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Ka Ni Li

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RE-CONCEPTUALIZING THE NOTION OF “EMPLOYER”: THE CASE OF LABOR DISPATCH WORKERS IN CHINA

INTRODUCTION

In December, 2012, only four years after China’s enactment of the Labor Contract Law (“LCL”),¹ which was widely considered to be highly protective of workers’ rights,² its legislature passed an amendment³ modifying the provisions that governed the use of labor dispatch workers and the regulation of the labor dispatch industry. Labor dispatch is a triangular form of employment relationship among workers, a dispatch agency, and a host company.⁴ Under such an arrangement, workers are hired by a dispatch agency and sent to work for a third-party host company, which in turn pays the agency a fee for the staffing service and the workers’ labor.⁵ Because the dispatch agency, and not the host company, is the formal employer of the dispatch workers,⁶ the host company can achieve significant cost savings, while gaining the flexibility needed to quickly respond to shifts in market demand.⁷ According to the LCL, companies can “generally”

1. Laodong Hetong Fa (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) (China) [hereinafter Labor Contract Law].

2. Mary Gallagher et al., *China’s 2008 Labor Contract Law: Implementation and Implications for China’s Workers* 1 (The World Bank Working Paper No. 6542, 2013), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-6542>.

3. Quanguo Renda Changweihui Guanyu Xiugai Zhonghua Renmin Gongheguo Laodong Hetong Fa de Jueding (全国人大常委会关于修改<<中华人民共和国劳动合同法>>的决定) [Decision of the Standing Committee of the National People’s Congress on Revising the Labor Contract Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 28, 2012, effective July 1, 2013) (China) [hereinafter the Amendment].

4. Feng Xu, *Labor Law Developments in China: The Emergence of Temporary Staffing Agencies in China*, 30 COMP. LAB. L. & POL’Y J. 431, 431 (2009).

5. *Id.*

6. Labor Contract Law, *supra* note 1, art. 58.

7. Host companies are not directly responsible for the dispatch workers’ social security payment, compensation, and severance pay. Moreover, although host companies indirectly pay dispatch workers compensation via the fee they pay to the dispatch agency, the cost to the host company is less because dispatch workers are generally paid lower wages than direct hires. Michael

use dispatch workers to fill “temporary, auxiliary, or substitute jobs.”⁸ However, because the LCL tightened labor regulations by requiring employers, among other things, to buy worker insurance, pay double wages for overtime, and pay severance depending on the employee’s years of service,⁹ many companies resorted to the use of dispatch workers to avoid the costs of complying with the restrictive new law.¹⁰

Contrary to a conventional, bilateral employment relationship between an employee and a single employer, a dispatch worker in a triangular labor dispatch arrangement may not be able to identify who his employer is. This confusion stems from the nature of the labor dispatch arrangement and from the law itself. Under a labor dispatch arrangement, the functions traditionally exercised by a single employer are distributed between the dispatch agency and the host company.¹¹ While the dispatch agency determines when and where to assign the worker and pays the worker wages and benefits, the host company exercises day-to-day supervision and control over the worker.¹² Therefore, a dispatch worker may perceive someone who remunerates him as the employer, or he may perceive someone who manages and controls him as the employer. The law provides no clear guidance in this respect. Although the LCL identifies the dispatch agency as the formal employer of dispatch workers,¹³ it also ascribes responsibility to both the dispatch agency and the host company when the dispatch worker suffers harm.¹⁴ The Amendment to the LCL, which became effective in 2013 and specifically

Standaert, *Effect of Chinese ‘Labor Dispatch’ Rules Could Be Muted by Loopholes and Laxity*, BLOOMBERG BNA (May 8, 2013). See also Virginia Harper Ho & Qiaoyan Huang, *The Recursivity of Reform: China’s Amended Labor Contract Law*, 37 FORDHAM INT’L L.J. 973, 977 (2014).

8. Labor Contract Law, *supra* note 1, art. 66.

9. See discussion *infra* Part I.A.

10. Dexter Roberts, *Why China’s Factories Are Turning to Temp Workers*, BLOOMBERG BUSINESSWEEK (Mar. 8, 2012), <http://www.businessweek.com/articles/2012-03-08/why-chinas-factories-are-turning-to-temp-workers>.

11. Pauline Thai, *Unfair Dismissal Protection for Labor Hire Workers? Implementing the Doctrine of Joint Employment in Australia*, 2012 AJLL LEXIS 16, at *3 (2012). This paper provides a good discussion on the problems of Australian labor hire arrangement at a conceptual and practical level, which is applicable to China’s labor dispatch arrangement because the two arrangements are quite similar.

12. *Id.*

13. Labor Contract Law, *supra* note 1, art. 58.

14. Labor Contract Law, *supra* note 1, art. 92.

addresses labor dispatch, further complicates the situation by limiting the sharing of responsibility only to situations where the worker's harm is caused by the host company.¹⁵ This necessitates a judicial determination as to which entity caused harm to the worker in each case.

Although the 2013 Amendment makes dramatic adjustments to the permitted scope of labor dispatch use and the regulation of the labor dispatch industry as a whole,¹⁶ it fails to resolve the fundamental question of who a dispatch worker's ultimate employer is. This failure makes private enforcement of the law by the dispatch workers more difficult and unlikely because they may not necessarily know which entity to pursue when their rights are violated.¹⁷ Many dispatch agencies operate as "empty shells" and may continue to do so after the passage of the 2013 Amendment.¹⁸ Therefore, it is crucial that a dispatch worker be able to pursue a more financially resourceful host company that exercises employer functions over him and enjoys the benefits of his labor, but does not have a contractual relationship with him. This can be achieved by incorporating the doctrine of the joint employer, as used in the United States, into China's law.

Part I of this Note examines the transformation of China's labor system from one of guaranteed lifetime employment to one based on private contracts and the development of labor legislation against the backdrop of China's late twentieth-century economic reform. It also traces the history and development of the labor dispatch industry. Part II compares the labor dispatch provisions in the 2008 LCL with the 2013 Amendment and addresses the inadequacies of the current law. Part III examines the joint employer doctrine of the United States. Part IV advocates for the incorporation of the joint employer doctrine into China's law, in order to ensure meaningful relief for dispatch workers whose rights are violated.

15. The Amendment, *supra* note 3, provision 4.

16. See discussion *infra* Part II.B.

17. See Ho & Huang, *supra* note 7, at 1018; see also discussion *infra* Part II.C.

18. See discussion *infra* Part II.C.

I. BACKGROUND

China's economic success today can be attributed to the economic and social reform it instituted few decades ago.¹⁹ The introduction of market mechanisms fundamentally altered the way labor was organized and utilized. This Part explores the labor system changes initiated by the Chinese government beginning in the late-1970s and the development of labor legislation that these changes necessitated. It also discusses the various stages of development of the labor dispatch industry in China.

A. Smashing the Iron Rice Bowl: The Transformation of China's Labor System and the Development of Labor Legislation

From the founding of the People's Republic of China ("PRC") in 1949 until economic reforms began in the late 1970s, China, under the leadership of Chairman Mao Zedong, implemented a Soviet-style command economic system.²⁰ Under this system, the state essentially owned and controlled all agricultural and industrial enterprises.²¹ It set production targets and prices and allocated resources in accordance to an economic plan promulgated by the State Council every five years.²² The state received all revenues from the enterprises and subsidized or absorbed any losses.²³ On the labor side, the State assigned workers to work in state-owned enterprises ("SOEs") and dictated all hiring and firing decisions.²⁴ Workers in these positions remained in the same work unit or enterprise for most, if not all, of their working lives.²⁵ By pledging allegiance to the Communist Party, the ruling political party of the PRC, these workers received guaranteed housing, schooling, medical care, and welfare and

19. Yu-Kong Zhao, *What Drives China's Success?*, FORBES OPINION (Oct. 2, 2014, 4:05 PM), <http://www.forbes.com/sites/realspin/2014/10/02/what-drives-chinas-success/>.

20. DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS: PROBLEMS, CASES, AND MATERIALS 483 (2d ed. 2010).

21. *See id.*

22. *Id.*

23. *Id.*

24. Xu, *supra* note 4, at 437.

25. Andrew G. Walder, *Organized Dependency and Cultures of Authority in Chinese Industry*, 43 J. ASIAN STUD. 51, 54 (1983).

pension benefits from the state.²⁶ This labor arrangement was known as the “iron rice bowl” system.²⁷ This labor system promoted egalitarianism and precluded social differentiation among workers, thereby reducing the likelihood of labor disputes.²⁸ It also made workers reliant on the state for their livelihoods and standards of living.²⁹ This reliance helped strengthen Party control and rendered workers highly deferential, unquestionably obedient, and extremely reluctant to raise claims to their superiors directly.³⁰ Consequently, Party ideologies and orders, not labor laws, were the main instrument of handling labor disputes.³¹

Burdened with this significant social welfare role, the SOEs were highly inefficient. The state was more concerned with constructing a “harmonious society” than with achieving profits, efficiency, and productivity.³² During that time period, China re-

26. Eli Friedman & Ching Kwan Lee, *Remaking the World of Chinese Labour: A 30-Year Retrospective*, 48 BRIT. J. INDUS. REL. 507, 509 (2010).

Typically, an SOE worker would live in a dormitory or housing provided by the SOE, work in the adjacent SOE factory or plant, send his children to the nearby school operated by the SOE, shop at the nearby markets owned by the SOE, visit the doctor at the nearby SOE hospital, watch movies at a theater operated the SOE, and receive pension benefits supplied by the SOE upon retirement.

CHOW & SCHOENBAUM, *supra* note 20, at 484–85. As a result, a worker’s professional, personal, and family lives became inextricably linked together, and they all revolved around his work unit. *Id.*

27. In China, rice has been a staple food for many years. The concept of an unbreakable “iron rice bowl,” thus, symbolized the Communist Party’s commitment to provide cradle-to-the-grave security for its citizens. NEIL C. HUGHES, *CHINA’S ECONOMIC CHALLENGE: SMASHING THE IRON RICE BOWL* 5 (2002).

28. Yunqiu Zhang, *Labor Law Reforms: China’s Response to Challenges of Globalization*, in *MODERN CHINESE LEGAL REFORM* 131, 139 (Xiaobing Li & Qiang Fang eds., 2013).

29. Walder, *supra* note 25, at 55.

30. *Id.* at 53.

31. Zhang, *supra* note 28, at 139.

32. See Minqi Zhang, *The Labor Contract Law: Construction of Harmonious Labor Relations*, 3 CHINA LEGAL DEV. Y.B. 131, 131–34 (2009); CHOW & SCHOENBAUM, *supra* note 20, at 485.

stricted foreign trade and barred most private and foreign enterprises.³³ Market competition was virtually absent.³⁴ SOEs lacked the incentive to perform well. In the event that an SOE performed poorly financially, the state would intervene to preserve the enterprise in order to avoid the significant social costs that might otherwise result.³⁵ SOE workers received a common salary regardless of performance and were not discharged for unsatisfactory work.³⁶ These economic and labor policies kept China poor, backward, and stagnant.³⁷

Following Mao's death in 1976, China began to reconcile itself to the country's poverty and underdevelopment.³⁸ In 1978, under the leadership of Deng Xiaoping, China began to experiment with capitalism and the development of free markets.³⁹ Deng announced an "open door" policy, which formally opened China to foreign trade and investment.⁴⁰ Four special economic zones ("SEZs") were established along the coast for the purpose of attracting foreign capital and businesses.⁴¹ These SEZs were

33. WAYNE M. MORRISON, CONG. RESEARCH SERV., RL 33534, CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES 2 (2014) [hereinafter CONG. RESEARCH SERV.].

34. *Id.*

35. CHOW & SCHOENBAUM, *supra* note 20, at 485.

36. *Id.*

37. CONG. RESEARCH SERV., *supra* note 33, at 2.

38. CHOW & SCHOENBAUM, *supra* note 20, at 485.

39. *Reformer with an Iron Fist: Deng Xiaoping*, CNN, <http://www.cnn.com/SPECIALS/1999/china.50/inside.china/profiles/deng.xiaoping> (last visited Oct. 4, 2014).

40. *Inside China's Ruling Party: Open Door Policy*, BBC NEWS, http://news.bbc.co.uk/2/shared/spl/hi/asia_pac/02/china_party_congress/china_ruling_party/key_people_events/html/open_door_policy.stm (last visited Oct. 4, 2014).

41. The Chinese government balked at opening the entire economy all at once and strategically designated four coastal cities (Shenzhen, Zhuhai, Xiamen, and Hainan) as SEZs to test the efficacy of free market economic principles. Douglas Zhihua Zeng, *China's Special Economic Zones and Industrial Clusters: Success and Challenges*, LET'S TALK DEV. (Apr. 27, 2011), <http://blogs.worldbank.org/developmenttalk/china-s-special-economic-zones-and-industrial-clusters-success-and-challenges>. Party leader, Deng Xiaoping, aptly described this experimental approach as "crossing the river by feeling the stones." Meaning that, rather than proceeding aggressively, reforms were to be undertaken incrementally. The state carefully evaluated the results of each reform before designing the next stage. William Martin et al., *Trade Policy, Structural Change, and China's Trade Growth, in HOW FAR ACROSS THE RIVER?: CHINESE POLICY REFORM AT THE MILLENNIUM* 153, 158 (Nicholas C.

hugely successful, which led to the subsequent rollout of more SEZs and industrial clusters throughout the country.⁴² Moreover, the state permitted the development of the private sector, viewing it as complementary to the state sector.⁴³ The burgeoning foreign and private enterprises created enormous competitive pressure for the SOEs, which were encumbered with the expensive “iron rice bowl” system.⁴⁴ In response, the state relaxed central planning and granted SOEs the right to make their own managerial decisions, including investment and production, hiring and firing, and the setting of wages and prices.⁴⁵ It also carried out restructuring of the SOEs and spun off certain nonessential state businesses to the private sector.⁴⁶ The restructuring of the state sector caused massive layoffs⁴⁷ and broke the social contract implicitly formed between the state and the workers, who had enjoyed job tenure and generous welfare benefits in the planned economy.⁴⁸ The resultant loss of job security and disruption to workers’ families and social lives pressured the state to enact labor legislation in order to deal with labor grievances and, more importantly, to sustain a social order conducive to economic development.⁴⁹

Hope et al. eds., 2000). Within the SEZs, foreign enterprises received preferential treatment compared to their local counterparts. For example, a foreign enterprise would enjoy guaranteed protection of private property rights, tax breaks, duty-free imports of raw materials, and faster customs clearance, and they were regulated by more liberal labor laws. See Douglas Zhihua Zeng, *How Do Special Economic Zones and Industrial Clusters Drive China’s Rapid Development?* 16 (The World Bank Working Paper No. 5583, 2011), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5583> [hereinafter Zeng, Working Paper] and Jin Wang, *The Economic Impact of Special Economic Zones: Evidence from Chinese Municipalities*, 101 J. DEV. ECON. 133, 137 (2013).

42. Zeng, Working Paper, *supra* note 41, at 12.

43. CHOW & SCHOENBAUM, *supra* note 20, at 485.

44. Friedman & Lee, *supra* note 26, at 509.

45. CHOW & SCHOENBAUM, *supra* note 20, at 485–87.

46. Xu, *supra* note 4, at 440.

47. Jill E. Monnin, *Extending the Reach of the Chinese Labor Law: How Does the Supreme People’s Court’s 2006 Interpretation Transform Labor Dispute Resolution?*, 16 PAC. RIM L. & POL’Y J. 753, 756 (2007).

