

INTERNATIONAL LABOR LAW FUNDAMENTALS: CHINA

ABA Section of Labor and Employment Law
Philadelphia ~ November 9, 2007

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I. INTRODUCTION

Many Chinese laws are modern imports.¹ Historically, Confucian codes of conduct greatly influenced Chinese law,² which is significant, because the teachings stated that individuals should be guided by *li*, virtue or propriety, as opposed to *fa*, the law.³ The general idea was that virtuous conduct had to come from the individual with an understanding that one should act under duty and obligation to others, not because of some legal compulsion. China's desire to join the World Trade Organization (WTO) was undoubtedly a motivating factor for the development Chinese law in the late twentieth century. Parallel with other reforms undertaken after Chairman Mao's death in 1986, China requested resumption of its contracting party status with the WTO and, in 1987, a working party on China's membership to GATT was established.⁴ From 1995 to 2001, China submitted detailed information to the WTO, including its revision and enforcement of laws -- with particular emphasis on intellectual property rights, including trade secrets -- to comply with WTO requirements under its Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁵ Likewise, employment and labor laws enacted over the last decade are designed to address concerns of both workers and employers. Underscoring its commitment to developing a transparent legal system, the 1999 Constitution of the People's Republic of China specifically states that China "exercises the rule of law, building a socialist country governed according to law."⁶ Chinese commitment to the rule of law has been reemphasized by President, Hu Jintao.⁷ To aid firms doing business in China, this paper details relevant major labor and

¹ See William C. Jones, *Trying to Understand the Current Chinese Legal System* in UNDERSTANDING CHINA'S LEGAL SYSTEM at 7 (C. Stephen Hsu, ed. 2003).

² *Id.*

³ JAMES M. ZIMMERMAN, CHINA LAW DESKBOOK: A LEGAL GUIDE FOR FOREIGN-INVESTED ENTERPRISES 32 (2d ed. 2005); Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 52 (2001); J. ZHANG, A SURVEY OF LEGAL HISTORY 65 (Fa Shi Jian Lue) (Mass House Publishing: Beijing 1987).

⁴ Karen Halverson, *China's WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 325 (2004).

⁵ H.E. Vice Minister Long Yongtu, Head of the Chinese Delegation, Fourteenth Session of the Working Party on China, WTO News Dec. 8, 2000, http://www.wto.org/english/news_e/news00_e/wpchina_longstatement_e.htm. See generally Veronica Weinstein & Dennis Fernandez, *Recent Developments in China's Intellectual Property Laws*, 3 CHINESE J. INT'L L. 227 (2004) (detailing developments in China's IPR laws to comply with TRIPS); Keith E. Maskus, *Intellectual Property Rights in the WTO Accession Package: Assessing China's Reforms* Dec. 16, 2002, http://siteresources.worldbank.org/INTRANETTRADE/Resources/maskus_tips.pdf#search (discussing China's pre-WTO reforms to intellectual property laws). See Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

⁶ Constitution of the People's Republic of China, Art. 5 (1999), http://www.novexc.com/prc_constitution_1999.html.

⁷ ZIMMERMAN, *supra* note 3, at 23 (citing THE U.S.-CHINA BUSINESS COUNCIL, CHINA OPERATIONS 2003, CHINA

employment law developments in China, including the newly adopted Labor Contract Law, protection of trade secrets under the Unfair Competition Law, discrimination and the protection of minors and female workers, sexual harassment, and workplace health and safety.

II. CHINA'S NEWLY ADOPTED LABOR CONTRACT LAW

For over a year, the Standing Committee of the National People's Congress ("SCNPC") reviewed various drafts of the Labor Contract Law. On June 29, 2007, the SCNPC passed the Labor Contract Law, which will take effect on January 1, 2008.⁸ Existing labor contracts are grandfathered by the new law. Thus, employers do not need to require existing employees to sign new contracts.

