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The Preferential Protection of Incomplete Labor Relations and Its Future Legislative Approach

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Abstract: ***Incomplete labor relations are not a definite legal relationship, but a spectrum of relationships between labor relations and civil relations. The concept of incomplete labor relations was proposed in official documents by the Ministry of Human Resources and Social Security and other departments, but it still leaves many issues such as the path, principles, content, and measures of preferential protection to be further studied and explored. The article argues that the preferential protection of incomplete labor relations should choose the "Civil Law +" approach, focusing on protecting the rights related to the basic survival of workers and their basic social rights. At the same time, the content of the preferential protection is not one-size-fits-all, and should reflect differentiation according to specific situations. In the long run, the trend of incomplete labor relations is bound to grow, and it is inevitable that the dichotomy of labor relations will be broken. At the same time, the bundling of social security and labor relations also needs to be dismantled, and the social security system should be transformed into a public service that everyone can enjoy.***

Keywords: Incomplete labor relations, Quasi-employees, Third-type labor, Preferential Protection**.**

1. Introduction

On July 16, 2021, the Ministry of Human Resources and Social Security, the National Development and Reform Commission, and six other departments jointly issued the "Guiding Opinions on Maintaining the Labor Security Rights and Interests of Workers in New Employment Forms" (hereinafter referred to as the "Guiding Opinions"), proposing the concept of "not fully conforming to the establishment of labor relations" in response to the labor rights protection issues in network platform employment. From this point on, China began to officially recognize the existence of a transitional third type of employment relationship beyond labor relations and civil relations. According to the terminology of the "Guiding Opinions," the academic community simply refers to it as "incomplete labor relations." The formal appearance of the term "incomplete labor relations" in national departmental documents has far-reaching implications. Before this, when dealing with employment relationships in network platform employment that were neither equal employment relationships nor labor relations, the common practice of theory and practice departments was to try to argue that they were either labor relations for protection or civil relations for equal protection. The "Guiding Opinions" opened a door and pointed out a direction, but it also left many questions such as the nature of incomplete labor relations, whether they need preferential protection, if so, in which matters should they be protected.

2. The Nature of Incomplete Labor Relations

In order to address the chaos in the employment of network platforms under the rapid development of the network platform economy, the "Guiding Opinions" drew two lines for network platform employment according to labor relations and civil relations, "in accordance with the establishment of labor relations" and "individuals relying on network platforms to independently carry out business activities and engage in freelance professions." The former is a labor relationship, managed by labor law; the latter is a civil relationship, adjusted by civil law. However, the innovation of employment forms on the Internet platform has led to a large number of new employment relationships between the two lines, which are the incomplete labor relations.

2.1 The Background of the Introduction of Incomplete Labor Relations

The "Guiding Opinions" did not clearly define incomplete labor relations, only describing them as "not fully conforming to the establishment of labor relations but the enterprise carries out labor management for workers." From this, we can judge that in incomplete labor relations, the employer has carried out labor management for workers, but it does not reach the degree of management required for labor relations. So what is the degree of management required for labor relations? The standard for this question is relatively clear, which is that workers have personal and economic dependency on the employer. However, in the employment model under the new business model of the Internet platform, personal and economic dependency have been deliberately weakened. Taking the famous "Flash Delivery Case" as an example, the defendant company emphasized that the "Cooperation Agreement" signed with the flash delivery personnel clearly stipulates that the relationship between the two parties is a business cooperation relationship, not a labor relationship. It is also stipulated that flash delivery personnel can decide whether to take orders independently, and the proportion of fees charged by the network platform operating company is not high, only 20%. This part of the fees is the network platform information fee stipulated in the contract, and the relationship between the two parties is an intermediary contract relationship between equal subjects. However, the court believed that the employer had made requirements for the conditions of being a flash delivery person when recruiting, and had explained the work content, methods, income calculation, incentive measures, rewards, business training, etc., which is in line with the characteristics of recruitment rather than the examination requirements of an intermediary for the contracting person. At the same time, the defendant company also issued a badge with identity recognition function for the flash delivery personnel. When working, the

