

CHINA

Legal Bulletin

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Executive Summary

The Evolution of Trade Unions in the PRC

The history of China's trade unions pre-date the founding of the PRC and span to the present post economic boom era where China is a global player in the market place around the world. These trade unions have gone through a number of changes over the years, but in many ways have retained several of their earlier characteristics. These organizations exist on huge Communist Party levels and reach to the most nominal size enterprises. From a time when they were merely voluntary till the present when the Chinese Government has endeavored to make them all but mandatory, Chinese trade unions are in a constant evolution and understanding their history, as well as their likely future, is an advantage to anyone doing business in the PRC.



Women in the Workplace: PRC Regulations on Female Labor

Female labor law has gone through periods of being a virtual minefield in a number of countries around the world. China is no different. This article includes some basic regulations regarding female employment of which every investor and employer in China should be aware. In addition, there are a number of regulations that many are likely not aware of and seem quite unique to China.



The Evolution of Trade Unions in the PRC

Trade Unions, more commonly referred to as Labor Unions in the west, have been undergoing complex changes for decades in China. As China's economy and needs change so has the basic functions of its labor/trade unions. The trade unions in China have served multiple purposes over their existence ranging from political organizations to social clubs, but are becoming more and more focused on protecting the employees. Trade unions in China today exist on different levels. The All China Federation of Trade Unions (ACFTU) organizes trade unions at the nation wide, provincial, and even city wide level. The provincial and city trade unions while not being completely controlled by the ACFTU are still subject to their oversight and management. The other level of trade unions lies in the basic unions of a specific company or enterprise. These unions are autonomous and are truly the unions that are where basic changes are made and the rules, laws and regulations are theoretically enforced. . The majority of this article will focus on the basic level trade unions.

Before the Founding of the People's Republic of China in 1949 unions were basically an arm of whatever political faction controlling them and were merely an extension of the party. The

obvious role of unions at this time was to carry out political agendas. After 1949 all manufacturing endeavors were nationalized. The Communist Party considered itself representing the "unified will of the people" and there was of course no hostility between the State Owned Enterprise's (SOE's) management and the common work force.¹ During this time period when doing business with foreign parties Chinese delegates would not allow references to "labor unrest" in force majeure clauses as this was a western problem that did not exist in China.²

Even though the Communist party considered itself the representative of the people, *Trade Union Law* of the PRC of 1950 was drafted, but remained untouched and was not amended until 1992 and again in 2001. In the years following the Founding of the PRC trade unions were usually considered administrative organizations that assisted employees in understanding labor rules and requirements, social clubs that subsidized social events or agents of the government that exerted control over enterprise.³ At this stage Chinese labor unions were not only funded by the government, the employees appointed were usually members of the Communist party put in place to carry out the wishes of the state.⁴

With the change of the Chinese economy in the early nineties the role of labor unions was desperately in need of an overhaul. Foreign firms



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entering the country regularly ignored the rights of their workers and employed oppressive working conditions.⁵ The *1992 Trade Union Law* made specific modifications to the previous Trade Union Law and gave the laborers more defined protection. This 1992 modification gave trade unions the right to request employers to rectify behavior that did not comply with agreements reached and agreed to with labor representatives, assist employees with labor contracts and question the employer if it was believed that employees were receiving unfair treatment.⁶ One large adjustment adopted in 1992 is, not only did these modifications give the right to represent and defend employees against violations of PRC labor laws and regulations by their employer, it declared this representation and defense of the employees the obligation of the unions.⁷

Despite the amendments made to trade union law in practice the trade unions rarely represented the laborer's interest. The reconciliation of the ideas that a trade union is put in place to protect the worker and not a social club or arm of the government has been slow to take place.⁸ In addition, managers who represent the wishes of the employer from these enterprises regularly become members and even directors of these unions silencing the voice of the laborers.⁹

