

Determination of Labor Relations of New Employment Mode in the Sharing Economy

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ABSTRACT. As an emerging business model, Sharing economy not only promotes the realization of commodity trading, but also promotes the growth of employment. This Economic model has exerted an important influence on China's macro employment situation. Meanwhile, the Internet platform enterprises in the sharing economy model are reshaping the mode of labor employment. In the new employment mode of Internet platform enterprises, the labor relationship between the platform enterprises and the platform employees is quite concealed. Current Labor Law cannot adjust such labor relation, exist a few problems, for example labor law cannot identify this kind of labor relation, the labor standard that sets in Labor Law cannot protect laborers of the Internet platform enterprises. To solve the current dilemma, it is necessary to classify the new employment mode in the Sharing Economy and re-examine the subordination theory of labor relations. On this basis, it is necessary to innovate the patterns of labor protection in the existing Labor Law to provide the most basic legal protection for a large number of employees of Internet platform enterprises.

KEYWORDS: sharing economy, employment mode; subordination theory; types of labor relations

1. Introduction

1.1 In the Sharing Economy the employment quality of Internet platform enterprises is generally low

Recently, the Sharing Economy has become a hot topic of general concern. With the help of mature mobile Internet technology and ubiquitous smart mobile devices, this emerging economic form has created a brand new business model -- platform economy model (also known as P2P model, peer to peer model) and endowed it with a broader concept. With the resource sharing platform built by the Internet, the demander looks for products and services, and the supplier matches the demand information. The parties on the platform share the social resources that were

originally privatized fairly and compensated, at the same time exchange and benefit in different ways in pursuit of a more pure win-win situation. According to relevant data, as of the beginning of 2017, the number of people participating in the sharing economy had exceeded 600 million, and nearly 6 million people had been employed through the sharing economy platform[1].

In the Sharing Economy, through the Internet platform controlled by the enterprise, it can provide information for both sides of the supply and demand of goods to promote the realization of the commodity transaction; at the same time it can also provide information for labor providers and labor demanders to promote the realization of labor transaction. In the sharing economy, a large number of platform enterprise practitioners (or "Network Contractors") have emerged. Such as Shared driver, network broadcast, Shared cook, Shared nanny, Shared maintenance worker, Shared agent driving, etc.), it has a greater impact on the labor market.

From the existing data, Internet platform enterprises in the Sharing Economy have indeed made great contributions to promoting employment, However, the quality of employment provided by Internet platform enterprises and the protection of basic labor rights and interests of online contractors are not optimistic. The quality of employment opportunities created by Internet platform enterprises in the Sharing Economy is generally low[2]. There have been many problems in terms of the working conditions of laborers and the protection of their basic rights and interests.

1.2 The change of traditional employment mode and the problems brought about by Internet platform enterprises

It has become a consensus that the development of sharing economy will have a lasting impact on the macro employment situation, and more importantly, platform enterprises in the sharing economy are reshaping the mode of labor and employment. Compared with the traditional industries, the forms of labor employment in the sharing economy are quite different, which are mainly manifested in two aspects. Compared with traditional labor, workers in the sharing economy have more autonomy to decide the workload, location, time and even content of their work. The employment provided by the Internet platform enterprises breaks the traditional structure of labor relations and introduces a new employment form of "Platform + Individual"[3]. Different from the traditional combination in which workers provide labor and employers provide means of production, the workers in the Sharing Economy platform will also bring their own means of production.

The new characteristics of labor employment in the sharing economy mainly depend on the emergence of a new labor supply structure. Although Platform Enterprises in the sharing economy provide consumers with cheaper goods, richer choices and more convenient services, such low prices and convenience are at the cost of the decline in the quality of employment of workers. The core problem of this phenomenon is that large Numbers of workers in the sharing economy cannot be included in formal labour relations.

