

Employer's Duty to Disclose Information: A Comparable Conversation between China and the US

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Abstract

This comment will discuss the laws on employer's duty of information disclosure for collective bargaining ("the Disclosure Duty"¹) in China and the United States of America. Its focus will be on the private sector, considering that the *National Labor Relations Act* (the "Act")² does not apply to public sector employers and employees,³ as well as Chinese labor law. Put another way, the comment will mainly examine the legal issues created by *Provisions on Collective Contract* in China (the 2004 Provisions)⁴ and basic U.S. labor law, the "Act".

The analysis of this comment suggests that one of the main divergences might be the fact that the employer's disclosure duty in the United States is derivative from a broader good faith bargaining requirement, but not in China. Without such a statutory requirement, the statutory context of the 2004 Provisions theoretically appears to be broader and more expansive than those of the "Act". Nonetheless, the drawbacks of Chinese labor law have actually impeded the information disclosure for collective bargaining, because of a lack of a mandatory duty to bargain collectively (in good faith) and of effective penalties on employer's violations of the laws. Under current situation in Chinese workplace, it might be suggested that some reasonable and practical changes in Chinese labor law, particularly in respect of information equality, could help encourage real collective bargaining.

Introduction

Information is perceived by both trade unions and management as a potential tool for enhancing their power in an industrial relations system.⁵ Information equality is

¹ Unless otherwise specified hereinafter, the duty to furnish information for collective bargain refers to the Disclosure Duty.

² 29 U.S.C. § 151-169.

³ Id. See also *Labor Relations Com. v. Blue Hill Spring Water Co.*, 11 Mass. App. Ct. 50, 414 N.E.2d 351 (1980).

⁴ It mainly refers to *Provisions on Collective Contract* in China (the 2004 Provisions) and other local regulations. On May 1, 2004, it was issued by the Ministry of Labor and Social Security (MOLSS). Ji Ti He Tong GuiDing [hereinafter the 2004 Provisions] http://www.gov.cn/gongbao/content/2004/content_62937.htm

⁵ Disclosure of Corporate Information to Trade Unions in North America, Hem C. Jain Industrial

important for negotiating parties to collective bargaining because the rational exchange of facts and arguments in collective bargaining will significantly increase the chance for collective agreement.⁶ By contrast, a refusal to respect a union's request for employer's information could measurably impede prospects for a successful collective agreement, since the unions do not have bargaining power equal with the employer to bargain collectively.⁷ Therefore, "the question at issue is not whether information should play a role in collective bargaining, but whether both sides should have equal access to it."⁸

Aiming to create equal access to the employer's information relevant to collective bargaining, Chinese labor law, as well as American labor law, has also provided bargaining parties with a legal right to relevant information which the employers hold.⁹ In 2011, at least six Chinese cities and provinces have revealed specific plans to promote and develop collective wage negotiations in local enterprises this year.¹⁰ However, there are serious questions about when and how the employer's duty to provide information is carried out under the current Chinese legal system.¹¹ By surveying Chinese labor law at a state and local levels, the conclusion hereof may be that the legislations on and the enforcement of the duty to disclose information is not currently effective.

For instance, absent of an explicit legal provision of the obligation to collectively bargain (or to bargain in good faith) in the 2004 Provisions, some employers have already dared to bid defiance to the labor laws and refused to engage in collective bargaining. Moreover, without serious remedies against violations of the labor law, it

Relations, vol.36, n4, 1981, p.748-774.

⁶ Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401 (1958).

⁷ Section 1 of Wagner Act, stat.142 (1947), 29 U.S.C. § 8(d) (1952), which says partly that: the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

⁸ Government of the United Kingdom, Commission for Industrial Relations, *Disclosure of Information*, H.M.S.O., London, 1971.

⁹ While the language of labor rights is demonstrably powerful in China, this does not mean that those rights are generally respected. For more discussion of this situation in China, see Liu Cheng and Sean Cooney,

¹⁰ There are Shenzhen and other cities: Hunan, Hebei, Zhejiang and Shandong which have already implemented collective wage negotiation policies and programs.

The Google map for collective bargaining in China:

<http://ditu.google.com/maps/ms?hl=zh-CN&ie=UTF8&brcurrent=3,0x31508e64e5c642c1:0x951daa7c349f366f,0%3B5.0,0&msa=0&msid=204331830402490124831.00049f973953b4450a469&ll=35.88905,104.238281&spn=21.301673,35.81543&source=embed>.

¹¹ On 21st July, 2010, the Standing Committee of Guangdong Province People's Congress convened to discuss the revised draft of its Regulations on the Democratic Management of Enterprises. However, there is no further stipulation on the employer's duty to provide information. The Regulations clearly state the government's role as one of "neutral coordinator". The power of settlement still remains in the hands of labor and management. Article 40 of the Regulations stipulates that when workers need collective wage consultations with the enterprise, a request should be sent to the union. When more than one-fifth of the workers have asked the union for collective consultations, the union should organize the democratic election of worker representatives to engage in such negotiations, and inform the enterprise of the request for collective consultations. Article 41 states that if no trade union, when one-fifth of workers ask for collective consultations, the democratic election of worker representatives is allowed under supervision of the local trade union to guide is allowed.

<http://www.clb.org.hk/en/node/100849>

is obvious that the employees are just literally announced to a wide-ranging right of access to the company's information, where it is easy for the employers to be on the pretext to avoid the mandatory duty.

Indeed, the collective bargaining processes have been substantially hampered because of the enterprises' willfully refusals to disclose information requested by the trade unions or the employees.¹² For example, during the Honda strike of 2010 in Guangdong province. The employees concerned indirectly obtained the employer's financial information on about 31.76 million USD of net income of and then, faced with this evidence, the employer reluctantly accepted the demand for wage increase since the employer did not legally provide the employees with such kind of information. Supposed that the employer could initially disclose financial information in response to the employees' demand for wage increase, the collective agreement could have been concluded earlier with less damage on both sides in the strike. Therefore, under current Chinese labor law, the employers cannot be substantially deterred from a willful refusal to disclose information. Accordingly, although there are many different reasons why a real collective bargaining hardly occurs in China, some observers said that information asymmetry in China is definitely one of key factors leading to impasse or strikes.¹³

This comment suggests that the US appears to provide more protections on the employee's interest -- at least with regard to the provision of information -- than China.¹⁴ For example, in a case of a pending consolidation, the U.S. Court of Appeals¹⁵ held that the employers are required to furnish information concerning any proposed merger before the merger was consummated.¹⁶ By contrast, pursuant to Chinese labor law, only after a merger is finished, the existing enterprises are required to consult collectively with workers on continuous performance of the existing collective agreement.¹⁷ Following such abovementioned requirement, the complaining employees often strike because they could not know what will happen in the future to their employments. For instance, in November 11th, 2011, dissatisfied about not being informed of Master Kong (Kang Shi Fu) company's acquisition with the Pepsi China before it was finalized in Hong Kong, the employees of Chinese

¹² Huang Wei Ming, The features of Chinese collective negotiation and the functions of trade unions, comparable industrial relations, china-South Korea-Germany.

¹³ One official in the Honda Strike of 2010 said that information inequality has limited the ability of the employees to protect their interest and compel the employers to compromise much more.

