

Exploration and Thinking on Identification of Work-related Injuries under the Shared-employee Mode

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Abstract. With the development of the platform economy, the sharing economy and the outbreak of the pandemic, the shared-employee mode has become more and more popular. At the same time, related issues around shared employees have gradually emerged. Therefore, we need to analyze the relevant issues arising from the prevalence of shared-employees from a legal perspective, especially the identification of work-related injuries. It is suggested that both parties make corresponding agreements to reduce conflicts.

Keywords: shared employee, work-related injury identification, foreign reference, legal regulations.

1. Questions

Affected by the coronavirus, many enterprises in China are facing an unprecedented crisis in terms of contract performance, labor and employment, and credit. Different industries are faced with two extremes. Some companies have a "labor shortage", while some companies' employees are "fleeing." In the face of difficulties, companies began to explore flexible employment models. The shared-employee mode is essentially "cross-border employment, temporary borrowing, and full use of idle labor". The adjustment of labor surplus and shortage, the employees of the unit with relatively wealthy employees will be lent to the unit that lacks work for a certain period of time. The labor relationship between the employee and the original unit, the relationship between the staff and the contract remains unchanged, and the original unit will still be responsible for the employment of the employee according to labor laws. Simply put, it is an act of seconding or borrowing employees who are temporarily unable to work for them under the condition of obtaining the consent of the wealthy employer, and finally pay the salary of the employees during this period. After the secondment is completed, the seconded personnel continue to return to the original unit to work. Highly flexible mobility, short-term contingency and diversified utilization have become its characteristics and the reasons for its popularity.

The shared-employee mode is helpful for enterprises to quickly resume production and operations, reduce business operating costs, and avoid the embarrassing situation of no work and stagnant income for workers. It has been widely adopted by employers during the epidemic. As a new mode of flexible employment, the shared-employee mode has many differences from traditional labor employment in terms of wage payment, supervision and management, and has changed the close subordination of traditional labor relations. In the shared-employee mode, there is a separation between the employing unit and the employing unit. While optimizing the allocation of human resources, it also exposes workers to great risks. For example, whether a traffic accident occurs on the way to and from get off work by the employing unit can be identified as work injury. Due to the inconsistency between the employer and the actual employer, who shall bear the responsibility for work-related injuries? The laborers themselves are on the weak side. In the case of disputes between the employers, it is more difficult for the laborers to defend their rights when faced with two powerful subjects. [1]China's current labor laws and regulations have made relevant provisions on the rights and obligations of part-time employment, labor dispatch and other flexible employment, and have carried out effective legal protection. However, the new flexible employment model of shared employment faces the dilemma of missing legal norms. How to identify workers' work-related injuries in shared employment and how to remedy and maintain their rights require active actions in the theoretical norms.

2. Deconstruction of the Legal Relationship of the Shared-employee Mode

At present, labor laws and regulations do not include the employment method of sharing employees. In essence, it is a new type of flexible employment form that adjusts the surplus and shortage of employees between enterprises lacking workers and companies with surplus employees, so as to realize the temporary flow of employees between enterprises and achieve the redistribution of human resources. However, the shared-employee mode is different from labor relations and labor dispatch, which are already protected by labor law norms. According to the existing labor law theory and employment practice, there are three main modes of shared employment.

(1) The mode of cooperation between enterprises. The main manifestation of this mode is: On the basis of soliciting the wishes of the employees, the enterprise and the laborer sign a tripartite agreement with each other, and one employer lends the employee to another employer, and the employee completes the task according to the requirements of the employer and accepts it at the same time. During the epidemic, Xibei, youth restaurants helped Hema using this model. The employer Hema signs an agreement with the accepting unit Xibei. Hema pays the fee to Xibei, and Xibei repays the fee paid by Hema to shared employees. According to the Notice on Doing a Good Job in Shared Employment Guidance and Services issued by the Ministry of Human Resources and Social Security, under this model, shared employment does not change the labor relationship between the worker and the original employer. In addition to the labor relationship between the employer and the employee, there is a cooperative relationship between employers. The rights and obligations between the two parties are clarified through the cooperation agreement signed between the enterprises. At the same time, the employee provides labor services for the employer. There is a labor relationship between them.