▪ **Note: China's 1995 Labor Law**, required all employers to execute labor contracts with their employees to establish the labor relationship and to specify the "rights, interests and obligations of each party."⁹ The Labor Law specified that a written labor contract must contain provisions addressing: 1) the time limit of the contract; 2) the content of the work; 3) labor protection and labor conditions; 4) labor remunerations; 5) labor disciplines (e.g. work hours, rest periods, rest days, vacation time, and holidays); 6) conditions for the termination of the agreement; and 7) liabilities for violations of the agreement.¹⁰ The labor contract may also include provisions "concerning the keeping of the commercial secrets of the employer."¹¹ This provision is important because it affords employers a formal mechanism to prevent employees from divulging trade secrets.¹² These contracts, including confidentiality provisions are still valid for existing employees.

2007 LABOR CONTRACT LAW: All employees who commence employment on or after January 1, 2008, however, have the benefit of the new Labor Contract Law, which is designed to protect their legal rights and to promote harmonious and stable employment relationships.¹³ Key provisions:

ANALYSIS: CHINESE POLITICS UPDATE, at 44). For an interesting perspective about the Chinese legal system and the role of the rule of law, see, Frank K. Upham, *Who Will Find the Defendant if He Stays with His Sheep? Justice in Rural China*, 114 YALE L.J. 1675 (2005) (reviewing *Song fa xiexiang: Zhongguo jiceng sifazhidu yanjiu* or *Sending Law to the Countryside: Research on China's Basic-Level Judicial System* by Zhu Suli, which was published in China in 2000).

⁸ China's Legislature Adopts Labor Contract Law (June 29, 2007), http://news.xinhuanet.com/english/2007-06/29/content_6308557.htm. Because the official translation of the Labor Contract Law [hereinafter Labor Contract Law] was not yet available at the time this article went to print, but an unofficial translation is on file with the author.

⁹ Labor Law of the People's Republic of China (adopted July 5, 1994, by the 8th Sess. of the Standing Comm. of the 8th NPC; effective as of Jan. 1, 1995), Art. 16, <http://www.jus.uio.no/lm/china.labor.law.1994/doc.html> [hereinafter Labor Law].

¹⁰ *Id.*, art. 19.

¹¹ *Id.*, art. 22.

¹² For a provocative discussion about whether a company should seek patent protection or trade secret protection in China, see, Robert Bejesky, *Investing in the Dragon: Managing the Patent Versus Trade Secret Protection Decision for the Multinational Corporation in China*, 11 TULSA J. COMP. & INT'L L. 437 (2004). This is an important issue in the context of business methods, because at this time the patentable status of business methods is in question in China. *Id.* at 441.

¹³ Labor Contract Law, *supra* note 10 at art. 1.

▪ **Written Employment Contract**

The Labor Contract Law requires the employment relationship to be based on a written employment contract.¹⁴ Employment contracts are divided into three types: fixed-term employment contracts, open-ended contracts and contracts for the completion of a certain project.¹⁵ As a disincentive to employers who might be tempted to fail to secure a written contract with an employee, the law provides clear penalties. If an employer fails to secure a written labor contract with the employee for more than one month, but less than one year following the employee's first day of employment, the employer is required to pay double the employee's monthly salary for each month of employment without a labor contract in place.¹⁶ Moreover, if an employer fails to secure an employment contract within the first year of employment, the employee is automatically deemed to have an open-ended employment contract.¹⁷

▪ **Contracts Must Specify Key Information**

Similar to the 1995 Labor law, the Labor Contract Law requires that employment contracts shall specify: 1) the name, domicile and legal representative or main person in charge of the employer; 2) the name, domicile and number of the resident ID card or other valid identity document of the worker; 3) the term of the employment contract; 4) the job description and the place of work; 5) working hours, rest and leave; 6) labor compensation; 7) social insurance; 8) labor protection, working conditions and protection against hazards; and 9) other matters which laws and statutes require to be included in employment contracts.¹⁸

▪ **Role of Labor Unions**

The Contract Labor Law allows a labor union to play a more important role in representing the interests of employees. Examples of the critical role labor unions play in the employment process under the new Contract Labor Law:

- Consulting with employers about labor rules and regulations regarding wage, hour, break, leave work safety and hygiene, insurance and benefits, training, work discipline, etc.;¹⁹
- Jointly coordinating with the local labor administration authorities and the employer to resolve any employment issues;
- Assisting and guiding workers in negotiating their employment contracts;
- Being advised and consulted with in connection with any mass lay-off;
- Demanding the employer rectify any legal violations or violations of a worker's employment contract; and

¹⁴ *Id.* at art. 10.

