

Why should workers have to pay their own legal fees even when they win their lawsuit?

The argument for shifting legal fees in labour dispute cases on to the employer

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During the run-up to the Spring Festival holiday, government and trade union officials were once again prioritizing the resolution of labour disputes, to ensure that migrant workers could return home with at least some of the pay owed to them by employers. In December 2011, at least eight government departments issued notices demanding that employers pay their workers on time,¹ and the national trade union urged local unions to mobilize and prioritize legal assistance for migrant workers in these matters.²

This annual tradition of officials scrambling to assist workers ahead of the holiday only underscores the fact that, despite years of new policies and laws, many employers continue to shirk their responsibilities and fail to provide their employees with their salaries and benefits in a timely manner. While a new amendment criminalizing the nonpayment of wages, implemented earlier in the year, is a welcome addition to the law, it is only aimed at cases where large amounts of wages are at stake, and in practice, it appears to have only been applied against bosses who have run off leaving large numbers of workers unpaid. Most workers must rely on civil remedies — mediation, arbitration or the courts — for their labour disputes. These remedies have a limited deterrent effect on bosses and can be prohibitively expensive for workers.

The high cost of going to court

As established by multiple regulations on the subject, such as the *Civil Procedure Law*, individuals pay their own court costs in China, with next to no expectation that the opposing

¹ Zhu Shanshan, [New campaign to ensure workers' wages](#), *People's Daily Online*, 30 Dec. 2011.

² Chen Xin, [Migrant workers get help collecting wages](#), *China Daily Online*, 30 Dec. 2011.

party bear any of the adversary's court costs. The handful of limited exceptions to this rule will be discussed in the latter part of this paper.

Although there are no laws expressly directed at regulating where the burden of attorney fees should lie, China generally follows the principles set out in the *Civil Procedure Law* with regard to court costs, so that each party pays his or her own attorney fees. By adopting this standard, China has apparently decided to follow the so-called "American Rule" (also known as the "both parties pay" system) for attorney fee allocation, as opposed to the "English Rule" (also known as the "loser pays" system) system adopted in the vast majority of countries.

Proponents of both sides argue that their respective systems decrease overall costs, encourage settlement, decrease frivolous lawsuits and encourage meritorious ones.³ It is a long-standing debate, and the merits of each system are beyond the purview of this article. However, it is important to note that unlike the Chinese system, the American one is full of statutory exemptions, in recognition of some of the system's deficiencies. When the cost of litigation outweighs the potential compensation awarded by the court, the "both parties pay" system falls on its head, and many worthy cases are not brought to court. If unaddressed, this allows many to violate the rights of others without fear of punishment, which is especially dangerous when core civil rights or the underprivileged are involved. To address this gap, both state and federal governments have implemented exemptions to the American Rule for many violations of civil rights,⁴ including violations of the *Fair Labor Standards Act*,⁵ and exemptions for workers in wage dispute claims.⁶ While there are probably many instances in which the cost of litigation is higher than the potential award, the exemptions have not been implemented in every such case. Instead, an analysis of the law indicates that these exceptions are implemented for cases where

³ See generally David Root, Note, *Attorney Fee Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, 15 *Ind. Int'l & Comp. L. Rev.* 583 (2005).

⁴ Congressional Research Service, *Awards of Attorneys' Fees by Federal Courts and Federal Agencies*, 20 Jun 2008.

⁵ Fair Labor Standards Act, 29 U.S.C. § 216 (b) (1938) (allowing recovery of attorney fees from employers that violate the Fair Labor Standards Act).

