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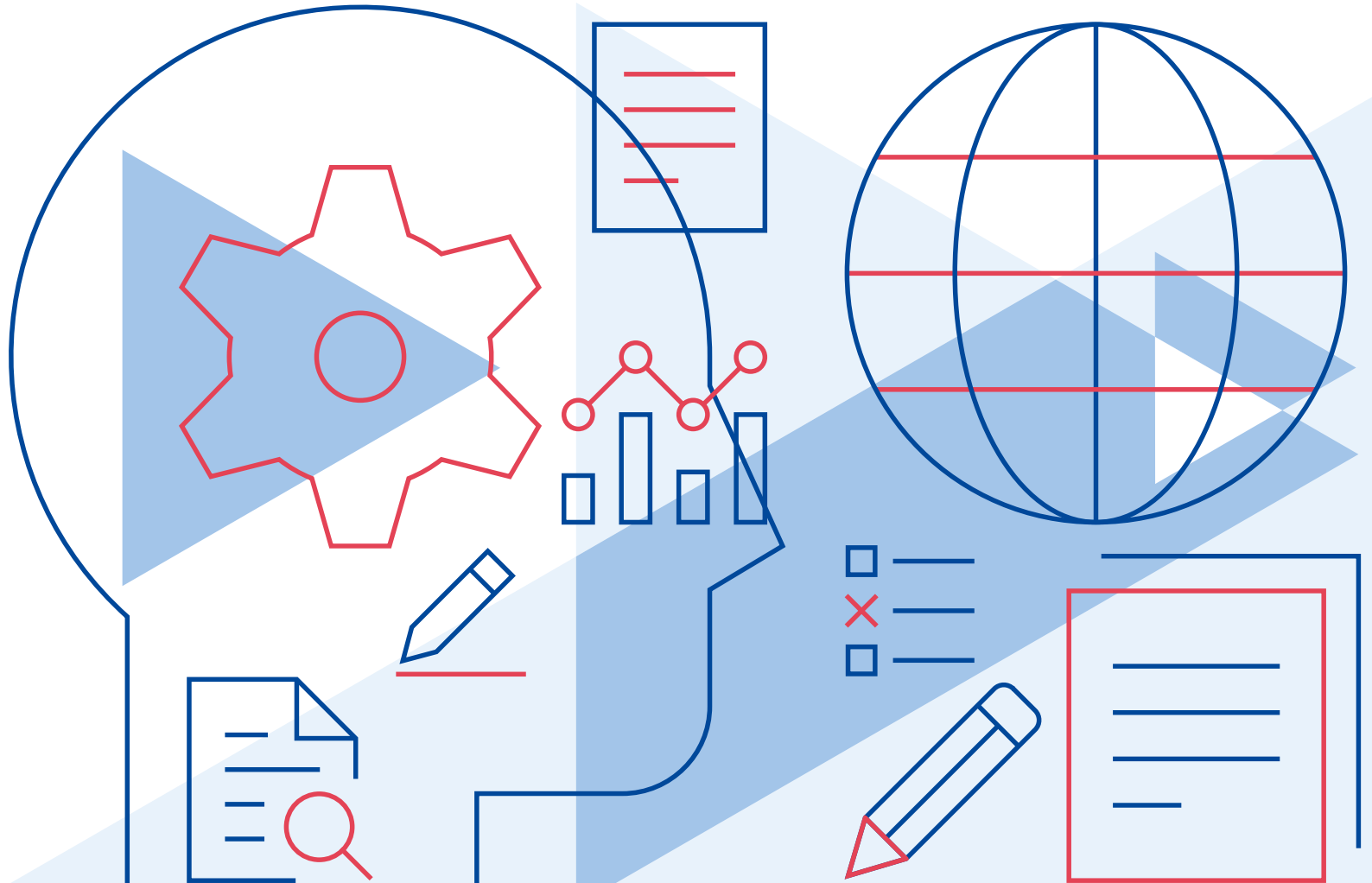
Resolution of labour disputes involving new forms of employment in China

Authors / Kun Huang, Yuxiang Sun



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Abstract

Based on the study of arbitration and judicial cases involving new forms of employment, this working paper identifies and examines notable characteristics of disputes involving new forms of employment. This working paper found that the number of such disputes is not large compared to the total number of labour disputes in China but is growing and mainly involving instant delivery sector. The claims concentrated on compensation for work-related injuries along with recognition of an employment relationship. Employers are difficult to identify due to multiple outsourcing and digital evidence which are more prevalent than in other labour disputes. Combining an analysis of a number of actual cases and interviews with labour dispute arbitrators, the paper also found that the "reference basis" for judgments in these disputes is the Notice on the Recognition of Employment Relationships (issued by the former Ministry of Labour and Social Security, Document No. laoshefa [2005] 12, hereafter referred to as the Notice 12).

Furthermore, the key consideration when determining the existence of employment relationships centres around ascertaining the actual reality of subordination, while algorithms, instant messaging tools and the use of labour intermediaries constitute a new type of labour management practices (or new set of tools) of platform companies in China. This report analyses some typical "methods" used by some platform companies to avoid employment relationships and the corresponding efforts to "reveal" the reality of employment relationships in the course of examining and determining the disputes. Examining and unearthing inconsistencies between the "employment facts" and the semblance of the contract or agreement, as well as the existence of effective management running through layers of subcontracting and false self-employment, were the central tasks of labour dispute resolution practitioners in most of the disputes. The problem of evidence in the handling of cases involving new forms of employment is also discussed. The report examines the problems that may arise in the implementation of the Guiding Opinion on Protecting the Labour Rights and Interests of Workers in New Forms of Employment. It also explores possible measures to respond effectively to the difficulties and challenges and presents suggestions regarding dispute resolution procedures, judgment rules for classifying the employment status of the worker, and rules for the distribution of burden of proof.

About the authors

Kun Huang is the Director of the Research Office of Labour Disputes of the Chinese Academy of Labor and Social Security (CALSS). She is an Associate Professor with a doctorate in Economic Law. She has nearly 20 years of research experience in the areas of labour relations and labour law and has led more than 15 policy-oriented research programme on topics that include early-stage intervention and prevention of labour conflicts, capacity building of labour inspectorates, atypical employment, flexible working hours, enforcement and interpretation of labour contract law, legislation of basic labour standards, responsible labour practices in global supply chain, good practices of collective negotiation in China and other relevant issues. She has published extensively, including China Labour Law (as co-author with Wang Quanxing), a national teaching material for law schools.

Sun Yuxiang is the Deputy Director and Associate Researcher of the Research Office of Labour Disputes of the CALSS. Her current research focuses primarily on labour dispute mediation and arbitration, labour relations in private enterprises, and labour clauses in free trade agreements.

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Acronyms

AB5	California Assembly Bill 5
Guiding Opinion	Guiding Opinion on Protecting the Labour Rights and Interests of Workers in New Forms of Employment
ILO	International Labour Organization
MOHRSS	Ministry of Human Resources and Social Security of China
SAMR	State Administration for Market Regulation of China
Notice 12	The Notice on the Recognition of Employment Relationships (issued by the former Ministry of Labour and Social Security of China, MOHRSS Document No. 12, 2005)

▶ 1 Research background

Research questions

The rapid development of the platform economy in recent years has created a new wave of employment opportunities, leading to a dramatic increase in the number of workers engaging in platform economy. Such workers include on-demand delivery workers, ride-hailing car drivers, truck drivers for logistics companies and internet marketers – all of whom rely on internet platforms for employment. In China, they are classified as New Forms of Employment. The definition of "New Forms of Employment" comes from the interpretation of the "Three New Economies" by the National Bureau of Statistics, which refers to the new links, new chains and new forms of activities derived from existing industries and fields relying on technological innovation and application in response to varied, diversified and personalized product or service needs. The "Three New Economies" are characterized by: internet-based business activities; innovation of business processes, service modes or product forms; and more flexible and efficient personalized services (NBS, 2023).

New forms of employment have given rise to new problems in the provision of labour protection with regard to the labour rights, interests and social security concerns of workers. These "problems" have been brought to light by an increasing incidence of labour disputes involving platform workers. Dispute cases related to platform workers are proving to be challenging for the existent dispute resolution and judicial practices. The need for clear guidance in the handling of such cases has become increasingly urgent – something that requires in-depth and extensive research and the formulation of relevant policy documents. In July 2021, the Ministry of Human Resources and Social Security (MOHRSS) and eight other related competent authorities jointly issued the Guiding Opinion on Safeguarding the Labour and Social Security Rights and Interests of Workers engaged in New Forms of Employment (hereafter referred to as the Guiding Opinion). This "document" addresses the question of workers in new forms of employment linked to internet platforms. The Guiding Opinion requests that the "courts at all levels and labour dispute mediation and arbitration institutions should strengthen guidance on the handling of labour disputes, coordinate work with each other, determine the relationship between enterprises and workers according to the facts of employment, and handle cases of labour rights and interests of workers employed in new forms in accordance with the law and regulations".

The dispute resolution institutions, not to mention the platform-based enterprises and workers, responded to the Guiding Opinion with great interest. In particular, the reference in the Guiding Opinion to workers who "do not fully conform" with the situation of establishing an employment relationship became the focus of attention. It emerged that the questions regarding the criteria for recognizing such workers and how "rights" and "protection" would be extended to them – that is, what the criteria would consist of and what the accompanying "rights relief channels" would be – are all in need of further study and clarification.

In this context, the research objectives of this study are to:

- understand the basic situation of arbitration and judicial cases related to new forms of employment in China in recent years;
- summarize the methods employed by the competent authorities in-handling such cases;

- identify changes in the cases after the release of the Guiding Opinion and the corresponding measures taken by the competent authorities;
- examine the inadequacies of substantive law and procedural law in the existing legal framework in dealing with labour disputes regarding new forms of employment, as well as the challenges to the existing system in dealing with labour disputes involving new forms of employment;
- explore and develop suggestions regarding the measures to determine the existence of an employment relationship in new forms of employment and to effectively protect workers' rights and interests from the perspective of the procedures and practices of labour dispute resolution; and
- propose recommendations on how to regulate new forms of employment and respond to the new challenges through improved regulatory framework and policies.

Research contents and methods

Based on the above research objectives, this study examines the practice of handling labour disputes arising from new forms of employment, the methods adopted by the various labour dispute resolution institutions for handling these disputes, including but not limited to the criteria for determining the existence of an employment relationship and recognizing subordination, the division of burden of proof, and the allocation of responsibility to the platforms and affiliated companies. Key to this analysis was the examination of judicial or arbitration decisions, supplemented by interviews with front-line dispute resolution practitioners and a review of the relevant laws and jurisprudence.

The labour dispute cases involving new forms of employment in this study are mainly confined to those groups of workers (or forms of employment) identified in the Guiding Opinion, that is, on-demand delivery workers (excluding general couriers), ride-hailing car drivers, truck drivers and internet marketers, who all rely on an internet platform for employment.

The research methods of this study were based mainly on case studies, supplemented by a literature review, interviews and field research. In terms of case studies, typical arbitration and judicial cases involving new forms of employment were selected, particularly in regard to on-demand delivery work and car-hailing services. Arbitration cases were mainly drawn from cases identified or published by local arbitration councils; and litigation cases were mainly selected from the China Judgments Online website[1].

Structured interviews were conducted with 37 arbitrators and focused on two areas of concern. One was learning about the overall situation of cases pertaining to new forms of employment, including the number of labour disputes, the type of employment, the difference from traditional labour dispute cases, the methods of establishing employment relationships, and the criteria and suggestions for judicial decisions regarding the cases. The other section investigates the specific concepts and approaches that arbitrators have considered, formulated, and experimented with during their work in resolving certain cases. The interview outline is included in the annexes.

For the literature review, this study examined the relevant theories on the determination of employment relationships, relevant cases in some countries or regions, the criteria used for the

[1] Since 2014, the Supreme People's Court has maintained a website ——China Judgments Online(中国裁判文书网，https://wenshu.court.gov.cn/) ——to publish the effective judgment instruments of the people's courts at all levels.

determination of employment relationships in judicial deliberation, and existing research findings of judicial cases involving new forms of employment in China.

▶ 2 Trend and features of labour disputes in new forms of employment

Disputes involving new forms of employment can, at first, be distinguished by the institution that has been invoked into action. Some cases are lodged directly with – or accepted directly by – the court of first instance (mostly at the "district" level) as ordinary civil cases. Such cases are usually framed as civil contract disputes and/or tort disputes. Other cases are lodged with the "labour dispute settlement" bodies, namely "labour arbitration commissions". These cases are framed as "labour dispute cases", where labour dispute settlement procedures are applied. Such cases are usually requests for confirmation of the existence of an employment relationship, the recovery of labour remuneration and overtime pay, and the claim for occupational injury insurance benefits or compensation.

The following analysis examines both of these "types" of disputes arising from new forms of employment. This study examines a range of cases that are available from the open judgment documents of courts at all levels.

The two different types of institutions examine cases on the basis of existing procedures as, at present, there are no special provisions on the procedures for handling disputes related to new forms of employment. Civil disputes in new forms of employment are subject to two final trials, while "labour disputes" – those that are lodged with the labour arbitration commissions – in new types of employment are subject to one arbitration and two trials.[2] There are no differences in handling procedures between labour dispute cases related to new forms of employment and ordinary labour dispute cases, and between civil dispute cases related to new forms of employment and ordinary civil dispute cases.

Features of disputes involving platform work

Dispute cases that arise from platform work are characterized by the following features:

The cases represents a small proportion of all kinds of disputes

China has a large number of workers engaged in new forms of employment. The estimate for the total number ranges from 50 million to 84 million, depending on the source. Work in the platform economy has been a subject of wide and extensive discussion in the news media and academic research. However, according to the research and interviews, the actual number of labour dispute cases arising from new forms of employment – that is, those brought to the attention of arbitration and courts – is not large, accounting for a small proportion of the total number of labour dispute cases. Furthermore, the frequency of disputes within the "cohort" of new forms of employment is relatively low compared with that among "ordinary" workers. Within the current statistical system and in terms of the availability of data (as well as the current system

[2] The whole labour dispute resolution system is composed of non-compulsory mediation and compulsory arbitration and if the applicants and/or defendants are not satisfied with the verdict issued by the labour arbitration committee, they may appeal to a grassroots level court within the time limit prescribed by law except for some kinds of cases that may be terminated in arbitration and will be accepted as civil cases in a trial system following a two-hearing approach.

of documentation), it is difficult to obtain precise information on the total number and types of cases arising from new forms of employment.