flash delivery personnel wear the badge to provide services, representing the defendant company, and the beneficiary of the reputation resources accumulated in the market is also the defendant rather than the employee himself. The badge also lists in detail the specific requirements for the service process of the flash delivery personnel, indicating that the defendant company manages the service process of the flash delivery personnel, all of which indicate that there is personal dependency between the flash delivery personnel and the defendant company. From the perspective of economic dependency, in each contract, the proportion of fees charged by the network platform operating company is indeed not high, but this proportion is not an important basis for judging the nature of the fees. In fact, the main revenue model of the Internet platform is to obtain profits through a large number of services, and essentially, the part of the fees collected is paid to the defendant company by the customer, not to the flash delivery personnel. There is no independent service contract between the flash delivery personnel and the customer. Therefore, the flash delivery personnel also have economic dependency on the company. However, the above explanation is not entirely convincing. Especially in terms of personal dependency, even if the flash delivery personnel can decide whether to take orders independently, and there are no work quantity requirements, no online time requirements, no service area requirements, and they can arrange their work and rest time independently, it is still forcibly interpreted as "once they take orders, they need to complete the service according to the company's specified work process," thereby arguing that there is personal dependency, which makes people feel a bit like explaining for a certain purpose. The "New Employment Form Network Platform Employment Legal Relationship Nature Research" project group of the First Intermediate People's Court of Beijing pointed out, "If the network platform operator only supervises and instructs the service quality provided by the practitioners to the customers to a certain extent, it should be allowed to exist" [1]. Another survey by the judicial practice department found that "in cases involving occupational injuries, judges tend to determine that there is a labor relationship; in other cases, they tend to determine that there is no labor relationship" [2]. In fact, this case did occur before the "Guiding Opinions" were issued, and now it seems more appropriate to classify it as an incomplete labor relationship.

2.2 The Basis and Definition of Incomplete Labor Relations

However, the above case still gives us other meaningful insights. First, even if the contract form between employees and employers has explicitly excluded the labor relationship, the judgment of the employment relationship actually follows the "fact first principle," that is, the principle of judging based on the employment facts. When it conforms to the characteristics of the labor relationship, it is a labor relationship, and the contract parties have no right to exclude the labor relationship by agreement and "calling a stag a horse". This also shows that the confirmation of the labor relationship is regulated by labor standard law and does not belong to the category of the parties' autonomy of will. Second, there is no clear standard for judging dependency. Incomplete labor relations can exist at any point between civil relations and labor relations. When it is closer to the civil relations end, the content of protection is less; when it is closer to the labor relations end, the need for preferential protection is even greater.

So, by what criteria do we determine that a certain employment relationship is an incomplete labor relationship? First, if there is no economic dependency but there is personal dependency, this is the non-standard employment such as labor dispatch, which does not need further judgment and belongs to the category of labor relations. On the contrary, if there is no personal dependency or the personal dependency is very weak, but the economic dependency is obvious, as revealed by the conclusion of the analysis of the flash delivery case in the previous text, this kind of employment relationship is an incomplete labor relationship. Therefore, we can define incomplete labor relations as follows: employment relationships with economic dependency but without personal dependency, or with weak personal dependency.

But we still can't help asking, what is the basis for the preferential protection of civil relations that should be regulated by the market? Understanding the true meaning of this basis may help us find the key to solving the protection of incomplete labor relations.

2.3 The Essence of Preferential Protection for Incomplete Labor Relations

At the beginning of labor becoming a commodity, there was no special protection for this special commodity, and the employment relationship was still regulated by civil law. It was because of the relative shortage of job positions and the relative surplus of labor resources that made the pricing power held by the employer side, and the employer used information asymmetry and the right to use and manage labor to reduce the cost of labor, thereby legally and formally legitimizing the exploitation of workers. At this point, it was no longer possible to adjust the unfair employment relationship on a case-by-case basis, and it was necessary for the public power to intervene in advance to macro-control the unfair employment relationship. In contrast, the civil relationship with management has long existed, such as the contract work relationship and domestic service contract relationship. Although there is a relationship of management and being managed, the freedom of choice of the contractor and the domestic service provider is relatively high, and their overall bargaining power in the market is relatively strong, and their basic human rights can be guaranteed. There is no need for public power to intervene and intervene in advance. Through this process, we can see that dependency due to management is not a sufficient reason for preferential protection of workers. Only when this dependency seriously distorts the equality of the legal relationship and constitutes systematic harm to one party, especially when this dependency affects the basic rights such as survival of one party, is there a need for preferential protection.

Understanding the underlying logic of preferential protection, we can see that whether it is the preferential protection of workers in labor relations or the preferential protection of incomplete labor relations, the deeper reason is not "dependency," but the serious dependency that leads to one party's serious dependence on the other, so that the interests of

the dependent party are systematically harmed, especially when this dependency affects the basic rights such as survival of one party, there should be preferential protection. There is no substantive difference in the protection of the two types of relationships, the only difference is the content and extent of preferential protection. At the same time, we also need to point out that the so-called preferential protection is essentially a priori protection, which is a systematic compensation at the institutional level, because even in civil relations without dispute, as long as one party's interests are damaged, legal relief can be claimed afterwards. Therefore, preferential protection should not be the exclusive domain of labor law, and scientific preferential protection should not only have one kind of "preferential protection policy package," but should be set according to specific dependency.

