A COMPREHENSIVE PROPOSAL FOR THE REFORM OF THE DISMISSAL LAW IN CHINA

Ke Zhenxing*

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* Ke Zhenxing, lecturer at Law School, Nankai University.

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Abstract

This article will offer a comprehensive proposal for the reform of the law of dismissal in China. Even though this topic has received extensive discussion, its significance remains relevant today for the following reasons. First, nowadays, an increasing number of companies operating under the platform model are inclined to reclassify employees as independent contractors. Given this extraordinary circumstance, loosening the dismissal protection and other legal protections may somewhat slow down this process. Second, there is room for the reduction of dismissal protection. Several provisions in the dismissal law are unreasonable and have placed undue burdens on employers. In addition, the establishment of social insurance provides an opportunity for the legislature to reform the dismissal law. By making it less restrictive, legislators can seek a new balance of interest between the employer and the employee. As a comprehensive proposal, this article will address other issues as well, namely the antidiscrimination rule, protections against employer retaliation, and remedial rule for illegal dismissals.

Keywords: dismissal law, summary termination, dismissal of incompetent employees, severance payment, whistleblower

I. INTRODUCTION

This year marks the fourteenth anniversary of implementing the Employment Contract Law[1] in China. After it was passed by the Standing Committee of the National People's Congress in 2008, scholars discussed whether the dismissal part of the law is stringent and causes a negative impact on the company and further on the economy.[2] Since the dismissal law remained unchanged, the discussion has decreased in recent years. This article wants to reignite the debate due to a new wave of reclassification of the employee to the independent contractor.[3] The new form of employment, such

[1] Laodong Hetong Fa (劳动合同法) [Employment Contract Law] (promulgated by the Standing Comm. Nat'l. People's Cong., June 29, 2007, effective Jan. 1, 2008) (Chinalawinfo).

[2] Please see two literature review: Qiu Jie (邱婕), *Laodong Hetongfa Zhi Jiegu Baohu Zhidu Yanjiu*, (《劳动合同法》之解雇保护制度研究) [*The Research on the Dismissal Protection in the Employment Contract Law*], 8 ZHONGGUO LAODONG (中国劳动) [CHINA LABOR] 82 (2018); Li Biao (李飙) & Ji Wenwen (纪雯雯), *Laodong Hetongfa Zhuyao Wenti Jingji Yanjiu Pingjie* (《劳动合同法》主要问题的经济研究评介) [*Comments on the Economic Research on the Major Issues of Employment Contract Law*], 6 ZHONGGUO LAODONG GUANXIE XUEYUAN XUEBAO (中国劳动关系学院学报) [JOURNAL OF CHINA UNIVERSITY OF LABOR RELATIONS] 91 (2018).

[3] It should be noted that, "independent contractor" is not a legal terminology in China. I borrow it from America as a convenient expression. More precisely, in China, labour providers are classified as employees

as platform work, has risen and developed rapidly in China. The platform company does not treat them as an employee. Therefore, according to the law, these platform workers are not entitled to an employee's rights.

One solution for this dilemma is to create a new type of employment and offer part of the rights to these platform workers. On July 16, 2021, the Chinese government issued the Guiding Opinions on Protecting Workers in the New Form of Employment. This regulation creates a third employment category for workers "who do not meet the employee status standard but are subject to some degree of control from the company." This regulation also grants the group many but not all employee rights, such as the minimum wage.

This article argues that creating a third employment category is wise but not enough, and we need to consider the source of this wave of reclassification. Stringent employment protection, such as the dismissal law, will incentive the company to reclassify. In this sense, a well-designed reduction of protection (if there is room for the reduction) could somewhat slow down the process. Meanwhile, since the dismissal law can prevent the employer from abusing its power to discharge the employee at will, the legislature must consider the matter carefully. This article will scrutinize the entire dismissal law and provide a comprehensive proposal, reducing the undue burden and improving other issues such as antidiscrimination.

Compared to other articles on the dismissal law, one advantage of this article is that it has referred to many guiding opinions about the dismissal in judicial interpretations created by high courts in various provinces. These provisions provide different approaches to revising the dismissal law. This article also examines dismissal law through the lens of comparative legal research by referring to foreign legislation.

In May 2020, the National People's Congress (NPC) promulgated the Civil Code. In November 2020, President Xi Jinping delivered an important speech at *The Conference of Comprehensively Governing the Rule of Law*. He indicated that "China should draw from its experience of the codification of civil law. And promote codification in other areas if the situation is ripe." Should the legislature plan to codify the labor and employment law, this article may serve as a source of inspiration.

II. BACKGROUND

A. A Brief Introduction to the Dismissal Law

1. Phase I: The Planned Economy Era. After the conclusion of the Socialist Transformation in 1956, most enterprises in China became state-owned. After graduation, people were assigned to factories; most worked for one factory until retirement (called the "iron rice bowl"). Dismissal protection

and non-employees, and non-employees include statutory nonemployees and independent contractors. Student interns are an example of statutory nonemployees.

was not necessary: unless a worker committed a crime, the employer could never discharge any employee.

2. Phase II: The Implementation of the Reform and Opening-up Policy. The "iron rice bowl" was problematic because such an employment relationship failed to establish a productive working climate. There existed no incentive for an employee to work hard, for he or she never had to worry about losing the job.

After 1979, China initiated the Reform and Opening-Up Policy to build a market-oriented economy. State-owned enterprises began to enjoy the autonomy to decide salary and set forth the terms and conditions of an employee's employment using a labor contract.

On July 12, 1986, the State Council issued two crucial administrative regulations: the *Interim Regulations on Dismissal by State-owned Enterprises of Employees in Violation of Discipline*, which listed typical workplace disciplinary violations, and the *Provisional Regulations on the Institution of the Employment Contract System in State-Owned Enterprises*, which listed grounds for a legitimate discharge. Collectively, they augmented employers' power to discharge employees.[4]

3. Phase III: From the Labor Law to the Employment Contract Law. With the establishment of the market economy in China, in 1994, the Standing Committee of the NPC enacted the Labor Law[5]. The Labor Law is a fundamental law in the area of employment, covering issues such as the employment contract, the labor standard, employment dispute resolution, and the labor union. Regarding dismissal, the Labor Law provided employers with more legal grounds to discharge employees,

Since 2006, President Hu Jintao and Prime Minister Wen Jiabao were dedicated to creating a harmonious society, and "putting people first" became the government's motto.[6] In response to this initiative, the legislature enacted the Employment Contract Law. The Employment Contract Law retained the basic framework of previous legislation that addressed the issue of abusive discharge but imposed much stricter rules. It should be noted that while the Labor Law remains in force, the Employment Contract Law has updated relevant provisions concerning employment contracts under the Labor Law. The Employment Contract Law was amended in 2012 but the rules of dismissal protection remain unchanged.

[4] For the detail of these regulations, please see Henry Zheng, *An Introduction to the Labor Law of the People's Republic of China*, 28 HARV. INT'L. L. J. 385 (1987).

[5] Laodong Fa (劳动法) [Labor Law], (promulgated by the Standing Comm. Nat'l. People's Cong., July 5, 1994, effective Jan. 1, 1995) (Chinalawinfo).

[6] Maureen Fan, *China's Party Leadership Declares New Priority: 'Harmonious Society'*, (Oct.12, 2006) http://www.washingtonpost.com/wp-dyn/content/article/2006/10/11/AR2006101101610.html (last visited Dec. 27, 2022)

B. Current Dismissal Law

An OECD report once collected data from 43 countries and found that, in terms of employment protection, China ranked number four in dismissal rights and was only surpassed by Indonesia, India, and Portugal.[7] The ranking may be subject to debate[8], but, as this section indicates, dismissal law in China is indeed stringent.

1. Precondition: Limited Grounds of Dismissal. Dismissal protection in China requires every discharge to have a legal ground. Before the Employment Contract Law came into force, the Labor Law allowed an employer and an employee to specify in what situation the employment relationship could automatically end. Under the Employment Contract Law, there is practically no room for parties to set other conditions for termination. According to Article 44 of the Employment Contract Law, in the following situations, "the employment contract will end where: the term of a fixed-term contract expired; the company goes bankrupt; the license for the company is repealed; an employee dies, or an employee retires, and situations regulated in other laws." In addition, Article 12 of the Regulation on the Implementation of the Employment Contract Law[9] reiterates that "an employer and an employee cannot agree on any other term for the end of the employment contract beyond the circumstances for the termination of employment contracts stipulated by the Employment Contract Law." The law only provides employers with the following legal grounds.

2. Fault-based Termination (Summary Termination). In China, an employee can be summarily terminated when he or she:

is demonstrated incapable in the probationary period;

materially breaches a work rule;

conducts a severe dereliction of duty or graft, causing substantial harm to the employer;

concurrently establishes an employment relationship with another employing unit, which seriously affects the accomplishment of the task of the

[7] The 43 countries including 34 OECD countries (Austria, Austria, Belgium, Canada, Chile, Czech, Denmark, Estonia, Finland, France, Germany, Greek, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Netherland, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the UK and the USA) and 9 non-OECD countries (Brazil, China, India, Indonesia, Russia, South Africa, Argentina, Latvia, Saudi Arabia). The OECD Report, *Strictness of employment protection – individual and collective dismissals*, https://stats.oecd.org/Index.aspx?DataSetCode=EPL_OV (last visited Dec. 27, 2022).