⁶ National Employment Law Project, [Winning Wage Justice](#), 32 (2011) (detailing state laws for recovery of attorney fees from employers that violate employment laws).

core rights are at stake; in one Supreme Court ruling, these are described as rights “that Congress considered of the highest priority.”⁷

As if to emphasize the priority attached to protecting such rights, governments did not simply implement a “loser pays” system. The exemptions shift the fees only on one condition — if the plaintiff (the person that initiates the lawsuit) ultimately wins. There is no fear of having to pay for the adversary’s case should the adversary win, though the plaintiff would still have to personally pay his lawyer should he loses. This system, often called “one-way fee-shifting” is intended to encourage lawsuits (by requiring the losing adversaries to pay legal fees) without also discouraging lawsuits (which might occur if plaintiffs have to pay, should they end up losing).

By encouraging more lawsuits, the implementation of fee-shifting in the United States has helped protect core rights. It has also helped encourage the phenomenon of “private attorneys general,” attorneys who practice privately, but specialize in lawsuits that protect core civil rights of the underprivileged. With fee-shifting comes the guarantee of a steady income, allowing the specialty to thrive, encouraging more lawyers to take up the practice and even helping to financially support organizations dedicated to rights work. The system incentivizes rights protection, creating a positive cycle with more and more rights being protected, and fewer daring to violate the law for fear of having to pay up in court.

The Chinese system: American but without exceptions

In contrast to the American system, the Chinese legal system sticks very closely to a “both parties pay” principle for attorney fees. Unlike the United States, which is rife with exceptions to the principle, clients must almost always foot the bill for their attorneys. This invariably creates a high price barrier, dissuading many people from pursuing legitimate lawsuits. In some cases, this is tantamount to tolerating violations of the law, since the person whose rights are violated is unable to afford the costs of legal redress. The inability to pursue redress through the justice

⁷ *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (describing why attorney fees award is justified in a racial discrimination case).

system can also cause people to seek redress by resorting to non-legal channels, such as protests, demonstrations, and even criminal action. This can lead to tragic results, such as in December 2010, when a 17-year-old worker stabbed his employer to death in a dispute over two months of unpaid wages totaling 700 yuan.⁸

Laborers, especially low-income migrant workers, are among the most vulnerable groups in such a system. Their incomes normally are very low in the first place, making lawyers relatively unaffordable; this situation is exacerbated in disputes with their bosses. Because labour disputes often involve withholding of income or compensation that workers rightfully deserve, workers in labour disputes are usually already starved for cash. The potential sums to be awarded also make seeking a lawyer cost-prohibitive — if you’re owed 700 yuan, even getting double compensation would make it not worth the when a lawyer costs much more. One possible solution, asking a lawyer to take the case and accept a portion of the award as payment (contingency fee arrangement), is unavailable; lawyers are forbidden from accepting labour dispute cases on a contingency basis.⁹

Figure 1. The High Cost of Lawyers in China (yuan)¹⁰



⁸ Li Yang, “[17-year old boy stabs boss 30 times over 700 yuan in wages](#),” *Xinhua*, 12 Dec. 2010.

⁹ See Article 11, National Development and Reform Commission and Ministry of Justice, [Notice on the publication of the Administrative Measures on the Fees for Legal Services](#) (国家发展改革委、司法部关于印发《律师服务收费管理办法》的通知).

¹⁰ *Local governments’ suggested minimum and maximum fees for civil lawyers.

Figure 1 illustrates the high cost of lawyers in comparison to the minimum wage in some of China's largest cities, based on local government-suggested guidelines for lawyer fees. In most cases lawyers ignore these guidelines and charge above the suggested maximum fee.

Addressing costs

The *Civil Procedure Law* does permit individuals to ask the court for financial aid, lower court fees, or exemption from court fees in cases of economic difficulty,¹¹ but this does help with high cost of lawyer fees. The authorities have acknowledged, in recent years, the high cost of seeking justice by eliminating fees for labour arbitration and increasing the amount of money spent on legal aid but the cost of pursuing legal redress remains high, especially for the most disadvantaged.

