

中美劳动法 对比

Comparing China and U.S. Employment Law

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中国北京

Beijing, China

历史上的差异

Historical differences

中国China

- 从铁饭碗转变
Transition from the Iron
Rice Bowl
- 开放
Kaifang
- 集体主义的文化
Collective culture

美国US

- 资本主义和工人权利一起，
从原始资本主义转变为更
为复杂的模式
Capitalist with changes from
crude capitalism to more
sophisticated model with
worker rights
- 个人主义文化
Individualist Culture

公共部门（排除在外）

Public Sector - we will exclude

中国CHINA

- 独立公共部门的模式——更多的保护

SEPARATE PUBLIC SECTOR
MODEL – more protection

美国US

- 独立公共部门的法律——更多的保护

SEPARATE PUBLIC SECTOR
LAW – more protection

个体劳动权力

INDIVIDUAL LABOR RIGHTS

- 有一种减少工人集体权利但保护工人个体权利的趋势

There is a trend to reduce the collective rights of workers but to provide individual rights

- 为什么？
Why?

工资的制定（其他就业方面）

Setting of Wages (other terms of employment)

中国China

- 国家及地方政府工作制定
National and Local government wage setting
- 影响更多工人
Impacts more workers
- 包括食品价格控制（节假日等）
Includes food price controls (holidays etc.)
- 法律规定带薪休假
Legal right to vacation

美国US

- 国家最低薪资标准
National minimum wage
- 各州可以设定更高的工资标准
States permitted to set a higher wage
- 主要针对服务行业的员工
Primarily relates to service workers
- 无法律规定带薪休假
No legal right to vacation

工作时间

Hours of Work

中国China

- 中国薪资法律规定平常8小时以后算加班，而且周末和节假日支付加班费。

China wage laws provide for overtime after 8 hours worked in a day and premium pay for weekends and holidays

美国US

- 超出40个“工作小时”后，超时部分按照1.5倍薪资支付。
After 40 “hours worked” entitled to payment of time and one-half
- 周末及节假日无加班费。
No premium pay for weekend work or holidays
- 工会工人劳资谈判中可以设定更高的加班费。
Collective bargaining may set higher standards for overtime and premium pay for union workers.

监管实施

Enforcement

中国China

- 政府劳动监察员
Government labor inspectors
- 在仲裁过程中和在人民法院内由雇佣律师代表工人。
Private worker attorneys who represent workers in arbitration and in the People's Court

美国US

- 联邦和州政府机构进行雇员调查及起诉。
Federal and State government agencies have investigative staff and may prosecute
- 美国也有从事劳务官司获利的律师团体。
US also has a cadre of worker attorneys who prosecute cases for profit
- 总体来说美国的监管实施更加完善及深入。
Overall US enforcement is more developed and consistent

社会保障

Social Security

中国China

- 主要是农民工保险问题。
Major issues with coverage for nongmingong
- 以省为建制的系统。
Provincial based system
- 医疗保险以工作地点和退休地点进行区分。
Medical coverage issues based on where worked and where retired

美国US

- 系统提供基本津贴，但是可受政府管控。
System provides basic benefits, but subject to change by government.
- 老年保障医疗制度提供了优秀的医疗服务，但是退休工人要分摊费用。
Excellent health care under Medicare, but retired workers share costs.

自由雇佣VS劳动合同

At – Will vs. Labor Contract

中国China

- 劳动合同法
Labor Contract Law
- 书面合同要求
Written Contract Required
- 明确注明持续时间
Specific duration
- 终止合同的规定
Termination provisions
- 遣散费
Severance pay
- 终身就业（北京对比上海等）
Lifetime Employment (Beijing vs. Shanghai, etc.)

美国US

- 自由雇佣
At – will employment
- 无书面合同
No written contract
- 任何时候及理由进行解雇
Fired at any time for any reason
- 但有许多“受保护的理由”
But there are many “protected reasons”

雇佣歧视

Employment Discrimination

中国China

- 种族地位
Ethnicity
- 丙肝（传染性疾病）
Hep C (infectious pathogen)
- 残疾
Disability
- 性别
Gender
- 宗教
Religion

美国US

- 种族
Race
- 残疾
Disability
- 性别
Gender
- 年龄
Age
- 宗教
Religion

例子——美国受保护的理理由

Protected Reasons in US – Examples

- 基于如下的歧视：种族、年龄（40岁及以上），性别、残疾、宗教.....