(2) The third-party platform-based cooperation model. The main features of this model are that the employer signs a service contract with a third-party platform of a human resources service company (such as the "Blue Ocean" employment platform launched by Alibaba Group during the epidemic), and the third-party platform signs a personnel outsourcing service agreement with the employer. There is no direct legal contractual relationship between two employers. Shared employees do not receive labor remuneration directly from the employer. All labor remuneration payments are made through the third-party platform. [2]In this model, although four parties are involved, the labor relationship of the shared employees still belongs to the employer, and there is no direct agreement between the shared employees and the third-party platform. Once the agreed working hours in the service agreement are completed, the shared employees still have to return to work for the employer.

(3) Direct recruitment mode. The main features of this model are: the accepting unit communicates with the employer in advance, recruits the employees who are waiting for the job or temporarily voluntarily shut down the employee in the employer, and signs a short-term labor contract or labor contract between the two parties. In the direct recruitment model, if the employer and the employee sign a short-term labor contract, then a short-term labor relationship is formed between the two parties. Even if the contract between the borrowing unit and the employee is a labor service contract, it does not mean that the two parties must be in a labor service relationship. Because the representation of the contract name will not affect the identification of the substantive legal relationship between the two parties, instead the labor relationship should be judged according to the work performed by the employee. [3]In this case, a dual labor relationship will be formed. Article 8 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Labor Dispute Cases (3) stipulates that employees who have been suspended without pay, employees who have not reached the statutory retirement age, and who have been laid off. If a person waiting for a post or a person who has a long-term leave for business suspension, has a labor dispute with a new employer and files a lawsuit in the people's court according to law, the people's court shall deal with it as a labor relationship. Dual labor relationship or multiple labor relationship is actually a labor relationship between one laborer and two or more employers. The law does not clearly state that it is illegal under the dual employment relationship. It's just that the employer is legally allowed to dismiss the labor relationship. One of them is that if you engage in multiple jobs that affect your first job, you

can be dismissed in accordance with the law. The dual labor relationship has been recognized from the previous negation in China's law, so the direct recruitment mode is considered a reasonable recruitment method in China's law.

3. Determination and Analysis of Factors for Identification of Work-related Injuries

The identification of work-related injury is an administrative confirmation of whether an employee is injured due to an accident (or suffers from an occupational disease) as a work-related injury or is deemed to be a work-related injury. [4]The identification of work-related injuries is a necessary step for workers with work-related injuries to obtain the benefits of work-related injury insurance, and it is the main focus in work-related injury disputes. The identification of work-related injuries is composed of several factors such as workplace, working hours, and reasons for work. Therefore, through the determination and analysis of the identification of work-related injuries in traditional labor relations, it will help to further explore the standard of work-related injury identification in the shared-employee mode under complex labor legal relations.

The factors for the identification of work-related injuries are mainly stipulated in Articles 14, 15 and 16 of the Regulations on Work-related Injury Insurance, of which the first item of Article 14 stipulates the basic factors for the identification of work-related injuries, that is, "in the workplace" "injury from work-related accidents" shall be identified as work-related injuries during the time and within the workplace, and the work-related injuries identified in items 2 to 7 are based on the first item and supplement the basic elements of work-related injury identification. Article 15 stipulates three situations that can be regarded as work-related injuries, and Article 16 stipulates three situations that cannot be identified as work-related injuries or deemed work-related injuries. Based on this, it can be seen that the identification of work-related injuries mainly includes factors of working hours, workplaces, and reasons for work, as well as subjective factors, that is, if a worker intentionally causes an accident injury, it cannot be identified as a work-related injury, and it is a special case that is excluded from the identification of work-related injuries. At the same time, Article 18 of the Regulations on Work-related Injury Insurance stipulates that when submitting an application for work-related injury identification, it is necessary to submit "documents proving the existence of a labor relationship (including a de facto labor relationship) with the employer". The existence of a labor relationship is usually a precondition for discussing the factors for identifying work-related injuries. However, there are also some special circumstances. For example, in the labor and social security administrative management cases of Lin Jiquan and Chongqing Xingping Construction Labor Service Co., Ltd., when there is illegal subcontracting or subcontracting, whether the two parties have a labor relationship can make compensation for work-related injuries. From this case, we can analyze that the purpose of the state's establishment of the work-related injury insurance system is to ensure that employees who suffer from accidents at work or suffer from occupational diseases obtain the employer's obligation to pay all work-related injury insurance. In Article 3, Paragraph 4 of the Provisions on Several Issues, the employer violates the law, that is, when there is illegal subcontracting or subcontracting, it is not appropriate for the employer to assume the liability for work-related injury insurance. From the perspective of interests, corresponding supplements have been made to the regulations on work-related injury insurance to make it more fair and reasonable.