Most workers, for example, need to rely on free or low cost legal aid but the subsidies provided by the authorities vary from region to region and are still below the government's own minimum suggested lawyers' fees. See Figure 2. Such low compensation does little to attract attorneys to legal aid work; skilled ones seek higher paying positions and the ranks of legal aid workers remain low while the need remains high amidst the burgeoning number of legal disputes. With low subsidies, legal aid attorneys may be inclined to cut costs, such as through time spent on the case. In order to cover the shortfall, legal aid attorneys must rely on outside sources of funding.

Minimum wage: [China Human Resources Outsourcing Service](#)

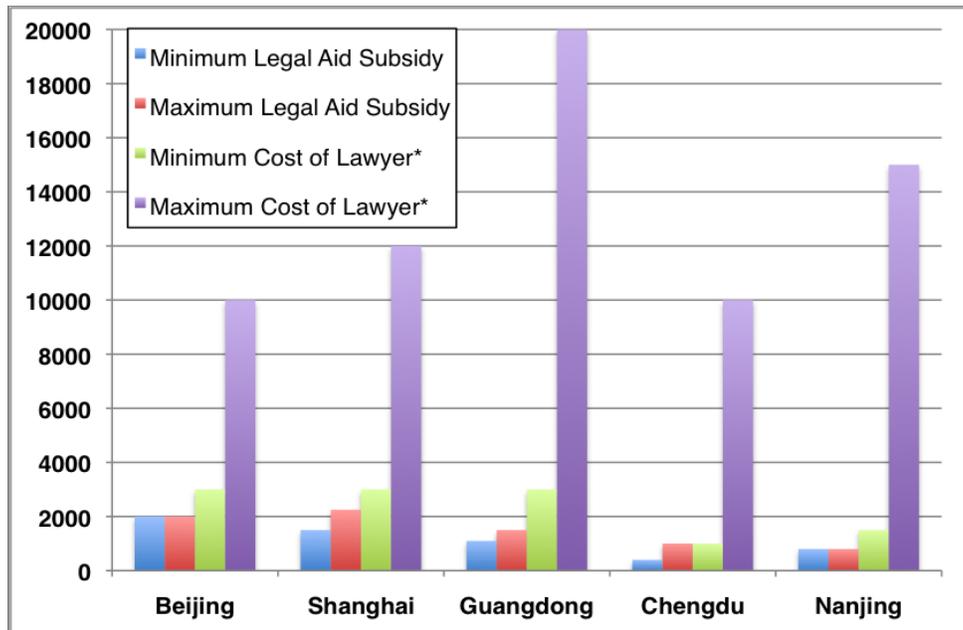
Lawyer fee guidelines for Beijing: [Notice of Beijing Justice Bureau Regarding Lawyer Fee Guidelines](#)

Lawyer fee guidelines for Shanghai: [Shanghai Government Guidelines for Lawyer Fees](#)

Lawyer fee guidelines for Guangzhou and Shenzhen: [Notice of Guangdong Price and Justice Bureaus on Lawyer Fees](#)

¹¹ Civil Procedure Law (民事诉讼法), Article 17.

Figure 2. Governmental legal aid subsidies compared with recommended lawyers' fees (yuan)¹²



China Labour Bulletin's litigation costs

In labour rights cases supported by China Labour Bulletin, the estimated standard fee for a lawyer, on average, would have been 38.8 percent of the total compensation sought in the more than 400 cases where data is available. The numbers are worse when the compensation actually awarded is factored in. In those cases, where data is available, the standard fee for a lawyer would have been over 175.9 percent of the compensation ultimately awarded.

An example of the costs that discourage workers from taking legal action is a 2010 case of a Shenzhen worker who was illegally dismissed from his job for making suggestions about

¹² *Local governments' suggested minimum and maximum fees for civil lawyers.