In terms of litigation, from 2018 to 2020, preliminary statistics show that Beijing, Shanghai, and Guangdong and Zhejiang provinces closed more than 2,000 cases of civil disputes related to new forms of employment, involving takeout delivery and express delivery, at the courts of first instance. The number of closed cases has been increasing annually, with disputes concentrated in two major categories: infringement disputes and labour disputes (71 per cent and 29 per cent respectively).[3] [4] However, compared to the total number of labour dispute cases during the same period, this accounts for only a very small percentage. In 2020, 1.09 million labour dispute cases were accepted by labour dispute arbitration committees at all levels across the country （MOHRSS, 2020） and 440,000 labour disputes were received by the people's courts of first instance (Supreme Court of China, n.d.). The statistical picture is confirmed by direct practitioners, as most of the arbitrators interviewed for this study report that they have only handled one or two cases involving new forms of employment.[5]

Increasing number of cases

The number of disputes involving new forms of employment shows a clearly increasing trend: such cases began to appear in 2013 and gradually increased after 2016. Both in China and internationally, new cases began to appear around 2013. The world's first labour dispute case against platform employment was a formal lawsuit filed by a California ride-hailing driver against Uber in the California District Court in August 2013, involving six claims, including Uber's theft of drivers' income and misclassification of drivers as independent contract workers (Tu Wei, 2021). There has been a steady increase in litigation regarding the classification of the working arrangements of platform labour around the world over the past few years (ILO, 2021). As of September 2021, there were 15 administrative decisions and 175 judgments issued by European countries on the classification of platform's workers.

In China, "the first labour dispute case of gig workers" generally refers to the case of Mr. Sun and seven other persons suing the Good Chef platform.[6] This case was accepted by the Beijing Chaoyang District Labour and Personnel Dispute Arbitration Commission in 2015. However, earlier in the second half of 2013, there were already a small number of labour dispute cases between drivers and platform companies, such as *Zhuang Yansheng v. Beijing Yixin Yixing Automobile Technology Development Service*;[7] *Wang Zheshuan v. Beijing Yixin Yixing Automobile Technology Development Service*;[8] *Sun Youliang v. Beijing Yixin Yixing Automobile Technology Development Service*. [9] [10]

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3 Research Group of Beijing No.1 Intermediate People's Court, "关于维护新就业形态劳动者劳动保障权益的实施意见". 人民司法 *2022*, No. 7.

4 Cases of infringement disputes accounted for about 71 per cent and labour dispute cases about 29 per cent. Most of the former are compensation disputes caused by traffic accidents of takeaway and express delivery vehicles, while the latter are mainly cases requiring confirmation of an employment relationship, recovery of labour remuneration and overtime pay, and claims for industrial injury insurance benefits.

5 Due to the lack of a unified definition of new forms of employment, the national level number of civil court cases and arbitration cases related to new forms of employment was still not available at the time of finalizing this report.

6 See 7人诉"好厨师"非法解雇获赔.

7 京石劳仲字（2013）第1520号裁决书；一审民事判决书（2013）石民初字第7471号；二审民事判决书（2014）一中民终字第6355号.

8 京石劳仲字（2013）第1691号裁决书；一审民事判决书（2014）石民初字第00367号；二审民事判决书（2015）一中民终字第01359号.

9 Applicants of both these cases were designated drivers, and in the litigation procedure, both judgments of the first instance and the second instance rejected the claims for the recognition of an employment relationship and the related remedies for non-conclusion of a written employment contract and severance payment.

10 京石劳仲字（2014）第712号裁决书；一审民事判决书（2014）石民初字第8170号；二审民事判决书（2015）一中民终字第176号.

Since 2017, the number of related cases in China has increased. Taking the second-level courts in Qingdao as an example, the number of takeaway and online car-hailing cases before 2016 was zero, while there were 16 such cases in 2016, 34 in 2017 and 44 in 2018. Although the proportion of labour disputes in new forms of employment is still small, it is evident that the number of cases has been increasing.[11]

Growing convergence on dispute issues

Disputes involving new forms of employment are predominantly over claims for compensation for work-related injuries, requiring recognition or determination of an employment relationship. In addition to the most common claims, disputes involving other claims and issues have also started to increase.

The determination (or recognition) of the existence of an employment relationship has always been the core "claim" in disputes arising from new forms of employment; moreover, this question has been the central challenge for the dispute resolution procedures and practitioners. Data show that this core claim accounts for more than half of the total claims involving new forms of employment (see Table 1 below). Interviews with practitioners reveal the challenge posed by this issue, with about 60 per cent of the arbitrators interviewed reporting that the claims they have handled called for a "preliminary" review to determine the existence of an employment relationship between the parties in the disputes.

▶ Table 1. Claims requiring determination of the existence of an employment relationship accounted for about 50 per cent of all cases involving new forms of employment

Source	Specific data
Beijing Chaoyang People's Court: "Internet Platform Labour Dispute Trial White Paper" (April 2018)	From 2015 to April 2018, the Chaoyang People's Court accepted a total of 188 cases relevant to platform employment. Among these cases, 115, or 61.2 per cent, were directly filed by parties seeking recognition (confirmation) of the existence of an employment relationship, and 171 cases were terminated, including 144 cases, accounting for 84.2 per cent, where the existence of an employment relationship was recognized. Of the 105 related cases that were finally settled by judgment, in 37.1 per cent of the cases, it was confirmed that direct employment relationships were established or did exist between the platform and the worker.
Press conference on new forms of employment organized by Beijing Third Intermediate People's Court	The nature of the legal relationship between employing enterprises and employees often becomes the core focus of disputes and constitutes the central question in the trials and difficulties in the deliberation. The cases in which the workers request confirmation of an employment relationship are the most numerous, accounting for more than half of all disputes involving new forms of employment.
White Paper on Trial of Disputes regarding New Forms of Employment in Qingdao	In regard to the claims of workers engaged in traditional employment arrangements, the request for confirmation of the existence of an employment relationship accounted for 3.77 per cent of the total number of cases, while 60.31 per cent of the claims arising from new forms of employment required determination of an employment relationship.

[11] Qingdao Intermediate People's Court, 青岛新业态用工纠纷审判白皮书, 2019.

Claims for the determination of an employment relationship usually do not come as "stand-alone" disputes. Rather, they are the precondition for the main cause of the claims, such as recognition of work-related injuries after a traffic accident. [12] For example, the "plaintiffs" in several early cases related to e-designated driving were all injured in traffic accidents. In the past two years, significant changes in the main claims have begun to emerge: from "recognition of an employment relationship + work-related injuries" to "recognition of an employment relationship + other substantial claims" (such as labour remuneration and compensation, and so forth). Some of the common claims found in "ordinary employment" disputes have also begun to emerge in new forms of employment. As with traditional employment, workers bring complaints related to the "failure of the employer to sign an employment contract" or the "failure to contribute to social insurance" to arbitration, following their dismissal (which leads to these "discoveries").

The frequency and complexity of "claims" in arbitration cases are on the rise. Numerous cases now encompass multiple claims, often three or more, which can include demands for "double the standard wage rate" (for weekend work), back pay of wages, economic compensation, monetary reimbursement for untaken paid annual leave, and indemnities due to inadequate social security contributions, among others.

Most cases occur in the takeaway delivery sector

The prevalence of labour disputes related to emerging employment models is notably focused, predominantly involving sectors such as ride-hailing services, takeaway delivery, intra-city courier services, and live streaming. Among these, disputes involving takeaway delivery personnel are the most common, eliciting extensive discourse.[13] While the number of car-hailing platforms and the quantity of workers engaged in their service is larger, according to the Guiding Opinion on Protecting the Labour Rights and Interests of Workers in New Forms of Employment, noted in the State Council's Regular Policy Briefing,[14] the number of food delivery workers has reached 7.7 million: 4.7 million workers work under Meituan, where more than 1 million workers are active on a daily basis; ele.me delivery service has a pool of more than 2 million workers. According to the statistics of the online car-hailing regulatory information exchange platform, as of 31 May 2022, a total of 274 online car-hailing platforms across the country have obtained a business license. The top ten platforms in terms of order volume include Ruqi, Xiangdao, T3, Xiehua, Shouqi, Cao Cao, Meituan, Wanshun, Didi and Huaxiaozhu. A total of 4.392 million driving licenses have been issued for ride-hailing drivers. In the 12 months ending 31 March 2023, Didi had 19 million annual active drivers in China, according to the annual business and social responsibility report released by Didi's official website. The number of dispute cases involving car-hailing is significantly smaller than that involving takeaway delivery. Although Didi has the largest share in China's ride-hailing industry, there are only about ten labour dispute lawsuits involving the Didi platform, and there has not been a single case in which a Didi driver has been recognized as an

[12] In filing for arbitration or a civil court hearing, more than half of the cases make specific claim regarding the existence of an employment relationship (see Table 1), while in some cases the question of the determination of the existence of an employment relationship arises as the arbitration/court begins to examine the claim, for example in the labour dispute between Tang Ruiting and Beijing Yisheng Health Technology Co., Ltd.

[13] The report issued by the Beijing Zhicheng Migrant Workers Legal Aid and Research Center collected and analyzed 1,907 cases where the judgment contained a conclusion on the issue of the existence of an employment relationship for delivery workers covering the period from April 2016 to June 2021.

[14] See https://www.gov.cn/zhengce/zhengceku/2021-07/23/content_5626761.htm

employee by the court.[15] Other leading ride-hailing platforms such as Shouqi, Cao Cao and T3 have all experienced ride-hailing disputes and lawsuits, while their numbers exceeding those involving Didi. For example, there are about 50 labour dispute litigation cases involving T3 Travel.

Further analysis of the reasons why the number of cases involving ride-hailing drivers is significantly lower than that of takeaway delivery workers, and the number of cases related to Didi is lower than that of other ride-hailing platforms, may present interesting insights for regulatory development. Platform-based ride-hailing services are characterized by more rigorous supervision by industry authorities; the platforms are more disposed to adopt initiatives to assume responsibility and pay compensation; and the platforms (in particular Didi) are more open to signing agreements with the drivers directly. Their business model relies less on services from third parties due to industry-specific constraints, which differentiates them notably in their sector. Another distinguishing characteristic is the variation in road accident rates and severity, along with disparate safety regulations between ride-hailing and takeaway delivery services. These unique factors in the platform ride-hailing industry could form a crucial foundation for devising robust and effective regulatory measures to govern platform employment and safeguard the rights and interests of platform workers.

Identifying the real employer: the veiled presence of platform companies

As in conventional labour dispute cases, most of the cases involving new forms of employment are brought by workers as claimants. However, in terms of the respondents, many entities are implicated in the cases involving new forms of employment, and the legal relationship among the supposed respondents is complicated. Besides the platform companies, respondents also include staffing agencies or other human resources service providers, agents, franchisees, contractors and other companies involved in the employment of a worker supposedly working under the name of the platform. Some cases may also involve Fin-tech companies, insurance companies and direct management personnel such as the head of the distribution site. For example, the respondents in case HD1[16] include a logistics company, a staffing agency, a technology company and a Fin-tech company. In case HD8, workers were actually employed by an individual to transport shared bicycles.

The types of specific respondents identified in workers' claims are also changing. In the early days, most cases identified the platform company as the respondent of the claims, seeking to secure confirmation that they were the employer party in an employment relationship. Recently, workers' claims target specific other business entities within the complex business arrangements that prop up the service provided by the platform company. As such, workers' claims seek to confirm an employment relationship with one or some of the "intermediary" entities, such as service providers to the platform company or other enterprises involved in

[15] This may stem from the fact that the regulatory framework for ride-hailing platforms makes it possible for the platforms to engage workers on the basis of a civil relationship. The Interim Measures for the Management of Online Taxi Reservation Operation and Service stipulate that "the company of online taxi booking platform shall sign various forms of labour contracts or agreements with drivers according to the characteristics of working hours and service frequency". This provision is seen as allowing and recognizing the civil relationship between drivers and the platform. On the other hand, the regulatory framework of ride-hailing platforms affects the contract arrangement between drivers and the platforms since the ride-hailing platform company can only carry out the relevant service after obtaining the corresponding Online Taxi Reservation Operation License and applying for an internet information service filing with the relevant department; the carrier responsibility is borne by the ride-hailing platform company. In the engagement of drivers for ride-hailing services, there is little involvement of third-party entities that cooperate with the platform by providing employment services. At the same time, there is no practice of guiding workers to register as self-employed persons. For example, Didi has signed service agreements directly with drivers for Didi platforms, and Didi has taken the initiative to pay compensation for traffic accidents.

[16] Cases numbered consecutively starting with "HD" refer to arbitration cases handled by the Labour and Personnel Dispute Arbitration Commission of Haidian District, Beijing.

arranging the work of workers for the service provided by the platforms, including pure employment service entities. The consumer-facing platform companies are increasingly retreating behind the scenes and gradually disappearing from the respondent's or defendant's seat.

Handling cases of labour disputes involving new forms of employment

In addition to the unique characteristics of the cases, there are also distinct aspects concerning how labour dispute arbitration and civil litigation procedures are applied to disputes stemming from platform work.

First, in terms of case acceptance (receivability), both the courts and labour dispute arbitration bodies have accepted cases brought by workers involved in new forms of employment. However, their "approach" to decision-making regarding "receivability" or the exercise of their competence over the workers' claims is noteworthy. All local labour dispute settlement bodies have accepted cases lodged by workers which seek to confirm "whether an employment relationship exists". However, for those cases where there is no such argument and where the disputes are purely about "rights", some local labour arbitration commissions have refused to accept them.

The main reason given for declining to accept these cases is that the uncertainty of the relationship between the two parties makes it difficult to ascertain whether it lies within the scope of labour disputes. Therefore, Shanghai courts decided that when receiving the former cases, in the first instance, the court will not require the parties to first go through the labour dispute arbitration procedure. Correspondingly, if the applicants can provide preliminary evidence (such as a work permit, work rules, some WeChat evidence that can preliminary prove the existence of management activities, and so forth) to prove the existence of an employment relationship, the arbitration commission may accept the case. When the two parties have only a civil agreement and do not have any further evidence to show the possibility of the existence of a personal subordination relationship, the labour arbitration commission will usually suggest the applicant go to the court.

Second, in terms of conclusions regarding the question of the existence of an employment relationship, over one third of the cases were concluded with positive confirmation on the existence of an employment relationship. However, there may be some emerging differences in the outcome for specific industries. The general trend is noted in various sources. The White Paper of Beijing Chaoyang People's Court shows that 37.1 per cent of the 105 cases involving new forms of employment that were finally settled by judgment confirmed the existence of an employment relationship between the platform and the workers. The Qingdao Intermediate People's Court White Paper shows that of the 38 applications for the confirmation of the existence of an employment relationship, 13 cases (34.2 per cent) were successful in finding such a relationship between the two parties. The trend points to increasing support for workers' claims. In 2013, the courts of first and second incidence mostly dismissed the claims seeking confirmation of the existence of an employment relationship in several cases involving e-designated driving. In general, until 2016, most court rulings did not support the workers' claims for the establishment of an employment relationship. At most, the courts found the platform companies were liable in tort cases, reflecting a more cautious protection. It was only after the "Good Chef Case" in 2017 (in which the court ruled that an employment relationship existed, but only supported the claim for compensation for illegal dismissal while still maintaining a cautious approach in terms

of the means of protection), that judgments supporting the establishment of employment relationships began to appear.

