOC. SEC., 2008 STATISTICAL BULLETIN OF HUMAN RESOURCES AND SOCIAL SECURITY DEVELOPMENT (2009) (discussing average annual salary growth of 17.2%); NAT'L BUREAU OF STATS. OF THE MINISTRY OF HUM. RES. & SOC. SEC., 2010 STATISTICAL BULLETIN OF HUMAN RESOURCES AND SOCIAL SECURITY DEVELOPMENT (2011) (discussing average annual salary growth of 13.5%); NAT'L BUREAU OF STATS. OF THE MINISTRY OF HUM. RES. & SOC. SEC., 2011 STATISTICAL BULLETIN OF HUMAN RESOURCES AND SOCIAL SECURITY DEVELOPMENT (2012) (discussing average annual salary growths of 14.3%); NAT'L BUREAU OF STATS. OF THE MINISTRY OF HUM. RES. & SOC. SEC., 2012 STATISTICAL BULLETIN OF HUMAN RESOURCES AND SOCIAL SECURITY DEVELOPMENT (2013) (discussing average annual salary growth of 11.9%); NAT'L BUREAU OF STATS. OF THE MINISTRY OF HUM. RES. & SOC. SEC., 2013 STATISTICAL BULLETIN OF HUMAN RESOURCES AND SOCIAL SECURITY DEVELOPMENT (2014) (discussing average annual salary growth of 10.1%); NAT'L BUREAU OF STATS. OF THE MINISTRY OF HUM. RES. & SOC. SEC., 2014 STATISTICAL BULLETIN OF HUMAN RESOURCES AND SOCIAL SECURITY DEVELOPMENT (2015) (discussing average annual salary growth of 9.4%); NAT'L BUREAU OF STATS. OF THE MINISTRY OF HUM. RES. & SOC. SEC., 2015 STATISTICAL BULLETIN OF HUMAN RESOURCES AND SOCIAL SECURITY DEVELOPMENT (2016) (discussing average annual salary growth of 10.1%); NAT'L BUREAU OF STATS. OF THE MINISTRY OF HUM. RES. & SOC. SEC., 2016 STATISTICAL BULLETIN OF HUMAN RESOURCES AND SOCIAL SECURITY DEVELOPMENT (2017) (discussing average annual salary growth of 8.9%); NAT'L BUREAU OF STATS. OF THE MINISTRY OF HUM. RES. & SOC. SEC., 2017 STATISTICAL BULLETIN OF HUMAN RESOURCES AND SOCIAL SECURITY DEVELOPMENT (2018) (discussing average annual salary growth of 10%).

246. Zuidi Gongzi Guiding (最低工资规定) [Provisions on Minimum Wages] (promulgated by the Dept. of Lab., Jan. 1, 2004, effective Mar. 1, 2004), art. 10.

247. The provincial-level divisions include twenty-three provinces, five autonomous regions, four direct-controlled municipalities (Beijing, Tianjin, Shanghai, and Chongqing), and the special administrative regions of Hong Kong and Macau. Phillip Thorne, *Geo Note: China-Subnational Structure*, MOODY'S ANALYTICS, <https://www.economy.com/support/blog/buffet.aspx?did=4F6CA2FD-432B-4B9A-A615-7D414EBF4CDB> (last visited Mar. 31, 2022). But the two special administrative regions are not subject to the provisions and therefore, this data does not include these two regions. See Provisions on Minimum Wages, *supra* note 246, art. 2.

248. The rate is calculated by the authors based on the minimum wages published by local governments (on file with authors).

249. See generally Nat'l People's Cong., Labor Contract Law, *supra* note 60.

250. Chenggang Zhang & Jinyu Wu, *Laodong Hetong Fa Shishi dui Shichang Yingxiang de Shizheng Guancha* [The Impact of the Labor Contract Law on the Market: an Empirical Investigation], 159 XUEHAI [ACADEMIA BIMESTRIE] 160, 161 (2016).

251. *Id.*; Xie Zengyi, *Yonggong Chengben Shijiao xia de Laodong Hetong Fa Xiugai* [The Amendment of Labor Contract Law: From the Perspective of Labor Costs], 68 FALV KEXUE [L. SCI.] 66 (2017).

252. See LAB. & SOC. SEC. DEP'T, SURVEY REPORT REGARDING LABOR SHORTAGE (Sept. 8, 2004).

253. See NAT'L BUREAU OF STATS. OF CHINA, STATISTICAL COMMUNIQUÉ OF THE PEOPLE'S REPUBLIC OF CHINA ON THE 2012 NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT (2013); NAT'L

official data, the size of China's workforce declined from 937 million in 2012 to 897 million in 2018.²⁵⁴

Another large proportion of labor cost is the social insurance premium²⁵⁵ and the housing fund. According to CIID's study, these costs were the main cause for the increase in labor expenditures.²⁵⁶ In the ten manufacturing firms that the study examined, the housing fund increased eight times and the social insurance premium increased five times, while wages increased three times from 2005 to 2015.²⁵⁷

The LCL does not regulate the social insurance premium.²⁵⁸ But the law helps increase employers' participation rate in the social insurance program by requiring employers to sign labor contracts with workers.²⁵⁹ In the past, some employers refused to sign labor contracts with their workers, thus avoiding the obligation to pay the employees' social insurance premiums.²⁶⁰ According to the 2001 China Urban Labor Survey, 12% of migrant workers signed labor contracts while 65% of local workers were employed by contract.²⁶¹ By 2010, 34% of migrant workers and 71% of local workers had written contracts.²⁶² In 2010, local workers' pension insurance coverage had increased to 88.5%, up from 77.5% in 2005.²⁶³

To summarize, most scholars—even those who oppose the labor flexibility approach—agree that the LCL likely increased labor costs, especially firing costs. However, our statutory analysis shows that, while certain provisions probably increased firing costs, other provisions may have reduced those costs. The best available evidence confirms that Chinese labor costs have risen since the passage of the LCL.²⁶⁴ Nonetheless, the LCL caused only a small proportion of those increased costs, and most

BUREAU OF STATS. OF CHINA, STATISTICAL COMMUNIQUÉ OF THE PEOPLE'S REPUBLIC OF CHINA ON THE 2018 NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT (2019). According to the annual report, in 2012, the working population (from age fifteen to fifty-nine) was over 937 million and in 2018 the number was 897 million. STATISTICAL COMMUNIQUÉ OF THE PEOPLE'S REPUBLIC OF CHINA ON THE 2012 NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT, *supra*; STATISTICAL COMMUNIQUÉ OF THE PEOPLE'S REPUBLIC OF CHINA ON THE 2018 NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT, *supra*. China's retirement age is sixty for males and fifty-five for females. Vivian Wang & Joy Dong, *A Graying China May Have to Put Off Retirement. Workers Aren't Happy*, N.Y. TIMES (May 31, 2021), <https://www.nytimes.com/2021/04/27/world/asia/china-retirement-aging.html>.

254. STATISTICAL COMMUNIQUÉ OF THE PEOPLE'S REPUBLIC OF CHINA ON THE 2012 NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT, *supra* note 252; STATISTICAL COMMUNIQUÉ OF THE PEOPLE'S REPUBLIC OF CHINA ON THE 2018 NATIONAL ECONOMIC AND SOCIAL DEVELOPMENT, *supra* note 252.

255. In China, social insurance includes pension, medical insurance, workers' compensation, unemployment, and maternity insurance. Adam Livermore, *Mandatory Social Welfare Benefits for Chinese Employees*, CHINA BRIEFING (Feb. 21, 2012), <https://www.china-briefing.com/news/mandatory-social-welfare-benefits-for-chinese-employees/>.

256. Li, *supra* note 240.

257. *Id.*

258. See generally Nat'l People's Cong., Labor Contract Law, *supra* note 60.

259. Zengyi, *supra* note 251.

260. *Id.*

261. Gallagher et al., *supra* note 4, at 27.

262. *Id.*

263. *Id.*

264. See *supra* notes 224, 232, 239–240 and accompanying text.

cost increases appear to have come from minimum wage increases, social insurance premiums, and contributions to the housing fund.²⁶⁵ Furthermore, labor costs are not the most important part of employers' total outlay. The CIID found that financing costs, land costs, transportation costs, environmental costs, and taxes have all been rising, and between 2005 and 2015, some of them did so much faster than labor costs.²⁶⁶ In other words, employers' total increased costs mostly come from other areas besides labor law. Therefore, the LCL and even labor law more generally should not be viewed as the primary reasons for the increase in labor and total costs. Likewise, blaming the LCL for greatly increasing employers' cost of operations is misleading.

D. Specific Evidence for China's LCL

As described above, cross-country empirical studies have produced ambiguous conclusions as to how EPL affects labor market outcomes. To better understand how China's LCL has affected economic growth, in this Section we turn to empirical studies that involved China or specifically investigated how EPL has affected China's economic growth. We will see that scholars have found positive, negative, and mixed effects. Therefore, the available country-specific empirical evidence also presents an incomplete and ambiguous story and fails to confirm that China's EPL has negatively affected China's economic development.

A few cross-country empirical studies include evidence from China.²⁶⁷ In one of the most influential papers, Juan C. Botero, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer conducted a study covering eighty-five countries and found that stronger regulation of employment protection, collective bargaining, and social security are "associated with lower labor force participation and higher unemployment [rates], especially of the young."²⁶⁸ However, this study has been harshly criticized by later authors and thus, its conclusion is questionable.²⁶⁹ Most importantly, a more recent study examining EPL of 117 countries over a much longer time period (from 1990 to 2013) with more refined coding methods reached the opposite conclusion.²⁷⁰ According to this study, more stringent EPL is positively correlated with employment levels, labor-force participation, and labor share.²⁷¹ The study's authors acknowledge that "these associations are relatively small when set against wider economic trends."²⁷² But their findings tend to refute the

265. See *supra* notes 248–255 and accompanying text.

266. Li, *supra* note 240.

267. Botero et al., *supra* note 199, at 1362; Adams et al., *supra* note 200, at 6, 8, 15.

268. Botero et al., *supra* note 199, at 1339.

269. See discussion *supra* Section II.B.

270. Adams et al., *supra* note 200, at 21–22.

271. *Id.*

272. *Id.* at 23.

conclusions of Botero et al. concerning labor force participation and unemployment.

There are a few studies that specifically examine the relationship between China's EPL and various economic factors. Some studies suggest that stricter EPL produces positive effects. For example, one paper investigated publicly listed firms from 2005 to 2013 using a difference-in-differences approach.²⁷³ The study observed that the effectiveness of the LCL had a positive relationship with investment in innovation, and this relationship was more significant in labor-intensive firms.²⁷⁴

More studies found mixed effects of the LCL. For instance, Ruijun Sun confirmed the theoretical prediction that the increased stringency of employment protections in the LCL decreases the adjustment speed of labor.²⁷⁵ She further concluded that the LCL makes the labor relationship of incumbent workers more stable but also makes it more difficult for unemployed workers and new entrants to find jobs.²⁷⁶ However, Sun's study did not examine the impact of these restrictions on the overall employment level.

