Introduction to Chinese Laws
中国法丛书

（英文版）

LABOR LAW AND SOCIAL SECURITY LAW OF CHINA

中国劳动法与社会保障法

Jianfei Li 黎建飞 著

中国人民大学出版社

（英文版）

LABOR LAW AND SOCIAL SECURITY LAW OF CHINA

中国劳动法与社会保障法

Jianfei Li　黎建飞 著

中国人民大学出版社
·北 京·

图书在版编目（CIP）数据

中国劳动法与社会保障法＝Labor Law and Social Security Law of China：英文/黎建飞著．—北京：中国人民大学出版社，2014.6

ISBN 978-7-300-19680-0

Ⅰ．①中… Ⅱ．①黎… Ⅲ．①劳动法-研究-中国-英文 ②社会保障-行政法-研究-中国-英文 Ⅳ．①D922.504②D922.182.34

中国版本图书馆 CIP 数据核字（2014）第 139851 号

中国法丛书（英文版）

Labor Law and Social Security Law of China

中国劳动法与社会保障法

黎建飞 著

Zhongguo Laodongfa yu Shehui Baozhangfa

出版发行	中国人民大学出版社		
社　　址	北京中关村大街 31 号	**邮政编码**	100080
电　　话	010－62511242（总编室）	010－62511770（质管部）	
	010－82501766（邮购部）	010－62514148（门市部）	
	010－62515195（发行公司）	010－62515275（盗版举报）	
网　　址	http://www.crup.com.cn		
	http://www.ttrnet.com（人大教研网）		
经　　销	新华书店		
印　　刷	北京联兴盛业印刷股份有限公司		
规　　格	170 mm×240 mm　16 开本	**版　　次**	2014 年 6 月第 1 版
印　　张	26.5 插页 2	**印　　次**	2014 年 6 月第 1 次印刷
字　　数	525 000	**定　　价**	78.00 元

Introduction

This is a professional book systematically discussing about the labor law and the social security law in China. The author elaborates the basic theories of labor law, introduces the labor law system, expounds the legislative background and intent of labor law, and analyzes the problems of legislation and legal practice.

Among the systematic elaboration of the basic contents, relevant essential materials, cases and examples are involved in each chapter, for example, how to understand the employer's liability of preventing workplace sexual harassment after defining the legislative intent? The object of labor law is labor relations. However, the pioneering study is needed on theoretical divergences and disputes of interests about the issues such as the peasant-worker, the dispatched labor and the illegal employment. In the theoretical discussion and practical research, it's not only to analyze problems on the criminal responsibility of the social insurance funds embezzlement and the occupation introduction, but also to care about legal means of sanctions against the arrears of the peasant-workers' wage, and the basic and additional wages in developed countries.

With the concerns of issues like the insurance agent's legal status, the taxi drivers' labor relations, the entertainment contract's legal character, the abolishment and reform of the labor arbitration's pre-procedure, the corporate social responsibility and the labor rights and interests, the international standards of the special protection for women workers, this book makes readers realize the synchrony of the labor law and the society's reform and development, and furthermore, makes readers think about persons and events relevant to the labor and social security relations around them.

Besides, the book has the following features:

It defines and distinguishes, in theory, *the employment relations and the labor relations*, *the employer and the employing entity*, *the employee and the labor*, *the civil contract and the labor contract*, etc.

It analyzes, in practice, the recent typical cases of labor law and social security law in China, such as *equal pay for equal work for the temporary worker and the formal worker*, *the company compensation for its employee fired for pregnancy*, etc.

It pays much attention to the researches on the hot issues of labor law and so-

cial security law in daily life, such as *three issues about the age of retirement*, *the court shouldn't enforce the social insurance funds*, etc.

It discusses important issues in the theoretical work, such as the reasons of unemployment, the theoretical base of the work-related injury certification on one's way to and from work.

From this book, readers will know and understand the progress and development of labor law and social security law in China, and know the current situation and the future of the legal construction of labor law and social security law in China.

Contents

中国劳动法与社会保障法

Chapter I

Basic Theory of Labor Law

Labor Law emerged in the 19th century against the special background of the western society. It started as a part of private law, but later acquired the characteristics of public law, which is a result of continuous evolution of the labor law and embodies the social nature of law.