¹⁴ It is worthy of note that "the basic statutory language and procedures through which the essentials of collective bargaining in practice have been nearly ossified for over fifty years in the United States.

Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527 (2002).

¹⁵ *Providence Hospital*, 93 F.3d 1012.

¹⁶ When a pending merger is sufficiently advanced, a union is entitled to request information relevant in order to prepare for effects bargaining. See *Holly Farms*, 48 F.3d at 1360 (upholding Board's finding that employer's failure to produce merger agreement when requested pre-merger constituted an unfair labor practice); *Children's Hosp. of San Francisco*, 312 N.L.R.B. 920, 923, 1993 WL 398480 (1993) (ordering disclosure of merger agreement because its contents, even before the merger was consummated, "clearly would have influenced [the union] as to negotiating tactics, positions, and demands").

¹⁷ Article 18 *Collective Agreement Regulations of Shanghai Municipality 2007* provides that after the enterprises merger, divide or reorganization, they should collectively negotiate with the employees over issues of the continuity of the collective agreement.

operations of the Pepsi's China protected their interests by engaging in a slowdown, submitting complaint and other measures.¹⁸

In addition, there are two different models of information disclosure both in china and the United States. They may be termed as statutory process-triggered and request-triggered.¹⁹ The Chinese labor law imposes an affirmative duty on employers; it means that the employers should take initiative to disclose information relevant to collective bargaining, even if there is no union request. By contrast, in American labor law the employer's duty to furnish information is triggered by a specific request from union to substantiate the assertions of the employers.

After examining the main divergences between china and the United States, this comment aims to harmonize legal practices in Chinese labor law, to improve the effective information exchange and then promote the bargaining parties to make a sincere effort to reach collective agreement. To this end, the structure of the paper is divided as three parts. Firstly, the comment begins in Part I with a basic introduction of the features of the disclosure duty in China and then reveals several drawbacks of Chinese labor law. Part II will examine the disclosure duty in the United States and merely analyze the interaction between a disclosure duty and a good faith bargaining requirement, subject to a subjective and an objective theory. Part III turns to a concluding remark for this comment.

Finally, no attempt herein is made to provide a comprehensive description of what the legislative branch in China should do or not regarding the disclosure duty.

I、 Disclosure Duty in China

In China's labor law, the express legal provisions explicitly provide wider-ranging right of an employee or union to secure information in workplace for collective negotiation, occupational safety and other justifications. Regarding collective bargaining, The 2004 Provisions further authorize employees to initiate the collective bargaining process "through more authentic representatives to prepare proposals on a wide scope of subjects clearly beyond the usual statutory labor standards and protections."²⁰ However, after 8 years, now those representatives still could not get

¹⁸ November 5th ,2011, <http://finance.sina.com.cn/chanjing/sdbd/20111205/104210934758.shtml>

¹⁹ In respect of the statutory information disclosure models in the European countries, Howard Gospel and Paul Willman state that "these arrangements are of two types – which we term *process-driven* and *event-driven*. Where information disclosure is process-driven, the trigger for its use lies within a bargaining or consultation agenda. The legislative approach to this tends to be a set of general rules on disclosure within a specified process such as a consultative or bargaining forum. The central purpose of such law is to enhance the operation of a process which itself may be either voluntary or mandated. By contrast, where information disclosure is event driven, it is triggered by a specific employer-initiated event which affects employment contracts irrespective of the representative context – examples are changes of ownership or redundancy. Here, the central purpose of the law is to create a temporary process around an employer- initiated event which has implication for terms of employment. "

Comparatively *Open: Statutory Information Disclosure for Consultation and Bargaining in Germany, France, and the UK.*

²⁰ Ronald C.Bron,China's Collective Contract Provisions:Can Collective Negotiation Embody Collective

enough useful information to bargain with the employers in China.

Regarding the employees' right to the employer's information, there are several problems preventing worker from realizing their rights as follows:

The poor quality of legislation; the absence of legal framework regulating union litigation on behalf of workers; the lack of a legislative process for direct election of trade union at the grassroots level; the lack of sufficient suitable qualified legal professionals able to defend workers rights; and inadequate legal education.²¹

For example, although the union can be set up as an "independent" legal entity,²² the All China Federal Trade Union (ACFTU) serves as a quasi-governmental entity. Trade unions play a dual role of promoting both employee interests and social stability. The Honda Strike has already shown that the official trade unions in the company did not really represent and protect the interest of the employees. Such arrangement has adversely affected the role of trade unions to act for the employees.

A. The Disclosure duty

Aiming to encourage bargaining parties to reach a collective agreement, Chinese labor law explicitly requires employers to disclose information relevant to collective bargaining, but does not impose a duty to collectively bargain (or bargain in a good faith) on the employers. In 1998, Office of The All-China Federation of Trade Unions required that negotiating parties are obliged to timely provide each other with information, material and data related, while recognizing the obligation of confidentiality as to information and data provided.²³ Moreover, in 2000 as of collective wage bargaining, the parties in collective negotiation, on request and within five days before the negotiations begin, are obliged to provide information related to wage collective negotiations.²⁴ In 2004, the negotiating representatives should perform the responsibility to provide each other with relevant information.²⁵ Apparently, those enactments have authorized the employees to be entitled to relevant information in order to improve collective bargaining and then reach collective agreement.

The disclosure duty is to be carried out by the lawful negotiating representatives who should act both honestly and trustfully on behalf of the both sides to collective bargaining. So, the 2004 provisions require that each side shall have at least three members with one chief representative to engage in collective bargaining and the

Bargaining ? Duke Journal of Comparative & Internatioanl Law,2006.

²¹ Liu Cheng and Sean Cooney, China's legal protection of worker's Human Rights ,Human rights at work, perspectives on Law and regulation, edited by Colin Fenwick and Tonia Novitz, at 164page.

²²Trade unions law 14 article: if the enterprise unions satisfy the requirements for legal personality stipulated by the Civil Code, they can obtain legal personality of social groups.

²³ Guidance on Participation of Unions in Wage Collective Negotiations,1998

²⁴ Article 18 of the Interim Measures for Collective Wage Negotiations of 2000,

²⁵ Article 25 of the 2004 Provisions.

number of the representatives for both parties shall remain the same.²⁶ As being of a holder of the right to the employer's information, the representatives of the “employee party” shall be selected by the trade union or, if none, then by democratic recommendations and agreed upon by one-half of the staff in that employer.²⁷ This kind of democratic election is closely connected with an institution in China, Workers Congress, which does not usually be paid more attention to in China.

At a national level, Workers Congress of the State-Owned enterprise has been legally defined as a basic form of democratic management and the institutions authorized to exercise power of democratic management in 2001.²⁸ Moreover, Shanghai city goes further than a national legislation mentioned above and then regulates that trade unions of all enterprises are the operating mechanism of the Workers Congress and undertake its daily work, not only in the State-Owned enterprise but also in non State-Owned enterprise.²⁹ Indeed, it means that, even without trade union at an enterprise level, a collective bargaining may be carried out by the representatives on behalf of the employees through the democratic election in the form of Workers Congress. For example, about 1,000 workers at the Astar Precision Watch factory (a subsidiary of the Citizen Watch Corporation) in Shenzhen began strike on 17 October 2011, where there was no trade union in the factory. On 17 November, management publicly announced the collective agreement reached in the collective bargaining talks with the employees after getting unanimous consent from all the workers.³⁰ The nature of such arrangement actually reflects the effectiveness of Workers congress without intervention of official trade union. Accordingly, even if there is no trade union at the workplace, the employees still may secure information and engage in collective bargaining through their representatives elected democratically in Workers Congress.

