

Research on Identification of Employment Relationship of Network Broadcast

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Abstract: The rapid development of the platform economy has had a comprehensive impact and challenge on employment, labor relations, social security, and other aspects. In the face of the impact of the development of platform economy on the standards for determining labor relations, legislation and policy should be planned before action. This article starts with the identification of employment relationships in online live streaming and explores the causes of the identification difficulties that exist in practice. In judicial practice, it is mainly recognized as a civil relationship between equal subjects according to the Notice on Matters Related to the Establishment of Labor relations, which makes the labor rights and interests of platform anchors not effectively protected. When determining the employment relationship of network live broadcast, we cannot excessively rigidly apply the theory of dependent attributes and we should investigate the substantive subordination, the personality subordination and the economic subordination of a variety of factors. At the same time, the necessity of social protection should be taken into account. According to different kinds of network broadcast employment, it can be divided into standard labor relations, non-standard labor relations and labor relations, and it is determined according to specific cases.

Keywords: Network Anchor; Labor Relations; Dependency; Non-standard Laborrelations; Necessity of Protection

1. The Presentation of the Issue

With the development of the Internet era, a variety of new ways of employment provide a large number of jobs and employment opportunities, but the increase of new ways of employment makes it difficult for the traditional framework of the Labor Law to fully protect labor rights and interests. The rise of the

platform economy and the change of the working concept of workers have promoted the emergence and continuous growth of new flexible employment groups. The characteristics of the new employment forms, such as flexible labor relations, diversified work contents and flexible work places, have led to the traditional dualism of labor legal relations cannot be adapted. For example, the flexibility of the work of network anchors leads to their inability to identify the working time and work place in the traditional form of labor, resulting in the identification of their work-related injuries and fatalities is controversial; it is difficult to define the nature of the contract between the network anchor and the live broadcast platform. Labor law, as a department law coexisting with private law and public law, how to adapt to many problems under the new employment. This paper focuses on the employment form of network live broadcast, aiming to clarify the legal application of labor law in the employment relationship of network live broadcast.

2. The Dilemma of Determining the Employment Relationship of Network Live Broadcast

With the deepening of China's market economy reform and the transformation and upgrading of social structure, traditional labor relations have gradually changed to network labor relations in the new era, which also leads to the deficiency of the application of traditional labor relations criteria in practice. The judicial interpretation of the law applicable to the trial of labor dispute cases issued in our country has not defined the specific meaning of labor relations.

2.1 Disputes over the Nature of Employment between Network Anchors and Live Broadcasting Platforms

As for the determination of the legal nature

of the employment relationship of network live broadcast, there are civil law norms and labor law norms to choose from. In the theoretical circle and judicial practice, there is a great dispute over which specific norms should be applied to the employment of network live broadcast. On the whole, network anchors are mainly divided into the following categories:

The first is authorized live broadcast. Users register their live broadcast accounts on the live broadcast platform, use their own devices and spare time to broadcast live, and obtain the right to broadcast live from the platform. Such anchors must sign an admission contract with the platform when registering. The contract only stipulates the distribution of interests between the two parties, and does not involve the distribution of means of production, nor does there exist obvious personality and economic subordination. Therefore, in this case, it is only a common civil cooperative relationship between the two parties.

The second type is the form of economic agency. The cooperation model is similar to that of domestic star agencies and artists. Anchors sign economic agreements with network economic companies, and the economic companies are responsible for the training and cultivation of anchors. Anchors can choose the type and content of live broadcast by themselves, and share the profits with the brokerage company through negotiation. In this case, the relationship between the anchor and the brokerage company is equal civil cooperation, and there is no labor relationship, which should be regulated and adjusted by civil law.

The third is the platform signing mode. Network anchors sign with live streaming platforms to become contracted artists, and the platforms conduct comprehensive management and supervision over them. The salary composition will be paid in the form of "basic salary + commission", and the tax in the live broadcast will be paid by the platform. However, as to whether this new type of labor legal relationship is a cooperative relationship or a labor relationship, and whether civil law or labor law should be applied to disputes between the two parties, there are considerable disputes in academia and judicial practice at present. This paper mainly discusses the identification of live broadcast employment relationship under the contract mode of such platforms.