In another study, Huang Ping examined the way that increased firing costs affect the growth rate of employment in firms from two different types of enterprises: labor-intensive and knowledge-intensive.²⁷⁷ Looking at 790 listed companies, Ping showed that the LCL was positively correlated to employment in knowledge-intensive firms but negatively correlated to those in the labor-intensive firms.²⁷⁸ The explanation is that workers in the knowledge-intensive firms are willing to invest more effort to acquire firm-specific skills because they feel more secure in their jobs.²⁷⁹ In contrast, workers in labor-intensive firms tend to put less effort into their work after firing costs increase.²⁸⁰ Overall, the net effect on labor productivity is unclear.²⁸¹

Ping Yan used firm-level data to investigate the impacts of the LCL and found that private firms, compared with public firms, were negatively affected in terms of firm-level year-to-year employment changes.²⁸² Her study also showed that the LCL had minimal effects on employment and

273. Xiaoran Ni & Yujie Zhu, *Laodong Baohu Laodong Mijidu yu Qiye Chuangxin* [Employment Protection, Labor Intensity and Enterprise Innovation: Evidence About the Implementation of the 2008 Labor Contract Law], 7 GUANGLI SHIJI [MGMT. WORLD] 154 (2016).

274. *Id.*

275. Ruijun Sun, *Dynamic Labor Demand and the Impact of Employment Protection Regulations: A Study Based on Dynamic Panel Data*, NANKAI ECON. STUD. 66, 76 (2010).

276. *Id.* at 77.

277. Huang Ping, *Dismissal Costs, Employment and Industry Transformation and Upgrading: Labor Contract Law and Evidence from Chinese Listed Companies*, 165 NANKAI ECON. STUD. 79, 80 (2010).

278. *Id.* at 91–92.

279. *Id.* at 83.

280. *Id.*

281. *See id.* at 81.

282. Ping Yan, *What Did China's Labor Contract Law Do to Its Private Manufacturing Firms?*, 8 CHINA ECON. J. 158, 164–65. (2015).

wages in firms with high wages, while in firms with low wages, employment fell and wages rose.²⁸³ Further, Yan concluded that more job turnover was found in “firms who did not train workers intensively to acquire firm-specific skills[.]”²⁸⁴

Finally, Tian and Wu find different impacts of the LCL on labor-intensive and non-labor-intensive firms.²⁸⁵ According to their study, LCL stimulates capital spending in fixed assets, intangible assets, and other long-term assets for non-labor-intensive firms but not for labor-intensive firms.²⁸⁶ The explanation is that labor-intensive firms are required to maintain a fixed ratio of labor and capital but in non-labor-intensive firms, labor can be flexibly replaced by physical capital.²⁸⁷

Some studies have found no correlation or a negative relationship between the enhanced EPL and economic factors. For example, Hongbo Pan and Shilai Chen included in their study both listed and non-listed firms and differentiated between state-owned and privately-owned enterprises and labor-intensive and non-labor-intensive enterprises.²⁸⁸ One of the most critical findings in their paper was that the LCL lowered the regional GDP growth rate.²⁸⁹ The study found that the negative effect was 1% during the early period after its enactment and 5% in recent years.²⁹⁰ Further, this effect was greater in areas where private enterprise accounted for a greater proportion of the local economy and provided more employment than state-owned enterprises.²⁹¹ In the study authors’ view, the LCL reduced the investment level of private enterprises, which in turn negatively affected local economies.²⁹²

However, the paper’s analysis excluded numerous enterprises, including foreign-invested firms, small- and medium-sized businesses, and newly established firms.²⁹³ These companies account for a large proportion of the economy. The paper also failed to control for other factors that might affect economic growth, such as the decrease of China’s

283. *Id.* at 164–66.

284. *Id.* at 165.

285. Tian & Wu, *supra* note 240, at 20.

286. *Id.*

287. *Id.*

288. Pan Hongbo & Chen Shilai, *Labor Law, Corporate Investment and Economic Growth*, 370 *ECON. REV. J.* 92, 95 (2017).

289. *Id.* at 103.

290. *Id.* at 101.

291. *Id.* at 102.

292. *Id.*

293. See Zhang Caiyun, Sang Baichuan, & Qian Jiajing, *Waishang Touzi Qiye zaihua Shouyi, Jingyan ji Qishi [Income, Experience and Enlightenment of Foreign-invested Enterprises in China]*, 459 *GUOJI MAOYI [INT’L TRADE]* 73 (2020); Lin Yiren, *Zhongguo Gongxinbu Buzhang Xiao Yaqing: Woguo xian You 4000 duo Wan Qiye zhong 95% Yishang shi Zhong Xiao Qiye [Xiao Yaqing, Minister of China’s Ministry of Industry and Information Technology: 95% of Our Country’s 40 Million Enterprises are Small and Medium-Sized Enterprises]*, (Mar. 3, 2021, 7:24 PM), http://www.china.com.cn/lianghui/news/2021-03/08/content_77287627.shtml.

demographic dividend²⁹⁴ in recent years.²⁹⁵ Pan and Chen also found a stark contrast between the effects on state-owned and private businesses.²⁹⁶ The LCL increased labor costs and negatively affected the invested capital in privately owned enterprises (POEs) during the early days after its enactment.²⁹⁷ As time went by, however, POEs gradually improved their treatment of workers, so that more recently, the LCL's negative impact has waned.²⁹⁸

Guanmin Liao and Yan Chen studied how the LCL affected China's A-share listed firms' management flexibility between 2003 and 2012.²⁹⁹ The study authors used the legal environment index developed by Gang Fan, Wang Xiaolu, and Zhu Hengpeng as a proxy for the enforcement level of the LCL in different provinces.³⁰⁰ They found that the LCL's enhanced employment protection has caused a decrease in management flexibility, particularly in firms with high labor intensity or greater need for management flexibility.³⁰¹ This study deserves praise for considering the issue of enforcement, but the authors' measure is unlikely to have accurately captured the effects of the LCL on the ground.³⁰² The legal environment condition index used in this study measured many factors, including the legal protection level of producers and consumers, the efficiency of courts when dealing with economic cases, and the protection of intellectual property, but not the enforcement conditions in labor disputes.³⁰³ Thus, their study cannot accurately reflect different areas' enforcement of labor laws such as the LCL.

Overall, the few empirical studies that have been conducted offer conflicting conclusions about the net economic effect of China's LCL. These studies also suffer from several methodological problems. All the researchers assume that the LCL greatly increases labor costs, but our analysis of the LCL's provisions casts considerable doubt on that

294. "Demographic dividend" refers to the growth in an economy that is the resultant effect of a change in the age structure of a country's population. The change in age structure is typically brought on by a decline in fertility and mortality rates. To receive a demographic dividend, a country must go through a demographic transition where it switches from a largely rural agrarian economy with high fertility and mortality rates to an urban industrial society characterized by low fertility and mortality rates.

295. See generally Fang Cai, *Demographic Transition, Demographic Dividend, and Lewis Turning Point in China*, 3 CHINA ECON. J. 107, 110 (2010).

296. Hongbo & Shilai, *supra* note 288, at 103.

297. *Id.* at 98.

298. *Id.*

299. Guanmin Liao & Yan Chen, *Laodong Baohu, Laodong Mijidu yu Jingying Tanxing: Jiyu 2008 nian Laodong Hetongfa de Shizheng Jianyan [Labor Protection, Labor Intensity and Business Flexibility: An Empirical Test Based on of the 2008 Labor Contract Law]*, 200 JINGJI KEXUE [ECON. SCI.] 91, 92 (2014).

300. *Id.* at 96.

301. *Id.* at 97–99, 102.

302. See *id.*

303. Fan Gang, Wang Xiaolu, & Zhu Hengpeng, *Zhongguo Shichanghua Zhishu-- Gedi qu Shichanghua Xiangdui Jincheng 2009 nian Baogao [China Marketization Index-- 2009 Report on the Relative Progress of Marketization in Various Regions]*, JINGJI KEXUE CHUBANSHE [ECON. SCI. PRESS], at 18 (2010).

assumption.³⁰⁴ Nearly all these studies also fail to consider gaps in coverage and lack of enforcement, thus overstating the real effects of the law on employers' decision-making. Finally, researchers tend to treat the LCL as a single aggregate variable. Such a coding scheme prevents us from learning anything about how individual components of the law may affect the labor market. Instead, the pattern is one of mixed results that fail to reveal what effect, if any, the LCL has had on aggregate economic growth. In conclusion, the available empirical evidence falls far short of showing that the LCL has caused China's economic slowdown.

III. FURTHER GROUNDS TO DOUBT CRITICS' ASSESSMENT OF THE LCL

The available empirical evidence offers little support for the hypothesis that the LCL has raised labor costs and adversely affected the Chinese economy. This Part examines several other reasons that the LCL is unlikely to have played a significant causal role in China's recent economic slowdown.

A. Restricted Coverage

In the context of EPL, "coverage" means the proportion of the total workforce that EPL protects. This is a factor that the OECD and other institutions' EPL indexes fail to consider when evaluating the stringency of each country's EPL.³⁰⁵ Scholars have long pointed out that coverage issues are essential to understanding how labor regulations operate.³⁰⁶ Benoit Freyens and J.H. Verkerke's paper suggests that failing to take account of the coverage factor significantly affects the leximetric measurement of EPL.³⁰⁷ As a result, the cross-country empirical studies that have affected policymaking worldwide probably overestimate EPL's aggregate influence. Likewise, when Chinese economists claim that the LCL has negatively affected China's economy, they not only fail to recognize that such negative effects have never been confirmed in the United States and European countries but also ignore the coverage problem and thus, may have overestimated the stringency and effect of the legislation.

Mariya Aleksynska and Friederike Eberlein studied EPL coverage in more than ninety countries.³⁰⁸ They showed that in China, only civil/public servants are excluded from the general protection and concluded that the coverage of EPL is very high—equal to or beyond that of most European countries.³⁰⁹ However, their study fails to note the lack of protection for part-time workers, a type of employee on which China relies much more

304. See discussion *supra* Section II.C.

305. Freyens & Verkerke, *supra* note 26, at 21.

306. Bertola et al., *supra* note 190, at 57, 70.

307. Freyens & Verkerke, *supra* note 26, at 4.

308. Mariya Aleksynska & Friederike Eberlein, *Coverage of Employment Protection Legislation*, 5 IZA J. LAB. POL'Y 1, 2 (2016).

