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# Legal Judgements on the Employee Status of Platform Workers in China—A Combination of Legal Formalism and Pragmatism

KE Zhenxing

*In China, labour providers can be classified as employees or independent contractors. Using food delivery riders as an example, this article collects legal judgements to investigate how judges adjudicate lawsuits regarding riders' status as workers (whether employees or independents). Legal formalism is a basic approach to legal adjudication. As a derivative of this approach, judges make use of the employee status identification rule to analyse cases by considering various factors, including riders' freedom to decide when and where to work and details of the control exerted on them. Judges are more likely to grant employee status to injured riders since the latter need workers' compensation benefits—an indication of legal pragmatism.*

## INTRODUCTION

In China, where workers are classified as employees or independent contractors,<sup>1</sup> the emergence of platform employment<sup>2</sup> raises awkward questions and compounds the issues related to the existing dichotomy. Although platform companies impose certain controls over the labour process and determine the remuneration standard for each order filled, the platform worker also enjoys increased job flexibility, such as the choice of when and where to work. Due to such flexibility, platform companies tend to treat workers as independent contractors. Consequently, platform workers cannot obtain the rights generally accorded to regular employees, such as a minimum wage and

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<sup>1</sup> It should be noted that, technically, the “independent contractor” terminology is not used in employment law in China. The author has borrowed it from the legal terminology of the United States as a convenient expression from the perspective of comparative study.

<sup>2</sup> Platform employment indicates the work mediated by online platforms. For example, Uber enables a consumer who needs a ride to conveniently find a driver willing to supply a ride via the app. Most people would also be familiar with the term “gig economy”. The gig economy covers a broad scope, including traditional offline temporary and contract work. Not all gig work is related to an online platform, e.g. a student who does tutoring as a side hustle. See Carolyn Ali, “What is the Difference between the Gig Economy and the Platform Economy?”, at <<https://beyond.ubc.ca/what-is-the-difference-between-the-gig-economy-and-the-platform-economy/>> [1 January 2023].

workers' compensation benefits. Platform workers may approach the courts<sup>3</sup> to claim employee status and relevant rights.

There is, however, no law or regulation in China that directly determines whether the platform worker can be identified as an employee. As judges are required to adjudicate lawsuits based on the traditional employee status identification rule, the process of such adjudication may present an interesting case study. Since the food delivery business constitutes a typical part of the platform economy in China, this article examines food delivery riders to investigate how judges adjudicate this type of lawsuit.<sup>4</sup> This article sheds light on how judges apply the traditional employee status identification rule in their adjudication and delves into the factors that influence the judges' final decisions.

Although many previous studies have examined such topics, gaps still exist. For instance, Lin's study collected solely judgements decided by courts in Beijing, Shanghai and Jiangsu province.<sup>5</sup> The sampling method may have led to omission of information. Studies by the Beijing Zhicheng Migrant Worker Legal Aid Center and Wang and Cooke, despite their complete compilation of judgements, lack a statistical analysis (such as through regression analysis) to improve the accuracy of the results.<sup>6</sup>

<sup>3</sup> Theoretically, in China, before filing a lawsuit in the court, parties should bring the dispute before the local employment arbitration committee; if one or both parties are not satisfied with the arbitration outcome, they can file a lawsuit in the court. For convenience of expression, in this article, the procedure of filing lawsuits in court usually covers the procedure of filing a dispute in the employment arbitration committee.

<sup>4</sup> Another typical platform economy is the ride-hailing driver business, although the research on the employee status of drivers, who are actually considered as contractors, is immaterial. According to the Interim Measures for the Administration of Online Taxi Booking Business Operations and Services (2019 Amendment), to become a ride-hailing driver, a driver should apply for an Online-booking Taxi Transport Certificate and an Online-booking Taxi Driver's Licence. As long as the government and the company strictly enforce this regulation, part-time drivers cannot participate in the ride-hailing business, and most drivers hold full-time status. Meanwhile, the platform (such as Didi Chuxing Technology Ltd., the largest platform company for the ride-hailing business) still does not recognise these full-time drivers as employees. Didi drivers seldom challenge their status as contractors. The author has collected information about relevant lawsuits in the Chinalawinfo database by searching for the keywords "employment relationship + Didi Chuxing". The search manifests only three lawsuits in which drivers claimed employment relationships. If a driver causes damage to a third party in a car accident and then claims his/her employee status, this may fall under the category of a tort lawsuit. Supposing the driver is an employee of the platform company, the company should then bear the vicarious liability. However, this article focuses only on labour disputes rather than tort issues.

<sup>5</sup> Lin Ou, "Regulating On-Demand Work in China: Just Getting Started?", *Industrial Law Journal* 51, no. 2 (2022): 435–63.

<sup>6</sup> Wang Tianyu and Fang Lee Cooke, "Internet Platform Employment in China: Legal Challenges and Implications for Gig Workers through the Lens of Court Decisions", *Relations Industrielles (Industrial Relations)* 76, no. 3 (2021): 541–64; Beijing Zhicheng Migrant Worker Legal Aid Center, "Pingtai jingjixia hezuo yonggong moshi laodong guanxi fenxi—yi waimai pingtai weili" (The Cooperation Model in the Platform Economy—the Delivery Platform as an Example), *Renmin sifa (People's Judicature)* 7 (2020): 20–7.

In this article, the author attempts to address the gaps by compiling information about all lawsuits filed by food delivery riders regarding their employee status, summarising how judges presented their reasoning when deciding cases and investigating by using the logistic regression method which determinant factors had affected the decisions.

The author's findings reveal that the judgements reflect a combination of legal formalism and pragmatism. Legal formalism is one approach by which judges make decisions according to the rule of law itself.<sup>7</sup> Judges commonly apply a legal syllogism to adjudicate cases: in this case, the rule is the employee status identification rule, the facts include not only the riders' freedom to decide when and where to work but also details of the control exerted on them, and the legal conclusion is the outcome of applying the rule to the facts. Meanwhile, pragmatism leads judges to consider also the consequences of their judicial decisions. This article's findings reveal that, after controlling factors such as the location of the court, judges are more likely to grant injured riders employee status (rather than treating them as independent contractors). A probable explanation is that judges understand that injured riders are in greater need of workers' compensation benefits than non-injured riders are. Therefore, judges are more likely to grant employee status to this group at their discretion.

The author also recognises the existence of governmental or public opinion influence in China on judges' exercise of autonomy in their decision-making. However, that may not be a severe issue for employment dispute cases. First, the measure that all judgements must be uploaded online offers not only transparency but also grants judges grounds to resist external pressure. Second, from a cost-benefit perspective, the amount of compensation in employment disputes is small, especially relative to lawsuits related to corporate law or property law. The government is less willing to interfere in employment dispute cases for such a small benefit at the expense of reputational damage. Therefore, the author believes that judges have the autonomy in this type of lawsuit and develop their adjudication logic accordingly.

From a comparative perspective, the adjudication practice in China can provide a useful reference for countries that adopt a dichotomy in employment status identification. In particular, judges in China have weighed up many adjudication factors which could guide the identification of a platform worker's employee status. This article therefore could also serve as a reference for scholars interested in Chinese judges' reasoning in adjudication activities.

## THE EMPLOYEE STATUS RULE IN CHINA

Before adjudicating employee status lawsuits, judges should first identify an applicable rule. Since platform work is new in China, there is no direct law on the employee

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<sup>7</sup> Timothy J. Capurso, "How Judges Judge: Theories on Judicial Decision Making", *University of Baltimore Law Forum* 29, no. 1 (1998): 5–16.

status of platform workers. Therefore, judges adjudicate these lawsuits based on the traditional rule of employee status identification.

### *How the Rule of Employee Identification Had Evolved in China*

In 1994, the Standing Committee of the National People's Congress enacted the Labor Law, which stipulates the primary matters regarding labour and employment. The law also formally codifies the dichotomy between an employee and an independent contractor. Article 2 stipulates that "this Law shall apply to enterprises, individual economic organisations and labourers who form an employment relationship therewith within the territory of the People's Republic of China."<sup>8</sup> According to this article, if a labour provider does not establish an employment relationship with the employer, he or she is deemed to be excluded from the employee status by the Labor Law.

