Identification of the Nature and Protection of Rights and Interests of "Net-Realing Workers" under Platform Economy

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Abstract: The advent of the Internet era has given birth to the vigorous development of the platform economy, and a number of new forms of employment, mainly net-sharing labour, have emerged, and this "de-labour relationship" mode of employment has also fallen into the gap of traditional dual framework theory in China. There is an urgent need for the law to make a clear identification of the nature of the net-sharing labour relationship, and to speed up the establishment of a mechanism to protect the rights and interests that match the demand of the net-sharing workers, to "untie" the protection content of some exclusive labour relations, to implement the principle of preferential protection, and to safeguard the legitimate rights and interests of workers.

1. Introduction

With the advent of the Internet era, the platform economy led by the emerging economic forms of rapid development. Taking net ride-hailing as an example, as of June 2019, the number of users of net ride-hailing or express cars in China has reached 339 million, accounting for 39. 7% of the total number of Internet users. The net ride-hailing user group has covered 31 provinces (districts and cities) in China, and a total of 680000 ride-hailing driver's certificates have been issued. [ ]As a typical form of business in the context of sharing economy, net labour, with its flexible employment mode and abundant information resources, constantly weakens the dependence between means of production and workers, challenges the dominant position of traditional wage labour, and plays an increasingly important role in the Internet economy. At the same time, there is no clear definition in the current law of our country, and the protection of rights and interests is still in the specious middle zone. Because of this, the conflict between the rights and interests of flexible employment personnel and the relatively lagging current labour law will form the best opportunity to "force" the reform of our labour law.

2. Reflections on the Theory of Determining the Nature of Internet Contract Workers under Platform Economy

At present, three kinds of opinions are put forward in theory and practice, which are all or part recognized as labor relations and protected according to labor law. Without judging the nature, direct case analysis and establishment of a third classification model ——" atypical labor relations "are supplemented by supporting measures. The author thinks that all three kinds of countermeasures solve the problems faced by the "net-hailing" group in a certain dimension, but they all lack the basis or are not enough to solve the problems properly, so they are analyzed here.

First, it may lead to the imbalance between the interests of ride-hailing drivers and ride-hailing companies. First of all, although the applicable "three elements" theory in our country, that is, in the economic subordinate attribute, organizational subordinate attribute and personality subordinate attribute judgment standard level did not give a precise definition of this kind of relationship, but also has a relatively clear judgment standard, this "one-size-fits-all" type of division method is not only contrary to the current legal spirit, but also contrary to the legislative purpose of "law must be followed ". Secondly, although the original intention of bringing the group of "net-wired workers"

into the scope of labor law protection in our country is good, such as helping to provide better social security treatment for net-wired workers, the provision may also become a passive and irresponsible umbrella for some unscrupulous net workers. It is worth noting that starting from the logical path of this view, there will also be a problem that can not be ignored. When the net-sharing labor relations are moderately incorporated into the labor relations, this seemingly moderate middle course actually implies a logical paradox. That is, how to measure the degree of moderation? If carry out this kind of policy, then must have some net net net labor relations to be classified into the field of labor relations, but did not answer to the other part of net net labor relations confirmation question, this and our country's current judicial present situation is not very different in essence, can only say that issued a kind of principle slogan.

Second, it is contrary to the logic of trial to judge the nature of net labor without making or weakening it. In the trial of cases involving net labor relations, the logic of trial can not be ignored because of the lack of law. In addition, the core object of adjustment of labor law is labor relations, and the premise of applying the relevant provisions of labor law is to meet the requirements of labor relations determination. If the court skips the necessary stage of labor relations determination and gives the substantive compensation or compensation conclusion directly, then the logical starting point of this judgment result is also hidden? Once the judicial judgment lacks the unified judgment standard, the biggest drawback is that it greatly weakens the predictability of the judgment result, makes it difficult for the parties to obtain appropriate right relief, and thus easily leads to the dissipation of judicial resources and the unstable consequences of the rights and interests of the parties. Such substantive obligations, such as the division of responsibilities and the obligation to pay, as an important part of the outcome of the judgment, must be based on law and should be a solid legal basis. If a clear determination of the nature of the case is abandoned, then even the proper outcome of the judgment is only based on a rough judgment based on a simple analysis of the case, floating on the surface, unconvincing, which is more similar to the judge's own reasoning research, rather than the logical rigorous argument results. This kind of judgment method based on the judge's insight into the world's human feelings, personal knowledge accumulation and judgment, focusing on solving specific disputes and neglecting the rationality of the overall system, is no different from the law of "substantive irrationality" put forward by Weber, and is not a real initiative to promote the consensus of our society on the net-sharing labor relations. [ ]

