

# A Study on the Identifying of Labor Relations in China's Gig Economy

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## Abstract

The Gig Economy has brought a lot of convenience to people's lives, and the form of employment in this economy has become more and more diversified and flexible, and the form of "platform + individual" has become common. Labor relationships are one of the most basic social relationships, and under this new form of employment, the relationship between laborers and employers (i.e., the relationship between laborers and platforms) has also changed, resulting in frequent labor disputes between employers and individuals, and how to identify the labor relationship between them and how to better protect the legitimate rights and interests of laborers under the new situation is very urgent. This paper analyzes the different legal characteristics of labor employment on Gig Economy platforms and traditional labor employment and tries to explore the design of new and diversified

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legal relationships of online employment based on the new business modes of different online platforms from the viewpoint of establishing the concept of "flexible and safe" in identifying labor relationships and the protection of labor rights in a hierarchical manner. The criteria for the identification of online employment relationships Reasonable allocation of the rights and obligations between platform companies and platform laborers and the establishment of suitable criteria for identifying labor relations will help the development of the Gig Economy and generate a large number of employment opportunities, which is a basic guarantee for the legality of platform laborers. On the basis of paying attention to it, we should strengthen research and practice to promote the development and improvement of labor relations law in online platform employment.

- 핵심어 Gig Economy; labor relations identification; platform laborers; new labor relations; subordination
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## I . Introduction

The Gig Economy is a new economic form formed spontaneously under the background of information interconnection. With the rapid promotion of the Gig Economy, people's social life has also undergone great changes. On the one hand, the economic development provides a large number of jobs, but at the same time, it also generates a large number of labor disputes, which brings challenges to the traditional labor relations legal system. The platform enterprises born under the Gig Economy use Internet technology to create an exchange platform connecting the supply side and the demand side, and the supply side transfers the right to use idle resources to the demand side and gets paid for it, which effectively improves the efficiency of using idle resources. The development of the Gig Economy has provided great convenience to people's daily life, such as using cell phone software to book online car services for travel, using take-out software to order meals without leaving home, and using

software to book accommodation rooms in advance for travel ..... As we can see, the sharing of social resources is reflected in every aspect of our lives, and people can no longer live without sharing platforms. However, while the new Gig Economy has brought great convenience to consumers, it has created a great challenge in terms of labor protection and the identification of employment relationships. As the platform companies use the internet technology to create a new employment pattern of "platform + individual", the traditional employers become the platform companies on the internet and make full use of the idle human resources with the help of internet technology. In the traditional labor pattern, the labor provider is called a laborer, but in the new Gig Economy, the labor provider relies on the platform to become a platform laborer, such as a take-away rider or a chauffeur. Compared with traditional laborers, platform laborers have more autonomy and can freely choose the time and place to provide labor services. In the platform labor pattern, many platform companies deliberately avoid establishing labor relations with platform laborers in order to reduce operating costs, thus many labor dispute cases have emerged. Since the relationship between the two sides is not exactly the same as the traditional labor relationship and does not belong to the labor relationship adjusted by civil law, there are different judgments in judicial decisions. In the platform employment relationship, it is difficult for the platform laborers to be protected by the labor law, and the litigation against the platform increases the communication cost between the two sides, and the result of different judgments in the same case intensifies the impact on the traditional labor laws and regulations, which causes great trouble to the protection of the rights and obligations of both sides. Nowadays, Chinese legislation and regulations do not provide uniform standards for the identification of labor relations between platform and platform laborers under the Gig Economy, and the traditional standards are not adapted to the flexible employment relationship, resulting in the lagging and non-adaptability of labor laws. The ambiguity of the standard of labor relations has led to the lack of protection of labors' rights and interests. Therefore, exploring the new standard of labor relations under the Gig Economy is crucial to the resolution of labor disputes and has far-reaching significance for the development of the Gig Economy

and the protection of labor rights and interests.

## II. Analysis of labor relations under the Gig Economy

### 1. Labor relations under the traditional employment patterns

#### (1) The concept of traditional labor relations

The analysis of the basic concept of "labor relations" is a prerequisite for the discussion of the standard of identifying labor relations, and the study and research of labor relations has been one of the important issues in Chinese jurisprudence. In China, traditional labor relations generally refer to the rights and obligations between employers and laborers in the process of labor established by law, which developed from the employment relationship of civil law. And the form of employment between laborers and employers is actually a combination of labor force and means of production (labor conditions).<sup>1)</sup> In the early days, the term "labor relations" was called "industrial relations," and with the development of the times, it has been used in different countries and regions with different names and concepts.<sup>2)</sup> Under the current labor law system in China, there are mainly two major legal relationships: labor relations and service relations, and in practice, only after the relationship between labor and employer is recognized as labor relations, the disputes between the two sides will be included in the management of labor disputes. Therefore, whether the labor relationship is established between the laborers and the employer is an essential issue for the laborers to decide whether their rights and obligations can be protected.

The primary basis for identifying labor relations in Chinese law is the Notice on Matters Relating to the Establishment of Labor Relations issued by the former Ministry of Labor and Social Security in 2005 (Ministry of Labor and Social Security Fa [2005]

1) 唐硕, "网约车司机与平台劳动关系之从属性判定——基于社会加盟车辆模式的实证分析", 『重庆电子工程职业学院学报』, 2021年第1期, p.27.

2) 郭军、李雪艳, "劳动关系发展趋势研究——基于概念演化视角的分析", 『经济经纬』, 2009年第1期, p.85.

