

Comparative Research on Confirming Labor Relation in the Platform Economy Between China and America

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Abstract. With the prosperity of the platform economy, assorted new forms of businesses have emerged, which are seemingly different from traditional employees, have literally emerged. In addition, Chinese labor laws split workers into laborers and non-laborers, only when a worker is a laborer can he or she be governed by labor laws. Thus, whether such workers are laborers has caused a definitional maze in both judicial practice and academia. One of the most representative of new business patterns is the rider of the food delivery platform. This article takes the food delivery rider who best represents one of the new forms of employment as a theme for analysis, and adopts the method of case analysis and comparative research. This paper holds the view that online platform enterprises have the following essential characteristics: online platform enterprises tend to abandon their fixed assets; they take more control of riders with the blessing of algorithms; and they skirt the law to mask real legal relationships. These features all contribute to proving more difficult to determine whether a rider is a laborer. In response to the policy of building harmonious labor relations and to protect riders' rights they deserve, this essay studies the ABC test established by the California State Supreme Court, by discussing the backdrop and merits of the ABC test, together with the reasons why it can be used for reference, to provide threads for China's judicial practice.

Keywords: Takeaway Riders, The ABC Test, Protection of Rights and Interests, Online Platform, Labor Law.

1. Introduction

Despite the steady economic situation and regular pandemic prevention, the platform economy seizes growth opportunities, especially in the service sector. According to China's Sharing Economy Development Report, online food delivery revenue accounted for about 21.4% of the restaurant industry revenue in 2021 [1]. Figure 1 shows the proportion of online delivery food revenue has maintained growth from 2017 to 2021.

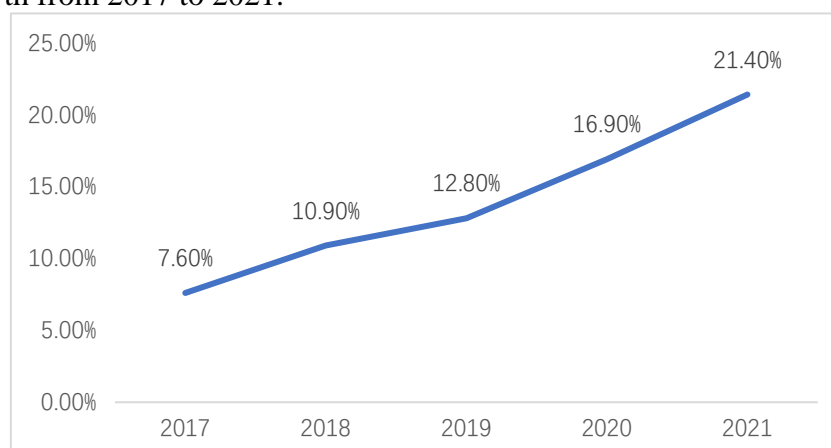


Figure 1. The Proportion of Online Delivery Food Revenue in the National Restaurant Industry Revenue, 2017-2021 [1]

However, behind the ascending number is the collapse of the mansion that protects workers' rights. Shao Xinyin, a food delivery worker (rider) of ELEME, is the epitome of numerous riders. April 27, 2019, at 11:50 p.m., When Shao was ready to off work, a truck with high beams approached, leading Shao to fall into a pit and get serious injuries. It is shocking and infuriating that no employer was

blamed to be liable for this accident because one company undertook ordinary management, another company paid his wages, and another two to three companies paid individual income tax for him. In this case, even the judge could not differentiate who was Shao's employer [2].