According to the existing Labor Law's recognition standards for labor relations, A large number of workers in Internet platform enterprises cannot be identified as labor relations. Platform enterprises try their best to eliminate the subordination of labor relations and give workers more "freedom" in appearance, so as to try to return to the scope of Civil Law regulation. Because these workers cannot be legally identified as employee, existing Labour laws do not guarantee their rights. Internet platform enterprises in the sharing economy create new labor employment mode, poses challenges to the existing Labor Law and Labor Law theory.

2. Assification of new labor employment in the Sharing Economy

2.1 The legal status of Internet platform enterprises in transactions in the Sharing Economy

Sharing Economy provides a platform for the exchange of resources and provides great convenience for the exchange of resources. The Internet platform enterprise provides the buyer and the seller with the transaction demand information, on this basis, completes the information matching between the two sides of the transaction, and facilitates the two sides to conclude the transaction. However, it should be noted that the Internet platform not only provides and matches the demand information, but more importantly, the platform designs and provides the format contract required by the transaction. Such contract generally has the provisions of the price terms, and the platform enterprise extracts a certain proportion of the shares from the transaction. This kind of transaction pattern is different from the traditional two-party transaction mode between merchants and consumers. On the surface, the Internet platform enterprises are like the intermediary outside the transaction parties, but given the platform for enterprises to deal with the impact of participation for the deal, some platforms has been far beyond the intermediary role. In the employment mode of Internet platform enterprises, it is necessary to analyze the legal status of platform enterprises in the transaction process if they are employers in the sense of Labor Law.

There are three possibilities for the legal status of Internet platform enterprises in the sharing economy: First, the Internet platform enterprises are not the main trading parties, but only assist the completion of the transaction, and there is only a relatively weak legal connection between the Internet platform enterprises and the sellers and buyers; Second, the Internet platform enterprise is the main party of the transaction, and completes the delivery of goods and services together with the seller, both of which jointly assume the responsibility of the operator to the buyer; Third, the Internet platform enterprise is the trading party, the buyer can require the platform enterprise to take the responsibility of the operator directly[4].

For the labor service transaction in the platform economy, whether the labor service provider (the online contract worker) has the pricing power of the labor service price, whether it can participate in the formulation of the trading rules, whether it can determine the performance of the transaction, as well as the control

over the liability for breach of contract caused by the exchange, are the basis for judging the participation degree of the labor service provider in the process of the labor service transaction on the Internet platform[5]. This is an important judgment basis to judge whether the Internet platform enterprises can become employers in the sense of Labor Law in the process of labor transaction.

2.2 Employment modes of Internet platform enterprises in the Sharing Economy

In practice, there is a general rule in the employment process of Internet platform enterprises. When the Internet platform enterprises have a high degree of control over the labor process, the participation of online contractors in the labor transactions on the Internet platform is generally low, and there is a negative correlation between them. Thus, the labor and employment modes of Internet platform enterprises in the Sharing Economy can be divided into the following categories according to the degree of control of Internet platform enterprises over the labor process and the participation of the network contract workers (labor service providers who actually provide products or services) in the transaction:

1) The employment mode in which Internet platform enterprises fully control the labor process, the network contract workers do not participate in the platform trade. In this employment mode, the network contract workers basically do not participate in the completion of the platform transaction, and they only need to accept the instructions of the platform to complete the labor process. 2015 “Meituan takeout case” is a typical representative of this mode of employment. In the takeout industry, the catering distribution company generally registers the mobile app for the takeout distributor, and the delivery man receives the order through the mobile app to complete the delivery of the catering takeout. According to the survey, most food and beverage delivery companies require the delivery staff to check on attendance every day, the attendance of the location in the company designated work site. After the attendance is over, the delivery staff will use the mobile app to receive orders. The delivery company evaluates and calculates the salary according to the quantity of orders received and the good and bad comments received by the delivery staff.