No. 12) (hereinafter referred to as the "Notice"). According to the Notice, there are three criteria for identifying labor relations as follows: First, the subject qualifications of the employer and the laborer must be legal. Secondly, the labor regulations formulated by the employer according to the law are applicable to the labor, and the labor is subject to the labor management of the employer and is engaged in paid labor. Third, the labor provided by the laborers is an integral part of the employer's business.<sup>3)</sup> These three criteria emphasize the theory of subordination of labor relations, in which laborers are managed by the employer, perform corresponding labor according to the employer's arrangement, and the employer pays the laborers, i.e., three aspects of personality subordination, economic subordination, and organizational subordination. personality subordination refers to the fact that in the labor relationship the laborers are subject to the instructions of the employer but also includes the employer's right to discipline the laborers, which represents the requirement of a high viscosity relationship between the employer and the laborers. Organizational and economic subordination means that the laborer is subject to the arrangement of the employer and fulfills the obligations assigned by the employer within the designated scope of work. Consequently, the employer is required to pay the laborer what he or she is entitled to on a regular monthly basis. The laborer is also dependent on the employer, and both sides have their respective rights and obligations.<sup>4)</sup> The above constitutes the traditional labor relations in China.

## (2) Traditional labor relations characteristics

Although the Labor Law does not specifically summarize the concept of labor relations, it can be defined as "social relations in which laborers provide the combination of labor and means of production to the employer, and the employer pays labor remuneration and manages and supervises the laborers in the process of labor".<sup>5)</sup> It can be seen that the premise of the labor relationship is that the laborer is

3) 黄振东, "劳动关系认定标准的实践困惑", 《晟典律师评论》, 2017年第1期, p.48.

4) 华春雷, "对长期"两不找"人员劳动关系的探讨", 《劳动保障世界》, 2019年第13期, p.57.

5) 周宝妹, "拒不支付劳动报酬罪主体的认定——以劳动关系为视角", 《江西社会科学》, 2020年第3期, p.18.

employed by the employer in the actual employment, which has to comply with the specific arrangements of the employer as well as the rules and regulations of the employer. Therefore, labor relations can be summarized into three legal characteristics, namely, equality and subordination of the two entities; exclusivity; and personality and property attributes.

First, the two entities of labor relations have equality and subordination. Both sides of labor relations are equal in legal status. The labor relationship is between the laborer who provides his/her labor force on one hand and the employer who employs the laborer on the other hand. The two entities are equal in the legal sense that there is a labor relationship between the hired and the employed, and the laborers shall provide corresponding labor services to the employer and accept the supervision of the employer, while the employer shall provide the laborers with corresponding remuneration and social security.<sup>6)</sup> In the meantime, the laborer has a certain subordination to the employer. To a certain extent, the laborer is subordinated to the employer, obeys the rules and regulations set by the employer, and performs the required work or services actively.

Second, the relationship between the two sides of labor relations is exclusive in its nature. That is, once a laborer signs a labor agreement with an employer, he or she cannot enter into a labor relationship with any other employer during the same period of time, resulting in an exclusive labor relationship.<sup>7)</sup>

Third, both sides of labor relations also possess the attributes of personality and property. The fundamental attribute of labor relations is the subordination of personality, which directly reflects the employer's employment autonomy, i.e., the mandatory regulations of working hours and rest system, the protection of labor's health, basic protection issues of human rights, etc. In contrast, property subordination,

6) 李婷, "浅析《劳动合同法》下双重劳动关系的界定", 『理论月刊』, 2011年第3期, p.101.

7) 沈建峰, "论劳动关系的实践界定", 『法律适用』, 2011年第12期, p.89.

on the other hand, is more obviously reflected in the fact that if the laborer provides the corresponding labor service, the employer is required to pay the laborer corresponding labor remuneration, in which case the economic reliance that the laborer has on the employer has formed, in which sense the two sides have the characteristic property subordination.<sup>8)</sup> Subordination is considered to be the crucial feature of traditional labor relations, which is also an extremely essential factor in distinguishing labor relations in relation to labor service relations.

## 2. Employment pattern of Gig Economy platform

### (1) New development of the Gig Economy on traditional labor relations

With the transformation of China's economic structure and the co-development of multiple economic forms, the emergence of non-standard labor relations has become an unstoppable trend, of which the new labor relations in the context of the Gig Economy is one of the manifestations. The Gig Economy is a new pattern of supply and demand based on the efficient, payoff, and humane sharing of private idle resources through the Internet. The development of the Gig Economy enables idle resources excluded from traditional markets to be fully utilized. The owners of idle resources share the right to use them to receive payment, whereas those on the demand side obtain a more humane and convenient supply by this means. But the issue arising from the transaction with idle resources on both sides of the supply and demand sides is about how to realize a fair transaction and balance the interests of both sides. Based on such a situation, a Gig Economy operation platform is born. The sharing platform serves as a guarantor for the two sides of a transaction, improving the utilization of information, capital, as well as labor by integrating resources and optimizing the use of idle resources in society. The sharing platform has also increased its visibility and profitability.<sup>9)</sup> Overall, the development of the Gig Economy has led to

8) 陈伟富, "共享经济背景下劳动关系认定研究", 兰州大学法学硕士学位论文, 2021年5月, p.12.

9) 唐鑑, 李彦君, 徐景昀, "共享经济企业用工管理与《劳动合同法》制度创新", 『中国劳动』, 2016年第14期, p.48.

a mutual benefit for both platforms and users.