48. Friedman & Lee, *supra* note 26, at 507.

49. The need for economic development and legal reform was summarized by Deng Xiaoping in the “Two-Hands” policy. On the one hand, the economy must be developed; on the other hand, the legal system must be strengthened. Jianfu Chen, *Market Economy and the Internationalization of Civil and Commercial Law in the People’s Republic of China*, in LAW, CAPITALISM AND POWER

In 1980, the state began to experiment with labor contracts in Shenzhen, one of the forerunner SEZs, in the context of joint ventures as it was aware that foreigner investors might run into difficulty hiring workers under the then existing socialist recruitment practice.⁵⁰ It allowed joint ventures to stipulate terms governing the employment, dismissal, and resignation of workers in labor contracts.⁵¹ The labor contract program was successful and was replicated in other coastal and regional areas.⁵² Meanwhile, national and local authorities promulgated piecemeal legislation on the use of labor contracts in the form of laws, regulations, notices, and directives, all of which created significant confusion.⁵³ Eventually, in 1995, the Labor Law⁵⁴ came into effect and codified the labor contract system, consolidating and superseding all previous laws.⁵⁵

Although the 1995 Labor Law was regarded as a major legislative achievement, it provided only the “skeleton of a regulatory framework” and could not effectively deal with the complexity of labor problems that arose during the reform period.⁵⁶ As part of the efforts to liberalize the economy, China’s central government

IN ASIA 59, 59 (Kanishka Jayasuriya ed., 2006). *See also* Friedman & Lee, *supra* note 26, at 509, 515.

50. Susan Leung, *China’s Labor Contract System from Planned to Market Economy*, 3 J. L. ETHICS & INTELL. PROP. 1, 2–3 (2012). Labor contracts were given statutory recognition by the Provisions for Labor Management in Sino-Foreign Joint Ventures of 1980. *Id.*

51. *Id.*

52. *Id.* at 3

53. Zhang, *supra* note 28, at 140–43; *see also* Leung, *supra* note 50, at 3.

54. 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. Nat’l People’s Cong., July 5, 1994, effective Jan. 1, 1995) (China); Leung, *supra* note 50, at 3.

55. The 1995 Labor Law is the foundation for labor rights and regulations in China. Aside from formally adopting a contract-based employment system and regulating aspects like wages, working hours, and insurance, the 1995 Labor Law provided for labor dispute resolution. The resolution process brought an important shift away from compromising forms of mediation toward more adversarial arbitration and litigation, which was what the Chinese government intended. Monnin, *supra* note 47, at 754–55.

56. The 1995 Labor Law lacked specificities in many respects. Its articles were either supplemented by numerous subordinate ordinances from various state agencies or left unelaborated. Sean Cooney, *Making Chinese Labor Law Work: The Prospect for Regulatory Innovations in the People’s Republic of China*, 30 FORDHAM INT’L L.J. 1050, 1055–56 (2007).

granted local governments broad power to make economic decisions and allowed them to retain a significant portion of the revenue generated from trade and investment.⁵⁷ Consequently, local governments vigorously competed with one another to nurture a pro-capital climate, which was attractive to investors, and condoned relatively weak enforcement of labor laws, which in turn guaranteed a ready supply of “cheap and docile” labor.⁵⁸ In addition, millions of rural migrant workers inundated urban areas for job opportunities, creating a “buyer’s market for labor.”⁵⁹ Owing to the household registration—*hukou*—system, these workers had a social status inferior to that of local resident workers and so were particularly prone to exploitation and discrimination by employers.⁶⁰ They were subject to excessively long working hours, lower wages, withholding of wages and benefits, termination without notice, non-renewal of employment contracts, and unsafe working conditions.⁶¹ Labor protests and unrest became widespread, putting pressure on the Chinese legislature to reform its labor law in order to restore social harmony and stability.⁶²

In 2007, China promulgated the Labor Contract Law⁶³ to deal with the defects of the 1995 Labor Law. The LCL contained nu-

57. Friedman & Lee, *supra* note 26, at 515.

58. Xu, *supra* note 4, at 435–36.

59. The number of rural migrant workers soared from an estimate of 30 million in 1989 to 130 million in 2006. Li Shi, *Rural Migrant Workers in China: Scenario, Challenges, and Public Policy* 4–5 (Int’l Labor Office. Working Paper No. 89, 2008). The abundance of migrant workers created a “buyer’s market for labor.” MARVIN J. LEVINE, *WORKER RIGHTS AND LABOR STANDARDS IN ASIA’S FOUR NEW TIGERS: A COMPARATIVE PERSPECTIVE* 7 (1997).

60. See Huafeng Zhang, *The Hukou System’s Constraints on Migrant Workers’ Job Mobility in Chinese Cities*, 21 CHINA ECON. REV. 51 (2010).

61. Leung, *supra* note 50, at 7.

62. Zhang, *supra* note 28, at 131–34.

63. Labor Contract Law, *supra* note 1. Early drafts of the law received an unprecedented level of public response and generated highly contentious debates. Cooney et al., *China’s New Labour Contract Law: Responding to the Growing Complexity of Labour Relations in the PRC*, 30 U.N.S.W.L.J. 786, 789 (2007). These debates involved not only Chinese workers, union leaders, management, labor bureau officials, and academics, but also international business lobbyists and labor organizations. Warner, M. and Zhu, Y., *Labour-Management Relations in the People’s Republic of China: Whither the ‘Harmonious Society’?* 20 (Cambridge Judge Bus. Sch., Working Paper No. 11, 2008). The Labor

merous progressive provisions that discomfited many employers. Among the most controversial were the insistence on a written and signed employment contract and the hefty penalties for non-compliance with the formalities.⁶⁴ If a contract remained unsigned after one year, an employer would be deemed to have entered into an open-term employment relationship with an employee.⁶⁵ While the LCL allowed an employee to resign unilaterally upon proper notice,⁶⁶ an employer did not have unfettered discretion to terminate an employee. An employer was required to make severance payments based on the employee's years of service⁶⁷ and generally could not dismiss an employee without cause and notice.⁶⁸ Furthermore, an employer had to compensate an employee for overtime work at a rate sometimes up to three times the normal wages.⁶⁹

For many enterprises, these stringent provisions meant a dramatic increase in their labor costs and a severe reduction of their organizational flexibility. To cope with the legal changes, enterprises exploited a loophole in Article 66 of the LCL, which pro-

Contract Law's passage represents a compromise between the competing demands of these interest groups. Cooney et al., *supra*, at 786.

64. Employers who fail to formalize the employment relationship with their employees in a written contract within one month of the employee commencing work must pay double the agreed-upon wages until the contract requirement is complied with. Labor Contract Law, *supra* note 1, art. 10. This is different from the 1995 Labor Law, which required the formation of a contract, but did not specify a written requirement. Compare Labor Contract Law, *supra* note 1, art. 10 with Labor Law, *supra* note 54, art. 16.

65. An open-term employment contract refers to a contract where the employer and the employee did not agree on a definite time to end the employment relationship. In other words, the employee will be employed on an ongoing, potentially permanent, basis, and the employer may not dismiss the employee without cause and notice. Labor Contract Law, *supra* note 1, art. 14.

66. *Id.* art. 37–38.

67. *Id.* art. 47.

68. The Labor Contract Law, *supra* note 1, prescribed several grounds by which an employer may dismiss an employee, including the following: (1) mutual agreement (art. 36); (2) summary dismissal, where the employee was found to be unqualified during probation period, had violated internal rules and regulations, or had committed fraud, dishonesty or other gross misconduct (art. 39); (3) termination by notice on statutory causes (art. 40); and (4) mass redundancy due to reorganization or difficulties in operations or management (art. 41).

69. *Id.* art. 31.

vided that “workers are dispatched *generally* for temporary, auxiliary, or substituting jobs.”⁷⁰ Relying on the unqualified nature of the word “generally,” many enterprises used dispatch workers extensively and on a continuing basis, even though this was not what the law intended.⁷¹ In 2012, in response to the misuse and overuse of labor dispatch arrangements, the Chinese legislature passed an Amendment to the Labor Contract Law,⁷² the provisions of which will be discussed in detail in Part II.