309. *Id.* at 10.

than other developed countries.³¹⁰ Part-time workers in China are subject to employment-at-will³¹¹ and do not get advance notice or severance payments when they are fired.³¹²

In addition to legal exclusion, workers under fixed-term contracts are usually dispatched workers and migrant workers, a large proportion of whom usually work as temporary workers and do not enjoy full EPL protection.³¹³ In China, fixed-term contracts are the norm, and indefinite-term contracts are the exception. There is no official national data on the proportion of Chinese fixed-term contract workers.³¹⁴ To study the implementation status of the LCL, in 2016, the All-China Federation of Trade Unions (ACFTU)³¹⁵ surveyed 141 enterprises of all kinds, from the cities of Guangzhou, Shenzhen, and Dongguan in the Guangdong province. The study found that more than half of employees signed fixed-term contracts in 86% of the enterprises investigated. Besides, more than 90% of fixed-term workers had a contract for less than or equal to three years.³¹⁶

The national data shows that since 2008, only around 40% of migrant workers have signed written labor contracts,³¹⁷ while the overall rate of written contracts for full-time employees is over 80%.³¹⁸ As mentioned earlier, in practice, without a written contract workers had difficulty proving that an employment relationship existed and thus, could not receive legal protection against unfair discharge.³¹⁹ Despite these facts, the LCL does not include specific protection for migrant workers. Because migrant workers account for one-third of China's labor force, the proportion of migrant workers who do not have written contracts and thus cannot enjoy complete protection against unfair discharge could be as high as one-fifth of the total workforce.

After the Chinese legislature issued the LCL in 2007, many employers began to use the exemption for temporary workers from labor

310. NON-STANDARD EMPLOYMENT AROUND THE WORLD: UNDERSTANDING CHALLENGES, SHAPING PROSPECTS, INT'L LAB. OFF. 1, 67 (2016).

311. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 71.

312. *Id.*

313. LIN ET AL., *supra* note 13, at 4.

314. *Id.*

315. See Worker Questionnaire & Questionnaire on the Implementation of Labor Law in Enterprises (2016) (data provided by staffs at the ACFTU) (on file with authors). [Editor's note: The *Denver Law Review* received a copy of the data to verify these assertions.]

316. *See id.*

317. 2009 Migrant Workers, NAT'L BUREAU OF STAT. (Mar. 19, 2010, 10:36 AM), http://www.stats.gov.cn/zjtc/ztfx/fxbg/201003/t20100319_16135.html; MONITORING REPORT (2008–2016). The National Bureau of Statistics discontinued publishing this data after 2017. See 2016 MIGRANT WORKERS MONITORING SURVEY REPORT, NAT'L BUREAU OF STAT. (2017). But see Luo Yan, *Shi Fumao: Wei Nongmingong Weiquan 15 Nian* [Shi Fumao: Advocating for the Rights of Migrant Workers for 15 Years], MINSHENG ZHOUKAN [MINSHENG WEEKLY] (Jan. 10, 2020).

318. *Nongmingong Laodong Hetong Qianding Lv Jidai Tigao* [The Rate of Signing Labor Contract for Migrant Workers Needs to be Improved], XINLANG WANG [SINA NETWORK], (June 21, 2017, 8:42 PM) <http://news.com.cn/o/2017-06-21/doc-ifyhmtrw3438706.shtml>.

319. Zengyi, *supra* note 251, at 68.

dispatch³²⁰ companies to avoid the LCL's obligations. According to a survey that the ACFTU conducted in 2011, dispatched workers accounted for 13.1% of the labor force.³²¹ In some areas, such as the City of Shanghai, the rate was even higher at 25%.³²² The survey found that employers treat dispatched workers unfairly because of the LCL's lack of regulation in this area.³²³ But dispatched workers currently enjoy almost as much employment protection as regular workers, at least by law.³²⁴ As we will discuss in the next Section, this legal protection is not fully enforced in practice.

Although the coverage of China's LCL on the books is broad, in practice, coverage is much more limited. The reduced protection that migrant, dispatched, and other types of temporary workers receive drastically diminishes the overall stringency and impact of the LCL. Inaccurately assessing the extent of coverage inappropriately leads many empirical studies to overestimate the LCL's stringency and effects.

B. Obstacles to Full Enforcement

We are unaware of any cross-country and within-country empirical studies that incorporate the measurement of enforcement. However, enacting a law is no guarantee that it will be enforced. Researchers have recognized the importance of incorporating information about enforcement in early leximetric efforts.³²⁵ Even so, few empirical studies have considered this factor, likely because it is difficult to quantify its influence. Systematic underenforcement would potentially cause observers to overstate the effects of EPL because, even in wealthy industrialized countries, statutory labor rights do not necessarily translate into effective worker protection in practice.³²⁶

A 2018 study attempted to solve this problem by controlling for the cross-country differences in effectiveness and legitimacy of employment laws.³²⁷ The study used the Freedom House indicator of human rights

320. *Working Conditions and Worker Rights in China: Recent Developments: Hearing Before the Cong.-Exec. Comm'n on China*, 112th Cong. 2 (2012) (statement of Mary Gallagher, Assoc. Professor of Pol. Sci. & Dir., Ctr. for Chinese Stud., Univ. of Mich.). Dispatched workers are technically employed by the dispatch agencies rather than the employer for which they work, so it is the agency that deals with any workplace grievances. Companies using labor dispatch have the advantage when they transfer the risk of being responsible for the worker to the agency that dispatches the worker. In the United States, this practice is referred to as temporary help services. See David Autor, *Why Do Temporary Help Firms Provide Free General Skills Training?*, 116 Q.J. ECON. 1409, 1409, 1412 (2001).

321. ALL-CHINA FEDERATION OF TRADE UNIONS, *Dangqian Woguo Laowu Paiqian Yonggong Xianzhuang Diaocha [A Survey on the Current Situation on Labor Dispatch in China]*, 154 ZHONGGUO LAODONG [CHINA LAB.] 23, 23 (2012).

322. *Id.*

323. *Id.* at 25.

324. See Interim Provisions on Labor Dispatch (promulgated by the Ministry of Hum. Resources & Soc. Sec., Jan. 24, 2014, effective March 1, 2014) (China).

325. See Giuseppe Bertola, *Microeconomic Perspectives on Aggregate Labor Markets*, 3 HANDBOOK LAB. ECON. 2985, 2986 (1999).

326. See Alvaro Santos, *Labor Flexibility, Legal Reform, and Economic Development*, 50 VA. J. INT'L L. 43, 85, 87–89 (2009).

327. Adams et al., *supra* note 200, at 19.

violations as the control factor.³²⁸ They found that in the long run, strengthening the protection of EPL was associated with rising labor force participation, rising employment, and falling unemployment.³²⁹ But they admit that the observed magnitudes are fairly small compared to the wider economic trends.³³⁰

Simon Deakin suggested using other indicators,³³¹ such as the World Justice Project rule of law index, which measures the de facto implementation of laws in each country, as a control variable.³³² Given the difficulties of measuring enforcement, using the indicator of human rights and the rule of law index as control variables might be better than doing nothing. However, these indicators can only reflect a rough enforcement picture of one country; they cannot tell us how labor law, or more specifically, EPL operates in a particular country. Thus, without a reliable picture of how labor laws operate in practice, the measure of the law on books is at best an approximation of real-world regulatory impact.³³³

Several internationally recognized rule-of-law ranking systems draw a rough picture of China's legal enforcement status. The 2016 World Bank rule of law index, which rates 215 countries, put China in the 31st to 52nd percentile.³³⁴ The 2017–2018 World Justice Project ranks China 75th among 113 countries.³³⁵ In the past several decades, China has issued laws that are comparable to those of other developed countries.³³⁶ However, as scholars have pointed out, the under enforcement problem applies in many different legal areas.³³⁷

328. *Id.* at 14–15.

329. *Id.* at 20–21.

330. *Id.* at 21.

331. See, e.g., Simon Deakin, *The Use of Quantitative Methods in Labour Law Research: An Assessment and Reformulation*, 27 SOC. & LEGAL STUD. 456, 458 (2018) (“Throughout the article, reference is made to features of the Centre for Business Research Labour Regulation Index . . . which was developed as an alternative to the OECD and World Bank indices[.]”).

332. See Adams et al., *supra* note 200, at 20–21.

333. *Id.* at 19.

334. *DataBank: Worldwide Governance Indicators*, WORLD BANK <https://data-bank.worldbank.org/source/worldwide-governance-indicators> (last visited Apr. 1, 2022) (applying filters of Country–China; Series–Rule of Law: Percentile Rank, Rule of Law: Percentile Rank, Lower Bound of 90% Confidence Interval, & Rule of Law: Percentile Rank, Upper Bound of 90% Confidence Interval; Time–2016).

335. *World Justice Project Rule of Law Index 2017–2018*, WORLD JUST. PROJECT 1, 5 (2018), <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2017%E2%80%932018> (last visited Apr. 1, 2022).

336. For example, China has issued laws that include the constitution, civil and commercial, administrative, economic, social, and criminal laws and the law on lawsuit and non-lawsuit procedures, which are also important laws in developed countries. *China's Legal System*, STATE COUNCIL FOR THE PEOPLE'S REPUBLIC OF CHINA, (Aug. 25, 2014, 5:13 PM), http://english.www.gov.cn/archive/china_abc/2014/08/23/content_281474982987244.htm.

337. See, e.g., Franklin Allen, Jun Qian, & Meijun Qian, *Law, Finance, and Economic Growth in China*, 77 J. FIN. ECON. 67 (2005) (pointing out that although China ranked relatively high in its shareholder protection law, its under enforcement problem makes the ranking unreliable.); Benjamin van Rooij, *Implementation of Chinese Environmental Law: Regular Enforcement and Political Campaigns*, 37 DEV. & CHANGE 57, 57–58 (2006).

In the field of labor law, the Chinese government has enacted standards, including just cause for discharge, minimum wage, anti-discrimination, prevention of child labor, social insurance, and access to dispute resolution (with the major exception of collective bargaining).³³⁸ As we have explained, China's EPL on the books roughly matches the average level of OECD countries. Nonetheless, there is ample evidence that most employers in China frequently violate these standards.³³⁹ For example, non-payment and underpayment of wages are still quite common even though the government has worked for more than a decade to address this chronic problem.³⁴⁰ Courts accept very few anti-discrimination cases.³⁴¹ Employers habitually discriminate against rural migrant workers.³⁴² The incidence of child labor is extremely high.³⁴³ Occupational health and safety standards are quite low by international standards.³⁴⁴

Some enforcement activities have undoubtedly increased since the enactment of the LCL. For example, Richard B. Freeman and Xiaoying Li find that the proportion of workers signing a written labor contract and employers' payment of social insurance premiums have increased substantially since the law was enacted.³⁴⁵ These results suggest that the LCL generates a noticeable improvement in employer compliance relative to the previous labor regulatory regime. As we will explore more fully below, however, the LCL is still chronically under enforced.³⁴⁶ Thus, policymakers must exercise caution in assessing the economic effects of China's EPL. Any prediction that relies solely on the law on books will grossly overstate the likely effects of the law on the ground.

338. Those standards are included in the LCL, Labor Contract Law, Employment Protection Law, Social Insurance Law, Labor Dispute Mediation and Arbitration Law, Work Safety Act, etc. See, e.g., Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 4, 26, 38, 42.

339. See discussion *infra* Sections III.B.1–B.2.

340. Wang Youling, Qi Zhongxi, Fan Xi, Tang Tao, Huang Xing, Yan Qilei, Wang Yueyang, Dong Boting, & Zhou Rui, *Rang Nongmingong Buzai 'Youxin' – Nongmingong Gongzi Qingqian Diaocha Baogao* [Let Migrant Workers No Longer "Worry About Their Wages" – Investigation Report on Migrant Workers' Wage Clearance], XINHUA WANG [XINHUANET] (Dec. 15, 2019, 1:06 PM), http://www.xinhuanet.com/politics/2019-12/15/c_1125348793.htm.