However, the Labor Law does not provide a definition of "employment relationship" or "employee status". In 2005, the Ministry of Human Resources and Social Security (hereafter MOHRSS) issued a "Notice on Matters Regarding the Establishment of Employment Relationships" (hereafter the "Notice on Employee Status"), the first document to provide guidance on determining employee status.<sup>9</sup> The draft of the Employment Contract Law issued on 20 March 2006 offers the following definition: "the right and obligation of the relationship wherein the employer hires an individual as a member, and the individual offers to labour for remuneration under the management of the employer". However, that clause was absent in the Employment Contract Law effective 1 January 2008, which was silent on defining the relationship.

### *The Traditional Rule of the Identification Standard of an Employment Relationship*

There are two essential components to the traditional employee status identification rule. First, according to Section 1 of Article 1 of the Notice on Employee Status, the employer and employee should comply with the criteria set by laws and regulations. For the employee, age is the first and foremost criterion. Companies cannot hire a labourer below 16 years of age. With regard to other conditions, for example, according to Article 12 of the Opinions on Several Issues concerning the Implementation of the

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<sup>8</sup> This translation refers to the official translated version with minor changes. For the official translated version, see <[http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content\\_1383754.htm](http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/12/content_1383754.htm)> [1 January 2023].

<sup>9</sup> Ministry of Human Resources and Social Security of the People's Republic of China (PRC), "Notice on Matters Regarding the Establishment of the Employment Relationship" (in Chinese), 28 July 2011, at <[http://www.mohrss.gov.cn/lbgxs/LDGXzhengcefagui/LDGXzyzc/201107/t20110728\\_86296.html](http://www.mohrss.gov.cn/lbgxs/LDGXzhengcefagui/LDGXzyzc/201107/t20110728_86296.html)> [1 January 2023].

Labor Law of the People's Republic of China,<sup>10</sup> issued by MOHRSS in 1995, college students working for a company outside the university cannot be identified as an employee until after graduation, even though they are subject to that company's control. For the employer, the main criterion is that while the establishment could be an individual industrial or commercial household, a company, or a private non-enterprise organisation, it cannot be a natural person or a family. Therefore, according to the Interpretation (I) of the Supreme People's Court of Issues Concerning the Application of Law in the Trial of Labor Dispute Cases,<sup>11</sup> issued by the Supreme People's Court (hereafter SPC), a domestic worker, for example, cannot be identified as an employee.

The second component is the characteristic of the employment relationship. According to Sections 2 and 3 of Article 1 of the Notice on Employee Status, an employment relationship encompasses the following criteria: "the employer's work rules apply to employees; to obtain remuneration, the employee is subject to the employer's control and provides labour under the employer's direction; the work the employee provides is integral to the employer's business". In 2005, Chinese academics began to consider "subordination" as the core characteristic that defines the employment relationship.<sup>12</sup> A mainstream Chinese labour and social security law textbook points out that such subordination emerged to organise production in the workplace: "It is a basic right for an employer to appoint the employee, and organise, direct and coordinate the labor process".<sup>13</sup> Furthermore, the existence of subordination is the basis on which the law intervenes in the employment relationship. If an employer abuses its power and violates the employees' rights, the law should provide bottom-line protection for those employees.

The development of subordination theory subsequently became more systematic. There are two types of subordination—personal and economic—although many scholars argue that there are three types, namely personal, economic and organisational. For example, Xiao illustrates how personal subordination involves the employer's right to direct, monitor, discipline and punish. Employees should perform the labour by themselves and for the exclusive benefits of the employer's company, rather than their

<sup>10</sup> Ministry of Human Resources and Social Security of the PRC, "Opinions on Several Issues Concerning the Implementation of the Labor Law of the People's Republic of China" (in Chinese), 4 August 1995, at <[http://www.mohrss.gov.cn/xxgk2020/fdzdgknr/zcfg/gfxwj/zh/202103/t20210330\\_412011.html](http://www.mohrss.gov.cn/xxgk2020/fdzdgknr/zcfg/gfxwj/zh/202103/t20210330_412011.html)> [1 January 2023].

<sup>11</sup> Supreme People's Court of the PRC, "Interpretation (I) of the Supreme People's Court of Issues Concerning the Application of Law in the Trial of Labor Dispute Cases", issued 29 December 2020, effective 1 January 2021, at <<https://www.lawinfochina.com/display.aspx?lib=law&id=34511&EncodingName=big5>> [1 January 2023].

<sup>12</sup> Yan Tian, "Pingtai yonggong guizhide lishi luoji—yilaodong guanxide congshuxing lilun weishidian" (The Historical Logic of the Platform Worker Regulations), *Zhongguo falü pinglun* (China Law Review) no. 4 (2021): 43–50.

<sup>13</sup> Liu Jun, ed., *Laodong yu shehui baozhangfa* (Protection of Labour and Employment Law) (Beijing: Gaodeng jiaoyu chubanshe [Higher Education Press], 2018).

own company. Moreover, the employee relies on the employer's financial resources and does not bear operational risks. Organisational subordination is the scenario in which an employee's labour becomes an integral part of the employer's business.<sup>14</sup> With this in mind, the author is more inclined towards identifying two subordination classifications: personal and economic. Organisational subordination is a subtype of economic subordination because the former still constitutes an economic issue in a broad context.

Similarly, in Chinese judicial practice, subordination has become a core factor in distinguishing an employee from an independent contractor. Most judges apply the Notice on Employee Status to adjudicate employee status lawsuits, and most courts also employ the subordination theory in their adjudication process. Table 1 presents a typical index of nine subordination-related factors which Liu and Zhong's study has summarised.<sup>15</sup> It should be emphasised that establishing an employment relationship does not require all nine factors to be met simultaneously. However, the more factors that are met, the higher the likelihood that the courts will recognise an employment relationship.

TABLE 1  
FACTORS OF SUBORDINATION

Type of Subordination	Factor
Personal subordination	Employee complies with work rules.
	Employee abides by rules for attendance, vacation, sick leave, etc.
	Employee complies with the employer's directions for working hours, worksite, content, methods, etc.
	Employee accepts the employer's supervision, assessment and punishment.
Economic subordination	Employee focuses on the labour process rather than the results.
	Employer bears all operational risks.
	Employee works for the benefit of the employer's company, not for the employee's own business.
	Employer provides required instruments and tools.
	All or most of the employee's income is from the employer.

Another similar and critical concept is the *laowu* relationship. First and foremost, this relationship does not align with the definition of an employment relationship and labour providers are not covered by the employment law. What does a *laowu* relationship encompass? This concept is seen only once in the relevant legal document. According to Section 1 of Article 32 of the Interpretation of the Application of Law

<sup>14</sup> Xiao Zhu, "Laodong guanxi congshuxing rending biao zhun lilunjieshi yutixigoucheng" (Theoretical Interpretation and Systematisation of the Identification of Subordination in the Employment Relationship), *Faxue (Law Science)*, 2 (2021): 160–76.

<sup>15</sup> Liu Li and Zhong Yanran, "Queren laodong guanxi jiufen anjian de shenli silu he caipan yaodian" (The Adjudication Method and Trial Issue of Employee Status Lawsuits), Shanghai shi diyi zhongji renmin fayuan gongzhonghao (Official WeChat Account of Shanghai, No. 1 Intermediate People's Court, China), 8 July 2019.

in Employment Lawsuits, the relationship between an employer and a worker who has already received a pension is treated as a *laowu* relationship. This provision first confirms that a worker who has already obtained a pension is not an employee. However, there is no definition of a *laowu* relationship in the employment law in China. Two situations are here referred to as *laowu* relationships. In the first, a labour provider is subordinated to an employer; the labour provider does not meet the criteria as a statutory employee (e.g. because the worker is a student or retired person), or the employer does not satisfy the criteria because it is an individual or a family rather than a company or a social organisation. In the second scenario, the labour provider and employer have complied with the criteria, but there is little evidence of subordination. For example, in highlighting the difference between an employment relationship and a *laowu* relationship, Wu states that in the former, the worker should obey an employer's directions and have a certain personal and economic subordination to the employer. In a *laowu* relationship, the employer has weak management over the worker and the employer focuses on the labour result rather than the labour process.<sup>16</sup> It should be noted that there is another understanding of the *laowu* relationship. For example, a study by Li and Qiao argues that a labour provider can make decisions independently and does not need to obey the employer's directions and observe disciplinary rules.<sup>17</sup> Based on this definition, subordination seems to be lacking. However, the two contradictory views on the *laowu* relationship will not affect the author's findings in this article. As the relationship does not represent an employment relationship in either of the definitions, the labour provider in the *laowu* relationship is not entitled to employment rights.