B. The Rise of the Labor Dispatch System

China’s experience with labor dispatch can be divided into four periods.⁷³ First, the opening up of the Chinese economy in 1978 and the influx of foreign enterprises necessitated the birth of labor dispatch agencies, which were called “foreign services companies” at the time.⁷⁴ Foreign enterprises that set up representative offices in China could not hire employees directly because

70. *Id.* art. 66. (emphasis added).

71. According to the All-China Federation of Trade Unions, as of 2012, the estimated number of dispatch workers was 60 million, which had been up more than twofold since the promulgation of the 2008 Labor Contract Law. See Roberts, *supra* note 10. Not only did private enterprises and foreign invested enterprises employ dispatch workers, but SOEs and civil services were also heavy users of dispatch workers. Ding Yongxun (丁永勋), Laowu Paiqian: Tonggong Tongchou, Guoqi Ying Daitou (劳务派遣: 同工同酬国企应带头) [Labor Dispatch: State-Owned Enterprises Should Lead the Implementation of the “Equal Pay for Equal Work” Principle], GUANGMING RIBAO (光明日报) (China), July 1, 2013, http://news.xinhuanet.com/comments/2013-07/01/c_116348843.htm. Industries that had a significant proportion of dispatch workers included public transportation, aviation, railroad, banking, insurance, telecommunications, customs, and even the Ministry of Human Resources and Social Security, which is a government organ charged with national labor policies and regulations. In some cases, enterprises, including state-owned ones, hired so many dispatch workers that they comprised more than half of the total workforce. Shenzhen Xinchou Luanxiang: Yongren Danwei Ge Xian Shentong Guibi Tonggong Tongchou (深圳薪酬乱象: 用人单位各显神通规避同工同酬) [Chaos of Shenzhen’s Worker Remuneration: User Enterprises Use All Kinds of Ways to Evade Conforming to the “Equal Pay for Equal Work” Principle], SHENZHEN SHANGBAO (China), Aug. 22, 2013, <http://news.sina.com.cn/c/2013-08-22/061028014650.shtml>. Ho and Huang called employers’ replacement of direct hires with dispatch workers “creative compliance.” Ho & Huang, *supra* note 7, at 981.

72. The Amendment, *supra* note 3.

73. *Labor Dispatch System in Reform*, WINDOW ON THE SOUTH (China), Mar. 17, 2011, translated by China Labor News Translations.

74. Xu, *supra* note 4, at 444.

the foreign representative offices were not considered “legal persons” in China.⁷⁵ Therefore, these representative offices had to engage labor dispatch agencies in order to hire local employees.⁷⁶

Second, labor dispatch agencies gained prominence as the state endorsed them throughout the economic reform period.⁷⁷ The state, dissatisfied with the rigidity of the job allocation system during the old “iron rice bowl” era, attempted to rid itself of the “social responsibilities” of guaranteeing lifelong employment and social welfare.⁷⁸ It laid off workers wholesale and advocated an “active employment” policy, which encouraged workers to rely on themselves to seek jobs, with the market mediating employment and the role of the State only to promote employment.⁷⁹ The labor contract system that was introduced at the time also reduced workers’ reliance on the state.⁸⁰ However, worried that an abrupt turn to an open labor market would disrupt the public order and undermine the basis of Party-state legitimacy, the state set up re-employment service centers to help the laid-off workers find alternative employment.⁸¹ It also engaged the help of labor dispatch agencies to sever the legal employment relationship with existing workers.⁸² To do so, the state made some workers resign and then reobtained the service of the same workers through labor dispatch agencies that directly hired them.⁸³ Labor dispatch agencies also helped other unemployed workers find jobs.⁸⁴ Therefore, the state regarded labor dispatch

75. *Id.* The following are the four modes of business presence for foreign enterprises entering China: wholly foreign owned enterprise, representative office, foreign vested partnership enterprise, and joint venture. A representative office serves as a liaison and promotion office for its parent company and is not allowed to directly engage in operational activities. It cannot sign contracts or issue invoices on behalf of the parent company; neither can it buy or own property. *Representative Office Registration in China*, PATH TO CHINA (Sept. 22, 2014), http://www.pathtochina.com/reg_ro.htm.

76. Xu, *supra* note 4, at 444.

77. *Labor Dispatch System in Reform*, *supra* note 73.

78. Xu, *supra* note 4, at 438.

79. *Id.* at 434.

80. Friedman & Lee, *supra* note 26, at 509.

81. The state called the laid-off workers “off-post” (xiagan) as opposed to “unemployed” to avoid any negative connotation. “Off-post” means that these workers were merely waiting for jobs. Xu, *supra* note 4, at 438–43.

82. *Labor Dispatch System in Reform*, *supra* note 73.

83. Xu, *supra* note 4, at 438–43.

84. *Id.*

agencies as an important institutional support in the labor market, enabling the state to phase out the “iron rice bowl” employment system and tackle the unemployment problem that existed at the time.⁸⁵

Third, the labor dispatch industry underwent unprecedented expansion as China became increasingly integrated into the global economy including its entry into the World Trade Organization (“WTO”) in 2001.⁸⁶ China’s abundant supply of relatively cheap labor and low labor standards lured foreign enterprises to set up production facilities in China or outsource their manufacturing operations to Chinese suppliers.⁸⁷ These foreign enterprises, along with domestic private enterprises, actively used labor dispatch in their operations.⁸⁸ Labor dispatch arrangements provided these enterprises with the kind of flexibility needed to meet fluctuating production needs caused by rapid shifts in demand, the implementation of new technologies, and recurrent economic cycles.⁸⁹ The supply of dispatch workers allowed enterprises to hire needed workers during times of economic expansion, while at times of cutbacks, enterprises could downsize their workforces without incurring massive layoff and unemployment costs.⁹⁰ In 2005, 85 percent of wholly foreign-owned enterprises used dispatch workers.⁹¹ The number of dispatch workers continued to rise, and labor dispatch agencies in China were established one after another as the labor dispatch service came to be seen as a highly lucrative and inexpensive business.⁹²

Fourth, the implementation of the Labor Contract Law in 2008 marked the beginning of another period of expansion of the labor

85. *Id.* at 442.

86. *Labor Dispatch System in Reform*, *supra* note 73. *China and the WTO*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited Oct. 4, 2014).

87. RONALD C. BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA 4 (2010).

88. *Labor Dispatch System in Reform*, *supra* note 73.

89. Orly Lobel, *The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy*, 10 TEX. WESLEYAN L. REV. 109, 115 (2003).

90. Steven J. Arsenault et al., *An Employee by Any Other Name Does Not Smell as Sweet: A Continuing Drama*, 16 LAB. L.J. 285, 285–86 (2000).

91. *Labor Dispatch System in Reform*, *supra* note 73.

92. *Id.*

dispatch industry.⁹³ The LCL touched the nerves of many businesses, as it made termination of workers prohibitively expensive and adjustment of the size of the workforce extremely difficult.⁹⁴ Some found that the law excessively empowered workers⁹⁵ and denounced it as instigating a return to the socialist “iron rice bowl” era.⁹⁶ As a result, employers increasingly turned to the use of dispatch workers.⁹⁷ The practice of using dispatch workers helped employers save significant costs in terms of social security payments, workers’ compensation, and severance pay as the workers were considered the employees of the labor dispatch agencies and not the host companies.⁹⁸ In anticipation of the LCL taking effect in 2008, many employers unilaterally terminated workers and demanded that the same workers sign contracts with labor dispatch agencies to resume their positions, known as “reverse labor dispatch.”⁹⁹ The labor dispatch industry as a whole experienced an “abnormal” boom.¹⁰⁰

II. COMPARISON OF THE LABOR DISPATCH PROVISIONS IN THE 2008 LABOR CONTRACT LAW AND THE 2013 AMENDMENT

The Chinese legislature took the first step to accord dispatch workers legal protection in the 2008 Labor Contract Law.¹⁰¹ Rather than benefitting from the new law, dispatch workers became a target of exploitation as companies substituted their direct hires with dispatch workers.¹⁰² This Part compares the labor dispatch provisions in the 2008 Labor Contract Law with the 2013 Amendment and exposes the loopholes that remain unclosed.