[8] Ding Wenwen & J. H. Verkerke, *Has China's Labor Contract Law Curtailed Economic Growth?* 99 DENV. L. REV. 453 (2021–22).

[9] Laodong Hetong Shishi Tiaoli (劳动合同法实施条例) [Regulation on the Implementation of the Employment Contract Law] (promulgated by the State Council, Sept. 18, 2008, effective Sept. 18, 2008) (Chinalawinfo).

original employer, or refuses to rectify this problem after the actual employer brings the matter to his attention;

uses deception or coercion to enter an employment contract with the employer, and

is being subject to an action for criminal liability.

3. Non-fault-based Termination. Article 40 of the Employment Contract Law provides that an employer can unilaterally terminate an employment contract after sending the employee a written notice 30 days in advance. The employer can instead pay the employee one month's wage and terminate the contract in the following three situations. First, an employee is sick or injured for a non-work-related reason. Suppose this employee cannot resume his original position after the expiry of the prescribed period for medical treatment or the employee simply fails to fulfill any other task assigned after returning to work. In either case, the employer can terminate the employment contract. The second circumstance is poor performance. The law allows for the discharge of an employee based on incompetence or ineptitude, should the employee has received additional training from the employer or already transferred positions. The third circumstance is there is an operational reason. Should the objective circumstances when the employment contract was signed substantially change, and the terms of the contract become impossible to perform due to the changed circumstances or mutual agreement on contract modification cannot be reached, termination of employment shall be permitted.

4. Mass Redundancy. Article 41 of the Employment Contract Law addresses the issue of mass redundancy. The article defines mass redundancy as a situation in which a company fires 20 or more employees, or any number less than 20 but accounts for at least 10 percent of its workforce. The employer should inform the labor union or all of its employees 30 days in advance. After consulting the labor union or its employees, the employer should then report its plan to the labor administrative department. Such mass redundancy is only allowed under four circumstances, namely:

(1) The enterprise undergoes restructuring subject to the Enterprise Bankruptcy Law;

(2) Serious difficulties emerge in production or business operations;

(3) After switching production, introducing a major technological innovation, or revising its business methods, the enterprise still needs to reduce its workforce, regardless of previous efforts to modify employment contracts;

(4) The objective economic circumstances when the employment contract was signed substantially change, and the terms of the contract become impossible to perform due to the changed circumstances.

While reducing the size of the workforce, the employer should try its best to retain employees: (1) who have concluded fixed-term employment contracts with the employer and have a relatively long term left; (2) who have signed open-ended employment contracts with the employer; and (3) who are the only

ones in their families to be employed, and have an elderly or a minor as a dependent. Suppose an employer reduced its workforce under the first paragraph of Article 41 and starts a recruiting process within six months of lay-off. In this case, the employer has to give notice to all the ex-employees dismissed at the time of the reduction and, all things being equal, hire them on a preferential basis.

5. Special Social Protection. Article 42 of the Employment Contract Law provides that even if there arises a situation specified by Articles 40 or 41, an employer cannot discharge an employee who:

(1) is engaged in operations exposing him to occupational disease hazards and has not yet undergone an occupational physical examination before leaving the position, or is suspected of having an occupational disease and is currently under diagnosis or medical observation;

(2) has confirmed an occupational disease or a work-related injury during his employment that costs or partially costs the employee's capacity to work;

(3) has contracted an illness or sustained a non-work-related injury and is currently undergoing treatment;

(4) is pregnant or in the perinatal period or in the lactation period;

(5) has been working for the employer continuously for no less than 15 years and will reach legal retirement age within 5 years;

(6) finds him or herself in any other circumstances proscribed by a law or an administrative regulation.

6. Procedural Requirement for a Dismissal. Other than the substantive requirements mentioned above, there are also procedural requirements to meet. According to the Employment Contract Law, an employer should inform the labor union of any discharge decision. Suppose the labor union finds the decision in a potential violation of labor laws, administrative statutes, or the employment contract, the union may ask the employer to rectify the decision. The employer has to consider the labor union's opinion and later submit a written statement to the union regarding its handling of the issue. Note that the final decision is entirely the employer's to make.

The Supreme People's Court (SPC) provides an exception clause that allows an employer to make the discharge legal as long as the employer communicates its decision to the labor union or its employees before trial. This rule is drawn from the Interpretation of Several Issues on the Application of Law in the Trial of Employment Dispute Cases,[10] issued by the SPC. Article 47 of this interpretation stipulates that when an employer fails to notify the labor union upon deciding to discharge an employee, the discharge can still

[10] Zuigao Renmin Fayuan Guanyu Shenli Laodong Zhengyi Anjian Shiyong Falü Ruogan Wenti de Jieshi 1 (最高人民法院关于审理劳动争议案件适用法律若干问题的解释（一）) [Interpretation of the Supreme People's Court on Several Issues about the Application of Laws for the Trial of Labor Dispute Cases] (promulgated by the Sup. People's Ct., Dec. 25, 2020, effective Jan. 1, 2021).

become legitimate if the procedural requirement is fulfilled before any employee files a lawsuit against the employer.

7. The Remedy for An Illegal Discharge. If an employer discharges an employee based on Articles 40 or 41, the employer has to pay a severance fee. The employee can receive an amount equal to his or her monthly salary for every full year he or she worked under the employer. Any working period that lasts at least six months but less than a year is counted as a full year. If a working period is less than six months, for that specific working period, the employee receives a severance payment that only equals half of his or her monthly salary.

In addition, the law stipulates remedies to prevent any breach of the rule. If a dismissal is illegal and the employee demands continued performance of the employment contract, the court can order compulsory reinstatement. Suppose the employee does not make such a demand, or the performance of the employment contract has become impossible. In that case, the employer shall double its severance payment.

8. Other Indirect Restrictions on the Dismissal Protection. It should be noted that the law restricts the use of the fixed-term contract. Before the Employment Contract Law came into effect, a fixed-term employment contract was a loophole that allows employers to circumvent dismissal protection. If an employee signs a one-year employment contract with an employer and is later found incompetent, the employer does not have to immediately discharge the employee, because when the one-year contract ends, the employer only renews fixed-term contracts for employees who perform well.

Two articles of the Employment Contract Law address this loophole. Article 46 (3) stipulates that suppose an employer signs a fixed-term contract with an employee, the employer has to pay a severance fee if chooses not to renew the contract. This article increases the cost of dismissal should the employer wish to exploit the loophole. Article 14 of the Employment Contract Law is about the open-end employment contract. Suppose an employee has consecutively concluded a fixed-term employment contract with the same employer twice. When renewing the contract, the employer should draft an open-ended one upon the employee's request.

III. DISCUSSIONS ON WEAKENING THE DISMISSAL PROTECTION

A. The Cost of the Dismissal Protection on the Company

After the passage of the Employment Contract Law, many articles began to discuss the dismissal law's effect on costs for the company. For example, Liu surveyed several groups of HR managers, and 167 managers answered the questionnaire. The result shows that 58.3% of managers think the new dismissal law increased the cost, and 23.2% think the increase is significant

among them. In addition, 41.7% think a new law does not increase costs.[11] This article argues, this law causes more costs on the following two items.

1. The Cost of the Administration. As Epstein pointed out, the dismissal protection regime increased the administrative costs for any company that wants to win a lawsuit.[12] For example, the formulation of the work rule is a condition to discharge an employee who commits misconduct legally. The company should democratically formulate a work rule and inform the employee of the work rule. For another example, the employer should establish an attendant checking system and require employees to sign an attendant sheet when they enter the company. Suppose an employer wants to discharge an employee who is absent for ten days. The employer could demonstrate the employee's absenteeism as long as there is no sign on the attendant sheet.

2. The Cost of the HR management. Since the dismissal protection law restrains companies' autonomy in operation, companies must consider any employment decision more carefully to avoid losing lawsuits. For example, suppose that an employee was significantly underperforming at work. The fear of losing cases and paying twice severance forces the company to retain this employee until the company obtains sufficient evidence. Therefore, strict dismissal protection will increase the HR management cost.

Several empirical research demonstrates such an effect. For example, Yanyuan Cheng and Liu Yang conducted a national survey, and 592 HR managers answered the questionnaire. The result shows that 54.9% think the law makes the company more cautious about dismissal decisions, 17.6% decrease the dismissal, and 12.8% slow down the firing; 9.5% think the law's impact on the dismissal decision is small.[13] Guanmin Liao and Yan Chen investigated the Employment Contract Law's impact on the operation's flexibility. The flexibility of the operation means that, theoretically, a company usually hires or discharges employees due to the company's external demand for production. However, the employer cannot adjust the workforce purely based on external demand if the employer pays the cost for such an adjustment. In this sense, the flexibility of the operation decreased. The authors ultimately demonstrated that the Employment Contract Law decreases such flexibility.