In the west most labor unions raise funds by charging their members dues or may be supported by tax dollars. Keeping the organization or industry separate from the union is paramount for ensuring the wellbeing of the laborers is the ultimate interest of the union. The characteristic of trade unions in China that will strike most western countries as peculiar is the fact the SOE's themselves are required to pay 2% of their overall payroll to the union, making the company itself the union's largest financial benefactor. Foreign Investment Enterprises (FIE's) were spared this requirement until the amendments promulgated in the *2001 Trade Union Law* which then allowed the ACFTU to force some FIE's to establish basic level unions in China.¹⁰ In addition, it gave laborers the right to form labor unions at will regardless if it was an SOE or and FIE. The basic level trade unions also collect dues, collect subsidies, and are allowed other forms of income.¹¹

Also, until the 2001 amendments FIE's were required to fund only some capital to their trade union but only if one existed, but post the 2001 Amendments FIE's were required to pay 2% of their payroll to unions regardless if their enterprise had a basic level union or not.¹² If there was no basic level union the money went directly to the ACFTU. Of the monies the basic level unions receive they are only allowed to keep 50% while being required to kick up 50% to the provincial unions and ACFTU.¹³ Most of these funds are spent on political training (propaganda), entertainment, training, administration expenses as well as other expenses.¹⁴ It becomes evident why the older views of the unions are slow to dissipate. While there is no regulation or law from the top levels of the Communist Party requiring unionization there are some local or provincial levels that require unionization, even for FIE's, although foreign firms still resist the implementation.

In recent years there have been a number of amendments to trade union law that are aimed at protecting the worker and not the enterprise.¹⁵ By the new statutes technically trade unions are mandatory.¹⁶ That being said, it is still very common for the individuals who head these labor unions to be in the pocket of the enterprise. While new amendments bolstering the rights of the common worker is a welcome site the new adjustments to the law still give no power to strike or organize slow downs.¹⁷ Most of these powers have been restrained in order to give foreign investors confidence in the power they will be able to wield over their investments. The ACFTU has the ultimate authority over these unions. Any union outside of the ACFTU would be deemed illegal and would be subject to arrest, once again enforcing control over the work force, quelling fears of investors.¹⁸

As previously stated, the manner in which the head of these basic level trade unions have been under scrutiny as the leader, in most cases, commonly had either the enterprise's or party's interest in mind, not the laborers. In response, *The Measures for the Election of the Trade Union Chairman of an Enterprise* was issued and became effective in 2008.¹⁹ Under Chapter IV, titled *Democratic Election*, Article 13 plainly says "The trade union chairman of an enterprise shall be elected under democratic elections procedures

according to law."²⁰ However, Article 15 of these measures read "The trade union chairman of an enterprise may be directly elected at the members' meeting, or be elected by the trade union committee of the enterprise; and may be elected concurrently with the election of the members of the trade union committee of the enterprise, or be separately elected."²¹ This outlines a number of ways an election can be held. It could be carried out by popular vote of all union members or a vote by a group of representatives for the union members, or a trade union committee put in place to make decisions on behalf of the trade union. Article 16 of this measure goes on to stipulate that there must be 2/3rds of the voting members taking part in the vote for it to be valid.²²

With regards to these popular votes that are held by groups of representatives or committees the question arises; how are these groups formed? If these groups are put together by the government or employer it would obviously seem to, once again, be an outlet to circumvent the will and protection of the employees. The Trade Union Law amendments of 2001 addressed this area vaguely by speaking to the ways in which these representative groups or committees function under Chapter 4 *Basic-level Trade Union Organizations*.²³ Seems the only reference of how these groups function is outlined by Article 35 of the Trade Union Law which says "The employee representative assembly of a state-owned enterprise shall be the basic-level structure through which the enterprise executes democratic management as it is the body through which the employees may exercise their rights to democratic management in accordance with the legal provisions."²⁴ It goes on to say, generally, that these committees should represent the wishes of the employees.²⁵ Although, with regards to exactly how these representative groups or committees come into existence, if it be by the hand of the employer, laborer or government, I have not found any guidelines in PRC regulations.