¹⁵ *Id.* at art. 12.

¹⁶ *Id.* at art. 82.

¹⁷ *Id.* at art. 14.

¹⁸ *Id.* at art. 17.

¹⁹ *Id.* at art. 4.

- Negotiating “collective contracts.”²⁰

▪ **Termination of a Contract & Severance Pay**

In accordance with the Contract Labor Law, employment contracts can be terminated under the following conditions:

- Both sides can agree to end the employment contract.
- Contract can end due to certain circumstances, such as expiration, death of the worker, bankruptcy of the employer.
- A worker can unilaterally terminate a contract with appropriate notice (generally 30 days), under certain conditions, including: failure to timely provide full pay; failure to provide the working conditions in the contract; not providing employment benefits; and having company rules violating the law.²¹ Additionally, if there are certain extreme circumstances, a worker can terminate the contract with no advance notice, e.g. threats of violence from the employer, or orders for work that threatens personal safety.
- Employers can also unilaterally terminate a contract for the following conditions: if the worker cannot satisfy the conditions of employment during probation, if there is a material breach of the contract, if the employee engages in serious dereliction of duty, if the employee is involved in graft, or if the employee has a business/employment relationship with another employer or commits a criminal act that is prosecuted.²² Other circumstances in which an employer may terminate an employment contract include: if the worker cannot work after a period of sick leave due to a non-work related injury or illness; remains incompetent to do the work even after training or adjustment of job duties, or some other major change in circumstances rendering the employment contract non-performable. Under such circumstances, the employer is required to give the employee 30 days notice or pay one month’s wages.

Employers are also required to pay severance pay under a broad variety of circumstances.²³
In general, the employer shall pay severance pay as follows:²⁴

Severance Pay = Monthly Wage x Number of Years of Employment

For high-income employees, if the monthly wage of the employee is greater than three times the average monthly wage of local employees in the preceding year, then the formula is:

Severance Pay =
3x the Average Monthly Wage of Local Employees x Number of Year of Employment

²⁰ *Id.* at art. 51.

²¹ *Id.* at art. 38.

²² *Id.* at art 39.

²³ *Id.* at arts. 36, 38, 40, 41, 44 and 46.

²⁴ *Id.* at art47.

▪ **Mass Lay-Offs**

Pursuant to the Contract Labor Law, a mass lay-off is defined as involving 20 or more employees, or fewer than 20 employees if by a proportion that accounts for more than ten percent of the total number of employees.²⁵ To reduce its workforce, an employer is required to explain the circumstances of the layoff to the labor union or to all of its employees 30 days in advance and to consider options. During a mass lay-off, the employer is also required to retain “priority persons,” defined as those who 1) have concluded with the employer fixed-term employment contracts with a relatively long term; 2) have concluded open-ended employment contracts with the employer; or 3) who are the only ones in their families to be employed and whose families have an elderly person or a minor for whom they need to provide. Moreover, mass lay-offs are only permitted: 1) if there is a restructuring pursuant to the Enterprise Bankruptcy Law; 2) if there are serious difficulties in production and/or business operations; 3) if the enterprise switches production, introduces a major technological innovation or revises its business method and, after amendment of employment contracts, still needs to reduce its workforce; or 4) if there is another major change in the objective economic circumstances relied upon at the time of conclusion of the employment contracts, rendering them unperformable.

▪ **Other Provisions: Confidentiality and Non-Competition Provisions**

The employer and worker may stipulate other matters, such as confidentiality of trade secrets and intellectual property.²⁶ If a worker has a confidentiality obligation, the worker and employer may agree on competition restriction provisions in the contract. Such provisions obligate the employer to pay financial compensation to the worker on a monthly basis during the term of the competition restriction after the termination or ending of the employment contract.²⁷ If the worker violates the non-competition restrictions, he is required to pay liquidated damages to the employer, as stipulated under the contract.²⁸ The Contract Labor Law specifically states that only senior management, senior technicians and those bound to keep information confidential may be held to non-competition agreements.²⁹ The terms of the non-competes, the geographic limits and the cap on liquidated damages are all subject to mutual agreement between the employer and employee. Importantly, however, the Contract Labor Law specifies that the maximum term of a non-compete clause is two years.³⁰ Overall, the Contract Labor Law is clear that an employee can be contractually prohibited from working for a competing employer that produces the same type of products or is engaged in the same type of business as the current employer, as well as prohibited from establishing his own business to produce the same type of products or engage in the same type of business.³¹

Note: These national laws in China are also supplemented by regional laws.³² For example, in Shanghai, to explicitly bind an employee to confidentiality, an agreement must be signed by each

²⁵ *Id.* at art. 41.