The development of the Gig Economy relies on the high-speed dissemination of information on the Internet, under the premise of which the jobs under the Gig Economy possess prominent flexibility and liberty. Due to the liberty of working time as well as place, the entry barrier to the industry is significantly lowered, making a large quantity of idle labor qualified for the criteria of the sharing platform. Furthermore, no complicated legal procedures are required to establish labor relations between sharing platforms and laborers. In the meantime, government strongly supports developing the Gig Economy based on the demand of relieving employment pressure and promoting employment rate, which has released a massive amount of job opportunities to society and enabled laborers to better reconcile work and family through this way of labor. For this reason, the services provided by sharing platforms can no longer be programmed and standardized, instead, it is more humanized, which provides the supply side with a flexible employment pattern while the demand side with a richer range of choices. The essence of Gig Economy is the integration as well as optimal utilization for idle resources, in which the distribution issue is inseparable in the process of development. The sharing platform is the integration of resources for idle labor, consequently, the distribution of interests in the operation process is inevitably involved with the labor force.<sup>10)</sup>In other words, what kind of relationship does the platform have with the laborers indeed? Labor relationship? Labor service relationship? Or is it an employment relationship? Regardless of the case, it implies that the relationship is not a traditional labor relationship, but a new pattern of labor relationship in the context of Gig Economy.

## (2) Characteristics of Gig Economy platform employment

### 1) Relying on the development of Gig Economy

The development of the Gig Economy has broken the monopoly of the traditional

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10) 李发财, "'互联网+'下职教资源的整合优化与共享利用", 『现代职业教育』, 2015年第28期, p.103.



employment pattern, and laborers' career choices have become more diverse, and employment has become more flexible from the traditional full-time employment pattern to the diverse employment channels under the Gig Economy.<sup>11)</sup> Laborers in the Gig Economy do not have to rely on fixed employment units to be remunerated for their labor output but can realize employment patterns in which one laborer dovetails with multiple platforms without the existence of a single employer. Under the circumstances in which employment gets tough but aging serious, the utilization of human resources in this way becomes a more flexible one, which is quite reasonable. In addition, it provides a large number of fresh and flexible positions on top of the traditional employment pattern. Those who are newly employed benefit from the convenience of the Gig Economy and enter or exit the labor process with more freedom, reducing the restrictions imposed by the employer on individuals and reversing the traditional corporate-dominated labor relations, which gradually grow by relying on the Gig Economy.

## 2) Combined platform and individual form of employment

Under the traditional employment pattern, the labor relations existing between laborers and employers are singular and fixed, i.e., the laborers sign a contract with the employers to establish labor relations between the two.<sup>12)</sup> With the development of Internet platforms, employers have transformed from offline entity enterprises into various Internet platform companies, for instance, Tik-Tok Travel<sup>13)</sup> and Meituan Take-away.<sup>14)</sup> Internet software, etc. Such platforms provide intermediary information or directly participate in production operations on both sides of supply and demand. Laborers have already turned into a new type of individual employment, which forms

11) 汪慧君, "共享经济模式下平台用工法律关系问题研究", 华中科技大学硕士论文, p.10.

12) 杨春建, "'互联网+'平台用工模式下劳动关系的认定——以"网约工劳动争议第一案"为例", 《法制与社会》, 2018年第11期, p.52.

13) Tik-Tok Travel is a carpooling mobile software launched in April 2014 by Beijing Changxing Information Technology Co., which was formerly known as Tik-Tok Carpool, providing online taxi and carpool travel services.

14) Meituan Takeaway, the online ordering platform of Meituan.com, was officially launched in November 2013 and is headquartered in Beijing.

an employment pattern of "platform + individual" or "platform + company + individual." This employment pattern brings vitality and convenience in the development of new-era platform companies, which also provides more possibilities for laborers' employment.

### 3) Weakening of the subordination of laborers

As mentioned above, the subordination of laborers and employers is one of the essential characteristics of traditional labor relations. In contrast, the labor supply and demand relationship in the Gig Economy has completely overturned the traditional labor relationship pattern. Massive laborers can realize employment on the sharing platform with only one click to register in a simple vetting procedure. Thus, the same laborer can realize multiple employments in accordance with his or her own time, address, and capability. Due to the elimination of the tedious and complicated interview process, laborers do not even need to leave their homes to finish their employment on the software platform, but simply "unbind" their jobs, which significantly reduces the subordination attribute between laborers and the platform company. The high mobility of labors, the flexibility of working hours, in addition to the multiple employment relationships between labors and platforms, all of which make the labor relations under the Gig Economy appear to be short-term, while the tripartite subject structure has weakened the personality subordination of labors.

### 3.The differences in employment patterns under a Gig Economy compared with traditional employment patterns

The employment patterns under the Gig Economy show the following differences compared with the traditional employment patterns:

First, the conditions for the establishment of employment relationships are different. The traditional labor relationship is established cautiously, in which a labor contract is

signed based on the mutual consent of the laborer and the employer, which means that the labor relationship is established between the two sides while the rights and obligations of both sides are formally protected by law, whereas the establishment of a new labor relationship only requires the individual to meet the access prerequisites set by the platform company to join and turn into a staff member. The difference between the two is that under the access mechanism of the new labor relations, laborers can only try to satisfy it without any room for negotiation, while the prerequisites for the establishment of labor relations between the two sides of the traditional labor relations can be reached by mutual agreement through negotiation.

Second, the content of work is also different. In the labor relationship under the Gig Economy, laborers only need to provide labor to a third party, while in the traditional labor relationship, laborers need to abide by the employer's orders and obey the employer's assignments.<sup>15)</sup>Take online taxis as an example. The driver needs to meet the requirements of passengers who use the platform software and provide services to third-party passengers.

Third, the remuneration of employment is different. The legal protection provided by the platform company for the platform laborers is nearly zero. The existing laws are not enough to regulate the bilateral relationship, which makes the platform company incapable of handling the relationship with the platform laborers well, which may arbitrarily accept or abandon the tasks assigned by the platform.<sup>16)</sup>In the traditional labor relationship, the employer has the responsibility to supply the laborers with the workplace and necessary resources, and because of the personality subordination of the laborers, the company can make the relevant regulations to regulate the laborers. Meanwhile, the company should purchase the necessary insurance for the laborers in accordance with the requirements of the law.