93. *Id.*

94. See Labor Contract Law, *supra* note 1, art. 36, 39–41.

95. Yin Lily Zheng, *It's Not What is on Paper, But What is in Practice: China's New Labor Contract Law and the Enforcement Problem*, 8 WASH. U. GLOBAL STUD. L. REV. 595, 596 (2009).

96. Geoff Dyer, *China's Labor Law Raises US Concerns*, FINANCIAL TIMES (May 2, 2007), <http://www.ft.com/cms/s/0/09d35e16-f8c4-11db-a940-000b5df10621.html#axzz2kGkj3O14>.

97. Roberts, *supra* note 10.

98. Standaert, *supra* note 7.

99. *Rights of 60 Million Labor Dispatch Workers Hard to Protect*, JINAN DAILY (China), Feb. 28, 2011, translated by China Labor News Translations.

100. *Id.*

101. Ho & Huang, *supra* note 7, at 980–81.

102. *Id.*

A. Labor Dispatch Provisions under the 2008 Labor Contract Law

The 2008 Labor Contract Law contained specific provisions that governed the labor dispatch industry and the use of labor dispatch arrangements.¹⁰³ Article 57 stipulated that labor dispatch agencies must have registered capital in the amount of at least 500,000 Renminbi (“¥”).¹⁰⁴ Article 58 identified labor dispatch agencies as the legal employers of dispatch workers and required them to fulfill the obligations of an employer.¹⁰⁵ Article 63 embodied the “equal pay for equal work” principle by stating that dispatch workers “shall have the right to receive the same pay as that received by employees of [the host company] for the same work.”¹⁰⁶ In the event that a host company did not have an employee in the same position, the remuneration would be determined with reference to that paid to an employee in the same or a similar position in the same geographical area.¹⁰⁷ Article 66 provided that “workers are dispatched *generally* for temporary, auxiliary, or substituting jobs.”¹⁰⁸ This provision was aimed at encouraging enterprises to directly hire workers and accord them the strengthened legal protection of the LCL, concerning pay, overtime work, termination, and union association rights.¹⁰⁹ “Temporary,” “auxiliary,” and “substituting” were not defined. Article 92 required labor dispatch agencies that violated the LCL to take corrective actions, and if the violations were severe, the agencies would be fined between RMB 1000 and RMB 5000 for every dispatch worker involved and have their business licenses revoked.¹¹⁰ In addition, it provided that a labor dispatch agency would bear joint and several liability with the accepting

103. Labor Contract Law, *supra* note 1, art. 57–67, 92.

104. *Id.* art. 57. ¥500,000 is approximately equivalent to USD 81,635. *Currency Converter*, BLOOMBERG, <http://www.bloomberg.com/markets/currencies/currency-converter/> (last visited Nov. 22, 2014).

105. Labor Contract Law, *supra* note 1, art. 58.

106. *Id.* art. 63.

107. *Id.*

108. *Id.* art. 66 (emphasis added).

109. Kevin L. Jones, *China’s Remedy for Labor Inequity Could Spark Unrest*, LAW 360 (Apr. 2, 2013), <http://www.faegrebd.com/webfiles/China’s%20Remedy%20For%20Labor%20Inequity%20Could%20Spark%20Unrest.pdf>.

110. Labor Contract Law, *supra* note 1, art. 93.

entity for compensation if any damage were caused to the dispatch worker, without regard as to who caused it.¹¹¹

B. The 2013 Amendment

The 2013 Amendment to the LCL specifically targeted the use of labor dispatch and the regulation of the labor dispatch industry. Mainly, it raised the entry capitalization threshold for labor dispatch agencies, restated the “equal pay for equal work” principle, restricted the situations in which dispatch workers could be used, and imposed higher penalties for both labor dispatch agencies and host companies for noncompliance of the law.¹¹²

The first provision of the Amendment increased the minimum registered capital required to operate a labor dispatch agency under Article 57 from ¥500,000 to ¥2,000,000.¹¹³ The second provision reemphasized the “equal pay for equal work” principle and mandated that employers apply the same “labor remuneration distribution methods” to dispatch workers and their direct hires.¹¹⁴ The third provision provided that direct employment must be “the *basic* form of employment” and that employment through labor dispatch arrangement would be “a *supplementary* form” and only used in “temporary,” “auxiliary,” and “back-up” positions.¹¹⁵ This provision defined a “temporary” position as a position that would last no more than six months; an “auxiliary” position as a position of non-core business operations that served the core business positions of the employer; and a “back-up” position as a temporarily vacant position that could be performed by others because a permanent employee was unable to complete his job responsibilities due to vacation leave, short-term study, or other legitimate reasons.¹¹⁶ In addition, the same provision required that the labor administrative department of the State Council prescribe a maximum percentage of dispatch workers

111. *Id.*

112. Su Yingsheng (苏应生) & Chen Chunmei (陈春梅), Qianxi Laodong Hetong Fa Xiuzhengan dui Laowu Paiqian de Yingxiang (浅析《劳动合同法(修正案)》对劳务派遣的影响) [Brief Analysis of the Impact of the Labor Contract Law Amendment on Labor Dispatch], 2 ZHONGGUO LAODONG 17, 17–19 (2013) (China).

113. The Amendment, *supra* note 3, provision 1.

114. *Id.* provision 2.

115. *Id.* provision 3 (emphasis added).

116. *Id.*

that an employer could use out of its total workforce.¹¹⁷ The fourth provision required a labor dispatch agency operating without a valid license to turn over any illegal gain and pay a fine of up to five times its illegal gain.¹¹⁸ It also ordered labor dispatch agencies and host companies that violated the law to take corrective actions promptly.¹¹⁹ If the dispatch agency or the host company took no corrective action within the prescribed deadline, it would be fined between ¥5000 and ¥10,000 for every dispatch worker concerned, and specifically, the dispatch agency would have its business license revoked.¹²⁰ The same provision required the dispatch agency to assume joint and several liability with the host company to compensate for any damage “caused by the [host company] to the dispatch worker involved.”¹²¹ The Amendment did not revise Article 58 of the LCL, which identified dispatch agencies as the legal employers of dispatch workers.

C. Analysis of the Current Law

Despite its intention to offer more protection to dispatch workers, the Amendment cannot achieve that purpose because, like the LCL, it does not clearly inform a dispatch worker of which party to pursue when his rights are violated. Instead, the Amendment adds a phrase “caused by the host company” to Article 92, which requires labor dispatch agencies to assume joint and several liability with host companies only for damages suffered by a dispatch worker caused by the host company.¹²² This addition means that a court is required to distinguish damages

117. *Id.* On Aug. 7, 2013, the Ministry of Human Resources and Social Security released draft measures for the implementation of the Amendment regarding labor dispatch for public consultation. Article 5 set the percentage of dispatch worker ratio at 10 percent. Guanyu Laowu Paiqian Ruogan Guiding Zhengqiu Yijian Gao Gongkai Zhengqiu Yijian de Tongzhi (关于<<劳务派遣若干规定(征求意见稿)>> 公开征求意见的通知) [Notice to Solicit Opinions on the Draft Measures for the Implementation of the Amendment Regarding Labor Dispatch] (issued by the Ministry of Human Resources and Social Security of China, Aug. 7, 2013) (China), http://www.mohrss.gov.cn/SYrlzyhshbzb/zxhd/SYzhengqiuyijian/201308/t20130807_109508.htm.