[11] Liu Caifeng (刘彩凤), *Laodong Hetongfa Dui Woguo Qiye Jiegu Chengben yu Guyong Xingwei deYingxiang—laizi Qiye Taidu de Wenjuan Diaocha* (《劳动合同法》对我国企业解雇成本与雇用行为的影响——来自企业态度的问卷调查) [*The Impact of the Employment Contract Law on the Company' Dismissal Cost and Hiring Behavior—Based on Questionnaire from companies*], 12 JINGJI GUANLI (经济管理) [BUSINESS AND MANAGEMENT JOURNAL] 143 (2008).

[12] Richard Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 969 (1984).

[13] Cheng Yanyuan (程延园) & Yang Liu (杨柳), *Laodong Hetongfa Shishi Duiwoguo Qiye Renli Ziyuan Guanli Yingxiang* (《劳动合同法》实施对我国企业人力资源管理的影响) [*The Influence of Implementation of the Employment Contract Law on Human Resource*], 7 JINGJI LILUN YU JINGJI GUANLI (经济理论与经济管理) [ECON. THEO. & BUS. MGM'T.] 66 (2010).

The authors do not clarify what specific protections in the law caused the decrease, and I think dismissal protection is one critical reason.[14]

B. Further Discussions on the Undue Burden

For these costs imposed on the company, scholars may justify that this increased cost is necessary for healthy HR management. For example, Jia Lin argues that, after the passage of the Employment Contract Law, it is time for companies to improve HR management and work rules. These improvements are a necessary cost for companies. Only when a company improves its management behavior can it achieve a maximum profit and minimum price.[15] This article will pay attention to the undue burden imposed by the law. The undue burden means a company has established legal compliance but still failed in the lawsuit since the legal requirement is too high. Or, the undue burden makes a simple HR decision complicated and also risks losing lawsuits. This article agrees that the necessary cost will restrain the employer's abusive power. However, the law should avoid adding such undue burden.

1. Provision Related to An Employee's Misconduct. This provision is an excellent example that even though companies have established a legal compliance system, they are more likely to lose lawsuits since the requirement is too high. As I introduced, the employer only can discharge an employee who commits misconduct based on the work rule. Section 2 of Article 39 states that an employer can discharge an employee who materially violates a work rule, but enacting a perfect work rule that covers every misconduct is nearly impossible. Judges have noticed this issue. In *Weiqiang v. Zhongbai Supermarket Ltd.*,[16] the judge noted that "Zhongbai Supermarket as an employer is just a common civil entity, and it is impossible for this supermarket to exhaust every serious misconduct when enacting a work rule." The incomplete contract theory can help explain it. As Oliver Hart points out, actual contracts are incomplete contracts that are "poorly worded, ambiguous, and leave out important things in real life."[17] Even in a legal contract, people cannot

[14] Liao Guanmin (廖冠民) & Chen Yan (陈燕), *Laodong Baohu, Laodong Mijixing yu Jingying Tanxing: Jiyu 2008 Nian Laodong Hetongfa Shizheng Yanjiu* (劳动保护、劳动密集型与经营弹性：基于2008年《劳动合同法》的实证检验) [*Employment Protection, Labor Intensive and Flexibility of Operation: Based on Empirical Study on the Employment Contract Law in 2008*], 2 JINGJI KEXUE (经济科学) [ECON. SCI.] 91 (2014)

[15] Jia Lin (林嘉), *Laodong Hetongfa Lifa Jiazhi, Zhidu Chuangxin ji Yingxiang Pingjia* (《劳动合同法》的立法价值，制度创新及影响评价) [*The Legislative Value, the Institutional Innovation and the Evaluation of the Employment Contract Law*], 2 FAXUEJIA (法学家) [THE JUR.] 1 (2008).

[16] Wei Qiang, Zhongbai Chaoshi Youxian Gongsi Laodong Zhengyi Ershen Minshi Panjueshu (魏强、中百超市有限公司劳动争议二审民事判决书) [Wei Qiang v. Zhongbai Supermarket Co., Ltd.] (2017)鄂01民终6208号 (Wuhan Interm. People's Ct. 2017).

[17] Oliver D. Hart, *Incomplete contracts and control*, AMERICAN ECON. REV., *107*(7), 1731–52 (2017).

list all possible scenarios. Thus, such an insufficient ex-ante investment may cause social inefficiency.[18]

The typical lawsuit, *Jiesheng Ding v. Beijing Alibaba Cloud Computing Technology Ltd.* manifests the severity of this problem. In 2013, Mr. Ding, an employee of a branch of Alibaba Company, one of the largest retail companies in the world, requested sick leave due to cervical spondylosis. After Mr. Ding returned to the company, Alibaba fired him. Alibaba claimed that Mr. Ding provided fake evidence of his sick leave and hid the fact of his traveling to Brazil, materially violating the company's work rules. Mr. Ding denied this accusation and filed a lawsuit alleging wrongful dismissal. The district and intermediate courts in Beijing supported Mr. Ding. The intermediate court explained that neither the law nor the company's work rules specified sick leave locations. Therefore, even though Mr. Ding went to Brazil, he did not violate the law or the company's work rules. In addition, whether Mr. Ding needs to travel to Brazil for treatment relies on hospital evidence rather than the company's subjective judgment. Based on these two reasons, the dismissal was illegal.[19]

It should be noted that Beijing High Court has understood such a dilemma. Beijing High Court has accepted the appeal from the Alibaba company and reversed this decision, arguing that good faith duty was essential for an employee. Employers and employees should mutually respect each other during the employment relationship. Therefore, although the company's work rules did not prohibit employees from traveling while on sick leave, employees' behavior should conform to the reason for sick leave. The origin of this obligation is good faith duty, even though the work rules did not specify such a condition. When the company asked Mr. Ding to submit materials about the sick leave, Mr. Ding refused, thus violating the good faith duty of an employee and disrupting the workplace's regular working order. In the end, the company legally discharged him.[20] However, the good faith principle cannot cover all types of misconduct. For example, an employee does not wear a mask in the company during the outbreak of Covid-19 in one city, which increases other employees' risk of being infected with the virus. Suppose the work rule does not specify the mask rule because the company cannot predict the outbreak of Covid-19. Discharging this employee may risk losing the lawsuit, and the good faith principle does not apply to this situation.

[18] Sanford J. Grossman & Oliver D. Hart, *The costs and benefits of ownership: A theory of vertical and lateral integration* 94(4) J. POL. ECON., 691–719 (1986).

[19] Beijing Alibaba Yunjisuan Jishu Youxian Gongsi yu Ding Jiesheng Laodong Zhengyi Ershen Minshi Panjueshu (北京阿里巴巴云计算技术有限公司与丁佶生劳动争议二审民事判决书) [Jiesheng Ding v. Beijing Alibaba Cloud Computing Technology Co., Ltd.], (2015) 一中民终字第650号 (No. 1 Interm. People's Ct. Beijing 2015).

[20] Beijing Alibaba Yunjisuan Jishu Youxian Gongsi Laodong Zhengyi Shenpan Jiandu Minshi Panjueshu (北京阿里巴巴云计算技术有限公司劳动争议审判监督民事判决书) [Jiesheng Ding v. Beijing Alibaba Cloud Computing Technology Co., Ltd.], (2017) 京民再65号 (Beijing High People's Ct. 2017).

2. Provision Related to Incapable Employees. This provision is an example that the dismissal law complicates simple HR issues, and the company is more likely to lose lawsuits. The feature of the provision is the hardness to discharge. First, the employer should demonstrate the employee is incompetent. The employer often fails to meet the requirements due to the following reasons: there is no performance standard for assessment; the standard is unclear; the employer does not inform the standard of the employee; the employer does not provide enough evidence to demonstrate. Next, the employer should adjust the employee's position or provide training. The employer also needs to illustrate the adjustment of the position or the training is relevant and reasonable. Then, the employer should demonstrate that the employee is again incompetent to discharge this employee.

This provision could provide more opportunities for an employee who slightly underperforms in the job. They can receive a chance to try another position or participate in training. Suppose that he or she can perform well in the second position. They are more likely to keep the job. In this sense, the employee will thank the dismissal protection for preventing the employer from discharging him at will. However, the problem is that it is unnecessary for an employee who is significantly incompetent for this job to impose such a burden on the employer. In addition, as lawyers and scholars found, the employer's win rate is very low in the case related to the incapable employee.

