

China

Introduction

The Chinese labor union movement can be traced back to 1921 when the Chinese Labor Union Secretariat was established.

In the early years of the People's Republic of China (PRC), which was founded in 1949, as long as private industry continued to exist, labor unions have represented the interests of workers against their employers. Then, in the early years of the Cultural Revolution (1966 to 1976), labor unions almost disappeared. However, beginning in 1971, the labor union organisation began to rebuild itself, and on October 23, 1983, a new Labor Union Charter was enacted and, in 1992, the Labor Union Law of the People's Republic of China was passed to replace the archaic Labor Union Law of 1950.

While Article 35 of the Constitution of the People's Republic of China (adopted on December 4, 1982, and amended in 1988 and 1993) guarantees the freedom of assembly and the freedom of association, PRC law (Article 12 of the Labor Union Law) provides that only union organisations belonging to the All-China Federation of Labor Unions ("ACFTU") are permitted to exist in China. Although the Labor Union Law gives unions the right to carry out their work "independently and autonomously," these rights are subject to compliance with the provisions of the Labor Union Charter and PRC laws enshrining the supremacy of the Chinese Communist Party (CCP) over labor unions (Article 4 of the Labor Union Law).

However, Eastern European developments in the 1980s, particularly the Polish "*Solidarnosz*" movement, and the establishment of independent unions in China during the movement for democracy (that ended with the Tian'anmen tragedy on June 4, 1989) may have helped Chinese government authorities rethink the role of labor unions. Remarkably, it was acknowledged that there may be contradictions between the interests of workers and those of other groups in society and that corruption and bureaucracy harm the interests of the masses. The promulgation of the Labor Union Law in 1992, a push to establish more labor unions in foreign-invested enterprises (FIEs), such as joint ventures and wholly foreign-owned enterprises, and political pressure to sign collective contracts could be read as an attempt by the

government to preserve the leadership role of the CCP by strengthening, at least *pro forma*, the role of labor unions without giving them real independence or power. A further amendment was made to the Labor Union Law effective October 27, 2001, and this is now the currently effective version of the Labor Union Law.

Today, labor unions are well represented in urban state-owned enterprises, collectively owned enterprises, and, to a lesser extent, in FIEs, but this may change in the future as the ACFTU puts increasing pressure on FIEs to unionize. Most recently, the ACFTU has begun a campaign to target Fortune 500 companies and their offices in China.

The Executive Committee of the ACFTU also recently passed the Working Regulations for Enterprise Unions (“Enterprise Union Regulations”) on December 11, 2006, in order to lay down clearer rules regarding the operation of enterprise unions, which have recently become more widespread as union organization efforts by the ACFTU have intensified.

Labor Unions

The General Role Of The Labor Union

In the past, Chinese labor unions seldom represented employees’ interests against management in a confrontational manner, and most labor unions were described as “social clubs” that organised collective welfare and social activities, such as going to the movies, preparing group vacations, etc. However, recently some unions have started to become more confrontational, particularly if a more outspoken employee becomes the union chairman.

Constitution Of The Labor Union

The ACFTU is organised hierarchically and, to some extent, mirrors the organisations of the Chinese Communist Party and the government. The National Congress and the Executive Committee are the main union organisations at the national level. ACFTU organisations also exist on the provincial, municipal, and county levels.

The primary organisations are labor unions formed on the enterprise level. Article 3 of the Labor Union Law gives all employees in China whose main income is derived from wages the right to join a labor union or to form one at the enterprise or unit level. There is no obligation, however, to join a union, and “closed shop” issues of compulsory unionism are not relevant.

Labor unions are usually single-company unions with elected representatives of the employees of a specific enterprise. They are staff associations solely within the enterprise and are usually not subject to strong outside intervention. Nevertheless, through labor unions at a higher level, the CCP occasionally exercises political pressure on enterprise-level union organisations to act in a certain manner, such as in negotiating and concluding a collective contract with management. However, negotiations are usually conducted by the union representatives of the enterprise.

Chinese labor unions at the enterprise level represent all employees, including executives and other senior management personnel. Therefore, there are no separate or specialised unions to represent the interest of managers. In the past, the union chairman was also often a member of the management. However, the Enterprise Union Regulations now make clear that senior management cannot be union chairman or any member of the union committee, so this practice will likely change in the future.