Substantial variations are still observable in the enforcement of laws and policies concerning the protection of workers' rights across different arbitration commissions, particularly in disputes that center on the establishment of an employment relationship. Most arbitration commissions and courts strictly implement existing laws and policies to protect the minimum wage, overtime pay, double wage difference[17], economic compensation, social insurance benefits, and so on. For example, in the case of *Wang Cheng v. Deppon Logistics Changshu and Haohuo Kunshan*, the court supported most of the nine claims, including the establishment of an employment relationship, wages, double wages, pay for the accrued untaken entitlement of annual leave, and high-temperature allowance.[18] In contrast, some local courts have shown some flexibility, confining their rulings to employers' responsibility based on the principle of "partial protection". As a result, only basic rights and interests, such as the claims related to work-related injury insurance, were supported.

Third, "electronic evidence" is becoming widely accepted in dispute proceedings. In traditional labour dispute cases, written employment contracts, work permits, registration forms/application forms and other recruitment records and witness testimony are mostly used as evidence to establish the existence of employment relationships. Most of the work records of workers employed in new forms of employment are kept in digital apps. Various labour management actions are also executed and achieved through digital apps as well as social media or social networking apps, such as WeChat groups. Given this development, it is not surprising that much of the available evidence exists in electronic or digital form. Electronic evidence[19] includes e-mail, SMS, QQ/WeChat chat records; microblog private messages and other instant messaging software data; blogs, microblogs and WeChat Moments; mobile phone recordings; electronic attendance sheets; electronic signatures; domain names; and other information stored in electronic media. The primary evidence in cases concerning new forms of employment typically includes WeChat chat logs and application screenshots. The admissibility of such evidence in legal proceedings varies, though it generally demonstrates a higher likelihood of acceptance.

[17] According to Article 82 of the Labor Contract Law of People's Republic of China, if an employer fails to conclude a written labor contract with a worker for more than one month but less than one year from the date of employment, it shall pay double monthly salary)

[18] 王成诉常熟德邦物流有限公司张家港金港分公司与浩火(昆山)网络科技有限公司劳动争议一审民事判决).

[19] Article 14 of Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings (Revised in 2019) provide guidance in this regard. Electronic data include the following information and electronic documents: (1)information released by web pages, blogs, microblogs and other network platforms; (2)communication information of mobile phone short messages, e-mails, instant messaging, communication groups and other network application services; (3)user registration information, identity authentication information, electronic transaction records, communication records, login logs and other information; (4)documents, pictures, audio, video, digital certificates, computer programs and other electronic documents; (5)other information stored, processed and transmitted in digital form that can prove the facts of the case. Article 15: "Where a party uses audio-visual materials as evidence, [they] shall provide the original carrier on which the audio-visual materials are stored." If the parties use electronic data as evidence, they shall provide the original. A copy made by the producer of electronic data that is consistent with the original, or a printout directly from the electronic data or other output media that can be displayed and identified, shall be regarded as the original of the electronic data.

▶ 3 The legal basis for assessing employment status in cases involving new forms of employment

Document No.12 as an effective legal basis for assessing employment status

Under the current system of labour laws, the establishment of an employment relationship is the prerequisite for labour rights, protection and social security. However, the Labour Law, Labour Contract Law, and other laws and regulations do not provide a clear definition of an employment relationship. The Labour Contract Law only stipulates that a written labour contract shall be concluded for the establishment of an employment relationship. The written employment contract is the primary evidence for the existence of an employment relationship. In the absence of a written employment contract, the determination of an employment relationship in fact in arbitration and litigation procedures is mainly based on the Notice on the Relevant Issues involving Establishment of an Employment Relationship issued by the Ministry of Labour and Social Security in 2005 (MOHRSS Document No. 12, 2005 – hereafter referred to as "Document No. 12").

The legal status and main contents of Document No. 12

Document No. 12 is a ministerial regulatory document, and its legal force is weaker than that of a ministerial regulation. Administrative regulatory documents are formulated and publicly issued by administrative bodies or organizations authorized by laws and regulations with the function of managing public affairs (hereafter referred to as administrative bodies) in accordance with statutory powers and procedures. They constitute a body of regulatory instruments together with administrative regulations, decisions, orders of the State Council, departmental rules and local government rules, which are applicable to the workings of administrative bodies, and to citizens, legal persons and others.[20] Departmental rules refer to the rules formulated by ministries, commissions, the People's Bank of China, the Audit Office and the institutions directly affiliated to the State Council that are endowed with administrative functions, in accordance with the laws and administrative regulations, decisions and orders of the State Council, and within the limits of their authority. The contents of the various regulatory or administrative documents or rules cannot contravene – or "overstep" – the laws promulgated by the National People's Congress and its Standing Committee and the administrative regulations issued by the State Council in accordance with the Constitution and laws.

Document No. 12 was issued in 2005 mainly in response to the recognition that "some employers did not sign employment contracts when recruiting workers, and this made it difficult to determine the employment relationship between the two parties when labour disputes occurred". Document No. 12 proposes three criteria for determining the existence of an employment relationship in the absence of a written employment contract. It also suggests a list of practical measures that could be employed to judge and divide the burden of proof for consideration of the evidence in determining the existence of an employment relationship (see Table 2 below).

[20] See https://www.gov.cn/gongbao/content/2018/content_5296541.htm.

▶ **Table 2. Main contents of Document No. 12**

Employment relationship established	As expressed in the document	
Premise	Employers and workers meet the subject qualifications[1] stipulated by laws and regulations.	
Criteria for the establishment of an employment relationship: subordination	Personal subordination	The workplace rules formulated by the employer according to law are applicable to the employees. The worker is subject to the labour management of the employer. The worker is engaged in paid work arranged by the employer.
	Economic subordination	Paid work
	Organizational/business subordination	The work provided by the worker is an integral part of the employer's business.
Evidence	(1) Wage payment documents or records (employee payment payroll) and records of payment of various social insurance premiums;	
	(2) The "work permit", "service certificate" and other documents issued by the employer to the worker that can prove the worker's identity;	
	(3) Recruitment records such as "Registration Form" and "Application Form" filled in by the worker;	
	(4) Attendance records;	
	(5) Testimony of other workers.	
Division of burden of proof	The employer shall bear the burden of proof for Items (1), (3) and (4).	

[1] The employer and the employees are required to conform to the subject qualifications of the laws and regulations, and according to the labour laws in China, employees mainly refers to those who have reached the age of 16, earn wage income as the main source of income, and have both labour right ability and labour behaviour ability; and an employer proscribed by law mainly refers to the enterprises and individual economic organizations and the private non-enterprise organizations in the People's Republic of China as well as state organs, institutions and social organizations.

In addition to requiring workers and employers to have the capacity as a subject of law, Document No.12 identifies a variety of employment relationship characteristics, including the application of rules and regulations of the employer towards the workers, the exercise of labour management by the employer over the workers, workers' dependence on paid work, and the integration of work in the business operation (the work carried out by the worker is an integral component of the business). In doing so, Document No. 12 adopts the various elements of the subordination theory and the control theory that are found in labour law theory. It also reflects the mainstream view that subordination is the most important criterion for identifying an employment relationship. It assumes that "subordination" has three aspects: personal subordination, economic subordination, and organizational/business subordination. Document No. 12 prioritizes personal subordination as the main criterion in determining the existence of an employment relationship. Economic subordination is used as an auxiliary indicator.

Different views on the applicability of Document No. 12

Many cases involving traditional forms of employment were reviewed by labour dispute settlement bodies and courts using Document No. 12 as a basis for determining the relationship

between employers and workers. Document No. 12 was also the most frequently referenced basis for determining the existence of an employment relationship in the arbitration and judicial proceedings for cases involving platform work. Two thirds of the arbitrators interviewed for this study explicitly mentioned that Document No. 12 formed the basis of their judgment and more specifically, the three-aspect criteria elabourated in that document.

Nevertheless, there are differing views on the applicability of Document No. 12 in dealing with disputes arising from platform work. One opinion holds that the determination of the existence of an employment relationship on the basis of the provisions of Document No. 12 in dispute cases involving platform work is generally solid. Some arbitrators believe that this is "the safest, most reliable and most authoritative basis". They assume that this conforms and is consistent with the identification of the characteristics of an employment relationship according to the law, which should be the most important consideration and task.[21] This is also the approach of most of the directly interested parties, whether platform companies, enterprises engaged in cooperation arrangements with the platforms, or workers. Many take Document No. 12, and particularly its three elements, as the basis for recognizing an employment relationship in facts and reasons or defence. Typical examples of this approach are found in the first instance hearing of the case of *Yunting v. Meng Jingping* in Suzhou (enterprise), and the second instance hearing of the labour dispute between Mr. Du and the Taiyuan Branch of Yuncheng Xinbang Logistics Co., Ltd. (worker).

However, some judges and arbitrators, along with most experts and scholars, have identified significant challenges in applying Document No. 12 to disputes involving workers in platform work. They have outlined various difficulties, including those detailed below.

First, many have pointed to the requirement of "having the following situations at the same time" as too rigid. Document No. 12 is seen as stipulating that only when all the elements, such as capacity as a subject of law, application of rules and regulations, labour management, paid labour and business components, are found to exist concurrently, can an employment relationship be recognized. This is the "all-inclusive" mode of "constitutive elements" (Wang, 2016). This is very different from the practice of the "key elements review" found in many other countries.[22]

The objective of the "constitutive elements" approach is to standardize labour employment. It restricts the discretion in individual judgement by requiring strict observation of the criteria for recognition of an employment relationship. This approach serves two objectives: the first is to promote standardization of employment relationships; the second is to enable the formation of consistent judgment outcomes and ensure the fairness of arbitration and judicial deliberations.[23]

The disadvantages of this approach are obvious. First, it makes it difficult to adapt to the complex and changing manifestations of employment relationships in practice, especially in new forms of employment, where these elements of subordination often exist in different degrees or levels instead of in an all-or-nothing way. Well before the issuance of the Guiding Opinion in 2021 -- which for the first time makes formal reference to the idea of an "incomplete employment relationship" -- there were already judgments on labour disputes that reflected this "shortcoming".

[21] There are also some arbitrators who believe that the cases involving new forms of employment are "not treated differently from other cases", "the form of employment is not necessarily different, the handling method is certainly the same", and "the criteria for cases regarding new forms of employment are consistent with other cases".

[22] For example, the 13 considerations identified in the ILO Employment Relationship Recommendation, 2006 (No. 198).

[23] This was perceived to be a paramount challenge or task at a time when the whole concept and practice of "employment relationships" were newly taking root in China during the transition away from the socialist organization of work under the planned economy. The fact that specialized labour dispute resolution procedures -- arbitration -- was newly established may also have influenced the adoption of this approach.

The observation that recognizes not (not fully) conforming to the necessary circumstances for the establishment of a (de facto) employment relationship" had already begun to appear in the judgment statements of some cases where the requests for confirmation of an employment relationship were denied. However, the issue is, how strong or evident should the subordination relationship be to meet the requirements for the establishment of an employment relationship?

The second difficulty in applying Document No. 12 for the determination of the existence of an employment relationship in disputes involving new forms of employment stems from the absence of a rigorous consideration of "labour management" as an indicator of an employment relationship. In any kind of arrangement for paid labour, it is possible to find "instruction" or "management", whether the work is carried out under the terms of an employment relationship, a civil service contract or commissioned work. Merely the fact that there is some degree of labour management towards the workers carrying out the work may not necessarily mean that there is (strong) subordination in the sense set out in the labour law.[24] It is necessary to ascertain whether the intensity of such management or instruction has reached the level of control or domination to affirm the existence of subordination and whether it constitutes personal and economic subordination. However, there is very little elabouration of the concept of "labour management" (the employer managing the work of the worker or the relationship with the work, and so forth) in Document No. 12. With the emergence of widely varying patterns of employment, especially in examining the nature of "labour management" in platform work, there is a need for a more in-depth and detailed elabouration of the concept in order to avoid a different understanding among arbitrators and judges, leading to different judgments for similar situations.

The third difficulty centres around how to understand the concept of "business components" (that the work provided by a worker is an integral component of the employer's business) and how this concept is to be applied in reviewing the work carried out in platform work. Document No. 12 does not provide a clear elabouration of this criterion. The determination of "business components" in labour disputes is not just a question about whether the platform is an intermediary entity or an enterprise engaged in specific service operations (which would have an effect of identifying organizational subordination), it also has implications for determining the nature of job allocation in a platform-based service. When a worker is given a task by the platform's "automatic" task assignment (or dispatch) system, is this merely a "matchmaking" activity – between a request from a customer and the readiness of a worker to accept the job – or is it an assignment of a work task to a worker by the platform company, similar to receiving a "work order" in a "traditional" employment arrangement (personal subordination)? This will also have a bearing on how to understand the nature of the fees charged by a platform: Is the fee for an information service or the sharing of the value created by workers (economic subordination)? The issue of "business component" already features as an important consideration in disputes involving platform work. For example, in the case of *Li Xiangguo v. Tongcheng Bing*, the court of first instance ruled that "Tongcheng Biying Technology Company, the operating company of the Flash Delivery Platform, is not an information service company but a company engaged in the cargo transportation business, and its claim that it is only obtaining intermediary fees cannot be

[24] According to Article 779 of the Civil Code, the contractor shall also accept the necessary supervision and inspection of the ordering party during the work, even in a contract of work where there is no labour management at all; and Article 1193 of the Civil Code also recognizes that the ordering party has the right to instruct the contractor. See Beijing No.1 Intermediate People's Court Research Group, "新就业形态下平台用工法律关系定性研究", 人民司法, No. 7, 2022.

established".[25] In China, the Interim Measures for the Management of Ride-hailing Taxi Operations and Services, issued in 2016, makes clear that "ride-hailing taxi operations and services" includes building a service platform based on internet technology, integrating information regarding customer requests and the availability of workers, using qualified vehicles and drivers, and providing non-cruise taxi reservation services. This makes clear that the work of car-hailing drivers is part of the business of online car-hailing platform-based enterprises. Thus, it does not support the claim by the platform company that it is only an "information matchmaker", but rather it provides critical guidance for the recognition of the relationship of organizational subordination between the drivers and the car-hailing service platforms.

Dispute settlement proceedings: assessing employment status on the basis of the recognition of a subordination relationship

The discussion on the applicability of Document No. 12 essentially focuses on whether the traditional theory and standards (criteria, indicators) for employment relationships still have explanatory power in the consideration of new forms of employment. An ILO working paper, "Platform Work and the Employment Relationship" (Valerio et al., 2021), which examines the rulings of national courts on the nature of the employment of platform workers in a number of countries, found that some of the indicators and principles regarding the employment relationship elaborated in the ILO Employment Relationship Recommendation, 2006 (No. 198) are still viewed as having substantive significance in court decisions. In China today, labour dispute arbitration and judicial proceedings still rely on the three dimensions of personal subordination, economic subordination and organizational subordination set out in Document No. 12 to identify employment relationships.