4. Abroad Reference to the Situation of Work-related Injuries in the Shared-employee Mode

The United States tends to divide employees into two types: employees and independent contractors. Employees are obviously under the protection of US labor laws. On the contrary, independent contractors are not protected by labor laws in the United States, including work-related

injury insurance. In this case, capitalists are more inclined to turn more workers into independent contractors, so as to reduce their responsibilities, and also make many workers at the bottom lose the protection of labor laws; from the perspective of the United Kingdom, in the Around 2010, temporary employees already accounted for 6 % of the total number of employed persons, among which England adopted the " control standard " to check whether there was a labor relationship. For example, in *Mersey Docks and Harbour Bd v Coggins and Criffith (Liverpool) Ltd*, the temporary labour dispatch agency was found to be liable, and in *Denham v Midland Employers' Mutual Assurance Ltd*, the employer of last employment was found to be to be responsible. These two cases also show that the UK places more emphasis on the strength of the employer's control over actual workers rather than contractual agreements.

The shared employees in each country meet the actual employment needs of each country. However, according to the characteristics of China's industrial and commercial system, the work-related injury insurance for shared employees requires a special legal system design. For example, in Japan, there is a special accession system for work-related injury insurance[5]. In Italy, occasional labor and temporary labor are also included in social insurance. The two subjects involved in work-related injury insurance in China are the employers who pay the work-related injury insurance after paying the work-related injury insurance and also pay the corresponding labor pension according to the situation, which can also allow the employer to improve the efficiency of preventing work-related injuries. In the process of work-related injury payment, due to the flexibility of employees, it is often difficult to truly realize the distribution of work-related injury benefits. Under this situation, it is even more necessary to learn from the labor law systems of relevant foreign countries and improve the work-related injury identification system for shared employees in China, so that flexible workers in the epidemic situation can obtain due legal protection to safeguard legitimate labor rights and interests.

5. Path Construction of Work Injury Identification under the Shared-employee Mode

The legal relationship under the shared-employee mode is more complicated, and the forms of work-related injury identification and responsibility also vary. This part will discuss and study from the following three aspects.

(1) The situation where the shared employee has a single labor relationship with the original employer. Neither the mutual cooperation model between enterprises nor the third-party platform-based cooperation model in the shared-employee mode has changed the labor relationship between the original employer and the worker. Based on the premise of not changing the labor relationship, it can be considered that the shared employee being dispatched to work in the accepting employer is a duty behavior, and the shared employee's work in the accepting employer can be regarded as completing the work tasks arranged by the employer. In the case of working hours, it can be recognized as a work-related injury. The third paragraph of Article 43 of the "Regulations on Work Injury Insurance" stipulates that "if an employee is injured by a work-related accident during the secondment period, the lending enterprise shall bear the liability for work-related injury insurance, but the lending enterprise and the seconding enterprise may agree on compensation methods". Shared employees also belong to employees. According to this regulation, if a shared employee suffers a work-related accident during the work period of the accepting employer, the original employer shall be responsible for applying for work-related injury identification and assuming the liability for work-related injury insurance, and the accepting unit shall provide assistance.

(2) Circumstances in which it is stipulated in the agreement that the employer shall bear the responsibility for work-related injuries. In the mutual cooperation model between enterprises, the enterprise and the worker usually agree on the relationship of rights and obligations between them through a tripartite agreement. If the original employer and the accepting employer have agreed on the mode of undertaking work-related injuries in the agreement, is this agreement valid? First of all, the agreement does not violate the mandatory provisions of the law. Article 7 of the original Ministry

of Labor's "Opinions on Several Issues Concerning the Implementation of the "Labor Law of the People's Republic of China": "The employer shall sign with the personnel who have been borrowed by foreign units for a long time... Labor contract, but during the period of borrowing and schooling, some relevant clauses in the labor contract may be changed through negotiation between the two parties." With reference to this provision, the original employer and the accepting employer can adjust the relevant content in the labor contract. Secondly, according to the results of the search of relevant cases across the country, it is usually determined that the contract is a valid contract. Although the contract is valid, it is difficult to accept the employer's payment of the work-related injury insurance if the insurance account connection and transfer is inconvenient and the payment of the work-related injury insurance can only be realized within one year. In order to protect the legitimate rights and interests of laborers, in judicial practice, the original employer may be required to first assume the liability for compensation from work-related injury insurance, and then claim compensation from the accepting employer according to the agreement.

