

The Destiny of Web Platform Workers in China: Employees, Nothing or a “Third Option”?

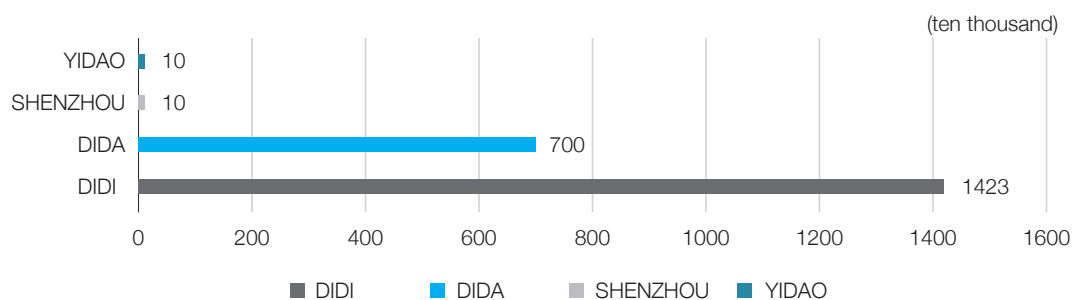
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- I. Introduction
- II. The current test of employment in China
- III. The actual working condition of web platform workers in China
- IV. The future of web platform workers in China: A third option breaking the binary divide

I. Introduction

As a researcher working and studying in a university in Beijing, here is an observation on how the college students spend their days: After getting up in the morning, they have a quick breakfast in the cafeteria and go to class. In the classroom, the professor might recommend some books during the lecture. They place their orders immediately on Amazon or JING DONG online bookstore, expecting to receive the book in one day or two. The class ends around 11:30 a.m. and to avoid the long lines in the cafeteria, the students normally place an order ten minutes before the class is over through a food delivery web platform, Eleme or MEITUAN, so they could avoid the crowd in the cafeteria and eat in their cozy and warm beds. On the way back to the dorm, they pick up the delivery they bought from TAOBAO or TIANMAO (online shopping platform) from the delivery guy. They might go out for dinner, by the “private car” they booked on DIDI, or asked a designated driver on E-Daijia. Basically, in most Chinese college campus, life would be much harder without the web platforms in smart phones, and things are not much different outside the campus.

The large demand explains, in recent years, the proliferation in the number of people who provide services through web platforms. According to the “Report on Sharing Economy in China 2016,”¹ in 2015, about 50 million people provide service in the form of gigs or on-demand services, accounting for 5.5% of total laborers in China. DIDI, for instance, one of the biggest ride-sharing company in China, provided about 15 million job opportunities (Figure 1). In other words, 15 million drivers may be providing their services through DIDI, in a so-far unclear legal status (employee, independent contractor, or any other classifications).



Note: The figure shows the number of drivers provided services from different web platforms and DIDI is clearly in a dominant position.²

Figure 1. Amount of drivers provided services through major web platforms in China.

1. The full text of the report (in Chinese) is available at <http://www.sic.gov.cn/archiver/SIC/UpFile/Files/Htmleditor/201602/20160229121154612.pdf>.

2. Figure 1 is from *Report on Sharing Economy in China 2016*, <http://www.sic.gov.cn/archiver/SIC/UpFile/Files/Htmleditor/201602/20160229121154612.pdf>. (translated by author).

II. The current test of employment in China

A. The dominant test of employment in current Chinese law

The dominant test governing the classification of employees in China is not codified by statute. Instead, it is set in a regulation issued by Department of Labor and Human Resources of China in 2005. It is a three-factor test. It says that “Without signing any written employment contracts, while the situations below exist, there is an employment relationship between the parties:

- (1) Both the “employer” and the “employee” have the necessary qualification required by laws,
- (2) The employee is subject to the labor rules and regulation formulated by the employer. The employee provides its service under the management of the employer. The employee is paid by the employer to work, and
- (3) The service provided by the employee is part of the business of the employer.”³

B. Analysis of the dominant test

This test has received widespread criticism from the scholars and lawyers, for it fails to provide useful guidance in most cases. It looks more like some general principles telling people what an employment is rather than a test telling lawyers and judges what makes constitutes an employment relationship (for instance, the Control Test or Economy Reality Test applied by American courts, which provides a set of factors to determine the classification).