## ADJUDICATION OF EMPLOYEE CASES

### *Recent Development of Platform Work in China*

Platform work is a new form of flexible employment. Companies provide online platforms on which workers can offer services to match consumer demands via the platform. An example is Didi Chuxing, an online ride-hailing company that enables customers to conveniently find drivers willing to provide rides via their app.

It should be noted that the mode of platform work, especially food delivery, has undergone significant changes since its emergence. In the early stage, platform companies like Meituan and Ele.me tended to hire food delivery riders via the app. So long as a rider registered in the app, he or she could start working. However, Meituan and Ele.me could face certain risks as judges tended to identify this association as an employment relationship, requiring the company to bear the legal obligations. To

<sup>16</sup> Wu Bin, *Laodong renshi zhengyi caipan guize he shicao zhiyin* (*Adjudication Rules for Employment Law and Guidance for Human Resources*) (Beijing: Zhongguo fazhi chubanshe [China Legal Publishing House], 2022).

<sup>17</sup> Li Kungang and Qiao Anli, "Laowu cheng yu laodong guanxi de qubie" (*The Differences between an Employment Relationship and a laowu Relationship*), *Zhongguo laodong* (*China Labor*) 3 (2015): 55–9.



avoid risks, Meituan and Ele.me have transferred this aspect of their business to other companies and they adopt a cooperation model that can be classified as labour dispatch<sup>18</sup> or outsourcing. Since platform companies are still required to bear some responsibilities in the labour dispatch model,<sup>19</sup> they prefer the outsourcing model, which cuts off the platform company's relationship with the worker.

The case of *Gao Zhiqiang v. Beijing Sankuai Online Technology Ltd.* can serve as an example. Beijing Sankuai Online Technology Ltd. (hereafter Beijing Sankuai) owns the Meituan app. Gao is a food delivery rider using the Meituan app and claims employee status with the Beijing Sankuai. Beijing Sankuai argues that since it has outsourced the business to Suzhou Yunting Network Technology Ltd. (hereafter Suzhou Yunting), Beijing Sankuai does not participate in the management of riders and their work, which is the responsibility of Suzhou Yunting. The judge confirmed that Gao is a rider of the Meituan app and is engaged in the delivery business. However, Beijing Sankuai is not the party that manages and supervises Gao and pays Gao remuneration. Therefore, Gao and Beijing Sankuai do not meet the requirements for establishing a labour relationship.<sup>20</sup>

Another way to avoid identifying the relationship as employment is to require riders to register themselves as “individual-run industrial and commercial households”. According to Article 54 of the Civil Code, a natural person who operates an industrial and commercial business may be an “individual-run industrial and commercial household” if he or she is registered according to the law.<sup>21</sup> In the food delivery industry case of *Wu Liangxia v. Tianjin Jisheng Meijia Information Technology Ltd.*, Wu first registered as an “individual-run industrial and commercial household” and then started a food delivery business.<sup>22</sup> However, registering as such does not guarantee that the rider will be identified as an independent contractor. The judge's deliberation will be based not only on the surface relationship (e.g. name or title) but also on an in-depth examination of the actual situation of the relationship between the rider and the outsourcing company.

<sup>18</sup> In the labour dispatch model, after a labour dispatch company hires an employee, the employee will be transferred to the company that uses him/her according to the contract between the labour dispatch company and the company. The company then retains the managerial control of the employee at work.

<sup>19</sup> According to Art. 62 of the Employment Contract Law, the company that uses the employee should bear responsibility for matters such as overtime payment and performance bonus.

<sup>20</sup> *Gao Zhiqiang v. Beijing Sankuai Online Technology Ltd.*, (2020)Su0508, civil case, district court, No. 2287.

<sup>21</sup> The State Council of the People's Republic of China (PRC), “Civil Code of the PRC”, 1 January 2021, at <[https://english.www.gov.cn/archive/lawsregulations/202012/31/content\\_WS5fedad98c6d0f72576943005.html](https://english.www.gov.cn/archive/lawsregulations/202012/31/content_WS5fedad98c6d0f72576943005.html)> [1 January 2023].

<sup>22</sup> *Wu Liangxia v. Tianjin Jisheng Meijia Information Technology Ltd.*, (2021)Su0213 civil case, district court, No. 2082. In this case, Wu is identified as an independent contractor. One important argument is that Wu does not have the intent to establish employment with the company based on the identity of the “individual-run industrial and commercial household”.

### *Data Collection and Method*

The author's source for case or data collection was the ChinaLawInfo website. Since not all judges cite the Notice on Employee Status in their judgements, the author was unable to find cases with direct reference to the regulation. As Meituan and Ele.me together account for 98 per cent of the entire online food delivery market in China,<sup>23</sup> the author searched for judgements that were decided before 2022 with "Meituan" and "employment relationship", or "Ele.me" and "employment relationship" as keywords. It should be noted that cases which centred around a restaurant hiring a rider to deliver food were excluded. A typical example is *Zhang Guochun v. Qingdao Haicang Branch of the Beijing Pizza Hut Ltd.* Zhang was hired by the Pizza Hut restaurant. Since Pizza Hut also launched its online business on the Meituan and Ele.me apps, when judgements are searched using the keyword "Meituan", such cases involving "Meituan" are ultimately excluded.<sup>24</sup>

Two noteworthy points require some explanation. The first concerns the procedures related to filing lawsuits. There are two methods for the rider to obtain workers' compensation. First, the rider can obtain employee status and then get compensation from the local workers' compensation administrative department. In most cities, the judicial procedure requires a rider to first file for arbitration with the labour arbitration commission to claim employee status. Then, if one party is dissatisfied with the arbitration result, it can file a lawsuit, which the court's civil division will handle. The rider, upon obtaining employee status, can apply for workers' compensation benefits from the local workers' compensation administrative department. In the second method, the rider does not need to obtain employee status via initial arbitration and litigation, but directly applies for workers' compensation benefits from the local workers' compensation administrative department. The administrative department can then decide whether to recognise a rider as an employee, and the rider does not need to first file for employment arbitration. The SPC confirmed the legality of such a procedure in *Xu Manyu v. Hainan Yiwei Medical Trade Ltd.*<sup>25</sup> A rider or the company could challenge the administrative decision by filing a lawsuit with the court's administrative division. Therefore, a small proportion of employee status cases was decided by judges in the administrative division.

Second, the research found 22 missing judgements from district courts and coincidentally, there were 22 decisions from intermediate courts. Given that these judgements from intermediate courts contain the main content of the judgement from district courts, such as the judge's analysis, the author collected relevant information and "created" these judgements.

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<sup>23</sup> "Food Delivery in China: A Rapidly Expanding Tech Battleground", Daxue Consulting, 11 March 2020, at <<https://daxueconsulting.com/food-delivery-online/>> [8 January 2023].

<sup>24</sup> *Zhang Guochun v. Qingdao Haicang Branch of the Beijing Pizza Hut Ltd.*, (2020)Lu02 civil case, intermediate court, No. 10301.

<sup>25</sup> *Xu Manyu v. Hainan Yiwei Medical Trade Ltd.*, (2020) SPC, administrative case, No. 507.