The delivery company will equip the deliverers with the necessary delivery tools such as electric cars, uniform clothing and delivery boxes. The price of each order of food delivery is determined by the delivery company. The delivery staff has no right to negotiate the price. Thus, it can be seen that the take-out distribution industry conforms to the employment in which the Internet platform enterprises completely control the labor process and the workers basically do not participate in the platform transactions. In existing legal precedents, most Judges will determine that there is a labor relationship between a deliverer and a delivery company that fit these modes of employment [6].

2) The employment mode in which the Internet platform enterprises partly control the labor process and the network contractors partly participate in the platform transactions. This mode of employment is the most common form of employment for Internet platform enterprises, such as the well-known Didi taxi

drivers and anchors on the network platform, as well as “Shared Cooks”, “Shared Nannies”, “Shared Maintenance Workers” and other labor transactions that provide life services through the network platform in recent years. The platform has no attendance system for Didi drivers, nor does it stipulate the amount of work. Working hours and working places are arranged by the driver independently, not subject to the company. The driver directly communicates with passengers through the network platform, and the main means of production in the work -- the vehicle is also provided by the driver himself. But at the same time, the platform makes rules to restrain the behavior of drivers. After receiving the order, the driver shall pick up and drop off the guests according to the order specified by the platform. The driver has no right to reject the order and cannot control the price of the order. The Internet platform enterprise also has the right to terminate its cooperation with drivers with poor service quality through rating mechanism. The Internet platform enterprise holds the pricing power, and the fares are collected by the Platform. If private cars are not connected to the Platform, they have no operating qualification.

The network broadcast platform is similar to the Didi taxi platform in that it has no attendance system for anchors and no task amount, which seems relatively free. However, in the “ Internet celebrity first case” in Shanghai, both the Platform and Internet celebrity anchors agreed that the female anchors should live broadcast (work) in the designated room on the website, and the time and how to provide live broadcast activities must be conducted in accordance with the requirements of the platform company. The female anchor shall deliver labor according to the employer's instructions in the contract[7].The Internet celebrity's behavior is not separated from the instructions of the Internet platform company, and the labor provided by her is conducted under the company's instructions. In practice, this type of employment is becoming the mainstream of platform employment[8].More and more Internet platform enterprises adopt the method of partial control of labor process to ensure the external reputation and competitiveness of Internet platform enterprises.

3) Internet platform enterprises do not control the labor process, network contract workers fully participate in the Platform trade employment. In this mode of Platform employment, the Internet platform enterprises only publishes information and responsible for supervising its own internal affairs, and basically does not participate in the Platform transaction. The network driving agent Platform in the “E--Driving agent case” in 2016 is this type of employment. The basic process of agent driving is that the customer sends the information of agent driving demand, the Internet platform sends the information to the driver of the registered platform through the app software in the form of public message, the platform will not instruct a specific driver to provide a specific labor service, the driver can independently decide whether to respond after receiving the relevant information. The driver has full autonomy on whether, when and where to provide the service. The Platform has no right to determine the time, place and object of the service provided by a particular driver who enters the driving agent platform, nor can it compel the driver to pay a specific service.

Through the analysis of the operation mode of the driving agent platform, it can

be seen that the driving agent driver independently completes the driving agent service according to his driving experience during the driving agent process. In the process of providing agent driving service, the performance contents such as driving route, speed, whether to stop in the middle of the journey, or changing the destination of agent driving, etc., are basically determined by the issuing customer or through negotiation with the agent driver. The Internet platform will not give any management or intervention during the performance of the contract obligations of agent driving. After the completion of the agent driving service, the agent driver will ask the customer to pay according to the distance and time traveled. The information service fee charged by the agent driving platform in a certain proportion is the reward for releasing the agent driving information. The relationship between the driving agent platform and the service provider is very loose, platform companies don't control labor process, also is the result of labor, the transaction is entirely between the service provider and the service demand customer, platform companies basically play the role of information publishers, drawn from platform trade for a certain proportion (usually not more than 30%) of transaction costs, provided information about trading as a reward. In most of the existing judicial cases, the judicial organs have denied the existence of labor relations between such Internet platform enterprises and labor providers.

