



Suggestions for Improving the Rules for Determining the Employment Relationship of Delivery Drivers

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Abstract

With the rapid development of the Internet, people's consumption concepts are constantly changing, and the development of the takeaway industry has ushered in a new era. Due to the increasing market size and the growing number of delivery personnel in the food delivery industry, disputes between delivery personnel and platform enterprises are growing. The work style of food delivery personnel in the food delivery process is becoming increasingly flexible, and the employment methods of platform enterprises are showing diversified characteristics. It is necessary to conduct research on the recognition of employment relationships among food delivery personnel and ultimately provide suggestions for improving their recognition rules. The paper first elaborates on the necessity of determining the employment relationship of food delivery personnel, explores the problems in determining the employment relationship of food delivery personnel, and finally proposes suggestions for refining labor legal norms and their implementation methods, improving the civil law contract employment system related to food delivery personnel, and establishing industry standards for determining the employment relationship of food delivery personnel.

Keywords

Delivery person; Employment relationship; Intermediate labor service providers; Protection of rights and interests

1. The practical dilemma of determining the employment relationship of food delivery drivers

At the beginning, delivery personnel and delivery platforms often signed labor contracts directly, and delivery personnel enjoyed all the labor rights of workers and were fully protected by labor laws. However, with the competition between delivery platforms, platform costs continued to increase, and the number of labor accidents faced by delivery platforms also increased. In order to reduce labor costs, delivery platforms began to reduce the number of self-operated riders. However, in order to ensure the efficiency of food delivery, forms of delivery personnel such as proxy riders, crowdsourcing riders, and individual businesses have emerged. The diversification of delivery personnel types and the subcontracting of food delivery services through other companies have significantly reduced the labor costs of food delivery platforms. However, due to the multi-level subcontracting and complex employment forms of food delivery services, it is difficult for delivery personnel to safeguard their rights and interests. The subcontracting form of food delivery business is very complex. For example, Company A's business is responsible for dispatching orders, Company B is responsible for insuring the food delivery personnel recruited by Company A, Company C is responsible for distributing the salaries of the food delivery personnel, Company D is responsible for paying personal income

tax, and finally, there has been a shift from directly recruiting crowdsourced riders to introducing third-party companies. Due to the multi-level subcontracting of food delivery services, a complex form of employment has been formed, which has caused great resistance to the determination of the employing unit in case of disputes, and the recognition of the employment relationship of food delivery personnel is also unclear.

Most delivery drivers have a low awareness of risk prevention. When they register on the platform, they can only accept or reject several agreements that automatically pop up on the system. There is no room for negotiation or negotiation regarding the content of the agreements. The format contract signed by the delivery driver is strong evidence of their weak negotiation ability (Dong Wenjun, 2022). When disputes arise between delivery drivers and delivery platforms, it is difficult to provide effective and compelling evidence to prove the existence of a labor relationship between the two parties. When a natural person becomes a delivery person in the form of a registered individual business, their employment relationship with the delivery platform or platform cooperative enterprise is not a labor relationship and is not protected by the Labor Law of the People's Republic of China. Delivery platforms and platform partner companies not only have actual control over the allocation of labor resources, but also control the labor income of external sellers, who are bound by the rules and regulations of the delivery platform and platform partner companies (Qin Qinghua, 2022). Compared to food delivery platforms and platform partner companies, food delivery drivers are in a disadvantaged position, making it even more difficult for them to protect their rights.

2. Legal provisions and existing issues regarding the recognition of employment relationships for food delivery drivers

2.1 The relevant provisions and limitations of the Labor Law of the People's Republic of China and the Labor Contract Law of the People's Republic of China

Article 2 of the Labor Law of the People's Republic of China stipulates that standard employers are enterprises and individual economic organizations, while non-standard employers include state organs, public institutions, and social organizations. Article 2 of the Labor Contract Law of the People's Republic of China expands the scope of standard employers to include organizations such as private non-enterprise units. To determine the existence of a labor relationship between the two parties, both parties must be qualified, with one party being an employer and the other party being an employee. The Labor Contract Law still imposes legal qualifications on the recognition of labor relationships between delivery drivers and delivery platforms or platform cooperative enterprises. Labor service providers who do not comply with the provisions of the Labor Law and the Labor Contract Law are not laborers and are not protected by the Labor Law and the Labor Contract Law. Civil law shall be applied to resolve disputes between the two parties. In the context of expanding employment, many labor providers who are difficult to identify as having established labor relations but have social protection needs cannot be included in the scope of application of labor laws (Shen Jianfeng, 2022). Compared to food delivery platforms and platform partner companies, food delivery drivers are in a disadvantaged position. In the judicial practice of strictly determining whether food delivery drivers are workers and whether both parties are qualified, many rights and interests of food delivery drivers who cannot be identified as workers are not protected.