Lawyer fee guidelines for Beijing: [Notice of Beijing Justice Bureau Regarding Lawyer Fee Guidelines](#)

Legal aid subsidy for Beijing: *Tengxun*, [Beijing Sets Maximum 4400 Yuan Legal Aid Subsidy for Criminal Cases](#)

Lawyer fee guidelines for Shanghai: [Shanghai Government Guidelines for Lawyer Fees](#)

Legal aid subsidy for Shanghai: *Xinhua*, [Shanghai's Legal Aid Case Types Expand](#)

Lawyer fee guidelines for Guangdong: [Notice of Guangdong Price and Justice Bureaus on Lawyer Fees](#)

Legal aid subsidy for Guangdong: Guangdong Finance Bureau, [Provisional Regulations For Disbursing Legal Aid](#)

[Subsidies](#) Lawyer fee guidelines for Chengdu: [2010 Chengdu Lawyer Fee Guidelines](#)

Legal aid subsidy for Chengdu: [Sichuan Judicial and Finance Bureaus, Implementation of Sichuan Legal Aid Funds](#)

Lawyer fee guidelines for Nanjing: [Notice of Jiangsu Judicial and Price Bureaus Regarding Adjustment to Lawyer](#)

[Fee Guidelines](#) Legal aid subsidy for Nanjing: [Nanjing Xuanwu District Legal Aid Center's Revision to Legal Aid Subsidy Standard](#)

management and worker treatment. Since he had been working for less than a year, he was only entitled under the law to compensation of one month's salary, which amounted to 900 yuan. However, the market rate in Shenzhen for attorneys handling such cases was around 6,000 yuan. The attorneys handling the case did not receive government legal aid and could only take the case because of financial support from CLB.

The legal process also crucially gives employers numerous opportunities to use delaying tactics such as frivolous appeals, to add cost and time, often frustrating workers into giving up or settling for much less than what they're actually owed. Legal aid attorneys, paid the same flat subsidy at each stage of the case regardless of the amount of work put in, may encourage their clients to settle rather than work longer hours for no additional reward. And at present, there is little legal sanction to deter employers from using such tactics.

The need for a new system

If China is to follow the "American Rule" for attorney fees, it must also, like the United States, include exceptions to the rule, particularly in labour dispute cases. Instead of requiring workers, civil society groups and the government to bear the costs of legal action, such costs should be shifted onto the employers. In the context of labour rights, such a system would allow a worker to have his legal costs paid for by the employer, if the worker prevails in his lawsuit. In the United States, federal statutes allows for winning parties to recover attorney fees for violations of the Fair Labor Standards Act,¹³ and 40 states have laws that allow for workers to recover attorney fees from employers in successful wage dispute claims.¹⁴

Fee-shifting accomplishes multiple goals: It increases the numbers of labour attorneys providing legal aid, enhances enforcement of labour laws, imposes the costs of recovery on the party responsible for the dispute, and deters employers from both violating labour laws in the first place as well as from engaging in delaying tactics after a dispute begins.

¹³ Fair Labor Standards Act, 29 U.S.C. § 216 (b) (1938) (allowing recovery of attorney fees from employers that violate the Fair Labor Standards Act).

¹⁴ National Employment Law Project, [Winning Wage Justice](#), 32 (2011) (detailing state laws for recovery of attorney fees from employers that violate employment laws).

Rather than being limited to a small flat fee, as in the current legal aid system in China, under a fee-shifting regime, attorneys would be compensated with a reasonable fee if they were able to help their clients prevail in their disputes with their employers, even in cases where the compensation awarded to the worker is low. Thus assured of compensation, the pool of available labour attorneys will expand, enhancing the private enforcement of labour laws. This is even more important in China, where there is roughly only one lawyer for every 6,700 citizens,¹⁵ compared to one lawyer for every 250 citizens in the United States.¹⁶ With so few lawyers to begin with, providing adequate financial compensation (beyond minimal subsidies) would encourage lawyers to help vulnerable workers.