In general, there are two employment modes of the food delivery platform: full-time riders and crowdsourcing riders. In fact, the emergence of the crowdsourcing model was because delivery food platforms attracted part-time workers in the society to engage in food delivery services by adjusting the delivery price, for gaining a competitive edge. At first, the two main parties of the corporation agreement were the platform and rider. In order to cut costs and transfer risks, the platform began to collaborate with labor crowdsourcing companies. As a result, one of the parties of the corporation agreement shifted from the platform to the crowdsourcing company. As required by law, the food delivery platform should sign a labor contract with the full-time rider. Nevertheless, to further transfer costs and risks, the platforms cooperate with labor outsourcing companies. Then the recruitment of full-time riders and day-to-day administration fall within the remit of the labor outsourcing companies. In some cases, when a full-time rider is accepted, he would be commanded to upload an application for the flexible form of employment. Once the rider signs up successfully, it means that the rider permits the application to register himself as a self-employed individual. For the same purpose, the labor outsourcing companies subcontract to other companies. In these modes, the platforms absolve themselves from spreading their obligation to many other companies [2]. Thus, the platforms claim that they only serve as information intermedia. These behaviors displayed by platforms pose a threat to Labor Law.

Reviewing the existing China law system, it presents a dual structure. Work relationships in China can be divided into labor relation, which could be further classified as standard labor relation and non-standard relation, and non-labor relation. The former is covered by labor laws, whereas the latter is governed by the Civil Code. If there is a labor relation between a work unit and a worker, then the worker could enjoy rights under the labor law, i.e., working hours, occupational safety, and social security. In contrast, if there is no labor relation between a work unit and a worker, it would be governed by the Civil Code rather than labor law. At present, only labor dispatch and part-time work can be defined as non-labor relations. It is obvious that labor laws don't regulate the new relationship between riders and food delivery platforms mentioned above. Beyond labor laws with too broad determination criteria, there is a comparatively explicit set of judgment standards. In 2005, the Ministry of Labor and Social Security of the People's Republic of China (abolished in 2008) issued the "Notice on Matters Concerning the Establishment of Labor Relations" (notice), which clarified several criteria for labor relations. First, both the employer and the laborer should meet the subject qualifications stipulated by laws and regulations. Second, the laborer is bound by various labor rules and regulations formulated by the employer according to law, and the laborer shall be under the management of the employer and engage in paid labor. Third, the labor provided by the laborer constitutes an integral part of the employer's business. If all three standards are satisfied, a labor relation would be confirmed without a written contract. This set of norms works to some extent. However, more than ten years have elapsed since this document was put in place. China's economy has changed tremendously during this period. Hardly does it work effectively. This article would dwell on it later.

Concerning China's current legal frame and the progression of the platform economy, it is reasonable and logical to conclude that the platform exploits workers by circumventing labor law in pursuit of profit maximization.

Turn to the labor dispute arbitration committee and the court, the protection of workers' rights depends on the tribunal to decide whether there is a labor relation between the platform and the platform worker. If the relationship is eligible for labor relation, then labor law can be applied [3]. However, in juridical practices, due to the lack of clear standards and complexity of relationships, judges blow hot and cold over the phenomenon. With the advent and development of crowdsourcing and multi-level contracting, it is more likely that the severity dominates the case. To be more detailed, if riders sue for damages, i.e., delayed wages and overtime pay, courts tend to dismiss the case.

Oppositely, if riders have occupational injuries, or even expire on work, then courts are inclined to confirm labor relations and decide companies, not platforms, to assume liability [2]. Figure 2 exhibits the courts' attitudes revealed by 1907 judgments. In conclusion, to be protected by labor law through judgments is difficult for workers. While tribunals could vary the case at their discretion, limitations are apparent.