In China, Article 25 of the 2004 Provisions expressly shows that negotiating representatives are responsible for providing relevant information. There is no further national law that clarifies how the duty to furnish information is triggered. Similarly in Beijing city, Shanghai city and Guangdong province, there is no rule that the disclosure duty is activated by the union's request. Accordingly, it appears that the bargaining parties should take initiative to provide each other with the relevant information, even if there is no request for information from a bargainer.³¹ However, it should be noteworthy of that, during “wage collective negotiation”, the employers are

²⁶ Article 19 of the 2004 Provisions.

²⁷ Article 20 of the 2004 Provisions.

²⁸ Article 30 of the Trade Union Law of 2001

²⁹ Trade unions are working institutions of worker assembly, and undertake the daily work of the workers' congress. Article 5 of Regulations of the Shanghai Municipality on the Workers Congress.

³⁰ In order to further broaden communication between management and labor, a “Labor and Management Coordination Committee” was established at Astar and Tang Duanfeng, an active participant in the collective bargaining discussions, was appointed as the worker representative on the committee.
<http://www.clb.org.hk/en/node/101233>

³¹ Article 25 of the 2004 Provisions: representatives for negotiating parties should perform their responsibility of providing the information related to the collective bargaining.

obliged to, upon request, provide information.³² At least, it may be inferred that, in the field of non-wage collective negotiations, the negotiators should disclose information, even without a request from the union or the negotiating representative on behalf of the employees.

Regarding the context of information disclosed, not only is there a uniform regulation on the scope of mandatory subject for collective bargaining, but also specific lists of relevant information have been explicitly required to disclose to trade unions. According to Article 3 of the Provisions, the content of the collective contract includes as follows:

“labor remuneration, working time, rest and holiday, labor safety and sanitation, professional training, and social insurance and welfare in accordance with the stipulation of laws, regulations and rules; the special collective contract refers to the special written agreement, in compliance with laws, regulations and rules.”³³

Moreover, the disclosed information also includes protection of the women workers, the wage adjustment mechanism, the collective contract and etc.³⁴

It is important to emphasize that the employers are required to provide quite extensive financial information to the employees, and the information disclosure duty is not premised on either the employers' proposals or a demand from the employees for a collective bargaining. In Shenzhen city, information disclosed includes workers' total wages, operating costs, financial statement, technology transformation and equipment renewal plan, and so on.³⁵ In Shenyang city, the company should truthfully submit the tax authorities last year's annual corporate income tax returns.³⁶ In Hubei province, the balance sheet, income statement and statement of cash flows should be disclosed.³⁷ In Gansu province, information required for collective bargaining includes fixed labor standards and payment of wages, labor productivity and labor cost conditions, payment of taxes and social insurance and other related production and management information.³⁸ Therefore, since the employers bear a mandatory obligation to disclose financial information, the employers could require the opposite side to conclude a confidentiality agreement and protect the confidential information.

So the law is quite clear about imposing on employers an unconditional obligation to provide relevant information, including financial information, to the employees. What is less clear is whether that obligation is actually enforceable or enforced. The Chinese Labor Bureau has the responsibility to supervise the negotiation process³⁹ and

³² Art 18 of the *interim Measures for collective wage negotiations* of 2000. Similarly, Chongqing city also requires the duty to provide information shall be triggered by a request from one bargainer.

³³ Art.3 of the 2004 Provisions.

³⁴ Art 52 of the Labor Contract Law of 2008.

³⁵ Art 27 of Regulations on Harmonious Labor Relations of Shenzhen.

³⁶ Art 7 of Measures on Wage Collective bargaining of Shenyang.

³⁷ Working Standards on Enterprises Wage Collective Bargaining of Hubei.

³⁸ Art 18 of Regulations on Collective Agreement of Gansu.

³⁹ Art.49 of the 2004 Provisions.

to coordinate the parties in resolving issues.⁴⁰ Regarding the rights disputes during the life of collective agreement (disputes over the alleged violation of the agreement), both parties on labor disputes may bring a lawsuit to the Labor Dispute Arbitration Commission and the People's Court.⁴¹ However, for the interests disputes during the negotiating period for collective agreement ((disputes over negotiation for the agreement)), either party to the collective bargaining can apply to the competent labor authorities for conciliation, over which the courts do not possess the jurisdiction.⁴² Meanwhile, the labor authorities may initiate the procedure of conciliation at their discretion even without application for conciliation by either party. In practice, there are very few of the rights disputes on collective agreements which were adjudicated by the authorities. Apparently, legislation emphasizes administrative enforcement of labor law. Even so, administrative authorities could not effectively address the interests disputes because few employees would like to wait for a final outcome after time-consuming conciliation process (one week or one month possibly) through the government. Consequently, almost all of the employees chose to strike on the street or do nothing at the workplace.

When there is a work slowdown or other work stoppage at the workplace, trade union is required to mediate and assist both of the employees and employers to resume work and restore work order as soon as possible.⁴³ This implies that strikes are not explicitly prohibited in china. Nonetheless, once impasse or strikes happen, the interest disputes could hardly be settled by local labor official sooner because there is absent of real information relevant to collective bargaining.

Theoretically, Chinese labor law "on the books" would seem to effectively promote information disclosure (particularly financial information). However, the opposite is true in practice. Although It is undeniable that a number of collective contracts have been signed by both of the employers and employees, at least until recently, those collective contracts just "simply reflect minimum legal requirement or the continuation of past practice and there is very little actually bargaining."⁴⁴ Now that there is so much discussion of the need to promote real bargaining, it is important to examine the conditions in which bargaining takes place. Without real and adequate exchange of substantial information, even if there is so-called collective bargaining, most collective contract will be signed without understanding the employers' real (financial)situation. What hampered a real collective contract or the employees to obtain sufficient information in China?

B. The problems in the Disclosure Duty

Regarding the disclosure duty, the poor quality of legislation mainly includes

⁴⁰ Art.50 of the Trade Union Law.

⁴¹ Art.55 of the 2004 Provisions.

⁴² Art.49 of the 2004 Provisions.

⁴³ Art.27 of the Trade Union Law.

⁴⁴ ICFTU,China's People Republic of :Annual Survey of Violations of Trade Union Righsts Supra

several points as follows.

