

CHINA AND INTERNATIONAL LABOR STANDARDS:
NEW GUIDELINES EXTEND LABOR PROTECTIONS
TO PLATFORM WORKERS

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International labor standards are largely promulgated by the International Labour Organization (ILO), whose conventions, protocols and non-binding recommendations address a wide range of labor issues and are broadly influential.¹ Despite their predominance most ILO treaties are only binding if ratified by member states, yet China has not ratified most of the ILO conventions, including those pertaining to freedom of association, prohibition of forced labor, and social security protections.² However, in July and August 2021, China's top court and several ministries put forward a series of documents intending to strengthen protections for workers, specifically those workers in the newly developing "platform" industry. As the name suggests, platform companies are businesses who provide a web application or a mobile app (a "platform") where workers are directly connected to and receive compensation from consumers. Platform workers make up a large and ever-growing portion of the Chinese workforce, so their inclusion in existing labor protections moves China significantly closer to full compliance with ILO standards. However, while a step in the right direction, it is still unclear whether the new changes will translate into substantial protections on the ground.

In recent years, platform companies such as Uber, Grubhub, and Airbnb have proliferated, underpinning what has become known as the gig economy.³ These companies consider themselves facilitators whose

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1. *Conventions and Recommendations*, INT'L LABOUR ORG., <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang—en/index.htm> (last visited Nov. 13, 2021). Other sources of international labor law include the major human rights treaties such as the International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Human Rights, but these will not be discussed here.

2. INT'L LABOUR ORG, *supra* note 1. For an in-depth analysis of Chinese labor law over the last century, see SEAN COONEY ET AL., *LAW AND FAIR WORK IN China* (2012).

3. The definition of a platform company varies depending on field. The term is used here, despite its vagueness, because it is the closest translation to the term used by the Chinese government, "平台企业" (*pingtai qiye*). In this context it is defined narrowly, as opposed to broader conceptions of data-sharing platforms.

primary role is to smoothly connect people seeking services with people willing to provide those services. The platform model brings increased flexibility for workers and a faster, easier, or cheaper experience for customers. However, along with platform companies' success has come a new wave of labor issues, and courts and legislatures have struggled to keep up.

Platform companies are ubiquitous in China, fueled by a large urban workforce and low overhead costs. As of 2019, there were seventy-five million platform workers in China.⁴ Some of the most common types of platform workers are *kuaidi* (express delivery) and *waimai* (take-out) drivers who work long hours for low pay, taking orders through apps on their phones in exchange for as little as ten cents USD per package.⁵ Only a minority of companies hire drivers as employees, while most consider them to be self-employed contractors.⁶ While intense work culture is hardly exclusive to platform companies, these workers have been at the center of a well-publicized struggle over labor rights in China since the beginning of the COVID-19 pandemic.⁷ For example, in November 2020, *kuaidi* drivers in multiple cities attempted to strike over thousands of dollars in missing wages—the equivalent of four to five months of pay—as well as pay cuts passed on to workers due to competition between express delivery companies.⁸ Because workers had no formal contracts with these companies, there were few, if any, legal options available to them.⁹ In addition to lost wages, many

4. Xiao Shanyun, *Understanding the Employment Status of Gig-Workers in China's Sharing Economy Era—An Empirical Legal Study*, 10 ASIAN J.L. & ECON. 1 (2019).

5. Joseph Brouwer, *Underpaid and Squeezed by Algorithms, Delivery Drivers Strike*, CHINA DIGITAL TIMES (Dec 3, 2020), <https://chinadigitaltimes.net/2020/12/underpaid-and-squeezed-by-algorithms-delivery-drivers-strike/>.

6. Whether or not this is a mis-categorization is a major area of concern both in China and in other countries with major gig economies, including the United States. Irene Zhou, *Digital Labour Platforms and Labour Protection in China* 4-5 (Int'l Labour Org., Working Paper No. 11, 2020), https://www.ilo.org/wcmsp5/groups/public/asia/ro-bangkok/ilo-beijing/documents/publication/wcms_757923.pdf; see also Maeve Allsup, *Gig Companies Face California Crackdowns That Uber, Lyft Escape*, BLOOMBERG L. (Apr. 15, 2021, 4:45 AM), <https://news.bloomberglaw.com/daily-labor-report/gig-companies-face-california-crackdowns-that-uber-lyft-escape> (discussing the proliferation of employee misclassification lawsuits in California).