For example, Haiyan Duan, Xiaoyu Ma, and Xuying Wang collected 329 judgments on discharging incompetent employees in the courts of Beijing, Shanghai, Guangzhou, and Shenzhen in 2015 and 2016. They found that the employers' average success rate in the four cities was only 7.27%. There are 109 relevant lawsuits in Beijing, and the win rate is 2.75%; 97 lawsuits in Shanghai, and the win rate is 13.4%; 48 lawsuits in Guangzhou, and the win rate is 6.25%; 75 lawsuits in Shenzhen, and the win rate is 6.67%. The most frequent reason for the loss is that the employer's evidence did not support the decision that the employee was incompetent, and the employer did not provide adjustment of position or training before discharging the employee.[21] Dong also collects relevant lawsuits in Beijing and Shanghai. There are 181 lawsuits in Beijing, and the win rate is 0; 210 lawsuits in Shanghai, and the win rate is below 5%. Both of the research can show the low win rate for the company.[22]

[21] Duan Haiyan (段海燕), Ma Xiaoyu (马晓钰) & Wang Xuying (王旭颖), *Yongren Danwei yin Laodongzhe Bushengren Danfang Jiechuquan Yanjiu-Xianshi Kunjing Yu Tupo Jianyi* (用人单位因劳动者不胜任之单方解除权研究——现实困境与突破建议) [*The Research about the Discharge on the Incompetent Employees—Reality and Suggestion*], http://www.zhonglun.com/Content/2017/03-21/1802232352.html. (last visited Dec. 27, 2022)

[22] For the difference in the win rate, each study does not list all names of the lawsuits, so I cannot find which case Duan's research cite but Dong's research does not. One guess is that many companies stipulate performance requirement in the work rule. Suppose an employee's performance is below the requirement, and the employer discharges the employee since the employee materially violated the work rule. This article does not know whether Dong's research and Duan's research include or exclude this type of the lawsuit.

Dong further found that there are 38 lawsuits that an employer discharges an incompetent employee because this employee materially violates the work rule, and the number in Shanghai is 29. Dong explained that the company's win rate in the lawsuits about the employee's misconduct decided by courts in Beijing is 29%, and in Shanghai is 31%.[23] Further, the reason that the incompetent employee would violate the work rule, Dong argued that, after the dispute occurred, the employee would be anxious about their future. If the employee loses patience and commits misconduct, the employer can discharge him based on the material violation of the work rule.[24]

However, compared with the discharge related to misconduct, the release associated with incompetence is harmful to the employee. Suppose that an incompetent employee is discharged based on Article 40. He can obtain severance payment and 30 days prior written notice or one month's wage instead of notice. Suppose the employer uses article 39 to discharge them, which is legal. The employee cannot obtain such benefits.

C. The Dismissal Law's Influences on Employment

People may argue the cost including the undue burden the dismissal law imposed is necessary to protect employees. However, this section will argue, a stringent dismissal law also could harm the employee's interest. When discussing whether the dismissal law's negative effect outweighs the benefits, we should consider this effect.

1. Different Impacts on Different Types of Employees. Regarding the dismissal law's effects on employment, the intuition is that a strict dismissal law can benefit all employees. This article argues that benefits vary for different groups of employees. First, an employee can be classified as a high-end or ordinary employee. The high-end employee usually is a highly skilled employee with a high salary. And the rest of the employees are ordinary employees, and some are low-skilled employees with lower wages.

This article argues that high-end employees benefit from the dismissal law. First, the law provides strong dismissal protection, both procedural and substantial. Suppose that a dispute on the dismissal occurs, an high-end employee can usually hire an excellent lawyer. If the lawyer can prove that the employer does not meet any one of the legal requirements, the employee will win the lawsuit. Meanwhile, even though the labor cost for a high-end

[23] This article is not sure Dong's sampling method on this finding. Meanwhile, the finding of the win rate is close to other research. For example, Zhenxing Ke collected relevant lawsuits decided by collected 2756 cases decided by district courts in Beijing between 2014 and 2018. The company's win rate is 0,31. Please see Zhenxing Ke, *Company Ownership Structure, Legal Compliance and the Probability of Winning an Employment Lawsuit in China*, 12(3) ASIAN J. L. & ECON., 269–86 (2021).

[24] Dong Baohua (董保华), *Buneng Shengren Jiechu Zhishang—Beijing Yisi, Shanghai Gouhuo* (不能胜任解除之殇——北京已死，上海苟活) [*The Death of Discharge related to an Incompetent Employee*], ZHONGGUO LAODONG (中国劳动), [CHINA LABOR] (Dec. 3, 2016, 18:40), https://mp.weixin.qq.com/s/aaysUYLeuYfRnLX1TD8Hig (last visited Dec. 27, 2022).

employee increases, if the high-end employee is indispensable in the company's operation, the company will continue to hire them.

In contrast, even though ordinary employees are more likely to win the dismissal lawsuit, they will still be worried about their jobs. First, the company may hire fewer ordinary employees to save such costs. Studies have demonstrated this tendency. Ping Huang's research used evidence from Chinese Listed Companies to show the law's different impacts on different groups of employees. The study found that dismissal protection against abusive dismissal negatively affected the hiring of labor-intensive businesses. As labor-intensive companies were sensitive to labor costs, the enhanced dismissal protection slowed down the increase in employment. Meanwhile, knowledge-intensive enterprise employees did not have such worries. These employees usually have high knowledge and skill, and employers in these industries have to hire more employees to expand their business.[25] Yuejun Tang & Yangwu Zhao also found that although manual workers' income increased, the overall job positions decreased. Meanwhile, the knowledge worker's income also increased, while their employment was not affected as much.[26] A recent study by Fan Jiang and Dachuan Yu also makes a similar conclusion.[27]

Nonetheless, it should be noted that the impact may not be too severe. In the past ten years, the economy in China maintained strong growth. Companies continued to hire many ordinary employees to expand the business regardless of the strict dismissal. Gallagher's paper provides an example. She argued that the open-ended contracts under the Employment Contract Law significantly increased the hiring cost. Still, the article does not claim that the unemployment rate had a corresponding increase. The reason might be that, because the labor supply in China decreased in recent years, employers had to retain employees and were willing to sign open-end contracts. Therefore, the effect of the open-ended contract on the unemployment rate is of no significance.[28]

2. The Rise of Nonstandard Model. In addition, ordinary employees' positions are more likely to be changed involuntarily into nonstandard work like labor dispatch and labor outsourcing jobs. The labor dispatch is a kind of fissured employment relationship. After a labor dispatch company hires an employee, it transfers the employee to the user company according to their

[25] Huang Ping (黄平), *Jiegu Chengben, Jiuye yu Chanye Zhuanxing Shengji*, (解雇成本、就业与产业转型升级) [*Dismissal Cost, Employment and Industry Transformation and Upgrading*], 3 NANKAI JINGJI YANJIU (南开经济研究) [NANKAI ECON. STUD.] 79 (2012).

[26] Yuejun Tang (唐跃军) & Yangwu Zhao (赵武阳), *Eryuan Laodongli Shichang, Jiegu Baohu Laodong Hetongfa*, (二元劳工市场、解雇保护与劳动合同法) [Dual Labor Market, Dismissal Protection and Employment Contracts Law], 1 NANKAI JINGJI YANJIU (南开经济研究) [NANKAI ECON. STUD.] 122 (2009).

[27] Jiang Fan (蒋帆) & Yu Dachuan (于大川), *Jiegu Guizhi dui Jiuye Wendingxing de Yingxiang* (解雇规制对就业稳定性的影响) [*The Impact of the Dismissal Regulation on the Stability of the Employment*], 9 LAODONG JINGJI YANJIU (劳动经济研究) [LAB. ECON STU.] 98 (2021).

[28] Mary Gallagher, John Giles, Albert Park & Meiyan Wang, *China's 2008 Labor Contract Law: Implementation and Implications for China's Workers*, HUMAN RELATIONS, 68(2), 197–235 (2015).

mutually agreed contract. The user company then retains managerial control over the employee. The labor dispatch can satisfy employers' demand for a flexible employment model. For example, the employer can hire a dispatched employee if an employee is ill and undergoes surgery. When the employee recovers and returns, the employer can terminate the services of the dispatched employee without paying severance. However, the labor dispatch is unfriendly to employees since a labor dispatch employee cannot obtain the wage at the same rate as a standard employee. Therefore, the Employment Contract Law also imposes restrictions on this model.[29]

Although the Employment Contract Law restrains labor dispatch, many employers continued to favor this nonstandard employment. In 2008, the number of dispatched employees was 20 million. In 2010, ACFTU issued the report *Investigation on the Labor Dispatch*. The report showed that the number of dispatched employees increased to 60 million,[30] which accounted for nearly 20% of the labor force in China. Another estimation by the MOHRSS is more conservative: the number of dispatched employees increased to 27 million.[31] With regard to this situation, Tongxian Shen argued that there is a logical relationship between strict dismissal protection and abnormal prosperity of the labor dispatch.[32] Ho and Huang thought it was ironic that the Employment Contract Law initially aimed to advance workers' rights, but resulted in facilitating the abuse of labor dispatch.[33] In 2012, the Standing Committee of the NPC revised the Employment Contract Law and added more regulations to restrain the rapid development of labor dispatch employment. At around the same time, the MOHRSS issued the Interim Provisions on Labor Dispatch to constrain the growth of labor dispatch. For example, the regulation stipulated that the number of labor dispatch employees shall not exceed 10% of the company's workforce.