## *Application of the Rule to Factors*

### *(i) Steps involved in adjudication deliberation*

First, in a small proportion of the judgements, judges reached conclusions on employee status based simply on facts without the need to articulate reasons. The first type of evidence for this is found when an outsourcing company signs an employment contract with a rider and the judge supports the employee status based directly on this evidence.<sup>26</sup> The second type is when the outsourcing company voluntarily recognises the rider as an employee and the judge confirms the employee status. For example, in the *Yang Min v. Fuqing Lanjiya Network Technology Ltd.* case, Yang was covered by personal accident insurance which the company, Fuqing Lanjiya, bought for Yang. Yang sustained an injury in an accident while at work and the company issued a certificate for the injury. In this certificate, the company recognised Yang as an employee. The judge confirmed the employee's status based on this evidence.<sup>27</sup>

In most judgements, judges adjudicate lawsuits by applying the Notice on Employee Status and subordination theory. Judges first check whether the platform worker and the company meet the key requirements. All platform workers in this study had done so—there was no child, retiree or student in the sample size. All companies in the sample have met the criteria. Beijing Sankuai Technology and Shanghai Lazhasi Technology, the registered company names of Meituan and Ele.me, respectively, were involved in such lawsuits only 16 times. This presents affirmative evidence that Meituan and Ele.me have outsourced the food delivery business to other companies. Most riders have understood that the platform company, which turned towards outsourcing companies, is not considered a proper defendant.

Judges then next check whether the platform worker and the company have established an employment relationship with consumers. As discussed earlier, the company usually signs a cooperation contract rather than an employment contract with a rider. In the *Wang Xueyang v. Fujian Renlibao Technology Ltd.* case,<sup>28</sup> the judge found that the cooperation agreement between the rider and the company, and the relevant work rule, stipulated that the rider could choose independently whether to accept the order based on its content and requirements, and the standard specified in the order information. The judge viewed this fact as supporting the conclusion that there was no consensus between the rider and company to establish an employment relationship.

However, it should be noted that the identification is not determined solely on the title and contents of a cooperation agreement. In many cases, such as *Peng Zhengqi*

<sup>26</sup> For example, *Shu v. Foshan Miaodianba Freight Agency Consulting Ltd.*, (2020)Yue 0106, civil case, district court, No. 8284.

<sup>27</sup> *Yang Min v. Fuqing Lanjiya Network Technology Ltd.*, (2019)M01 civil case, intermediate court, No. 6811.

<sup>28</sup> *Wang Xueyang v. Fujian Renlibao Technology Ltd.*, (2021)Min 06 civil case, intermediate court, No. 1823.

*v. Huaian Chuanpu Commercial Ltd.*,<sup>29</sup> judges have argued that, even though the contract between the company and the rider is not an employment contract, the rider should be identified as an employee because the actual employment mode accords him or her an employment relationship. In this sense, judges focus more on the de facto employment mode rather than the name of the contract. Meanwhile, whether the employee is subordinated to the employer forms the core of the identification. The next section discusses personal and economic subordination in judgements.

*(ii) Personal subordination*

Judges focus typically on the recruitment, delivery and performance assessment phases to demonstrate personal subordination.

- *Recruitment phase*

The company requires a rider to obtain a health certificate in this phase.<sup>30</sup>

- *The course of delivery service*

In this phase, most companies hold morning meetings, which the riders must attend. The riders are also expected to inform the company upon completing their workday.<sup>31</sup> One judgement highlights that the manager conducting morning meetings will explain the delivery operation rules as well as provide safety education.<sup>32</sup> In addition, most companies also provide employee badges, work uniforms, helmets and food delivery boxes, etc. These companies also check riders to confirm that they wear their work uniforms neatly, keep the food box clean and hygienic, and perform the work safely and carefully.<sup>33</sup>

The app assigns the food order based on the rider's location or distance from the customer. The rider must fulfil the assignment of the order<sup>34</sup> and cannot cancel the order at will.<sup>35</sup> Furthermore, a rider, upon accepting an order, should follow the delivery service rules. For example, the rider should ensure prompt delivery of food

<sup>29</sup> *Peng Zhengqi v. Huaian Chuanpu Commercial Ltd.*, (2020)Su 0804, civil case, district court, No. 1224.

<sup>30</sup> For example, *Li Mingming v. Dalian Jingcheng Domestic Service Ltd.*, (2018)Liao02 civil law, intermediate court, No. 907.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Cai Baofeng v. Ningbo Yibuzhicheng Information Technology Ltd.*, (2018)Zhe0191 civil case, district court, No. 1610.

<sup>33</sup> For example, *Geng Jian v. Huaian Meijia E-Commerce Ltd.*, (2020)Su0803 civil law, district court, No. 559.

<sup>34</sup> *Yin v. Xian Huatong Runsen Lift Ltd.*, (2021)Gan0702 civil law, district court, No. 3746.

<sup>35</sup> *Wang Jingkai v. Shandong Henghai E-commerce Ltd.*, (2019)Lu 01 civil case, intermediate court, No. 1299.

to the customers<sup>36</sup> and should also comply with the directions of the delivery process and standard service language.<sup>37</sup>

- *Performance assessment*

In this phase, the judge focuses on the company's assessment and punishment. For evidence of employee status, one judge argues for confirmation in relation to the customer's claim of a mechanism to review the rider's delivery service.<sup>38</sup> Another judge argues that the company assess the rider's delivery service quality and exercise its power to deduct a certain percentage of the rider's remuneration if the customer rates the rider one or two stars in review (a five-star review denotes the highest service rating). Such exercise of power is characteristic of the management style of outsourcing companies.<sup>39</sup>

Meanwhile, other judges demonstrate that riders are independent contractors, based on the following analysis.

- *Recruitment phase*

When riders point out that the outsourcing company imposes requirements, the judge argues that these requirements are imposed by the platform company or the client, and not by the outsourcing company.<sup>40</sup> In the case *Wang Yunhai v. Benxi Lianxinghui Technology Service Ltd.*, the judge also argued that the delivery service standard was based on the requirements of the client or platform company.<sup>41</sup>

- *The course of delivery service*

First, one judge argues that the provision of work uniforms and food boxes by Ele.me is for brand-building and promotion.<sup>42</sup> Second, as for service delivery management, the judge also depended on the following facts to demonstrate that the rider was an independent contractor. In *Peng Jingyin and Wang Guanghui v. Cixi Yuminuode Enterprise Service Ltd.*, after the plaintiffs' son Wang Lei died in a car accident while delivering food, his parents sued the company. Wang Lei had registered in the Meituan app, so he could decide independently whether and when to accept an order, the

<sup>36</sup> *Ran Quan v. Dongguan Pengyuan Network Technology Service Ltd.*, (2018)Yue1391 civil case, district court, No. 502.

<sup>37</sup> *Huang Shenqing v. Xuzhou Huizhan Network Technology Ltd.*, (2020)Su12 civil case, intermediate court, No. 1379.

<sup>38</sup> *Ma Wenlong v. Jiangsu Junda Logistical Network Ltd.*, (2020)Su0813, civil law, district court, No. 840.

<sup>39</sup> *Tang Tonayang v. Huaian Kuaitui Tongcheng Network Technology Ltd.*, (2017)Su0804 civil law, district court, No. 1736.

<sup>40</sup> *Li Jumei v. Shanghai Peiren Enterprise Outsourcing Ltd.*, (2019)Jing0105 civil law, district court, No. 86060.

<sup>41</sup> *Wang Yunhai v. Benxi Lianxinghui Technology Service Ltd.*, (2021)Liao0504 civil case, district court, No. 1243.