For example, in the labour dispute between Tang Ruiting and Beijing Yisheng Health Technology Co., Ltd.,[26] the review process focused on identifying the three dimensions of subordination. The evidence for personal subordination was sought through the review of (1) the extent of control on the basis of work rules, (2) exercise of management, supervision and inspection of work of the worker and control of working hours, and (3) technical control of the working process. Economic subordination was investigated on the basis of provision of work equipment, determination of work remuneration and the restriction of sources of livelihood. The existence of organizational subordination was sought by examining the work assignment and management through a WeChat group. In this case, the arbitration and the court of first instance ruled that no employment relationship was found between the two parties. However, the court of second instance found that such a relationship did exist between the two parties.

[25] In many cases abroad, Uber has also claimed that it does not provide transportation services but is only a technology company. Courts in the United States and the U.S. Department of Labour often rely on the test of "whether work is an integral part of the employer's business" in conducting a multi-factor economic reality test. However, in January 2021, the U.S. Department of Labour issued the "Independent Contractor Status under the Fair Labour Standards Act" rule (2021 IC rule), which adjusted the question, now to read, "whether the work belongs to the integrated unit of production". This had the effect of narrowing the scope of the facts to be considered. It was only regarded as a non-core element with relatively low probative force. Subsequently, the 2021 IC rule was revoked. In October 2022, the U.S. Department of Labour proposed to amend the Wage and Hour Division (WHD) regulations to modify its rules for determining the classification of employees or independent contractors under the Fair Labour Standards Act (FLSA) to be more consistent with judicial precedent and the text and purpose of the FLSA Act. In the latest proposed rule, it once again reverts to the long-established practice of overall situation analysis of the economic reality test. It focuses on whether the work is integrated with the employer's business and to what extent the work done is an integral part of the employer's business, rather than whether it belongs to an "integrated production unit". This factor does not depend on whether an employee is an integral part of the enterprise, but on whether the function they perform is an integral part of the enterprise. This formulation favours workers to be recognized as employees when the work they do is critical, necessary or essential to the employer's primary business. It recognizes the worker as an independent contractor when the work performed by the worker is not critical, necessary or related to the employer's primary business.

[26] 京0101民初13884号, 2019; 京02民终8125号, 2020.

The table in Annex 1 sets out in detail the acceptance of evidence, the determination of facts and the judgment conclusion.

In addition to examining the above three aspects, the judge in the court of second instance also emphasized the necessity of protecting labour rights and interests. The second instance judgment pointed out that the relationship between Yisheng Health Company and Tang Ruiting was clearly characterized by personal subordination, economic subordination and organizational subordination. The relationship between the two parties was a dominant relationship in which one party controlled and managed the other party. It found that it was impossible for the two parties to establish substantive and fair rights and obligations through completely equal consultation and that it was necessary to bring Tang Ruiting into the scope of labour law protection and then achieve the result of substantive equality through basic labour protection.

The need to extend the protection of labour law was also cited in the judgment of the court of first instance in the Li Xiangguo case. Specifically, the court held that firstly, it was Li Xiangguo's "basic right" to obtain work-related injury insurance benefits, which needed to be realized by establishing an employment relationship. Secondly, the risk cost of traffic accidents of Flash Delivery staff could not be transferred to society, and it was necessary to clarify the responsibility of enterprises through the recognition of an employment relationship. Thirdly, the court stated that enterprises cannot avoid the management costs associated with an employment relationship with Flash Delivery workers.[27]

In most cases involving claims of occupational injury compensation, it is possible to find a certain correlation between the degree of the harms caused to the worker and the conclusion regarding recognition of an employment relationship. Factors such as personal injury, property damage, level of consequent disability, and so forth, which, by themselves, are not determinants of an employment relationship, are found to be taken into account in the courts' conclusion. The rate of positive recognition of an employment relationship in cases involving occupational injury is significantly higher than for cases involving claims related to labour remuneration and social security disputes. A case study of takeaway riders by the Zhicheng Center shows that in cases involving platform work organized through outsourcing arrangements, the acceptance rate of occupational injury cases was 16.7 per cent higher than for cases involving work remuneration or social security disputes. In the self-employed model – that is, platform work where the individual worker is directly engaged with the platform – the difference in the acceptance rate between the two types of cases was 35.9 per cent (Zhicheng Public Interestes Lawyers, 2021a).

In addition to the above points, the relationship of subordination has also been explored and identified in other features of work organization and execution. For example, the deliberation of employment relationships has pivoted to the information that the platform is able to obtain through and then utilize in its operations. There is growing recognition that information has become a very important means of production for platform companies. The platform relies on its control of relevant information and the technical means to carry out the technical control of the working process of the platform service providers. Through this use of information, the platform company establishes a dominant position in the relationship with the platform service providers (workers). See section 4 of this report for a specific analysis.

[27] 李相国与北京同城必应科技有限公司劳动争议一审民事判决书, 京0108民初53634号, 2017.

Elements of new types of labour management

In new forms of employment, subordination has some new manifestations. Algorithms, GPS tracking and other geographic positioning devices, ratings and complaints, and behaviour and performance scores are recognized as important tools of control and punishment. They are perceived as important indicators in identifying organizational and personality subordination in judicial trials in many countries. Understanding their function adds greatly to understanding the concepts and application of command, control and punishment in platform-based work.

In domestic research, "Takeaway Riders, Trapped in the System" presents an in-depth elaboration of the digital employment relationship between takeaway system algorithms and riders. Many studies have shown that automatic monitoring and decision-making systems driven by algorithms are increasingly replacing the functions of managers in traditional employment relationships, such as assigning tasks, giving instructions, evaluating the work performed, providing incentives or imposing penalties. Some studies clearly emphasize that the platform formulates labour process rules, comprehensively supervises the labour process and determines the distribution of labour results through monopoly algorithm technology. Based on these findings, some scholars have proposed that the dependence of workers on platform companies based on algorithmic management should be recognized as "algorithmic subordination". However, in existing domestic cases in China, there is no clear trend with regard to recognizing platform rules and algorithm control as a kind of labour management. In many cases, the judgment was based on a comprehensive consideration regarding whether the workers in the case have the right to refuse, whether the platform or the associated enterprises (known as "cooperation partners" who serve the platform in realizing the final service offered by the platform) have other daily management duties, and whether there exist sectoral service standards and other factors.

Control through algorithms

Whether the platform company manages the workers in the course of delivering its service is an important criterion considered in cases that call for the determination of an employment relationship. When an enterprise becomes relatively large in its size, scale and operation, "labour management" is often executed on the basis of a management system and work rules. However, in the case of new types of employment – that is, work carried out under various arrangements to deliver the services offered by platforms – it has been contended that there are no similar rules for and regulations of the platform companies which form the basis for management of workers (those workers who actually deliver the services to the final customer). The idea is that labour management, as we understand it, does not exist in platform labour. It is contended that the platforms do not directly manage the workers on a daily basis. This may reflect the existence and operation of various functional "intermediaries" that operate between the platform (enterprise) – the "brand" and the "app" that provide the service to the customer – and the worker to actually deliver the service to the client. In many platform services, one of the key functional intermediaries is a "human resources intermediary company" that provides human resources services to platform companies. Such intermediaries, or "cooperation partners", are but one of a wide range of enterprises that make the operation of platform services possible, constituting an essential component of the "business model" of platform companies. Human resources intermediary companies – there can be many such companies providing services to a single platform company – are regarded as the company that nominally "employs" the workers. However, most of these companies claim that management rules are defined by the platform companies and that they do not have their own unique rules and regulations. More fundamentally, it is claimed that there are no written rules and regulations for managing workers or the work they perform. The one thing that exists are platform "algorithms" that run the platform operation. Platform

operations have therefore raised a fundamental question: Is the platform algorithm executing the function of rules and regulations management, thus playing a role similar to the management rules found in "traditional" enterprises and employment forms?

In new types of employment, the algorithm can be commonly understood as a series of platform rules and decision-making mechanisms that manage basic operations, such as workers' entry into and exit from the platform, order allocation, the piecework unit price, the share of "income" from each service delivery, the composition of remuneration and payment, working hours, evaluation, and reward and punishment rules. In the deliberation of disputes, one view that has been expressed is that these rules are only performance requirements and standards put forward by the platform to ensure service quality and service standards. As such, it is posited that they are not mechanisms for labour management, and their existence and operations are not sufficient indicators to determine the existence of an employment relationship between workers and platforms. This view is widely adopted in the cases of online taxi bookings, partly because the Interim Measures for the Management of Online Taxi Booking Operations and Services require online taxi booking platform companies to assume carrier responsibility and have clear requirements for their online taxi booking operations. For example, ride-hailing platform companies are required to ensure that drivers who provide services on the basis of online work assignments meet the same requirements as those who provide services offline. This means that the requirement that drivers should upload photos on apps every day is interpreted as ensuring compliance with the requirement for identity verification rather than attendance management. Disputes involving live-streamers also follow a similar logic, such as the number of days of live-streaming and the length of live-streaming: The leave system and other requirements are regarded as contractual obligations and compliance with sect-oral management regulations. As such, these are not recognized as constituting management action in the sense set out in the Labour Law.

Another view recognizes the reality of subordination embodied in these rules. In the case of Tang Ruiting detailed in Annex 1, the court emphasized the "technical control" of platform employment and held that the platform controlled the order receiving time, end time and customer satisfaction of its service through "quality control management".

Although court decisions in many countries tend to pay greater attention to the role of the rating system as a tool of control and the basis for disciplinary action, the courts in China have not deemed the rating system and pay deduction mechanisms used by the platforms as the exercise of the employer's disciplinary power.

Some rulings hold that the platform's customer rating system is only an incentive tool and does not constitute a disciplinary mechanism. For example, in the labour dispute between Tian Lanxia and the Beijing Branch of Didi Chuxing Technology Co., Ltd., the labour arbitration held that the reduction of service scores by the platform for drivers refusing orders and other acts does not constitute a "labour management" action in the sense set forth in the Labour Law. The court of first instance held that while such platform settings were helpful to reducing the potential of poor service, because the driver could choose to switch off the order mode or log off from the app, the relationship between the platform and the driver mediated by these settings was not deemed to constitute "labour management" by the employer. In the case of *Shao Xinyin v. Dias (Chongqing) Logistics*,[28] whether an employment relationship existed between the two parties was assessed on the basis of the nature of the operation of these settings. The appeals court held that the reduction of delivery job allocations to the rider by the platform after the rider refused

[28] 邵新银与迪亚斯（重庆)物流有限公司确认劳动关系纠纷二审民事判决书, 渝01民终780号. 2021.

to deliver after receiving an order should be perceived as the adjustment of the rider's distribution ability by the algorithm rather than control of his work will. The court did not find "managerial action" in this process and, based on this, concluded that there was no employment relationship between the two parties.

Offline cooperating entities

Although the data-driven algorithm is at the centre of a platform's daily operations, the algorithm itself cannot meet all management needs nor completely exclude the necessity for traditional labour management methods. Even if platform-based, light-asset enterprises have their own management teams (for example, Didi provides more than 1,000 employees to meet drivers' needs), it is challenging to cover a large number of employees scattered all over the country, so they need offline organizations to provide local services such as offline training, claims settlement and other services. For example, since 2015, Didi has outsourced the supply and management of drivers to local management companies (or driver service companies). The services or management provided by driver service companies include training and rule instruction, oversight of rule implementation; distribution of rice, oil, grains and other in-kind incentives offered to drivers; organizing birthday parties and other activities for drivers; distribution of epidemic prevention equipment (that became essential during the COVID-19 pandemic); and handling driver complaints. The management of drivers by external management companies ensures that the requirements of Didi can be met.

Market dominance and network effects provide large platforms with tremendous power to control their service providers. Whoever controls the platform algorithm controls the labour process. For example, in takeout delivery, Meituan headquarters controls the collection and dispatch of orders, the charging (fee) standards for each order, the order dispatch rules, the allocation of income between the platform and workers, and all capital flows through the app. Distribution companies assign work tasks to riders through the system they manage. Similarly, although Didi refers to external management companies as strategic partners, many management companies work one on one with Didi, rely entirely on the platform and are controlled by it.[29] Didi's monopoly and control of information ensures its effective supervision over the management company. Specifically, Didi requires these "management companies" to maintain a specific number of drivers and to record the total monthly income of drivers and their service ratings and retention rate.[30] Didi conducts regular investigations and year-end assessments of the management companies. A management company is more like a division of Didi, delegated to exercise some of the employer's powers and obligations, while Didi controls the source of the business, the distribution process and revenue distribution. Similarly, Meituan has more than 1,000 distribution companies that deliver its basic business and are responsible for recruiting and managing delivery riders.

[29] Meituan's real-time intelligent distribution system "Super Brain" has been continuously optimized and upgraded, constantly shortening delivery times. At the ArchSummit in 2019, Wang Shengyao, the senior algorithm expert of the Meituan Distribution Technology Team, introduced the basic operation of the intelligent system. The delivery path of the rider can be planned in 0.55 milliseconds, and from the second when the customer places an order, the system will decide which rider is to be assigned to take the order according to the rider's path, position and direction. Orders are usually dispatched in the form of three or five orders. An order has locations for picking up and delivering meals. If a rider carries five orders which involve ten locations, the system will plan the optimal distribution plan based on finding a solution from "ten thousand orders to ten thousand people" in 110,000 route planning possibilities within a second. In 2019, the average delivery time of takeout orders in the whole industry in China was reduced by ten minutes compared with three years previously. The shortening of delivery times is partly due to the efficiency of the system, but also shows that the control of labour is strengthening rather than weakening.