The first factor of the test is about the parties’ qualification. It is unclear what the “qualification” in this context refers to and why it is a consideration for employment. It is probably to make sure that both parties of the employment are legally qualified, like the employee needs to fulfill the minimum age (16 years old) to be employed, or the employer should be legal business entity fulfill the requirements in Chinese Corporate Law. But whether one is eligible to do business and whether one is eligible to hire someone are separate questions under Chinese law. It does not have to be a legal business entity to hire someone. Imagine a group of people intending to register a company, which need to hire some accountants and in-house lawyers to process the necessary paper work for registration. Those accountants and lawyers are clearly employed, but they might fail to be classified as employees if the corporate registration is not complete.

On the second factor, it does reflect some aspects of the fundamental nature of employment, namely, the right to control. Yet still, it lacks the necessary specifications to be applied, like what factors would ultimately determine that the employee is “subject to” the labor rules and regulations, and what factors would prove there is some “management” between the two parties and thus the employer is *in facto* control the employee. Chinese scholars have identified several factors that could be used to recognize the existence of control, like the employee is asked to dress in employer’s uniform and follow certain behavior code, the work is done with the detailed instruction from the employer or its agency, the employee is paid on the basis of how much the job has done instead of the accomplish of the task, and the employer has the authority stipulated in the manual or the contract to transfer, demote or even penalize an employee.⁴

The third factor of the test often fails to distinguish the employment from other alternatives in Chinese law, like outsourcing, staff leasing or temporal help. For instance, outsourcing is when companies outsource work to independent contractors. Although the independent contractor’s service is part of the principal’s business, there is still no employment relationship between the two parties. Another example is the temporal help (labor dispatch), a popular alternative of direct employment used in China. Although the Chinese Labor Contract Law has put many limitations on temporal help (could only be used on the temporary, seasonal or replaceable positions), it is not rare that many big enterprises use it as their major form of hiring, using temporal help on its key, important and permanent positions. Under the current Chinese law, there could be no employment between

3. The full text of the regulation is available at http://www.mohrss.gov.cn/LdGxs/LDGXzhengcefagui/LDGXzyzc/201107/t20110728_86296.htm.

4. See Jianfei Li, *Labor Law and Social Security Law of China*, Renmin University of China Press, 2014, 98-103.

the temporal help staff and the employer. When cases like this come to the court, the three-factor test offers seldom useful guidance to the judges.

Another point needs to be noticed is that the linking word used in this statute is “AND,” which means all three requirements should be fulfilled to establish an employment relationship. Compared with the “Control Test” or “Economy Reality Test” used by American courts, which lists 13 or more factors for the court to judge and weigh between different factors and come to a conclusion,⁵ there is no such flexibility in the test in Chinese law for the judges to use their discretion. It is a very rigid and strict test that either the employee meets the three factors or there is no employment relationship at all.

C. When the current test meets the web platforms and gig economy⁶

The lack of clarity of the test mentioned above is amplified when it is applied to the cases concerning the legal status classification of people provide service through web platforms. Many jobs that used to be easily recognized in the factory now need to be re-defined in the “Internet Plus” era. Like the rules and regulations made by the employer, do the rating stars system used by most web platforms constitute “rules and regulations”? Should the instructions that ask the DIDI drivers to provide bottled water and all kinds of phone chargers be taken as a factor of control? These issues are brand new to the judges. Although the leading case about the classification of employee like *O’Connor v. Uber* in America has not happened in China yet, it is just the momentary calm before the storm because in those cases involving torts and vicarious liability, courts have made their judgment on issue of the classification of workers who provide services through web platforms.