The fourth is the difference in the manner of termination of an employment

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15) 盖建华, "共享经济下'类劳动者'法律主体的制度设计", 『改革』, 2018年第4期, p107.

16) 赵德淳, "对劳务派遣中的劳动关系再规制", 『财经问题研究』, 2012年第7期, p.95-96.

relationship. In the new labor relations, the platform laborer only needs to cancel his or her account on the platform if he or she wants to terminate the relationship, or even unilaterally uninstall the relevant software, which is a more casual and less restrictive way to terminate. The platform can suspend the account of the platform laborer in the case of serious errors, so as to terminate the labor relationship of both sides. Since there is very little regulation in law nowadays, no guidance can be given to both sides of the new labor relations, which makes the labor market more chaotic.

### III. The necessity of identifying labor relations under the Gig Economy

The Gig Economy is changing towards the direction and orientation of adaptability and mobility. However, under the rapidly changing economic model and labor relations, the legal relationship and regulations between laborers and platforms are still very vague, making it difficult to effectively protect the rights and interests of laborers.<sup>17)</sup>Currently, most of the contracts signed between laborers and employers under the Gig Economy platform are short-term contracts or even no contracts at all. In China, labor relations and social insurance are tightly bound together. An identification of labor relations between sharing economic platforms and laborers determines whether the platforms should bear the liability of employer substitution or compensation based on work injury insurance.<sup>18)</sup>Though the status of laborers has been significantly improved in comparison with the previous one, and they have the initiative to negotiate with the employer, the employer is always the capitalist who stands high in the pursuit of profit, whose practice of exploiting and squeezing the surplus value of laborers in order to obtain more profit will not change. Laborers are still in the position of being oppressed and having their rights violated. Nowadays, China does not have enough jurisprudence to support the expansion of traditional labor relations. In the face of the autonomy and flexibility of the labor force under the Gig Economy, in such a rapidly

17) 王婉鑫, "共享经济视阈下劳动关系的法律规制", 『人民法制』, 2019年第12期, p.83-84.

18) 闫冬, "平台用工劳动报酬保护研究:以外卖骑手为样本", 『中国人力资源开发』, 2020年第2期, p.118.

developing economy, sticking to the traditional concept of labor law will make the new form of employment completely out of protection of labor law, which will expose a large number of new laborers to huge risks in their choice of employment, which will seriously affect the development of the new form of employment in the long run and eventually hinder the normal growth of China's economy.<sup>19)</sup>For this reason, the labor laws must be timely adjusted to better adapt to the changes brought about by the new employment forms.

### 1. Risks that the laborers faced under the Gig Economy

The new employment form under the Gig Economy has brought a lot of new challenges and risks to the practitioners, mainly in three aspects: First, the uncertainty in the process of labor payment has increased significantly. Though laborers are entitled to a higher freedom under the Gig Economy, this also means the stability of the position itself is decreased. On the surface, it appears that labor's employment opportunities have expanded indeed, but the risks associated with the unpredictability of the jobs themselves are naturally imposed on the laborers. In addition, this uncertainty may be reflected in changes to salaries and benefits, a lack of voice in labor-related agreements, and opportunities for negotiation. Second, platform companies may engage in various forms of disguised "exploitation". As a direct consequence of the rapid expansion of capital through the Internet, laborers have fewer choices and less organizational interaction with each other. Especially in the current situation where the Gig Economy itself is not yet regulated, the "platform" + "individual" is more of a binding and obligatory relationship for individuals. Third, the social insurance system is relatively lagging behind. According to the Social Insurance Law, flexibly employed laborers under the Gig Economy can participate in pension and medical insurance. Unlike the labor relationship, which compulsorily requires units to purchase insurance for employees, the insurance coverage is also limited to pension and medical care,

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19) 殷晓琳, "共享经济模式下新型用工关系法律性质认定", 『巢湖学院学报』, 2020年第4期, p.45.

which obviously does not match the new form of employment and does not protect the rights and interests of laborers adequately.<sup>20)</sup>

## 2. The impact of the Gig Economy on the traditional labor legal system

The law is always lagging behind, especially conspicuous in the rapid development of the Gig Economy in the Internet era. The traditional Chinese labor law system is structured according to the "dichotomy," including two basic types of labor relations and service relations.<sup>21)</sup> The dichotomy of labor relations being regulated by labor law and labor relations being regulated by civil law has resulted in a large number of laborers in the Gig Economy being excluded from the protection of labor law because they are not considered to be in a labor relationship with the employer.<sup>22)</sup> It is necessary to make timely legal adjustments to protect the rights of new laborers. At present, the determination of labor relations in China is mainly based on the provisions of the Notice on de facto labor relations. According to the standards of the Notice, the law excludes the relationship between the subject of Internet labor and the platform enterprise from the scope of adjustment. However, in judicial practice, there are cases in which labor relations are recognized, which indicates that there is a mismatch between legislation and practice, and the lag of the law makes it impossible to recognize such subjects as Internet laborers.

The Labor Law regulates the standard labor relations, and the subjects are clearly directed, i.e., the employer and the laborer have signed a clear labor contract, other than that there will be no differences. Among the flexible employment forms, only labor dispatch and part-time work are included in the scope of labor law, and flexible employment was not taken into consideration at the early stages of labor law legislation, and the two types of non-standard employment were regulated only when

20) 问清泓, "共享经济下社会保险制度创新研究", 『社会科学研究』, 2019年第1期, p.93.

21) 王全兴, 王茜, "我国'网约工'的劳动关系认定及权益保护", 『法学』, 2018年第4期, p.68.