<sup>42</sup> *Li Jumei v. Shanghai Peiren Enterprise Outsourcing Ltd.*, (2019)Jing0105 civil law, district court, No. 86060.

number of orders and the delivery destination. Also, the outsourcing company did not impose any schedule or management.<sup>43</sup>

The details of service delivery are covered in further discussions. The judge in the case *Ge Xiaoguang v. Tianjin Woqu Human Resource Ltd.* pointed out that in the case of an app-assigned order, the company does not have a mandatory requirement for the rider to accept the order, neither does it impose performance assessment and management on the number of orders or working days.<sup>44</sup> Furthermore, a judge explained that if a rider cannot complete the delivery order, the app can assign incomplete orders to other riders.<sup>45</sup>

Several judges defend their view that riders are independent contractors while acknowledging the existence of a certain level of management which is, however, weaker than that in a normal employment relationship.<sup>46</sup> For example, riders do not need to arrive at the company's office to report their attendance.<sup>47</sup> The judge pointed out that, even though riders attend the morning meetings held at the company, the meetings are not mandatory and there is no punishment for non-attendance. Therefore, in a strict sense, an independent contractor's management style differs from that of the company.<sup>48</sup> Furthermore, although the company stipulates requirements for the number of working days and orders, these requirements are intended to serve as incentives. In other words, riders who meet these requirements are rewarded accordingly. This type of incentive should not be considered a management tool for the company.<sup>49</sup>

### (iii) Economic subordination

Economic subordination is commonly portrayed as follows: the rider works for the outsourcing company and obtains remuneration, and the delivery service is integral to the company's business. The judge argues that the rider is paid by order (piece rate pay) and receives remuneration once a month, which characterises an employment relationship.<sup>50</sup> In addition, the payment method is regular and constant, resembling that provided to an employee.<sup>51</sup> Another characteristic is the stability of the employment

<sup>43</sup> *Peng Jingyin and Wang Guanghui v. Cixi Yuminuode Enterprise Service Ltd.*, (2020)Yu05 civil law, intermediate court, No. 7685.

<sup>44</sup> *Ge Xiaoguang v. Tianjin Woqu Human Resource Ltd.*, (2019)Su03 civil case, intermediate court, No. 8795.

<sup>45</sup> *Yang Yutao v. Chongqing Feipai Technology, Ltd.*, (2020)Yu05 civil case, intermediate court, No. 5158.

<sup>46</sup> *Gao Chengshun v. Guizhou Fanfou E-commerce Ltd.*, (2020)Yun2502 civil case, district court, No. 728.

<sup>47</sup> *Xin Yuhao v. Xinjiang Xinfeng Supply Chain Management Ltd.*, (2019)Xin0104 civil case, district court, No. 11065.

<sup>48</sup> *Wang Yunhai v. Benxi Lianxinghuike Technology Service Ltd.*, (2021)Liao0504 civil case, district court, No. 1243.

<sup>49</sup> *Liu Yubo v. Shanghai Lazhasi Information Technology Ltd.*, (2020)Ji0102 civil case, district court, No. 5794.

<sup>50</sup> *Qin v. Ningbo Jieshun Food Delivery Ltd.*, (2018)Su0507 civil case, district court, No. 6703.

<sup>51</sup> *Xie Dong v. Chongqing Feipai Technology Ltd.*, (2019)Yu05 civil case, intermediate court, No. 5084.

relationship, as is evident in the agreement that the outsourcing company requires the rider to sign—the agreement stipulates that the rider should inform the company one month in advance before terminating the agreement. The judge argues that this provision also manifests a certain stability in the relationship.<sup>52</sup>

Most judges who identify the rider as an independent contractor argue that the company remunerates riders by the orders they fulfil. The greater the number of orders, the higher the rider's income. Moreover, the company does not set a minimum wage. The remuneration for riders is not based on salaries that have historically been calculated by an employee's job position and years of working.<sup>53</sup> Rather, the company remunerates riders project by project. Although the company pays the rider once a month, it simply collects from customers the remuneration for all the orders completed in that month.<sup>54</sup> Furthermore, one judge pointed out that the customer paid a service fee to the company, which in turn paid a proportion of the service fee to the rider according to the agreement signed between the company and the rider. Therefore, the customer, rather than the company, remunerates the rider.<sup>55</sup>

Another factor concerns the instruments used for food delivery. One judge argues that riders using their own electric bikes to deliver food are responsible for the maintenance, oil and any fines should they violate the traffic rules. Therefore, the rider bears the transportation cost, unlike an employee's income consideration for the costs involved in labour.<sup>56</sup>

The last factor concerns the issue of full-time or part-time status. To demonstrate that a rider is an employee, the judge often argues that the rider regards the delivery job as his or her primary career and hence, he or she must complete a particular workload to make a living. Although riders have the freedom to reject any order, they have little choice.<sup>57</sup> Some judges further investigate the number of hours a rider works to ascertain the rider's full-time status. For example, in *Shen Liangxin v. Yixing Suda Delivery Service Ltd.*, the judge argued that Shen worked nine hours a day according to the timesheet provided by Yixing Suda Delivery. Thus, compared with part-time riders, Shen was considered a full-time rider.<sup>58</sup> Conversely, judges are more likely to classify riders as independent contractors if they work part-time. For example, in *Gao Chengshun v. Guizhou Fanfou E-Commerce Ltd.*, the judge found that Gao held a full-time job besides the delivery job. Therefore, Gao did not commit all of his time and energy to the delivery job, so the remuneration from it was not his primary source of income.<sup>59</sup> However, another judge argued that Chinese law does

<sup>52</sup> *Zheng Qipeng v. Huai'an Chuanpu Commerce Ltd.*, (2020)Su0804 civil case, district court, No. 1224.

<sup>53</sup> *Xie Haijun v. Chongqing Feipai Technology Ltd.*, (2018)Yu0108 civil case, district court, No. 19398.

<sup>54</sup> *Li Yi v. Yuxi Hongren E-commerce Ltd.*, (2021)Yun03 civil case, intermediate court, No. 915.

<sup>55</sup> *Zhang Junlong v. Jiangsu Feitu Information Technology Ltd.*, (2020)Lu0303 civil case, district court, No. 3497.

<sup>56</sup> *Gao Chengshun v. Guizhou Fanfou E-Commerce Ltd.*, (2020)Yun2502 civil case, district court, No. 728.

<sup>57</sup> *Li Zilong v. Baoqing Jishidao Delivery Service Ltd.*, (2019)Hei0523 civil case, district court, No. 3371.

<sup>58</sup> *Shen Liangxin v. Yixing Suda Delivery Service Ltd.*, (2018)Su0582 civil case, district court, No. 8886.

<sup>59</sup> *Gao Chengshun v. Guizhou Fanfou E-Commerce Ltd.*, (2020)Yun2502 civil case, district court, No. 728.

not prohibit workers from establishing two employment relationships with two different companies.<sup>60</sup>

In addition, the company did not offer to help the rider pay social insurance expenses—evidence that the rider is not an employee.<sup>61</sup> On the other hand, the judge also argued that the company's provision of employers' liability insurance for the rider could indicate the rider's employee status in the company because the employers' liability insurance is not a statutory obligation for companies in China.<sup>62</sup>

### *Summary and Implications*

Judges' reasoning has here been presented according to principles of legal formalism in reaching decisions. Judges first laid out the traditional employment status rule, investigated the facts and then reached a conclusion after applying the rule to the facts. The following measures are here considered ideals of legal reasoning: Judges focus not only on the rider's freedom to decide where and when to work but also on the details of the service process, such as the provision of work uniforms and food delivery boxes with the company branding, the attendance and order assignment policies, the nature of the remuneration, instrument of delivery and payment of employer liability insurance.

In addition, examining and summarising these judgements could contribute to creation of new rules on employee status. If China insists on applying dichotomous categorisation in determining employment relationships, these aforementioned factors in judgements could provide a constructive investigation into the identification standard. In December 2022, the SPC issued the Opinion about Providing Judicial Service and Guarantees for the Stability of Employment. The document specifies that judges should comprehensively consider the following factors in workers' claims for employee status: the extent to which a worker can independently determine working hours and workload; the level of management in the labour process; whether a worker should obey the work rule, disciplinary rule, and the rule on rewards and punishments; the continuity of employment; whether the worker can decide or change the service price, etc. The SPC's new rule will further guide the adjudication of platform workers' employee status in the future.