After these regulations were implemented, the number of dispatched employees dramatically decreased. However, another nonstandard employment model, the outsource model, overgrew and began to replace the labor dispatch model. For example, in Nanjing City, the number of dispatched employees decreased by 11.3% from 2016 to 2017. Over this period, the number of outsourcing employees increased by 175%.[34]

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[29] Virginia Harper Ho & Qiaoyan Huang, *The Recursivity of Reform: China's Amended Labor Contract Law*. 37 FORDHAM INT'L L.J. 973, 996 (2013).

[30] Report shows the number of the Labor Dispatched Employee increase to 60 Million and Call on the Revision of the Employment Contract Law, http://www.eeo.com.cn/2011/0225/194384.shtml (last visited Dec. 27, 2022).

[31] *Id*.

[32] Shen Tongxian (沈同仙), *Laodong Hetongfa Laozi Liyi Pingheng Zaisikao* (《劳动合同法》中劳资利益平衡的再思考) [*A Rethinking on the Balance between Employer and Employee in the Employment Contract Law]*, 1 FAXUE (法学) [L. SCI.] 57 (2017).

[33] Ho & Huang, *supra* note 30.)

[34] *Laowu Paiqian Renshu Zhunian Dijian, Renli Ziyuan Qiye Zhuanxing Waibao*, (劳务派遣人数逐年递减，人力资源企业转型外包), [*The Number of Labor Dispatch Employees Decreased, and Human Resource*

D. The Missed Opportunity for Revision

Around 2016, there was a chance to revise the Employment Contract Law, including the dismissal. On November 10, 2015, in the 11th Meeting of the Central Leading Group for Financial and Economic Affairs, President Jinping Xi first stated the idea of supply-side structural reform. Also, President Xi proposed five pillars for the supply-side reform in this meeting, and one pillar is to insist on and improve the fundamental economic institution, improve the market environment, and stimulate the vitality of enterprises.

This meeting triggered another wave of discussion about revising the Employment Contract Law, including the dismissal part. For example, Dong's article listed ten unbalance of interests between employers and employees, and one concern is the law excessively restricts employers' autonomy on the dismissal.[35] On March 08, 2016, Jiwei Lou, Minister of the Financial Department, criticized the Employment Contract Law on national TV, saying, "for enterprises and employees, the extent of protection afforded by the Employment Contract Law is unbalanced. And overprotection of employees may make employers unwilling to create jobs."[36]

Meanwhile, on July 26, 2016, The Political Bureau of the CPC Central Committee held a meeting. The meeting memo indicates that "the focus of cost decrease is to increase the flexibility of the labor market." On November 08, 2016, the Standing Committee of the NPC approved a report issued by the Financial and Economic Committee of the NPC. This report was about a series of proposals from the members of the NPC on revising laws, including the Employment Contract Law. The report stated that "the MOHRSS had declared that there were controversies about the purpose of the legislation, open-end contract, severance fee, etc. Next, the MOHRSS would fully review the Employment Contract Law contents and offer a proposal for revising the law. The Financial and Economic Committee of the NPC also suggested the MOHRSS consider suggestions from members of the NPC further and provided suggestions on the revision based on reviews and investigations."[37]

However, on February 25, 2018, the Standing Committee of NPC rejected to revise the Employment Contract Law. The Chairman of the Social Law Office of the Legislative Affairs in the Standing Committee of the NPC, Linmao Guo, explained that revising the Employment Contract Law still needed further research. Guo said, "for the revision of the Employment

Company Embraces Outsource Model], , (Sept. 30, 2017).

[35] Dong Baohua (董保华), *Laodong Hetongfa Shida Shiheng* (《劳动合同法》十大失衡) [*Ten Unbalance Problem in the Employment Contract Law*], 4 TANSUO YU ZHENGMING (探索与争鸣) [EXP. & FREE VIEWS] 10 (2016).

[36] *China's Finance Minister criticizes labor law on live TV*, China Daily (Mar. 08, 2016), http://www.chinadaily.com.cn/business/2016-03/08/content_23780764.htm (last visited Dec. 27, 2022).

[37] The MOHRSS will Raise Suggestions on the Open-end Contracts, etc. http://www.xinhuanet.com/politics/2016-11/08/c_1119868324.htm (last visited Dec. 27, 2022).

Contract Law, the first question is whether relevant regulations in the Employment Contract Law increase companies' burden. And the second concern is whether employment is not flexible under the Employment Contract Law. After reaching a consensus on these two questions, the Standing Committee of NPC will put the revision on schedule."[38]This statement seems to be a pretext for the delay of the revision. First, there are no absolute right or wrong answers to these two questions, and the legislature should have the courage to decide how to design the dismissal law. Second, even though there is no consensus on these two critical problems, the legislature could also consider revising several provisions where the consensus is much easier to reach.

E. The New reasons for the Reform of the Dismissal Law

In China, the new form of employment, a new type of nonstandard employment, has developed rapidly. Platform work is a typical example. It emerged in China as early as 2012, and now, platform workers have been a significant part of the workforce in China.[39] However, platform companies treat workers as independent contractors with flexible employment models, unlike traditional employees. Companies argue that, although platform workers have some freedom to decide when and where to work, they are subordinate to their employers to a greater degree than independent contractors. Under Chinese laws, these workers cannot obtain the rights guaranteed to employees, especially worker compensation benefits. Similar examples are live streamers who work for the Multi-Channel Network, and most live streamers are not identified as employees. One consequence is that a platform company can save labor costs, leaving platform workers vulnerable to risk. Suppose a rider suffers an injury or even dies in the course of employment, the platform company tends to deny responsibility and insist that the platform worker is not its employee.

Currently, one method is to create a third employment category for the platform worker and entitle partial rights to the third employment category. The Guiding Opinions on the New Form of Employment, jointly issued by eight departments on July 16, 2021, made a significant breakthrough in classifying the employment relationship. This document creates a new employment category:" a worker who does not meet the employee status standard but is subject to some degree of control from the company." This document creates a third employment category, an intermediate worker between 'employee' and 'independent contractor.' Their rights include the minimum wage, the right to

[38] The Legislative Affairs in the Standing Committee of the NPC: it is not ripe to revise the Employment Contract Law, https://news.sina.com.cn/o/2018-02-25/doc-ifyrvaxf0439244.shtml, (last visited Dec. 27, 2022).

[39] State Information Center, *Report on the Development of Sharing Economics in 2021*, http://www.sic.gov.cn/News/557/10779.htm (last visited Dec. 27, 2022). In 2020, the number of platform workers is 6.31 million. In this report, the sharing economy is equal to the platform economy.

relax, and occupational injury insurance, but they do not cover dismissal rights and paid leave.

I argue the creation of the third employment category is appropriate for the protection of the platform worker. It provides a legal framework for platform workers and also provides urgent rights the worker needs, such as occupational injury insurance. I also argue this third employment category should cover more nonstandard employment, not just platform work.[40] It should be noted that, besides platform companies, many service sector companies have introduced platforms into the assignment of tasks and changed traditional management. These areas include health care, maintenance support department, etc. Consider the lawsuit Ruiting Tang v. Beijing Yisheng Health Technology Ltd.[41] as an example. Tang was a therapist and worked for Beijing Yisheng. From July 2015 to October 2015, he had a regular working site and time and earned the minimum wage. From December 2015, he had to accept orders in the company's app and obtain a 60%–70% share for every service order. There was no minimum wage, and he did not need to comply with the attendance policy. The company discharged Tang in May 2019. Tang filed a lawsuit to claim employee status and its related benefits. This change in management is still minor because, from a personal subordination perspective, the company retained a high level of control, such as establishing the service rules, monitoring the process, and technical supervision of the labor process. Ultimately, the judge supported Tang's claim. The judges criticized the company, stating that the company intended to avoid the obligation of the employment laws by ostensibly changing the management mode while still maintaining traditional control.

Meanwhile, even though the third employment category could provide more rights for nonstandard employment, another method is to help employees to retain their standard employment. The Employment Contract Law is not the only reason that causes the transformation to nonstandard employment. The employment costs, such as the minimum wage, the overtime wage, and the social security fee, are also critical factors to facilitate the company to change the employment model.[42] However, a well-balanced dismissal law could help slow down the process. For a company, the advantage of formal employment is that it could provide more job security for employees and help employees increase productivity. Companies may retain their standard employment if the protection level, such as dismissal law, is lowered. It should be noted that I am not arguing that after the labor standard is loosened, all the companies will use

[40] Zhenxing Ke, *A Third Employment Category for Platform Workers in China: A Tough Start*, 10(2) THE CHINESE J. OF COMP.E LAW 297 (2021).

[41] Tang Ruiting yu Beijing Yisheng Jiankang Keji Youxian Gongsi Laodong Zhengyi Ershen Minshi Panjueshu (唐瑞亭与北京宜生健康科技有限公司劳动争议二审民事判决书) [Tang Ruiting v. Beijing Yisheng Health Technology Co., Ltd.] (2020)京02民终8125号 (Beijing No.2 Interm. Ct. 2022).