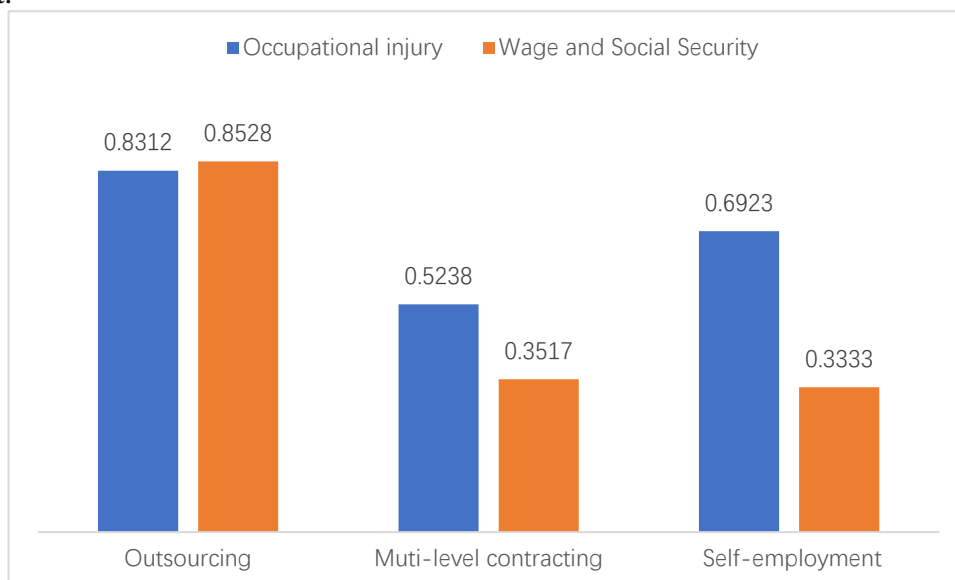


Figure 2. The Difference in the Effect of Factors [2]

In the wave of sharing economy, under the guideline of idle means waste and transfer use rights, traditional business employment modes undergo huge changes. Advocates propagandize that it's a win-win situation where flexible employment forms are prevalent, for individuals have a chance to realize independent development and companies cut costs. However, in this case, when workers are injured, who is liable for damages? Therefore, it is an urgent priority to clarify labor relations, for workers' rights are tightly close to the labor law in China.

2. Characteristics of China's Platform Employment

Some scholars argue that there is no labor relation sitting between platforms and platform workers because workers possess autonomy in work decisions, namely the critical reason lies in that platform workers are able to choose whether to provide services, when and where to provide services. In addition, in the takeaway trade, electric scooters serving as the main labor instruments are provided or leased by workers themselves rather than platforms. And platforms only optimize the delivery routes, they don't force workers to follow these plans [4]. There are other arguments, but this paper would not describe them here. Admittedly, platform workers have unique characteristics that differ from traditional employers. Nevertheless, because of these features, this paper stands on the opposite.

2.1. Abandonment of Fixed Assets

As the labor user is a platform enterprise, it presents distinct characteristics. The platform itself becomes the only unsubstituted factor of production and an indispensable operation tool. That is to say, other factors of production, i.e., raw material and production apparatus. Under such a situation where enterprises maximize the divestiture of assets except information platforms, how do these enterprises find other ways? One way is crowdsourcing workers themselves must prepare delivery tools, smartphones, and other necessary equipment. Meanwhile, they must bear their own risks. What the platform companies' main focus is intangible, Internet information software and its related technical support system for meeting various types of customers. Platform companies try their utmost to build themselves into the role of information service intermediaries, so that the market risks at both

the supply and demand ends of their business chain are divested in different forms to the service providers and the demand side [5].

2.2. Employment management with overemphasizing performance

Platform enterprises are exposed to carrying out inappropriate management that places too much emphasis on performance. On the one hand, it is reflected in the algorithm used by the platform. On the other hand, it is presented in the improper incentive policy of the platform.

In seeking the optimal solution algorithm development, it performs deep learning, computer iterative computation, and an intelligent dispatching system of order allocation and planning execution to maximize delivery efficiency. Dwelling on algorithm optimization of delivery platforms, systems continuously shorten delivery time tailored to each rider. In 2016, the 3-kilometers delivery time limit was up to 1-hour; in 2017, it shrunk to 45 minutes, which was further squeezed to 38 minutes in 2018. In 2019, the average delivery time in the entire industry was reduced by 10 minutes compared to 2016 [6]. Although the riders have shortened delivery time through experiences and the improvement of knacks, these transitory personal edges would be captured by the algorithm, becoming new standards for all riders [6].