341. Jiefeng Lu, *Employment Discrimination Law Research in China: A Reflection on Current Approaches and a Discussion*, 4 TSINGHUA CHINA L. REV. 107 (2011).

342. Zhang Zhanxin, *Employment Marketization, Social Security Inclusion and Rights Equalization of Rural Migrants*, 2 CHINA POPULATION DEV. STUD. 57, 69 (2018).

343. Maplecroft, a risk analysis firm, ranked 197 countries regarding the risks of child labor. China was ranked the 20th, which means it had extreme risks of child labor. See Katie Hunt, *The 10 Worst Countries for Child Labor*, CNN (Oct. 15, 2013, 3:09 AM), <https://www.cnn.com/2013/10/15/world/child-labor-index-2014/index.html>.

344. Tim E. Pringle & Stephen D. Frost, *The Absence of Rigor and the Failure of Implementation: Occupational Health and Safety in China*, 9 INT'L J. OCCUPATIONAL & ENV'T HEALTH 309, 316 (2003).

345. Xiaoying Li & Richard B. Freeman, *How Does China's New Labour Contract Law Affect Floating Workers?*, 53 BRIT. J. INDUS. RELS. 711, 712 (2015).

346. See discussion *infra* Section III.B.2.

1. Less Effective EPL Rules

Both the Labour Regulation Index (LRI) and OECD index rank China's EPL rules among the most stringent in the world.³⁴⁷ But some provisions of these laws have no practical legal consequences because of distinctive features of Chinese labor markets. For example, the LRI assigns China's LCL the highest score for the element of "notification of dismissal" in its regulation of dismissal sub indicator because the LCL requires the employer to notify the trade union of any collective or individual dismissal and to consider the trade union's view.³⁴⁸ Enterprise unions in China, however, only rarely play a significant role in representing workers.³⁴⁹ In practice, as long as the employer follows the formal procedure of notifying the trade union, the union will accept the employer's action, and the LCL's requirements will be met.³⁵⁰ Thus, the notification procedure provides no meaningful protection for workers.

Other rules are impractical. As we noted in Part II, the OECD's 2013 ranking assigns China the highest score for severance payment obligations because every OECD country that requires severance pay caps the payments while China has no such limitation. At least in theory, required severance payments under the LCL could reach twenty or even thirty months' wages.³⁵¹ But this comparison neglects the fact that fixed-term contracts predominate in China. Medium- and long-term service employees account for only a very small proportion of the labor force.³⁵² Therefore, the requirement of much higher severance payments for medium- and long-term service employees is largely irrelevant for almost all workers. As a result, China's seemingly stringent severance pay provisions have far less practical significance and fewer potential adverse effects than a naïve reading of the statutory provisions implies.

2. The Limited Effectiveness of Government Enforcement

Regarding the implementation of EPL, the LCL gives local labor inspection agencies the power to inspect the dissolution of labor contracts.³⁵³ Labor inspection agencies can review the materials relevant to labor contracts and conduct on-the-spot inspections of workplaces.³⁵⁴ If the agency discovers that an employer has unfairly discharged a worker or has failed to compensate the discharged employee appropriately, it can impose

347. See John Armour, Simon Deakin, & Mathias Siems, *CBR Leximetric Datasets 12 CBR Extended Shareholder Protection Index* (2016). See generally OECD EMPLOYMENT PROTECTION LEGISLATION, *supra* note 61.

348. *Id.*; see also Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 41, 43.

349. Wenwen Ding, Unexpected Historical Echoes: The Advent of Unionism in China and the United States, in *Essays on the Employment and Labor Law in China* (2019) (S.J.D. Dissertation, University of Virginia) (on file with authors).

350. *Id.*

351. See Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 47.

352. LIN ET AL., *supra* note 13, at 22.

353. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 75.

354. *Id.*

penalties on the employer, including correction notices and compensation orders.³⁵⁵

To an uninformed observer, China appears to have established a comprehensive system to enforce the country's labor laws. Two regulations clearly describe the responsible agencies and their obligations, the labor inspection measures and procedures, the process of dealing with labor complaints, and the penalties imposed on employers.³⁵⁶ However, the ability of these labor agencies to secure compliance with the LCL is limited. They have insufficient resources and staff to carry out their responsibilities. In 2016, only 28,000 inspectors from 3,000 labor inspection agencies oversaw some 436,480,000 firms with over 770 million workers.³⁵⁷ On average, each inspector was responsible for approximately 1,600 firms and 27,500 workers.³⁵⁸ The ratio of workers to labor inspectors is still far from the ILO benchmark for transitional economies of one inspector per 20,000 workers.³⁵⁹

Furthermore, although local labor inspection agencies supervise and enforce the LCL's day-to-day operations, the decentralized system of governance at the subnational level constrains their effectiveness. According to this decentralized system, all local labor inspection agencies are first subordinate to the Labor Inspection Bureau of the Ministry of Human Resources and Social Security (MOHRSS) and then to local governments.³⁶⁰ In practice, however, local governments rather than the bureau have a great deal of control over its local branches because the local government controls the funding, appointments, promotions, and decision-making of local branches.³⁶¹ For local governments, economic growth is a much more important priority than labor inspection because local governments depend on local taxes for income, and the evaluation and promotion of their leaders is based on economic performance.³⁶² Where labor inspection could have a negative effect on the local economy or on a company's ability to

355. *Id.* art. 82, 85, 87.

356. See Regulation on Labor Security Supervision, (promulgated by the State Council Oct. 26, 2004, effective Dec. 1, 2004), art. 3.

357. *Renshebu Laodong Jianchaju Fuzeren jiu Qiye Laodong Baozhang Shoufa Chengxin Dengji Pingjia Banfa Da Jizhe Wen* [The Staff in Charge of the Labor Inspection Bureau of the Ministry of Human Resources and Social Security Answered Questions on the "Measures for the Evaluation of the Integrity Level of Enterprise Labor and Social Security"], MINISTRY OF HUM. RES. & SOC. SEC. (Aug. 4, 2016), http://www.mohrss.gov.cn/ljdcj/LDJCJgongzuodongtai/201608/t20160804_244837.html.

358. *Id.*

359. The ILO set up benchmarks for the human resources of labor inspectorates according to the stage of economic development of the country: one inspector per 10,000 workers in industrial market economies; one per 15,000 workers in industrializing economies; one per 20,000 workers in transition economies; and one per 40,000 workers in less developed economies. See Int'l Lab. Org., *Strategies and Practice for Labor Inspection*, ¶13, GB.297/ESP/3 (Nov. 2006).

360. Zengyi Xie, *Woguo Laodong Zhengyi Chuli de Linian, Zhidu yu Tiaozhan*, [The Concept, System and Challenge of the Labor Dispute Resolution Mechanism in China], 138 FAXUE YANJIU [CHINESE J. L.] 97, 108 (2008).

361. *Id.* at 107–08.

362. Hongbin Li & Li-An Zhou, *Political Turnover and Economic Performance: The Incentive Role of Personnel Control in China*, 89 J. PUB. ECON. 1743, 1744–45 (2005).

attract investment, most local officials will refrain from vigorously enforcing the LCL.³⁶³

Moreover, labor inspections in China are mostly reactive. One type of labor inspection is led by the central government through a top-down campaign.³⁶⁴ These campaigns usually follow significant social unrest and address specific compliance failures, such as wage arrears and employers' failure to enter into written labor contracts or pay social insurance supplements.³⁶⁵ Another type of labor inspection originates from below through workers' complaints or whistleblowing.³⁶⁶ These two categories account for nearly 90% of the cases that labor inspection authorities have settled.³⁶⁷ For example, in 2015, among 389,000 settled cases, 324,000 stemmed from complaints and 37,000 from whistleblowing.³⁶⁸ These same agencies also engaged in some proactive enforcement efforts. For example, in 2016, the MOHRSS reported 1.91 million active labor inspections.³⁶⁹ However, this number reached only 4% of all firms and according to researchers, most of these inspections consisted of no more than a paper report submitted by the employer.³⁷⁰

Additionally, penalties for violations are mild and unlikely to deter noncompliance. Labor inspectors have the right to issue warnings, correction orders, fines, and compensation orders.³⁷¹ But they have no independent power to issue more serious penalties, such as ordering a business to close, confiscating earnings, or detaining the employer.³⁷² Moreover, inspectors overwhelmingly settle cases by "warnings" and "orders to make corrections," which have little deterrent effect on employer behavior.³⁷³ In 2015, for example, labor inspectors imposed fines in only 3.6% of cases, settling 85.7% with orders to make corrections³⁷⁴ within specific time limits.

363. Wenjia Zhuang & Kinglun Ngok, *Labour Inspection in Contemporary China: Like the Anglo-Saxon Model, but Different*, 153 INT'L LAB. REV. 561, 580 (2014).

364. Sarah Biddulph, Sean Cooney, & Ying Zhu, *Rule of Law with Chinese Characteristics: The Role of Campaigns in Lawmaking*, 34 U. DENV. L. & POL'Y 373, 380-81 (2012).

365. *Id.* at 391.

366. Zhuang & Ngok, *supra* note 363, at 562.

367. *Id.* at 575.

368. 2015 STATISTICAL BULLETIN, *supra* note 245.

369. 2016 STATISTICAL BULLETIN, *supra* note 245.

370. SEAN COONEY, SARAH BIDDULPH, & YING ZHU, *LAW AND FAIR WORK IN CHINA* 123 (2014).

371. Sean Cooney, *China's Labour Law, Compliance and Flaws in Implementing Institutions*, 49 J. INDUS. RELS. 673, 678 (2007).

372. *Id.*

373. Xie, *supra* note 360.

374. See NAT'L BUREAU OF STATS., 8-2 SETTLEMENT OF LABOR INSPECTION CASES, ZHONGGUO LAODONG TONGJI NIANJIAN [CHINA LABOR STATISTICAL YEARBOOK] 346 (2016). The cases included in this calculation are the 253,216 cases made actions by the labor inspection agency. *Id.* These cases include 217,016 cases (Orders to Make Corrections), 10,895 cases (Decisions of Administrative Settlement), 12,275 (Decisions of Administrative Penalty), 3,711 cases (Disciplinary Warning), 9,191 cases (fines) and 121 cases (other). *Id.* Among the 253,216 cases, 9,191 cases were imposed fines and 217,016 cases were ordered to make corrections. See *id.*

When an employer fails to compensate the discharged employee appropriately, a labor inspector may order a business to make severance payments.³⁷⁵ If an employer refuses to comply with such correction notice, the LCL empowers a labor inspector to order a firm to pay an additional 50%–100% of the amount owed to the employee in question.³⁷⁶ If the employer still refuses to pay, the labor department has no way to increase its pressure.³⁷⁷ The employee must pursue the case before a labor arbitrator or a court.³⁷⁸ However, these formal processes are too time-consuming and cumbersome for many workers in China.³⁷⁹

3. The Official Dispute-Resolution Mechanism

In recent years, the Chinese government has been eager to make the formal system of dispute resolution—including voluntary mediation,³⁸⁰ compulsory labor arbitration,³⁸¹ and the court system—more accessible and efficient. The ruling Communist Party clearly hopes that workers will express their discontent through official channels rather than participating in more disruptive collective action in the workplace and streets.³⁸² Although the number of formal claims has risen, we doubt that these reforms have increased legal pressure on employers to comply with the law. Instead, preexisting obstacles, such as the lack of legal representation and difficulty collecting damage awards, now combine with an emphasis on speed over justice and a lack of independence among arbitrators and judges to undermine the deterrent force of Chinese EPL.