22) 周宝妹, "拒不支付劳动报酬罪主体的认定——以劳动关系为视角", 『江西社会科学』, 2020年第3期, p.190.

the Labor Contract Law was introduced.<sup>23)</sup> In the labor group without a labor contract, the labor relationship is established by the three simultaneous<sup>24)</sup> definitions in the Notice. The current law adopts an all-or-nothing approach in determining labor relations, which is rigid and inapplicable to the new form of employment of online contract labor under the Gig Economy. In 2018, the Labor Law was amended, but the new Labor Law still does not add intermediate labor subjects, and the recognition criteria are still under the framework of "dichotomy," without expanding the scope of laborers.<sup>25)</sup> There is no clear response to the legal status of laborers in platform employment in the legislation. From the perspective of legislation, there is no clear response to the legal status of platform network laborers. Take the example of "online taxi" drivers. Many drivers provide their own vehicles, and they still have comparatively large autonomy after registering on the platform. On the surface, they seem to be more in line with the criteria for determining labor service relations, but the income of the car drivers is mainly dependent on the platform company, and they are also bound by various rules such as business evaluation and business regulations of the platform company. For example, the car drivers have to wear work uniforms and receive information released by the platform company when providing services. Once a car driver accepts an order, he or she must provide the service in strict accordance with the platform company's rules. The platform company has greater authority to supervise and restrain the driver. It can be seen that the online car driver, as the epitome of a new form of employment under the Gig Economy, has both the shadow of labor service relations and the characteristics of labor relations in some aspects, which is obviously inconsistent with the "dichotomy" of labor relations and service relations in the traditional Chinese labor law system. This model is not well

23) 何小勇,邢智峰, "被派遣劳动者适用无固定期限劳动合同的法律问题探讨——以机关事业单位使用编制外人员为视角", 『中国劳动关系学院学报』, 2019年第2期, p.84.

24) A. The employer recruits laborers without a written labor contract but meets all the following circumstances, the labor relationship is established. (a) the employer and the laborer meet the subject qualifications stipulated by laws and regulations; (b) the labor rules and regulations formulated by the employer according to law apply to the laborer, the laborer is subject to the labor management of the employer and is engaged in the paid labor arranged by the employer; (c) the labor provided by the laborer is an integral part of the employer's business.

25) 王天玉, "超越'劳动二分法':平台用工法律调整的基本立场", 『中国劳动关系学院学报』, 2020年第4期, p.76.

suited to the new employment patterns emerging from the current economic development. In order to solve the embarrassing position of identifying laborers in the network platform, it is necessary to adjust the law in time to protect the rights of new laborers under the current economic development.

#### IV. The dilemma of labor relations Identification under the Gig Economy

##### 1. China's labor relations Identification standards are lagging behind

The current standards for the determination of labor relations in China are mainly divided into two types of cases in practice. The first one is that the employer has signed a labor contract with the labor, and the establishment of labor relations is determined by the signing of the labor contract; the second one is the question of how to determine whether labor relations are established when the employer has not signed a labor contract with the labor. For platform labors, if they have not signed a written labor contract, the determination of whether they are labors is based on the criterion of subordination to determine whether a labor relationship has been established between them and the employer. This "dichotomy" can effectively protect the rights and interests of labor who have established a de facto labor relationship. However, the employment mode of the Gig Economy platform is an intermediate form beyond the "dichotomy," and it is difficult to confirm whether a de facto labor relationship is established between the labor of this intermediate form and the employer. Such employed persons have economic subordination to the employer, but it is ambiguous as to whether they have personality subordination. They are between a labor relationship and a labor service relationship. Whether they are considered as labor relations or labor relations, they cannot be fully and effectively protected.<sup>26)</sup>

If it is considered as a de facto labor relationship according to the "dichotomy" model, labor law can be applied to protect the rights and obligations of both parties.

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26) 杨云霞, 庄乔季, "分享经济下的劳动者保护", 『西安交通大学学报(社会科学版)』, 2019年第 4 期, p.59.



Labor law adopts a tilted protection for laborers who establish labor relations. However, in practice, laborers on the Gig Economy platform, who are in between labor relations and labor relations, do not fully meet the standards of labor law protection. However, if the labor law is applied to provide the same protection to laborers who establish de facto labor relations, it will harm the legitimate rights and interests of the employer, add obstacles to the Gig Economy platform, and increase the operating costs and risks of the platform company in modern society where the Gig Economy is developing rapidly.<sup>27)</sup> The purpose of labor law's inclined protection for labors is to protect labors who are on the weaker side, but it is obviously not appropriate to directly include them into labor law for protection when the two sides have not reached a highly subordinate labor relationship. On the other hand, if the labor relationship is defined as a labor relationship because it does not meet the standards of labor law and only the protection of civil law is applied, the protection of the rights of the platform labors is very weak,<sup>28)</sup> and many of the rights of the labors, such as the right to rest, social insurance, etc., are based on the premise that the labor relationship is established. This is undoubtedly a blow to labor in the Gig Economy. In addition, among the three criteria for judging whether labor relations are established—personality subordination, economic subordination, and organizational subordination—in practice, the criteria of personality subordination are generally used as the main criterion and economic subordination as the supplementary criterion.<sup>29)</sup> The employment mode of the Gig Economy is characterized by high economic subordination and low personality subordination. If the traditional labor relations criteria are rigidly applied, it is very unfavorable to the intermediate form of employment labor in the Gig Economy. As that in the case of Wang XX v. Black Mamba Branch<sup>30)</sup>, due to the fact Wang XX had not signed a labor contract with the

27) 班小辉, "零工经济'下任务化用工的劳动法规制", 『法学评论』, 2019 年第 3 期, p.110.

28) 战东升, "民法典编纂背景下劳动法与民法的立法关系——以'类似劳动者型劳务提供者'的保护为切入点", 『法学』, 2018 年第 10 期, p.99.

