

On the Restraining Factors and Improvement of Labor Contract Law's Real Effectiveness

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Abstract

Since The Labor Contract Law of the People's Republic of China came into force on January 1st, 2008, it has been facing the situation of poor effectiveness. This paper analyzes the restraining factors of Labor Contract Law's real effectiveness from material conditions, institutional conditions, and legislation conditions. Basing on the above mentioned analysis, this paper brings out several countermeasures such as improving legislation quality; strengthen law enforcement efforts, increase legal consciousness, and perfect supporting systems to improve the Labor Contract Law.

Key words: Labor contract law; Effectiveness of law; Real effectiveness

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INTRODUCTION

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Since The Labor Contract Law of the People's Republic of China came into force on January 1st, 2008, it has been facing the situation of poor effectiveness. This paper analyzes the restraining factors of Labor Contract Law's real effectiveness from material conditions, institutional conditions, and legislation conditions. Basing on the above mentioned analysis, this paper brings out several

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1. RESTRAINING FACTORS OF THE REAL EFFECTIVENESS OF LABOR CONTRACT LAW

1.1 Material Conditions

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First, the economic development level restricts the implementation of Labor Contract Law. Since China's reform and opening-up, Chinese economy maintains steady and rapid development, especially in recent decade, the economic growth keeps a very fast speed which mainly because China has grasped the opportunity of the world's manufacturing center's transfer and made up related system reforms. The implementation of the Labor Contract Law has some impact on foreign investment plans, and also increases certain labor costs for processing and manufacturing, services and other labor-intensive enterprises. In the long run, Labor Contract Law is good to help build and develop harmonious and stable labor relations, enhance the update of economic transformation, and ultimately improve the coordinated development of man and economy. However, in the short term, practical result of Labor Contract Law will be restricted.

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Second, the "strong capital, weak labor" pattern formed during a long history as well as the dependence on cheap labor force under extensive economic growth mode created obstacles for the implementation of Labor Contract Law. China has rich labor resources and low labor costs which once became one of the greatest reasons of fast economic growth. However, an effective legal mechanism for protecting laborers' rights and interests is not perfect which leads to the formation of the "strong capital, weak labor" relation. Labor Contract Law intends to change the

weak position of workers in the labor relations, enhance their legal consciousness and ability to safeguard their own lawful rights and interests. Consequently, this will inevitably be opposed and boycotted by vested interests during the implementation of law.

1.2 Institutional Conditions

First, every supporting system and measure of the Labor Contract Law is not complete which will inevitably cause problems during the law's implementation. The labor contract law has stipulated a lot of content of labor relations, in fact, in continental law countries, there are many specific laws aiming at resolving different labor relation disputes. For example, there are Dismissal Protection Law, Labor Remuneration Law, and Collective Bargaining Law etc. China's Employment Promotion Act mainly focuses on promoting employment while there is still requirement for legislation on employment itself. Anti-discrimination Law and Fair Employment Law are also required to be carried out. There is a strong need for independent legislations for many labor relations.

Second, incomplete social security system still exist. At present, China's social security system has different performance in urban and rural areas, different regions, and different groups. The serious problems of China's social security system, such as lack of related regulations, unconnected systems, and bad continuity, has greatly prevented sufficient labor force flow and move, and also makes the protection of laborers' social security rights and interests lost, especially in the case of low-end labor groups which has become an increasingly prominent problem. For example, according to current way, many workers, especially migrant workers, once they move long-distance work stations or go back home, they are unable to connect the social insurance they paid in different areas which greatly influences labor contracts.

Third, labor market system and policies are not incomplete. When China's labor market moves toward to marketization, strict census register policy and welfare system, employment classification standard, and serious lack of controlling from the government on labor market are still stopping free flow and fair employment of labor force. Apparently, the Labor Contract Law's power is weak.

Fourth, lack of system and policies to support Small and Medium-Sized Enterprises (SMEs). Controlled by current economic system, for SMEs in China, especially the small private enterprises, policy support is still insufficient. Many of these companies live on the margins of society under heavy tax burden and harsh control. "One size fits all" type of labor contract punishment is undoubtedly even worsening their situations.

1.3 Poor Legislation Quality

First, the legislation skills used for Labor Contract Law have problems. Several provisions in the Labor Contract Law have different meanings and some rules have loopholes which hinder the implementation of the Labor Contract Law. For example, article 4 of the Labor Contract Law stipulates:

When an Employer formulates, revises or decides on rules and regulations, or material matters, that have a direct bearing on the immediate interests of its Employees, such as those concerning compensation, work hours, rest, leave, work safety and hygiene, insurance, benefits, employee training, work discipline or work quota management, the same shall be discussed by the employee representative congress or all the employees. The employee representative congress or all the employees, as the case may be, shall put forward a proposal and comments, whereupon the matter shall be determined through consultations with the Trade union or employee representatives conducted on a basis of equality.