Since the enactment of the LCL, there has been steady growth in the number of formal claims filed.³⁸³ The Chinese government has eliminated filing fees for labor arbitration and reduced fees for court cases.³⁸⁴ The government along with labor non-governmental organizations (NGOs) and activists have also worked to educate workers about their legal rights.³⁸⁵ These efforts appear to have encouraged more workers to use the official dispute-resolution system. In 2008, for example, the labor dispute

375. Nat'l People's Cong., Labor Contract Law, *supra* note 60, art. 85.

376. *Id.*

377. *See id.* arts. 80–95.

378. *See id.* art. 77 There are no other legal institutions that workers can turn to; thus, they have to go to labor arbitration or court.

379. *See* discussion *infra* Section III.B.3.

380. Mediation is voluntary and the mediator's decision normally has no legal effect. Statement of Mary Galler, *supra* note 320, at 7.

381. In China, labor arbitration is compulsory for virtually all labor disputes. *Id.* The labor dispute arbitration committee (LDAC) is a governmental body, and the arbitrators are labor bureau officials subject to the influence of local government officials. Cooney, *supra* note 371, at 680.

382. *See* Harvey Thomlinson, *China's Communist Party is Abandoning Workers*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/opinion/china-communist-party-workers-strikes.html> (“The government's default approach to labor disputes has been to treat them as a threat to law and order.”).

383. *See infra* notes 387–88 and accompanying text.

384. Measures for the Payment of Litigation Fees (promulgated by the St. Council, Dec. 19, 2006, effective Apr. 1, 2007) China Online, 2006, at art. 13.4.

385. Mary Gallagher & Yujeong Yang, *Getting Schooled: Legal Mobilization as an Educative Process*, 42 L. & SOC. INQUIRY 163 (2018).

arbitration committee (LDAC) accepted 693,000 cases, double the number in 2007, and by 2015, the number of labor arbitration cases reached nearly 814,000.³⁸⁶ Similarly, in 2008, the number of labor cases that the courts accepted reached 286,000, an increase of nearly 100% nationwide.³⁸⁷ Since then, labor cases have continued to increase steadily, rising from 665,760 in 2013 to 813,859 in 2015.³⁸⁸

Rather than hiring more arbitrators and judges to handle this increased volume of cases, officials have instituted reforms that accelerate case processing. Chinese law requires the LDAC to issue a judgment no more than sixty days after accepting a case.³⁸⁹ In an effort to meet that goal, many local jurisdictions have adopted new procedures, such as the “elemental mode of handling cases,”³⁹⁰ to simplify and expedite the process. The Nanhai District of Foshan City, for example, reports that a streamlined system reduced the case backlog by 35% and shortened processing time by 28%.³⁹¹ Despite these reform efforts, some cases take much longer—up to eight months—to adjudicate because there are an insufficient numbers of arbitrators to handle the steadily growing caseload.³⁹² Additionally, weak institutional capacity and a lack of professionalism and training undermines the authority of labor arbitration³⁹³ and the courts.³⁹⁴

Contrary to the typical practice in the United States and Europe, however, mandated arbitration does not produce a final, binding judgment. About half of all arbitration cases are appealed to a court.³⁹⁵ Although Chinese law requires judges in first-instance trials to issue a ruling within six months (with a possible extension up to fifteen months), these first-instance trials do not resolve most cases.³⁹⁶ The ensuing second-instance

386. NAT'L BUREAU OF STATS. OF THE MINISTRY OF HUM. RES. & SOC. SEC., 2007 STATISTICAL BULLETIN OF HUMAN RESOURCES AND SOCIAL SECURITY DEVELOPMENT (2008); 2008 STATISTICAL BULLETIN, *supra* note 245; 8-2 DISPOSAL OF LABOR DISPUTES 2016, *supra* note 374, at 344–45.

387. 2008 STATISTICAL BULLETIN, *supra* note 245.

388. See 8-2 DISPOSAL OF LABOR DISPUTES 2016, *supra* note 374, at 344–45.

389. 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] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 2007, effective May 1, 2008), art. 43 (decision must be issued within forty-five days, with a potential extension of no more than fifteen days, for a total of sixty days).

390. The “elemental mode of handling cases” requires the labor arbitration committee to summarize the key issues in a case, deliver pretrial guidance to the parties, investigate the case before trial, attempt mediation, limit the trial to key issues, and simplify the contents of the judgment.

391. *Nanhaiqu Tuixing Laodong Zhongcai Gaige Fangan* [Nanhai District Adopted the Labor Arbitration Reform], ZHUJIANG SHIBAO [ZHUJIANG TIME] (Apr. 27, 2018), https://www.foshan-news.net/nh/nhtt/201804/t20180427_156977.html.

392. See Interview with Labor Lawyers in Beijing (on file with authors). [Editor's note: These interviews were conducted informally, and the interviewees are anonymous. The *Denver Law Review* received notes from the authors and verified the assertions using those notes.]

393. Zengyi, *supra* note 251, at 97.

394. Benjamin L. Liebman, *Legal Reform: China's Law-Stability Paradox*, 143 DAEDALUS 96, 105–06 (2014).

395. See, e.g., NAT'L BUREAU OF STATS., 24-26 DISPOSAL OF LABOR DISPUTES, ZHONGGUO LAODONG TONGJI NIANJIAN [CHINA LABOR STATISTICAL YEARBOOK] (2015) (showing 711,044 cases settled with 313,175 settled by arbitration).

396. See *id.*

trial ordinarily takes an additional three months, but an extension can double this time.³⁹⁷ As a result, a party may wait as long as two years to resolve a dispute through arbitration and trial.³⁹⁸ And a considerable proportion of cases progress through all the official labor tribunals.³⁹⁹ Although some commentators contend that the LDAC reduces the workload of courts,⁴⁰⁰ others characterize it as a complicated and difficult process for workers.⁴⁰¹ Thus, for at least a significant fraction of cases, delays in the official dispute-resolution process diminish its effectiveness.

In practice, however, courts decide many cases relatively quickly. Since 2000, the Party-state has prioritized rapid resolution of conflicts rather than careful adherence to legal procedures.⁴⁰² The Party's foremost goal is to discourage workers from protesting or causing social unrest.⁴⁰³ Processing claims quickly appears to be the principal strategy for achieving this goal. Accordingly, the government evaluates, compensates, and promotes judges and arbitrators primarily based on the number and rate of cases decided rather than on the basis of the effectiveness or fairness of their decisions.⁴⁰⁴ Indeed, many cities require judges to sign a letter of assurance indicating the minimum number of cases that they will decide each year.⁴⁰⁵ Although the number of labor disputes has increased significantly, the number of judges has remained constant in recent years.⁴⁰⁶ Official data show that the number of cases handled per judge has tripled since 2008.⁴⁰⁷ In order to reach the targeted number of cases, judges have had to

397. Some Rules Set Forth by the Supreme People's Court for Strictly Abiding by the Time Limits for Case Hearing and Execution (promulgated by Sup. People's Ct., revised Dec. 16, 2008, effective Dec. 31, 2008), art. 2.

398. *Id.*

399. There is no national data on the number of cases that parties appeal to a higher court but in the City of Guangzhou, for example, between 2011 and 2013, parties appealed about 30% of first-instance court decisions. Guangzhou Laodong Zhengyi Baipishu (2011–2013) [Guangzhou Labor Dispute Litigation White Paper (2011–2013)], Guangzhou Fayuan Wang [Guangzhou Court Net], [hereinafter Guangzhou White Paper]. In the cities of Beijing and Kunming and the provinces of Shandong and Sichuan, 42% of all labor cases were appealed in 2015 and 2016. *See* Taihetai Lvshi Shiwusuo Laodong Renshi Bu [Labor and Personnel Department of Tahota Law Firm], *Laodong Zhengyi Shenpan Shiwu Dashuju Diaoyan Baogao—Canyin Hangye* [Big Data Research Report on Labor Dispute Trial Practice-Catering Industry], Wolters Kluwer Net (Feb. 18, 2021), <http://lawv3.wkinfo.com/cn/topic/61000000411/7.html>. In the City of Pingle, the appeal rate reached 62.47% from 2008 to 2012. *See* Huang Cuiling, *Guanyu Laodong Zhengyi Anjian Shenli Qingkuang de Fenxi* [Analysis of the Trial of Labor Dispute Cases], ZHONGGUO FAYUAN WANG [CHINA CT. WEB] (Apr. 2, 2013), <https://www.chinacourt.org/article/detail/2013/03/id/932839.shtml>.

400. Xie, *supra* note 360, at 98.

401. Guangzhou White Paper, *supra* note 399 (noting that 52% of labor arbitration cases in Guangzhou were appealed to the courts and this is evidence of “arbitration’s limited utility as a filter” for cases); Cooney, *supra* note 371, 679–80.

402. *See* Wei Sun, *Performance Evaluation System*, CHINA CT. (July 12, 2017, 9:53 AM), <http://tjfy.chinacourt.org/article/detail/2017/07/id/2918705.shtml>.

403. *See id.*

404. *Id.*

405. *Id.*

406. *See* Zuigaoyuan: *Faguan Pingjun Banan Shuliang Tisheng zhi 2008 Nian de Jin San Bei* [Supreme Court: The Average Number of Cases Handled by Judges has Nearly Tripled from 2008], ZHONGGUO XINWEN WANG [CHINA NEWS NETWORK] (Aug. 1, 2017), <http://www.chinanews.com/gn/2017/08-01/8292304.shtml>.

407. *Id.*

simplify and accelerate legal procedures. These shortcuts make it less likely that labor courts can fully enforce the legal protections contained in the LCL. Thus, China's official labor tribunals appear to be pursuing faster case handling at the expense of fairness—placing speed over justice.