29) 胡格赢, "试论劳动关系认定中的'从属性标准'", 『山东青年』, 2014 年第 3 期, p.162.

30) 析法说典 | 外卖骑手与平台企业之间是否存在劳动关系? 来源: 银川法院.

[https://m.thepaper.cn/baijiahao\\_19225627](https://m.thepaper.cn/baijiahao_19225627), Accessed: 2020.08.18.

company, the wages of Wang XX were not paid by the branch, the monthly determined income received was from the platform ELEME Takeout (饿了么)<sup>31)</sup> orders were multiplied by the number of units priced, and work and wage arrangements were not subject to the branch's management and dominance. Moreover, no specific agreements were made on Wang 's labor time, location, intensity, pay, etc. In accordance with the "dichotomy" to judge it, the two sides had low personality subordination characteristics, not in line with labor relations in the high subordination of labor relations, which led to the court's inability to identify the existence of labor relations between the two sides. Therefore, the traditional labor relations standards are no longer applicable to the Gig Economy and cannot protect the rights and interests of platform employment.

## **2. The Gig Economy platforms circumvent the establishment of labor relations**

### **(1) Identifying labor relations will increase the operating costs of the platform.**

The rapid development of the Gig Economy has not only brought convenience to people's lives but also driven the development of China's economy under the difficulties of the traditional employment mode during the new crown epidemic. The rapid development should pay more attention to the various legal issues that arise with it. Labor relations cannot be identified not only because of the lack of laws but also because, once labor relations are identified, the Gig Economy platform has to pay for a series of laborers' rights and assume corresponding obligations, such as the need to purchase social insurance for laborers and not to terminate labor relations at will. This greatly increases the operating costs of the platform, which is why platform companies avoid establishing labor relations. The current development of sharing platforms is

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31) Founded in 2008 as a local living platform, ELEME Takeout focuses mainly on online take-out, new retail, instant delivery and catering supply chain, etc. It has driven the digitalization of China's catering industry, developing take-out into a third routine dining option for Chinese people besides cooking and dine-in.

accompanied by the increasing difficulty of protecting the rights and interests of platform laborers, which urgently requires the exploration of a suitable path of neutralization.

## **(2) Difficulties in dividing responsibilities between sharing platforms and laborers**

Another important reason for Gig Economy platform companies to avoid establishing labor relations with laborers is that it will increase the legal risk for the platform. Under Chinese law, once a legal relationship is established, the employer is fully responsible for any fault of the laborer in the course of providing services, i.e., the platform company will bear no-fault alternative liability,<sup>32)</sup> which is a huge risk for the platform company. In China's current Gig Economy employment, most of the laborers are part-time laborers, and only 20 percent of the laborers are full-time laborers.<sup>33)</sup> Most of the part-time laborers are not only working for one company but also have labor relations with other companies. If all full-time laborers and part-time laborers are considered to be in labor relations one-size-fits-all, the platform companies will bear huge risks, and such risks are unfair and unaffordable for the platform companies in the rising stage of development. Therefore, the distribution of legal responsibilities is also an important reason affecting the identification of new labor relations.

As the scale of platform laborers grows larger and larger, the risks and costs to be borne by the platform increase, and whether the labor relations are identified or not is a matter of whether the platform can develop sustainably. That's why platforms often use covert management and other ways to avoid labor relations.

## **3. Traditional labor relations certificates are obsolete**

In practical affairs, the main basis for identifying labor relations is the provisions in

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32) 蒋琳瑶, "网约平台法律责任探析", 『攀枝花学院学报』, 2018年第6期, p.36.

33) 常超毅, "共享经济下平台用工劳动者权益保障综述", 『合作经济与科技』, 2021年第13期, p.176.

the Notice. The Notice was promulgated in 2005, and with the natural lag of the law and the modern society of rapid development and changes in the Gig Economy, it is obvious that the provisions of the Notice issued in 2005 are no longer fully applicable to the current social environment. For example, the Notice requires that if the employer has not signed an employment contract with the laborer, the following documents may be used to identify the existence of the labor relationship between the two sides: "proof or record of payment of wages", "record of payment of social insurance premiums", "work permit", "service license", "registration form," "certification form," and "attendance records," "testimonies of other laborers," etc.<sup>34)</sup> In traditional labor relations, the credentials are often complete and in a single form, which makes them easy to ascertain. However, with the popularity and development of the internet, the electronic and ambiguous phenomenon of employment credentials is becoming more and more prominent. For example, the Gig Economy platform often verifies the identity of laborers through mobile apps in the process of onboarding, and the payment of wages is done through withdrawals by drivers through WeChat or Alipay platforms. There are no paper certification materials such as "employee payroll" and "registration form", and the platform company basically does not issue employment vouchers to laborers, or often shows them in the form of "electronic certificates." The platform companies basically do not issue employment vouchers to laborers or often display them in the form of "electronic certificates". The traditional "attendance" mode is gradually disappearing under the flexible employment mode of the Gig Economy, which not only does not require "reality check-in", but also has no fixed employment hours. <sup>35)</sup>Therefore, in the case of employment in the Gig Economy, once the labor relationship should be defined but no labor contract is signed, the "certifications" as a criterion for determination are seriously lagging behind from the current application. At the same time, it also aggravates the situation that employers reverse avoid establishing labor relations according to the "legal standard," and some laborers with little legal awareness lose the opportunity and right to defend their labor rights due to the

34) 刘双, "两不找'期间劳动关系如何认定", 『劳动和社会保障法规政策专刊』, 2019年第4期, p.44.

35) 李帛霖, "共享员工视角下企业借调用工的本质及效力认定", 『中国人力资源开发』, 2021年第9期, p.84.

unclear understanding of this.