Furthermore, in China, the MOHRSS and seven other government departments<sup>63</sup> jointly issued the Guiding Opinions on the New Form of Employment on 16 July

<sup>60</sup> *Gao Guojin v. Zhenjiang Fuyao Network Technology Ltd.*, (2019)Su0982 civil case, district court, No. 2730.

<sup>61</sup> *Liu Jingchao v. Weihai Thunderbird Delivery Service Ltd.*, (2017)Lu10 civil case, intermediate court, No. 1858.

<sup>62</sup> *Yang Yutao v. Chongqing Feipai Technology Ltd.*, (2020)Yu0107 civil case, district court, No. 917.

<sup>63</sup> These departments are the National Development and Reform Commission, Department of Transportation, Department of Emergency Management, General Administration for Market Regulation, National Health Insurance Bureau, the Supreme People's Court and the All-China Federation of Trade Unions.



2021. This document created a trichotomy of employment: the employee, the independent contractor and a third employment category, which is an intermediate between employee and independent contractor. Specifically, this intermediate category refers to “a worker who does not meet the employee status standard but is subject to some degree of control from the company”. The definition could also be improved based on the summary of judgements. This category is characterised as partially personal subordination and partially economic subordination. The consequent regulations issued by the provincial government provide more detailed definitions. For example, the Implementation Measures for Protecting Labour Rights and Interests of Workers in New Employment Forms in Hainan Province defines the third employment category as follows: “the platform worker owns the freedom to arrange the working hours, independently decide to work online or relax offline. Meanwhile, suppose the worker is online, he or she should obey the platform company’s service standard and remuneration method”.<sup>64</sup> This definition grasps the core standard for a third employment category based on the findings of this article.

## LEGAL PRAGMATISM AS EVIDENCED IN DECISIONS

### *Background of Legal Pragmatism in Platform Worker Lawsuits*

Posner presented a succinct background of legal pragmatism: “the core of legal pragmatism is pragmatic adjudication, and of pragmatic adjudication is heightened judicial awareness of and concern for consequences, and thus a disposition to ground policy judgments in facts and consequences rather than in conceptualisms and generality”.<sup>65</sup> The author’s findings in this article suggest that most judges espouse legal pragmatism in employee status judgements. Theoretically, if a judge adjudicates lawsuits based only on the facts of the lawsuit and the relevant laws, the decision (an employee wins or loses) will be randomly distributed. However, studies have found that whether an employee sustains an injury is essential to the judge’s decision.<sup>66</sup> Furthermore, whether a platform worker is identified as an employee provides a critical background, as the worker cannot obtain workers’ compensation benefits and is at risk of falling into poverty after suffering an injury in an accident.

Meituan and Ele.me attempted to address the problem by encouraging riders to purchase commercial insurance. For example, Meituan facilitates riders’ purchase of such insurance for personal accidents and third-party liability. When the rider

<sup>64</sup> “Implementational Method to Protect the New Form of Employment Workers’ Labour Rights in Hainan Province” (in Chinese), at <<https://m12333.cn/policy/zdmp.html>> [1 January 2023].

<sup>65</sup> Richard Posner, “Legal Pragmatism”, *Metaphilosophy* 35, no. 1–2 (2004): 147–59.

<sup>66</sup> Wang Wenzhen and Li Wenjing, “Pingtai jingji fazhan dui woguo laodong guanxi de yingxiang” (The Effect of the Development of the Platform Economy on the Employment Relationship in China), *Zhongguo laodong* (China Labor) 1 (2017): 4–12; Beijing Zhicheng Migrant Worker Legal Aid Center, “Pingtai jingjixia hezuo yonggong moshi laodong guanxi fenxi—yi waimai pingtai wei li” (The Cooperation Model in the Platform Economy—The Delivery Platform as an Example), *Renmin sifa* (People’s Judicature) 7 (2020): 20–7.

starts accepting orders in the Ele.me app, the app deducts a service fee of RMB3 towards purchasing insurance for that day. On 21 December 2020, Mr Han, a rider, died in a mishap while delivering food. Han's wife said that her husband thought that he had paid for an insurance premium, having RMB3 deducted daily from the app. However, Han's wife later learned that the premium paid was only RMB1.06—Ele.me explained that the RMB3 deduction is actually a platform service fee, and each rider is eventually offered coverage through the insurance policy based on RMB1.06 after the platform takes its entitled share from the service fee.<sup>67</sup> In the end, Ele.me provided RMB600,000 as the pension for the family of the deceased, and the dispute was settled.

However, compared to workers' compensation, commercial insurance has many disadvantages. First, from the procedural perspective, workers' compensation is much more employee-friendly since the workers' compensation bureau initiates the appraisal. By contrast, commercial insurance usually sets various conditions for receiving the benefit. Therefore, as has been reported, many workers have to give up the benefit since they cannot afford the time and energy required to complete the procedure.<sup>68</sup> Second and most importantly, benefits from commercial insurance are not as generous as those from workers' compensation. Judges in Beijing's Haidian District Court found that, in 2018, the minimum amount of workers' compensation benefits for a grade-10<sup>69</sup> disability (disability subsidy, medical assistance and disability assistance) could be RMB86,363.4. Comparably, most commercial insurance pays out only RMB15,000 for the same level of disability. As is evident, benefits of workers' compensation are nearly six times higher than those of the commercial insurance.<sup>70</sup> Therefore, a judge may consider allowing injured riders to claim workers' compensation benefits.

Judges have also expressed such opinions in several judgements. In *Rao Shengde v. Jiangxi Meipei Industrial Ltd.*, Rao's son, Rao Jianwen, died in an accident on his way to deliver food. Jiangxi Meipei Industrial rejected Rao Shengde's claim that Rao Jianwen was its employee. The judge argued that

Jiangxi Meipei Industrial benefitted from Rao's labour and should bear the relevant legal and social obligations. If the court lets the company off for using

<sup>67</sup> "The Rider Died and the Platform Company Compensates only 2000 Yuan? The Platform Company Responds", Chnfund, 9 January 2021, at <[https://app-web.chnfund.com/jx/202101/t20210109\\_2717109.html](https://app-web.chnfund.com/jx/202101/t20210109_2717109.html)> [26 October 2023].

<sup>68</sup> See <<http://capital.people.com.cn/n1/2021/0104/c405954-31988012.html>> [8 January 2023].

<sup>69</sup> The disability identification system comprises 10 grades and grade-10 is the minimum level of disability. The document "Standard for Identifying the Ability to Work—Gradation of Disability Caused by Work-Related Injuries and Occupational Diseases" (issued by the Ministry of Human Resources and Social Security) specifies the criteria for comprehensive assessment and grading of disability grades. A class 10 disability would involve "no functional impairment or mild functional impairment after healing of fractures", like a broken arm that would keep people off their e-bikes for a while.

<sup>70</sup> The Research Group in the Haidian District Court in Beijing, "She hulianwang hangye laodong zhengyi xianzhuang fenxi ji duice jianyi" (An Analysis of and Suggestions for Lawsuits Involving the Internet Industry), *Falü siyong (Journal of Law Application)* 8 (2019): 94–107.

labour paid at a low cost, the company is less willing to adopt safety protection measurements, which will ultimately cause more social problems. Therefore, the company, in adopting a new technology and management mode, should not avoid legal responsibility.<sup>71</sup>

As highlighted earlier, past studies have not attempted to use statistical methods to analyse the data. After all, many factors may affect the results. The author developed a model for this article to obtain more accurate results in investigating whether the aforementioned factors would affect lawsuit decisions.

### *Statistical Results*

#### *(i) Descriptive results*

Table 2 indicates a rapidly increasing number of lawsuits from 2018 onwards, attributable to the increased number of food delivery riders during the period. The government's strong support for the development of the platform economy, which is enabled by technological innovation, has led to an increase in the number of riders. The food delivery industry received additional support because it could promote job opportunities.