Firstly, there is some kind of intentional avoidance to enact a mandatory duty of the employers to collective bargaining in China. At a national legislative level,⁴⁵ no mandatory obligation to collectively bargain has been stipulated in the labor laws in China, except for a duty not to refuse a demand for collective bargaining.⁴⁶ Accordingly, the so-called right to collective negotiation appears to require the employers to engage in collective bargaining,⁴⁷ but it only means that the employers should only perform a duty not to refuse a demand for collective bargaining.⁴⁸ In fact, what the 2004 provisions require the employers to do is to make a written response of the employer to a request from union for collective bargaining.⁴⁹ Moreover, the duty not to refuse a demand mentioned above cannot be interpreted or deemed to require both bargaining parties to meet at reasonable times, provide information or confer in good faith with respect to wages, hours, and other terms and conditions of employment. Therefore, collective bargaining in China may be treated, to some degree, as voluntary process and it means that all of what the enterprises should do is just only to sit around the bargaining table to submit a written response to the employees.⁵⁰ For instance, a mandatory duty on the enterprises to collectively bargain had been concealed in the first draft of *The Regulation on Enterprise Wage Collective Negotiation of Hunan Province* in September 2011, and then it shows that collective bargaining on wage will not be treated as a mandatory duty on the enterprises.⁵¹ The fact manifestly states that there is no real obligation of the employers to collective bargaining in china. Consequently, it is easy for the employers to make a "surface bargaining" by sitting around negotiating table and submit a written response to the employees but without providing any substantial information.

Here is a question whether “the principle of good faith” in the 2004 Provisions could be considered as a duty to collectively bargain.⁵² In China, the collective negotiations process is “delineated, with “good faith” requirements built in to facilitate cooperative

⁴⁵ At a national legislative level, there is no express provision of mandatory duty to collectively bargain stipulated in the 2004 Provisions and Contract Labor Law.

⁴⁶ Neither china and the United States has ratified the Right to Organize and Collectively Bargain (Convention NO.98)

⁴⁷ The concept of a right is fundamental in both the Labor Law and The Trade Union Law. some times the term “rights” is used simply to indicate a procedural entitlement, as in an expression such as *youquan tichu jianyi* (“to have a right to give an opinion”). Such the words *youquan* (to have a right) are employed in the sense of civil and political or economic and social rights.

Liu Cheng and Sean Cooney, *China’s legal protection of worker’s Human Rights ,Human rights at work, perspectives on Law and regulation*, edited by colin fenwick and Tonia Novitz, at 160page

⁴⁸ In china, an employer is required to make a written response to a demand for collective bargaining from the other party, subject to Article 32 of the 2004 Provisions.

⁴⁹ In China, a bargainer is just only required to make a response in writing to a demand of collective bargaining from the other party, subject to Article 32 of the 2004 Provisions.

⁵⁰ Art 23 of the Regulations on Enterprises Wage collective Bargaining of Tianjing; Art 22 of the Regulations on enterprises wage collective bargaining of Xinjiang; Art 13 of the Regulations on collective contract of Beijin.

⁵¹ <http://news.163.com/11/0928/10/7F1JLHH00014AEE.html>

⁵² Some scholar concludes that the doctrine of good faith in China is anything but “identical” to its counterpart in the US. Chunlin Leonhard, *A legal Chameleon: An Examination of The Doctrine of Good Faith In Chinese and American Contract Law*, Connecticut Journal of International Law, Vol. 25, No. 305, 2010.

exchanges of proposals.”⁵³ China first recognized the doctrine of good faith as a legal doctrine in the General Principles of the Civil Law (“GPCL”) in 1987.⁵⁴ Article 4 of the GPCL provides that, “when conducting civil activities, the principles of voluntariness, fairness, compensation for equal value, honesty, and credibility shall be followed.” Moreover, the 2004 Provisions stipulate that both parties should collectively negotiate in compliance with the principles of honesty and trustworthiness, fairness and cooperation.⁵⁵ Considered as one Chinese characteristics of collective bargaining system, one of the real purposes of Chinese labor law is to wish both parties negotiate on a cooperative base with no conflict.⁵⁶ Indeed, the purpose of the 2004 Provisions merely require both bargaining parties make efforts to avoid strikes and maintains peaceful industrial relations on cooperation.

Consequently, absent of convincing evidence of legislative history and statutory language of Chinese labor law, it is hardly concluded that the principle of honest and trustworthiness could not be interpreted to imply a mandatory duty of the employers to collective bargaining in order to deter the employers’ willful “surface bargaining” and require the employers to disclose information requested by the employees.

Secondly, one of biggest problems faced with the employers is the matter of timing. After receiving a demand for collective bargaining, the employers will be confused by the different time periods of making a response to the demand because the time periods vary from a state law to different local regulations. For example, the 2004 Provisions require a bargainer should make a reply within 20 days after receiving a demand for collective bargaining from other party.⁵⁷ In Shanghai city, a written reply should be made within 15 days from the date of receiving a demand for collective bargaining. In Shenzhen city, within 10 days after receiving a demand for collective bargaining a receiving party should make a respond in writing. Notwithstanding those differences, one of the most important confusions is that no legal provision clearly tells the employers when they should disclose information to the employees. Beyond the uncertainty mentioned above, another one is whether both parties may decide the time to provide information by negotiation or the employer must provide the employees with information at the same time when the employer makes a response to a demand from the employees? There is no right answer to those questions under the current legal situation in China.

Thirdly, and perhaps most importantly, a lack of effective remedies of Chinese labor law leads to the widespread non-compliance with the disclosure duty. Regarding a violation of disclosure duty in China, some local regulations provide several remedies

⁵³ Ronald C.Bron,China's Collective Contract Provisions:Can Collective Negotiation Embody Collective Bargaining ? Duke Journal of Comparative & Internatioanl Law,2006.

⁵⁴ The General Principles of The Civil Law of The People’s Republic of China,(2000) [hereinafter GPCL].

⁵⁵ Art.5 of the 2004 Provisions.

⁵⁶ Thoughts about collective bargaining system based on western legal research, Zhao Wei.

⁵⁷ The interim Measures for collective wage negotiations of 2000 states that ,within 20 days after receiving a intent letter of collective bargaining, a negotiating party should make a written reply to other party.

for victims, including: order to correct misconduct,⁵⁸ or warning and publish for public the employer's unethical filing.⁵⁹ Moreover, in Shenzhen, where an employer refuses to provide information, it will be ordered to make correction within five days; if it fails, a fine from about \$159 to \$1590 shall be imposed on it.⁶⁰ In Guizhou province,⁶¹ if an employer does not truthfully perform the disclosure duty, the legal representative of the company may be imposed a fine of from \$79.5 to \$318. As of the current remedies available to the victims of violations of the disclosure duty, it also reflects sort of the intention of the legislature who appears not to really force the employer to disclose information. Accordingly, those remedies in china are so minor that the employers willfully refuse the demands for collective bargaining.⁶²

Consequently, there will be no guarantee that the information relevant during collective bargaining can be fully and effectively disclosed to the trade unions and the employees. Those incompatibilities concerned above obviously impede the negotiator's performance of their obligation to disclose information. There should be some changes in the current Chinese labor law on information disclosure for collective bargaining.

II、 Disclosure Duty in the US

In 2011, the union membership rate for private-sector workers (6.9 percent) was substantially lower than the rate for public-sector workers (37.0percent) in the United States.⁶³ Indeed, the low rate of union membership in private-sector can partly manifest a fact that most of those workers might not directly benefit from the collective bargaining initiated by the trade unions. However, the data may state that the union members enjoy higher wage than those who do not belong to the trade union. In 2011, among full-time wage workers, union members had median weekly earnings of \$938, while those who were not union members had median weekly earnings of \$729. At least, it is undoubted that the collective bargaining on wage might help the workers who belongs to the trade unions earn more money.

A. The Disclosure Duty

The Distinguished from Chinese labor law, the Act does not contain an express requirement that information should be furnished for collective bargaining in the United States.