2.2 The Differences between Live Broadcast Employment and Typical Labor Relations

Whether the relationship between the parties is recognized as labor relationship is adjusted by the labor law, which directly affects the distribution of rights and obligations of the parties, and also affects whether the contract terms concluded by the parties are protected by the inclined nature of the labor law, thus excluding the space for voluntary autonomy. After being recognized as a labor relationship, network anchors can enjoy labor rights such as unilateral termination of contract, nondismissal without fault, economic compensation under special circumstances and social insurance benefits such as industrial injury insurance under labor law and labor contract law. As for the brokerage companies, although the recognition of labor relations can strengthen the unified management of network anchors and protect their rights and interests by using the non-competition clause and the service period clause, the labor law and the labor contract law bring heavier social burdens to them, including increasing the employment cost and the risk of termination.

Typical labor relations arise from the collectivized labor in factories during the industrialization period. The means of production are provided by the employer, and the employees are concentrated in fixed places to work in a unified time interval, which is described as subordinate labor. It is characterized by the combination of "my own labor force + other people's means of production". However, most of the anchors in the network live broadcast use their own equipment according to their own schedule. Unlike previous employers, economic companies only provide live broadcast platforms for the main broadcast, which belongs to the combination mode of "my own labor force + other people's means of production (working conditions) + my own means of production (working conditions)" [1].

Typical labor relations usually have the characteristics of workers accepting the assignment of the employer and being managed by the rules and regulations of the employer. In particular, the employer will formulate the attendance system, and the

worker's salary, position elevation and punishment system has a certain decision, which is very obvious subordination. However, there is a strong independence in the employment relationship of network broadcast, and the network anchor has a great say in the content and form of its live broadcast. Compared with the typical labor relationship, the subordination is obviously weakened.

3. The Causes of the Dilemma in Determining the Employment Relationship of Network Live Broadcast

The traditional labor relations show strong personal dependence and economic dependence. In the new employment form, the workers get rid of the bondage of their employers to a certain extent, and have a certain autonomy in time and space.

3.1 The Flexibility of Network Broadcast Employment is the Objective Reason Why it falls into the Identification Dilemma

As mentioned above, the biggest difference between employment of network live broadcast and traditional labor lies in the flexibility of employment form. Network anchors have a certain degree of autonomy in the work process, and the management intensity of network anchors is relatively small on live broadcast platforms. In terms of working hours, the labor law stipulates an eight-hour working day for traditional labor relations in order to protect workers' right to rest. However, in the context of online broadcast employment, inconsistent working hours are the norm, and the labor provider, the network anchor, can have more autonomy in the specific working hours. In terms of work scenarios, compared with the fixed work place of traditional labor, network anchors can provide labor services in different places due to their flexibility in labor service provision. For example, live game broadcasting has low requirements on the workplace; Outdoor live broadcasting requires changing different work locations.

In terms of work content, in order to protect audience stickiness and attract new viewers, the platform also encourages network anchors to use their expertise to attract more traffic. Network anchors have strong work independence, and cooperation is not a necessary part of work. Therefore, live streaming platforms manage individual anchors, and there is no general

similarity in the management content of all anchors, which is also one of the reasons for the difficulty in identifying labor relations in the employment of live streaming platforms. In addition, the flexibility of remuneration is different from that of traditional labor relations. The remuneration of anchors is mainly composed of three parts: base salary, commission and audience reward. However, the specific arrangement is very flexible in practice, and some cooperation agreements do not even have an agreement on base salary. The result is that whether the network anchor can get a salary is linked to the quality of its live broadcast. Failure to meet the required popularity standards may lead to the network anchor's labor remuneration right cannot be guaranteed accordingly.

The above are the flexibility and autonomy shown in the employment relationship of network live broadcast, which is different from that of traditional labor relations. On the surface, it seems that the employment relationship of network live broadcast no longer has the subordination of traditional labor relations, but has some elements of equal civil relations. It seems that civil law norms regulating equal civil relations should be used. This is the objective reason for the dilemma in the application of the employment law of network live broadcast.