On 12 August 2019, China Central Television featured Meituan, the main driver of the platform economy, on *Xinwen lianbo* (a TV programme that reflects the official stance of the Communist Party of China) and lauded its "Employment First, Steady Improvement of People's Livelihood" principle.<sup>72</sup> In particular, after the outbreak of the COVID-19 pandemic and the adoption of the zero-COVID policy by the Chinese government, food delivery became an essential service during city lockdowns. As the number of food delivery riders increases, the number of lawsuits also increases. Another explanation of such an uptrend is that employees had a high success rate of winning cases from 2014 to 2019 (see Table 3), and this gave them the impetus to file lawsuits to claim rights.

TABLE 2  
No. of LAWSUITS BEFORE 2022

Year	No. of lawsuits
2016	9
2017	49
2018	190
2019	234
2020	324
2021	159
Missing values	22
<b>Total</b>	<b>987</b>

<sup>71</sup> *Rao Shengde v. Jiangxi Meipei Industrial Ltd.*, (2018)Xin0203 civil law, district court, No. 1056.

<sup>72</sup> "Xinwen Lianbo Praises Meituan: Employment is the People's Greatest Livelihood", Chinanews.com, 13 August 2021, at <<https://www.chinanews.com.cn/business/2019/08-13/8925280.shtml>> [26 October 2023].

The situations leading to a high success rate of lawsuits are complicated. Further steps in the analysis ensure more precise statistical results. First, if more than one employee filed a lawsuit against the same company based on similar facts, the author retained one judgement as representative. Second, given that judges in the civil and administrative divisions have different educational backgrounds and professional skills, this article focuses on civil division judgements. The author derived a sample size of 779 lawsuits in this study.

As shown in Table 3, riders' win rate in the lawsuits is 0.63 (489/779). A key explanation for such a high value is the increased likelihood of injured riders winning their cases (0.67). Meanwhile, regular riders who claim employee status and relevant rights, such as overtime payments, do not have such a high win rate (0.58). Additionally, Table 3 reveals that the win rate is significantly influenced by the year variable. For instance, the win rate decreased after 2020. This decrease can be attributed to a rise in lawsuits filed by workers who did not sustain injuries (see Table 4). Since judges are less inclined to grant employee status to workers who did not sustain injuries, the overall win rate has decreased. In addition, administrative regulations that have emerged in big tech firms since 2020 may not affect the win rate. In 2020, the central government moved to "curb the disorderly expansion of capital" and issued documents on antitrust, labour, etc. As discussed earlier in this article, the Guiding Opinions on the New Form of Employment offer protections to platform workers, establishing a third employment category, particularly for workers "who do not meet the employee status standard but are subject to some degree of control from the company" and are entitled to the minimum wage, etc. However, the guiding opinions document does not specify whether a platform worker is an employee. Since riders continue to file lawsuits to claim employee status, judges continue to apply their adjudication logic to employee status. Therefore, the document may not affect the win rate.

TABLE 3  
BASIC INFORMATION ABOUT EMPLOYEE STATUS JUDGEMENTS

Decision	No. of cases		
Employee wins	489		
Employee loses	290		
Health status	No. of cases	No. of cases won	Win rate
Healthy	275	158	0.58
Injury	448	299	0.67
Death	56	32	0.58
Year	No. of cases	No. of cases won	Win rate
2016+2017	39	28	0.72
2018	137	104	0.76
2019	178	125	0.70
2020	251	140	0.56
2021	152	73	0.48
Missing value	22		

TABLE 3 (*cont'd.*)

Location	No. of cases	No. of cases won	Win rate
Shanghai	49	23	0.46
Suzhou	28	25	0.93
Beijing	39	25	0.65
Chongqing	34	10	0.31
Other cities	625		
Level of court	No. of cases	No. of cases won	Win rate
Intermediate court	246	164	0.67
District court	533	325	0.61
The company's registered place and the court's location	No. of cases	No. of cases won	Win rate
The company's registered place and the court's location are the same <sup>73</sup>	516	341	0.66
The company's registered place and the court's location are different <sup>74</sup>	243	134	0.55

TABLE 4  
HEALTH STATUS OF PLATFORM WORKERS, 2016–21

Year	No. of lawsuits platform workers filed	No. of platform workers who sustained an injury	Ratio of platform workers who sustained an injury
2016 + 2017	39	27	0.69
2018	137	92	0.67
2019	178	104	0.58
2020	251	129	0.51
2021	152	86	0.57
Missing value	22	10	

In addition, more factors were introduced into the analysis regarding the win rate, for instance, the location of the court. Previous studies have found that courts in different cities have different perspectives on winning employment lawsuits. For example, Ke and Cheng's analysis finds that companies in Shanghai have a higher win rate in dismissal lawsuits than companies in Beijing and Guangzhou.<sup>75</sup> Similarly, Ahl et al. observe that courts in Beijing and Guangzhou have better legal protections for foreign employees than courts in Shanghai do.<sup>76</sup> The author selected Beijing, Shanghai, Suzhou and Chongqing as variables in this study to compare with other cities in China. Courts

<sup>73</sup> For example, the case *Zhang Xiaoping v. Shanghai Enyu Logistics Ltd.*, (2021)hu0116, civil case, district court, No. 7632: the company Shanghai Enyu Logistics Ltd. is registered in Shanghai and the district court in Shanghai decides the case.

<sup>74</sup> For example, the case *Lin Jiayin v. Ningbo Mijia Food Delivery Ltd.*, (2021)hu0112, civil case, district court, No. 6247: the company Ningbo Mijia Food Delivery Ltd. is registered in Ningbo city, Zhejiang province, and the district court in Shanghai city decides the case.

<sup>75</sup> Ke Zhenxing and Cheng Jinhua, "The Practice of Federalism in the Chinese Legal System: An Empirical Study on Labour Contract Law", in *Renmin Chinese Law Review*, ed. Shi Jichun (Cheltenham: Edward Elgar, 2021), pp. 30–56.

<sup>76</sup> Björn Ahl, Pilar-Paz Czoske and Xu Cui, "Labour Rights Protection of Foreign Employees in China", *Asia Pacific Law Review* 28, no. 1 (2020): 122–37.

in these cities were chosen due to their distinctive preference towards either employers or employees. Shanghai may display a greater tendency to support employers, whereas Beijing and Suzhou may lean towards employees.

*(ii) Regression analysis*

As shown in Table 5, injured riders are more likely to be identified as employees. The court location also has a significant impact on the results. Riders in Chongqing and Shanghai are less likely to be identified as employees; riders in Suzhou are more likely.

It should be noted that although death is a more severe outcome than an injury, the results reveal that death does not have a significant correlation to the legal results. This complicates the explanation. First, the court location is a critical mediator. There are 51 lawsuits that involve the death of riders. However, 11 lawsuits were decided by courts in Chongqing and Shanghai, which are more likely to identify riders as independent contractors. Second, judgements in several lawsuits have pointed out that after the rider's death, the deceased's family members obtained personal accidental insurance benefits from the insurance company.<sup>77</sup> Alternatively, the family members may have settled with the company, which had already paid a portion of the compensation.<sup>78</sup> In these two scenarios, judges are reluctant to support the claim of employee status after the family filed a lawsuit for the rider's employee status.

TABLE 5  
DETERMINANTS OF EMPLOYEE STATUS JUDGEMENTS

Health status	Model coefficient (standard error)
Injury	0.32 (0.17)*
Death	0.02 (0.33)
<b>Level of the court</b>	
District court	-0.28 (0.18)
<b>The company's registered place and the court's location</b>	
The company's registered place and the court's location are the same	0.35 (0.18)*
<b>Place (city)</b>	
Shanghai	-0.78 (0.31)**
Suzhou	1.83 (0.75)**
Beijing	0.25 (0.36)
Chongqing	-1.58 (0.40)***
<b>Date</b>	
2020	-0.20 (0.22)
2019	0.93 (0.25)***
2018	1.01 (0.27)***
2016 + 2017	1.12 (0.43)***
<b>R-squared</b>	0.14

Note: \*  $p < 0.1$ ; \*\*  $p < 0.05$ ; \*\*\*  $p < 0.01$

<sup>77</sup> *Wang Ling v. Boyue Rencai Service (Ningbo) Ltd.*, (2019)Wan0191 civil case, district court, No. 5775.