118. The Amendment, *supra* note 3, provision 1.

119. *Id.*

120. *Id.*

121. *Id.*

122. The Amendment, *supra* note 3, provision 4.

caused to a dispatch worker by a host company from those caused by a labor dispatch agency. If it is the former, the worker will be able to enforce a judgment against both the agency and the company; if it is the latter, the worker will only be able to obtain relief from the agency. This distinction matters because the dispatch worker has a better chance of actually recovering damages when both parties are held liable. Nevertheless, in reality, it may not be clear-cut as to who caused the damage to the dispatch worker, as demonstrated by the following cases.

In 2006, in Hanzhou, a dispatch worker who worked as a security guard in a factory died on the job.¹²³ It was not clear what exactly caused his death, but the incident took place at the factory.¹²⁴ The deceased's parents sued the labor dispatch agency, and the court held the agency liable.¹²⁵ However, since the death occurred at the factory, one may reasonably connect the death to the host company through, perhaps, its failure to provide safety protection for, lack of training for, or overworking of the guard. Yet the court found that, since it was a workplace casualty, the agency, which was the guard's legal and contractual employer, was liable.¹²⁶ Under the Amendment, which party caused the damage to the worker is pertinent to the deceased's family's ability to recover damages. If the court had found that the factory caused the guard's death, the family would have been able to enforce the judgment against both the factory owner and the labor dispatch agency, instead of only the agency.

In another 2006 case in Beijing, a dispatch worker, who worked as a promoter at a phone company, was owed overtime pay and demanded compensation from the phone company. However, he was denied the payment on the basis that the company did not have an employment relationship with him.¹²⁷ The worker then proceeded against his agency, but was again turned

123. Laowu Paiqian Yuangong Shangban Cusi: Shei lai Chengdan Zeren? (劳务派遣员工上班猝死: 谁来承担责任) [Who Bears the Responsibility of a Dispatch Worker's Death During the Course of Employment?], HUALUWANG (华律网) (China), Apr 11, 2012, <http://www.66law.cn/goodcase/12001.aspx>.

124. *Id.*

125. *Id.*

126. *Id.*

127. Laowu Paiqian Renyuan de Jiaban Gongzi Shei lai Zhifu (劳务派遣人员的加班工资谁来支付) [Who is Responsible for the Overtime Payment of a Dispatch Worker?], HUALUWANG (华律网) (China), Oct 12, 2011, <http://www.66law.cn/goodcase/10198.aspx>.

away because the agency maintained that it had never arranged for him to work overtime.¹²⁸ Eventually, the worker arbitrated the claim against both parties.¹²⁹ The arbitrator found the phone company liable, but also assigned joint and several liability to the agency.¹³⁰ This case demonstrates that both host companies and labor dispatch agencies have a tendency to shirk responsibility and impute liability to the other party when a dispute arises. Moreover, dispatch workers often do not know who their “employers” are because they perform work-related tasks for one and have a contractual relationship with the other.

This problem is further compounded by the fact that the heightened entry capitalization requirement from ¥500,000 to ¥2,000,000 does not necessarily make labor dispatch agencies be in a better position to compensate an injured dispatch worker, as past experience shows. When the LCL was passed in 2007, it raised the minimum registered capital for labor dispatch agencies from ¥30,000 to ¥500,000.¹³¹ Nevertheless, this increase did not result in dispatch workers receiving the pay and benefits to which they were legally entitled.¹³² On the contrary, by explicitly regulating labor dispatch, the law legitimized labor dispatch as a form of employment.¹³³ Many enterprises began to exploit this form of employment because the law merely advised that labor dispatch be used in certain limited situations, but did not completely foreclose their ability to use labor dispatch outside those

128. *Id.*

129. *Id.*

130. *Id.* This case was a bit unusual in that Article 62 of the Labor Contract Law, which was unrevised, expressly required a host company to pay overtime remunerations to dispatch workers. The fact that the worker arbitrated the claim against both the host company and his agency illustrates the point that dispatch workers can be confused about which party is liable for the damages they suffer.

131. *Rights of 60 Million Labor Dispatch Workers Hard to Protect*, *supra* note 99.

132. *Id.*

133. Chaos of Shenzhen’s Worker Remuneration: User Enterprises Use All Kinds of Ways to Evade Conforming to the “Equal Pay for Equal Work” Principle, *supra* note 71.

situations.¹³⁴ The labor dispatch industry underwent an unprecedented boom.¹³⁵ For instance, between 2010 and 2011, the number of agencies grew dramatically from 49,000 to 56,000.¹³⁶ One method labor dispatch agencies used to get around the law was to get the required registered capital through borrowing.¹³⁷ As soon as they obtained the business licenses to begin operations, the labor dispatch agencies could return the funds because the authority would not monitor or investigate the subsequent activities of the agencies.¹³⁸ Consequently, many of the agencies operate as “empty shells,” leaving dispatch workers with no relief if their rights are violated.¹³⁹

As an additional safeguard, shortly before the Amendment became effective, on June 20, 2013, the Chinese Ministry of Human Resources and Social Security issued detailed measures for the implementation of the administrative license for labor dispatch agencies.¹⁴⁰ Specifically, the Ministry would supervise and guide the work of labor dispatch agencies on an ongoing basis,¹⁴¹ and the dispatch agencies would have to submit annual reports about their business operations and financial situations.¹⁴² However, the dispatch agencies are not required to lodge the capital with a bank or financial institution. Therefore, it is possible for

134. *Id.*

135. *Id.*

136. During the same period, Japan and the United States came second and third in the ranking, but the total number of their private employment agencies had stayed virtually constant, at 20,000 and 13,910, respectively. Compare CIETT: INTERNATIONAL CONFEDERATION OF PRIVATE EMPLOYMENT AGENCIES, THE AGENCY WORK INDUSTRY AROUND THE WORLD 18 (2013), available at http://www.ciett.org/uploads/media/CiETT_EC_Report_2013_Final_web.pdf with CIETT: INTERNATIONAL CONFEDERATION OF PRIVATE EMPLOYMENT AGENCIES, THE AGENCY WORK INDUSTRY AROUND THE WORLD 12 (2012), available at http://www.ciett.org/fileadmin/templates/ciETT/docs/Stats/CiETT_econ_report_2012_final.pdf.

137. *Rights of 60 Million Labor Dispatch Workers Hard to Protect*, *supra* note 99.

138. *Id.*

139. *Id.*

140. Laowu Paiqian Xingzheng Xuke Shishi Banfa (劳务派遣行政许可实施办法) [Measures for the Implementation of Administrative License for Labor Dispatch] (issued by the Ministry of Human Resources and Social Security of China, Jun. 20, 2013) (China), http://www.gov.cn/flfg/2013-06/21/content_2430867.htm [hereinafter the Measures].

141. *Id.* art. 3.

142. *Id.* art. 22.

labor dispatch agencies to shuffle their funds and manipulate the information they submit in their annual reports, making it difficult for the Ministry to appraise their financial health.¹⁴³ The heightened entry requirement, therefore, will not guarantee relief for injured dispatch workers.

To ensure that a wronged dispatch worker can assert his rights and recover damages from a financially able party, it is necessary to re-conceptualize the notion of an “employer” in Chinese law. The labor contract system espoused by China relied heavily on the idea of bilateral contracts between workers and employers.¹⁴⁴ The LCL expressly identified labor dispatch agencies as the workers’ only employer.¹⁴⁵ However, the conception of the employer as a single indivisible entity failed to capture the reality that dispatch workers are subject to various sources of direction and supervision.¹⁴⁶ Although the law imposed joint and several liability on both host companies and dispatch agencies in certain situations,¹⁴⁷ it did not consider a host company an “employer.” Therefore, the current law has allowed enterprises to exercise functions of an employer, but avoid the formal status of an employer, thereby evading employer-related responsibilities.¹⁴⁸

III. THE DOCTRINE OF JOINT EMPLOYMENT IN THE UNITED STATES

The doctrine of joint employment, used in the United States, encapsulates the mechanics of distributing liability in a trilateral or multilateral employment arrangement. It is a mechanism by which responsibility can be ascribed to parties other than the

143. Chaos of Shenzhen’s Worker Remuneration: User Enterprises Use All Kinds of Ways to Evade Conforming to the “Equal Pay for Equal Work” Principle, *supra* note 71.