3.2 The Dichotomy of Labor under the Traditional Framework cannot be Applied to the Change of Labor Pattern

The current legal framework for adjusting labor relations in China is the "labor dichotomy" of "labor law and civil law", and there is no transition type between the two. [2] China's labor law system was established under the background of the transition from planned economy to market economy. Influenced by this special historical process, China's labor law system still retains the color of the unit system of the planned economy, and sets the main adjustment object as the stable employment of the standard employment state. Based on this, labor law and civil law are automatically divided into two systems, using labor form to describe dependent labor and independent labor, forming the institutional framework and knowledge structure of "labor dichotomy". [3] At the beginning of reform

and opening up, this institutional framework could cover most labor forms, but with the continuous development of the market economy, labor forms are changing day by day, and some labor providers cannot be included in the scope of the protection of the current labor law. For example, migrant workers on construction sites cannot be identified as labor relations because of the labor they provide. They can only be protected through the "patching" of policies and regulations; another example is the vacation internship of college students who have not obtained graduation certificate, although it has obvious subordination, it is excluded from protection because the identity of the subject does not conform to the presupposition of the labor law. For example, "disputes between families or individuals and domestic service personnel", "disputes between individual artisans and helpers and apprentices", "disputes between rural contract operators and employees" have not even been protected by the "shrunk version" above.

In recent years, a large number of labor groups engaged in flexible employment relying on platforms lack rights and interests protection under the current law. In judicial practice, due to the limitations of judgment ability and thinking habits, the basic basis is the Notice on Matters Related to the Establishment of Labor Relations issued by the former Ministry of Labor and Social Security in 2005. When applying this provision, judges often equate "standard labor relations" with "labor relations", and hold that there is an either/or feeling between standard labor relations and civil relations. Instead of measuring the legal interests of the actual network broadcast employment relationship, the result is that the employment relationship of network anchors with a certain degree of autonomy in employment form is difficult to be included in the category of labor relations.

3.3 Network Broadcast Employment Constitutes the identification Logic of Non-Standard Labor Relations

The development of the tertiary industry gives birth to non-standard labor relations, and labor relations become flexible and diversified. In the face of the impact of new employment methods on the legal regulations of traditional labor relations, many countries are actively exploring solutions. For example, Italy has established a quasi-subordinate labor system, which gives

preferential protection to "continuous cooperation and cooperation" in terms of social security. [4] German law divides "employee-like persons", which is still subject to the jurisdiction of the labor court. [5] As far as China is concerned, non-standard labor relations are a special type of labor relations arising from flexible employment and system transformation. It is characterized by that labor time, labor remuneration, workplace and insurance welfare are different from the traditional fixed forms of employment and employment situation. On the one hand, in order to save labor costs, employers only establish labor relations with core employees, on the other hand, workers in order to flexibly employment, to adapt to their diversified employment needs, such as part-time employment, part-time employment and other non-standard labor relations came into being.

At present, the problem encountered in the employment of network broadcast is that the identification of labor relations in practice is usually based on the traditional subordination framework of standard labor relations. Therefore, in practice, it is usually determined that the employment of network broadcast does not constitute labor relations because it does not meet the constituent requirements of standard labor relations. [6] Non-standard labor relations are between labor relations and standard labor relations. Compared with standard labor relations, non-standard labor relations are more flexible and less subordinate. In terms of organizational form, labor providers have greater autonomy. Only the personality and economic subordination are the fundamental characteristics of the subordination of labor relations, which belong to the substantive subordination. The so-called organizational subordination is only the expression form of subordination in standard labor relations, which cannot reflect the essential characteristics of labor relations. [7] Only the substantive subordination determines the weak position of the laborer relative to the capital side, so it is necessary to give it the inclined protection of labor law.

4. Explore the way out of Network Broadcast Employment Protection

"China's labor law has some functional

defects. Because it adopts a single adjustment model and molds labor relations, the applicability of non-standard labor relations under flexible employment is insufficient." [8] The complexity of network broadcast employment puts forward higher requirements for judicial practice, and a flexible identification method should be explored to strike a balance between the platform's economic benefits and the protection of anchors' rights and interests. According to the contract anchors of the platform, the subordination should be determined in essence based on different factors, the necessity of social protection should be taken as a supplementary consideration, and the employment relationship of network live broadcast which is still in the "gray zone" should be clarified.