7. Zoey Zhang, "996" is Ruled Illegal: Understanding China's Changing Labor System, CHINA BRIEFING (Sept. 9, 2021), <https://www.china-briefing.com/news/996-is-ruled-illegal-understanding-chinas-changing-labor-system/>; Vivian Wang, *On Singles' Day in China, Couriers Clamor for More*, N.Y. TIMES (Nov. 11, 2020), <https://www.nytimes.com/2020/11/11/business/alibaba-singles-day-couriers.html>.

8. Wang, *supra* note 7; Meaghan Tobin, *Shop Till You Drop*, REST OF WORLD (Nov. 11, 2020), <https://restofworld.org/2020/cracks-in-the-foundation/>.

9. Tobin, *supra* note 8.

companies have also failed to provide insurance to their contractors to cover injuries incurred on the job.¹⁰

In response to increased public outcry and a number of high profile cases, China's Ministry of Human Resources and Social Security released the Guiding Opinions on Protecting Labor and Social Security Rights and Interests of Workers Engaged in New Forms of Employment (Guidelines) in July 2021 specifically targeting the rights of platform workers.¹¹ In addition to extending general labor protections, such as equal pay, to platform workers, the Guidelines also include articles that specifically address the needs of platform workers. Most notably, the Guidelines require that employers enter into contracts with workers even when their relationship does not meet all of the requirements for a legal "labor relationship," mandate that employers provide insurance or assist workers in getting insurance, and emphasize the role of labor unions.¹²

How much weight do the Guidelines actually hold with the courts? The Chinese legal system follows a civil law tradition, meaning that only codified statutes are given the force of law.¹³ The task of a Chinese judge is to draw a conclusion based on the text of such statutes in addition to regulations and other forms of legislation. The National People's Congress and its Standing Committee enact statutes, and the State Council promulgates numerous administrative regulations. The various national ministries also put forward rules and departmental

10. Eliza Gkritsi et al., *Food Delivery: Drivers Take the Risks. Platforms Reap the Rewards*,

TECHNODE (Dec. 4, 2019), <https://technode.com/2019/12/04/food-delivery-drivers-take-the-risks-platforms-reap-the-rewards/>.

11. Renli Ziyuan Shehui Baozhang Bu, Guojia Fazhan Gaige Wei, Jiaoting Yunyu Bu Deng Guanyu Weihu Xin Jiuye Xingtai Laodongzhe Laodong Baozhang Quanyi De Zhidao Yijian (人力资源社会保障部、国家发展改革委、交通运输部等关于维护新就业形态劳动者劳动保障权益的指导意见) [Guiding Opinions of the Ministry of Human Resources and Social Security, the National Development and Reform Commission, the Ministry of Transport, and Other Ministries and Commissions on Protecting the Labor Rights and Interests of Workers Employed in New Forms] (July 16, 2021)

http://www.mohrss.gov.cn//xxgk2020/fdzdgknr/zcfg/gfxwj/ldgx/202107/t20210722_419091.html [hereinafter Guidelines].

12. *Id.* arts. 2, 9-10.

13. See THOMAS W. SIMON ET AL., CHINA'S CHANGING LEGAL SYSTEM: LAWYERS AND JUDGES ON CIVIL AND CRIMINAL LAW 1-2, 4 (2015) (arguing that while China combines some aspects of civil, common, socialist, and customary law, China should be primarily considered a civil law tradition which relies heavily on judicial inquiry and substantive, over procedural, justice).

regulatory documents (the Guidelines fall under this latter category).¹⁴ Rules are a form of legislation, and while guidelines are not, judges generally treat them as binding in cases that fall within the scope of the relevant ministry's authority unless higher-ranked legislation exists that contradicts such guidelines.¹⁵ Therefore, while the Guidelines fall relatively far down the hierarchy of Chinese laws, they are still influential.