144. China borrowed the labor contract system from the West when it opened up its economy in the late 1970s. The traditional, Western employment relationship is founded on a bilateral contract between an employee and an employer. Thai, *supra* note 11, at *13–14; *see also* Zhang, *supra* note 28, at 148.

145. Labor Contract Law, *supra* note 1, art. 58.

146. Thai, *supra* note 11, at *13–14.

147. Labor Contract Law, *supra* note 1, art. 92.

148. Lobel, *supra* note 89, at 115–16.

contractual employer when more than one entity exercises employer functions over a worker.¹⁴⁹ Under this doctrine, an individual may be the employee of more than one employer in the same job, and an employer may be held liable for labor violations committed exclusively by another joint employer.¹⁵⁰ The advantage of this doctrine is that a worker can recover damages in the entirety from any one or all of the wrongdoers, so long as he does not receive double compensation.¹⁵¹

Various U.S. statutes incorporate the joint employer doctrine, and the Fair Labor Standards Act (“FLSA”) defines “employ” broadly as “to suffer or permit to work.”¹⁵² The tests for determining whether a joint employment relationship exists differ across federal circuits, but most courts focus on whether the alleged joint employer has asserted “control” over the workers.¹⁵³ Courts analyze the “economic realities” of the situation to determine the existence of a joint employment relationship.¹⁵⁴ This Note examines the tests used by the Ninth and Second Circuits, which illustrate formal control and functional control respectively.

A. *The Bonnette Test of the Ninth Circuit*

The Ninth Circuit developed a four-part test in *Bonnette v. California Health & Welfare Agency*, where it found that the California state and county welfare agencies were joint employers

149. Thai, *supra* note 11, at *24.

150. ABA SECTION ON LABOR & EMPLOYMENT LAW, EMPLOYMENT RIGHTS AND RESPONSIBILITIES COMMITTEE, *Joint Employer Liability under the FLSA: Wage and Hour Claims by Employees of Subcontractors and Litigation Issues Involving Undocumented Workers* (2012), http://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/employment_rights_responsibilities_committee_midwinter_meeting/25.authcheckdam.pdf.

151. Robert S. Peck, *The Development of the Law of Joint and Several Liability*, 15 HAW. B.J. 4, 4–5 (2011).

152. Fair Labor Standards Act (FLSA), 29 U.S.C. § 203(g) (2006).

153. PROSKAUER ROSE LLP, *Client Alert: Second Circuit Expands Potential Vicarious Joint Employer Liability for Wage and Hour Violations by Subcontractors* (2004), <http://www.proskauer.com/files/News/8aa36ed7-0eee-4367-b39f-51857271ec02/Presentation/NewsAttachment/2b216849-3313-424c-9543-10660a6b4853/4cde4963-fd99-4357-b9f7-a0abc6fc77c8.pdf>.

154. ABA SECTION ON LABOR & EMPLOYMENT LAW, *supra* note 150, at 2.

of chore workers who provided domestic in-home services to welfare recipients.¹⁵⁵ In order to avoid being considered the employer of the chore workers, the agencies provided the recipients with funds and asked them to select, hire, and pay the workers.¹⁵⁶ However, the agencies determined the tasks to be performed, hours required, and rate of pay and verified the hours worked before disbursing any payment.¹⁵⁷ The agencies also regularly supervised the chore workers' job performance.¹⁵⁸ The workers, who did not receive minimum wage, brought a claim to hold the state agencies jointly liable,¹⁵⁹ since their contractual employers, the welfare recipients, would not be able to pay any judgment. In determining whether the agencies were joint employers, the Ninth Circuit looked at whether the alleged employers (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.¹⁶⁰ Although the court did not make a determination as to whether the agencies had the power to hire and fire the chore workers, the court found that their overall influence and control made them joint employers of the chore workers.¹⁶¹

The *Bonnette* court expressly mentioned that the four factors were not intended to be "etched in stone"¹⁶² and, indeed, the court's application in *Zhao v. Bebe Stores, Inc.*¹⁶³ revealed the limitation of the four-factor test. In *Zhao*, although Bebe actively reviewed the work product of the subcontractor's employees for quality control purposes and retained a company to monitor the subcontractor's compliance with applicable labor laws, Bebe was not a joint employer with the subcontractor.¹⁶⁴ The court reasoned that the subcontractor had the full power to hire and fire the workers, control the workers' schedules, and determine the

155. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

156. *Id.* at 1468.

157. *Id.*

158. *Id.* at 1470.

159. *Id.* at 1468.

160. *Id.* at 1470.

161. *Id.*

162. *Id.*

163. *Zhao v. Bebe Stores, Inc.*, 247 F. Supp. 2d 1154, 1157 (C.D. Cal. 2003).

164. *Id.* at 1160.

rate and method of pay, and it maintained employment records.¹⁶⁵ The *Bonnette* factors, therefore, mainly focused on formal control and did not account for functional control.

B. The Zheng Test of the Second Circuit

Acknowledging the limitations of the *Bonnette* factors, the Second Circuit in *Zheng v. Liberty Apparel Co., Inc.* stated that the four factors were sufficient, but not necessary, to establish joint employment.¹⁶⁶ In *Zheng*, a garment manufacturer contracted out the last phase of its production process to a contractor, which, in turn, hired the plaintiff garment workers and did not comply with the national minimum wage requirements.¹⁶⁷ The workers alleged that their work was done predominantly for the manufacturer and that the manufacturer sent representatives to the contractor's factory regularly to inspect their work and give instructions and orders.¹⁶⁸ The appellate court found that the trial court erred by relying exclusively on an analysis of the four *Bonnette* factors.¹⁶⁹ It remanded the case and ordered the trial court to consider the following six factors, in addition to the *Bonnette* factors: (1) whether the premises and equipment of the alleged joint employer were used for a worker's task; (2) whether the subcontractor had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which the worker performed a discrete line-job that was integral to the alleged joint employer's process of production; (4) whether responsibility under the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the alleged joint employer supervised the worker's work;

165. *Id.*

166. *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 79 (2d Cir. 2003). In *Zheng*, the Second Circuit referred to the *Bonnette* factors as the "*Carter* factors" because it previously adopted them in *Carter v. Dutchess Community College*, 735 F.2d 8 (2d Cir. 1984). For the purposes of consistency, this Note will refer to the four-factor test as the *Bonnette* test.

167. *Zheng*, 355 F.3d at 64–65.

168. *Id.* at 65.

169. *Id.* at 78–79.

and (6) whether the workers worked exclusively or predominantly for the alleged joint employer.¹⁷⁰ By examining these factors, the Second Circuit acknowledged that an entity that had “functional control” over a worker, even in the absence of the formal control measured by the *Bonnette* factors, could be found to be a joint employer.¹⁷¹

IV. INCORPORATION OF THE DOCTRINE OF THE JOINT EMPLOYER INTO CHINESE LAW

By incorporating the doctrine of joint employer into its law, China can ensure that dispatch workers are able to assert their rights against all entities that act as an “employer” and enforce a judgment against the more financially equipped party. Moreover, such a “transplantation” of a common law doctrine into a civil law system is workable.¹⁷² To do so, Article 58 of the Labor Contract Law should re-conceptualize the notion of an employer as any entity that exerts “formal or functional” control over dispatch workers, and not limit that notion to entities that have a contractual relationship with the workers. The terms “formal control” and “functional control” should be loosely defined, and the *Bonnette* factors and the *Zheng* factors should be included as a non-exhaustive list of factors to be considered by judges. These factors will be useful guideposts for judges to assess whether an

170. *Id.* at 72. The six factors were drawn from *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (finding that a slaughterhouse was a joint employer of meat boners, even though it did not hire the meat boners, set their hours, and pay them, and that meat boners were hired by their supervisors with whom the slaughterhouse contracted).