²⁶ *Id.* at art. 23.

²⁷ *Id.*

²⁸ *Id.* at arts 23, 25 and 90.

²⁹ *Id.* at art. 24.

³⁰ *Id.*

³¹ *Id.*

³² See Molly Riley, China: Employment Contracts-Confidentiality-Non-Competition Agreements, I.C.C.L.R. 2002, 13(10), N.103-104 (2002).

employee,³³ including part-time employees if they are also required to keep commercial secrets confidential.³⁴ Under the Shanghai regulations, the parties involved may agree upon confidentiality clauses in a labor contract or make a separate confidentiality agreement.³⁵ For the employee who has the obligation to keep commercial secrets of the employing unit, the parties involved shall agree upon the advance notification period of revoking the labor contract or confidentiality agreement, but the advance notification period shall not exceed six months.³⁶ During the notification period, the employer can take measures to keep the employee away from the commercial secrets; however, where the commercial secrets are made public, the confidentiality clauses or confidentiality agreement are automatically invalidated.³⁷ If an employee fails to keep the commercial secrets confidential, thereby breaking the labor contract, pursuant to the regulations fair and reasonable compensation should be paid.³⁸ Shanghai also has regulations governing against unfair competition that are very similar to the Unfair Competition Law.³⁹ Similar to the laws of Shanghai, other local laws also help to regulate labor contracts, trade secrets and non-compete provisions. For example, the Guangdong Regulations on Technology Secret Protection circumscribe the scope of the non-compete, allowing restriction only on matters central to the employer's business.⁴⁰ The Shenzhen Measures on the Protection of Technical Secrets in Enterprises in the Special Economic Zone, allow an employer to restrict employment, but require a high degree of consideration in exchange for the non-compete agreement: at least two-thirds of the employee's salary for the previous year must be paid.⁴¹ Similar to the Shanghai Regulations, if the employer's secrets become publicly known, the term of the non-compete is cancelled.⁴²

II. PROTECTION OF TRADE SECRETS: UNFAIR COMPETITION LAW

Thus, the 1995 Labor Law and the Contract Labor Law in China are designed to help employers protect their trade secrets. This invariably prompts the question: What information is considered to be a trade secret in China and how is it protected? The protection of a company's trade secrets is relatively new in China. Inasmuch as the Chinese economy was centrally planned, trade secrets and technical knowledge were a matter of "state secrets" and breach could result in severe punishment.⁴³ The economic reforms leading to privatization and market economy changed this perspective, creating the need for private owners to protect their interests. This change was formally made when the State Council issued the Provisional Regulations on

³³ Labour Contract Regulations of Shanghai Municipality (effective May 1, 2002), http://www.12333.gov.cn/english/rules/rule/t20041028_4648.html [hereinafter Shanghai Labour Contract Measures]. For more information, see, Shanghai Municipality FAQs on Labour Contracts, <http://www.shanghai.gov.cn/shanghai/node8059/FAQ/node8462/node8464/index.html>.

³⁴ Shanghai Labour Contract Measures, *supra* note 33, at art. 49.

³⁵ *Id.*, art. 15.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*, art. 17.

³⁹ Regulations of the Shanghai Municipality Against Unfair Competition (effective Dec. 1, 1995).

⁴⁰ *Id.*

⁴¹ *Id.* (citing Shenzhen Measures on the Protection of Technical Secrets in Enterprises in the Special Economic Zone, arts. 16 and 17).

⁴² *Id.*, art. 19.

⁴³ PETER FENG, INTELLECTUAL PROPERTY IN CHINA 385 (2d ed. 2003).