Thirdly, a third kind of "non-typical labor relations" is set up in the traditional dualistic framework as the attribution of labor relations among the new practitioners such as net-sharing. It is true that this view, as the mainstream theory in academic circles, has made a useful attempt to ease the tension between net-work and platform, and has resolved the embarrassing situation of judges "either not protecting or protecting all" in the determination of actual labor relations. But I think this kind of seemingly strict system design is still biased. At present, the problem of net-sharing labor relations is how to find its position within the existing legal framework and apply it reasonably, rather than making a new system to adapt to the new things. Indeed, the shift from traditional full-time labor to increasingly flexible working patterns is not the product of the "Internet +" era, which is only a catalyst for its intensification. "Internet + era only changed the way labor and means of production combined, did not change the nature of labor ,[3] so there is no need to break the original framework of our country because of its form particularity. Therefore, the direct classification of net labor relations into the category of "atypical labor relations" has weakened the court's dilemma in judging the nature of the case, but in the subsequent determination of the rights and obligations of net workers, the judge's discretion on whether to apply specific labor security measures will certainly reflect his true attitude towards the determination of the labor relationship, that is, either biased towards labor relations or labor relations, which unconsciously brings the problem back to its origin, that is, qualitative problems. This approach to solving existing problems by establishing new legal relationships, regardless of their enforceability, is essentially a covert legal circumvention.

3. Reasons for misalignment and lack of protection of rights and interests

3.1. Lack of clear regulation at the legislative level in relation to the determination of labour relations

In our country, it is found that labor relations are the basis and premise of applying the Labor Law, the Labor contract Law and other laws, that is, following the basic principle of "protecting labor relations on the one hand, not labor relations on the other ". Labor relations are difficult to define, and the protection of labor rights and interests lacks the foundation. And judging whether there is a labor relationship mainly depends on the two factors of written labor contract and factual labor relationship, in practice, the problem mainly focuses on the latter. China usually according to the former Ministry of Labor and Security on the establishment of labor relations related matters notice to make a determination of the fact of labor relations, that is, the academic commonly known as the "three elements" theory. [ ]This theory provides a relatively "clear" definition standard for labor relations outside the scope of labor contracts, and also plays an indispensable role in judicial practice, but the problem is that the judicial organs put the definition focus of Internet employment relations unreasonable on "subject qualification determination ", but pay less attention to other elements. As the first element of the three elements, this article makes the interpretation of the criteria for the determination of labor relations limited to the narrow field, the "solemnity theory" priority review thinking induced the judicial organs do not do substantive examination of labor relations fluke psychology, thus ignoring the "flexible employment personnel" rights and interests protection needs. The traditional standard of identification of labor relations is narrow, and the emergence and development of "quasi-labor relations" between strong and weak subordinate attributes outside the standard has not been fully foreseen and covered, and there are no other alternative implementation clauses, so it is difficult to achieve the balance between the development of platform economy and the protection of net workers' rights and interests.