According to a report, a whopping 74.5 percent of the food delivery riders worked full-time in 2019 [7]. Figure 3 provides riders' average daily working hours. Back to the Introduction part, by examining the platform development process, the platform is clearly pursuing expanding the number of crowdsourcing riders, but why are there still a large number of riders working full-time? For one thing, an effective way is allowance. Platforms often set allowance in high temperature, rainy days, noon rush hours, midnight snack period, and weekends. The bonus is stepped. If riders want to get the highest bonus, they have to spend more time running a single. For another thing, platforms have launched some programs for organizing crowdsourcing. As a result, those organized riders are still classified as outsourcing, while many of them have changed from part-time to full-time. What has to be mentioned is that the income of purely being a common crowdsourcing rider is even as low as less than half of the average person's monthly income in the city. Riders joining programs must obey complicated rules, i.e., fulfilling online time requirements each day, achieving basic delivery quantity each time period, avoiding delaying the delivery, and being not permitted to reject or cancel the order, otherwise, they would be evaluated as unqualified, which would lead them to fail to get bonus [8]. Reviewing another set of data. In 2018, the income accounted for more than 90% of the total family income was about 16% among delivery riders. On crowdsourcing platforms, 43% of practitioners are the sole income earners in their families [9]. It is predictable that when the algorithm turns into the core of management and workers' livelihoods depend upon it, how work risks increase in multiple growths.

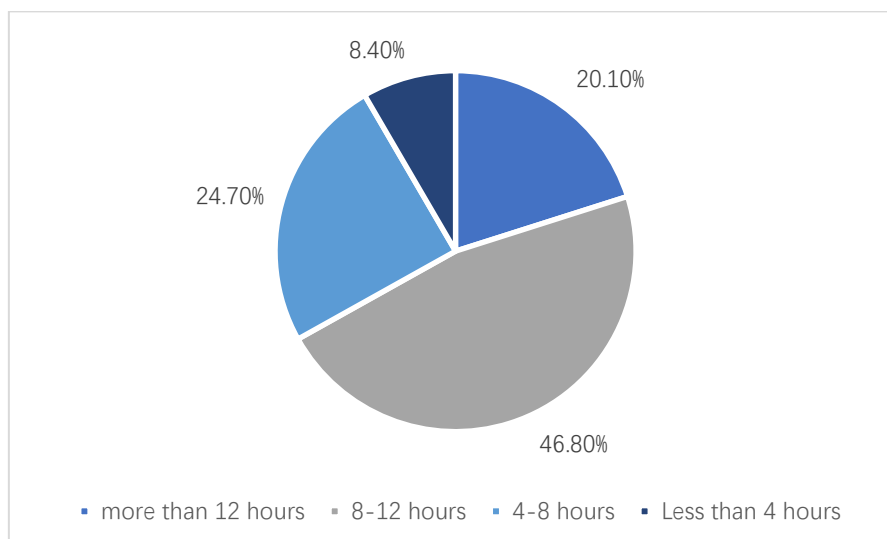


Figure 3. Average Daily Working Hours of Riders [10]

2.3. Hidden Labor Relations

The food delivery platforms have altered their employment mode from signing labor contracts with riders to outsourcing and crowdsourcing. Through the innovation of their employment modes, the platforms constantly transfer the cost and risk of employment outwards, and they have indeed gotten the blast while others get the blame. In the case where delivery food platforms themselves employ riders in their infancy, the ratio of platforms that were confirmed as labor employers was up to 100%. However, under the direct outsourcing and network outsourcing modes, the proportion has dropped from 100% to less than 1% [2]. It brought about a sheep-flock effect, meaning other outsourcing companies have followed suit. The original intention of flexible employment is to realize the free development of individuals and reduce the labor cost of enterprises, but now it has become a tool for enterprises to carry out more cruel exploitation.