The Chinese government has also expanded the use of mediation to resolve labor cases.⁴⁰⁸ The mediation rate for all civil cases (including labor disputes) surged from around 30% in 2002⁴⁰⁹ to 63.1% in 2013.⁴¹⁰ The number of cases that mediation organizations accept has risen steadily from 685,000 in 2010 to 866,833 in 2015.⁴¹¹ The government evaluates labor arbitrators and, until recently, judges based on their success mediating disputes, and encourages both arbitrators and judges to use mediation before, during, and after a hearing.⁴¹² Wenjia Zhuang and Feng Chen report that in some localities, such as Shenzhen, mediation, though technically voluntary, has become “de facto mandatory” before the court will accept a case for labor arbitration.⁴¹³

Ideally, mediation offers parties faster dispute resolution, lower costs, and less disruption to their relationship. Moreover, the resulting settlements reduce the overwhelming workload of the LDAC and the courts. China's approach to mediation, however, is often coercive.⁴¹⁴ Courts and officials pressure parties to resolve their cases and thus, many final settlements fail to vindicate basic legal requirements.⁴¹⁵ The Party-state has little interest in providing substantial remedies. Instead, local officials prefer to downplay legal conflicts and prevent citizen petitions from reaching central officials.⁴¹⁶

Lack of legal representation also impedes private enforcement of labor regulations. Very few workers hire attorneys to represent them in

408. The proportion of LDAC cases resolved through mediation rose from 35% in 2007 to 67.9% in 2017. 2007 STATISTICAL BULLETIN, *supra* note 386; 2017 STATISTICAL BULLETIN, *supra* note 245.

409. See Liu Min, 1978-2010 Nian Minshi Suson Tiaojielv Bianqian ji qi Jieshi [*Changes in Civil Litigation Mediation Rates and their Interpretations from 1978 to 2010*], 40 (2020).

410. Jian Ma, *Shixian Shenpan Fuwu Jingji Shehui Fazhan de Xinchangtai — 2014 Nian Quanguo Fayuan Shenli Minshangshi Anjian Qingkuang Fenxi* [*Realize the New Normal of Trial Serving the Economic and Social Development — Analysis on the Trial of the Civil and Commercial Cases by Courts Across the Country in 2014*], RENMIN FAYUAN BAO [PEOPLE'S CT. DAILY], (May 14, 2015), http://rmfyb.chinacourt.org/paper/html/2015-05/14/content_97690.html?div=-1. In Guangzhou, for example, courts resolved 68% of first-instance labor dispute cases through mediation in 2011, 60% in 2012, and 56% in 2013. Guangzhou White Paper, *supra* note 399.

411. 2010 STATISTICAL BULLETIN, *supra* note 245; 2015 STATISTICAL BULLETIN, *supra* note 245. In 2012, the MOHRSS even required large companies to establish internal labor mediation committees to reduce the number of disputes overwhelming the formal system.

412. Aaron Halebua, *Who Will Represent China's Workers? Lawyers, Legal Aid, and the Enforcement of Labor Rights*, at 13 (Oct. 2016).

413. Wenjia Zhuang & Feng Chen, “Mediate First”: *The Revival of Mediation in Labour Disputes Resolution in China*, 222 CHINA Q. 380, 391–92 (2015).

414. Halebua, *supra* note 412, at 1, 2.

415. *Id.*

416. *Id.* at 22.

mediation, which often occurs before a formal complaint has been filed.⁴¹⁷ “[O]ne Beijing mediator estimates that only 5% of . . . workers have counsel.”⁴¹⁸ But even workers who initiate arbitration or a formal judicial proceeding are often unable to afford representation. In large cities, lawyers typically “demand at least RMB 3,000 [(\$443)] for each stage of litigation.”⁴¹⁹ Although they appear modest by Western standards, these legal fees exceed what many low-wage workers can pay, particularly when the claim is one for unpaid wages or wrongful termination.⁴²⁰

The fact that workers often have trouble collecting judgments when they prevail further undermines enforcement of the LCL.⁴²¹ “In many instances, the employer simply refuses to pay . . . and the worker must petition the court to enforce its award.”⁴²² “A legal aid NGO in Beijing reported that in the cases that it litigated on behalf of nearly 2,000 workers,” employers voluntarily paid the full judgment in only 36% of the cases and partially paid the judgment in 7% of cases, and the NGO had to petition the court for enforcement in the remaining 57%.⁴²³ Although workers are usually very likely to collect the judgement after they petition for enforcement,⁴²⁴ this additional proceeding takes considerable time and effort. At any time during this process, the defendant-employer may disappear or transfer its assets to a new legal entity, thus frustrating the worker’s collection efforts.

Finally, both arbitrators and local judges lack genuine independence and thus, tend to toe the Party line instead of challenging economically influential employers. Each LDAC conducts labor arbitrations as a captive bureaucratic subdivision of a local administrative department.⁴²⁵ This dependence on local officials has led critics to conclude that LDAC decisions

417. The median recovery in cases open to the public in 2017 was about 17,000 RMB (\$2,464). Legal Miner, *Report on Factors Affecting the Winning Rate of National Labor Dispute Cases in 2017*, <http://www.legalminer.com/blog/?p=2985> (last visited Mar. 31, 2022) (while this link does not work in the United States, the *Denver Law Review* received a copy of the webpage from the authors to verify). According to official data, the monthly minimum wage in twenty-eight provinces is less than RMB 2,000 (USD 295) in 2020. *31 Sheng Zuidi Gongzi: 6 Sheng Biaozhun chao 2000 RMB, Shanghai Lianxu 4 Nian Weiju Bangshou* [Minimum Wages in 31 Provinces: 6 Provinces with a Standard Exceeding 2,000 Yuan, Shanghai Tops the List for 4 Consecutive Years], XINLANG WANG [SINA NET] (Aug. 10, 2020), <https://finance.sina.com.cn/china/gncj/2020-08-10/doc-iivhvpwy0117975.shtml>.

418. Halebua, *supra* note 412, at 2.

419. *Id.* at 19.

420. Legal Miner, *supra* note 417.

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

422. Halebua, *supra* note 412, at 9.

423. *Id.* (“A study of labor disputes filed in Jilin Province courts in 2014 showed that 30% of the cases applied for the enforcement proceeding, as compared to 19% of civil cases generally.”).

424. For example, in the Guangzhou City Intermediate Court, the rate of collecting judgments in enforcement cases was 91.74% in 2020. See Zhang Yahui, Huang Ying, & Huang Ruohan, *Guangzhou Zhongji Fayuan: Zhuanxiang Zhixing Zhuli “Zhishang Quanli” Jishi Bianxian* [Guangzhou Intermediate Court: Special Implementation Helps Realize “Paper Rights” in Time], *RENMIN FAYUAN BAO* [PEOPLE’S CT. DAILY] (Feb. 8, 2021), http://rmfyb.chinacourt.org/paper/html/2021-02/08/content_200999.htm?div=-1.

425. Xie, *supra* note 360, at 107–08.

are prone to favor government and business interests at the expense of justice for individual workers.⁴²⁶

Similarly, the judicial system is subject to the control of the Party, and judges look to local governments for their compensation.⁴²⁷ After years of reform, “Party organs are [now] neither involved in most quasi-legislation issued by the Supreme People’s Court, nor generally involved in the review of cases considered by courts.”⁴²⁸ However, the overall direction of courts’ work is still guided by Party Policy.⁴²⁹ The overriding value of maintaining social stability continually shapes courts’ dockets and decisions. For example, fear of enabling disruptive social movements has made class actions generally unacceptable.⁴³⁰

4. Employer Strategies to Circumvent Enforcement

Employers have also adopted practices that allow them to evade legal obligations under the LCL. For example, they may obtain workers through labor dispatch services, outsource significant portions of their work, rely heavily on part-time workers, or hire student interns.⁴³¹ In each case, the employers’ strategy undermines enforcement of otherwise applicable labor regulations.

At least initially, labor dispatch was the most common avoidance strategy. The 2008 LCL only requires the user company to have one of the justified grounds and fails to ask the user company to meet the prohibited grounds if it wants to return workers to the dispatch agency.⁴³² Even though, according to Phillip Huang, who analyzed all fifty-seven cases involving labor dispatch in 2012 that were open to the public, user companies discharged dispatched workers at will and did not make any severance payments.⁴³³ Courts enforced the LCL’s restrictions on discharge and severance pay requirements only when the dispatch agency itself terminated

426. *Id.* at 107.

427. Yanrong Zhao, *The Courts’ Active Role in the Striving for Judicial Independence in China*, 12 FRONTIERS L. CHINA 278, 280–81 (2017).

428. *Id.* at 281.

429. *Id.*

430. *Id.* at 291.

431. See Halegua, *supra* note 412, at 7.

432. See Nat’l People’s Cong., Labor Contract Law, *supra* note 60; Interim Provisions on Labor Dispatch, *supra* note 323 (requiring the user company to meet prohibited grounds while returning workers to the dispatch agency).

433. In 2013, the Supreme People’s Court launched the China Judgments Online located at <http://wenshu.court.gov.cn>. Coco Feng, *China’s Official Online Database of Court Rulings Briefly Censored by Glitch at Search Engine Provider Baidu, Which has Fixed the Problem*, SOUTH CHINA MORNING POST (Feb. 21, 2022, 6:00 PM), <https://www.scmp.com/tech/policy/article/3167814/chinas-official-online-database-court-rulings-briefly-censored-glitch>. This website offers the largest collection of judgments and decisions from Chinese courts. *Id.* On July 25, 2016, the Supreme People’s Court ruled that almost all judgment documents, except those involving state secrets and crimes by minors, should be released online. Zuigao Renmin Fayuan Guanyu Renmin Fayuan Zai Hulianwang Gongbu Caipan Wenshu de Guiding, Fashi (2016) 19 Hao (最高人民法院关于人民法院在互联网公布裁判文书的规定, 法释(2016)19号) [Supreme People’s Court Regulations Regarding Publication of Judicial Decisions on the Internet, Judicial Interpretation No. 19 (2016)] (promulgated by the Sup. People’s Ct., July 25, 2016, effective Oct. 1, 2016).

workers.⁴³⁴ Although the LCL formally limits labor dispatch to temporary, auxiliary, or substitutable positions,⁴³⁵ many employers have shifted regular employment to dispatched workers.⁴³⁶ Use of dispatched workers is quite widespread. By June 2011, according to the ACFTU, the number of dispatched workers grew to 37 million from 25 million in 2006.⁴³⁷ Dispatched workers are particularly prevalent in some state-owned enterprises, such as China Mobile, where they accounted for 60% of all employees.⁴³⁸ In total, 16.2% of all employees are dispatched in state-owned enterprises.⁴³⁹ In some sectors, including financial services, information transmission, computer science, and software development, more than 60% of workers were dispatched.⁴⁴⁰

In 2014, hoping to curtail perceived abuses, the Department of Human Resources and Social Security issued “Interim Provisions on Labor Dispatch.”⁴⁴¹ Although these rules require user companies to comply with the LCL’s limits on discharge, employers may still return dispatched workers at will as long as the dispatch agency accepts the company’s decision.⁴⁴²

Also, in response to these more restrictive regulations, employers have increasingly resorted to outsourcing and expanding their hiring of part-time workers who do not enjoy employment protection under the LCL.⁴⁴³ Extensive outsourcing has been common in the banking industry (including banks with foreign investors) since 2014.⁴⁴⁴ Although we were unable to find national data on the use of outsourcing and part-time workers, the Shanghai Foreign Service Corporation reported that the flexible employment market (including labor dispatch and outsourcing) grew at an average rate of 22% between 2015 and 2018.⁴⁴⁵ And according to several labor lawyers in Beijing, both practices have become increasingly popular

434. Philip C. C. Huang, *Dispatch Work in China: A Study from Case Records, Part I*, 43 MODERN CHINA 247, 256–58, 260 (2017).