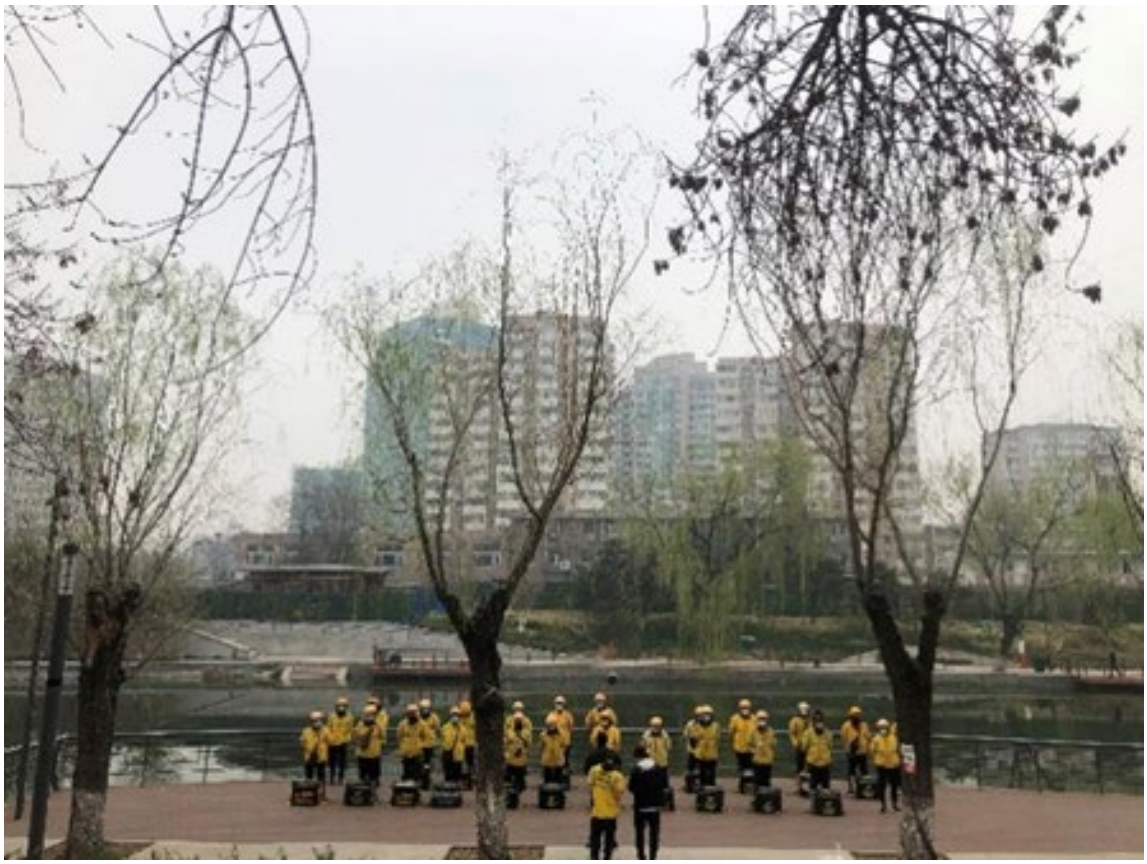
[30] Drivers can choose the car rental company, but the driver management company is chosen by Didi for the driver.

Instant messaging tools: A vital component of the work process

Communication has long played a key role in the management, coordination and control of an organization. In new forms of employment, instant messaging tools such as DingTalk and WeChat have been incorporated into the labour control process as a means of organizational control (Li, 2021). In addition to app screenshots, the most common evidence submitted by the parties in disputes involving new forms of employment is the chat records from WeChat and WeChat groups.

Unlike in traditional workplaces, where meetings, discussions and mailboxes are the main communication mechanisms for managing workers and work processes, human resources intermediary companies which cooperate with platforms mainly communicate with and manage workers through instant messaging tools like WeChat. In some cases, this is supplemented by offline meetings, as in the case of Meituan, where its delivery or management companies (who actually "hire" and manage the delivery riders) regularly hold offline morning meetings, which are more like team-building rituals.

When a worker joins a certain platform, in addition to registering on the app, they also need to link with the WeChat account of the human resources intermediary company (which is their direct management unit) and join its WeChat group. The instant messaging tool is the usual "communication channel" between the delivery rider and the human resources intermediary company. If the delivery rider or driver has a below-threshold performance score or order accomplishment, or records a good performance, the intermediary company and team manager (the head of distribution stations and the team leader) will pay special attention to that worker, for example by having a short discussion with them or sending them a small red envelope reward through WeChat. Instant messaging is used as "personal" communication between the supervising unit and the individual rider. Furthermore, the WeChat group provides a virtual common space for the human resources intermediary company and workers to share information collectively and facilitate problem solving. For example, the service company will announce Didi's latest policies and requirements to drivers in the WeChat group. More importantly, this group is used as a means to cultivate a spirit of cooperation between workers and the platform.



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The typical patterns of disguised employment relationships and related dispute proceedings

A survey of a wide range of relevant disputes and interviews with related stakeholders revealed three main ways through which platform companies present their relationships with workers, avoiding the establishment of an employment relationship. The three main patterns of avoidance – or disguise – of an employment relationship have given rise to corresponding dispute settlement deliberations.

Using contracts other than employment contracts: Inconsistency between the facts of employment and the contract

Some platform companies enter into civil or commercial contracts with the workers who provide the services that the platform offers. This assumes or designates the relationship as a commercial one, where the workers engage in self-employment rather than in an employment relationship. Such a relationship enables the platform to reduce labour costs and evade employer responsibility.

In practice, most platforms and workers sign "service cooperation agreements" with standard terms, digitally on the app itself. Workers sign the agreement by checking "agree" in the registration process after downloading the app.

Some workers sign electronic agreements with the platform (for example, Didi signs service cooperation agreements with all its drivers directly); other workers sign written agreements (offline) with the platform's agent company. These "agreements" are rarely "employment contracts" but commonly take the form of a "principal-agent agreement", "cooperation agreement", "contract agreement", "contracting agreement" or "lease agreement".

Some platform companies resort to a "labour dispatch arrangement", where workers sign employment contracts with labour dispatch companies or other human resources service companies.

Only a very small number of platform companies sign employment contracts directly with workers.

These civil/commercial agreements usually contain standard clauses. They do not contain clauses concerning labour protection and in most cases they incorporate a clear stipulation that the parties are not entering into an employment relationship and that there is no obligation on the part of "Party A" to pay social security contributions on behalf of "Party B"; or that labour laws are not applicable.

The following is an example of such a non-labour contract. Didi signs service cooperation agreements with all its drivers. The agreement states that:

"The company only has [an] affiliated cooperative relationship with all drivers who provide online car-hailing services. There is no direct or indirect employment relationship, and this relationship is not subject to the application of the Labour Law, Labour Contract Law, Social Insurance Law and Housing Provident Fund Management Regulations and other laws and regulations."

From the procedural point of view, the platforms or their cooperating companies that mediate employment (that is, provide "employment services") carefully craft the terms of the agreement in complicated, lengthy and professional language to maximize their rights and minimize their obligations, and this is then presented as a "standard agreement". There is virtually no room for substantive negotiations on the part of workers. Workers are left only with the choice of agreeing or not agreeing (to work or not to work), with limited possibilities of carefully analysing the details of the clauses set out in the standard template.

If a worker chooses to "disagree", they cannot proceed to the next step of registration. For example, the service cooperation agreement of Didi states that "if you do not agree to this agreement, you cannot log in to the application, receive orders or serve passengers". No clause can be modified.

Examining the reality/facts of the relationship and unearthing indicators of the employment relationship between the platform and a worker who has entered into this kind of civil agreement is the main difficulty and, indeed, the focus of dispute resolution proceedings involving new forms of employment. A key principle that is being established in practice is that consideration should be given to whether there is a gap between the name and content of the agreement and the employment facts and the unequal status of the two parties upon signing of the agreement.[31]

[31] See Huang Wenxu, eds, " Uber司机是否为Uber公司员工，英国劳动法庭做出判决"，人民法院报, 25 November 2016, 8th edition.

Multiple layers of "subcontracting" and the extensive networks of "cooperating" companies: Who is the employer and responsible for what?

A new element of "new forms of employment" that is emerging is the multiplicity of "entities" featuring on the "employer" side of the relationship: What emerges is that there is no one-to-one relationship between a worker and an employer. The relationships among the entities on the "employer side" are complicated, especially in terms of the extent of "responsibility" they bear in relation to the workers. In practice, in the context of presenting a dispute, this constitutes a problem for workers in identifying or designating an entity as the "plaintiff". Who should the worker sue? In initiating a dispute, whether labour arbitration or litigation, many workers are not clear who should be named as the real employer, and who should be the target of the claims for liability and remedy.

Firstly, the legal entity of the platform-based "company" itself is complicated. For example, workers know that they work in the name of Didi or Meituan, but in naming the "respondent" in their dispute claim, they quickly learn that it is not so simple, that it is difficult to designate the correct or the exact legal subject. The legal entities that exist behind the commonly known name of Didi include "Beijing Xiaoju Technology Co., Ltd.", "Didi Chuxing Technology Co., Ltd.", and "Beijing Didi Infinite Technology Development Co., Ltd." It is difficult for workers to understand the relationships between these legal entities, especially in terms of questions regarding employment relationships with the platform.

Secondly, the actual operation of a platform is made possible through a combination or layers of subcontracting, which would include logistics companies and other agents, human resources service companies, payment companies and other enterprises cooperating in employment. These entities take part in – or carry out different aspects of – the "management" of workers. As the "business model" evolves, it can be seen that the platform itself increasingly hides behind the myriad of contributing entities and gradually disappears.

From the cases brought to the dispute resolution bodies, it is evident that the role of the platform company in new forms of employment has changed significantly in recent years. In the early stages, in several e-designated driving cases, the platform was named directly as the respondent or defendant. Later, it was positioned as a co-respondent/co-defendant. More recently, platforms are portrayed as a "third party". Today, they no longer appear as any kind of party and in most cases do not need to participate in the arbitration hearing or litigation proceedings, with only their name being mentioned as a brand or context.

Platform-based companies transfer employment relationships and employment responsibilities to various "service providers", usually "requiring" them to sign labour contracts with their drivers or delivery workers. The "service providers" stand in to assume legal responsibilities under the banner of an employment relationship. For example, the service agreement between Didi and a "labour service company" specifies the requirements Didi sets for the company:

"The rights and obligations of Party A (labour service company) are stated as follows: ...sign a formal employment contract with the driver of Party B (labour service company). In accordance with the relevant national and local regulations and the standards and subjects determined by Party A and Party B through negotiation, Party B shall pay social insurance for Party A's drivers in full and on time, and pay the drivers' wages, bonuses, various benefits and other expenses in full and on time according to the agreement between Party A and Party B..."

Meituan's "Delivery Service Contract" clearly states that:

"Party B (Suzhou Yunting Network Technology Co., Ltd., the labour service company) shall be liable for all employment risks or personal injury (death, disability, medical treatment) and property losses caused to any third party during the delivery service period, and Party A (Shanghai) shall be exempted from liability."

This move – the transfer of responsibility – in the course of the evolution of the platform labour business model, is imitated by the "collabouration enterprises". The "service providers" engaged by the platform companies to shift risks and responsibilities also do not want to bear the risks and shoulder the responsibilities. Thus they have also started to replicate the practice of outsourcing all or part of their business just as the platforms have done. For example, the dispute between Suzhou Yunting Network Technology Co., Ltd. (service provider to Meituan) and Wang Zhijun, where the worker wanted to confirm the existence of an employment relationship, revealed a complicated cascading of outsourcing that created substantial uncertainty regarding who is involved in the employment relationship. It was revealed that Yunting (service provider to Meituan) had outsourced some of its work for Meituan to another entity. The project outsourcing agreement signed by the two parties reads:

"If Party B (Huai'an Cangwu Network Technology Co., Ltd.) fails to sign a contract with employees in accordance with the contract filing, withholds employees' wages, or pays employees' wages lower than the local minimum wage standard, Party A (Suzhou Yunting Network Technology Co., Ltd.) may order it to make corrections within a time limit.

If Party B fails to make corrections within the time limit, Party A shall have the right to unilaterally terminate the contract, and Party B shall compensate for any losses caused to Party A."

In the above case, the third party, Huai'an Cangwu Network Technology Co., Ltd., even offered to "request the court to confirm the establishment of an employment relationship between the defendant and our company".

Company A is tasked with order dispatch, Company B handles insurance, Company C manages wage disbursements, Company D oversees individual income tax payments, and Companies E, F, and G supply rental vehicles. The employment relationships of workers engaged in platform work are obfuscated within smaller peripheral companies through deliberately complex outsourcing arrangements (Zhicheng Public Interestes Lawyers, 2021b).

The problems brought about by layers of subcontracting affect the dispute resolution proceedings in the following ways:

Firstly, in determining "whether there is an employment relationship", it is clear that the question "who is the employer" has a significant impact on the outcome of the case. From the practical point of view of pursuing a case, it seems easier for workers to sue the human resources intermediary company rather than the platform itself in order to claim the existence of an employment relationship.

The labour dispute between Gao Zhiqiang and Beijing Sankuai Online Technology Co., Ltd. and Beijing Qianbaobao Payment Technology Co., Ltd. can be illuminating. In this case, the worker sued Beijing Sankuai and Qianbaobao, but the dispute also involved Suzhou Yunting Network Technology Co., Ltd. (the agent of Meituan) and Haohuo Kunshan (a labour outsourcing platform). During the court hearing, the worker was asked to name which company he wanted to claim as the employer party in his employment relationship. The worker chose Beijing Sankuai Company. The claim was eventually rejected due to insufficient evidence. However, in two similar

cases involving the same company, namely, the case of *Suzhou Yunting Network Technology Co., Ltd. v. Wang Zhijun* and that of *Suzhou Yunting Network Technology Co., Ltd. v. Meng Jingping*, the workers named Suzhou Yunting Network Technology Co., Ltd. (the agent of Meituan) as the respondent in the claim seeking recognition of an employment relationship. In these two cases, it was deemed that there existed an employment relationship, both at the arbitration hearing and at the court of first instance – unlike in the case where the worker named Beijing Sankuai as the respondent.

Secondly, after employment responsibility is transferred from the platform to the human resources intermediary company, the regulation and protection of workers' rights becomes more difficult. When platforms sign various agreements directly with workers, government regulation only needs to lock in a few large platforms. However, when there are complicated layers of subcontracting, the objects of supervision are broken up into parts and the number of entities to address is multiplied.[32] Moreover, the ability of human resources intermediary companies to comply with labour obligations and to assume employer responsibilities is generally weaker than that of the platform companies themselves. In some cases, these "intermediaries" even lack the qualification for being an employer. For example, some takeaway riders' stations are registered as self-employed workers rather than as "enterprises". Even workers and the "employment service collabouration enterprise" (that is engaged by a platform to provide "employment services") may not have the capacity to actually fulfil its employment-related obligations. In December 2020, the Third Intermediate People's Court of Chongqing made 85 judgments in succession, requiring two delivery companies to pay delivery riders double wages, compensation for unused paid leave, and so forth. However, with registered capital of 150,000 Chinese yuan (CNY) and CNY1 million, respectively, the two companies successively became defaulters after the judgment and failed to comply with the judgment.

Thirdly, despite the phenomenon of multiple layers of subcontracting, there are few cases where the platform companies were directly named to assume responsibility related to the employment relationship or to share the responsibility.

In the context of freewheeling outsourcing or the contracting out of the different parts of the business operation, questions regarding what responsibilities a platform company should bear, and how the responsibilities between the platform company and the human resources intermediary companies should be allocated, have become a major conundrum for dispute resolution proceedings. The judicial judgments have not been consistent.

The situation may begin to change, however, with implementation of the Guiding Opinion. In the Guiding Opinion, platform companies are required to bear the corresponding responsibilities according to law if the rights and interests of workers are damaged by human resources intermediary methods such as outsourcing. In November 2022, the People's Court of Chaoyang District, Beijing, held a public hearing and issued a decision regarding a dispute over the right to life triggered by the sudden death of a takeaway rider on the way to deliver meals late at night. Liu Moumou, a delivery worker, died of a sudden illness in the course of delivering meals. The court found that Liu's own responsibility amounted to 10 per cent, the platform company's responsibility was 20 per cent based on the fact that the platform did not perform due diligence and thus stood at fault, and the responsibility of the information technology company was 70 per cent. The court ordered the takeaway platform and the information technology company to pay Liu's family members more than CNY1.5 million in compensation.