3. Results

According to a recommendation of the International Labor Organization, when an employer uses other legal arrangements to hide the essential employment relationship, which has the effect of depriving the employer of rights he or she deserves, it is called a disguised employment relationship [9]. One of the practices of disguised employment relationships is to cover the employment relationship with other legal relationships [11]. For example, the employer might reach a short-term labor service contract with the employee, so that the employer doesn't have to assume liabilities of labor laws. In this way, food delivery platforms are to get rid of the status of the employer. Labor relations should be a coexistence of equality and subordination, in which equality is mainly reflected in procedure rights, i.e., entering into contracts. However, in the disguised employment relationship, the subordination of workers is factitiously weakened, and the inequality between the two parties is strengthened. Hence, the employer can start or end the unilateral control of the worker at will in this scenario. Moreover, in the sharing economy, platform companies use platforms to isolate riders from the product market, making riders lack knowledge and control over the product market. And because of the algorithms set, riders have almost no choice. In addition, since the size of subsidies granted by the platform is fixed, it is likely to lead to restless competition among riders, contributing to a reduction in the value of their labor. A vicious circle would form.

Conclusions Investigating the notice itself, first of all, according to the guidelines of the notice, only if three criteria are met equally can it be determined that there is a labor relation. This identification is somewhat mechanical and rigid, which is difficult to adapt to the volatile labor relations in different forms that have emerged in the booming sharing economy. Secondly, there are relatively limited specific elements to be considered when determining labor relations in the notice, and the standards given are still abstract. Thirdly, the item seems to overstress the subject's qualifications. Under the sharing economy, the threshold for laborers to enter the labor market is very low, inducing a multitude of laborers who do not owe the legal qualifications can work for platforms to obtain remuneration.

In recent years, whether it is the disappearance of China's demographic dividend, the younger generation's desire to be liberated from fixed jobs, the intensified competition among enterprises, or the advent of capital's cold winter, etc., flexible employment's occurrence has its economic reality. Given the average daily active riders of Meituan surpassing 1 million in 2021, according to a report about the rights protection of Meituan riders published by Meituan, the platform has functioned as an employment reservoir. As a whole, the platform economy plays an important role in improving the efficiency of social resource allocation, promoting economic development, alleviating employment conflicts, providing multiple channels, and broadening labor income. In addition, due to the large number of platform workers, if improperly extended the coverage protections of labor laws, the labor cost of platform enterprises would be too expensive, which is not conducive to their development. However, it does make the position of workers more unfavorable in the game with employers in practice. Therefore, for balancing the stimulation of the labor market vitality with the protection of

labor rights, exploring labor relations identification standards that are more in line with the sharing economy market is imperative, considering the interests of both parties. Only in this way can we respond to foster harmonious industrial relations.

4. The ABC Test

The ABC test is a simplified version of the common law test [12].

4.1 Background

From 1995 to 2005, the percentage of the workforce identified as independent contractors rose from 6.7% to 7.4% in America. However, the figures almost doubled from 2005 to 2015 in America. Why did it increase sharply? An employee is someone who works for one employer, onsite, on a fixed schedule, for a consistent period of time, and is compensated in wages. There are currently few definitions of an independent employee. To some extent, any worker who does not fit the definition of an employee can be classified as an independent contractor [12]. Practically speaking, modern independent contractors are workers in business for themselves, they can choose where, when, for whom to work, for what rate of pay they work, and so on. Namely, a worker is an independent contractor when the user only enjoys the right to decide the outcome of the worker's work and is unable to control the work process. An author explains that independent contractors are cheaper than employees, sometimes as much as 30 percent. When the work is performed by an independent contractor, the employer has no need to pay employment tax and could save expenses at the cost of providing health insurance, retirement plans, and other compensation. And according to James Baron, a Yale management professor, this employment model allows companies to enlarge or narrow the scale of employees in response to diversified demand to cope with future conditions. The imagination would not boggle at such flexibility might take worker's benefits to the graves. Whereas this misclassification sorts employers as independent contractors in the gig economy, neither applicable legal rules nor judicial opinions give an unambiguous response [13].