The Labor Union Law stresses that labor unions may be established by the “working classes” of their own free will. According to the Labor Union Charter, the election of labor union committees at all levels should reflect the will of the voters, the lists of candidates should be subject to full discussions, and elections should be held by secret ballot (Article 9 of the Labor Union Charter). The formation of a new labor union is to be submitted to the union at the next higher level for approval (Article 14 of the Labor Union Charter). Therefore, in practice, the entire process, starting with whether a labor union is established in an enterprise, is decided by higher-level authorities.

Labor Unions In FIEs

Employees of foreign-invested enterprises, just as in other types of enterprises, have the right to set up a labor union within the enterprise to carry out labor union activities. The right is expressly stated in the Implementing Regulations for the Law of PRC on Sino-Foreign Equity Joint Ventures (“EJV Regulations”) and the Implementing Regulations on the PRC Wholly Foreign-Owned Enterprises Law (“WFOE Regulations”).

The Labor Union Law does not require companies to establish enterprise unions among their employees. There are no legal penalties imposed on a company if an enterprise union has not been established in it. However, the Labor Union Law does prohibit companies from actively obstructing employees or the ACFTU from establishing a union in the company.

The Scope Of Labor Union Rights In Businesses

General

The scope of labor union rights is laid down in the Labor Union Law and other related regulations, which provide unions with the right to:

1. Protect the democratic rights and interests of the employees;
2. Help the enterprise in the management and supervision of the welfare and bonus fund;
3. Organise studies and carry out recreational activities; and,
4. Teach employees to abide by laws, regulations, and internal enterprise rules.

Participation In Board Meetings

In Sino-foreign equity joint ventures, when meetings of the board of directors are held to discuss “major matters such as development plans and production and operational activities” of the enterprise, union representatives have the right to attend as non-voting delegates and to make known to the board the opinions and demands of employees (Article 98 of the EJV Regulations). Additionally, when the board discusses questions relating to employee rewards and penalties, wage systems, welfare benefits, labor protection, and labor insurance, labor union representatives should attend as non-voting delegates and the board “shall heed the opinions of the labor union and obtain the labor union’s cooperation.” The Implementing Regulations of the Wholly Foreign-Owned Enterprises Law, effective December 12, 1990, and as amended by the State Council on April 12, 2001, contain a similar provision with regards to employee matters.

The labor union also has participation rights under the Company Law. In particular, Article 18 of the Company Law states that in the event an enterprise “considers a decision on restructuring its system, major issues on its business operations or the formulation of important internal rules and regulation,” it shall solicit the opinion of its labor union. In addition, the enterprise “shall solicit opinions and suggestions from its workers and staff members” in this regard.

As the Company Law only requires enterprises to “solicit opinions and suggestions” of labor unions whereas the Implementing Regulations state a requirement to

“obtain cooperation” from the labor unions, it is possible that the Company Law takes away the veto right, but attendance would still be legally required, and the union would have to be invited to provide opinions and suggestions.

Under the Labor Union Law, where an employee alleges “serious violations” of labor laws or regulations by a company, the labor union has the power to represent the employee in negotiations with the company and request that the violation be corrected. Examples of serious violations include withholding wages, keeping unsafe or unsanitary working conditions, illegally extending working hours, and taking illegal advantage of female and underage employees.

Enterprise unions should generally conduct any of their meetings or union activities outside of working hours and may only conduct meetings or other activities during working hours with the prior consent of the enterprise. A union committee member who is not a full-time union personnel may not conduct meetings or activities during working hours for more than three days per month, and, as long as the union committee member stays within this three-day limit, his or her wages and benefits should not be affected by participation in the union activities.

Under Article 4 of the Employment Contract Law, one of the necessary steps in validly adopting a set of company rules or regulations (such as an employee handbook or code of conduct) is consultation with a labor union or elected employee representatives. If such procedures are not followed, an employer cannot use those company rules as a legal basis for taking action against an employee.