3. Reference to Overseas "Third-Type Labor" Protection

Incomplete labor relations have different names in different countries, different backgrounds of emergence, and also have different coping measures. The concept of incomplete labor relations in China is proposed in the context of network platform employment, aimed at protecting new employment forms such as couriers, express delivery personnel, and ride-hailing drivers who rely on the Internet platform. The problem to be solved is that the rights of these new employment forms are too weak under civil law protection and too strong under labor law protection, requiring a relatively moderate approach as a buffer, and also to fill the gap between the autonomy of civil relations and the integrated preferential protection of labor relations. In fact, theoretical research and practical exploration of legal relations between the two abroad have also begun, and some developed countries or international organizations also have their own similar "incomplete labor relations," which we will introduce and compare.

3.1 Modes of Protection

(1) Third-Type Labor Forms: The Open Attitude of the European Union

The third-type labor forms recognized by the European Union are somewhat similar to the incomplete labor relations in China. The names vary among the member states of the European Union, but they can all be collectively referred to as third-type labor forms, such as "quasi-employees" in Austria and Germany, "economically dependent self-employed workers" in Spain, and "quasi-subordinate self-employed workers" in Italy. The European Commission has stated that it has no intention of creating a third-type labor form at the EU level, but respects the practices of each member state domestically [3]. In June 2021, the European Union published the "Second Phase Consultation Report on Possible Actions Addressing the Challenges Related to Working Conditions in Network Platform Work," recognizing that some member states have created an intermediate or third-type form for individuals who are economically dependent on a single customer or "employer" and are between workers and self-employed, in order to provide labor and social protection [4].

(2) Quasi-Employees: The German Version of "Incomplete Labor Relations"

Germany's quasi-employee system has a high degree of consistency with our incomplete labor relations. As early as 1926, Germany first defined quasi-employees in law, and has gradually improved it, ultimately clarifying three elements: (1) Quasi-employees are not workers, and their relationship with the contracting party does not have personal dependency; (2) Quasi-employees must have economic dependency on the contracting party, and their remuneration from the contracting party constitutes the main source of their income; (3) Protection is needed according to specific circumstances. It should be noted that the third requirement here is not a necessary result of the first two, but a parallel condition, which also reveals that a weak party with economic dependency does not necessarily need preferential protection, as it also depends on the specific circumstances that may cause damage to their rights and interests.

(3) Non-Employee Workers: The British Version of "Incomplete Labor Relations"

The United Kingdom originally divided workers into employees and self-employed based on whether there is an employment contract. Employees are protected by labor law due to being under the "sufficient control" of the employer, while self-employed workers are not. However, after the 1970s, "a large number of self-employed workers' services were embedded in the business of others. These people do not meet the definition of employees but have protection needs" [5]. Therefore, the concept of "worker" was introduced in the "1971 Trade Union and Labor Relations Act" as a higher concept of “employee”. Thus, in the UK, there are employee workers and non-employee workers. The relationship between non-employee workers and the contracting party is similar to incomplete labor relations. The main reason why quasi-employees are not employees is that they have personal independence, which is reflected in their "right to decide on the results and progress of work, which is the fundamental reason why quasi-employees cannot be fully included in the scope of labor law adjustment" [6].

Similar to the UK, the International Labor Organization (ILO) refers to the form of work that is in the middle ground between employment and self-employment as "dependent self-employment" and preferential protection towards it. The practices of the UK and the ILO suggest that, first, incomplete labor relations are not only found in employment labor but may also exist in other civil relations, such as domestic workers in contract work who are overly dependent on a single contracting party, or individual workers who are seriously dependent on the supply of raw materials or product sales contracts from the other party of the contract, all of which may have economic dependency. Secondly, it once again indicates that economic dependency is not a sufficient condition for receiving preferential protection but only a necessary condition, and it also needs to be determined according to specific circumstances.

3.2 Paths of Protection

In the choice of paths for preferential protection, for quasi-employees or non-employee workers, civil law adjustment cannot provide effective protection, and using labor law

protection will harm the interests of the relative party, so it is necessary to seek a middle path between the two. There are two paths for preferential protection: one is "labor law -" which means to dismantle the "preferential package" of labor law's preferential protection on the basis of applying labor law and subtract some preferential items; the other is "civil law +," which means to still adjust based on civil law and add mandatory norms. The latter path is in the same direction as when labor law separated from civil law, and it is also more conducive to operation, and is adopted by most countries.