435. Nat’l People’s Cong., Labor Contract Law, *supra* note 60, art. 66.

436. The employer typically asks some incumbent regular employees to sign labor contracts with a dispatched firm. See Liu Genghua, *Private Employment Agencies and Labour Dispatch in China*, 6 (Int’l Lab. Off., Working Paper No. 293, 2014).

437. ALL-CHINA FEDERATION OF TRADE UNIONS, *supra* note 321, at 23.

438. *Id.* at 24.

439. *Id.* at 23.

440. *Id.*

441. Interim Provisions on Labor Dispatch, *supra* note 323.

442. Interview with labor lawyers in Beijing, *supra* note 392.

443. See Nat’l People’s Cong., Labor Contract Law, *supra* note 60, art. 71.

444. See Zhang Xin, *Sidhang Laowu Paiqiangong Qunian Suojian 8.43 Wanren* [The Labor Dispatch Workers of the Four Major Banks Shrank by 84,300 Last Year, a Drop of More Than 70%], RENMIN WANG [RENMIN NET] (Apr. 28, 2015, 8:29 AM), <http://finance.people.com.cn/money/n/2015/0428/c42877-26915892.html>.

445. See 2017 *Linghuo Yonggong Yewu Xianzhuang yu Qushi Baogao* [Industry Report “2017 Flexible Employment Business Status and Trend Report”], WAIFUYUN GUANWANG [FOREIGN SERV. GP.] (Jan. 31, 2018), https://www.fsgplus.com/fsgplus/news/hr-insight/201801/t20180131_22740.shtml (discussing that the Shanghai Foreign Service Group’s “2017 Report on Status and Trend of Flexible Employment Business” predicts that the trend toward increased flexible employment will continue).

in the past several years.⁴⁴⁶ In the face of new regulations, companies have resorted to outsourcing to an even greater extent than they relied on labor dispatch agencies.⁴⁴⁷

Chinese manufacturers, especially those in the electronics and textile industries, also employ many student interns.⁴⁴⁸ Because the law does not define students as workers, they are excluded from most legal protections under the LCL,⁴⁴⁹ and Chinese courts reject labor cases from student interns.⁴⁵⁰ Moreover, local governments often facilitate the use of student labor as part of a strategy to lure employers to relocate to their area.⁴⁵¹

This comparative freedom from regulation has encouraged hiring, and student interns have become an important segment of China's labor force.⁴⁵² Most notably, in the summer of 2010, Foxconn Technology Group, the world's largest electronics manufacturer, hired roughly 150,000 students, making them approximately 15% of the company's total workforce.⁴⁵³ Acer confirmed that it uses student workers in some of its factories to "ease labor pressure."⁴⁵⁴ Wistron, one of Hewlett-Packard's suppliers, reported that its intern ratio was nearly 50% in 2010, and at Pegatron, 30% of the workforce is made up of student interns.⁴⁵⁵ Wintek, HEG, Honda, and Toyota are also among the firms that report significant use of student labor.⁴⁵⁶

* * *

As shown in this Section, significant obstacles exist to the full enforcement of Chinese labor regulations. For example, the predominance of fixed-term contracts reduces the practical significance of severance pay requirements. A chronic lack of resources weakens government enforcement agencies. The official dispute-resolution system handles many cases

446. Interview with labor lawyers in Beijing, *supra* note 392.

447. *Id.*

448. Yuan Yang, *Illegal Overtime in China Factory Highlights Labor Woes*, FIN. TIMES (Nov. 22, 2017), <https://www.ft.com/content/bf01de70-cea6-11e7-b781-794ce08b24dc>.

449. Lin Jie & Han Huan, *Qiye Lianjia Shiyong Shixisheng Zhedi Laodongli Chengben Shangzhang [Companies Use Interns Cheaply to Offset Rising Labor Costs]*, ZHONGGUO QINGNIAN BAO [CHINA YOUTH DAILY] (Feb. 14, 2011), http://zqb.cyol.com/html/2011-02/14/nw.D110000zgqnb_20110214_1-05.htm?div=-1.

450. CHINA LAB. BULL., *The Mass Production of Labour: The Exploitation of Students in China's Vocational School System*, (Jan. 12, 2012), <http://www.clb.org.hk/en/files/share/File/general/vocationalschoolsystem.pdf>.

451. *Id.*

452. Eva Dou, *OEM Companies in China Abuse School Interns*, WALL ST. J. (Sept. 29, 2014, 8:55 AM), <https://cn.wsj.com/articles/CN-TEC-20140926111046>.

453. Jenny Chan, Pun Ngai, & Mark Selden, *Interns or Workers? China's Student Labor Regime*, 13 ASIA-PAC. J. 4372 (Sept. 7, 2015), <https://apjif.org/Jenny-Chan/4372>; *see also* FOXCONN TECH. GP., *Foxconn is Committed to a Safe and Positive Working Environment*, (Oct. 11, 2010), http://regmedia.co.uk/2010/10/12/foxconn_media_statement.pdf ("Interns currently comprise 7.6% of our total employee population in China and at no time has this percentage ever exceeded 15% even during the summer peak seasons when more students want to enroll in the internship program.").

454. Dou, *supra* note 452.

455. *Id.*

456. Earl V. Brown Jr. & Kyle A. deCant, *Exploiting Chinese Interns as Unprotected Industrial Labor*, 15 ASIAN-PAC. L. & POL'Y J. 150 (2014).

but remains out of reach for most workers and is subject to the influence of local officials who prioritize economic development over worker protection measures. And finally, Chinese employers routinely use labor dispatch agencies, outsourcing, part-time workers, and student interns to evade legal constraints on employment termination. We conclude that, although the LCL undoubtedly increased the stringency of Chinese employment protections, any estimate of how the law has affected labor costs must necessarily account for these weakening influences.

C. Understanding Economic Growth in China

During the past forty-four years, since China began to open and reform its economy, the country has experienced a period of extraordinary economic growth. The annual rate of growth exceeded 5% in all but three of those years, and the rate of GDP growth averaged nearly 10% from 1978 to 2018.⁴⁵⁷ The World Bank described China's economic rise as "the fastest sustained expansion by a major economy in history."⁴⁵⁸ Since the global economic crisis of 2007–2008, however, the country's growth rate has fallen from a peak of 14.2% in 2007 to just under 7% in 2018, the year before the COVID-19 pandemic began.⁴⁵⁹

It should be no surprise that policymakers and commentators have sought an explanation for this marked slowing of economic growth in China. Some scholars and government officials have criticized the LCL and attributed declining growth to the employment protections contained in that law. As we showed in Part I, the provisions of the LCL impose constraints no more stringent than the average among OECD countries we studied. Part II showed that neither economic theory nor the available empirical evidence supports critics' causal claims about the LCL. It remains for us to offer a more plausible explanation for why China's GDP growth has cooled in recent years.

Scholars have identified several contributing causes of China's recent economic slowdown. In 2007–2008, the global financial crisis shocked the export sector of the Chinese economy at roughly the same time that the LCL became effective.⁴⁶⁰ Economic growth in China has historically been heavily dependent on producing goods for export.⁴⁶¹ Thus, the dramatic

457. *China Overview*, THE WORLD BANK, <https://www.worldbank.org/en/country/china/overview#1> (last visited Apr. 2, 2022); *GDP Growth (Annual %) – China*, WORLD BANK DATA BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?end=2018&locations=CN&name_desc=false&start=1978&view=chart (last visited Apr. 2, 2022).

458. MORRISON, *supra* note 2 (quoting the World Bank China Overview website from March 2017). Of note, this quoted language is no longer available on the China Overview website. See *China Overview*, *supra* note 457.

459. See sources cited *supra* note 457.

460. See generally Bo Chen & Ran Jing, *Financial Crisis, Financial Costs, and Changes in China's Export Trade*, 124 *ECON. RES. J.* 30 (2013).

461. Kunrong Shen, *The Causes and Solutions of China's Economic Slowdown*, 45 *ACAD. MONTHLY* 95, 97 (2013).

drop in global demand for those exports likely explains much of the fall in growth immediately after the Great Recession.⁴⁶²

More broadly, some commentators believe that a slowdown was inevitable.⁴⁶³ As an economy gets bigger, it becomes increasingly difficult to sustain the sort of breakneck growth China experienced after opening its economy.⁴⁶⁴ Once the country moved from the ranks of less developed nations into the upper middle class based on per capita GDP, the country's progressively larger economic baseline made continued 10% growth extremely unlikely. Growth has similarly decelerated in many other countries making this economic transition.⁴⁶⁵

Several additional factors have contributed to slower growth. From 1980 to 2010, the Chinese working-age population steadily grew while the dependent population declined.⁴⁶⁶ China thus benefited, for the first three decades after reforming its economy, from a so-called demographic dividend that boosted employment, savings, investment, and ultimately economic growth.⁴⁶⁷ According to Fang Cai, the country's advantageous population age structure contributed 26.8% of total Chinese GDP growth from 1982 to 2000.⁴⁶⁸ But since 2010, these demographic trends have reversed, contributing to labor shortages and rising wages.⁴⁶⁹ As the demographic dividend disappeared, the Chinese economy shifted to a lower path of growth, averaging about 7% from 2012 to 2019.⁴⁷⁰

Reduced foreign direct investment may have also played some role in China's declining growth rate.⁴⁷¹ Although one might worry that the LCL somehow caused investors to pull back from projects in China, the pattern of investment expenditures makes that explanation implausible.⁴⁷² Foreign direct investment fell in 2008 as the LCL came into effect, but investment then rose each year until 2013 when it began to fall once

462. *Id.*

463. Barry Eichengreen, Donghyun Park, & Kwanho Shin, *When Fast Growing Economies Slow Down: International Evidence and Implications for China 1–2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 16919, 2011).

464. See S.R., *Why China's Economy is Slowing?*, *ECONOMIST* (Oct. 7, 2015), <https://www.economist.com/the-economist-explains/2015/03/11/why-chinas-economy-is-slowing>.

465. Barry Eichengreen, Donghyun Park, & Kwanho Shin, *Growth Slowdowns Redux: New Evidence on the Middle-Income Trap 6–7* (Nat'l Bureau of Econ. Rsch., Working Paper No. 18673, 2013).

466. Cai, *supra* note 295.

467. *Id.*

468. *Id.*

469. See China Economic Growth Committee, *The Growth Path, Efficiency and Potential Growth Level*, 11 *ECON. RES. J.* 4, 12, 18–19 (2011).

470. World Bank Databank, *GDP Growth Rate*, <https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG> (last visited Apr. 23, 2022).

471. Peng Xingting, *Perspective Behind the Withdrawal of Foreign Capital from China*, *CRI ONLINE* (Mar. 7, 2008, 3:47 PM), <http://news.cri.cn/gb/12764/2008/03/07/2945@1969745.htm>; see Finbarr Bermingham, *China's Manufacturing Exodus Set to Continue in 2020, Despite Prospect of Trade War Deal*, *S. CHINA MORNING POST* (Jan. 9, 2020, 12:00 AM), <https://www.scmp.com/economy/china-economy/article/3045141/chinas-manufacturing-exodus-set-continue-2020-despite>.