Fee-shifting also ensures that employers who violate workers' rights are not only responsible for compensating their workers, but also for the legal costs entailed in the case. Instead of the burden and costs of labour rights enforcement being disproportionately placed on the government, workers and civil society, the costs are rightfully placed on those that violate the law. The added cost should further deter employers from breaking the law in the first place. Additionally, since the added costs of delays and appeals are borne by the employers, they are no longer incentivized to delay but rather to settle earlier in order to avoid the risk of having to pay both parties' heightened legal fees.

Shenzhen's fee-shifting regulations

In China, steps to allow for exceptions to the attorney fee rule have primarily come from judges. At the national level, the Supreme People's Court has issued separate interpretations of business laws permitting for recovery of attorneys' fees in successful business cases involving unfair competition, trademark infringement and copyright infringement.¹⁷

¹⁵ [Licensed Lawyers Number 200,000 in China](#), *Xinhua*, 26 Dec. 2011.

¹⁶ American Bar Association Market Research Department, [Lawyer Demographics](#), Apr. 2010.

¹⁷ See Donald C. Clarke, "The Private Attorney-General in China: Potential and Pitfalls," *Washington University Global Studies Law Review*, 8 (2009) 253-254 (detailing interpretations of Supreme People's Court that have permitted recovery of attorneys fees.)

To date, the only instance of a codified exception to the general rule on attorney fees is in the southern city of Shenzhen, which has already gained substantial experience in dealing with and regulating labour disputes. Here, local regulations allow for fee-shifting in labour disputes up to a point. For example, Article 58 of the 2008 *Regulations on the Promotion of Harmonious Employment Relationships* state that:

If a worker prevails in a labour dispute after labour arbitration or trial, the attorneys' fees paid by the worker may be assumed by the employer, but such fees may not exceed 5,000 yuan; the portion in excess of 5,000 yuan must be paid by the worker.¹⁸

However, there are problems in both the wording of the regulations and their implementation. The regulations do not make the fee-shifting mandatory, require workers to personally pay the attorney upfront, limit the amount an attorney can recover, and apply unreasonable formulas for calculating the awardable attorney fee. Moreover, all too often, judges and arbitrators simply do not acknowledge the regulations as applicable law.

Reimbursement requirement

The requirement that workers must have already paid the attorney before their fees can be reimbursed immediately eliminates one of the major benefits of a fee-shifting policy, namely recourse to lawyers by those who would normally not be able to afford them. The requirement also discourages attorneys from providing lower-cost or free services since they can only be reimbursed if they had charged the worker upfront. The only workers helped by the Shenzhen regulation are those with enough money to retain a lawyer in the first place. The regulation is under-inclusive and does not help the workers who would benefit the most from fee-shifting; those who cannot afford a lawyer.

This was illustrated in a 2009 case of a former janitor who sued his former employer for a multitude of labour violations, including unpaid wages, benefits and overtime. The entire legal process, from arbitration through a court trial and appeal, took more than nine months to

¹⁸ 深圳经济特区和谐劳动关系促进条例(第五十八条) “劳动争议仲裁和诉讼案件, 劳动者胜诉的, 劳动者支付的律师代理费用可以由用人单位承担, 但最高不超过五千元;超过五千元的部分, 由劳动者承担。” Promulgated 23 September 2008 by the Standing Committee of Shenzhen's People Congress.

complete. The estimated market rate for attorney fees in this case was 10,000 yuan. However, the attorney hired was willing to accept a lower fee, most of which was paid by CLB, so the worker had to personally pay out just 1,000 yuan, a fraction of the actual cost. However, since the regulations only award the attorney fees that the worker himself paid, the court allowed a mere 1,000 yuan as attorney fee award. A more ideal situation would require the employer to pay the entire attorney fee, regardless of whether or not the worker had personally fronted the total cost.