## V. Exploring the path of identifying labor relations under the Gig Economy

### 1. Reconstruct the criteria for identifying labor relations according to law

#### (1) Application of the "intermediate laborer" identification method

The current "one-size-fits-all" "dichotomy" model makes it possible to apply the law in practice with the disadvantage that "if a laborer is identified as a laborer, he or she will be inclined protected, but if not, he or she will not be inclined protected". The disadvantage of such an either/or approach is that it is unfair in legal practice and the rights of "intermediate laborers" are violated.<sup>36)</sup> Therefore, the binary model should be changed to a ternary model, i.e., platform laborers should be divided into three categories: first, atypical labor relations; secondly, independent laborers; and thirdly, "intermediate laborers," i.e., independent laborers with high subordination.<sup>37)</sup> The determination of the subordination of platform laborers varies greatly from case to case, and it is up to the law to adjust which type of platform laborer should be classified and whether they should be given certain inclined protection. However, the transformation of the framework from the binary model to the ternary model is the basis for the identification of labor relations into the law, and only by transforming the framework first can we lay a good foundation for the labor relation identification into the law.

#### (2) Raising the legal hierarchy of labor relations identification criteria

From the above, we can see that in practice, the identification of labor relationships

36) 杜连峰, "新就业形态下和谐劳动关系治理: 挑战、框架与变革", 『河南社会科学』, 2022年第2期, p.120.

37) 石超, "自主性视角下的平台经济非典型劳动者保护", 『河北法学』, 2022年第6期, p.147.

is mainly divided into two types of cases. The first one is that the employer has signed a labor contract with the laborer, and the labor relationship is established by the signing of the labor contract; the second one is that the employer has not signed a labor contract with the laborer, and the labor relationship is established according to the three criteria stipulated in the Notice, namely, personality subordination, economic subordination, and organizational subordination. The question of whether a labor relationship is established is based on the three criteria stipulated in the Notice. In terms of legal hierarchy, the Notice is a departmental regulation, and its status is lower than that of judicial interpretations and laws.<sup>38)</sup> With the development of the Gig Economy, there are more and more labor relations legal disputes, but the legal basis for hearing such cases is still the Notice, which is not convincing and not a long-term solution for the new labor relations legal disputes with rapid development and many problems. The rapid development of Gig Economy is the trend of the times, and it is necessary to raise the legal hierarchy of the identification criteria, and various levels of legal regulations can collaborate with each other to better deal with the labor relations disputes arising in the new situation.

Based on the above analysis, it is necessary to integrate the existing policy provisions on labor relations identification and raise them to the legal level, so that the criteria for labor relations identification can complement the subjective model adopted in the Labor Law, the Labor Contract Law, and the Social Insurance Law; to classify platform laborers in a specific and detailed manner; and to set out in general terms the main factors for examining whether labor relations are established in the legal provisions to form a complete set of mechanisms for determining labor relations.<sup>39)</sup> Platform laborers, for example, are identified as a typical labor relations and highly subordinate independent labor categories under labor and civil law, and special legal arrangements are made for the division of labor rights and interests protection. In social insurance law, special laws

38) 毕振华, "论劳动保障行政部门职权范围内的劳动关系判定", 『劳动保障世界』, 2020年第29期, p.4.

39) 张弓, "平台用工争议裁判规则探究--以《关于维护新就业形态劳动者劳动保障权益的指导意见》为参照", 『法律适用』, 2021年第12期, p.89.

applicable to platform laborers should be arranged to include them in the social insurance coverage regardless of whether they are identified as atypical labor relations or highly subordinate independent labor relations. Even for independent laborers, social insurance for residents should be used as a backstop. In this way, the identification of labor relations can be adjusted at the legal level by adopting specific, general, or enumerated methods in the Labor Law and other laws, so as to strengthen the adaptability of the law to social development and finally realize the dynamic adjustment of the scope of application of labor relations identification standards.<sup>40)</sup>

## **2. Taking the factual consent of labor as the basis for establishing labor relations**

In many cases of labor relations identification, the platform companies deny that they have implemented measures such as supervision and control over the laborers, trying to reduce the personality subordination between the laborers and the company, and thus denying the establishment of labor relations.<sup>41)</sup> Moreover, platform companies often try to avoid the establishment of labor relations and reduce employment costs by signing cooperation agreements, agency contracts, or contracting contracts with platform laborers. Although such contracts signed between platform companies and laborers do not violate the mandatory provisions of laws and administrative regulations, the legal relationship established by such contracts is not consistent with the real legal relationship. Therefore, in order to prevent platform companies from deliberately avoiding the establishment of labor relations with laborers, when determining what kind of legal relationship between platform companies and laborers should exist, we should not only look at what kind of contract the two sides have signed but should strictly consider the true consent of both sides and combine the relevant legal facts. In determining the true consent of both sides, three levels should be considered: the name of the contract; the terms of the contract; and the labor facts.<sup>42)</sup> When the

40) 孟现玉, "平台经济下劳动关系认定标准的重塑", 《河南财经政法大学学报》, 2018年第3期, p.88.

41) 胡磊, "平台经济下劳动过程控制权和劳动从属性的演化与制度因应", 《经济纵横》, 2020年第2期, p.40.

consent of the contract name conflicts with the consent of the contract terms, the consent of the contract terms should be used as the basis for judging the legal relationship between the two sides. When the consent of the contract name conflicts with the consent of the labor facts, the consent of the labor facts should be used as the basis for judging the legal relationship between the two sides. When the consent of the contract terms conflicts with the consent of the labor facts, the consent of the labor facts should also be used as the basis for judging the legal relationship between the two sides. In the event of a conflict between the agreement of the contract terms and the agreement of the labor facts, the agreement of the labor facts shall be used as the basis for judging the legal relationship between the two sides. As a result, the agreement of labor facts shall be the primary basis for judging the legal relations between the two sides in determining the labor relations between the platform company and the laborers.