3.3 Content of Protection

In terms of the content of preferential protection, most countries focus on some provisions in the labor standard, including safety and health, working hours, work injury insurance, minimum wage, rest and vacation, etc. Of course, these preferential protections are not applicable as a whole, but are selected according to the situation, such as the EU's legislative plan focuses on improving the working conditions of network platform workers, and Canada's legislative amendments focus on minimum wage, labor protection, and collective rights, etc.

3.4 Objects of Protection

In terms of the objects of protection, countries also have choices. French legislation mainly protects the employment in transportation and food delivery platforms, US legislation mainly targets transportation platforms, and Italian legislation specifically targets food delivery rider platforms. At the same time, in order to avoid the generalization of preferential protection, some countries have also set thresholds for protection, such as the absolute value of income, the proportion of income in personal total income, etc.

4. Discussion and Suggestions

Before and after the issuance of the "Guiding Opinions," there has been ongoing theoretical research and practical exploration by scholars and the judicial practice community on how to protect the omitted part of platform practitioners in China. Some scholars advocate that the existing non-standard labor relations in China's labor law can be slightly modified to solve the problem [7]; a similar view also believes that the traditional concept and determination theory of labor relations have strong elasticity and adaptability, and they are not completely outdated, and can still accommodate network platform employment relations, and China does not need to formulate special rules for the identity of network platform workers at present [8]; some scholars take the courage to completely solve the problem, and believe that China should adopt a "separate chapter" system in labor standard legislation, and build a three-part system of labor relations [9]; some scholars look to the future and suggest that China should build a legal protection system composed of labor law, civil law, and social insurance law, and the current focus on practical problems should be to moderately expand the determination of labor relations and cautiously choose protective measures, and strengthen the responsibilities of platform enterprises [10]. The above views and suggestions all have their rational components. On this basis, the author further believes that the protection of incomplete labor relations in China needs to be considered at both short-term and long-term levels. The short-term focus is to explore the resolution of legal application issues, which is the exploration period; the long-term goal is to establish a corresponding legal standard system, which is the (system) construction period.

4.1 The "Civil Law +" Pathway for Preferential Protection

During the exploratory period, it is necessary to gradually enrich the "toolbox" for the preferential protection of incomplete labor relationships. At this stage, the author believes that any expansion of legal rules should be approached with caution. It is not advisable to forcibly include parts that should belong to incomplete labor relationships into labor relationship management by lowering the standards for judging labor relationships. Such a "flood irrigation" approach to legal application, while beneficial in some ways, can be detrimental to the rule of law in China, which is still in its growth stage. The solution should still return to the track of the rule of law, adhering to the current dual structure and exploring the scope of preferential protection for the intermediate state along the "Civil Law +" approach. The reason for choosing the "Civil Law +" path rather than the "Labor Law -" path is that the rigidity of labor law is not suitable for the characteristics of the exploratory period. The reduction of labor standards requires legislative authorization, and reducing individual labor relationships in labor law, which already has a civil nature, loses its exploratory significance. "Civil Law +" is a gradual path of preferential protection for parts of interests that urgently need protection, breaking through the problem during the exploratory stage and then resolving it through legislation when conditions are ripe, which is more prudent. The exploration of Western countries has also proven that the conditions for directly legislating to establish a "labor relationship - incomplete labor relationship - civil relationship" trinary structure system are not yet in place. The reason is that there are still disputes in the theoretical circle about incomplete labor relationships, the judicial practice is also moving forward in exploration, and the innovation of employment forms continues.

4.2 Content of Preferential Protection

The essence of incomplete labor relations is still a civil relationship, but this type of civil relationship requires preferential protection because dependency leads to systematic damage to the interests of the weaker party, and they themselves are unable to resolve it. If there is no concern for the loss of interests, it is also appropriate to adjust according to civil norms, such as in the United States, half of the states have legislated on ride-hailing, all in different ways denying that ride-hailing drivers are employees. In fact, whether it is Spain's "economically dependent self-employed workers" or Italy's "quasi-subordinate self-employed workers," they are not a form of labor relationship parallel to employees and self-employed workers, but belong to a type of self-employed worker. Nevertheless, these "self-employed workers" can still obtain rights in terms of remuneration, occupational safety, and mandatory insurance [11].