3.2. Excessive leniency in the administration of justice

Because the current labor law lacks specific and detailed evaluation criteria for the protection of the rights and interests of net workers, people's courts at all levels often adopt the simple "self-understanding law" under the theoretical framework of "three elements" for such cases. In the case of motor vehicle traffic accident, for example, the result of the court's judgment is usually three types: first, the employer should compensate for the damage caused by the contract workers who accept the management of the company without bargaining power. [ ] Second, it is determined as a contract relationship, and the platform shall be jointly and severally liable for compensation according to the management fee charged by the operator to the contract workers. [6]Third, according to the fact of illegal operation of the network contract workers directly apply the fault imputation principle, determine that they assume all the liability for compensation, there is no identification of labor relations. [7]It is not difficult to see from the above-mentioned cases that people's courts at all levels have different evaluation results on the nature of such cases, and some have even skipped the nature of the determination, directly issued a judgment, this practice of circumventing the blind area of the law and blurring the law is not conducive to the unification of the judgment mechanism, but also contrary to the legal principle of "co-judgement ". In fact, before the rise of the Internet platform, the "labor relationship" between subordinate and non-subordinate zone has been common, and the judge has to do nothing but judge whether the labor relationship is established based on the degree of such subordinate or control relationship. Through the summary of the above judgment results, the author can see the logic of the court's discretion, that is, the court does not determine the labor relationship, considering the interests of the platform; the determination of labor relations, considering the interests of the victims. Regardless of whether the court's exclusion of the interests of net workers is in line with the principle of preferential protection, it is also difficult to push the people's courts at all levels to reach a consensus on the identity definition of "flexible employment personnel ".

3.3. Inadequate social security measures

Different from the western developed countries in the middle of the society in the online part-time personnel, China's Internet platform and labor-intensive industries, platform workers (especially offline workers) more similar to the blue-collar workers and other bottom service personnel. Therefore, compared with the western countries similar to the "Uber" and other digital talent platform freelancers [], China's net-work group has lower technical content, greater labor intensity, more unstable income, as a "pillar" of life pressure, which also leads to their poor ability to cope with occupational risks, more strong demand for social security. However, neither laws and regulations nor local policies provide such net-work groups with the necessary social benefits, and even basic social insurance is sometimes difficult to guarantee. In addition, the randomness of the result of judicial decision often leads to its own legal exploitation by the operator, but also must bear the additional responsibility risk obligation, even through the judicial way to seek relief is "no way to cast stone ". In order to be prepared, they must earn more, which can only be done by extending working hours and increasing the intensity of their work. This neglect of the protection of the rights and interests of the "net-sharing workers" group not only runs counter to the preferential protection principle clearly stipulated in the labor law, but also is not conducive to the establishment of a harmonious society and the development of human rights in our country.

4. Extrative experience

4.1. Italian "quasi-subordinate labour"

The Italian Civil Code establishes a dual system of labour-related activities, namely "subordinate labour" and "autonomous labour ", while Italy regards labour-related activities outside the dual system as" quasi-subordinate labour ", and the labour relations in the intermediate zone can be guaranteed by the labour law and collective autonomy. In addition, the Italian labor law also specifies five criteria for "quasi-subordinate workers ": first, cooperation; second, long-term and continuous relations; third, coordination with the client's functions; fourth, mainly paid by himself; and fifth, completion of specific projects. A third of these standards was first found in the Italian Work Act, in which legislation defined a new definition of "cooperation "—— introduced the client, thus eliminating the requirement that net-hailing workers be included in labour relations only if they performed their work individually. This is also reflected in the provisions of article 409(3) of the Italian Code of Civil Procedure, which states that the scope of application of labour proceedings includes three types: agency relations, business representative relations and other cooperative relations. The other cooperative relationship shows that although the labor service provider does not have the subordinate attribute, the work item is mainly completed by himself, which provides the continuous and cooperative labor payment for the company (that is, the economic entity that includes the cooperation of the principal). It is obvious that this regulation is in line with the working nature of net-hailing workers, and it also has its unique reference advantages and applicable soil for determining the nature of net-hailing workers according to the present situation of platform economy development in China.