Involvement In Dismissals

Under the Labor Law and Article 41 of the Employment Contract Law, labor unions have a certain role in mass lay-offs. With regard to mass lay-offs, if an enterprise genuinely needs to reduce its personnel because of statutory restructuring during bankruptcy; due to major difficulties in terms of production or operation; due to a change in production, the introduction of a major technological innovation, or change in mode of operations; or due to other major changes in objective economic circumstances, the enterprise has to explain the situation to the union 30 days in advance. The labor union has the right to voice its opinion on the matter, and its opinion shall be heard (Article 41 of the Employment Contract Law). National and local regulations also provide details regarding the conditions and mechanics of such mass lay-offs.

For other types of dismissal, the Labor Union Law requires that an employer give prior notification to a union before unilaterally terminating its employee. This requirement applies in all cases of unilateral termination, even termination for misconduct. The notification requirement can frequently be satisfied by sending a letter to the labor union notifying them of the identity of the employee, the intended date of termination, and the grounds for termination. However, the employer must give the labor union an opportunity for comment, although the labor union does not have a veto over the layoff plan or the termination.

The Labor Union Law provides that if the union believes a termination violates the law or any relevant contract, it may demand that the enterprise reconsider its termination decision, and the enterprise should then consider the union's opinion and notify the union in writing how it will handle the matter. On the other hand, if labor union authorities do not respond, the employer has met its responsibility, and the employees can then be terminated from employment. The employee being terminated can challenge the termination himself or herself before a labor arbitration panel or court, and the union may provide support and assistance to the employee's complaint.

Assistance In Signing Individual Labor Contracts

Labor unions in FIEs have the power to assist employees in signing individual labor contracts (Article 18 of the Labor Union Law, Article 96 of the EJV Regulations, and Article 71 of the WFOE Regulations). In practice, the union and/or the Labor Bureau may be involved in negotiating the format of individual labor contracts with management.

Collective Bargaining

Collective bargaining may be required where it is requested by the labor union or at least one-half of the employees. Pursuant to the Labor Law, an enterprise "may" enter into a collective contract with its employees. This provision, however, is further modified by other national regulations. In particular, according to the Provisions of Collective Contracts ("Collective Contract Provisions"), effective May 1, 2004, if either party makes a written request for a collective contract, the other party shall not refuse without justifiable reason to conduct collective negotiations. In light of this, it is very difficult for FIEs to avoid collective contracts if the labor union wants one.

The Employment Contract Law explicitly envisions and allows for regional collective bargaining, though with some restrictions; the collective bargaining should be done within a certain industry and only within areas below the county level. Such regional collective contracts would be binding on all enterprises within the industry and/or area concerned and all employees working at the enterprise(s).

The standards for working conditions and remuneration in all individual employment contracts reached between the enterprise and its employees must not be any lower than the standards stipulated in the collective contract. In this way, the collective contract can be seen as a framework agreement between an employer and its employees under which all individual employment contracts must be covered.

Involvement In Labor Disputes

Labor unions also participate in the mediation and arbitration of labor disputes. Labor union representatives may sit on mediation and arbitration committees. They also offer support and assistance when an employee applies for arbitration or litigation.

The Function Of Labor Union Representatives

In enterprises with 200 employees or more, full-time union personnel may be hired. Union chairman, vice-chairman, and other union committee members are protected against certain actions by the enterprise, for example: if the employment contract of the union chairman, vice-chairman, and other union committee members is a fixed-term contract and is due to expire during the individual's term in office, it should be automatically extended to coincide with his or her term of office unless he or she reaches the statutory retirement age during the term of office. A union chairman, vice-chairman, and other union committee members can only be unilaterally terminated by an employer during their term of office on "for cause" grounds listed in Article 39 of the Employment Contract Law. If an enterprise terminates or transfers union personnel in violation of the law, the enterprise may be ordered to reinstate the employee to his or her original position and/or pay compensation to the employee.

Full-time labor union representatives shall continue to receive their wages, bonuses, and allowances and shall enjoy the same social insurance and welfare benefits as regular employees (Article 41 of the Labor Union Law). However, the national law is not clear on who must pay the salary of full-time labor union representatives. Article 41 of the Labor Union Law, which provides that the salary shall be paid by the enterprise,

applies only to state-owned enterprises and collectively-owned enterprises; the Labor Union Law is silent on FIEs. It is not clear whether the salary must be paid from union funds or by the enterprise, and local regulations and Ministry of Labor and Social Security officials have expressed contradictory views.