This chapter introduces the concept, the subjects, the status and the role of labor law and explains the labor legislation system in China through a review of the process of adoption of the Chinese Labor Law.

Section 1 Concept and Significance of Labor Law

Ⅰ. The Concept of Labor Law

Labor law is a generic term referring to legal norms that regulate labor relations and other relations closely related to labor relations. In China, it is an important and independent branch of the socialist legal system. The purpose of labor law is to regulate through law labor relations and certain other relations closely related to labor relations, so as to protect lawful rights and interests of laborers, establish, sustain and develop stable and harmonious relationships between employing units and laborers, and promote economic development and social progress.

Since labor law came into being in the 19th century, it has played a special role in stabilizing labor relations and promoting social and economic development. The status and role of labor law have been universally recognized by countries around the world and, as a result, the law has gained rapid development throughout the world.

The Oxford Companion to Law defines labor law as the body of all legal principles and rules pertaining to hired labor. Roughly the same as industrial law, it governs legal issues relating to employment contracts and labor or industrial

relations. ① In his book *Theory of Labor Law*, Shi Shangkuan defines labor law as "the law on labor relationships. More specifically, it is the entire body of legal systems regulating labor relationships and all other subordinate relationships". ② As far as its content is concerned, labor law covers employees and employers in labor relationship, labor contracts, collective contracts, labor organizations (trade unions), labor disputes, labor protection, labor adjustment, labor remedies, and labor insurance.

As regards foreign labor law and labor law scholarship, German scholars and experts hold that labor law is the entire body of labor-related legal norms and, therefore, not drawing upon a concept on physical activities, but upon an economic concept instead, covering both physical and mental work. For example, the work performed by a computer programmer, a photographer's model, and a doorman at a hospital is all labor under the labor law. ③ In Japan, the labor law refers to the entire body of legal norms regulating employment relationships. Also called labor-capital relationship by Japanese economists, such employment relationships refer to the passive labor relationship whereby a laborer is hired by an employer and performs work under his order. ④ The labor law in South Korea is the law that regulates the labor relationships between laborers and employees for the purpose of ensuring the subsistence of the former. ⑤ The Singapore labor law regulates the labor relationships between employees and employers and applies to employees who work for their employers under labor contracts. It does not apply to any person occupying a managerial, an executive, or a confidential position to seamen, domestic workers, or any person employed by a Statutory Board or the Government. ⑥ The Swedish labor law applies to all employees and employers. ⑦ The Russian labor law regulates the relationships among all employees and employers. The labor contract under the Russian labor law is an agreement between the employee (worker) and the employer (enterprise, a government organ, or an organization) according to which the employee undertakes to perform certain professional, technical, or office work determined by such agreement and

---

① David M. Walker, *The Oxford Companion to Law*, Chinese edition, Beijing: Guangming Daily Press, 1988, p. 511.

② Shi Shangkuan, *Theory of Labor Law*, Shanghai: Zhengda Press, 1934, p. 1.

③ Wang Yiying (ed.), *Foreign Labor Law and Social Security Law*, Beijing: Renmin University of China Press, 2001, p. 71.

④ Wang Yiying (ed.), ibid., p. 408.

⑤ Ibid., p. 487.

⑥ Ibid., p. 578.

⑦ Ibid., p. 652.

comply with the internal work regulations of the employer while the employer undertakes to pay remuneration to the employee for the work he has done and to ensure the work conditions as stipulated by the labor law, collective contract, and relevant agreements between the two parties. ①

Professor Douglas L. Leslie of Virginia University discusses in his book Labor Law in a Nutshell the legal norms mediating labor-capital relationships, including judicial control of trade union activities before the promulgation of the Wagner Act, such as penalization of the workers' or trade unions' activities aimed at raising wages or improving work conditions; the selection of representatives for collective bargaining; the competence of and procedures before the National Labor Relations Board; the lawfulness of peaceful picketing during a dispute between the employer and employees; the lawfulness of direct and indirect measures taken by an employer against the collective mutual assistance and mutual protection actions taken by employees; the methods and procedures of collective bargaining, the implementation of collective contract, etc. Compared with the labor law in the traditional sense, the above provisions apparently have their unique characteristics. ②

The Labor Standards Act of the Taiwan province provides for the minimum standard of work conditions, requiring that the terms and conditions of any agreement between an employer and a worker shall not be lower than such minimum standards. The Act is applicable to the business (or industries) of mining and quarrying, manufacturing, construction, water, electricity and gas supply, transportation, warehousing and telecommunications, mass communication, and other businesses (or industries) designated by the relevant competent authority. As far as its content is concerned, the Act covers labor contract, wages, working hours, rest and vocation, child workers, female workers, retirement, compensation for industrial injuries, apprentice, work rules, supervision, inspection, and penal provisions.