However, the law does not provide how to deal with such cases when the parties cannot negotiate. Although the Implementation Regulations of Labor Contract Law has made explanations and complements on certain vague rules, there are still many places retain unclear in the Labor Contract Law.

Second, the legislation design of the Labor Contract Law has problems. For instance, the controversial article 14 on "open-ended employment contract" and article 46 on "severance pay" are thought too look-ahead of China's practical situation. In addition, there are no clear rules stipulating the application scale of the Labor Contract Law and no scientific and precise definitions on laborers. It neither includes illegal employment subject whom greatly needs neither law protection at present nor extinguishes the protection levels between senior management staff and common employees. The main protection subject of the Labor Contract Law is not clear.

Third, lack of legislation prediction on the implementation effectiveness of the Labor Contract Law. For example, as a particular labor business, labor dispatch gains rapid development in recent years. It shows great advantages in meeting employers' seasonal, temporary, occasional employment requirements. However, due to the lack of regulations, many companies and units in different regions made great deal of unfair cases when using such method. Although Labor Contract Law makes provisions on labor dispatch for the first time, it gives deflected prediction on labor dispatch's development. Some scholars predict that the strict restriction of Labor Contract Law on labor dispatch will cause great deal of irregular labor dispatch agencies change profession or shut down. While during the implementation of Labor Contract Law, labor dispatch has become the main method for avoiding Labor Contract Law's rules.

2. COUNTERMEASURES FOR IMPROVING THE REAL EFFECTIVENESS OF THE LABOR CONTRACT LAW

Laws, only be effectively implemented in reality and abide by, can be transferred from paper into action. Legal provisions transferred into social reality through the implementation of laws. If a law cannot be well implemented and abide by, even it is well made, its social significance is also very limited. Laws' real effectiveness level ranges from completely no effect to 100% effect. It is a standard for evaluating laws' quality and performance. To improve laws' real effectiveness is helpful for realizing laws' social functions and legislation aims.

First, improve legislation quality. The direct effectiveness of laws can easily attract people's attention while the indirect effectiveness is usually neglected by people. When we judge a specific law's real effectiveness, we should completely consider the direct and indirect effectiveness of the law. However, for the legislators during the legislation process, they should try their best to predict every possible effectiveness of the law after its implementation, and try to reduce loopholes and improve legislation quality.

Second, increase law implementation power. From the actual implementation situation of the Labor Contract Law we can see that Chinese laws' implementation effect depends on legislation skills, legislation levels, and mainly on the promotion of the nation. The real implementation effect is directly connected with the attention paid by the government. The enforcement of those laws which are paid more attention and importance by the government is better than others. In certain period, these laws have strict enforcement and better effect. On the other hand, the ones that lack of government's attention may not have such great enforcement and effectiveness. Accordingly, at the present stage, the realization of the function of laws in China mainly depends on the external force as a guarantee. The rule of law status remains in an external mode based on systematic level. Therefore, the implementation of the present law needs to increase the intensity of law enforcement, and establish strict law enforcement standards to achieve the legislative purpose and the intended legislation effect, and further to maintain the authority of the law.

Third, increase legal consciousness. The formation of

the rule of law society should not only stay and be content to the external development pattern. The realization of good legal effect should be from social main body's consciously abidance and compliance, and from people's internal convince of the law. From the point of future development, construction of law-abiding citizen ethics and cultivation of the law spirit is an internal model for the development of the rule of law which should worth more attention.

Fourth, complete supporting systems. The effective enforcement of laws depends on the connections and cooperation between different systems. It is a co-worked effect. Single law's effect is limited. In complicated real life, we need various kinds of laws, regulations, and other normal document of law to complement, perfect, and support each other. Meanwhile, the effectiveness of law enforcement also relies on the coordination, support, and supplement from other different systems so that the effectiveness of law can be realize in the greatest scale. To improve supporting systems and countermeasures is the key point for protecting the effective enforcement of the Labor Contract Law. For example, set up reasonable tax burden and social insurance premium pay rate for enterprises, provide policy support for the development of small and medium-sized enterprises, build systems of social insurance transfer and connection as soon as possible, and provide the rule of law environment for enterprise management and so on.

CONCLUSION

This article discusses the restraining factors of Labor Contract Law's real effectiveness from material conditions, institutional conditions, and legislation conditions. Moreover, basing on the above mentioned analysis, this paper brings out several countermeasures. First, improve legislation quality. Then, increase law implementation power. Third, increase legal consciousness. Lastly, complete supporting systems.

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