3. Limitations of the existing labor relationship recognition standards

3.1 China's existing legal provisions on the determination of labor relation

Civil Law is the law that adjusts between equal subject, it cannot adjust the labor relation that has subordinate nature. Therefore, the legislation needs to intervene and regulate labor relations in the form of Labor Law, to a certain extent, restrict the property rights and freedom of contract of the employers, so as to realize the substantive equality of both sides of labor relations. In effect, because employees and employers share common interests, Labor Laws not only do not hinder economic development, but also ensure that employers and employees cooperate on the basis of equality and voluntariness[9]. According to the subordination theory, the subordination of employees to the employers can be divided into three aspects: economic subordination, organizational subordination and personality subordination. The criterion to determine the subordination of labor relations is not simply dependent on the subordination of one aspect. In judicial practice, it is necessary to combine various factors and comprehensively evaluate the identification of labor relations.

China's current "Labor Law" and "Labor Contract Law" does not have clear and clear standards for the identification of labor relations. In the judicial practice, the judgment standard of subordination of labor relations is derived from the "Notice on matters relating to the establishment of labor relations" issued by the former ministry of Labor and Social Security in 2005. It in the provisions of article 1: "Employers to employ persons laborer fails to conclude a written labor contract, but at the same time with the following conditions, labor relationship is established."1 The employer

and the laborer meet the subject qualification stipulated by laws and regulations;2 Various labor rules and regulations formulated by employers according to law shall be applicable to workers, The laborer is subject to the labor management of the employer, to engage in paid work arranged by the employer.3. Labor provided by workers is an integral part of the employer's business[10]. According to the requirements of the "Notice", the existence of labor relations can only be recognized when the main body qualification, rules and regulations, labor management, remunerative labor, business composition and other constituent elements are simultaneously possessed.

3.2 Limitations of the existing labor relationship recognition standards

In fact, the subordination of labor relations is only a relative concept. Different workers have different forms of subordination. In reality, there are different degrees of subordination, and their boundaries are not absolutely clear. Therefore, in many cases, it is still quite difficult to judge the identity of workers only by the criteria of subordination. The determination standard of subordination of labor relations established by the "Notice" requires that the determination of labor relations should have all the conditions of the constitutive elements of labor relations at the same time [11]. Only when all the elements of the constitution of the labor relationship are confirmed can the labor relationship be identified.

During the period when the "Notice" was issued, a large number of employment forms in China were standardized labor relations with the characteristics of personality, economy and organizational subordination. Legislators hope to inculcate the concept of standardized labor relations into the whole society with the help of relevant laws, regulations and rules. In fact, with the development of social economy, labor relations present a complex and changeable form of expression, it may be similar in appearance to the way of commission, contracting or "Independent Contractor". With the help of the Internet platform, the forms of labor and employment are more diverse, and the flexibility of labor and employment is infinitely enlarged. In the employment mode of the Internet platform, in many cases, it is necessary for the labor relationship to be separated from the laborer's work in the workplace designated by the employer, that is, the laborer's organizational subordination to the employer is weakened. In addition, the overlapping roles of labor service provider and seller of labor transaction in the employment process of the platform lead to the weakening of the economic subordination of employees of Internet platform enterprises.

3.3 The main scope of the existing labor relation protection is relatively limited

Because our country law stipulates that the existence of labor relations can only be recognized if all the conditions of the constitutive elements of labor relations are possessed at the same time. After being recognized, there are only two kinds of subjects, the employees with labor relations and other subjects without labor relations. The main body that labor law gives protection is divided simply into two

kinds of main subjects that have protection or have no protection at all. This problem not only affects the application of labor law, but also has a considerable impact on the application of Social Security Law. In our country, labor relation and social insurance relation adopt the method of “Binding”. Workers excluded from labor relations face the dilemma of having no social security. According to the first survey on direct employment of online stores conducted by the employment promotion association of the ministry of human resources and social security in 2014, there were 9.624 million people directly employed through online stores in China, but more than 70 percent of online store employees did not participate in any form of social insurance. The People's Daily published an article in October 2017, according to the national more than one hundred delivery workers, 90% of people do not have the labor contract and social insurance[12].