⁵⁸ Art 53 of the Trade Union Law.

⁵⁹ Art 50 of the Regulations on Collective Contract of Gangsu; Art 31 of the Regulations on Enterprises Wage Collective Bargaining of Xinjiang.

⁶⁰ Art 65 of Regulations on Harmonious Labor Relations of Shenzhen.

⁶¹ Art 29 of Regulations on Collective Contract of Guizhou.

⁶² The role of trade unions in collective bargaining —— a case of Beijing city,

http://www.cslnet.cn/show_tit.aspx?id=828&r=9828135#_ftn1

⁶³ 7.2 million Employees in the private sector belonged to a union, compared with 7.2 million union workers in the private sector. USDL-12-0094, UNION MEMBERS —2011.

However, The National Labor Relations Board (the “Board”)⁶⁴ had interpreted the principle of good faith bargaining to mandate the negotiators to disclose information relevant to collective bargaining, since Sections 8(d) of the Act requires an employer and union to bargain in good faith with each other.⁶⁵ As of information communication, it could be dated back to a case of *Allen, S.L., & Co., Inc* in 1936.⁶⁶ In the *Allen* case, the Board ruled that the “interchange of ideas, communication of facts peculiarly within the knowledge of either party is the essence of the bargaining process.” Consequently, it could be concluded that a disclosure duty is indirectly encompassed in the obligation to collectively bargain in good faith in Section 8(a) (5) of the Act, where requested information is relevant and necessary to the union's mandatory duty to bargain on behalf of employees.”⁶⁷

Regarding the doctrine of good faith bargaining, not only does it require “more than a willingness to enter upon a sterile discussion of union-management difference but also to bargain collectively in a good faith effort to reach an agreement.”⁶⁸ Although it usually leads to a fact that some tension exists between freedom of contract and industrial peace,⁶⁹ the doctrine of good faith bargaining seemingly could make a careful balance between regulating the bargainers’ negotiating conduct and the specific context of collective bargaining, aiming to improve the parties’ unequal power to bargain on their collective interest in cooperation, while spontaneously to maintain private determination of terms and conditions of employment through negotiation and possible resort to economic weapons.⁷⁰ In sum, such an imposition of a duty to bargain in good faith would theoretically function well to minimize these unhappy results by promoting informed discussions on the both parties’ disputes.

Aiming to limit the Board’s discretion in applying the principle of a good faith

⁶⁴ In the United States, the bargainers to Collective bargaining should exchange proposals with the National Labor Relations Board (NLRB), which as the administrative body supervise the employer and union to ensure they bargain in good faith, without committing unfair labor practices.

⁶⁵ A mutual obligation to bargain collectively arises under sections 8(a) (1) and (5) and 8(d) of the National Labor Relations Act (“NLRA”). The relevant provisions concerned above state:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;...

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this subchapter;

...

(d) Obligation to bargain collectively. For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

29 U.S.C. §§ 158(a) (1), (a) (5) and (d).

⁶⁶ *Allen, S.L., & Co., Inc.*, 1 NLRB 714,728 (1936).

⁶⁷ *NLRB v. Leonard B. Hebert, Jr. & Co., Inc.*, 1124 (5th Cir.1983).

⁶⁸ *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395 (1952).

⁶⁹ Wellington, Harry H., "Freedom of Contract and the Collective Bargaining Agreement" (1964). Faculty Scholarship Series. Paper 1975. http://digitalcommons.law.yale.edu/fss_papers/1975

⁷⁰ Kenneth G. Dau-Schmidt, *The Duty to Bargain in Good Faith: NLRB v. Truitt Manufacturing Co. and NLRB v. Insurance Agents' International Union*, <http://law.bepress.com/expresso/eps/1318>

bargaining requirement for industrial peace, the court in the *Herman Sausage Co.* case further held: “Nor may the Board directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements, for the Act does not regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement.”⁷¹ Therefore, the substantive terms and conditions of collective agreement should be decided only by the bargaining parties themselves, rather than the Board.

Notwithstanding these advantages of a good faith requirement, there still is no answer to the questions: whether a refusal to supply information is a per se violation of the duty to bargain or merely evidence of lack of good faith in bargaining?⁷² Put another way, doubt is whether an objective or subjective tests maybe fit well within the disclosure duty included in a good faith bargaining requirement.

In the United States, the disclosure duty does not arise until one party makes a request for information.⁷³ In *Western Wirebound Box* case, the court held that if no request from the trade union was made for such data, the failure of the company to produce data did not constitute failure of its duty.⁷⁴ Unless information expressly is requested by a bargaining party, an opposite party does not bear a duty to furnish information.⁷⁵ The request need not be in writing and it need not be repeated.⁷⁶ Moreover, if unions do not make sufficient request for financial data substantiating the employers' claims, until after negotiations have ended, the employers are not obligated under the Act to provide this information.⁷⁷ Nonetheless, there are few exceptions. For instance, even if there is no express request on the information by union, the employers still should perform the duty to divulge the information to the unions when union ask to increase wage or reduce working hours.⁷⁸

In the United States, an employer's duty to bargain is owed only to the certified bargaining representative.⁷⁹ Section 9 of the Act provides that unions, if certified or recognized, are the exclusive representatives of bargaining unit members.⁸⁰ Once the Board certifies a union as the exclusive bargaining agent, the union enjoys an irrebuttable presumption of majority support for one year,⁸¹ and a rebuttable presumption of continuing majority support thereafter.⁸²

⁷¹ N.L.R.B. v. Herman Sausage Co, 231-32 (5 Cir. 1960).

⁷² Patric Hardin and John E. Higgins, Jr., the developing labor law (fourth edition volume 1), At 859, ABA section of labor and employment law.

⁷³ Boston Herald-Traveler corp., 102 NLRB 627(1953)

⁷⁴ NLRB v. W. Wirebound Box Co., 356 F.2d 88, 90-91 (9th Cir. 1966)

⁷⁵ NLRB v. Boston Herald-Traveler Corp., 210 F.2d 134 (1st Cir. 1954)

⁷⁶ Bundy Corp., 292 NLRB 671(1989)

⁷⁷ In NLRB v. Pac. Grinding Wheel Co. (1978, CA9), 572 F.2d 1343, 98 (9th Cir. 1978) BNA LRRM 2246, 83 CCH LC P 10536.

⁷⁸ First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666 (1981).

⁷⁹ 29 U.S.C. § 159(a) (1952).

⁸⁰ In addition, Section 6 of the Collective Bargaining Agreement Law of Taiwan provides that labor union is an eligible bargaining entity for collective bargaining.

⁸¹ Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987).

⁸² Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987).