4.2 Defects of the Common Law Agent Test

The right-to-control test, also called the common law agent test, is the first legal standard and is the dominant test applied to distinguish whether a worker is an independent contractor or an employee. It involves ten factors: control, supervision, integration, skill level, continuing relationship, tools and location, method of payment, intent, employment by more than one company, and type of business. No single factor is conclusive. Courts agree that if the hiring entity controls the work process is the most. If the hiring entity controls, the worker would be viewed as an employee. The common law control test that courts use today is remarkably unchanged from its original formulation, despite the fact that employment relationships have evolved dramatically since the rule's inception. Although economic and technological developments have posed an enormous influence on employment patterns, courts still use almost the same set of factors as the original right-to-control test [12].

As for the right-to-control test, it is of confusion and ambiguity. To begin with, the test itself is comprised of multifactor analysis, which might contribute to similar cases being decided differently by using the same test. Secondly, some of the factors can't pace with the times. Take one of the outdated factors to illustrate. Traditionally, assuming greater control over workers in the employer's place of business, a worker who works onsite is more likely to be deemed as an employee than an independent contractor [13]. However, telecommuting has become prevalent, especially after the pandemic epidemic coronavirus sweeping the world since 2020.

4.3 Introduction of the ABC Test

In April 2018, the California State Supreme Court ruling in *Dynamex Operations West, Inc. v. Superior Court* established a new legal standard, known as the ABC test, for determining whether a worker is classified as an employee or an independent contractor. The ABC Test set a default

presumption that a person providing labor or service for remuneration shall be considered an employee rather than an independent contractor. According to Assembly Bill No.5 (AB-5), the user, or the hiring entity, can prove a worker is an independent contractor if all three of the following conditions are satisfied:

Autonomy. The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact.

Business Dissimilarity. The person performs work that is outside the usual course of the hiring entity's business.

Custom of the worker. The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The bill goes on to list a number of work relationships are exempt from the application of the ABC test, for which Borello test is still applied.

4.3.1 Advantages of the ABC Test

There are a series of advantages of the ABC Test. First, the default puts the onus on employers; failure to establish any one of the three prongs would end up labeling the worker an employee. Previously, California law required courts to utilize the Borello test which consists of several factors to decide the nature of the relationship between the hiring entity and the worker. However, The California Supreme Court held "that such a wide-ranging and flexible test for evaluating whether a worker should be considered an employee or an independent contractor has significant disadvantages, particularly when applied in the wage and hour context." Thus, The California Supreme Court placed the burden on the hiring entity [14]. This paper also believes that this measure of reversing the burden of proof is reasonable. For one thing, the employer is often in a stronger position than the employee who is in a weaker position. For example, going to court takes time and money. Thus, if a worker opts to file a sue, there is a good chance that he or she will lose the income that would have been earned during that part of the time. For another, it could mitigate the phenomenon that the hiring party misclassifies its workers.

Second, the ABC Test removes some outdated factors and those of which endow judges a lot of discretion, i.e., intent. By contrast, the ABC Test provides objective conditions. As mentioned before, none of the factors plays a determinant role in the previous test. This also means respective judges would weigh the same factor differently, and even the same judge would assign different weights to the same factor when adjudicating similar cases. However, in the ABC test, to reverse its presumption, all three standards must be satisfied, which are more impartial.

4.3.2 The Reasons Why the ABC Test could be Used for Reference

For decades, U.S. labor and employment law has used a binary employment classification system, labeling workers as either employees or independent contractors [12]. Likewise, Chinese labor laws also bisect relationships established between hiring entities and workers. Neither of these two countries classifies workers into three categories as some other countries do. Therefore, there is a legal basis and rationality for China to borrow the ABC test from the U.S.

Furthermore, one of the reasons that California reforms the ABC test is because California has a workforce of nearly twenty million in 2019. And California is the home of Silicon Valley and many technology companies are located here, where literally misclassification is to be reckoned with. Hence, many workers will be covered by the law [15]. Similarly, the Chinese labor market is huge, much larger than California's. If don't pay enough attention to the protection of online workers due to their obscure nature, then the harm will be detrimental and labor laws would lose their proper meaning.