Technology Transfer (Provisional Regulations) in 1985.⁴⁴ The text of the Provisional Regulations, states that it was formulated to “arouse the enthusiasm, initiative and creativity of staff and workers, in particular scientific and technical personnel, to bring about the rapid application of scientific and technical research results and know-how to material production and to effectively implement the policies of economic construction reliant on science and technology.”⁴⁵

UNFAIR COMPETITION LAW

The most significant development for the protection of trade secrets in China, however, was promulgation of the Law of the People’s Republic of China Against Unfair Competition (Unfair Competition Law), which became effective in 1993.⁴⁶ Enacted in response to the needs of the changing economy in China, as well as to an agreement with the United States, the Chinese government agreed through this law to prevent the disclosure of trade secrets, including disclosure by third parties.⁴⁷ As more enterprises in China were becoming privately owned and there was an increasing interest in foreign investment, there was growing pressure to protect technical and commercial secrets. The Unfair Competition Law was promulgated to safeguard the “healthy development of the socialist market economy,” encourage and protect fair competition, prevent acts of unfair competition, and defend the lawful rights and interests of operators and consumers.⁴⁸

▪ Defining “business secret”

A critical aspect of the Unfair Competition Law is the definition of “business secret” (which is used interchangeably with trade secret) as “technical information and operational information which is not known to the public, which is capable of bringing economic benefits to the owner of rights, which has practical applicability and which the owner of rights has taken measures to keep secret.”⁴⁹ The law restricts the acts of an “operator,” which is defined as “a legal person or other economic organization or individual engaging in the trading of goods or profit-making services.”⁵⁰ Specifically, an operator may not adopt any of the following means to infringe on business secrets:

- 1) obtaining business secrets from the owners of rights by stealing, promising of gain, resorting to coercion or other improper means;
- (2) disclosing, using, or allowing others to use business secrets of the owners of rights obtained by the means mentioned in the

⁴⁴ *Id.* See Provisional Regulations of the State Council on Technology Transfer (promulgated Jan. 10, 1985), http://novexcn.com/technology_transfer.html.

⁴⁵ *Id.*

⁴⁶ Law Against Unfair Competition of the People’s Republic of China (Sept. 2, 1993) [hereinafter Unfair Competition Law], http://www.sipo.gov.cn/sipo_English/flfg/xgflfg/t20020420_34756.htm.

⁴⁷ See Sino-U.S. Memorandum of Understanding Concerning the Protection of Intellectual Property Rights art. 4 (Jan. 17, 1993).

⁴⁸ Unfair Competition Law, *supra* note 46, art. 1.

⁴⁹ *Id.*, art 10. This definition also is in the rules promulgated in accordance with the Unfair Competition Law. See Several Regulations Concerning Prohibition of Acts of Infringement of Business Secrets, art. 2 (effective Nov. 23, 1995), in TRADE SECRETS THROUGHOUT THE WORLD, vol. 1, Appendix 8B (Melvin F. Jager, ed., Thomson West 2005) [hereinafter Regulations Concerning Infringement].

⁵⁰ Unfair Competition Law, *supra* note 46, art. 2.

preceding item;

(3) disclosing, using or allowing others to use business secrets that he has obtained by breaking an engagement or disregarding the requirement of the owners of the rights to maintain the business secrets in confidence.⁵¹

▪ **Supreme People's Court Interpretation**

Inasmuch as the Unfair Competition Law allows for courts to exercise a high degree of subjectivity, the Supreme People's Court recently issued an Interpretation on Several Issues Concerning Law Implementation in Hearing Civil Cases in Respect of Unfair Competition (the "Interpretation").⁵² The Interpretation also lists specific factors for courts to use to determine if the owner of the trade secrets has undertaken confidentiality measures: 1) restricting disclosure to relevant people; 2) "locking" or encrypting confidential information; 3) marking the information "confidential"; 4) using passwords or codes on the confidential information; 5) entering into confidentiality agreements; 6) restricting access/visits to machines or sites with confidential information; and 7) other reasonable measures.⁵³ Importantly, the Interpretation also addresses what is or is not a trade secret under the Unfair Competition Law. It clearly states that "trade secret" information obtained through one's own research and development or reverse engineering does *not* constitute infringing action under the Unfair Competition Law.⁵⁴ With regard to customer lists, the Interpretation does recognize this information to be a trade secret if they refer to special customer information that is not publicly available, such as names, addresses, deal details, and contact methods.⁵⁵ If, however, a customer conducts business with a company based on the trust of a certain individual employee and the customer voluntarily continues to do business with the former employee at his new employer, this will not constitute a violation of the Unfair Competition Law.⁵⁶