In terms of international labor standards, the ILO's Declaration on Fundamental Principles and Rights at Work (hereinafter the Declaration) and its 2006 Employment Relationship Recommendation (hereinafter the Recommendation) are particularly relevant to the Guidelines.¹⁶ The Declaration is the ILO's most expansive attempt to codify a set of fundamental labor rights and is binding on all U.N. Member States without needing ratification.¹⁷ Given China's reluctance to ratify many of the ILO's conventions, the Declaration is notable as one of few ILO standards considered to be binding on China. The Recommendation is not binding; however, it is meant to serve as a soft law guideline that can be influential regardless of enforceability.¹⁸ While the Declaration deals primarily with broad rights and ideals, the Recommendations include more specific goals, which China's new Guidelines more clearly incorporate. In particular, the Recommendation emphasizes the need for states to provide clear legal guidance on what constitutes a labor relationship, including what factors may create a labor relationship even without a contract.¹⁹

14. These are sometimes called administrative regulatory documents but are referred to here as departmental regulatory documents in order to differentiate them from administrative regulations.

15. Jamie P. Horsley, Presentation, Lawmaking, Rulemaking, Regulatory Documents and Decision-making in China: Opportunities for Public Participation 2 (Apr. 18, 2019), https://law.yale.edu/sites/default/files/area/center/china/document/horsley_lawmaking_march_2019.pdf.

16. Int'l Labour Org., *Employment Relationship Recommendation, 2006 (No. 198)* (June 15, 2006), <https://www.ilo.org/legacy/english/inwork/cb-policy-guide/employment-relationshipprecommendationno198.pdf>.

17. Int'l Labour Org., *ILO Declaration on Fundamental Principles and Rights at Work* (June 18, 1998), <https://www.ilo.org/declaration/lang——en/index.htm>.

18. Int'l Labour Org., *Conventions and Recommendations*, *supra* note 1.

19. *Guiding Opinions of the Ministry of Human Resources and Social Security, the National Development and Reform Commission, the Ministry of Transport, and Other Ministries and Commissions on Protecting the Labor Rights and Interests of Workers Employed in New Forms*, Art. 18, PKULAW.COM, https://www.pkulaw.com/en_law/4496e1faa982c904bdfb.html (last visited Nov. 13, 2021) [hereinafter *Translated Guidelines*].

In China, as in many other states, platform companies have created controversy over the categorization of workers.²⁰ Most legal systems traditionally categorize workers as either employees or non-employees (also referred to as independent contractors). Platform workers, in China and elsewhere, are usually independent contractors on paper, but in many cases, enterprises have direct control over their actions in a way that more closely resembles the relationship between employer and employee.²¹ What rights and benefits a worker is entitled to depends on whether there is a labor relationship between company and worker. But unlike some states, China does not go so far as to create a third category of worker that sits in between employee and independent contractor.²² Instead, Article 2 of the Guidelines attempts to avoid the categorization debate entirely by first creating a rule that mandates work contracts whenever a work relationship closely resembles that of an employee and employer, and then emphasizing the role of “civil laws” (as opposed to “labor laws”) in regulating work relationships that do not fall under that description.²³

20. From 2015 to 2017, 84% of platform company-related cases in Beijing were related to the existence or nonexistence of a labor relationship between the parties. Zhou, *supra* note 6, at 32.

21. *Id.* at 5. See also Shanyun Xiao, *Understanding the Employment Status of Gig-Workers in China's Sharing Economy Era – An Empirical Legal Study*, 10 *ASIAN J.L. & ECON.* 1 (2019) (comparing the various types of gig worker labor relationships in a Chinese context).

22. In Canada, for example, gig workers have been placed in an intermediary category referred to as “dependent workers.” David Doorey, *The Classification of “Gig” Workers in Canadian Work Law*, ON LABOR (Jul. 7, 2020), <https://onlabor.org/the-classification-of-gig-workers-in-canadian-work-law/>.

23. “Business enterprises which meet the conditions for establishing a labor relationship shall conclude labor contracts with workers in accordance with the law. If an enterprise does not fully meet the conditions to establish a labor relationship but administers labor management over its workers. . . .the enterprise and workers shall be guided to conclude written agreements to reasonably determine the rights and obligations of both parties. Where individuals rely on a platform to independently carry out business activities and engage in freelance work, among other things, the rights and obligations of both parties shall be regulated in accordance with the civil laws.” Guidelines, *supra* note 11, art. II (translation by author, slightly edited for clarity). The words “employee” and “employer” are used here for clarity, but Chinese law rarely mentions the term “employment.” Instead, it defines “labor relationships” between “workers” and “work units” (单位, *danwei*), which includes enterprises, organizations, and other entities which are more commonly referred to as employers in English contexts. For further discussion of terminology see Zhou, *supra* note 6, at 27-30.