Fee limitations

The 5,000 yuan ceiling on fee reimbursement similarly limits the regulation's effectiveness. This ceiling is presumably aimed at preventing attorneys from engaging in fraudulent or frivolous actions to drive up their fees. However, any regulations for fee-shifting should follow the example set in other legal systems and optimally be aimed at reasonably compensating the attorneys of winning parties for their services, regardless of whether or not the attorney had already been paid by the worker.

In the United States, calculating the attorney fee to be awarded usually requires the judge to apply a method known as the "lodestar" approach: a figure is arrived at by multiplying the hours worked on the case by a reasonable hourly rate, and may then be adjusted based on the success of the attorney.¹⁹ In China, labour rights cases are usually billed at a flat rate rather than by the hour, making it difficult to implement the lodestar system. However, unlike in the United States, local governments in China have issued specific guidelines for the permissible range of lawyer fees, indicating a capacity for the law to regulate the issue. Lawyers may also be incentivized to maintain more detailed accounting and billing records if that helps serve as a basis for determining an attorney fee award. In any case, rather than setting an arbitrary limit on the fees attorneys can be awarded, any limits should be based on the fee guidelines already in place for attorneys fees, and fees for frivolous or fraudulent activity could be denied on evidence of such activity.

¹⁹ See *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 563 (1986) (describing "lodestar" approach to attorney fee awards).

Problematic application

Another issue with the Shenzhen regulations is that it does not specify how arbitrators and judges are supposed to apply fee-shifting in cases where the worker wins only a part of his compensation request. In practice, it appears that courts have decided to apply a mathematical formula based on the proportion of the total monetary request — for instance, if the worker initially requested 20,000 yuan total in compensation, but was only awarded 10,000 yuan, the worker would be entitled to just half the total attorney fee that was previously paid.

Conversations lawyers have had with Shenzhen judges confirm that there are internal court guidelines to this effect.

The problem with such an application is that it bears little relation to what could be considered reasonable attorney fees. Lawyers and workers always aim high in their requests for compensation; this is especially the case in labour disputes since some compensation claims are not firmly set in law. For instance, in certain situations, the *Labour Contract Law* allows workers to ask their employers to pay extra compensation, from between 50 and 100 percent extra, for failure to pay wages, failure to pay overtime, paying below minimum wage, and discharging a worker without paying proper economic compensation.²⁰ Under the law, the worker is allowed to request an extra 100 percent compensation in these cases, but the court may grant an award as low as 50 percent. Under such circumstances, the attorney may win compensation for his client, but the amount would vary drastically depending on whatever percentage the judge decides to fine the employer — a factor that may have little to do with the attorney.

The issue is immediately evident in the CLB-supported case discussed above in which the attorney only accepted 1,000 yuan directly from the worker. The court of first instance awarded 1,000 yuan in attorney fees but, on appeal, that figure was reduced to just 200 yuan because the appeal court rejected a request for compensation for not signing a written employment contract (that the trial court had supported), which amounted to about 50 percent of the total amount requested. As a result, the worker only won about 20 percent of his total compensation request, and the appeal court, following the guidelines, reduced the attorney fee award by the same

²⁰ 第八十五条, “中华人民共和国劳动合同法” (Article 85, Labour Contract Law) adopted at the 28th Session of the Standing Committee of the Tenth National People’s Congress on 29 June 2007.

percentage. If the worker had simply not made the request, the percentage would have been higher, and the attorney would have received a higher attorney fee award, even though the attorney may have worked less (since he would have argued for one demand less).

Lawyers have indicated that the appeals court rejected the request in error because when the Shenzhen government recommends that lawyers charge a minimum of 3,000 yuan to represent clients in civil cases, 200 yuan is under no circumstances reasonable attorney fees for a nine-month long legal dispute involving arbitration, civil trial and appeal, especially when the attorney won most of the requests of the worker, and obtained nearly 15,000 yuan compensation for an employer's labor rights violations.