Although the above definitions of labor law focus on different elements, their commonalities are obvious: firstly, as far as "act" (or "behavior") is concerned, all labor laws are legal norms that regulate "labor"; secondly, as far as "actor" is concerned, all labor laws are legal norms that regulate "workers" and "employing units" (or "employees" and "employers"); and finally, as far as "legal

---

① Ibid., p. 676.

② See Douglas L. Leslie, *Labor Law in a Nutshell*, Chinese edition (Zhang Qiang et al. transl.), Beijing: China Social Sciences Publishing House, 1997.

relationship" is concerned, all labor laws are legal norms that regulate "labor relationships".

Ⅱ. Act in Labor Law

(Ⅰ) The Meaning of "Labor"

Compared with the "labor" in its ordinary sense, the "labor" under the terms of labor law has some special connotations. Since the regulation by law of social relationships is embodied in legal rights and obligations, which in turn are linked to the legally prescribed conditions, it is the conditions of "labor" laid down by law that give special meanings to "labor" under labor law. First of all, the law requires that laborers must meet certain legal conditions regarding their qualifications; the remuneration for the labor must enable laborers to meet the basic living needs of himself and of his family; such labor must be done for someone other then the laborer himself or his family and therefore has an obvious social nature; such labor must also be based on a labor contract or employment relationship. The laborer must be subordinate to and accept the management by certain employing unit or employer. Therefore, the basic elements of "labor" include: legal obligation (as different from labor performed as voluntary help); labor contract relationship (as different from labor performed within spousal relationship or parent-child relationship); remuneration (as different from voluntary labor based on ethical considerations); and its occupational nature (namely, as a means of earning a living as different from internship and other non-occupational labor).

Shi Shangkuan also held that the "labor" under labor law should be different from the "labor" in general sense and must meet certain conditions: "The labor in general sense refers to the conscientious and purposeful physical and mental exertion by human beings whereas the labor under labor law must contain the following elements: (a) it is the fulfillment of legal obligations; (b) it is based a contract relationship (rather than based on spousal relationship or parent-child relationship under civil law); (c) it is paid; (d) it is occupational; (e) there is a relationship of subordination. From the above elements we can see that the labor under the labor law is a paid occupational labor based on contractual obligation and performed in a relationship of subordination."①

(Ⅱ) "Labor" and "Employment"

According to the above-discussed understanding of labor, the "labor" that

---

① Shi Shangkuan, *supra* note 2, p. 1.

contains the above-mentioned elements can be equaled with the "employment" under labor law. In fact, under labor law, "labor" is almost identical with "employment," because occupation and income are the basic elements of the realization of laborers' labor rights. "Individual laborers have already selected the locations of the social labor they engaged in when the entrepreneurs have purchased and allocated factors of production and recruited employees. Social production begins when employees arrive at their work posts and begin to work (namely when they are employed); they are transformed from merely ordinary consumers into social producers, employees and consumers."① However, "employment", as another important concept of labor law, is contrary to the concept of "unemployment".

Labor and social security authorities in China have given the following definitions to "employment" and "unemployment": "the unemployed" refers to persons who are of legal working age (namely 16 - 60 for men and 16 - 55 for women) and have the ability to work, but who are currently jobless and actively seeking for a job. Those who engage in certain social labor, but whose remuneration for labor is lower than the minimum living standard for local urban residents should be considered as unemployed persons. "Employed persons" refers to persons who are of the legal working ages (namely 16 - 60 for men and 16 - 55 for women), engage in certain social economic activities and receive lawful remuneration for their work or obtain income from operation of business. Among them, those whose remuneration for work reaches or exceeds the local minimum wage standard are fully employed; those whose working hours are less than those prescribed by law and whose remunerations for work are lower than the local minimum wage standard but higher than the minimum living standard for local urban residents, and who wish to engage in more work are underemployed.② Since this standard not only takes labor as a precondition for "employment", but also contains specific requirements on "remuneration for work", it makes a clearer distinction between "labor" and "employment" and therefore has a more practical significance.