[42] Lin Jia (林嘉), *ShenShen Duidai Laodong Hetongfa Shiyufei* (审慎对待《劳动合同法》的是与非) [*to Review the Employment Contract Law Right or Wrong Prudently*], 8 TANSUO YU ZHENGMING (探索与争鸣) [EXP. & FREE VIEWS] 56 (2016).

standard employment rather than nonstandard employment. I emphasize that if labor standards are too strict for standard employment, the labor standard will push companies to seek various ways to circumvent labor protections, such as labor dispatch, the outsourcing model, and platform work. The legislature should seek a balance between the interest of the employee and the employer.

IV. A COMPREHENSIVE PROPOSAL FOR THE REFORM OF THE DISMISSAL LAW

At all events, we must treat the reform of the dismissal law in China with great caution, especially when it comes to loosening the protection for employees. First, China is a socialist country, and protecting employees' rights and interests is the priority of the Chinese government. In addition, in view of "path dependence", the dismissal protection regime in China is strict and historical. Thus, reducing the protection that the employee has enjoyed will cause objections from the employee. Ultimately, unlike Western countries, the labor union in China cannot play the role of collective bargaining, so the government has to intervene more in the dismissal issue and provide protection.

This proposal in this article does not plan to revise the dismissal law radically. The dismissal law in this proposal will keep the basic framework, and the revision will focus on specific provisions.

A. Make the Dismissal Law More Flexible

1. The Rule Model and the Standard Model. As I have introduced, the provision of summary termination is rigid and does not conform with the contract theory. This article first plans to introduce the distinction between a legal rule and a standard, and then discuss the proposal. Taking a speed signal as an example, "no driving over seventy miles per hour" is a rule while "no driving at an unsafe speed" is a standard. Korobkin summarized that "rules establish legal boundaries based on the presence or absence of well-specified triggering facts". At the same time, "the standards require adjudicators (usually judges, juries, or administrators) to incorporate into the legal pronouncement a range of facts that are too broad, too variable, or too unpredictable to be cobbled into a rule."[43] Schlag summarized the advantages and disadvantages of rules and standards[44] as follows.

TABLE 1. THE RULE MODEL V. THE STANDARD MODEL

Rules		Standards	
Advantage	Disadvantage	Advantage	Disadvantage
Certainty	Intransigence	Flexibility	Manipulability

[43] Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25 (2000).

[44] Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 400 (1985).

Uniformity	Regimentation	Individualization	Disintegration
Stability	Rigidity	Open-endedness	Indeterminacy
Security	Closure	Dynamism	Adventurism

The amendment of summary termination by the judicial interpretation is an excellent example of rule v. standard. Since the employment contract is incomplete, the law could add a provision under the principle of the dismissal law. From a comparative perspective, dismissal law in many countries has a miscellaneous provision. For example, in Germany, according to the Dismissal Protection Act, the termination of an employment contract will be legally effective only if the termination is "socially justified". In Japan, Article 16 of Labor Contract Law stipulates that "suppose a dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, it is treated as an abuse of rights and is invalid." These two examples are typical standard models, providing more autonomy for an employer to decide.

2. The Application of the Standard Model. Even though the current employment law does not own such a principle, China could add a miscellaneous provision for summary termination. The Beijing High Court offered an excellent example in its judicial interpretation *Answers to the Law Application in Employment Dispute Lawsuits 3*. This method first refers to Article 3 of the Labor Law that "employees shall abide by workplace disciplines and professional ethics." Then, this judicial interpretation stipulates that this provision was an essential requirement for employees, supposing an employee had any misconduct that seriously violated labor disciplines or professional ethics but work rules did not explicitly prohibit this misconduct. In this situation, the employer could terminate their employment contract.

Shenzhen Intermediate Court also offered a solution: the employer can summarily discharge an employee based on Section 2 under Article 23 of the Labor Law. The background Under Article 25 of the Labor Law is that an employee can face summary termination if he: (1) is on probation; (2) violates work rules or workplace discipline; (3) carries out a serious dereliction of duty or graft, causing substantial harm to the employer; and (4) is being subject to legal action for criminal liability. In Shenzhen, the Intermediate Court issued the Guidance for Judgment on Labor Dispute Lawsuits and the Description for the Guidance for Judgment on Labor Dispute Lawsuit. Employees should obey the commonly accepted rules for workplace discipline. When an employee violates these rules, even though a work rule does not cover it, the company can still discharge the employee under section 2 of Article 25 of the Labor Law. According to this article, there is no restraint on the scope of workplace discipline, which means an employer can formulate workplace discipline based on the employer's will. However, I do not think the Shenzhen solution is a good idea. As I introduced above, in the dismissal part, the Employment Contract Law has replaced the Labor Law. The Shenzhen solution that reintroduces the provision of the Labor Law into the current employment law is confusing. The

solution from the Beijing High Court is a better idea and could be generalized to more places.

Suppose the Employment Contract Law adopts the rule model, more provisions can be improved. First, Chinese law could adopt the rule model in the mass redundancy provision. As I introduced, in China, while reducing the size of the workforce, the employer should prioritize the retention of employees: (1) who have concluded fixed-term employment contracts with the employer and have a relatively long term left; (2) who have signed open-ended employment contracts with the employer; and (3) who are the only ones in their families to be employed, and have an older adult or minor as a dependent. This regulation on selection is a typical rule model, and it is very rigid for a company to operate. However, in Germany, there is a standard model. The law stipulates social criteria, including "years of service with the company (seniority), age, family support obligations, and disability."[45] None of the four criteria is prior to the others, and the employer has the discretion to make a decision. In this case, an employer could own more autonomy.[46]

Another example is the one-month notice period when an employer discharges an employee according to Article 40 of the Employment Contract Law, such as dismissing an incompetent employee. This provision is too rigid. Suppose that an employer has worked for the company for a long time, for example, more than ten years, finding a job is more difficult for this employee than for young people who can quickly learn new technologies. Therefore, providing just one month for the older employee is unfair. From a comparative perspective, a reasonable provision should stipulate that the length of the notice period depends on the year the employee works for a company. For example, in the Alberta Province in Canada, the length of the notice period is based on how long they have worked for the employer – an employee who works for more than 90 days but less than two years can obtain one week's notice period, and an employee who works for two years or more can get two weeks.[47] Similarly, in the UK, the length of the notice period also depends on the years of employment: at least one week's notice if employed between one month and two years; one week's notice for each year if employed between 2 and 12 years; 12 weeks' notice if employed for 12 years or more.[48]

[45] Michael Magotsch & Pascal Kremp, *Termination Of Employment*, *in* KEY ASPECTS OF GERMAN EMPLOYMENT AND LABOUR LAW 145 (Kirchner, et at. eds., 2010).

[46] *Also see* Xie Zengyi (谢增毅), *Laodongli Shichang Linghuoxing yu Laodong Hetong Fa Xiugai*, (劳动力市场灵活性与劳动合同法的修改) [*The Flexibility of the Labor Market and the Revision of the Employment Contract Law*], 2 FAXUE YANJIU (法学研究) [CHINESE J. L.], 95 (2017).

[47] Employment Standard Rules-Termination and Termination Pay, https://www.alberta.ca/termination-pay.aspx.

[48] *Redundancy: your rights*, https://www.gov.uk/redundancy-your-rights/notice-periods. (last visited Dec. 27, 2022) (hereinafter *Redundancy*).

B. Reduce the particular requirements

1. Reduce the Requirement for Discharging an Incompetent Employee. In the dismissal area, I argue the law can loosen two provisions to reduce labor costs. The first is the provision about the discharge related to the incompetent employee. As introduced above, if an employer discharges an incompetent employee, the employer has to meet three requirements. The first requirement is that the employer should demonstrate that this employee is incompetent. The second requirement is that the employer should demonstrate that this employee has obtained more training or has been transferred to another position. The third requirement is that the employer verifies that this employee still lacks good job performance.

I argue that the second requirement should not be mandatory. It can be replaced with new criteria concerning whether the employee's performance is significantly below the requirement. If the employee's performance is significantly below the requirement, an employer can discharge the employee. In Germany, the standard of incapability is an employee's performance is at least 30% lower than comparable average employees.[49] If an employee's performance is insignificantly below the requirement, the employer should provide an opportunity for position adjustment or training, and the employer can discharge the employee if the employee is still incompetent for the job. The judge is responsible for deciding whether the employee's performance does not significantly meet the requirement.

From a comparative perspective, like in the UK, Germany, Japan, and Russia, the laws about the dismissal of an employee with insufficient job performance are less strict. They do not require the last two steps. In Russia, if an employee is not fit for the occupied position or job functions because of insufficient qualification, according to the results of professional attestation, the labor agreement can be terminated by an employer.[50] In Japan, when courts adjudicate whether the discharge of an incompetent employee is reasonable, courts will consider whether an employer has provided any assistance to an employee, including education and training, but assistances are not mandatory.[51]

2. Reduce the Standard of The Severance Payment. The second provision is about the calculation standard of the severance fee. As I introduced above, in China, the severance fee is calculated on the basis of the number of years for which the employee has worked for the employer at the rate of one month's wage for each full year. Any period of not less than six months but less

[49] Magotsch & Kremp, *supra* note 46, at 142.