Although “the appropriate scope of collective bargaining cannot be determined by a formula,”⁸³ collective bargaining subjects in American labor law may be divided into three categories: mandatory, permissive, and illegal. Mandatory subjects of bargaining are the topics set forth in the Act: wages, hours, and other terms and conditions of employment. Refusing to bargain collectively (in good faith) over mandatory subjects of bargaining is an unfair labor practice. The parties are free to bargain about the “permissive” subjects.⁸⁴ Illegal topics, such as “hot cargo” agreements, are improper subjects for bargaining.⁸⁵

In the United States, information regarding a firm’s sales and profits is commonly regarded as highly sensitive and confidential data,⁸⁶ where there is “no presumption of relevance when a union seeks access to financial information.”⁸⁷ Disclosure of financial information, “such as balance sheets, income statements, tax returns, and working capital analyses does not fit neatly within the statutory obligation to bargain collectively.”⁸⁸ In the *Truitt* case, the Supreme Court ruled that the employer’s duty to bargain in good faith requires that financial information should be disclosed to substantiate the employer’s claim of inability to pay wage increase or benefit.⁸⁹ In the *Caldwell* case, the Board found that the employer was required to meet the union’s request for detailed information involving costs, productivity, and competitor performance where the employer asserted that concessions were necessary in order to make “a less competitive facility viable and to become more competitive in the industry.”⁹⁰ In *E. I. du Pont*, the Board held that production cost and competitor data were relevant where the employer proposed a major restructuring of production jobs.⁹¹ Therefore, the information disclosed to the employees is closely related to the context of the claims or assertions of the employers.

When the employer refuses to disclose information to the trade unions, the latter may strike to compel the employers to do so. However, though there is a statutory right to strike in the private sector, case-law interpretation of that statute permits employers to replace striking workers. *NLRB v. Mackay Radio*⁹² was a decision that allowed a firm to replace economic strikers permanently and to refuse their return to employment after a strike. However, if the employees are striking over an employer’s unfair labor practice, they cannot be permanently replaced. Several legal scholars have observed

⁸³ *Ford Motor Co. (Chi. Stamping Plant) v. NLRB*, 441 U.S. 488, 496, 99 S. Ct. 1842, 1847 n.8 (1979).

⁸⁴ *NLRB v. Borg-Warner*, 356 U.S. 342, 78 S. Ct. 718, 2 L. Ed. 2d 823, 42 L.R.R.M. (BNA) 2034 (1958).

⁸⁵ NLRA Sections 8(e) and 9(a); 29 U.S.C. §§ 158(e), 159(a). A “hot cargo” clause is an agreement: (1) not to handle, sell, or transport another employer’s goods, or (2) to cease doing business with another person. Section 8(e) gives a limited exemption to agreements of this type in the construction and clothing manufacturing industries.

⁸⁶ *White furniture Co.*, 161 NLRB 4444(1966), aff’d su nom. *United furniture workers v. NLRB* 388 f. 2d 880 (4th Cir 1967)

⁸⁷ *Nielsen Lithographing Co.*, 305 N.L.R.B. at 699; *USW v. NLRB*, 983 F.2d 240, 243 (D.C. Cir. 1993)

⁸⁸ Brent Robbins, NOTE: Rethinking Financial Information Disclosure Under the National Labor Relations Act 47 *Vand. L. Rev.* 1905

⁸⁹ *NLRB v. Truitt Mfg. Co.*, Annotation, 351 U.S. 149, 76 S. Ct. 753, 100 L. Ed. 1027 (1956)

⁹⁰ *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006)

⁹¹ *E. I. du Pont & Co.*, supra, 276 NLRB at 336.

⁹² *NLRB v. Mackay Radio & Telegraph Co.* 304 U.S. 333 (1938)

that the decision has made the "United States ... almost alone in the world in allowing permanent replacement of workers who exercise the right to strike."⁹³

The Board's own remedies for employer violations of the duty to bargain are very limited, as in China. "Penalties for misconduct are so minor that employers treat them as just another cost of doing business,"⁹⁴ Senator Edward Kennedy, D-MA stated. Although "this system of remedies is so woefully inadequate that employers have little incentive to abide by the law," it is worthwhile to review the remedial scheme in American labor law, to compare it with remedies in Chinese labor law.

In the United States, the Board may order the employers, which violate the duty to bargain in good faith, to cease and desist from refusing to bargain in good faith with the Union, and from interfering in any manner with the efforts of the Union to bargain collectively. In *NLRB v. Pan American Grain Co.*, The United States Court of Appeals for the First Circuit affirmatively grant enforcement of the Board's order in its entirety, where the Company was required to bargain collectively with the Union upon request; to reinstate the striking employees upon application; to make them whole for any loss of earnings resulting from a failure to reinstate; and to post appropriate notices at workplace within the specific time.⁹⁵ However, it should be emphasized that there is not the administrative fine or penalty on the employer's violations of the labor law

B. Objective or Subjective?

In China, it is easy for the employers to make surface bargaining since they are just only required to engage in collective bargaining with a written reply but without a good faith requirement. By contrast, a good faith requirement in the US requires both parties should make a sincere effort to reach collective contract and provide information in good faith. Accordingly, it is necessary for China to think over the possibility and practicability of absorbing a good faith bargaining requirement to support a duty to furnish information in order to push forward a real collective bargaining through vigorous exchange of substantial information.

Before doing that, a question arise where a refusal to supply information is a per se violation of the duty to bargain or merely evidence of lack of good faith in bargaining? Put another way, when and in what manner is an employer required to furnish information to a union in order to comply with a good faith bargaining requirement?⁹⁶

⁹³ Quoted in Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards*, 2000.

⁹⁴ March 27, 2007, available at: http://help.senate.gov/Maj_press/2007_03_27.pdf.

⁹⁵ *NLRB v. Pan American Grain Co.*, 432 F.3d 69 (1st Cir. 2005), issue is whether Pan American had a duty to bargain over the layoff decision itself as opposed to only the effects on that decision. Employer decisions such as layoffs, relocations of jobs, and plant closings are sometimes mandatory subjects of bargaining and sometimes not, depending on the reasons for the decision and whether the issues raised by the decision are amenable to resolution through the bargaining process.

⁹⁶ Robert A. Huston, *Furnishing Information as An Element of Employer's Good Faith Bargaining*, 35 U.

How is going on with the interactions between them?

To answer those questions mentioned above, two legal theories advanced must be mentioned to understand the obligation of information disclosure.⁹⁷

A first theory is a subjective approach, and it emphasizes the employer's improper mental attitude which is inferred from his refusal to furnish information rather than an act of the refusal itself. As of a common formulation of the duty to bargain in good faith, it constitutes the obligation of the parties to collectively bargain with sincerity so as to indicate "a present intention to find a basis for agreement and a sincere effort to reach a common ground."⁹⁸ Moreover, the requirement of good faith mandates the parties to negotiate with "a sincere desire to reach agreement on the issues in dispute and to make a reasonable effort to reach an agreement, which makes a party's state of mind important through relying on a subjective test."⁹⁹ Apparently, a "sincerity of effort" to reach an agreement may play a key role to disclose a real intention of the employer whether or not to bargain in good faith.¹⁰⁰ Therefore, this subjective approach is used to determine whether there is a violation of the duty to furnish information.

In addition, it should be noted that a good faith requirement does not create a per se obligation of disclosure.¹⁰¹ In *Southern Saddlery* case, while applying this definition of good faith bargaining to any cases, the Board would examine for a clear indication as to whether it has refused to bargain in good faith, but the Board usually does not rely upon any one factor as conclusive evidence to prove that it did not genuinely try to reach an agreement.¹⁰² Some of past decisions have indeed emphasized that good faith -- or lack of it -- must depend upon a factual determination based on the overall conduct of the party charged.¹⁰³

Most confusion caused by a good faith requirement used as a subjective approach to compel employers to furnish financial information may be the *Truitt* case, where an employer grounded his bargaining position on an inability to pay increase pay required by the union and was required substantiate its claim by furnishing financial information.¹⁰⁴ One of the primary principles distilled from the *Truitt* case is that "not in every case in which economic inability is raised as an argument against increased

Det.L.J.472.