This is not the first time China has sought to demand written legal contracts between employers and workers.²⁴ China's 1994 Labor Law and 2008 Labor Contract Law both sought to mandate written contracts to protect employees' rights and make it easier to adjudicate disputes.²⁵ The Guidelines extend the same principles from this prior legislation to platform workers, a step which brings Chinese law further into compliance with Section II of the ILO's Employment Relationship Recommendation on determining the existence of an employment relationship, as well as Section I(4)(b) on combatting "disguised" employment relationships.²⁶ But while this change clarifies the position of platform workers, it fails to increase protections for those who do not qualify for the contract mandate—China's civil laws do not provide the same level of insurance, minimum wage, and other protections as its labor laws, which govern labor contracts.²⁷

Furthermore, in order for a contract to provide meaningful protection, workers must be able to enforce it in court. Realistically, many national laws do not translate to real protections on the ground because of court access issues, in part because workers lack funding, time, and knowledge of the legal system.²⁸ Many platform workers are also migrant workers (known as the "floating population," or 流动人口 *liudong renkou*) and face increased burdens in pursuing arbitration, primarily high time and cost barriers, as well as heightened vulnerability due to their outsider status under China's household registration system.²⁹ Although China's court system allows non-lawyers to serve as representation in civil cases, it is difficult for workers to find representation

24. Daniel S.S. Cairns, *New Formalities for Casual Labor: Addressing Unintended Consequences of China's Labor Contract Law*, 24 WASH. INT'L L.J. 219 (2015) (arguing that China's strategy for promoting labor rights in the 2000s has primarily hinged on mandating and enforcing individual contracts, as demonstrated by the 2007 Labor Contract Law).

25. *Id.* at 229-30.

26. See *Employment Relationship Recommendation, 2006 (No.198)*, *supra* note 16, §§ I(4)(b), II.

27. Zhou, *supra* note 6, at 30.

28. Aaron Halegua, Note, *Getting Paid: Processing the Labor Disputes of China's Migrant Workers*, 26 BERKELEY J. INT'L L. 254, 270 (2008).

29. Migrant workers are usually unable to obtain household registration (户口, *hukou*) in their place of work. This significantly limits their access to public benefits and puts them in a precarious position with employers due to rampant *hukou* discrimination. Cairns, *supra* note 24, at 227; see also Na Lan, *Is There New Hope in Labor Rights Protection for Chinese Migrant Workers?*, 2 ASIAN-PAC. L. & POL'Y J. 483, 493 (2009) (laying out the five main barriers migrant workers face in obtaining legal representation); see also Timothy Webster, *Ambivalence and Activism: Employment Discrimination in China*, 44 VAND. J. TRANSNAT'L L. 643, 670-72 (2011) (describing the ways in which *hukou* discrimination impacts migrant workers).

at all, especially if they are located in a smaller city where legal aid is not widespread.

Despite these difficulties, two of the Guidelines' articles explicitly mention the role of the courts in protecting platform workers. Article 18, for instance, lays out the responsibilities of the legal system, establishing expectations for both courts (e.g., strengthening guidance for the handling of labor cases) and legal aid organizations (e.g., increasing the availability of services for workers engaged in the platform industry).³⁰ The language in this article is characteristic of many administrative guidelines in that it both lays out very specific obligations for many different players while also leaving the details of those obligations vague. This vague language runs the risk of leaving too many loopholes to be effective. This is what some scholars refer to as a "high standards-low enforcement" policy, in which the central government intentionally boosts its own legitimacy by setting policies that read well to the public, even if it is unlikely to fully enforce them.³¹

Regardless, Article 18 is promising for two reasons. First, the Guidelines seek to resolve the legal representation issue by explicitly calling on civil society organizations to provide legal aid. This signals to local governments that these civil society groups are valuable and should receive support. Second, courts are to "strengthen the guidance for handling" labor cases, indicating that increased consistency among the courts and enforcement in favor of workers is a priority for the government. Stronger and more consistent guidance would benefit workers and advocates by providing them with a better sense of their legal options.