[32] In September 2021, Meituan had 1,103 external collabouration distributors, see http://m.techweb.com.cn/article/2021-09-15/2857593.shtml.

False self-employment

According to the provisions of Document No. 12, the premise for establishing an employment relationship is that both the worker and the employer need to meet the legal qualifications to be qualified as a "subject". Self-employed workers are independent commercial subjects; they do not qualify as subjects who can form employment relationships. Because of this, they cannot enter into and establish an employment relationship with an employer. For this reason, many platforms or collabourating who provide employment services for the platforms induce or force workers to register as self-employed, citing various benefits of this arrangement, including easier payment (service fees) and lower tax obligations.[33] The service contract they sign with the workers removes them from the substantive status as employers, thereby also removing their responsibilities as employers. The platforms have established or resort to special mechanisms and purpose-built entities to facilitate this process – making use of a procedure called "cluster registration". For example, Haohuo, a human resources service platform, channels workers to an affiliated company (Shuidi) that automatically registers the workers as self-employed before signing service agreements with them, creating the false appearance of self-employed status for the workers.

Most workers are forced or led to register as individual businesses. From the cases analyzed, it is possible to note the deliberate intention in the actions of the human resources intermediaries in obliging workers to register as individual businesses. Most workers are not aware of being given the status of "self-employed". Workers follow these steps at the request of direct managers such as the stationmaster, believing that these are required. Most of the time, they are not informed about the purpose and significance of the steps they have taken in order to start work until their disputes are examined at arbitration or by the court. The labour dispute between the Bozhou Branch of China Mobile Tietong Co., Ltd. and Guo Hao is one such example. In some cases, the registration as a self-employed worker does not even contain the signature of the worker themself, indicating that such registration lacks their informed consent. In some instances, the actual registration occurs only after a worker is involved in a traffic accident, as in the Meng Jingping and Wang Zhijun cases.

Some collabourating companies handle the registration of workers as self-employed during or following the termination of an employment relationship. This means that workers within an employment relationship may prematurely end their employment contracts as stipulated, or workers who have not signed an employment contract are asked to register with the Haohuo app, often without understanding the purpose.

It is notable that the registration of workers as independent individual business entities is spreading to other traditional industries beyond the platform economy. In the labour dispute between Mao Xi and Shenyang Dongfu Supermarket Co., Ltd., the driver who originally had an employment relationship with the employer was registered as an individual business. The court of first instance held that the employment relationship had been terminated following the registration of the driver as an individual business and, as a result, the worker's claim was only partially supported.[34]

A review of the judgments show that in most cases the courts and arbitration proceedings do not tend to identify the workers as self-employed in these situations. The key reasoning in these

[33] Tax considerations: If the delivery rider is registered as an individual business, the tax rate on business income is roughly 0.1–1 per cent, which is much lower than the tax rate on labour income.

[34] 毛喜与沈阳东副超市有限公司劳动争议一审判决书. 辽0103民初2420号. 2020.

ruling is that the work process – the way workers receive platform orders, the work methods and the content of work – did not change prior to or following the registration as self-employed. For example, in the labour dispute between Jiangsu Ranguang Logistics Co., Ltd. and Xiaodong, a quick delivery worker, it was found that the daily work content and working hours of workers registered as self-employed were still subject to the assignment and management of Jiangsu Ranguang Logistics Company (a subcontractor for a platform). Workers continued to use the work tools provided by Jiangsu Ranguang Logistics Company and comply with its rules and regulations, which remained mostly the same. Thus, the court found that the behaviour of the parties still conformed to the basic characteristics of an employment relationship. To date, similar conclusions have been drawn in "traditional cases" that have been identified and published by the courts (or other authoritative bodies) in various local jurisdictions.

Another factor informing the decision regarding the "self-employed" status of workers is the provision of work equipment (the means of production). Who actually provides or owns the tools and resources necessary to carry out the work is taken as an important basis for the determination of employment status. In examining this question in disputes involving new forms of employment, the judges and arbitrators have expanded their view of what constitutes work equipment and have begun to include data and information technology as a means of production.

The means of production in the traditional employment relationship mainly includes the tools, machines, equipment and raw materials needed by workers to engage in labour. The new economic model also includes some traditional means of production, such as transportation, machinery and equipment. In some disputes involving new forms of employment, the courts saw fit to deny the existence of an employment relationship on the grounds that the delivery riders or ride-hailing drivers provide their own means of production. In these cases, it is frequently observed or argued that "vehicles and vehicle insurance are owned by the drivers themselves". "They provide vehicles by themselves, and we do not provide vehicles. Therefore, we do not exercise work management over the workers."

However, in daily operations, the platform economy relies on the internet to master interactive information and information technology, which are considered to be the most important means of production and which dictate labour conditions in new forms of economic activity.

The recognition of information and the technology that collects and makes use of the information as important components of the "means of production" is found in many deliberations of disputes that contest the existence of an employment relationship. For example, the 2017 Beijing 0108 Basic People's Court 53634 states the following: "Li Xiangguo can decide what kind of vehicle to use, and Tongcheng Biying Company does not provide him with labour tools." However, the Court observed that in new forms of employment under the internet economy from which the dispute arose, the so-called means of transportation were not the main means of production. Rather, information gathered by the operator of the Flash Delivery platform, Tongcheng Biying Technology Co., Ltd., through internet technology was the more important means of production. Yet, the information and information technology that constituted the main "means of production" in the business operation were not available to Li Xiangguo himself. Based on this observation, the Court ruled that Tongcheng Biying Technology Company was in a strong, dominant position in the employment relationship with Li Xiangguo by virtue of its control over the relevant information and technical means. This echoes the observations and conclusions drawn by many courts in other countries, which have concluded that the basic means of production is the app, not the worker's mobile phone or electric car. Compared with the importance of the apps and algorithms, the value of electric cars and mobile phones provided by workers was perceived to be negligible in the actual operation and generation of business and value (Valerio, et al., 2021).

▶ 4 Evidence for the resolution of labour disputes in new forms of employment

In interviews, many arbitrators observed that "evidence is a big problem", and the difficulty that evidence brings to the determination of employment relationships is sometimes even greater than identifying the employment relationship itself.

In most disputes arising from new forms of employment, the parties submit electronic evidence such as app screenshots and WeChat chat records in addition to – or in some cases in lieu of – the specific evidence material listed in Document No. 12 to prove the existence of a factual employment relationship. This material evidence includes payroll documents, payment records of various social insurance premiums, work permits, service certificates and other documents that can prove identity, registration forms, application forms and other recruitment records, as well as attendance records. Judicial bodies have differing opinions on the authenticity of electronic evidence, the growing prevalence of which and the need to verify it has increased the difficulty of assessing cases.

In view of the disadvantageous position of workers in obtaining evidence, both Document No. 12 and the Mediation and Arbitration Law stipulate reversing the burden of proof, requiring employers to provide evidence which is related to the disputes and within their control. The regulatory approach assumes that the employer shall bear the adverse consequence if they fail to provide relevant evidence.

The acceptance of new electronic evidence, evidence preservation and other issues were not anticipated when Document No. 12 was formulated in 2005, but now they have become pressing concerns. There are no stand-alone rules of evidence in labour dispute arbitration; most of the rules of evidence of many local arbitration commissions refer to civil litigation practices. These practices are guided by the Rules for Handling Labour Dispute Arbitration Cases, a national level regulatory document issued in 2017. While this guidance does not specify the probative force of electronic evidence, it stipulates that matters such as form of evidence, submission of evidence, exchange of evidence, cross-examination of evidence and identification of evidence involved in dispute settlement shall observe and follow the relevant provisions of the Rules of Evidence in Civil Procedure, unless there is a specific provision in the Rules. The Civil Procedure Law now includes electronic evidence in the scope of evidence. Initially it was understood that the courts needed to verify the reliability of WeChat evidence, but it is now accepted that this is not necessary. With the changes in civil litigation practices, some local arbitration commissions have made some corresponding adjustments.

For example, the Jiangsu arbitration department stipulates that electronic evidence is included in the scope of evidence. Jiangsu rules call on the arbitration commissions to examine the evidence from WeChat, Alipay and other internet messaging apps against the three aspects of relevance, authenticity and legality. It advises that the authenticity of the other party's subject (identity) and the originality and completeness of the chat records should be checked in examining the WeChat or QQ and other virtual chat records. It also stipulates that electronic evidence cannot be used alone as the basis for determining the facts of the case without the confirmation of the competent department. It advises that electronic evidence should be fully confirmed by the other party or by the competent department, and that the parties must provide other evidence to form a valid chain of evidence. It holds that isolated and single evidence without a fully formed

chain of evidence cannot be recognized as valid evidence.[35] At the national level, there has not yet been a recent update of the 2017 guidance.

[35] See Article 17 of the “Summary of the Seminar on Difficult Issues in Labour and Personnel Disputes in Jiangsu Province(《江苏省劳动仲裁案件研讨会纪要》)"issued by Jiangsu Provincial Labour Dispute Arbitration Commission: "How should arbitration institutions grasp the probative force of electronic evidence such as WeChat and Alipay when reviewing its effectiveness?

▶ 5 Possible impacts of the implementation of the Guiding Opinion

With the rapid development of the platform economy, the number of workers engaged in new forms of employment, such as online car-hailing and instant delivery services, has increased dramatically. But these workers face new situations and problems in securing their rights and interests. To address the challenges and policy gaps, on 22 July 2021, the MOHRSS and seven other government ministries (or agencies) jointly issued the Guiding Opinion, a guideline to improve the protection of the rights of workers engaged in new forms of employment. The Guiding Opinion has, for the first time, made clear that platform companies should shoulder their due responsibilities in protecting the lawful rights and interests of their employees. The Guiding Opinion advocates for taking measures to improve labour market institutions and mechanisms. It calls for implementation of pilot initiatives in making available occupational injury insurance for workers engaged in ride-hailing, food delivery and instant delivery services through platform companies.[36] But there are still some legislative gaps that need to be addressed in the future, including the question of social insurance coverage and the application of minimum labour standards. The following sections examine the substance and implications of the Guiding Opinion in some detail.

The legal effect of the Guiding Opinion and its limitations

As a regulatory document, the legislative authority and normative effects of the Guiding Opinion are limited. It is not a normative legal document that can be cited by court judgment documents. Nevertheless, it is expected that the Guiding Opinion will have an actual impact on the outcome of arbitration hearings and judicial decisions regarding disputes related to new forms of employment.

Current national and local legislation do not contain any provisions regarding the question of whether the relationship between workers (working in new forms of employment) and platform companies is characterized as an employment relationship. They do not provide any guidance on how to determine whether an employment relationship exists or does not exist (in the context of the platform economy). In view of the absence of clear legal provisions, the Guiding Opinion will become an important reference for institutions that have the competence to resolve disputes regarding new forms of employment.

In the following sections, specific provisions of the Guiding Opinion will be examined in order to learn how it should be understood and interpreted in practical efforts to recognize and determine legal liability in new forms of employment. An exploratory analysis will be followed by a review of some of the issues that may require further discussion and clarification.

[36] The Guiding Opinion requires piloting localities to provide occupational injury insurance for flexible employees in ride-hailing, food delivery and instant delivery platform companies. Distinct from the existing work-related injury insurance, this pilot scheme is designed for workers in new employment forms. Since its launch in July 2022, the first batch of pilot programmes involved seven platform companies: Cao Cao Travel, Meituan, Ele.me, Dada, Shansong, Lalamove and GoGoVan. These pilots have been conducted in seven provinces and cities nationwide, covering a total of 6.15 million individuals. The pilot of occupational injury protection adopts a payment-per-order approach, with the platform bearing the costs. Workers encountering injuries, such as traffic accidents or other accidents, while carrying out platform order tasks are eligible for occupational injury protection benefits. These benefits include medical expenses, rehabilitation costs and other items, following the basic principles of existing work-related injury insurance. See 国务院政策例行吹风会：《社会保险经办条例》有关情况.

The main contents of the Guiding Opinion

The Guiding Opinion divides the engagement of workers (the work arrangement) in new forms of employment in the platform economy into three types , namely:

- the engagement of workers in full conformity with the establishment of an employment relationship;
- the engagement of workers not in full conformity with the establishment of an employment relationship, but where the enterprise executes labour management measures and actions towards workers; The Guiding Opinion refers to this type of "employment" as an "incomplete employment relationship";
- individuals who rely on the platform to independently carry out business activities – engage in freelance activities, and so forth.

The term "incomplete employment relationship" is used to denote those groups of workers who have greater autonomy in their work (for example, they can decide whether to log in and take orders independently), but in the actual process of providing labour, they must comply with the algorithms and labour rules determined by the platform-based company and be managed by it. The Guiding Opinion postulates that the work arrangements that these workers and the platform-based company enter into do not fully conform with the characteristics of employment relationships. At the same time, the Guiding Opinion recognizes that the relationship between the two parties in such an arrangement is not a completely equal civil relationship. The importance of the Guiding Opinion is that in this situation it is reasonable to expect that the platform-based companies should assume some degree of (corresponding) responsibility in protecting the rights and interests of workers.

With regard to the ways of handling disputes involving workers employed in new forms of employment, the Guiding Opinion sets forward some relevant principles, namely,

"Courts and labour dispute mediation and arbitration institutions at all levels should strengthen the guidance of handling labour disputes, coordinate their work, determine the relationship between enterprises and workers according to the facts of employment, and handle cases of labour rights and interests of workers employed in new forms in accordance with the law and regulations."(Article 18)

All kinds of mediation organizations, legal aid institutions and other specialized social organizations are called on to provide more convenient, high-quality and efficient dispute mediation, legal consultation, legal aid and other services for workers employed in the platform economy according to law.

The positive implications of the Guiding Opinion on employment practice

Since the issuance of the Guiding Opinion, relevant ministries and agencies have actively promoted the protection of the rights and interests of workers employed in the platform economy through various administrative actions, including guidance meetings and other means of direct engagement with platform economy entities. There has been some positive progress, including a relative halt in the practice of inducing the registration of workers as self-employed, and the adjustment of threshold values (for example, fee rates) in algorithmic processing. The pilot work in occupational injury insurance is also being steadily taken up.

There have been some highly publicized incidents which highlight the impact of the Guiding Opinion. In September 2021, takeaway riders were required to register as self-employed workers, triggering a substantial discussion on social media. In response to public attention, Ele.me[37] and Meituan[38] issued statements declaring their policy of prohibiting the inducement of or forcing delivery riders to register as self-employed. Many provinces or lower-level localities developed and issued follow-up documents for implementation of the Guiding Opinion, also setting forth more clearly formulated requirements. For example, Hebei Province stipulated that enterprises should not force or induce workers to register as self-employed in order to evade their employment responsibilities.