While it is stipulated in trade union law that the representatives of the basic level trade unions should be elected by democratic function it has rarely occurred this way in practice until recently. In early 2012 a labor dispute at Ohm's electronics

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in Shenzhen brought about a surprising development in China's ever changing labor union frontier. The Southern Metropolis Daily reported that resulting from this labor dispute the employees pulled together and democratically elected the leader of their union. The Vice Chairman of the Shenzhen Municipal Federation of Trade Unions not only attended the democratic elections but stated that he would promote the spread

of this democratic process. Although, the situation has drawn some opposition, the secretary of the Communist Party of China (CPC) Guangdong Provincial Committee, Wang Yang, has lambasted the democratic process.

So the question is; has a new day for China labor unions come about? Will we see the spread of laborers democratically electing their union representatives who

will then in turn have a strong motive to represent the laborer and not the firm? Or will we see opposition from the CPC such as the CPC Guangdong Provincial Committee quash this potential movement? Either direction taken could have large implications to the process of doing business in China in the future.

By Joe Rocha III & Caleb McMahon

1. See Winston Zhao, *Ensuring Compliance with China's New Labor Laws*, Corporate Law and Practice Course Handbook Series, June-July, 2008, at 149, 170. [Hereinafter China's New Labor Laws].
2. *China's New Labor Laws*, 170
3. *Id.*, 171
4. *Id.*
5. *Id.*
6. *Trade Union Law* (Article 16-20 of the 1992 Law and Article 19-22 of the 2001 Law).
7. *Id.* (Article 21 of the 1992 Law and Article 22 of the 2001 Law)
8. *China's New Labor Laws*, 172
9. *Id.*, 173
10. See Zana Z. Bugaighis, *What Impact Will the Revised Trade Union Law of China have on Foreign Business?*, Pacific Rim Law and Advisory Journal, March 2007, 16 Pac. Rim L. & Pol'y J. at 405, 412 [hereinafter *What Impact Will the Revised Trade Union Law of China have on Foreign Business*]
11. *Trade Union Law*, Article 42
12. *China's New Labor Laws*, 177
13. *Id.*, 178
14. *Id.*, 179
15. See generally *What Impact Will the Revised Trade Union Law of China have on Foreign Business*
16. *Id.*
17. *Id.*
18. See Aaron N. Lehl, *CHINA'S TRADE UNION SYSTEM UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: IS CHINA IN COMPLIANCE WITH ARTICLE 8?*, University of Hawaii Law Review I, Summer, 1999, 21 U. Haw. L. Rev. 203 at 203, [hereinafter *China's Trade Union System*]
19. *Measure for the Election of the Trade Union Chairman of an Enterprise* (for Trial Implementation) (July 25, 2008), database@chinalawinfo.com
20. *Id.*, at Article 13
21. *Id.*, at Article 15
22. *Id.*, at Article 16
23. *Trade Union Law*, Chapter 4
24. *Trade Union Law*, Article 35
25. See generally *Trade Union Law*, Chapter 4

Women in the Workplace: PRC Regulations on Female Labor

On April 8th, 2012 the 200th meeting of the State Council was held and the *Special Regulations Concerning Labor Protection of Female Employees* (hereinafter "these regulations") were promulgated repealing the previous *Regulations Concerning Labor Protection of Female Employees of July 21st, 1988*.¹ While the changes themselves are minute, the overall regulations are imperative to know and understand. There are facets of these regulations that will seem a bit peculiar, especially for Foreign Investment Enterprises (FIE's) that may not be familiar with them.

While some regulations, as previously stated, may be peculiar for the most part the regulations addressing female labor are quite standard. For example, it is illegal to terminate or lower the salary of a female employee as a result of her becoming pregnant. These regulations also go on to prohibit pregnant women from certain

work such as work of high levels of intensity, heavy lifting, working around dangerous chemicals, and the like. In addition, the standard maternity leave in the PRC is 98 days. An extra 15 days is granted if multiple children are born (i.e. twins) and in the occurrence of dystocia.