In our country's labor dispute cases, there are quite a number of cases is to confirm the labor relations. The reason is that many social insurance benefits must be obtained on the premise of the existence of labor relations. For instance the most typical industrial injury affirms, the premise that our country affirms industrial injury is to undertake labor relation affirms first. The existence of labor relations can be included in the scope of work-related injury insurance and then enjoy work-related injury insurance. The provisions of the Labor Law that determine labor relations lead to a large number of online contract workers not getting labor protection in reality, also led to the generation of a lot of labor dispute case. In a word, in the face of flexible working time, working place and employment form, the defects of the existing judgment method of labor relationship and its disconnection from reality gradually emerge. This flaw is magnified by the emergence of new modes of employment in the sharing economy.

4. Identification of labor relations in the Sharing Economy

4.1 Defining the core criteria for determining the subordination of labor relations

In response to the new trend of flexible employment, many countries (such as Germany, the United States and Japan) re-examine the subordination theory of Labor Law in a large number of judicial cases[13]. With the help of a large number of judicial cases, the theory of subordination is further developed. In a decision made by the Federal Labor Court of Germany in 2000, it was pointed out that when differentiating employees from other types of service providers, they should be examined mainly from the perspective of personality. Also point out that personality properties in various industries and positions of power degree is different, therefore, should not applicable to all industries and jobs of unified criterion.

In a specific case, it is necessary to make an overall evaluation by taking all relevant situations into consideration when judging the existence of labor relations. The German judicial and academic circles have summarized a series of specific characteristics, the most core of which is that the employee is integrated into the employer's organization and works under the direction of the employer, of these two,

working under the direction of an employer is more important[14]. Similar to Germany, the core criterion to judge the subordination of labor relations in Japanese labor legislation is also the command and supervision of the employer to the employee[15]. The core of the existence of labor relation is that the laborer is subordinate to the employer in personality and accepts the labor management from the employer, so as to obtain the paid for work[16].

At present, the determination of labor relations in China attaches great importance to the satisfaction of all the constituent elements of subordination, but ignores the core subordination of personality. As a result, in the process of determining the specific labor relationship, the judge can not meet all the requirements of the constitution, and is easy to ignore the careful examination of the core elements. In view of the fact that the "Standardization" system concept of labor relations identification is seriously inconsistent with the "Flexible Activation" of platform employment, the future improvement of Labor Laws should be based on the flexible activation of labor relations as the basic starting point of system design.

In terms of the determination of labor relations, the existing determination mode that meets all the constitutive requirements is gradually abandoned, and the determination mode of "core elements" is adopted instead. The core elements refer to the substance of the labor relationship "working for others with compensation under the direction and supervision of the employer". The character subordination and economic subordination in subordination are regarded as the benchmark of labor relations. The purpose of the investigation and determination of labor relations is to focus on the degree of "A paid job that is restricted". Specifically speaking, the criterion that decides the existence of labor relation or not should involve: The autonomy authority of laborer in work process, the indication frequency and restraint intensity of employer to laborer and the share of management risk, and whether laborer has the tool, The extent to which the laborer decides on the place and time of work, whether the employer provides working conditions and what kind of working conditions, etc.

4.2 Innovate the existing types of Labor Law protection subjects

The "Dichotomy" of protecting labor relations and not protecting self-employed labor has been questioned in the field of international Labor Law for a long time. Some countries have adopted new classifications in place of traditional way, notably Germany, which has begun to develop an "Similar Employees" model of self-employment. Because of "Similar Employees" in the aspect of social and economic status is highly similar with the employees, so they can enjoy part of the protection of the Labor Law. "Similar Employees" basically refers to be flexible obtain employment group. Is not only Germany, other countries are also change the way the "Dichotomy" labor protection. Take Italy as an example. With the rapid development of Italian society and economy after 1970, many new forms of employment emerged. However, due to the influence of traditional dichotomy, the Italian government is unable to identify these new forms of employment and thus to effectively protect workers [17]. In this case, Italian lawmakers began to abandon

the traditional “Dichotomy” to create a new “Three Classifications” and set up a new section in the labor law to protect it.