171. *Zheng*, 355 F.3d at 72.

172. China is a civil law country, and the United States is a common law country. The two have different political and economic systems. When “transplanting” laws from one legal system to another, Alan Watson, a legal commentator, argued that law is separate from social systems and that “borrowing” from a very different legal system, such as one at a different stage of development or with a different political structure, could be successful. In his opinion, the legal reformer is looking for an *idea* that could be incorporated into part of the law of his country, and the success of such a legal transplant depends on the recipient country’s desire for, or receptiveness to, the foreign legal rule, rather than similarities with its context. Anthony Forsyth, *The ‘Transplantability’ Debate in Comparative Law and Comparative Labor Law: Implications for Australian Borrowing from European Labor Law* 2–3 (Ctr. for Emp’t & Labor Relations L., Working Paper No. 38, 2006), available at <http://www.law.unimelb.edu.au/files/dmfile/wp381.pdf>.

entity has exercised meaningful control over a worker so as to be deemed a joint employer.

Moreover, in the revised Article 92 of the LCL, the distinction between damage caused to a dispatch worker by a host company and that caused by a labor dispatch agency should be eliminated. Entities that are found to be joint employers of the dispatch worker should be jointly and severally liable for *all* employment-related damages.

To illustrate how the incorporation of the joint employer doctrine will help dispatch workers assert their rights against, and recover damages from, entities other than the labor dispatch agencies, their contractual employers, this Note will apply the *Bonnette* and *Zheng* factors to the case of Apple, Inc. (“Apple”). Apple, a prominent multinational company that designs, develops, and sells consumer electronics and computer software, has contracted with a number of suppliers in China to manufacture its products.¹⁷³ These suppliers, in turn, hire a large number of dispatch workers to work at their factories.¹⁷⁴ In this scenario, four parties are involved in this employment relationship—Apple, the Chinese suppliers, the labor dispatch agencies, and dispatch workers. Neither the suppliers nor Apple have a contractual relationship with the dispatch workers. These dispatch workers, in reality, are treated like “second-class workers” in the factories.¹⁷⁵ They generally receive lower wages and fewer benefits, while working longer hours.¹⁷⁶ Many suffer from work-related injuries, and some have even committed suicide.¹⁷⁷ Under the current law, these injured workers may bring a lawsuit against the agencies and potentially the factories, if the injuries were caused by the factories. Nevertheless, Apple, the most wealthy and responsible party, can walk away without any accountability. If the court finds that the agency is responsible for a worker’s injury, the worker will only be able to recover from the agency, which is unlikely to have sufficient resources to pay damages. If the court finds that the factory is responsible, the worker will be able to cover from both the agency and the factory.

173. See CHINA LABOR WATCH, BEYOND FOXCONN: DEPLORABLE WORKING CONDITIONS CHARACTERIZE APPLE’S ENTIRE SUPPLY CHAIN (June 27, 2012), <http://www.chinalaborwatch.org/pdf/2012627-5.pdf>.

174. *Id.* at 10–18.

175. *Id.* at 11.

176. *Id.* at 6–8.

177. *Id.* at 3.

Yet, the factory may not necessarily be in a better position to compensate the workers because it may have cash flow problems.

If the court applies the *Bonnette* and *Zheng* factors of the joint employer doctrine, it will be irrelevant which party caused the damage to the worker. As long as the injury is employment-related, the court will look at both formal and functional control exerted by the factory and Apple. Since Apple is the one that prescribed the product requirements and both Apple and the factory exercise some degree of control over the dispatch worker in terms of quality control, they may be held as joint employers. In this case, the worker will be able to recover from the agency, the factory, and Apple. Access to Apple's deep pockets is important because, more likely than not, Apple will be the only party that can afford to compensate the workers.

The *Zheng* test, which focuses on functional control of an alleged joint employer when formal control is absent, is particularly useful in the finding of a joint employer liability when an enterprise uses a subcontracting arrangement as a subterfuge to evade employer obligations.¹⁷⁸ Many multinational enterprises engage Chinese subcontractors to perform some aspects of their work and exert general quality control, but avoid direct involvement in the employment practices of the subcontractor in order to avoid liabilities.¹⁷⁹ Application of the *Zheng* test will help to bring these enterprises into the purview of the law and allow

178. *Client Alert: Second Circuit Expands Potential Vicarious Joint Employer Liability for Wage and Hour Violations by Subcontractors*, *supra* note 153.

179. Jabil Circuit, an electronics manufacturer that produced the rear plastic cover for Apple's iPhone 5C, infringed its workers' rights in numerous ways, including the following: excessively long work hours, refusal to provide work breaks, use of dispatch workers beyond statutory limits, lack of safety training, and forcing workers to sign disclaimers releasing it from any liability. See CHINA LABOR WATCH, CHINESE WORKERS EXPLOITED BY U.S.-OWNED IPHONE SUPPLIER: AN INVESTIGATION OF LABOR CONDITIONS AT JABIL GREEN POINT IN WUXI, CHINA (Sept. 5, 2013), http://www.chinalabor-watch.org/pdf/Jabil_Green_Point.final.pdf. Samkwang, a supplier with factories in several locations in Asia, including China, manufactures cell phones and electronic parts and components for Samsung, is involved in many labor violations. Its factory in China made its workers work excessively long hours, did not pay for overtime, hired dispatch workers in excess of the statutory limit, provided inadequate training, and failed to maintain a safe and satisfactory working environment. See CHINA LABOR WATCH, INVESTIGATIVE REPORT OF SAMKWANG SCIENCE & TECHNOLOGY CO., LTD. (Dec. 5, 2013), http://chinalabor-watch.org/pdf/2013.12.11_Dongguan_Samkwang_Science_and_Tech.pdf.

dispatch workers to access an additional, and often more financially able, entity for recovering damages.

CONCLUSION

China's extraordinary economic success since its initiation of economic reforms and trade liberalization has stunned the world. However, its legal system has not had the luxury of time to undergo a lengthy elaboration process, but has had to compress this process into a very short period.¹⁸⁰ Borrowing and adopting foreign laws is inevitable, and China will benefit from incorporating the doctrine of joint employer from the United States; so that economic development will not be carried out at the expense of workers who lack bargaining power. In fact, globalization has increased the need for ever greater organizational flexibility and increased competitive pressure, the misuse and overuse of agency workers have become commonplace in many countries, some of which have considered or experimented with the idea of dual or joint employers.¹⁸¹ The joint employer doctrine sanctions enterprises that externalize liabilities onto third parties while benefiting from the fruit of dispatch workers' hard work. It is a broader and fuller conceptualization of the employment relationship found in a labor dispatch arrangement.

*Ka Ni Li**

180. Cooney, *supra* note 56, at 1058.

181. In France, a 1979 Act required agencies to lodge funds in a bank or a financial body, and when the financial guarantee is insufficient to cover the agencies' liabilities to the workers, the host company will shoulder subsidiary liability and be required to make payment to the workers, despite an absence of contractual relationship. Christophe Vigneau, *Employment Agencies: Temporary Agency Work in France*, 23 COMP. LAB. K. & POL'Y J. 45, 48–49 (2001). Italy considered the possibility of integrating the idea of dual employership into its labor regulatory framework. See Luca Ratti, *Agency Work and the Idea of Dual Employership: A Comparative Perspective*, 20 COMP. LAB. L. & POL'Y J. 835 (2009).

* BSc, The University of Manchester (2011); J.D. Brooklyn Law School (expected 2015); Executive Articles Editor, *Brooklyn Journal of International Law* (2014–2015). I would like to thank Professor Barbara Gartner and the entire staff of the *Brooklyn Journal of International Law* for their diligent review and constructive feedback throughout the preparation of this Note. I would also like to thank my parents for their unconditional love and support in all my life's endeavors. Any errors or omissions are my own.