⁹⁷ C.S. Union Request for Information in the Collective Bargaining Process, University of Pennsylvania Law Review, Vol.105, No.1 (Nov., 1956), PP.90-109.

⁹⁸ *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686 (9th Cir. 1943)

⁹⁹ *Truitt Mfg. Co., Annotation*, 76 S. Ct. 753, 100 L. Ed. 1027, 100 L. Ed. 1027. "Good faith bargaining necessarily requires that claims made by either bargainer should be honest claims. This is true about an asserted inability to pay an increase in wages. If such an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy."

¹⁰⁰ *NLRB v. National Shoes, Inc.*, 208 F.2d 688, 691-92 (2 Cir. 1953).

¹⁰¹ *Id.* In *Truitt*, the Supreme Court further said that the employer's failure to furnish data to substantiate the claimed inability to pay was not a per se violation of the Act.

¹⁰² *Southern Saddlery Company*, 90 NLRB 1205 (1950)

¹⁰³ *NLRB v. GE*, 418 F.2d 736 (2d Cir. 1969).

¹⁰⁴ *NLRB v. Truitt Mfg.*, 351 U.S. 149, 76 S. Ct. 753, 100 L. Ed. 1027 (1956).

wages it automatically follows that the employees are entitled to substantiating evidence. Each case must turn upon its particular facts. *The inquiry must always be whether or not under the circumstances of the particular case the statutory obligation to bargain in good faith has been met.* * * *¹⁰⁵ To determine whether an assertion of inability to pay has come into existence, the Board usually observes an employer's statement "in the context of the particular circumstances in that case".¹⁰⁶

To evaluate the employer's conduct as a whole, the Court said in *W.R. Hall Distrib. case*¹⁰⁷ that "Delay, its cause and effect, cooperation between the parties or its lack, preparation for discussion or its lack, and the reasonableness or unreasonableness of demands are among those factors which the fact finder can consider in the difficult task of laying bare the subjective intent of the parties."

In *Nielsen Lithographing Co.*, the Board further clarified that an employer is required to furnish financial information only where an employer asserts a present inability to pay, or a prospective inability to pay during the life of the contract being negotiated, instead of simply insisting that it does not want to pay.¹⁰⁸ In particular, inability to pay may be inextricably linked to presently nonsurvival in business.¹⁰⁹ By contrast, when the employer claims only economic difficulties or business losses or the prospect of layoffs, it just says that it does not want to pay.¹¹⁰ Accordingly, when an employer just says that it does not want to pay, there may be no duty of it to disclose information. Those results seem to depend on the context of what you say in your case: you could not pay or you would not do so.

Consequently, the first theory is living with the psychological standard, which is "extremely difficult to understand, articulate, or implement,"¹¹¹ since there is no "magic word" which will clearly or definitely indicates an assertion of an inability to pay presently or not prospectively.¹¹² Due to no patent demonstration of a good faith, it is difficult for bargaining parties to comply with this psychological standard. Moreover, this uncertainty normally leads to the risk of a bargaining party pretending to bargain in good faith, where "a skilled negotiator can simply mask their actual bad faith intention, by going through the motions of bargaining without having any real desire to reach an agreement with the other side."¹¹³

Accordingly, it is possible for those experienced bargainers, who have been aware of legal risks, to willfully avoid "pleading an inability to pay" in bargaining. For instance, to avoid furnishing financial information, employers may simply say nothing except

¹⁰⁵ The Duty to Furnish Information Under the National Labor Relations Act Jeffrey I. Pasek Charles J. Kawas

¹⁰⁶ *Lakeland Bus Lines*, 335 NLRB 322, 324 (2001), enf. denied *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 358 U.S. App. D.C. 230 (D.C. Cir. 2003).

¹⁰⁷ *NLRB v. W.R. Hall Distrib.*, 341 F.2d 359, 362 (10th Cir. 1965).

¹⁰⁸ *Nielsen Lithographing Co.*, 305 NLRB 697 (1991), at 700.

¹⁰⁹ *AMF Trucking & Warehousing*, 342 NLRB 1125, 1126 (2004)

¹¹⁰ *Supra*.

¹¹¹ Duvin 'The Duty to Bargain: Law in Search of Policy' *Columbia Law Review* (1964) vol 64 248 at 256.

¹¹² *Atlanta Hilton & Tower*, 271 NLRB 1600, 1602 (1984).

¹¹³ *Globe Cotton Mills v. NLRB*, 103 F.2d 91, 94 (5th Cir. 1939).

for “no comment” on union’s question why employers refuse to meet union’s demands. In the *Lakeland* case, a clever denial on an inability to pay might exempt an employer from a disclosure duty. In the *Lakeland* case, in the exchange of letters between Company and Union counsel, Lakeland repeatedly stated that it had never claimed an inability to pay. Because Lakeland did not assert an inability to pay, there was no obligation to disclose the requested financial information. The court held that its refusal to do so therefore did not constitute a refusal to bargain.¹¹⁴

Faced with the uncertainties of a subjective approach, things have changed. Under some specific situations, failure to furnish information may not be regarded as evidence or an element of good or bad faith bargaining, for instance, in *Gehnrich & Gehnrich* case.¹¹⁵ The employer in *Gehnrich* was found to violate Section 8(a) (5) and (1) of the Act by refusing to furnish the Union with financial information but there is no evidence of a bad faith of the employer because the employer withheld the information in dispute as a strategy to elicit further concessions from the Union. This case seemingly reflects one position that the duty to furnish information began to step away from an element of the duty to bargain in good faith to per se obligation. Put another way, “the case law applying *Truitt* demonstrates that an employer's refusal to substantiate an inability-to-pay claim has become objective evidence of per se bad faith bargaining.”¹¹⁶ Therefore, the standard for the disclosure duty in *Truitt* appears to shift from a subjective approach to objective one.

The second theory advanced focuses on the objective relevance of the requested information and the statutory function of the trade unions as exclusive representative of the employees. Once the requested information is objectively necessary and related to the collective bargaining process, the disclosure duty is triggered and the union is entitled to request and receive it.¹¹⁷ Under such objective theory, “The employer's obligation to furnish information to the union is based upon the union's need for such information to provide intelligent representation of the employees.”¹¹⁸

In fact, a number of cases held that a refusal to furnish relevant information constitutes violation of Section 8 (a) (5) of the Act.¹¹⁹ Even if the Union initially fails to show the relevance of the requested information, the employer should supply specific information, for example, wage data.¹²⁰ The court in the *Yawman* case ruled

¹¹⁴ *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 358 U.S. App. D.C. 230 (D.C. Cir. 2003).

¹¹⁵ *Gehnrich & Gehnrich* 1977,232 N.L.R.B. 1122

¹¹⁶ Brandon David Lawniczak,NOTE: Substantiating "Competitive Disadvantage" Claims: A Broad Reading of *Truitt*,87 Mich. L. Rev. 2026,June, 1989.