From an objective point of view, the large number of flexible workers, including Net Contract Workers, is clearly different from traditional employment methods. By adopting the method of “core element” type labor relationship identification, this part of workers can be included in the protection scope of labor relationship. However, the subordination of this part of workers is weaker than that of traditional employees, so it is necessary to consider different treatment in law. To be specific, a new mode of laborers should be set up between the laborers who are “Completely Protected” and the other subjects who are “Completely Unprotected”. This subject can be protected by Labor Law in many aspects, especially labor protection and social security.

A series of Internet platform enterprises, such as live broadcast platform, Didi taxi and “Shared Chef”, can transcend the time and space limits and realize the purpose of remote control of the above workers with the help of Internet technology and smart phone and other devices. Unlike employees in standard labor relations, workers in this labor relationship have more autonomy on the surface, but this autonomy is actually very fragile. Once off the Platform, they lose access to revenue, so they have to be managed by the Platform company and follow the rules set by the Platform company. For this kind of special laborer subject, due to its intermediate status, its protection degree should be relatively weak than the standard labor relation. Our country Labor Law should develop a chapter specially, design special protection measure to “Similar Employees”.

4.3 Provide basic labor protection for the laborers of new employment mode

The Sharing Economy model has become a new development trend. Influenced by this trend, the development of Internet platform enterprises is very rapid, and the number of Platform companies involved in labor service industry is particularly remarkable. As mentioned above, in sharp contrast to the rapid development of platform employment, the labor rights protection of platform enterprises is insufficient. Employees engaged in labor work in platform enterprises are generally faced with such problems as weak Labor Law protection, lack of social security and high work intensity. From the perspective of practical conditions, it takes a considerable amount of time to provide protection to the workers of Internet platform enterprises by amending the standards of labor relationship identification through legislation or adding “Similar Employees” in Labor Legislation.

In recent years, the infringement of labor rights and interests of Net Contract Workers in Internet platform enterprises frequently exposed in the news media, as well as a large number of employment disputes in judicial practice, all indicate that this problem urgently needs to be solved. Therefore, for the protection of this new type of labor relations, we can consider a step-by-step strategy. The first step is to make use of the “special provisions on labor protection”, introduce the special provisions on labor protection for Platform Employment in the shortest time, and

demonstrate the core standards for the identification of labor relations, as well as the types of new Labor Law protection subjects. This approach is conducive to providing the most basic protection to the Platform workers in the shortest time, and to reducing the number of labor disputes while protecting a large number of workers in Internet platform enterprises.

The formulation of special provisions on labor protection should start from the characteristics of the employment of enterprises in the Internet platform and introduce corresponding labor standards. For example, we should make guiding norms on the Labor Law protection, labor intensity and working hours of such workers, in order to provide reference for the corresponding labor dispute case settlement. At the same time, on the basis of the concept of the bottom line guarantee of the protection of workers of the Internet platform enterprises, we will gradually solve some practical problems, such as occupational injury, basic Medical insurance, basic Endowment insurance and other related problems. We need to start from the following four aspects: First, workers of Internet platform enterprises are allowed to participate in social insurance payment, and their social insurance status can be set as flexible employees; Second, make clear the payment obligation of industrial injury insurance for owners of Internet platform businesses, and refer to the specific mode of part-time employment; Third, require Internet platform enterprises to “Pay Wage Security Fund”; Fourth, starting from the special provisions on labor protection of enterprise workers on the Internet platform, it is considered to build a Social insurance network for this part of workers. Finally, we will gradually build a national unified Social insurance system for flexible employees, including those working in Internet platform enterprises.

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