### **3. Guaranteeing labor s' access to labor relations certificates**

#### **(1) Clarify the form of evidence certificates**

The Notice specifies the types of evidence certificates to prove labor relations. However, with the development of social economy, Internet technology is becoming more and more extensive, more and more enterprises are registered on the Internet, and the forms of evidence certificates become more diversified and complicated, which makes it difficult for laborers to obtain relevant certificates and thus puts them in a disadvantageous position in labor disputes. Therefore, it is necessary to clarify the forms of evidence certificates under the Gig Economy and make detailed provisions on the characteristics of each type of evidence, what should be noted, and the forms that may exist under the Gig Economy, so that laborers can have a more comprehensive knowledge of evidence certificates and can find the evidence that is beneficial to them in the vast and diverse virtual data to prove labor relations with the employer.<sup>43)</sup>

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42) 田思路, "共享用工:'狭义借调'中的三方合同构成", 『法学』, 2022年第1期, p.156.



## (2) Improve laborers' ability to obtain evidence certificates

In traditional labor relations, because the Internet technology is not yet mature, these certificates are often presented in paper form, which is more homogeneous and easier for laborers to obtain. However, with the advent of the Gig Economy, Internet technology is becoming more and more extensive, and enterprises are more and more dependent on the Internet. Therefore, more and more enterprises register and keep the certificates of labor relations with laborers via the Internet,<sup>44)</sup> such as attendance records. Under the employment mode of the Gig Economy, the way of attendance signing tends to be diversified, and it is not necessarily necessary to do it on site, and it is more convenient to sign in with one click on a cell phone. After signing in with cell phones, laborers often quit the page, which makes it difficult to save the records and retrieve them when they are needed. Therefore, it is necessary to improve laborers' ability to obtain evidence certificates, make them aware of the importance of evidence certificates in their daily work training, understand the forms of evidence certificates under the Gig Economy, and pay attention to the preservation of evidence certificates in their work.

## VI. Conclusions

With the rapid development of the Gig Economy, the new employment mode is being updated and changed continuously, and the platform economy has become inclusive and open, and the new economic mode mainly based on the platform economy has influenced every aspect of social life. In this context, the emergence of platform laborers is also characterized by a new mode of employment, and the problem of determining the labor relations of this new group of laborers has gradually appeared in the public eye and become a legal issue that needs to be solved. As it is

43) 董保华, "我国劳动关系解雇制度的自治与管制之辨", 『政治与法律』, 2017年第4期, p.112.

44) 刘慧慧, "探究'互联网+'对现代企业经济管理创新模式的影响", 『上海商业』, 2022年第4期, p.152.

difficult to define the labor relations of platform laborers, the lack of social security for them has led to a series of social problems and conflicts. Each country has its own applicable theory for the labor identification of platform laborers. In China, since the Labor Law and the Labor Contract Law do not clearly define labor relations, it is more difficult to determine the labor relations of platform laborers, and the labor disputes of platform laborers inevitably increase, and the different decisions of the courts in deciding such cases are also more controversial. This paper conducts an analysis focusing on the identification of labor relations between platform companies and platform laborers from the theoretical background, the current situation and the current dilemma faced by the development of platform laborers and puts forward relevant suggestions and ideas for the identification of labor relations of Chinese platform laborers. The paper puts forward the viewpoint of the legal identity identification criteria and its judgment factor group of sharing economic service providers with personality subordination as the core and organization subordination and economic subordination as the auxiliary. By analyzing whether a "third category of laborers" can be introduced, the development and identification of labor relations are analyzed comprehensively, and the reform is advocated from two aspects: theory and practice. It is important to keep up with the times to update the laws and regulations and improve the relevant legal system and mechanism so that the legal rights and interests of Gig Economy service providers can be effectively protected by law in real reality.

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## ■ 국문초록

## 중국 공유경제상 노동관계 인정에 관한 연구

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공유경제는 사람들의 삶에 많은 편익을 가져다주었고, 그 경제 형태에서 근로 형태가 점점 다양화·유연화되면서 '플랫폼+개인'이라는 근로 형태가 보편화됐다. 노동 관계는 가장 기본적인 사회적 관계 중 하나이며, 이러한 새로운 형태의 노동자와 사용자 간의 관계, 즉 노동자와 플랫폼 간의 관계도 변화하여 사용자와 개인 간의 노동분쟁이 빈번히 발생하게 되었다. 둘 사이의 노동관계를 어떻게 인정할 것인지, 새로운 상황에서 노동자의 합법적인 권익을 어떻게 더 잘 보장할 것인가가 매우 중요한 문제가 되었다. 본 논문은 공유경제 플랫폼 노동자와 전통적인 노동자의 다른 법적 특징을 분석하고, 노동관계를 '유연성'과 '안전성'의 관점에서 수립한다. 노동권 보호 방안의 다양화를 이루어야 한다는 입장에서 서로 다른 인터넷 플랫폼의 새로운 비즈니스 모델에 대해 다양한 방식으로 설계된 새로운 유형의 인터넷 노동자의 법률관계 인정기준을 검토한다. 플랫폼 회사와 플랫폼 노동자의 권리와 의무를 합리적으로 배치하고, 적절한 노동관계 인정기준을 마련하는 것은 공유경제 발전에 도움이 될 것이며, 많은 일자리를 창출할 것이다. 또한 플랫폼 노동자에 대한 합법적인 권리 기반을 보장할 것이다. 이러한 기초 위에서 연구와 실천을 강화하고, 인터넷 플랫폼 노동 중 노동관계 법률의 발전과 완성을 추구해야 한다.

• Key Words 공유경제 ; 노동관계 인정 ; 인터넷 계약직 ; 새로운 노동관계 ; 종속성

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