4.2. " Dependent Contractor "in Canada

Similar to other common law countries, Canada's judgment on labor relations takes "degree of control" as the basic method, which is manifested in control, ownership of tools, profit opportunities and risk of loss. The emergence of new types of freelancers poses new challenges to this judgment, such as small traders, shoemakers, milking workers and other similar groups, which are highly dependent on the company, are not protected in the context of labour relations. On this basis, Canada adjusted the criteria for determining the nature of such groups to the degree of economic dependence of workers on a single customer, that is, to determine whether the single source of income as a percentage of total income meets the requirements for determining "quasi-subordinate labour relations ". [9][ ]In addition, with the development of the platform economy, this group, although growing, has not yet developed a scale advantage and does not legally have the right to

collective bargaining. Therefore, in order to achieve the balance of interests between the company and the company, many jurisdictions in Canada have incorporated this intermediate type into collective labor relations legislation, reaffirming the status of economic subordination as the core judgment standard of labor relations. The Ontario Labour Relations Act also provides that "whether or not tools, vehicles, equipment, machinery, materials or anything owned by a dependent contractor are provided, they provide services or perform work for another person to be remunerated, and depending on the terms or conditions of performance, the dependent contractor is economically subordinate, the person shall be more considered an employee than an independent contractor ". The definition of such legislation reflects two kinds of regulation trend: first, the core position of economic subordinate attribute is further consolidated, it is concluded that labor relations should follow the principle of fact first, not only meet the formal requirements; second, the standard of tool dependence is further weakened, and it is concluded that labor relations do not simply examine the dependence of workers and means of production, but the key lies in the reality between the service provider and the provider. This point has a strong reference significance for our legislation to identify the nature of net contract workers.

4.3. " Independent practitioners "in the United States

The current labor laws in the United States define workers in roughly two identities, one is "employees ", the other is" independent contractors ", and platform practitioners under the "part-time economy" are placed in the gray area between the two identities. In the process of determining the nature of "independent practitioners ", the results of the participation of such groups in the United States workers classification test are often partially consistent and not applicable. For example, independent practitioners often give negative answers to questions such as whether it is necessary to withdraw from the competitive market for employers and whether the relationship between employers and practitioners is permanent, while independent practitioners often give positive answers about the degree of control of employers over service prices, working hours, workplace and way of work. To address this dilemma, the seattle city council issued a law to protect the rights of ride-hailing drivers. The Seattle Act first identified ride-hailing drivers as independent contractors, but retained two safeguards from the statutory rights of employees: one to give them the right to organize and collective bargaining, and the other to authorize them to have a specific type of legal status as independent contractors associated with ride-hailing. This provides the path support for strengthening the protection of the real rights and interests of "net-hailing workers" in our country at present. If we draw lessons from this action, we will promote the local legislation that the net-hailing drivers are regarded as new workers in our country, and will also provide the necessary power base for the local government to supervise this field to some extent. Based on the current plan of the United States, China can improve the legal regulation and supporting measures of typical business forms in the platform economy, expand the coverage of the relevant rights and interests protection provisions in the labor law to net workers, and complement the work of improving the linkage of laws and regulations such as the Employment Promotion Law and the Social Insurance Law, so as to explore the reasonable orientation of net workers group in China.

5. Suggestions to Solve the Problem of Net-Real Relations

To sum up, the core problem of platform economy is how to balance the tension between individual interests and social public welfare, and we need to explore the trade-off and choice of maintaining moderate tension within the framework of existing labor law. Reasonable distinction between labor relations and labor relations means that it is helpful to straighten out the distinction between the two in civil law style first, and then to follow the value orientation of our country and safeguard the interests of each subject. The increasingly flexible employment of Internet platform leads to the changing social and economic structure, so it is difficult to generalize the definition standard of typification and unification of the new employment mode in a short period of time. Therefore, the new employment mode under the Internet platform economy should pay attention to the functional analysis and multi-angle discrimination of the content of labor rights and interests

protection, not only to avoid "one size fits all ", but also to avoid the generalization of identification.