2.2 The relevant provisions and limitations of the Civil Code

During the process of compiling the Civil Code of the People's Republic of China, many well-known contracts were added, but employment contracts are still applied as anonymous contracts. When applying the Civil Law of the People's Republic of China to adjust employment relationships, employment contracts as anonymous contracts can be governed by the provisions of the General Principles of the Contract Law, or by referring to the most similar contract norms in the Contract Law or other legal provisions. The contract section of the Civil Code basically continues the framework and system centered on the transaction of goods and their rights in the Contract Law of the People's Republic of China. The rules under this system are limited in solving the problems arising from employment contracts based on labor or services (Zhan Dongsheng, 2022). When determining the employment relationship between delivery drivers and delivery platforms or platform cooperative enterprises based on the contract code, the provisions of the contract and commission contract are referred to. Obviously, the scope of protection for the rights and interests of food delivery drivers under civil law is smaller than that under labor law.

2.3 Other relevant regulations and their limitations

The provisions of the "Notice on Matters Related to Establishing Labor Relations" issued in 2005 are difficult to adapt to the new employment disputes between food delivery platforms or platform cooperative enterprises and food delivery drivers. The No. 56 Order issued by the Ministry of Human Resources and Social Security in 2021 provides guidance on the protection of labor rights and interests of workers in the new form of employment. It protects workers in the new form of employment by regulating employment, improving systems, optimizing labor rights protection services, and improving labor rights protection mechanisms. However, this guidance does not provide clear provisions on employment disputes between workers in the new form of employment and platforms, and has not been elevated to law. Although it conforms to the requirements of economic development and responds to the needs of workers in the new form of employment, it is still not detailed enough to summarize and apply to all issues represented by disputes over employment relationships between foreign salespeople.

3. Relevant regulations outside the domain

Economic globalization and technological progress are impacting traditional employment methods. Whether platform workers should be protected by labor laws is a hot topic in the global labor law community. One way to solve this problem is to classify platform workers as dependent self-employed workers between hired and self-employed, and provide legal protection as a third type of worker. This system exists in typical countries such as the common law and civil law systems, such as Germany's "class of employees", Canada's "dependent contractors", Spain's "economically dependent self-employed workers", and the United States has also explored whether to establish a third class of workers. However, there are many difficulties for the third type of workers in both legislative system design and judicial practice activities. In building the path of socialist rule of law with Chinese characteristics, China should learn from relevant regulations outside the country, and protect the legitimate rights and interests of food delivery personnel on the basis of identifying and regulating the standards for determining the employment relationship of food delivery personnel.

The German labor law adopts a tripartite classification of workers, which includes self-employed individuals, employees, and quasi-employees. According to Article 12a of the German Collective Contracts Act, class employees refer to individuals with economic subordination and who, like employees, require preferential protection. Class employees are not employees, and the two cannot be equated. Class employees have economic subordination, but there is no personality subordination (Wang Qian, 2017). On the one hand, the income of class employees from contractual relationships is their main source of income, which is their economic attribute. On the other hand, employees are not necessarily required to integrate into the employer's organization, and have a higher degree of freedom in the specific ways of fulfilling the contract, such as working hours, location, and content. It can be seen that the scope of German labor law is showing an expanding trend, and it also provides preferential protection for employees.

Canadian law recognizes some workers as dependent contractors. Independent contractors who are not employees and only work full-time for one company cannot obtain corresponding rights protection through collective bargaining (Xiao Zhu, 2018). On the basis that independent contractors do not enjoy collective bargaining rights, Canadian jurist Arthur proposed the concept of "dependent contractors" in 1956. The concept of employees in Canada includes dependent contractors, but dependent contractors do not enjoy all the labor rights that employees have. In judicial practice, only within the scope of collective labor rights claimed by "dependent contractors" due to labor collective relationships, "dependent contractors" belong to true employees and also to the expansion of labor law protection.

In 2007, Spain enacted the Self-Employed Labor Law, which broke the traditional dichotomy between employment and self-employment in Spain and established economically dependent self-employed workers as the third type in addition to employees and self-employed workers. If at least 75% of the subject's income comes from providing economic or professional services to the principal, then the subject meets the criteria of economic dependence and is considered an economically dependent self-employed worker. Although the status of economically dependent self-employed workers and employees cannot be equated, the scope of their rights is greater than that of self-employed workers. The establishment of economically dependent self-employed workers in Spain is in line with the trend of expanding the protection of the rights and interests of atypical labor providers.

Assembly Bill No. 5 (AB5 for short) is a bill proposed to protect the legitimate rights and interests of tens of thousands of people who provide atypical labor services in California. AB5 is a legal adjustment for legislators to respond to the challenges posed by the development of the Internet to traditional employment relations. The AB5 Act

provides for a new ABC test that meets the following criteria: A. The worker is not subject to guidance from the employer in their work; B. The employee engages in business outside the main business scope of the employing company; C. Workers usually engage in independently established industries, professions, or businesses; These three regulations are only for independent contractors, otherwise, they will be considered as employees (Chelsea Rauch, 2021). This has a normative role in determining employment relationships and protecting the legitimate rights and interests of non-typical labor providers. The United States applies the AB5 Act in judicial practice to determine employment relationships, which is similar to Germany's approach and expands the scope of protection of labor laws to a certain extent.