The “election” of the labor union chairman must be approved by the labor union organisation at a higher level. The chairman must be chosen from existing staff and not from outside the enterprise. The chairman cannot be removed until his or her term of office expires and only with the consent of the enterprise’s union committee and the union organisation one level higher.

The activities of the labor union must be conducted outside working hours. When it is necessary to conduct union activities during working hours, the prior consent of the enterprise must be obtained. However, certain types of “social activities” may be undertaken during working time, and wages must be paid as if the employees were working. Such social activities include the exercise of the right to work or to be elected; attending as an elected representative meetings convened by the labor union, the government, or other mass organisations; and other activities (Article 10 of the Provisional Regulations on Payment of Wages of January 1, 1995).

Funding Of Labor Unions

FIEs must pay two percent of the total monthly payroll to the labor union. The total payroll includes the salary of non-union members and of the expatriate employees of the FIE. In addition to allocations from the enterprise, labor unions also receive membership dues and government subsidies. A portion of the labor union income must be forwarded to higher-level labor union organisations, but the bulk is used for enterprise employees.

Industrial Actions

The PRC Constitutions of 1975 and 1978 provided explicitly that employees had the right to strike. However, the right to strike is not included in the 1982 Constitution, which is still in force. Nevertheless, the ACFTU chairman has been quoted as saying, albeit ambiguously, that the silence of the Constitution on the right to strike does not mean that strikes are generally prohibited.

The Labor Law is also silent on strikes. Article 27 of the Labor Union Law states that if there is a work stoppage or work slowdown, the labor union must represent

the employees in consultations with the enterprise and put forward opinions on resolving the matter and that the labor union shall also assist the enterprise in duly carrying out the work concerned and resuming production and work as quickly as possible.

Alternate Forms Of Employee Representation – Employee Assemblies / Employee Representative Congresses

Under the Employment Contract Law, one of the necessary steps in adopting company rules or regulations is discussion of the proposed rules or regulations by an employee assembly or employee representative congress, which can then issue its suggestions and opinions on the proposed rules. In addition, if a company has no union, it must consult with the elected employee representatives.

Many laws and regulations make reference to employee assemblies and employee representative congresses, though most FIEs and their foreign investors are unfamiliar with the concept. This is likely because in practice employee assemblies/employee representative congresses generally only existed in state-owned enterprises and rarely if ever appeared in FIEs.

However, recent regulations and union rules contemplate employee assemblies/employee representative congresses existing and operating in private enterprises, including FIEs. For example, the Collective Contract Provisions require that a collective contract be voted on by an employee assembly/employee representative congress before the collective contract can come into effect. The Enterprise Union Regulations also specify that employee assemblies/employee representative congresses shall have certain duties in private enterprises and FIEs, including the following:

1. Listening to the enterprise's reports on its development plans and yearly plans and providing comments and suggestions regarding those reports;
2. Adopting collective contracts and company rules and plans that affect the immediate interests of employees;
3. Supervising the enterprise's operations with regards to employee matters; and,
4. Other matters provided by law, policy, or company rules.

While there are no laws or regulations mandating that each enterprise must have an employee assembly/employee representative congress, this may become necessary if, for example, a meeting of all employees to discuss company rules is not feasible because of the large number of employees in the enterprise or a collective contract is required. Under the Collective Contract Provisions, a collective contract must be adopted by an employee assembly/employee representative congress before it can come into force. This is one example demonstrating how the establishment of an enterprise union, which can then demand collective bargaining, may lead to other forms of employee representation needing to be established. Therefore, although there are currently only a few FIEs that have employee assemblies/employee representative congresses, it would be generally useful for FIE managers to be familiar with the nature and basic workings of such bodies as they may become more prevalent in the future.

In terms of how exactly employee representative congresses should operate in private enterprises and FIEs, there is currently little statutory guidance. On the national level, the Enterprise Union Regulations, as well as regulations directed towards state-owned enterprises provide some guidance. Elections of employee representatives are only valid if two-third of the employees attend the vote and if the representative receives more than one-half of the votes cast. Similarly, any resolution passed by an employee representative congress will only be valid if two-third of the employee representatives attend the vote and the resolution receives more than one-half of the votes cast. Generally, employee assemblies/employee representative congresses should meet once or twice a year to discuss employment matters and may also be called for ad hoc meetings to discuss company rules and collective contracts.