The current application of the Shenzhen regulation, which focuses on “victory percentage” overreaches in its attempt to address the issue of partial victories. Workers and their attorneys are punished for aiming high or miscalculations when requesting compensation — especially so when compensation amounts for some violations are left to the discretion of the judge. Instead of working on a straight percentage basis, a better system would more reasonably relate to the services provided by the attorney. A simple solution would be to award the total fees if the attorney was substantially successful in obtaining redress for labour violations — if a suit was not frivolous. Another method, in use in American courts, excludes the hours spent on unsuccessful claims from the attorney fee award.²¹ Such a system is admittedly much easier to implement in the U.S, with the widespread practice of detailed hourly billing in America's legal profession, but having Chinese labour attorneys to support their attorney fee requests with detailed accounting of their activities should not be too much of a burden.

Inadequate enforcement

The non-mandatory nature of the regulations is another problem. Instead of requiring that the attorney fees “must” be paid for by the employer, the regulations only state that the fees “may” be assumed by the employer. Of course, such wording would not be a problem if, in practice, arbitration panels and courts regularly granted fee-shifting requests. However, in Shenzhen such institutions seem very reluctant to grant fee-shifting requests.

²¹ See *Hensley v. Eckerhart*, 461 US 424, 440 (1983).

From 2008, when the regulations were first implemented, through 2010, CLB supported 76 successful labour dispute cases in Shenzhen. In all the cases the worker was able to obtain compensation from the former employer, and in all the attorneys asked for the employer to pay their client's legal fees. Only three of 76 fee-shifting requests were granted. All three instances were from the courts; no labour arbitration panels granted these requests. Often, labour arbitration panels did not even know about the regulations, declaring that requests for fee-shifting were outside the purview of such arbitration, even though the regulations clearly state that fee-shifting may occur after arbitration.

A more effective fee-shifting regulation

An ideal fee-shifting regulation, to be adopted nationally, would learn from and address the shortcomings of the Shenzhen regulation. It would make fee-shifting mandatory in successful cases, remove unreasonable limits on the amounts that may be awarded, and ensure that such a policy is actually recognized and implemented. The following is a proposal for a more effective fee-shifting provision that could be adopted nationally:

If a worker prevails in a labour dispute after labour arbitration or trial, the reasonable attorney fees of the worker's attorney(s) shall be assumed by the employer, but such fees may not exceed the maximum recommended fee established in local guidelines for attorney fees.

(劳动争议案件经仲裁或者诉讼，劳动者胜诉的，由用人单位支付劳动者代理律师的费用，支付范围为律师费用的合理部分，但不超过各地的律师收费指导价最高上限。)

Conclusion

In order to reduce the costs of labour rights enforcement, as well as the incidence of labour rights violations, it is essential that China implement an effective system of attorney fee-shifting in labour rights cases. Currently, high costs deter workers from seeking legal redress and force them to accept a lower settlement or sometimes engage in extreme actions in their search for redress. Such a system inappropriately rewards the employer for violating workers' rights. Fee-shifting on the other hand increases the cost to employers and deters them from violating rights in the first place. Moreover, attorneys would be more willing to take labour dispute cases safe in the knowledge that they can collect a reasonable fee from the employer. This would both reduce the costs for the worker and expand the pool of available attorneys, thereby strengthening the enforcement of labour rights.

Such a system should ensure that fee recovery is limited only to successful cases and that only reasonable fees are granted, as is the case in other jurisdictions. Since local governments have already demonstrated their ability to determine the reasonableness of attorney fees in their maximum and minimum suggested fee guidelines, they should have no problem in determining whether a requested fee is reasonable or not.

The present system does not adequately protect workers' rights nor do enough to deter employers from violating those rights. Workers, the government, and civil society currently bear the brunt of the costs associated with labour rights enforcement. Fee-shifting will increase the enforcement of labour laws and deter employers from violating rights in the first place. A policy that shifts the costs of rights protection onto those employers who violate workers' rights is fundamentally more equitable.