4. Suggestions for improving the rules for determining the employment relationship of delivery drivers

There are two views in academia regarding the employment relationship between delivery drivers and delivery platforms. The first viewpoint is to transform the binary division of labor into a ternary division of labor, categorizing food delivery drivers as a third type of worker (Que Zibing, 2022). The second viewpoint is to still adhere to the binary division of labor and improve the existing labor laws on this basis to solve new problems (Chang Kai, 2021). The author agrees more with the second viewpoint and therefore proposes the following suggestions.

4.1 Refine labor laws and regulations and their implementation methods

On July 16, 2021, the Ministry of Human Resources and Social Security and eight other departments jointly issued guidance on safeguarding the labor protection rights and interests of workers in new forms of employment. This regulation requires each region to formulate specific implementation measures according to local conditions, which fills certain loopholes in the dispute over the employment relationship of delivery drivers. At present, the labor laws of the People's Republic of China are mainly focused on emergency response, lacking strong internal coordination and external integrity (Zhu Hailong, 2022). The Labor Law of the People's Republic of China adopts a binary approach to whether the employment relationship of food delivery drivers constitutes a labor relationship. This guidance breaks through the situation where the platform's employment is either subject to labor law or civil law adjustment, and stipulates that if the enterprise manages the labor of the workers but does not fully meet the conditions for establishing a labor relationship, it guides the enterprise to enter into a written agreement with the workers to reasonably determine the rights and obligations of the enterprise and the workers. This guidance can be elevated to law, and the legal norms under the binary system of labor laws should be innovated and improved, and the recognition of employment relationships on the applicable platform should be reasonably designed from the legal superstructure. Gradual regulation of employment relations should not only be reformed in terms of legal forms and systems, but also in terms of refining specific implementation plans and corresponding practices.

4.2 Improve the civil law contract employment system for delivery drivers

Not only does labor law need to keep up with the times, but civil legal rules also need to be improved. Since the General Principles of Civil Law in 1986, the legal rules of the People's Republic of China have not left a certain space for employment contracts that use the labor of others. Although employment contracts appeared in the draft of the Contract Law in the 1990s, they did not ultimately appear in the form of named contracts in the Contract Law of the People's Republic of China. During the process of compiling the Civil Code, although some scholars proposed to define employment contracts as named contracts, the Civil Code ultimately did not introduce relevant regulations on employment contracts.

Firstly, specific rules regarding employment contracts can be introduced. Many employment relationships in social life cannot be fully regulated by labor laws or labor contract laws, so civil law plays an irreplaceable role in adjusting employment relationships. In the context of specific rules regarding employment contracts, when disputes arise regarding employment relationships, the specific rules regarding employment contracts can be directly applied to fill the gap and resolve disputes between labor providers and users that cannot be included in the labor relationship.

Secondly, socialized civil legal norms can be further introduced to explore the agreement between delivery drivers and delivery platforms or platform cooperative enterprises on this basis. In judicial practice, the people's court should specifically explore what the agreement between the delivery platform or platform cooperative enterprise and the delivery person is, and should explore the essence of the agreement between the two to avoid the situation of "different

judgments in the same case". The agreement fully reflects the true intentions of both parties to the contract. If the delivery person fully understands and agrees to the non-labor contract reached between themselves and the delivery platform, and the delivery platform has provided sufficient and reasonable explanations, communication, and interpretation, then the agreement between the two parties should be followed in judicial practice.

4.3 Establish industry standards for recognizing the employment relationship of delivery drivers

The Human Resources and Social Security Order No. 56 and the Municipal Supervision Order No. 38 encourage the food delivery industry to establish its own trade unions, but do not provide clear regulations on the standards of the food delivery industry. Due to the complex conditions for establishing trade unions and the high difficulty of their operation, establishing trade union standards for the food delivery industry is more feasible than establishing a food delivery trade union. It is undeniable that the food delivery industry will become increasingly standardized and systematic, and establishing food delivery unions that are not based on labor relations will be a possible trend (Wang Tianyu, 2022). At present, there is no established industry standard for delivery drivers in the delivery industry.

If a food delivery industry standard that can recognize the employment relationship of food delivery personnel can be established based on fully considering the practical needs of food delivery platforms and food delivery personnel, it can avoid the situation of "different judgments for the same case" as much as possible. When establishing industry standards for recognizing the employment relationship of food delivery drivers, it is necessary to fully consider the actual operational needs of food delivery platform operators, and also develop professional standards and security plans for food delivery drivers. Some conflicts can be resolved in advance through food delivery industry standards, and a true industry standard that is conducive to the development of the food delivery industry, promotes employment in the food delivery industry, and helps to recognize the employment relationship of food delivery drivers can be formed.

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