Now for a few regulations with regards to pregnant women that may be considered a little more interesting to the western laoban. While intensive labor for pregnant women is not allowed, the council found it pertinent to specifically ban pregnant women from working in "mine pits." Pregnant women are also not allowed to perform any work at high altitudes or perform any task in which they may come into contact with cold water. Pregnant women are also not allowed to work in areas where there is considered to be extreme or loud noises. If the female employee's position is not considered appropriate for a pregnant woman then

it is the responsibility of the employer to find her a placement that is suitable for the employee during the pregnancy. Also, once the pregnant employee becomes seven months pregnant it is against these regulations to allow her to work night shifts.

Once a female employee returns to work from her pregnancy leave she is still provided with certain concessions. Women who have a child who is one year old or less are not allowed to work "extended hours" and can not be assigned night shifts. The most generous consideration is for a mother in the nursing period. During this period the mother is allowed a one hour break per day for nursing purposes. If she has multiple children in the same birth (i.e. twins) she is allowed an additional hour for each additional baby. So fair warning, if you have a female employee who has triplets, expect to have a compensated absentee employee for a period of time.



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A news article recently spot lighted the reaction of women being asked details about their menstrual cycle when taking the Chinese civil service exam.² Most of the women voiced that they felt these were odd questions for what was the equivalent of a job application.³ In reality, the questions were not without merit. There is a whole section of labor regulations that address female employees and what is to be avoided during menstrual cycles.⁴ According to the *Regulations Concerning Labor Protection of Female Employees* women during their menstrual cycle, like women during pregnancy, can not take part in labor that would put them in contact with cold water, labor in low temperatures or labor at high altitudes. If an employer is worried about what water is too cold, what temperature is too hot, or what altitude is too high there are specific guidelines outlined by the government addressing each of these issues in the *Standards of Classification of Labor involving Contact with Cold Water*; *Standards of Classification of Labor in Low Temperatures*, and *Standards of Classification of Labor at High Altitudes*.

These regulations are usually put more to use in manufacturing facilities and are not required in some service industries. Although, before dismissing these regulations as inconsequential

be warned that these policies do have teeth. Depending on the severity of the infraction fines can be levied against the enterprise anywhere from 1,000 RMB-300,000 RMB as outlined in article thirteen and fifteen of the new *Regulations Concerning Labor Protection of Female Employees*. If the offense is severe enough it is even possible for criminal charges to be filed.

Last, but far from least, these new regulations do leave a very interesting area of female labor regulations unanswered. With the one child policy that China has been enforcing for over three decades it has become popular for women who want more than one child to leave the country to have these children. Article 15 of the original *Regulations Concerning Labor Protection of Female Employees* stipulates that "If a female employee violates the birth control regulations of the State, her labor protection shall be handled in accordance with the birth control regulations of the State and these Regulations shall not apply".⁵ These new regulations delete the content of such clause. Employers are understandably at a loss for what guidelines they should follow in the case their female employees are in fact violating the one child policy and in turn having a number of children. The new regulations do not address if

an employer may terminate their labor contract or if her employer should still adhere to these regulations and grant the employee a maternity leave of at least 98 days and follow the additional guidelines outlined for pregnant women. In practice, when a female employee violates the one child policy, the company has granted an unpaid work leave of 98 days, but there has been no authority that has declared this lawful. Whether governmental authorities promulgate any specific measures on implementation of these regulations or any court publicizes relevant cases in the future, this topic will undoubtedly be one hotly followed.

Most of the regulations regarding female employees in the PRC would be considered standard. Although, one may assume the most common, most known, most established regulations are usually not where potential legal pitfalls lie, especially for foreign investors. These pitfalls usually exist in the eccentricities of the countries code influenced by history and culture. It is pertinent to understand the labor laws of the country you are in, especially if they are as dynamic as the PRC's female labor regulations.

By Lu Yunguang & Caleb McMahon

1. *Special Regulations Concerning Labor Protection of Female Employees*, April 8th, 2012
2. Anonymous, *China Odd, Strange & Weird* (March 21, 2012), <http://www.chariweb.com/2012/03/lawyers-to-swear-party-loyalty.html>
3. *Id.*
4. *Special Regulations Concerning Labor Protection of Female Employees*, April 8th, 2012
5. *Regulations Concerning Labor Protection of Female Employees of July 21st, 1988*

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