There have also been some initiatives focusing on algorithmic management. In July 2021, the State Administration for Market Regulation (SAMR) issued the Guiding Opinion on Implementing the Responsibility of Online Catering Platform and Effectively Protecting the Rights and Interests of Takeaway Delivery Workers. The SAMR guidance calls on platform companies not to adopt the "strictest algorithm" but a "reasonable algorithm" based on more reasonable assessment thresholds regarding the number of order take-ups, the punctuality rate, login rate and other assessment elements, and to appropriately relax the distribution time limit. This intervention led to the first-ever public disclosure by Meituan regarding its work process algorithm. It made public its rules for calculating the delivery time of riders and the algorithm logic for estimating the delivery time.

The impact of the Guiding Opinion of disputes involving new forms of employment

Reaffirmation of rights and interests may trigger an increase in rights disputes

The Guiding Opinion identifies some basic rights that should be afforded to workers employed in new forms of employment. It calls on the respective competent authorities to urge enterprises to pay these workers not less than the local minimum wage standard, to formulate and revise piecework unit prices and the income allocation between the workers and the platforms, and so forth. The aspirations articulated by the Guiding Opinion may lead to expectations on the part of workers that may not be matched by the standards formulated by companies. Furthermore, the new intermediate category – "incomplete employment relationship" – may open a path for companies to evade the obligation to ensure labour rights and interests associated with employment relationships. It cannot be ruled out that platform-based companies may try to classify

[37] In the Guiding Opinion, besides the three types of work arrangements, "labour dispatch" and "other collabourative employment methods" (paragraph 3) are also identified among the different types of work arrangements in the platform economy. Detailed provisions on labour dispatch are stipulated in the Labour Contract Law (Articles 66 and 67) and the relevant rules. They make clear that labour dispatch is only allowed for supplementary, temporary and auxiliary assignments, and applicable only for non-core business purposes. They guard against abuse by stipulating that a company may not establish a labour dispatch firm with the purpose of "supplying" labour to itself. Further safeguards are provided by a quantitative ceiling on the use of labour dispatch workers – that is, labour dispatch workers shall not exceed 10 per cent of the total workforce in an enterprise. As to "other collabourative employment methods", it generally refers to outsourcing and subcontracting practices. Further "guidance" texts are expected regarding these work arrangements.

[38] Meituan announced on 8 September 2021 that it had issued the "Initiative on the Protection of the Rights and Interests of Workers Employed in New Forms" to 1,103 takeout companies and held a video conference to conduct a special study to raise awareness regarding the new regulations and policy. The "Initiative" called for "strictly prohibiting inducing and forcing workers to register as self-employed as a means to avoid employment responsibility". It also contained a policy to standardize the employment behaviour of delivery partners. On 14 September 2021, a "Notice on the Prohibition of Requiring Riders to Register as [an] Individual Business Household" was sent to all partners, again reiterating this policy and putting forward specific requirements. It announced that it would require all partners to sign a letter of commitment as part of efforts to further strengthen the supervision of the platform.

workers as working in arrangements that are "not fully in line with the establishment of an employment relationship.

Recognizing this potential negative trajectory, the MOHRSS has stepped up efforts to guide the employment behaviour of platform-based companies and reduce the risk of a proliferation of new "modes of employment" that do not fully conform with the establishment of an employment relationship. This has led to the development of a set of model texts for contracts and agreements that could be used in engaging/contracting workers to carry out the business activities of platform companies. These templates were designed, respectively, to be used for workers engaged in conformity with the establishment of an employment relationship and those engaged under the category of an "incomplete employment relationship". The three templates issued in February 2023 contain indicative guidance regarding the rights and obligations of companies and workers by suggesting specific contract clauses. This represents a practical approach in clarifying the respective boundaries of rights and interests of the constitutive parties in the platform business – the platform companies, third-party collabouration/partner entities and workers – to give effect to the spirit of the Guiding Opinion.

More practical guidance is being developed along these lines. The MOHRSS and the Supreme People's Court jointly issued Six Typical Cases Involving New Forms of Employment[39] to assist and guide labour arbitration and litigation proceedings involving new forms of employment.

The "six typical cases" cover most of the major types of work in the digital economy in China, including online car-hailing services, instant delivery, live-streaming and online domestic services, as well as the typical types of employment found in these services. The case analyses demonstrate a clear approach in addressing the key questions or issues that need to be examined in disputes involving new forms of employment. They highlight adherence to the principle of primacy of facts in determining the relationship between companies and workers and elabourate a methodology for a "subordination test plus constitutive factors examination" in determining the existence of an employment relationship in a variety of new forms of employment. This methodology requires an examination of the degree of autonomy of workers regarding working hours for the platform as well as their workload; a comprehensive analysis of the features of personal subordination, economic subordination and organizational subordination between workers and enterprises; and greater attention to the discovery of the extent and effect of labour management. The "six typical cases" can also be taken as an official announcement of an attitude and approach to "illegal employment behaviors" designed to circumvent employers' obligations. They target civil cooperation agreements, "fake outsourcing of real employment" and inducement of workers to register as individual industrial and commercial entities for correction/eradication, in order to ensure strict protection of the legitimate rights and interests of workers.

The definition of "not fully conforming to the situation of establishing an employment relationship" and the criteria for establishment of "employment facts" are not clear.

The Guiding Opinion created the category of "not fully conforming to the situation of establishing an employment relationship" but did not provide a clear definition of this terminology. Academic opinions differ (Fan, 2022), and there is a sense of confusion among the frontline practitioners of dispute resolution proceedings. The coining of "incomplete" employment relationship raises

[39] The MOHRSS and the Supreme People's Court's Notice on Jointly Releasing the Third Batch of Typical Cases of Labour and Personnel Disputes (人力资源社会保障部 最高人民法院关于联合发布第三批劳动人事争议典型案例的通知).

questions on two fronts: one is about the substantial rights of workers, such as which rights (among all the rights that are afforded in a "complete" employment relationship) should be recognized for workers in an "incomplete" employment relationship and to what extent these rights should be protected; the other is about procedural issues, that is, what is the appropriate institution or channel of remedy for disputes arising from situations that "do not fully conform to the situation of establishing an employment relationship". In addition to these issues, other terms also need to be clearly defined, such as "written agreement" and "primacy of facts" mentioned in the Guiding Opinion.

The Guiding Opinion does not directly specify the relevant recognition criteria for identifying different types of employment in new forms of employment. This reflects the reality of the wide range of different employment forms emerging or prevalent in different new industries, as well as the continuing development and changes in employment patterns in the platform economy.

In terms of labour dispute resolution proceedings, the Guiding Opinion does not provide a solution to the often-mentioned problems related to grounds for judgment, while introducing the additional difficulty of having to distinguish between the three types of relationships. Some of the shortcomings are addressed in local initiatives. Jiangxi Province is the first – and for the moment the only – province to flesh out what constitutes "employment facts":

"The relationship between companies and workers is comprehensively identified according to the working hours, working frequency, workplace, remuneration settlement, labour tools, the degree of supervision and management of workers by enterprises, disciplinary measures and other factors."[40]

Lacking clarity on remedies for the rights of workers working in arrangements "not fully conforming to the situation of establishing an employment relationship"

Currently, there are no laws or policy documents explicitly outlining remedies for labour rights in situations "not fully consistent with the establishment of an employment relationship." In legal proceedings, courts can handle such cases as ordinary civil disputes, which is uncontroversial. The key issue lies in China's labour dispute resolution mechanism, which involves one arbitration and two levels of court review. Labour disputes must first go through a mandatory arbitration phase before proceeding to subsequent litigation. Whether an arbitration commission -- a dispute resolution mechanism for labour disputes involving workers in an employment relationship -- should accept disputes lodged by workers working under work arrangements "not fully conforming to the situation of establishing an employment relationship" is still under discussion.

Most of the arbitration commissions do not agree to accept cases of incomplete employment relationships, citing the lack of a sound legal basis for receivability and competence. The competence for receivable cases for labour dispute arbitration is stipulated in the Law on Mediation and Arbitration of Labour Disputes. "Not fully conforming to the situation of establishing an employment relationship" is not a legal concept, but one that has been created by administrative regulatory documents. On the one hand, if the scope of receivability of labour disputes is to be changed through judicial interpretation, then it risks exceeding the prescribed authority of the court's judicial interpretation; on the other hand, if arbitration follows the court's interpretation

[40] See Article 19 of the Policy document of Jiangsu Bureau of Human Resources and Social Security： "关于维护新就业形态劳动者劳动保障权益的实施意见".

(the court issues a new interpretation despite the above), then arbitration is exceeding what the law allows it to do; subsequently, the court may state that the arbitration has overstepped its mandate.

Furthermore, the current law does not specify the definition of "not fully conforming to the situation of establishing an employment relationship". The new category contains some features of civil legal relationships, such as contracting and outsourcing, which originate from laws other than labour laws. As such, handling them would require knowledge and expertise of the related laws, which may require relevant professionals with a legal background and qualifications. Existing labour dispute arbitrators mainly apply labour laws and regulations and have little experience of civil laws and regulations, signifying that labour arbitration bodies may not be able to ensure quality and effectiveness in handling these -- at best -- hybrid cases.

Anticipating these difficulties, most labour arbitration commissions do not consider it appropriate to include disputes in “not fully conforming to the situation of establishing an employment relationship” in the scope of labour disputes.

However, there is no clear consensus among experts and scholars. Some posit that “not fully in line with the establishment of an employment relationship” is a form of civil relationship and thus the court is the appropriate forum for dispute resolution. Other experts argue that there is no normative basis in civil law to address "not fully conforming to the situation of establishing an employment relationship" emanating from platform-based employment (Zhang, 2021).[41] They propose that it should fall within the scope of adjustment of the Labour Law and accept that the Labour Law could be partially applied to the new category, including the dispute settlement system of one arbitration and two trials.

Still other experts suggest that the employment mode of "not fully conforming to the situation of establishing an employment relationship" should be identified and applied strictly, to avoid misapplication or abuse. They call for the principle of “presumption of an employment relationship”: it should first be assumed that the employment relationship is established, and the platform should bear the burden of providing sufficient reasons and evidence to justify the legitimacy of an incomplete employment relationship (Tu & Wang, 2021).

At present, there are two kinds of practice for local labour arbitration: one is refusing to accept this category of cases and giving instructions to the applicants to submit the cases to the civil court. This is also a common practice for most local labour arbitration commissions; the other is accepting certain claims, as in Jiangsu Province. Jiangsu Province has made it clear in the supporting documents that "the courts and arbitration institutions should accept all cases that meet the conditions for filing and accept and handle cases of incomplete employment relationships involving the wages and remuneration of workers and disputes over compensation for occupational injury protection (workers should be but are not insured) in accordance with this Opinion and the employment agreement between the two parties". As of March 2022, according to the available information, there has not been a dispute that has been received based on this new policy of Jiangsu Province.

[41] The specific reason is that while the employer's liability stipulated in Article 11 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Personal Injury Compensation Cases (2003) has been cited by judges as the reference for solving the problem of liability in "employment relationships", this judicial interpretation is no longer available as it was deleted following its revision in 2020. In the special provisions on the subject of liability, the tort liability chapter of the Civil Code stipulates the employer's vicarious liability and personal labour damage liability but remains silent on the legal liability of enterprises in non-employment relationships.

▶ Box 1: Specific requirements for the settlement of disputes and mediation and arbitration in province-level documents implementing the Guiding Opinion

Hunan, Fujian and other provinces have proposed to promote the establishment of labour-related dispute mediation bodies in the chambers of commerce and the trade associations in those sectors where new forms of employment are prevalent, and to improve the mechanisms for resolving disputes raised by workers in new forms of employment.

Chongqing[42] issued guidance documents that clarify the scope of labour dispute mediation to cover the disputes between platform-based companies and related workers where there are employment relationships with workers, as well as between platform-based companies and workers where there are no employment relationships with workers. However, Chongqing documents make clear that labour dispute mediation is not extended to cases of "incomplete employment relationships" by stipulating that "disputes requiring determination of an employment relationship" shall not be accepted and mediated. For these cases, the parties shall be guided to avail of legal means, such as labour arbitration and civil litigation.

Jiangxi, Gansu and other provinces have proposed to promote the coordinated mechanism of "court + trade union" for labour dispute litigation and mediation, with an emphasis on per-litigation and in-litigation mediation. In contrast, Anhui Province proposes to establish special labour dispute mediation committees or special service windows at the various people's mediation committees in towns and wards where there is a relative concentration of platform companies and a relatively high number of labour disputes.

Jiangxi Province also published a guidance document listing the factors (indicators) for identifying the relationship between companies and workers. Working hours, working frequency, workplace, remuneration settlement, labour tools, as well as the degree of supervision and management of workers and disciplinary measures were put forth for examination.

[42] The Guidelines on Mediation of Disputes on Labour Security Rights and Interests in New Forms of Employment are applicable to the people's mediation committees for labour disputes established according to the law by trade union organizations at all levels.

▶ 6 Suggestions

The recognition of employment relationships and the redefining of their scope will substantially affect the interests of the relevant parties; therefore, any policy adjustment should be cautious and systematically structured (Li & Tian, 2015). The publication of the Guiding Opinion reflects the need to provide positive and active guidance (or a basis) for the protection of the rights and interests of workers engaged in new forms of employment over and beyond what can be provided through judicial actions. At the same time, the Guiding Opinion has to be seen as a tentative (or provisional) initial effort in reconstructing the concepts and principles of the employment relationship and the protection of the rights and interests of workers. As such, the Guiding Opinion can be understood as an effort in system construction.

The Guiding Opinion clearly states its objective to provide and establish clear guidance and principles of "supporting and standardizing the development of new forms of employment, effectively protecting the labour rights and interests of workers employed in new forms and promoting the healthy and sustainable development of the platform economy".[43]

The Guiding Opinion makes clear that it is not intended to thwart either the development of new forms of employment or new business models and activities. It also clearly states that both economic development and the generation of jobs should not sacrifice labour rights.

This chapter examines some preliminary suggestions on how to address the task of assessing whether an employment relationship exists in new forms of employment in order to facilitate the improvement and strengthening of dispute resolution proceedings in cases involving new forms of employment. The suggestions examined in this section strive to reflect and give effect to the basic philosophy, principles, orientation and approaches expressed in the Guiding Opinion.

Making mediation and arbitration accessible for labour disputes of all types of work

Does the case of "not fully conforming to the situation of establishing an employment relationship" apply to current labor regulations? The answer to this question will determine whether related disputes will be perceived as labour disputes that can avail of labour dispute arbitration procedures. It is necessary to quickly clarify whether disputes between workers and platform companies or cooperation partner companies should be able to make use of the traditional procedure of "one arbitration and two trials" when the "work arrangement" is deemed to be "not fully conforming to the tests of employment relationships". In the long run, especially in view of the scope of application of the envisioned Basic Labour Standards Law,[44] disputes involving workers working in arrangements that "do not fully conform with the establishment of an employment relationship" should be able to be settled under the framework of labour law. However, according to current regulations and practices, labour arbitration is not regarded as competent to accept

[43] See Preamble to the Guiding Opinion.