---

① Yao Yuqun, *Employment Theory and Employment Promotion*, Beijing: China Labor Publishing House, 1996, p. 4.

② Bai Tianliang, "Redefining the Concepts of Employment and Unemployment and Setting the Target for the Control of Unemployment Rate at 4.5%", http: //www.chinanews.com/, May 13, 2003.

Ⅲ. Actors in Labor Law: "Laborers" and "Employing Units"

(Ⅰ) Meanings and Scopes of "Laborers" and "Employing Units"

The term "actors" in labor law refers to the parties to a labor relationship, more specifically, laborers and employing units. Generally, the latter two terms appear easy to understand. However, they have special meanings under labor law and, therefore, need to be understood in a more specific way.

In China, "laborers" are natural persons who provide labor to employing units. They are referred to as "workers" or "employees". The term "laborers" in labor relationship refers to natural persons who engage in physical or mental work for and receive remuneration from an employing unit in accordance with the labor law and the labor contract. A laborer must meet the following legally prescribed conditions:

(1) Age. Chinese Labor Law provides that the minimum working age for Chinese citizens is 16. Persons under the age of 16 may not be employed by or establish any labor law relationship with an employing unit. Employing units may not recruit citizens under the age of 16, or will bear the corresponding legal responsibilities. Persons under the age of 18 are prohibited from engaging in occupations or work that may endanger the health, safety or moral of minors. For example, the Labor Law prohibits employing units from engaging workers under the age of 18 in heavy work, work exposed to toxic or hazardous substances or other work harmful to their physical or mental health, or other dangerous operations.

(2) Labor capacity. Since laborers must do the labor personally, they must have the capacity for labor. Moreover, for certain industries, labor capacity includes the capacity to meet special requirements of these industries. For example, people suffering from certain infectious diseases are not allowed to work in the catering industry. Broadly speaking, labor capacity should also include the laborer's freedom of action, which enables the laborer to participate in labor with his free action. Therefore, citizens who are deprived of personal freedom in accordance with law, such as those placed under re-education through labor or sentenced to fix-term imprisonment may not establish labor relationship with an employing unit.

Furthermore, Chinese law contains no restrictive rule on the nationality of laborers. Anyone, regardless of whether he or she is a Chinese citizen, a foreign citizen or stateless person, can become a laborer in China as long as he or she meets the relevant requirements set out in Chinese labor law.

"Employing units" is also called "business owners", "the capital", "employers," or the "hirers". In the Chinese law, they are uniformly called "employing units", which refers to entities that hire, manage, and bear corresponding responsibilities to laborers.

There are different types of employing units in China:

(1) Enterprises lawfully registered in China, including enterprises of various ownerships and organizational forms, such as state-owned enterprises, collectively-owned enterprises, private enterprises, foreign-invested enterprises, Hong Kong, Macao and Taiwanese enterprises, hybrid enterprises, joint-equity enterprises, joint ventures, and township enterprises.

(2) Lawfully registered individual economic organizations, namely individually-owned businesses having acquired business license in accordance with law. Individually owned enterprises have the right to hire helpers and apprentices.

(3) Institutions established in accordance with law, including cultural, educational, health, and scientific research institutions, for example, schools, hospitals, and publishing houses. These institutions have the right to employ laborers within the competence prescribed by law.

(4) State organs established in accordance with law. They have the right to employ laborers within their competence as prescribed by law.

(5) Mass organizations established in accordance with law, including trade unions, women's federations, research societies, and associations. They have the right to employ laborers within their competence as prescribed by law.

(Ⅱ) Specific Obligations of "Laborers" and "Employing Units"

With regard to the "actors" in labor law, the labor law provides for not only the minimum age for work but also the basic rights and obligations of laborers and employing units. More importantly, the basic rights and obligations refer to neither citizens' constitutional rights, nor laborers' rights and obligations in a general sense, but rights and obligations that are common in all labor relationships. There are correlations between such rights and obligations, namely the rights of one party usually constitute or correspond to the obligation of the other party.