In addition to addressing the courts, the Guidelines emphasize the role of labor unions and workers' representatives in protecting labor rights. This is particularly relevant in terms of international labor

30. "Courts at all levels and labor dispute mediation and arbitration institutions shall strengthen the guidance for handling of labor dispute cases, smooth the connection of arbitration and trial, determine the relationships between enterprises and workers based on the employment facts, and handle cases of protection of the labor rights and interests of workers employed in new forms in accordance with the laws and regulations. Various mediation organizations, legal aid institutions and other specialized social organizations shall provide more convenient, high-quality and efficient dispute mediation, legal consultation, legal aid services and other services for workers employed in new forms in accordance with the law." *Translated Guidelines, supra* note 19, art. 18.

31. CYNTHIA ESTLUND, A NEW DEAL FOR CHINA'S WORKERS? 108 (2017); Qianfan Zhang, *A Constitution Without Constitutionalism - The Paths of Constitutional Development in China*, 8 INT'L J. CONST. L. 950, 954-55 (2010) (arguing that many otherwise good laws stumble at the implementation stage due to a conflict of interests or a lack of serious central oversight).

standards, including the “freedom of association and the effective recognition of the right to collective bargaining,” addressed in obligation 2(a) of the ILO Declaration on Fundamental Principles and Rights at Work, the most significant of the ILO’s binding labor conventions.³²

Articles 10 and 17 of the Guidelines specifically address worker’s rights with respect to trade unions, workers’ representatives, and collective bargaining.³³ Despite seeming to align more closely with the ILO’s Declaration, the language of these articles is slightly misleading. Generally, references to trade unions in China refer only to the All-China Federation of Trade Unions (ACFTU), China’s sole legally authorized central trade union, which comprises layers of unions at the regional and industrial levels.³⁴ While the ACFTU is an important player in defending worker’s rights, it is nevertheless a political body. Indeed, most of the international labor community does not consider it to be a union at all, due to the inherent contradiction of being a party organ first and a representative of workers second.³⁵ Therefore, it is unclear how much power China actually intends to give to independent workers who organize.

The one noteworthy exception comes in Article 10, which mentions “trade unions *and workers’ representatives*.”³⁶ Such language is potentially indicative of a new level of flexibility within the Chinese union system. While history indicates that a healthy level of skepticism is appropriate, the inclusion of “workers’ representatives” shows a level of awareness of workers’ needs, particularly following the well-publicized

32. *ILO Declaration on Fundamental Principles and Rights at Work*, *supra* note 17, art. 2(a).

33. According to Article 10, “Enterprises shall be urged to develop and revise system rules and platform algorithms that directly involve labor rights and interests, such as entry and exit of platforms, order distribution, unit price, commission rate, remuneration composition and payment, working hours, rewards and punishments, fully listen to the opinions and suggestions of trade unions or workers’ representatives, and publicize the results and notify workers thereof.” *Translated Guidelines*, *supra* note 19, art. 10. Additionally, according to Article 17, “Trade unions at all levels shall strengthen the effective coverage of organizations and work, broaden the scope of rights protection and services, and actively recruit workers employed in new forms to join the trade unions. They shall enhance the ideological and political guidance for workers, to guide workers to safeguard legal rights rationally and legally. They shall keep a watch on enterprises in fulfilling their employment responsibilities, to protect the rights and interests of workers. They shall proactively negotiate with industry associations, leading enterprises or enterprise representative organizations, enter into industry collective contracts or agreements, and endeavor to develop industry-specific labor standards.” *Id.* art. 17.

34. ESTLUND, *supra* note 31, at 45-50.

35. Cairns, *supra* note 24, at 225.

36. *Translated Guidelines*, *supra* note 19, art. 10 (emphasis added).

2020 strikes. In any event, some scholars believe that the ACFTU itself is Chinese workers' best chance at real protection, in part because of its strong government connections.³⁷ If true, the increased authority granted to the ACFTU by the Guidelines could have a larger impact over time.

By extending the protections contained in the new guidelines to platform workers, China has taken an important step towards incorporating international labor standards into domestic law. While it is still unclear how much influence or authority the new Guidelines will have, they nevertheless redefine the policy priorities of the government and bolster platform workers' legal rights by explicitly laying out the expectations of the government. However, one should not overstate the Guidelines' significance simply because their language is promising. When citizen protests gain media attention, like the November 2020 strikes, the Chinese government typically either suppresses the information or takes steps to publicly resolve the situation. The new Guidelines are an example of the latter, but it is still too early to tell whether they are a mere political move or a significant tool for those who seek to defend workers' rights.

37. ESTLUND, *supra* note 31, at 61-62.