[50] *Labor Code of the Russian Federation of 31 December 2001*, NATLEX, http://www.ilo.org/dyn/natlex/docs/WEBTEXT/60535/65252/E01RUS01.htm (last visited Dec. 27, 2022)

[51] Kazuo Sugeno & Keiichi Yamakoshi, *Dismissals in Japan Part One: How Strict is Japanese Law on Employers?* 11 JAP. LAB. REV. 83, 86–87 (2014).

than one year shall be counted as one year. This article argues that the severance payment could be reduced for two reasons. First, compared with other western countries, China's calculation standard of severance is much higher. In Germany, although the law did not regulate the calculation of severance payment, a general rule is that employers should expect severance payments of about 0.5 monthly salaries per year of work.[52] In the UK, the calculation of severance payments is more complicated. An employee can get half a week's pay for each full year if they are under 22; they can receive one week's payment for each full year if they are 22 or older but under 41; they can obtain one and half week's pay for each full year if they are 41 or older.[53] Even in Japan[54] and America, severance pay is not mandated by any act, and whether an employee can receive the severance depends on the company's policy. The MOHRSS has recognized that compared with the standard of severance in the USA and Japan, the standard in China is comparatively higher.[55]

In addition, as unemployment insurance has been established in China, there is room for reducing the standard of severance. If the proposals offered in this article are accepted, more employees, such as the incompetent, will be more likely to be discharged. In this case, unemployment insurance will be of more help. Before the unemployment insurance establishment, the legislature thought, "[the severance] could alleviate the unemployed people's psychological anxiety and hardness of life, and further maintain the stability of society. The severance also contributes to forming a social mutual aid system."[56] Nowadays, as long as these employees are terminated involuntarily, they can apply for unemployment insurance benefits. According to this regulation, there are three conditions employees should satisfy if they want to receive benefits: employees and employers have paid into the unemployment fund for at least one year; the termination is involuntary; employees have undergone unemployment registration and sought new jobs. Therefore, the severance payment could have less role in mutual social aid.

3. The Exemption for Small and Micro Businesses. The Employment Contract Law lacks an exemption for small businesses and was criticized by

[52] Magotsch & Kremp, *supra* note 46, at 141.

[53] *Redundancy*, *supra* note 46.

[54] Sugeno & Yamakoshi, *supra* note 52, at 88.

[55] Renli Ziyuan Shehui Baozhang Bu dui Zhengxie Shisan Jie Quanguo Weiyuanhui Di Er Ci Huiyi Di 1261 Hao (Shehui Guanli Lei 112 Hao) Tian de Dafu (人力资源社会保障部对政协十三届全国委员会第二次会议第1261号（社会管理类112号）提案的答复) [MOHRSS's Reply to the No. 1261 Proposal in the Second Session of the 13th National Committee of the CPPCC] http://www.mohrss.gov.cn/xxgk2020/fdzdgknr/zhgl/jytabl/tadf/201911/t20191115_341703.html (last visited Dec. 27, 2022).

[56] YANG JINGYU (杨景宇) & XIN CHUNYING (信春鹰), ZHONGHUA RENMIN GONGHEGUO LAODONG HETONGFA JIEDU (中华人民共和国劳动合同法解读) [THE INTERPRETATION OF THE EMPLOYMENT CONTRACT LAW], ZHONGGUO FAZHI CHUBANSHE (中国法制出版社) [CHINA LEGAL PUBLISHING HOUSE] (2007).

many scholars.[57] Jianfei Li, a former official in the Policy Division of the Labor Department, noted that the legislature did not differentiate the scale of companies in the labor law system when defining an employer.[58] In other words, big and small businesses must abide by the same labor law in China. I argue that the main priority of small companies is to survive in a competitive market. If the dismissal protection regime is too strict, it will restrain the operational flexibility of small businesses. In addition, as small companies have a limited budget for legal compliance, they usually cannot establish a professional legal compliance system. While small businesses should be encouraged to obey the law, it is crucial to recognize that they play an essential role in creating job opportunities and contributing to tax revenues. According to The Fourth National Economic Census, at the end of 2008, employees in medium, small and micro companies accounts for 79.4% of the total.[59] Recent research by the State Statistics Bureau also shows that every 1% increase in operating income in medium and small businesses in the past ten years led to a 0.3% rise in Gross Domestic Product (GDP).[60] Therefore, employment law should balance employee protection and economic development.

From the perspective of comparative law, many countries have exempted small businesses from dismissal protections. For example, in America, the Worker Adjustment and Retraining Notification Act of 1988 only applies to companies with 100 or more employees. In addition, though the Dismissal Protection Law in Germany has a high level of dismissal protection, it is only applicable to the employer that hired more than ten employees who have worked for more than six months.

I propose that the dismissal procedures of work rule formulation and labor union notification could be exempted for small businesses. On the other hand, the substantive aspect of dismissal protections should not be exempted now. Small and micro businesses cannot abuse the power to discharge an employee at will, but the procedure requirement can be exempted to reduce their compliance cost. For example, "Opinions on the Employment Dispute

[57] *See*, *E.g.*. Wang Yijiang (王一江), *Yuqing Dui Zhongxiao Qiye Mianchu Laodong Hetong Fa* (吁请对中小企业免除劳动合同法) [*Call on an Exemption of Employment Contract Law on Small Businesses*], XINLANG WANG (新浪网) [SINA], (Feb. 17, 2008), http://finance.sina.com.cn/emba/ckgsb/20111004/23301 0577511.shtml (last visited Dec. 27, 2022)

[58] Li Jianfei (黎建飞), *Woguo Xiaoqiye Laodong Zhengce Fagui Chuangzhi Shishi* (我国小企业劳动政策法规的创制与实施) [*The Creation and Implementation of Labor law and Policy on Small Businesses*], 5, FAXUE ZAZHI (法学杂志) [L. SCI. MAG.] 8 (1992).

[59] Guojia Tongjiju (国家统计局) [National Bureau of Statistics of China], *Zhongxiaowei Qiye Chengwei Tuidong Jingji Fazhan de Zhongyao Liliang* (中小微企业成为推动经济发展的重要力量) [*The Medium and Small and Micro companies Become Critical Force for the Promotion of the Economic Development*], GUOJIA TONGJIJU WANGZHAN (国家统计局网站) [NATIONAL BUREAU OF STATISTICS OF CHINA] http://www.stats.gov.cn/tjsj/zxfb/201912/t20191218_1718313.html (last visited Dec. 15, 2022)

[60] Tang Weiwei (汤巍巍), Guowuyuan Zhengce Lixing Chuifenghui (国务院政策例行吹风会) [REGULAR STATE COUNCIL POLICY BRIEFING], ZHONGGUO ZHENGFU WANG (中国政府网) [CHINESE CENTRAL GOVERNMENT'S OFFICIAL WEB] http://www.gov.cn/xinwen/2022zccfh/15/sjbb.htm (last visited Dec. 15, 2022)

Adjudication (Trial)" issued by the High People's Court of Zhejiang Province in 2009 stipulates that, "Suppose a work rule enacted by an employer after the implementation of the Employment Contract Law have not gone through the democratic procedures specified in Section 2 of Article 4 of the law, and suppose the contents of such work rules do not violate laws, administrative regulations, and policies, which have been disclosed or informed to workers, such work rules may be used as the basis for employment management by the employer." I suggest that this rule should only apply to small and micro businesses.

B. Provisions Need to be Improved

Even though the dismissal law is somewhat stringent, a comprehensive reform does not mean loosening the regulation. The proposal also includes suggestions on how to improve current provisions and add new provisions.

1. Anti-discrimination. The Employment Promotion Law,[61] passed in 2008 by the Standing Committee of the NPC, has already contained an antidiscrimination section. However, it only specified the recruitment process, though it has covered many types of discrimination: gender, ethnic minority, disability, infectious disease carriers, or rural migrant workers.[62] It is uncertain whether the protections from this act can apply to the dismissal process since this law only applies to the recruitment situation. The Employment Contract Law does not specify antidiscrimination content, either.

Currently, many judges adjudicate employment discrimination cases with the principle of tort law. In Huiling Fan v. Zhuhai Yingli Estate Management Ltd., Fan argued that the company discharged her because she was pregnant. In contrast, the company claimed the reason for dismissal was Fan's absenteeism. The judge stated that the company discharged Fan because Fan was pregnant based on evidence. Therefore, it was a discriminatory treatment and infringed on Fan's right to equal employment.

Meanwhile, many judges still use the current framework of dismissal protection law rather than tort law. Take a transgender case as an example.[63] Mr. C[64] was a transgender person and was recruited by a health checkup company. The HR department complained that he dressed like a homosexual person and looked "unhealthy" and that his appearance damaged the company's image. A few days later, Mr. C was discharged. The company

[61] Jiuye Cujin Fa (就业促进法) [Employment Promotion Law] (promulgated by the Standing Comm. Nat'l. People's Cong., Aug. 30, 2007, effective Jan. 1, 2008) (Chinalawinfo).

[62] Rural migrant workers did not have "hukou", the Chinese version of registration system, which made them have no access to public services, such as health care, education, pension and subsidized housing.