¹¹⁷ *Boston Herald-Traveler Corp.*,110 NLRB 2097 (1954).

¹¹⁸ Martha M. Cleary, J.D. Employer's duty to furnish wage infodrmation to employees' representative under Cox, National Labor Relations Act, supra.

¹¹⁹ *The B. F Goodrich Company*, 89 NLRB 1151; *The Electric Auto-Lite Company*, 89 NLRB 1192; *Montgomery Ward & Co., Inc.*, 90 NLRB 1244; *Leland-Gifford Company*, 95 NLRB 1306, enforced *NLRB v. Leland-Gifford Co.*, 200 F.2d 620, 623 (1st Cir. 1952); *The Hearst Corporation*. 102 NLRB 637; *Boston Herald-Traveler Corporation*, f02 NLRB 627; *Hekman Furniture Co.*, 101 NLRB 631; *NLRB v. Union Mfg.*, 179 F.2d 511, 512 (5th Cir. 1950); *Nat'l Labor Rels. Roard v. Jacobs Mfg.*, 196 F.2d 680 (2d Cir. 1952).

¹²⁰ *NLRB v. YAWMAN & ERBE MFG. CO.* 187 F.2d 947(2d Cir. 1951). Where the employer should not refuse the union’s request without showing a relevance of information requested because the employer has an affirmative

that “it is virtually impossible to tell in advance whether the requested data will be relevant except in those infrequent instances in which the inquiry is patently outside the bargaining issues.”¹²¹

Following the rationale in *NLRB v. Yawman & Erbe Mfg. Co.*,¹²² the *Jacobs* decision indicates that good faith bargaining inherently requires substantiation of economic incapacity claims, regardless of the bargainer's good or bad faith. In the *Jacobs* case, where the respondent employer asserted that it was financially unable to meet the union's demands but refused to substantiate its assertion by furnishing information to the union, the court held that the disclosure requirement “will be met if the respondent produces whatever relevant information it has to indicate whether it can or cannot afford to comply with the Union's demands.”¹²³

In the *Western Wirebound Box* case, the court stated that the “principle announced in *Truitt* is not confined to cases where the employer's claim is that he is unable to pay the wages demanded by the union.”¹²⁴ In *Caldwell Manufacturing Co.*,¹²⁵ where the employer asked for concessions from the employees and further grounded its proposals on a need to be more competitive in the industry, the Board found that the union was entitled to that information because relevancy of requested information was established when it would have assisted the union in verifying the employer's claims regarding its proposals and allowed the union to make counter proposals, even if the requested information was not presumptively relevant. Accordingly, in *Caldwell*, the disclosure duty did not fall back on a good faith instead of relevancy of requested information.

Moreover, the *KLB* case mainly focus on the importance of the information requested by trade unions,¹²⁶ where the board found that the Supreme Court observed in *NLRB v. Truitt Mfg. Co.*, that, “if . . . an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.” and then held that faced with these assertions of the employer's lack of competitiveness, the Union had a legitimate claim to information that it could use to understand, evaluate, and possibly rebut the Respondent's assertions.¹²⁷ Consequently, an objective approach shows that the requested information must be submitted to unions unless it is “plainly irrelevant” to collective bargaining as long as the information is relevant or important to the mandatory responsibilities of the unions.¹²⁸

In sum, two theories mentioned above coexist and respectively represent different

statutory duty to supply relevant information.

¹²¹ *NLRB v. Yawman & Erbe Mfg.*, 187 F.2d 947 (2d Cir. 1951).

¹²² *Id.*,

¹²³ Nat'l Labor Rels. Board, 196 F.2d 680.

¹²⁴ *NLRB v. W. Wirebound Box Co.*, 356 F.2d 88, 90-91 (9th Cir. 1966)

¹²⁵ *Caldwell Mfg. Co.*, 346 NLRB 1159, 1160 (2006)(citations omitted).

¹²⁶ *KLB Industries, Inc v NLRB*,357 NLRB No.8.

¹²⁷ *KLB Industries, Inc v NLRB*,357 NLRB No.8.

¹²⁸ *NLRB v. Yawman & Erbe*, 187 F.2d 947.

views as to “how disclosure duty in collective bargaining should operate and interact with the duty to bargaining in good faith.”¹²⁹ If a purpose of an imposition of disclosure duty is just only for management and labor to sit around bargaining table with sincere effort to reach agreement, the subjective approach of good faith bargaining requirement could provide sufficient support for the disclosure obligation. By contrast, the second approach manifests that collective bargaining should not be considered as an end of bargaining itself but it must function as an effective method of accomplishing the statutory purpose of avoiding strikes and peaceful industrial relations. Therefore, the latter means that the requested specific information must be disclosed to unions to “evaluate the accuracy of the specific claims and to respond appropriately with counterproposals.”¹³⁰ Apparently, the secondary approach could create an objective ascertainment of the requested information, which the unions need to provide intelligent representation of the employees.¹³¹ Without examining the employer’s conduct as a whole, it could be concluded the disclosure duty serve as a per se violation and may effectively compel the employers to provide relevant information.

III、 Concluding Remarks

Based on the statement mentioned above, both of American and Chinese labor law take advantage of different measures to encourage collective bargaining by imposing the employers on an obligation to disclose information. By instituting a formal system of collective negotiations, the need to strike may be obviated, thereby potentially saving the company millions in lost production.¹³² Moreover, the real collective bargaining could be benefits for the employees and the government because collective bargaining will always result in an agreement higher than the minimum standards and reduce the possibility of labor unrests. Nonetheless, less than 7 percent of the union membership rate for private-sector workers in the US and a number of the strikes in China seems to indicate sort of the failure of collective bargaining in both countries.

It is hardly concluded that American labor law is better than Chinese labor law with respect of the disclosure duty, or vice versa. Subject to an adversarial legal system in the United States, there is a glaring defect of an uncertainty of applying a good faith requirement with a subjective test to decide a duty to provide information. And, a lawful replacement on the strikers will limit the actual effects of strike. By contrast, a provision of replacement on the strikers would be not allowed in china because such replacement on the strike will definitely damage social stability. In addition, because of a lack of a good faith requirement in china, the disclosure duty actually could not work well because of those incompatibilities of Chinese labor law and minor penalties

¹²⁹ *Supra* 97.

¹³⁰ A-1 Door and Building Solutions, 356 NLRB No. 76 (2011).

¹³¹ Martha M. Cleary, J.D. Employer's duty to furnish wage information to employees' representative under National Labor Relations Act.

¹³² Closing Governance Gaps: How best to improve workers' rights in China, <http://www.clb.org.hk/en/node/101192>

on the employer's illegal act mentioned above.

After surveying and analyzing U.S. basic labor law, there should be changes on those incompatibilities of Chinese labor law. Aiming to address weakness of a duty not to refuse a demand for collective bargaining, the time is up for Chinese labor law to consider whether or not to properly adopt a mandatory duty to collective bargain in good faith, which maybe leads collective bargaining out of the current adverse situation of information disclosure. It means that not only the employers should make provide relevant information subject to an objective test, but also they should efforts in good faith to reach agreement with the employees. In addition, regarding the timing to disclose information, China may regulate the bargainers to collective bargaining to provide information after receiving a written request for information from the other side, which will clarify when the disclosure duty arise and then will be broken.