Generally speaking, the laborers have the following five obligations:

1. A labor obligation, namely the obligation to deliver labor in accordance with a labor contract—This obligation has an exclusive nature, i. e., the labor obligation can be fulfilled only by the party to a labor contract. In some countries such as Germany, there are two exceptions to this rule of exclusiveness: first, the employer agrees or usually allows a third party to carry out the labor on behalf of

the employee; and second, it makes no difference whether the labor is carried out by the employee himself or by a third party on behalf of the employee. In view of the exclusive nature of the labor obligation, the employer's right to request labor is also exclusive. In principle, such right cannot be transferred to a third party without the consent of the laborer himself. However, such right can be transferred if the employer is lawfully changed without changing the content of the laborer's obligations. Under such circumstances, the employer's obligation will also be transferred along with the right. In addition, the laborers' labor obligation must not contradict relevant laws. A laborer has the right to reject his or her employer's order, which is malicious in nature, against public morals, or harmful to the health of the laborer. Moreover, a laborer has the right to reject labor obligations not provided for in the labor contract, unless there is an emergent situation or special occupational practice. The location of the fulfillment of labor obligation must also be agreed upon in the labor contract. If the employer wants the laborer to work in a location other than that specified in the labor contract, he must get the consent of the laborer and pay extra expenses. This is also true for the time of fulfillment of labor obligation. Unless there is an emergency or occupational practice, the laborer has the right to refuse to work outside the time prescribed in labor contract.

2. The obligation to obey the employer's orders, namely the laborer's obligation to accept the command and supervision by an employer during work—A laborer must not only comply with the relevant laws, the labor contract and any special agreement, but also follow the instructions of the employer with respect to the method, location, and time of work. Nonetheless, the laborer has the right to disobey an employer's order which is unlawful, immoral or harmful to the laborer's lawful rights and interests. As a rule, a laborer has no obligation to obey his employer's instructions outside the working hours, unless in case of emergency or household labor.

3. The obligation of confidentiality, namely the laborer's obligation not to disclose any confidential information relating to his employer's production or business—The laborer must keep confidential any commercial or technical information of his employer which the latter wishes to keep from any third party. The laborer is especially prohibited from providing such information to his employer's competitors, whether for a pay or not. In case of domestic work, a laborer may not disclose private information or violate the privacy of his employer. A laborer operating a business on behalf of his employer may not operate another business of the same kind for himself or for a third party, or become a shareholder

of a same kind of employing unit, without the consent of his employer. Otherwise, the employer has the right to claim any profit the laborer has thus made as compensation.

4. The obligation to improve the work efficiency of the employer—All laborers have the obligation to increase the work efficiency of their employers, namely they should fulfill their duties with due diligence and make to their employer any proposals that can improve the work efficiency of their employers. Moreover, they may not accept bribery or engage in any other activities harmful to the interest of their employers. Here arises the issue of "secondary labor" in labor law, or "second job" in popular terms. The labor laws in some countries provide that an employee may not conclude a new labor contract with a third party without the consent of his current employer, unless the new labor contract will not impede the implementation of the current labor contract. An additional condition is that "the secondary labor may not fall within the employer's scope of business". This prohibition draws upon two considerations: firstly, an employee who took on too much work will not be able to fulfill his labor obligation to his employer; secondly, an employee who engages in secondary labor falling within his employer's scope of business will inevitably compete with the employer and therefore harm the interest of his employer.

5. The obligation to pay compensation for damage—Also called collateral obligation by some scholars, this obligation means that the laborer should pay compensation for the damages caused by non-fulfillment or incomplete fulfillment of his labor obligation. Meanwhile, a laborer must also compensate for any damage to the employer's production materials, machines, or instruments caused by him either intentionally or unintentionally. Several different legislative regimes can be adopted for the establishment of this obligation. It can be provided for as part of the system of damage for breach of contract under the civil law, in an agreement between the two parties, or in the collective contract or industrial regulations.

Generally speaking, the employers have the following five obligations to their employees:

1. The obligation to pay labor remuneration—This obligation correlates with the laborer's labor obligation; or it can be said that it corresponds to the right to labor remuneration of a laborer who has fulfilled his labor obligation. Usually, labor remuneration is explicitly provided for in labor contracts or collective contracts and takes three forms: monetary payment, payment in kind, and a mixture of monetary payment and payment in kind. In the past, payment in kind was the main form of labor remuneration. Later, it was gradually replaced by