<sup>78</sup> *Gao Chengshun v. Guizhou Fanfou E-Commerce Ltd.*, (2020)Yun25 civil case, intermediate court, No. 2001.

There are however several limitations in this study. As not all judgements contain health status information, the question whether the lack of such information is because no incident of injury took place or because the judge excluded the information (even though there was an injury) needs to be considered. In this regard, the author would argue that if a severe injury occurs, the judge will introduce it as factual information for the lawsuit. Leg fractures are a common form of severe injury that riders sustain during food delivery. Riders should file a lawsuit if they cannot claim workers' compensation benefits to cover medical bills and other losses. With regard to less severe injury, even though the judge does not include the health information in the lawsuit documentation, the state of injury may be too mild to affect the lawsuit result. Therefore, the limitations of this study may not have a significant impact on the outcome.

### *Tensions between Legal Formalism and Pragmatism*

China has a civil law system in which legal formalism forms the basic mode of legal thinking. Therefore, the judge's task is to apply the law to the case. The advantage of the legal formalism approach is that it prevents judges from making arbitrary decisions and ensures consistency in decision-making for similar cases. On the other hand, the disadvantage is that the approach may lead to a lag in economic and technological development. Judges do not need to face such a dilemma if the legislation is able to address issues of workers' compensation properly. In this sense, legal pragmatism could remedy the weakness of legal formalism and help rebalance the interests of the company and the rider. In particular, most judges in China may consider "stability maintenance" (*weiwen*) as a form of conflict resolution. These judges believe that riders who sustain injuries and cannot afford medical care may fall into despair and do things that threaten social stability. Therefore, offering them employee status to access workers' compensation can help prevent such risky situations.

The disadvantage of the legal pragmatism approach is that decisions on similar cases can be decided differently, thus jeopardising the adjudication's predictability. Judges evidently also recognised such a scenario. For example, in the case of *Shangqiu Suishou Network Technology Ltd. v. Human Resource and Social Security Bureau of Shangqiu*,<sup>79</sup> the judge identified the rider as an employee. However, the judge also emphasised that such a deduction cannot be generalised, and the identification should be determined based on the specific circumstances of each case. In addition, pragmatism may affect the neutrality of judges as the company may challenge the judge's position, claiming that it favours the rider and that the judgement is unfair. This article, however, argues that pragmatism's benefit outweighs its cost in lawsuits concerning platform status and that the combination of the approaches of both legal formalism and pragmatism approaches presents a more feasible solution.

<sup>79</sup> *Shangqiu Suishou Network Technology Ltd. v. Human Resource and Social Security Bureau of Shangqiu*, (2019)Yu14 administrative case, intermediate court, No. 49.

### *Proposals to Solve the Tensions*

An option to alleviate the tensions between legal formalism and pragmatism is to develop a separate system known as the occupational injury system. Local governments have since initiated experimental projects on occupational injury insurance. On 9 March 2018, Wujiang district, located in Suzhou city, Jiangsu province, issued the Regulation on Occupational Injury Insurance for Flexible Employment (Trial). First, this ordinance determines that a worker pays RMB180 annually for insurance coverage and that the company does not need to pay. Second, platform workers are able to claim benefits if workers sustain sudden, unintended accidents (not including illness) such as an injury, disability and death on the job. If the experimentation is successful and becomes institutionalised as a national policy, the judge will not have to deal with the classification predicament in work-related injury cases.

However, occupational injury insurance is not suitable for other groups, such as app-based workers (e.g. ride-sharing drivers and designated drivers) or most independent workers. This proposal therefore does not fully resolve the tension. A fundamental approach is to define the coverage that includes app-based workers and many other independent workers.

The criteria are now proposed for identifying which categories of riders could be considered employees based on the factors of personal and economic subordination. These criteria could then be generalised to other groups.

The first critical factor for personal subordination is that a rider cannot refuse the order. Once riders accept the order, they are expected to comply with the service's work rules. A particularly notable indicator of subordination is that the algorithm developed by the company sets the time limit for each order. If riders fail to deliver on time, they may face fines or other penalties. Although riders have the freedom to choose their working hours if food delivery is their primary source of income, they will work as much as possible to make a living. In this sense, the freedom to choose working hours is not determinative of the classification of employment type and needs to be analysed alongside economic subordination. An initial factor to consider in connexion with economic subordination is the source of the income. To be identified as an employee, the rider should be mainly affiliated with one platform, and at least 75 per cent of the earnings should be obtained from this platform. The rider must work for a minimum of five days (at noon and in the evening) for this platform,<sup>80</sup> to an extent comparable with that of a formal employee's working schedule. Ultimately, it should be noted that the platform company decides the service price for each order. To sum up, riders can be identified as employees if they meet all the aforementioned criteria.

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<sup>80</sup> For example, one rider may create accounts on the app of Meituan and Ele.me. If the rider wants to be identified as an employee for one app, such as Meituan, the rider should meet these requirements. For example, the rider works in the Meituan app five days a week and spends two days on the Ele.me app.



App-based workers can be classified into two types. The first type is similar to riders in that the app dispatches orders to the platform worker and the algorithm plays a role in management, providing the route as a reference and setting the time limit within which each order should be fulfilled. Ride-share and designated drivers are examples of this type of app-based workers, although the time limits imposed on them are less stringent than those for food delivery riders. If these drivers also meet the economic subordination requirement, such as the source of the entire income is from the company, these drivers could be identified as employees. The other type of app-based worker also receives orders via the app, but the app does not contain any algorithm. The fundamental standard of personal subordination is similar for this group: the company imposes heavy control in the labour process. Especially if the worker fails to comply with the work rule, the worker may be fined or even discharged.

The *Tang Ruiting v. Beijing Yisheng Health Technology Ltd.*<sup>81</sup> lawsuit provides one such example. Tang was a therapist and was employed by Beijing Yisheng Health Technology. In December 2015, the company announced a new policy requiring therapists to accept orders through the company's app. Tang was no longer obligated to comply with the attendance policy and the minimum wage was eliminated. In May 2019, the company discharged Tang, who then filed a lawsuit to assert his employee status. The judge at Beijing No. 2 Intermediate Court supported Tang's claim. First, the judge admitted that the app allows workers to choose working hours independently and that workers' subordination to the company is hence weakened. However, this is only a technological change in management methods and no substantial changes had occurred related to subordination. For example, the judge argued from the perspective of personal subordination, highlighting as a key factor the company's maintenance of a high level of control, such as establishing the service rule, monitoring the process and exerting technical authority over the work process.

For most other independent workers whose jobs are unrelated to the app, if they are still under control in the labour process and are economically subordinated to the company (similar criteria), these independent workers could also be identified as employees.

## CONCLUSION

The emergence of the platform economy poses the critical question of whether a platform worker can be identified as an employee. Given that China has lacked a regulatory regime in the platform economy in the recent past, judges have to deal with lawsuits and claims of employee status filed by food delivery riders, especially those who have sustained injuries in work-related accidents. This article examines how judges in China adjudicate the platform workers' employee status, utilising the concepts of legal formalism and legal pragmatism. In the legal formalism approach, since there

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<sup>81</sup> *Tang Ruiting v. Beijing Yisheng Health Technology Ltd.*, (2020)jing 02, civil case, intermediate court, No. 8125.

is no specific rule on the employee status of the rider, judges apply the traditional identification rule to the fact and make their decision. In addition, as riders who sustained injuries need employee status to claim workers' compensation, judges are more likely to identify these riders as employees. In sum, judges provide a realistic solution to the workers' compensation issue in that riders have obtained some coverage and protections. The case study could also serve as a useful reference for other countries encountering this complicated issue.

Additionally, this article highlights that tensions exist between the legal formalism and the pragmatism approach employed by some judges. The author proposes to define the criteria of employee status for platform workers in order to address the dilemma so that they can be better covered and protected. The author will also continue to observe whether the legislature or the SPC in China issues a clear rule on the definition in the future.

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