(3) Situations where there is a dual labor relationship. In the direct recruitment mode, the labor relationship between the shared employee and the original employer has not been terminated, and a de facto labor relationship will be formed with the accepting employer at the same time. There is no agreement on the subject of work-related injury liability, and who should be held responsible for the work-related injury accident of shared employees is prone to prevarication. At this time, it should be in accordance with Article 3, paragraph 1 of the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Cases on Work Injury Insurance and Article 1 of [5]the Opinions of the Ministry of Labor and Social Security on Several Issues Concerning the Implementation of the Regulations on Work Injury Insurance [6]It is stipulated that if an employee is injured or injured by the designated unit, the designated unit shall be responsible or the unit at the time of injury shall be held responsible. A view supported by the civil case guidance issued by the Beijing Supreme People's Court holds that the labor relationship is unique at the same time. Therefore, an employee with a dual labor relationship is basically an employee who performs the only work for different units at different times. Therefore, the work injury received by the employee when the employee performs the only work for a unit should be carried out by the unit. In practice, in order to prevent the occurrence of things that damage the rights and interests of workers, the labor supervision department can follow Article 1 of the " Opinions of the Ministry of Labor and Social Security on Several Issues Concerning the Implementation of the Regulations on Work Injury Insurance" and "Some Issues Concerning the Implementation of the Regulations on Work Injury Insurance". Opinions of the People's Republic of China (Lao She Bu Han [2004] No. 256) stipulated in Article [7], the two units were ordered to pay work-related injury insurance premiums for shared employees at the same time. However, the author believes that the payment by two units may conflict with the current regulations on the payment of work-related injury insurance by one employer, and the shares paid by both units at the same time cannot be accurately allocated, and it is not convenient to identify and operate. It is possible to pay a fixed unit, detail the main responsibility, and make up for the failure to pay by other means. The fixed unit can be set as the worker's current work unit, that is, if there is a work-related injury problem in the dispatched unit, the dispatched unit should be designated to pay for the work-related injury problem, which is fairer to the original unit and more conducive to the laborer to show evidence and negotiate with the dispatched unit on labor injury issues.

6. Conclusion

In the context of the prevalence of shared employees, the related issues of shared employees have led to careful consideration of the application of labor laws, especially the legal application challenges to the identification of work-related injuries of shared employees. Specifically, how to solve these labor law dilemmas still requires a specific analysis of the related issues of shared employees. At present, there are three modes of cooperation between enterprises, the third-party platform cooperation mode and the direct recruitment mode. Each mode has different ways of identifying

work-related injuries. In the end, China also believes that the direct recruitment mode is the most reasonable recruitment method. Combined with the experience of countries such as the United States, the United Kingdom, Japan and other countries outside the region, it lists the relevant cases of the United States and the United Kingdom, and jointly proposes the identification path of work-related injuries under the shared-employee mode in China, that is, the original work unit should be responsible, and the dual labor relationship requires a unit to pay, and compensation needs to be paid according to the requirements of the agreement, which increases the clarity of labor law.

As an integral part of the social insurance system, work-related injury insurance is enforced by the state through legislation. It is a social responsibility performed by the state to employees, and it is also a basic right that employees should enjoy. Similarly, with the increasing trend of shared employees, the basic rights of shared employees cannot be ignored. Clarifying workers' rights to work-related injury insurance under the shared-employee mode can fully protect workers' legitimate labor rights and interests, and guide employers to actively fulfill their labor security obligations, thereby promoting the healthy and orderly development of labor legal relations.

References

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- [7] Article 1 of the "Opinions of the Ministry of Labor and Social Security on Several Issues Concerning the Implementation of the Regulations on Work Injury Insurance" stipulates: "If an employee is employed in two or more employers at the same time, each employer shall pay work injury insurance premiums for the employee separately. If an employee suffers a work-related injury, the employer where the employee works when the employee is injured shall be liable for work-related injury insurance in accordance with the law."
- [8] Article 1 of the " Opinions on Several Issues Concerning the Implementation of the Regulations on Work Injury Insurance" (Lao She Bu Han [2004] No. 256) "If an employee is employed in two or more employers at the same time, each employer shall be the employee respectively. Pay work injury insurance premiums."