▪ **Burden of Proof**

Moreover, the Interpretation also clarifies the burden of proof on a plaintiff claiming a violation of the Unfair Competition Law. To successfully make a case, the plaintiff must prove 1) compliance with the statutory requirements (e.g. the media, detailed content and commercial value of the trade secret and specific confidentiality measures taken); 2) the information is identical or materially identical to its trade secret; and 3) the opposing party's improper means of obtaining the information.⁵⁷

If a plaintiff has a *prima facie* case under the Unfair Competition Law, staff members or

⁵¹ *Id.*, art. 10(1)-(3).

⁵² Interpretation of the Supreme People's Court on Several Issues concerning Law Implementation in Hearing Civil Cases in Respect of Unfair Competition (Dec. 30, 2006) [hereinafter Interpretation] (translation on file with the author).

⁵³ *Id.* at art. 11.

⁵⁴ *Id.* at art. 12. "Reverse engineering" refers to relevant technical information on any product acquired by dismantling, surveying, mapping and analyzing products obtained through open channels. *Id.*

⁵⁵ *Id.* at art. 13.

⁵⁶ *Id.*

⁵⁷ *Id.* at art. 14.

workers who divulge or use business secrets of their employer in breach of contractual stipulations or contrary to confidentiality requirements can be held liable.⁵⁸ Article 10 of the Unfair Competition Law imposes liability on any third party who “obtains, uses or discloses the business secrets of others when he obviously has or should have full awareness of the illegal acts” and the law also provides for legal responsibility for any operator who causes damages to another.⁵⁹ Injured parties may institute proceedings before a People’s Court⁶⁰ or seek administrative enforcement of the law with the offices of the Administration for Industry and Commerce (AIC).⁶¹

▪ Compensation

Pursuant to the Unfair Competition Law, the injured party is to be compensated for the damages and, where “the losses suffered by the injured operator are difficult to calculate, the amount of damages shall be the profits gained by the infringer during the period of infringement through the infringing act.”⁶² Additionally, the infringer bears the responsibility of paying all reasonable costs paid by the injured operator in investigating the acts of unfair competition. Operators infringing on another’s business secrets may be ordered to desist from the illegal act and the relevant supervising authority may impose a fine of “more than 10,000 Yuan (RMB) and less than 200,000 Yuan (RMB).”⁶³ Effective February 1, 2007, however, the method for determining damages for unfair competition is to be based on the method for calculating damages for infringing patent rights or trademark infringement, depending on the act of unfair competition.⁶⁴ Additionally, where any infringing act causes trade secrets to be known to the public, the damages shall be determined in accordance with the commercial value of the secrets, including such factors as research and development costs, benefits from implementing trade secrets, prospective interests and the time during which competitive advantages can be maintained.⁶⁵ Overall, the Interpretation helps to clarify and create more detailed guidelines for the protection of trade secrets in China.

Note: In addition to the Unfair Competition Act, the Criminal Law of the People’s Republic of China imposes criminal liability for theft of business secrets.⁶⁶ The infringing party who causes “heavy losses” can face imprisonment or detention for a term of three years or less and/or a fine; however, if the consequences are especially serious, the infringer could be imprisoned between three and seven years and be fined.⁶⁷

⁵⁸ Regulations Concerning Infringement, *supra* note 49, art. 3(4).

⁵⁹ Unfair Competition Law, *supra* note 46, art. 10.

⁶⁰ For an overview of the Chinese court system, see DELI YANG, INTELLECTUAL PROPERTY AND DOING BUSINESS IN CHINA 96-97 (2003).

⁶¹ Regulations Concerning Infringement, *supra* note 49 art. 11. Note that only the People’s Court has the power to award compensation; the AIC has the power to investigate acts of unfair competition and impose penalties.

⁶² *Id.*, art. 20.