On this basis, the author thinks that the net-sharing labor relations can be regarded as labor relations, following the principle of preferential protection and differential protection in the protection of the rights and interests of net-sharing workers ," untying "the exclusive protection content of some labor relations, and appropriately adjusting the existing labor rights and interests protection measures and applying them according to demand. There are four reasons for this suggestion: first, in our country, labor relations do not apply the content of labor relations protection of course, which is conducive to reducing the cost of employment of enterprises, in line with the essential characteristics of flexible development of platform enterprises; second, the application of labor relations protection measures on demand is not only conducive to saving policy costs, but also can effectively avoid the phenomenon of "lazy" enterprises; Thirdly, the exclusive protection content of excluding net-work under certain circumstances is in line with the current situation of China's platform economy development, such as the regulation of minimum wage, some enterprises with weak capital and allowing labor to work part-time, net-work is not strongly dependent on their economy, if the blind implementation of minimum wage standards will only make small and micro enterprises in their infancy more difficult; Finally, the beneficial attempt to bring "flexible employment personnel" into the scope of labor security, led by the Social Insurance Law, opens up a new situation in our country to unbind some exclusive protection contents of labor relations with labor relations, which is not only helpful to alleviate the rigid problem of dualistic framework in our country, but also coincides with the "preferential protection principle" advocated by our labor law. Specific safeguards can start with the following:

5.1. Improved social security mechanisms

Although the Social Insurance Law allows flexible employees to purchase various types of social insurance, the policy is not yet mandatory, coupled with the influence of inherent cognition and the suppression of platform enterprises, the actual participation of net workers is not optimistic. However, the flexibility of the work nature and the independence of the work content make it difficult to apply the insurance mechanism of the regular workers, which requires the establishment of a social insurance payment mechanism suitable for the net workers. In this regard, the country can adopt the combination of coercion and incentive to formulate relevant laws to meet the real social security needs of Internet workers. In the specific implementation of social security, according to the emergency sequence of industrial injury insurance, unemployment insurance and maternity insurance, the flexible employment personnel can be gradually included through legislation, and the platform enterprises and flexible employment personnel can be tried to pay pension insurance, medical insurance and unemployment insurance together, but the proportion is different, the platform contribution proportion is moderately lower than the normal employer, as for industrial injury insurance and maternity insurance, the platform payment is the primary consideration scheme, flexible personnel and the platform share the secondary alternative scheme.

5.2. Employment growth service initiatives

Although the Employment Promotion Law has established an employment service system which is mainly based on public employment services and supplemented by for-profit employment services, the prominent contradiction in reality is that the for-profit employment services enjoyed by flexible employment personnel are not sufficient to meet their more flexible working patterns, thus requiring the protection of public employment services more than regular full-time workers. In this context, the author thinks that the state can expand the coverage of the public employment service mechanism moderately, and give corresponding protection to the net contract workers with certain public security needs. Within the scope of this institutional framework, special financial funds can also be allocated to effectively support the skills training work of Internet workers, so as to make institutional and material measures to protect the rights and interests with Chinese characteristics that are conducive to the development of net workers. Enterprises can also set up their own employment service system, through training cards, online meetings, exchange feedback, regular assessment and other modules set up, multi-angle tracking of the learning progress of net-sharing

labor practitioners, which can not only close the network contract workers and platform companies, but also save the cost of supervision of enterprises, and truly realize the dual development and supervision of enterprises and employees.

5.3. Innovative working mechanisms for trade unions

In terms of the trade union system, to give full play to the functions of the All-China Federation of Trade unions and the Local Federation of Trade unions, and to bring flexible employment personnel into the scope of protection of collective labor relations, we may consider establishing grass-roots trade unions within the platform enterprises. Article 3 of China's Trade Union Law regards "wage income as the main source of living" as the only symbol to define the membership of trade unions, but the legal status of workers in labor relations should not be limited to the above formal characteristics. For some industries, such as car-sharing and take-out, industrial unions can be considered. By reconstructing the form of organization of trade unions, a trade union system with four levels of linkage among the All-China Federation of Trade Unions, the Local Federation of Trade Unions and the trade unions within enterprises is formed, which not only helps to share the work burden of high-level trade unions, but also provides a convenient and fast channel for protecting the rights and interests of net-hailing workers.

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