So, what should be preferential protected for this group that falls between labor relations and civil relations? Behind the economic dependency, the damage to rights and interests can be inferred, and our task is to protect the basic survival

interests of one party from being harmed by the other due to economic dependency, and to avoid having to make concessions on some personal rights and social rights due to economic dependency. Specifically, in terms of economy, the minimum wage level should be protected. Of course, since practitioners still enjoy a great degree of freedom to work or not to work, the minimum wage level here is not a wage floor, but a "density" of unit time wages, which is a scientific wage calculation issue. In terms of personal rights, in addition to the right to labor safety, the basic rest rights of practitioners also need to be protected. Similarly, due to the practitioners' greater freedom to "skip work," the basic rest rights at this time are reflected in the fact that when practitioners need to maintain their own basic survival, the intensity of labor will not be so great as to make them exhausted. This issue can still be returned to the scientific nature of algorithms and management systems. In terms of social rights, practitioners should have the freedom to associate, join trade unions, and reflect their own demands. Although practitioners do not belong to the category of workers, they can still enjoy necessary social security, such as occupational injury protection, to share risks and stabilize future expectations.

4.3 Guarantee of Preferential Protection

(1) Individualized Preferential Protection Reduces Employers' Responsibility

The above content of preferential Protection is only a general list. When dealing with the specific employment relationship between employers and employees, it is necessary to make choices according to specific situations, such as when the income level is high, the protection of the minimum wage is not necessary; when the economic dependency of practitioners is low and there are other higher proportion incomes, the protection of the minimum wage, maximum working hours, etc., may be unnecessary, and only the corresponding occupational injury protection is needed. This kind of personalized a la carte preferential Protection can reduce or avoid unnecessary pressure on the employer, and is more willing to cooperate with the preferential protection of incomplete labor relations.

(2) Leading Enterprises or Industry Associations Form a Leading Trend

Internet platform employment has the characteristics of industry, and leading enterprises or industry associations in the industry can take the lead in the protection of incomplete labor relations, take the lead in formulating industry standards, or introduce institutional models or templates for preferential protection, forming a "wild goose mode" for the protection of incomplete labor relations in the industry.

(3) Procedural Measures Ensure the Implementation of Preferential protection

First, establish a collective bargaining system. China's trade union system has its own unique advantages, that is, strong inclusiveness and a sense of overall situation. Although practitioners of incomplete labor relations do not belong to the category of workers in labor law, this does not affect their right to associate and join trade union organizations, because we have a system foundation for groups other than workers to join trade unions. It is only necessary to consider whether it is more appropriate for practitioners of incomplete labor relations to join industry trade unions, regional trade unions, or to establish their own enterprise trade unions. Our suggestion is to prioritize joining industry trade unions, which is conducive to the realization of collective bargaining rights. The advantage of the trade union's sense of overall situation is reflected in the fact that it not only protects the immediate rights and interests of practitioners but also takes into account the overall and long-term interests. Its higher position even provides support for the formulation of relevant laws in the future. Second, apply the provisions of labor law on the reversal of the burden of proof and the advance payment of wages in labor disputes, such as the advance ruling system stipulated in Article 43 of the "Labor Dispute Mediation and Arbitration Law" and the system of recovering labor remuneration stipulated in Article 109 of the "Civil Procedure Law."

(4) Use the Formulation of Separate Laws to Fix the Exploration Experience in Mature Fields

Both in China's actual situation and in the practice abroad, there are cases where a single field is regulated first, such as regulations in the catering industry, express delivery industry, and freight industry. Therefore, it is recommended that when conditions are ripe, a separate law can be considered to regulate the protection of incomplete labor relations in a single field, and gradually establish a complete regulatory system.

5. Conclusion

The challenge of network platform employment to the "labor relations-civil relations" dichotomy of labor is obvious. In the long run, the advancement of technology will inevitably lead to the growth of incomplete labor relations, and the dichotomy of labor relations will be broken, and the construction period of a new regulatory system will come. Based on this, it is necessary to carry out institutional innovation in the protection of incomplete labor relations from both theoretical and practical levels: on the practical level, the feasible direction is to establish a modular protection system for employers and employees to choose from, or to provide a menu of individual protection systems for ordering; on the theoretical level, it is necessary to weaken or even break the current dichotomy of labor relations, change the current practice of overly relying on the determination of the existence of labor relations, and advocate for labor rights protection based on dependency, establishing a "holographic spectrum" from the autonomy of civil law and freedom of contract to the preferential protection of labor law, where employers and employees can choose their own contract mode at any point on the spectrum. This may be the ultimate ideal for dealing with labor relations. Correspondingly, the current focus on occupational injury and social security issues is no longer a "by-product" of labor relations. The social security system will have independence and will be available to everyone in society, becoming a truly social security.

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