⁶³ Unfair Competition Law, *supra* note 46, art. 25.

⁶⁴ Interpretation, *supra* note 52 at art 17.

⁶⁵ *Id.*

⁶⁶ Criminal Law of the People’s Republic of China, Section 7, art. 219 (July 1, 1979, revised on March 15, 1997, effective Jan. 1, 1998), <http://www.cecc.gov/pages/newLaws/criminalLawENG.php>.

⁶⁷ *Id.*

III. DISCRIMINATION AND THE PROTECTION OF MINORS AND FEMALE WORKERS

- The Labor Law provides that an employer may not discriminate on the basis of nationality, race, sex, or religious belief.⁶⁸
- The Labor Law also prohibits the employment of persons under the age of sixteen years.⁶⁹
- The Labor Law prohibits female employees from working in mining operations, dangerous occupations, working in high altitudes, at low temperatures or in contact with cold water, or performing strenuous physical labor during menstruation.⁷⁰
- Pregnant women are also not allowed to engage in strenuous physical labor, and expectant mothers in their final trimester of pregnancy are barred from night work and overtime.⁷¹ Maternity leave is a minimum of ninety days⁷² and nursing mothers are not allowed to work overtime, night hours or engage in strenuous physical labor for up to one year after childbirth.⁷³

IV. SEXUAL HARASSMENT

- On December 1, 2005, the Amended Law of the People's Republic of China on the Protection of Rights and Interests of Women went into effect ("Amended Law").⁷⁴ Article 40 of the Amended Law prohibits sexual harassment against women. It also states that female workers shall have the right to file a complaint with the units where they work and in the departments where they work. Article 40 and the Amended Law, however, do not give any more specific information beyond these broad statements. The lack of a clear definition can create confusion and make enforcement difficult.
- Thereafter, on July 31, 2006, the Hunan Province issued Measures for Enforcement of the Law of the People's Republic of China on the Protection of Rights and Interests of Women in the Hunan Province ("Hunan Law"), which went into effect on October 1, 2006. Pursuant to the Hunan Law, sexual harassment can take the form of behavior, language, words, pictures, and electronic messages with obscene content. The victim of the alleged sexual harassment can report the incident to the police for investigation, who will then determine if there should be an administrative punishment or a criminal penalty. The harassment victim can also sue in courts for civil remedies. Moreover, the Hunan law requires employers to prevent and prohibit sexual

⁶⁸ Labor Law, *supra* note 9 at art. 12.

⁶⁹ *Id.* at art. 15. Note: there are exceptions for minors in the entertainment sector and athletic events. Additionally, there are restrictions on the type of work workers aged 16-18 may engage in, e.g. prohibitions on working in underground mining, working with poisonous or harmful substances, and engaging in physically intense labor.

⁷⁰ *Id.* at arts. 59 and 60.

⁷¹ *Id.* at art 61.

⁷² *Id.* at art 62.

⁷³ *Id.* at art 63.

⁷⁴ Amended Law of the People's Republic of China on the Protection of Rights and Interests of Women (effective December 1, 2005) ("Amended Law"), <http://www.china.org.cn/english/government/207405.htm>.

harassment in the workplace. Inasmuch as the Hunan Law does not provide penalties for employers who fail to prevent harassment or who do not act on harassment complaints, this provision may not be very effective. Despite this fact, however, it is possible that a female employee who is harassed may be able to sue her employer if it has not taken measures to protect women in the workplace from being harassed.

- Both the Amended Law and the Hunan Law do not protect men from harassment by women, and do not appear to protect women from harassment by other women.

V. WORKPLACE HEALTH AND SAFETY

- Employers are required to establish a program of workplace health and safety, and to take specific measures to guard against workplace accidents.⁷⁵ Examples include: protective work clothing, goggles, hard hats, etc. as appropriate for the workplace.

CONCLUSION

This overview of major employment and labor laws is designed to alert employers and employees of their rights and responsibilities in the workplace in China. It is also always important for employers to check for local laws and regulations, which supplement the national laws. Overall, as is the case with many aspects of Chinese law, the labor and employment laws are in a period of amendment and refinement, as the country positions itself in the 21st century global marketplace.

⁷⁵ Labor Law, *supra* note 9 at arts. 52-57.