4.1 Substantially Determines the Subordination

From the existing non-standard labor relations, part-time employment and part-time employment allow the existence of formal autonomy factors, so the examination of the subordination should not be too strict in practice. As mentioned above, only the personality and economic subordination can determine the work of an employee. The fundamental standard of dynamic subordination can be considered in practice by combining the following factors.

Personality subordination is mainly reflected in the management of network anchors by live broadcasting platforms and the dependence of network anchors on the business of live broadcasting platforms. The specific review can be considered from the following aspects: (1) Network anchors do not broadcast live on the platform at one time; (2) whether the network broadcast platform has the right to make requirements and regulations on network anchors in terms of working place, working time and workplace; (3) whether the network live broadcast platform trains and evaluates the anchors; (4) The live broadcast platform rewards and punishes the anchors according to the live broadcast situation.

The economic dependency of anchors is reflected in their economic dependence on live broadcasting platforms. Judicial organs can review the following aspects: (1) The fixed salary of network anchors accounts for the majority of their monthly income, which is more than the income brought by live broadcasting

rewards and advertisements; (2) The business source of the anchor depends on the users, information and other resources provided by the live broadcast platform. In the employment of live broadcast on online platforms, the complex salary structure of anchors weakens the economic subordination. According to the above factors, the subordination is investigated to determine whether it constitutes labor relations.

Some scholars argue that the employment relationship of network live broadcast can be divided into three situations through the analysis of the subordination, namely, standard labor relationship, non-standard labor relationship and labor relationship. [9] When the employment relationship of network broadcast conforms to the subordination of traditional labor relationship, it should be identified as standard labor relationship; If the network anchor has a certain degree of autonomy in the live broadcast work, but has the above-mentioned substantive subordination attributes and strong dependence on the platform, it can be identified as a non-standard labor relationship, and labor laws and regulations should be selected according to the specific circumstances to provide slanting protection for the anchor. If the network anchor and the platform have considerable bargaining power and do not have substantial subordination, the labor relationship should be identified and the civil law norms regulating equality between subjects should be applied for protection.

4.2 Take the need for Social Protection as a Supplementary Consideration

While comprehensively considering the merits according to different cases, it is also necessary to evaluate and determine the impact of labor relations on network anchors and live broadcasting platforms from the Angle of legal interest balance. If we blindly expand the scope of recognition of labor relations, it will lead to excessive employment costs for live broadcasting platforms and greatly increase the burden on platforms. "Labor law embodies the integration of public law and private law. The mandatory norm in labor law reflects the nature of state intervention in public law,

while the autonomy norm reflects the concept of voluntary autonomy in private law." [10] While comparing with standard labor relations, the comparison with labor relations should not be ignored. In practice, in determining the employment relationship of network broadcast platform, we should first use the theories of personality dependency and economic dependency to determine whether it conforms to the standard labor relationship. Secondly, in the selection of non-standard labor and labor relations, priority should be given to civil law norms for equal protection. [11] If substantive equality cannot be achieved, social protection can be considered at this time. Such a ranking can make the identification of network broadcast employment relationship more clear.

5. Conclusions

Whether the labor relations between network anchors and network broadcast platforms can be determined, and whether they are protected by the inclined protection of labor law or equal protection by civil law norms is a major issue facing the network broadcast industry and judicial practice. Flexible employment has tended to be generalized, so it cannot be determined by rigid application of the subordination theory. Although the new characteristics of platform employment make the traditional labor relations concept and judgment theory encounter great challenges, but the concept and judgment of traditional labor relations have strong flexibility and adaptability, and are not completely out of date. Non-standard labor relations, as the connection between labor relations and labor relations, can effectively balance the interest relationship between the two subjects, which will not excessively increase the labor burden of the platform, but also protect the labor rights and interests of network anchors. The identification of the employment relationship of network platforms should take into account the specific employment characteristics of different platforms and different types of anchors on the same platform.

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