[63] *Transgender Man Wins China's First Job Bias Lawsuit*, (Jul. 27, 2017) https://www.bloomberg.com/news/articles/2017-07-27/transgender-chinese-man-says-he-s-won-job-bias-lawsuit (last visited Dec. 27, 2022). Since this judgment covers the privacy issue, this judgment cannot be found in the Chinalawinfo database.

[64] To protect this employee's privacy, the media used a pseudonym.

argued that Mr. C had an unsatisfactory performance; his dress did not fit the company, and he was absent from work. Mr. C then filed a lawsuit in the district court. Essentially, this is a discrimination case. The company discharged Mr. C because he dressed like a homosexual person, and for other reasons, such as incompetence, was a pretext for the termination. However, since China's antidiscrimination law is imperfect, the district court held that the dismissal was illegal because the company failed to justify incompetence as the cause of the discharge. But if the company had successfully asserted any of the above dismissal reasons, it would have been hard for the employee to win the case. Therefore, many scholars advocate that the dismissal protection law should add antidiscrimination provisions.[65]

In addition, the anti-discrimination rule needs to be improved. For example, the rule on indirect discrimination is incomplete in China. The distinction between direct and indirect discrimination is that direct discrimination requires proof of discriminatory intent. Meanwhile, disparate impact does not require proof of discriminatory intent. Still, it needs to demonstrate that a neutral policy that results in a discriminatory effect cannot be justified by job-related and business necessity. In the U.S.A., the early case about disparate impact is Griggs v Duke Power Co.[66] established the rule of indirect discrimination (in the U.S.A., indirect discrimination is called disparate impact). In judicial practice, judges also support the employees' claims that the discharge policy causes a disparate impact based on race[67] and gender[68] In Shenzhen, the Shenzhen Special Economic Zone Gender Equality Promotion Ordinance has specified that indirect discrimination is also prohibited. This article also suggests that indirect discrimination can be added to the law at the national level.

2. Protection against retaliation. Many scholars have pointed out that the dismissal law lacks special protection against retaliation by the employer. If an employee is discharged because he fulfills a public obligation, the law

[65] Shen Tongxian (沈同仙), *Laodong Hetongfa Laozi Liyi Pingheng Zaisikao* (《劳动合同法》中劳资利益平衡的再思考) [*a Rethinking on the Balance between Employer and Employee in the Employment Contract Law]*, 1 FAXUE (法学) [L. SCI.] 57 (2017); Peter C.H. Chan, *The regulation of dismissal in China: Diverging standards of serious breach dismissal and the need for reform*. 33 KING'S L. J. 208 (2022).

[66] In this case, Duke Power planned to promote many employees through internal exams. The result showed that, 58% of white employees passed the exam, meanwhile, only 6% of black employees passed the exam. The Supreme Court pointed out that, the different results between white employees and black employees stemmed from the history of segregated education. In history, white men received better education than black men. Therefore, when white men and black men took the same exam, it was no surprise that less black men passed the exam than white men. Therefore, the Supreme Court hold that the exam was unequal for the black men and that the employer could not prove that the exam was job-related and a business necessity.

[67] Chicago Teachers Union, et al. v. Board of Education of the City of Chicago, No. 1:2012cv10311 - Document 314 (N.D. Ill. 2021)

[68] Brooks v. Hilton Casinos Inc., 959 F.2d 757 (1989)

should intervene. This intervention also signals that the government encourages more employees to protect the public interest and will protect these employees.

Take the protection for a whistleblower as an example. A whistleblower is a person who exposes any information or activity that is deemed illegal, unethical, or incorrect within an organization that is either private or public. For example, in America, the Occupational Safety and Health Act protects employees from retaliation by employers taking "adverse action" against employees who report injuries, safety concerns, or other protected activities.[69] If the Standing Committee of the NPC adopts a whistleblower clause in the dismissal protection law in the future, the following issues should be noted.

The first issue is about the contents and the procedure of the report made by the employee. The contents of the information usually are a company's violation of the law. In addition, a few states in the USA mandate that reports should include breaches of professional ethics. For example, in Pennsylvania, protected information includes violations of statute or regulation and violations of public interest or professional ethics. This article argues that China could specify the violation of law as the content of the report. If local ordinances and professional ethics are added, the law will be too complicated to enforce.

In terms of the procedure of reports, theoretically, there are many ways to submit the information. For instance, employees can announce in a press conference, submit a piece of information to the media, or submit it to higher authorities. However, most states in America have specified that the lawful procedure is to present the message to the government or public sector. It should be noted that the definition of the public sector varies in different states. In many states, the public sector only refers to administrative agencies at the federal and state level. Meanwhile, the public sector includes judicial, legislative, and administrative agencies in another group of states. This article argues that the agency that receives the information should be limited to administrative agencies. The judicial or legislative agency does not have power over the administrative agencies, such as investigation and discipline. If the judicial or legislative receives such information, they should transfer the issue to the government.

A controversial issue is whether employees must initiate an internal investigation before submitting the report to higher authorities. For example, in Maryland in the USA, according to the Health Care Worker Whistleblower Protection Act, healthcare employees must at least report their suspicions internally before submitting the message to a higher power. Meanwhile, also in Maryland, according to the Maryland Occupational Safety and Health Act, there is no prerequisite procedure for an internal investigation, and a whistleblower can submit the report to an external organization directly. This article argues that the employee should report to their supervisor in most

[69] Yang Haonan (杨浩楠), *Wanshan Woguo Jiegu Baohu Zhidu de Lujing Xuanze* (完善我国解雇保护制度的路径选择) [*The Way of Improving the Dismissal Law in China*], 6 FAXUE (法学) [L. SCI.] 153 (2018).

scenarios first. If the supervisor neglects the information, they can resort to the government. Meanwhile, suppose that an issue relates to an essential public interest, such as food safety or infectious diseases, the employee could report to the government directly.

3. The Reform of The Remedy for Illegal Dismissals. In judicial practice, many discharges are related to the public interest. For example, when a whistleblower exposes the company's activity that is deemed illegal, unethical, or not correct to the public, the company will be punished due to this activity. Another example is that when an employee refuses to give false evidence in court, the company might hence lose the lawsuit. In these situations, employers tend to discharge the employee as retaliation.

As I have mentioned, if an employee is illegally discharged, one remedy is to pay a severance fee at twice the usual rate. This rule does not impose deterrence for the employer who terminates an employee as retaliation. Many scholars have pointed out that the dismissal law lacks protection against retaliation by the employer.[70] Especially when an employee is discharged because he fulfills a public obligation, the law should intervene.

In the U.S.A., a judge argued: "the imposition on the employer of the small additional obligation to pay a wrongfully discharged employee compensation would do little to discourage the practice of retaliatory discharge, which mocks the public policy of this State."[71] Therefore, the dismissal protection law should set punitive damages to deter retaliation against the employee, protecting employees and the public interest. Jing Mao proposed that the punitive damages rate should be between three times and seven times the severance pay rate. And the determination of the amount should consider factors of the severance fee, cost of deterring illegal dismissal, dismissal's mental damage on employees, and financial satiation of the employer.[72] I also argue that the punitive damages calculation should not be a fixed number, and judges should consider factors (e.g., the consequence of the illegal discharge) to determine the amount of the damages.

V. CONCLUSION

As Summers said, it is naive to believe employers will not abuse their power to discharge employees.[73] At the individual level, the inequality of bargaining power between employers and employees in the employment contract is well recognized. Employers are likely to abuse their power to terminate employees

[70] Mao Jing (毛景), *Baofuxing Jiegu Rending Biaozhun ji Falü Zeren zhi* Gouzao (报复性解雇认定标准及法律责任之构造) [*The Definition of Retaliatory Discharge and Its Legal Responsibility*], 19 SHANGHAI CAIJING DAXUE XUEBAO (上海财经大学学报) [J. SH U. FIN. & ECON.] 115 (2017).

[71] Kelsay v. Motorola, Inc., 74 Ill. 2d 172 (1978).

[72] Mao Jing (毛景), *supra* note 71, at 115.

[73] Clyde W. Summer, *Individual Protection against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 520 (1976).

at will, so a dismissal law is necessary. This proposal retains the structure of the dismissal law the Employment Contract Law has built and further fills the gap, such as the antidiscrimination and whistleblower issue.

Meanwhile, this article proposes that the level of dismissal protection could be decreased for the following reasons. First, new forms of employment, such as platform employment, are developing rapidly. However, companies treat them as independent contractors. Aside from the creation of the third employment category and offering many rights to this particular group, loosening dismissal protection and other legal protections may somewhat slow down this process, thus safeguarding employees' interests. Second, several unreasonable provisions in the dismissal law have already imposed an undue burden on employers. Third, the establishment of social insurance provides an opportunity for the legislature to reform the dismissal law. Therefore, there is also room for a minor reduction of the dismissal protection. To begin with, the dismissal law could adopt the standard model to make provisions more flexible. In addition, particular burdens on the discharge could be reduced, and the severance payment could be decreased as well.