Third, California historically prioritizes workers' rights, which is an urge for adopting the ABC test [15]. China provides tilted protection for workers. In order to alleviate the tension between labor and management and to protect the legitimate rights of labor, Chinese lawmakers have enacted labor laws tilted toward labor. Thus, there is a jurisprudential basis for China to draw on the U.S. experience.

4.3.3 The Reasons Why the ABC Test could be Used for Reference

This paper needs to make a few points in particular to counter some of the arguments against bringing online workers under the protection of labor laws.

Firstly, the platform is not just a network. Indeed, the communications infrastructure of the twenty-first century is the open Internet, and Internet access and use are intermediated in nature from start to finish. However, platforms leverage the affordance qualities of network organization in order to facilitate interaction, and thus platforms play a role in binding the network and privatizing and controlling the infrastructure. One of the goals of a platform is to increase the stickiness of its users as much as possible, and to achieve this goal, the platform must provide the services that its participants want, while discouraging its participants from using other platforms. Platforms use technical protocols and centralized control to delineate the network space for users. Platform protocols give users flexibility in some aspects of use while closing off other aspects of flexibility. The control given to the protocols allows for intermediary functions, allowing the platform to be its own master. The platform formulation ignores what is necessary to define and maintain security at the edge of the platform through control. Platform protocols allow participants to access, on the one hand, and are the point of contact between Internet technology and political authority, on the other. The latter is what ordinary virtual networks lack. It is also the latter that reshapes the terms of economic exchange [16].

Secondly, there are some claims that workers who provide their own tools are not employees. Judicial practice in the United States is worth thinking about. For example, in *FedEx Home*, the courts held that “drivers own their vehicles...be supportive of independent-contractor status...In addition, drivers operate out of the FedEx Hartford facility, where they work in tandem with FedEx’s package handlers. Because aspects of the instrumentalities factor cut both ways, we find it to be neutral.” In summary, tool ownership is not the determining factor.

Thirdly, though complaints from companies that AB-5 would hurt their business operations, in *Garcia v. Border Transportation Group, LLC*, the courts held that those “costs are only those required in order for them to bring their businesses into compliance with California law.”

Last but not least, the ABC test also has some weaknesses. One of the drawbacks is caused by “C” prong. “C” prong raises some problems in practice. Employers may rack their brains to get workers to be deemed as independent contractors rather than employees. For example, some employers require workers to incorporate or establish limited liability companies. The goal of “C” prong is to establish whether an individual is occupied in the operation of an independent business in fact, not whether the individual is capable of doing so. In *Garcia v. Border Transportation Group, LLC*, the Garcia court held that the “appropriate inquiry under part (C) is whether the person engaged in covered employment actually has such an independent business, occupation, or profession, not whether he or she could have one.” Such a loophole is because the language of part (C) is not explicit. Law is made by people, so it inevitably has some flaws. Therefore, when taking a page from the ABC test, it is necessary to keep a watchful eye on judicial practices of the country where the law is implemented to check if underlying problems would occur. Besides, we should not just take it. We need to base on China’s realities and maintain a desired balance between various policies. Only in this way can we take full advantage of the strengths of the socialist and build harmonious labor relations with Chinese characteristics.

5. Conclusion

Whether it is to maintain the healthy operation of the economy and society or to protect the laborers’ rights, the premise is to clarify the boundary between laborers and non-laborers. In the rapid development of the Internet economy, such an issue has become even more pressing. Some people argue that food delivery riders are not laborers because they have different characteristics than traditional employees, but this paper argues that when judging the nature of the law, we should not only see it from the outside. In addition, considering the social impact and fairness of such a judgment

is also necessary. The reality is that a large number of Internet platform companies use outsourcing to mask real labor relations and exercise stricter control over takeaway riders. This behavior poses a great challenge to China's labor laws. In the current context of unclear legal norms in China, the ABC test in the United States is a good reference. The ABC test has overcome the shortcomings of some of its previous testing standards, and it is more in line with the Internet economy era. However, this test also has deficiencies. Thus, we still need to combine individual cases and make comprehensive judgments to avoid falling into the deficiencies of the ABC test.

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