Discrimination on the basis of: Race, Age (40 years or older), Gender, Disability, Religion...

- 美国劳工关系法保护的员工

NLRA “Concerted Activity” by workers

- “告密者” 法案或防止报复法案

- “Whistleblower” Laws or protection from retaliation

——职业安全与卫生条例

OSHA

——家庭与医疗假期法案

FMLA

——萨班斯-奥克斯利法案

– Sarbanes-Oxley

自由雇佣 对比 劳动合同

At – Will vs. Labor Contract

中国China

- 工人可以通过劳动纠纷仲裁法庭实施合同法权利。
Workers can enforce contract law rights at Labor Dispute Arbitration Tribunal
- 2010年8月21期的《劳工与工业》头条，《中国劳动合同仲裁：没有工会，没有问题》，孙金月及Ruth Obar博士撰写。
Bucuo - Journal of Labour and Industry, August 2010, Vol. 21, No. 1, Chinese Labor Contract Arbitration: No Union, No Problem, with Dr. Jinyue Sun and Dr. Ruth Obar.

美国US

- “自由雇佣”也有例外，在这些情况下使用了一个复杂的诉讼模式，包括有联邦，州和地区的诉讼。
A complex litigation model involving both federal, state and local lawsuits where the exceptions to “at-will” are litigated
- 自由雇佣鼓励诉讼以进行保护活动。
At-will encourages litigation for protected activities

劳资纠纷的解决

Labor Dispute Resolution

中国China

- 更低廉的劳动纠纷仲裁法庭。
Less expensive Labor Dispute Arbitration Tribunal
- 在中国要付多少律师费？中华全国总工会的角色是什么？
How are attorney fees paid in China? Role of ACFTU?
- 在广州费用转变的讨论——对不对？
Discussion of fee shifting in Guangzhou – duibudui?

美国US

- 要找个专门的私人律师
Need to find expert private lawyer(s)
- 各种相关政府机构及法院。
Various forums-government agencies and courts
- 高费用
Expensive
- 低收入工人通常无法负担
Lower wage workers usually cannot afford

集体劳动法规

Collective Labor Law

中国China

- 中华全国总工会总负责
 - 但是山高皇帝远。

ACFTU – hierarchy

“The mountains are high and the emperor is far away”

- 发展中省份和地区的法规支持集体协商。

Developing Provincial and Regional Law re collective bargaining

- 法律在罢工中的角色
Legal role of the Strike

美国US

- 全国联邦负责
National federations

- 地方工会
Local Unions

- 某些城市中心及行业形成了强大的集体权利，如码头工人、建筑业、娱乐业。

Strong collective rights are found in certain urban centers and industries such as longshoremen, construction, entertainment

集体劳动权利

Collective Labor Rights

中国China

- 在理论上工人可以被代表，但是被代表的“程度”是个问题。

Workers may be represented in theory but there is issue as to “strength” of the representation

- 地区的集体谈判特性和劳工权利

Regional nature of collective bargaining and labor rights

美国US

- 许多工人没有被工会代表。

Many workers are not represented by unions.

- 美国有全国劳动法规定工会角色及集体谈判。

US has a national labor law that governs the role of the union and collective bargaining.

集体纠纷的解决

Collective Dispute Resolution

中国China

- 劳资纠纷仲裁部门有集体权利区域。
Labor Dispute Arbitration office has collective rights area
- 当地公安机构可能卷入集体纠纷事件。
Local law enforcement may get involved in collective disputes
- 发展中模式。
Developing model

美国US

- 联邦和州级机构：Federal & State Agencies:
 - 1) 劳动部门Departments of Labor
 - 2) 国家劳资关系委员会NLRB
 - 3) 联邦仲裁与调解局FMCS
- 工会抱怨申诉程序
Union grievance procedures
- 尤其对非工会劳工来说，这是个不完美的模式。
Imperfect model especially for non-unionized workers

集体谈判的难处

Collective Bargaining Challenge

- 工人需要用“工资竞争”作为谈判筹码。
Workers need to take “wages out of competition” for bargaining leverage
- 在全球化的今天，这更加困难——需要新的应对策略。
This is more difficult with globalization - new tactics are needed