[44] In the draft of the Basic Labour Standards Law, "new form of employment" is defined as a quasi-employment relationship. "Disputes arising from the application of the relevant provisions of this Law between employers and workers who have established quasi-employment relationships with them, as well as between employers and overage workers or student workers recruited by them, belong to labour disputes and are subject to labour dispute settlement procedures." That is to say, workers in new forms of employment can submit their disputes to the current dispute settlement procedures of consultation, mediation, one arbitration and two trials.

disputes between workers and companies in new forms of employment once the concept of "not fully conforming to an employment relationship" comes into effect because the Guiding Opinion does not provide clarification and has no statutory capacity to clearly define what it means to be “not fully conforming”. Is it a kind of employment relationship, a civil relationship or a mix of an employment and civil relationship?

Given that the definitive and competent solution has yet to be provided, it is necessary to adopt some interim (flexible) approaches, as has already been done with some practical initiatives and measures adopted in different provinces. In light of these efforts, a set of possible provisional measures can be suggested.

First, advocate for a "mediation first" strategy, emphasizing that during mediation, the focus should not be on the existence of an employment relationship (as per Zhejiang practice) and refrain from addressing requests to establish or determine the employment relationship within the mediation proceedings.

Second, initiate a pilot program (to be implemented in select regions, such as Jiangsu) that permits disputes involving workers in arrangements that “do not fully meet the criteria for establishing an employment relationship” to be referred to labour arbitration. This aims to develop and standardize practices for potential national adoption.

Third, facilitate access to labour dispute resolution procedures for cases in which a party can present preliminary evidence, such as work permits and labour contracts, to substantiate the existence of an employment relationship (Shanghai practice). This may require a preliminary examination of the basic requirements for receivability. If the two parties only have a civil agreement and there is no evidence of personal subordination, the case shall be deemed as falling short of the requirement and will not be accepted. Such cases may be brought to the court directly as a civil litigation between the worker employed in new forms of employment and the respondent.

Primacy of facts: the central principle in assessing employment status

Firstly, the basic methodological principle of labour dispute resolution should be adherence to the principle of primacy of facts – regardless of the name given to the contract or agreement that defines the work arrangement -- in order to determine the relationship between enterprises and workers according to the facts of employment. The principle of primacy of facts (or “facts first”)[45] is the main principle in the determination of the existence of an employment relationship set out in the ILO's Employment Relationship Recommendation, 2006 (No. 198). This means that the determination as to whether there exists an employment relationship should not be based on the description of one party or both parties, nor on the words of the agreement, but on the facts and actual implementation by both parties.

In the platform economy, the terms of the agreement are often unilaterally determined by the platform company, making the principle of primacy of facts especially applicable. The Guiding

[45] The principle of primacy of facts is in line with paragraph 9 of the ILO Employment Relationship Recommendation, 2006 (No. 198): “For the purposes of the national policy of protection for workers in an employment relationship, the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties”.

Opinion's stipulation that "the relationship between companies and workers should be determined according to the facts of employment" as the guiding principle for handling cases regarding new forms of employment conforms to the principle of "primacy of facts". Therefore, before any breakthrough is made in substantive law, the principle of primacy of facts should be the basis for case handling. Given this, the determination of the existence of an employment relationship should be based on Document No. 12, and the essential characteristics of the subordination of employment relationships should be the main indicators guiding the examination.

Secondly, the current "all-or-nothing" mode or "ticking-all-the-boxes" approach[46] should be switched to a more flexible mode, meaning that an overall assessment should be carried out to identify the main features as a means to reaching a decision regarding the nature of the relationship, similar to the "key elements review" practice found in other countries or regions in determining the establishment of an employment relationship. The reviewed elements can also be "scored" in terms of the degree of subordination and according to actual impact. Finally, this study, having examined employment practices and dispute resolution proceedings, recognizes – in addition to the importance of a "key elements review" approach – the need for development of a comprehensive and open system of "elements" (indicators to test the existence of employment relationships).

For example, in terms of personal subordination, a more open (and illustrative and perhaps non-exhaustive) list of questions should be available for efforts to examine or reveal actual conditions. It may be essential to ask whether the worker must provide labour personally; whether the worker can independently make decisions on working time, place and tasks; whether the labour process is managed and controlled by the company; and whether the company executes tasks through a system of rules or algorithmic procedures, which have the effect of "directing" work. It may also be crucial to determine whether the company makes use of work rules, labour discipline or reward and punishment measures vis-a-vis the workers; whether workers are subject to the company's performance evaluation – mediated through "customer" assessment – in combination with or separately from the above-mentioned "work rules"; whether workers work in the name of the company; and whether the relationship between the two parties features a certain degree of continuity, in a "context-appropriate" approach.

A similar approach should be adopted in identifying economic subordination. It would be essential to ask whether the payment of labour remuneration is regular or periodic; whether the amount is relatively fixed, and whether labour remuneration is the only or main source of income for workers. In terms of business subordination, it is necessary to consider factors such as whether the work performed by the worker is a part of the company's business, and whether the worker has the ability to bargain for the price of their services.

It will be important to "flesh out" the "elements" suggested above into a set of more operational indicators through further research. At the same time, it will be crucial to provide practical guidance for the front-line practitioners of labour dispute resolution proceedings, especially regarding "element selection" and "weight assignment" for different "elements" in actually determining the existence of employment relationships through a "comprehensive consideration of key elements" approach.

Most experts, scholars and policymakers do not agree with the formulation of quantitative indicators because these would likely become a "guide to avoiding responsibilities", in addition

[46] The current"all-or-nothing"mode refers to the current interpretation and practice in recognizing the existence of an employment relationship and calls for confirmation of the existence of all features simultaneously.

to creating a practical-operational problem of "thresholds" regarding the requisite number of working days or hours, and the percentage share of income from platform work in a worker's total personal income. They prefer to clarify the criteria step by step through cases. However, front-line case dispute resolution practitioners expect to receive the clearest guidance possible; in general, they are averse to actions that require discretion, especially regarding new and difficult cases posed by new forms of employment.

Setting rules for burden of proof allocation

In disputes regarding new forms of employment, the problem of providing and verifying electronic evidence is prominent. There is a need to review and redesign the rules of the division of burden of proof in dispute resolution proceedings involving such employment. It should be clearly stipulated that the employer bears the burden of proof, while a detailed methodology for the realization of this responsibility should be developed. This is essential, given the complicated work and business arrangements and the highly "disadvantaged" position of individual workers within the overall work structure that constitutes the platform company, in order to balance the ability of both sides to engage effectively in litigation.

In developing the new rules, the inversion of the burden of proof in California's Assembly Bill 5 (AB5) may be a valuable reference. The rule stipulates that it is assumed that there is an employment relationship between the worker (working in new forms of employment) and the platform (or any other enterprise that is a cooperation partner providing employment services to the platform) until the enterprise (the platform or the cooperative enterprise) successfully proves otherwise (that is, that the worker is not an employee).

For the workers, "requirement B" is the most substantial feature of their relationship with the platform. It effectively prevents the platform (or cooperation enterprises) from denying the employee status of workers whose work activities constitute the core business of the platform. This is a most powerful indicator for "employee status" for platform workers.[47]

The European Union's latest Directive on Improving Platform Working Conditions also builds on a similar idea. When a platform or worker has an objection to the determination that upholds employment status, the party that objects to this conclusion must prove that the relationship is not an employment relationship in accordance with the definition provided in the national laws. If the platform raises an objection, the burden of proof shall be borne by the platform. If the worker objects or wants to transfer to self-employed status,[48] the platform is also obliged to provide relevant support, in particular by providing all relevant information so that the worker can continue to work effectively as a self-employed person ((EU Council, 2024).

Some important studies have already been done, including by the courts themselves (Beijing No.1 Intermediate People's Court Research Group, 2022), regarding the procedural rules – including the issue of the holder of the burden of proof – that may be needed or that can be applied to the task of recognition of the legal relationship of employment on different types of platforms. Valuable suggestions can be drawn from these pioneering efforts (see Box 2 below).

[47] But in late 2020, platform-based companies such as Uber and Lyft jointly pushed through a referendum, Proposition 22, which exempted ride-hailing drivers and delivery riders from the AB5 Act and made it possible to recognize the workers as independent contractors.

[48] It acknowledges that it is possible for the worker to wish to hold self-employed status, as it is a worker's own choice.

▶ Box 2: Suggestions emerging from studies

In the case of an employee providing labour to platform operators or other collabourating employers, if there is a claim that there is an employment relationship between the two parties, it shall be presumed to be so, and it will be beholden upon the employer to prove that the labour provided by the employee is not subordinate.

When the contract concluded between the employee and the relevant employer is not an employment contract, it is presumed that the contract expressed the real will of the two parties to establish a service relationship. However, when the contract concluded by both parties is inconsistent with the actual performance and covers up the real legal relationship, then the actual performance and the real legal relationship shall prevail.

When establishing fundamental employment facts proves challenging, but employees present evidence such as work permits and payroll records to support the assertion of an employment relationship, the determination should be made based on a dialectical analysis of the substantive elements and the forms of expression within employment relationships.

The shift of the burden of proof to platforms is justified because they have in their control all the factual elements that determine the relationship. One of the most important elements they control is the algorithms they employ in the management of their business. It may be necessary, however, to prepare for possible increases in "classification" disputes if there is (an overly skewed) inversion of the burden of proof, as in the case of some countries.

Annex 1: Labour dispute between Tang Ruiting and Beijing Yisheng Health Technology Co.,Ltd.

Subordination dimension	Findings of facts/ evidence	Conclusions of the Court of First instance	Conclusions of the Court of Second instance
Judgment result		No employment relationship found All claims rejected	There exists the requirements of subordination. The case meets the criteria for the recognition of an employment relationship. The claim for payment of monetary compensation for unused annual leave is upheld. The claim of compensation for the illegal termination of the employment relationship is rejected.

Subordination dimension		Findings of facts/ evidence	Conclusions of the Court of First instance	Conclusions of the Court of Second instance
Personal subordination	Control of work rules	Regulations on the Management of Yisheng Home Technician Service in 2017 were downloaded from "Yisheng Technician app".	Accepts that the "Yisheng Daojia Technician Entry Agreement", which establishes the relationship between the two parties, clearly stipulates that the nature of the relationship between the company and complainant is one of "cooperation", and the terms of remuneration and other contents stipulate that the two parties are entering into a cooperation relationship. There is some element of management, but it is aimed at updating skills (technician training) and service quality assurance. Such management as it exists does not fall within the scope of "labour management".	Accept the nature and reality of control through the mechanism of work rules established by the company.
	Management, supervision and inspection and control of working hours	WeChat chat records. In the Registration Form of a Traditional Chinese Medicine Physician it is stated that "if you do not go to work, or leave your post casually, if you cannot receive orders on non-rest days, you must apply to the leader of the platform Chinese medicine department 24 hours in advance".		
	Technical control of working process	Work is flexible; remuneration and the workplace are not fixed. Attendance for work is different from the traditional attendance requirement.		Job assignment opportunities are provided entirely through the platform of the "Yisheng Technician app". Remuneration is calculated from the data accumulated on the platform. "Quality control management" is executed through the platform, which controls the timing of the start and end of work; and registers customer satisfaction for service/ work done by Tang Ruiting.

Subordination dimension		Findings of facts/ evidence	Conclusions of the Court of First instance	Conclusions of the Court of Second instance
Economic subordination	The provision of work equipment	In the process of carrying out the service, the worker is required to wear the work clothes/ uniform and carry the work/identification card of Yisheng Health Company; a stethoscope is required for this work. A thermometer, timer, sphygmomanometer, disposable bed sheet, disposable pillow towel, scraping board, medicinal oil, hand sanitizer and other necessary tools for massage are provided by Yisheng Health Company.		The information and technical equipment and material provided by the "Yisheng Technician app" platform are required in order for work to be done by Tang Ruiting and other technicians. This equipment and material is provided and controlled by Yisheng Health Company.
	Determination of remuneration for work	The service charge standard is determined by Yisheng Health Company; the work remuneration can be obtained only after the monthly settlement; corresponding fees shall be charged for temporary additional orders. The full payment by the customer is made to Yisheng Health Company for accounting before remuneration is distributed to the worker.		The income allocation of the two sides (the platform company and the worker) is calculated by the Yisheng Health Company based on the accumulated revenue data of the platform. Yisheng Health Company does not specify the specific rules and calculation methods of the income allocation between it and Tang Ruiting.

Subordination dimension		Findings of facts/ evidence	Conclusions of the Court of First instance	Conclusions of the Court of Second instance
	Limitation/ exclusivity of source of livelihood	It is clearly stipulated in the Yisheng Home Technician Entry Agreement that Tang Ruiting shall not engage in services related to competitors, otherwise he shall bear full liability for compensation.		Yisheng Health Company – by means of the Entry Agreement – actually excluded the possibility of Tang Ruiting providing services for other competitors to obtain additional sources of income. Tang Ruiting could only provide labour for Yisheng Health Company, and the remuneration obtained from the company was the main source of income.

Subordination dimension		Findings of facts/ evidence	Conclusions of the Court of First instance	Conclusions of the Court of Second instance
Organizational subordination	Appearance	When providing services, Tang Ruiting must wear the work uniform/clothes and badge of Yisheng Health Company. The QR code displayed on the work card is the public number of Yisheng Health Company.		By controlling the appearance (work uniform, identification card, and so forth), Yisheng Health Company has presented itself as the service provider from the perspective of customers. Tang Ruiting provides services for customers on behalf of Yisheng Health Company, and the appearance of his work is fully reflected in the service behaviour of Yisheng Health Company. By controlling the appearance of Tang Ruiting's work, Yisheng Health Company makes customers feel that they are receiving services from Yisheng Health Company, rather than perceiving Yisheng Health Company as an intermediary platform.
	Organizational management			Yisheng Health Company manages and coordinates with its members (workers) through a WeChat group.

Annex 2: Interview outline

1. What are the main types of employment in cases regarding new forms of employment that you handle? How many cases regarding new forms of employment are there in different sectors respectively?

2. What are the main types of disputes in these cases (such as wage disputes, specific labour rights disputes, and so forth)?

3. Many such cases involve the establishment of an employment relationship. What is your thinking on the method of establishing an employment relationship?

4. Are these disputes different from those involved in traditional labour disputes? If so, what are the differences? How do you address disputes that are different from traditional labour disputes in arbitration?

5. Is there a relatively stable standard for handling disputes regarding new forms of employment? If yes, what is it? If no, what is the standard that you usually use?

6. When handling cases regarding new forms of employment, will you refer to the arbitration awards of existing cases? If so, in what way?

7. According to work experience, what impact does the judicial results of the cases have on new forms of employment?

8. What suggestions do you have for the standard of arbitration award in cases regarding new forms of employment?

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Contact details

ILO Regional Office for Asia and the Pacific
CO–Beijing

ILO Country Office for China and Mongolia
1-10 Tayuan Diplomatic Office Building
Beijing 100600
China
T +86 10 6532 5091
beijing@ilo.org
www.ilo.org/beijing

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