472. See *China Foreign Direct Investment*, CEIC, <https://www.ceicdata.com/zh-hans/indicator/china/foreign-direct-investment> (last visited Apr. 2, 2022).

again.⁴⁷³ Thus, other considerations—and not the LCL—appear to have driven the fluctuating levels of foreign investment. More plausible explanations include increased environmental protection costs, a higher minimum wage, labor shortages, less favorable trade policies, and an inability to get bank financing.⁴⁷⁴ Likewise, many critics of the LCL predicted that the new law would disrupt the labor market and cause widespread unemployment.⁴⁷⁵ Contrary to this prediction, the unemployment rate in China has remained steady at around 4% for the past decade, and it has even declined slightly since 2016.⁴⁷⁶

These statistics paint a consistent picture of powerful economic and demographic forces that explain China's slowing growth rate. This slowdown began at roughly the same time that the LCL came into effect. But no available theoretical analysis or empirical evidence suggests that the law depressed Chinese GDP growth. It follows that policymakers have no reason to believe that reforming or repealing the LCL will reignite the explosive growth China experienced in the first three decades after reforming its economy.

CONCLUSION

We conclude our discussion of the LCL by asking whether the law's critics have made a case for reform. Calls to bolster employment and growth by making the labor market more “flexible” are far from unique to China. In fact, the current reform movement closely resembles similar efforts in Europe and, more recently, in other developing and transitional nations.⁴⁷⁷

The idea that national economic health hinges on increasing labor market flexibility first developed in response to deteriorating economic conditions in Europe.⁴⁷⁸ In the 1980s, scholars observed that the U.S. labor market was improving even as the unemployment rate sharply rose in many European countries.⁴⁷⁹ This contrast between economic conditions in Europe and the United States prompted researchers and policymakers to ask whether the more stringent labor regulations common in Europe might explain the continent's persistent unemployment problem.

Although a few early empirical analyses identified a negative correlation between EPL stringency and employment levels, the OECD's 1994 Jobs Study popularized the notion that reducing firing costs was the key

473. *Id.*

474. *See supra* Parts I & II.

475. *See supra* notes 271–74 and accompanying text.

476. *China Unemployment Rate*, CIEC, <https://www.ceicdata.com/en/indicator/china/unemployment-rate> (last visited Apr. 2, 2022).

477. Adams et al., *supra* note 200, at 3–4, 10, 13.

478. Freyens & Verkerke, *supra* note 26, at 5–6.

479. *Id.*

to combatting unemployment and economic stagnation.⁴⁸⁰ According to the resulting OECD Jobs Strategy, countries needed to relax employment protections⁴⁸¹ by “[l]oosen[ing] mandatory restrictions on dismissals . . . [and] [p]ermit[ting] fixed-term contracts.”⁴⁸² These policy recommendations inspired many OECD countries to reform provisions of their EPL.⁴⁸³ By 1997, the United Kingdom, Portugal, and Spain had significantly reduced protections for permanent workers.⁴⁸⁴ Italy, Spain, and Sweden allowed the use of temporary work agencies, and Belgium significantly eased restrictions on fixed-term contracts.⁴⁸⁵

This commitment to labor flexibility soon spread to other international agencies. From its first edition in October 2003, the World Bank's Doing Business (DB) project promoted labor market “flexibility” as a critical factor in economic development.⁴⁸⁶ DB reports advised both developing and transitional nations to deregulate their labor markets to increase employment and spur economic growth.⁴⁸⁷ Unsurprisingly, policymakers in these countries took seriously the recommendations of a major provider of international financial assistance. Further increasing pressure on national legislators, the World Bank issued a series of Country Economic Memorandums addressing conditions in Bolivia, Colombia, Ecuador, Lithuania, and Nepal.⁴⁸⁸ These documents condemned labor regulations in these countries for increasing firing costs and recommended eliminating legal restrictions on firing to spur economic development.⁴⁸⁹ The International Monetary Fund similarly relied on the World Bank's DB reports to

480. ORG. FOR ECON. COOP. & DEV., THE OECD JOBS STUDY: FACTS, ANALYSIS, STRATEGIES (1994).

481. *Id.*

482. *Id.*

483. ORG. FOR ECON. COOP. & DEV., IMPLEMENTING THE OECD JOB STRATEGY: LESSONS FROM MEMBER COUNTRIES' EXPERIENCE (1997).

484. *Id.*

485. *Id.*

486. See DOING BUSINESS IN 2006: CREATING JOBS, WORLD BANK & INT'L FIN. CORP. 26 (2006); DOING BUSINESS IN 2005: REMOVING OBSTACLES TO GROWTH, WORLD BANK & INT'L FIN. CORP. 30–32 (2005); DOING BUSINESS IN 2004: UNDERSTANDING REGULATION, WORLD BANK & INT'L FIN. CORP. 30–38 (2004).

487. DOING BUSINESS 2004, *supra* note 486, at 23, 92, 94.

488. See, e.g., BOLIVIA: COUNTRY ECONOMIC MEMORANDUM POLICIES TO IMPROVE GROWTH AND EMPLOYMENT, WORLD BANK 32, (2005) (Report No. 32233-BO); ECUADOR-INVESTMENT CLIMATE ASSESSMENT, WORLD BANK 186–87, 190 (2005) (Report No. 31900-EC).

489. See Peter Bakvis, How the World Bank & IMF Use the Doing Business Report to Promote Labour Market Deregulation in Developing Countries, 2, 5, 7–11 (2006) (unpublished, available online).

recommend broader labor market deregulation⁴⁹⁰ in several countries, including Nepal,⁴⁹¹ Romania,⁴⁹² and South Africa.⁴⁹³

We have already shown in Part II, however, that there is no academic consensus on the relationship between EPL and labor market outcomes. The OECD Jobs Study and the World Bank's DB reports, in particular, have been the subject of withering criticism from scholars as well as unions and other labor market institutions in European countries.⁴⁹⁴ In reaction to this criticism, the OECD has since retreated from its strong advocacy for labor market flexibility. According to the 2004 OECD Employment Outlook, the effect of EPL on aggregate employment is uncertain.⁴⁹⁵ And in 2011, facing methodological criticisms from scholars and strong opposition from labor institutions around the world, the World Bank similarly reconsidered its position.⁴⁹⁶ The most recent DB report takes a more neutral position, calling on developing countries to balance labor flexibility and worker protection.⁴⁹⁷ Despite these belated concessions to empirical reality, legislative efforts to weaken employment protections have persisted. From 2008 and 2013, more than one-third of OECD countries relaxed regulations of both individual and collective dismissals.⁴⁹⁸ By increasing labor market flexibility, lawmakers hope to boost job creation and reduce unemployment.

Advocacy for greater labor flexibility has now reached China. In recent years, some Chinese economists and government officials have criticized the LCL, claiming that it makes labor markets too rigid and thus, hinders economic growth.⁴⁹⁹ These arguments closely resemble the reasoning that drove the OECD and the World Bank to advocate for deregulation.

As we have shown, however, the case for reform rests on a shaky foundation. The LCL is not as stringent as most scholars and critics have claimed. Even though the LCL undoubtedly strengthened China's EPL,

490. *Id.* at 2, 5, 7–12.

491. NEPAL: ARTICLE IV CONSULTATION – STAFF REPORT; PUBLIC INFORMATION NOTICE ON THE EXECUTIVE BOARD DISCUSSION; AND STATEMENT BY THE EXECUTIVE DIRECTOR FOR NEPAL, INT'L MONETARY FUND 4, 10, 14, 17, 22, (2006).

492. ROMANIA: 2006 ARTICLE IV CONSULTATION – STAFF REPORT; STAFF STATEMENT; PUBLIC INFORMATION NOTICE ON THE EXECUTIVE BOARD DISCUSSION; AND STATEMENT BY THE EXECUTIVE DIRECTOR FOR ROMANIA, INT'L MONETARY FUND 4, 16–17, 29, 32, (2006).

493. SOUTH AFRICA: ARTICLE IV CONSULTATION – STAFF REPORT; STAFF STATEMENT; AND PUBLIC INFORMATION NOTICE ON THE EXECUTIVE BOARD DISCUSSION, INT'L MONETARY FUND 19–20, 23–26, 45 (2005).

494. Richard B. Freeman, *Labour Market Institutions Without Blinders: The Debate Over Flexibility and Labour Market Performance*, 19 INT'L ECON. J. 129, 129–32, 134–36 (2005).

495. See EMPLOYMENT OUTLOOK 2004: REASSESSING THE OECD JOBS STRATEGY, ORG. FOR ECON. COOP. & DEV. 12 (2004).

496. TREVOR MANUEL, CARLOS ARRUDA, SERGEI GURIEV, JIHAD AZOUR, HUGUETTE LABELLE, CHONG-EN BAI, JEAN-PIERRE LANDAU, TIMOTHY BESLEY, ARUN MAIRA, DONG-SUNG CHO, & HENDRIK WOLFF, INDEPENDENT PANEL REVIEW OF THE DOING BUSINESS REPORT 1–3, 44 (2013).

497. See DOING BUSINESS 2018: REFORMING TO CREATE JOBS, WORLD BANK 206–07 (2018).

498. OECD EMPLOYMENT OUTLOOK 2013, *supra* note 29, at 67.

499. See *supra* notes 6–13 and accompanying text.

our analysis shows that the law probably did not significantly increase employers' labor costs. It strains credulity to argue that the enactment and enforcement of the LCL contributed in any important way to the recent slowdown in Chinese GDP growth. Other powerful influences—such as the global financial collapse, the inevitable slowing that accompanies countries' transitions to higher levels of economic development, the disappearance and reversal of the demographic dividend, and fluctuations in foreign direct investment—offer far more plausible causal accounts for slower growth in China.

Moreover, the Chinese government would be wise to heed the updated advice of the World Bank to balance labor flexibility and worker protection. Since 2000, workers in China have expressed their discontent about wages and employment conditions by filing claims under the official dispute-resolution mechanism and by organizing mass protests and strikes.⁵⁰⁰ If the government embraces the calls of critics to repeal or drastically curtail the LCL, those same workers may be inspired to expand their collective action. Despite influential calls in many nations for greater labor flexibility, there has been no global trend toward EPL deregulation over the past two decades.⁵⁰¹ Instead, all countries and regions have gradually strengthened their EPL over time.

We conclude, therefore, where we began by expressing profound skepticism that reforming the LCL will reignite economic growth in China. This story has been told in many places and at many times before. Despite their superficial plausibility, claims about reform ignore reality. From a global perspective, the LCL is not unusually stringent. The law has never been vigorously enforced. And the available empirical evidence casts doubt on the idea that increasing labor flexibility will spur employment and growth. A more defensible stance towards the LCL would invite input from scholars and stakeholders about how to ease compliance and streamline enforcement of the law's provisions.

500. See *supra* Section III.B.3.

501. See Adams et al., *supra* note 200, at 20.