One of the biggest problems in those cases is the inconsistent results under the same facts. For instance, in *E-Daijia* case, involving the issue of the classification of designated drivers sent by the web platform, the facts normally would indicate the drivers are employees since they are required to wear the uniform of company and follow certain behavior code made by the company. However, the intermediate court in Beijing concluded that the designated drivers are independent contractors, not the employees of *E-Daijia*, so the drivers themselves are liable for the traffic accident caused by them during the work. The courts determined that the web was no more than a data collector collecting and sending data and information to match up the designated drivers and the customers. The uniform, the behavior code and the payroll are just some necessary business maneuvers to make sure the partnership between the web platform and drivers run smoothly.⁷

However, things are different in Shanghai. Under similar facts, the intermediate court in Shanghai, comes to an exact opposite judgment. A designated driver in Shanghai brought a lawsuit to the court to ask the *E-Daijia* to reimburse the damage to the third party caused by the driver. Although the facts are almost identical to the cases in Beijing, the Shanghai intermediate court concluded that these facts are not different from the traditional factors that indicate strong control between the workers and the web platform. Thus it does not escape the domain of traditional employment.⁸

The inconsistent and unpredictable results under the same facts in different courts may well prove that the court is in no better position than anyone else to classify a platform worker under current law. It seems that the test and the theory behind it have failed to catch up with technological changes. China has a civil law system, so it is the National People’s Congress that has the power to make and change the law, which usually takes a long time and is a complicated process. Courts at different levels, especially the courts in the big cities, could have a crucial role to develop the law, fixing the defects in the current test of employment by its power to interpret the regulations in cases. Many scholars and lawyers are looking forward to hearing the judicial opinion on the question of how the

5. See *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal. 3d 351, 1980.

6. Web platforms provide job opportunities and make profits is the most representative form of gig economy in China. Some other forms of gig economy, like catering, house-keeping, baby-sitting through staff-leasing company or service agency are also popular in China.

7. The full text of the judgment (in Chinese) is available at <http://wenshu.court.gov.cn/content/content?DocID=8f1b7a8d-161c-4020-9ab5-9fcb797380d5&KeyWord=%E4%BA%BF%E5%BF%83%E5%AE%9C>.

8. The full text of the judgment (in Chinese) is available at <http://wenshu.court.gov.cn/content/content?DocID=ac2ba5e5-ef8e-451f-932f-b96b85477515&KeyWord=%E4%BA%BF%E5%BF%83%E5%AE%9C>.

current test is applied in the new situation. Unfortunately, Chinese courts have only provided inconsistent answers, instead of the reasoning leading to them. No court has answered the questions that might influence the outcome of a case such as when no traditional (written and published) rules and regulations have been made, does a rating system constitute the “rule and regulation” in web platform cases. They just jump right to the conclusions of the case, leaving behind many questions that need to be further explained.

III. The actual working condition of web platform workers in China

Like their unclear legal status, the actual working condition of most web platform workers, is not looking as good as we imagined. Their actual working condition put them in an awkward situation: On the one hand, their working environment is much worse than those of employees (e.g. DIDI drivers versus taxi drivers). On the other hand, they are not as independent as contractors (e.g. the designated cooks versus the caterers).

A. The worrying working environment

DIDI proudly claims in their website and TV commercials that their drivers could earn as high as 10,000 yuan or more per month if they work hard enough. This is partly true. On its early stage, to recruit more drivers to join them and compete for market share, DIDI promised a high bonus (they call “subsidy”) to their drivers. Normally, the daily income of a driver who finishes 30 orders is about 450 yuan. So it is true that a hard-working driver could earn 10,000 yuan a month. However, it does not include the cost of purchasing a car, the gasoline, the depreciation and the possible penalty laid by transportation administration.⁹ Most importantly, DIDI has stopped paying extra bonus to their drivers for each order finished. Now the normal income of a DIDI driver could be reflected by Picture 1.



Picture 1. A DIDI driver who have been working for 10.8 hours until 20:16 on March 27, and his gross income that day is 123.59 yuan.¹⁰ (The cost of purchasing the vehicle, the gasoline and the depreciation of the vehicle are not included.)

9. News about the administrative penalties laid to DIDI drivers, see http://www.sohu.com/a/126912869_119659.

10. Picture 1 is from <http://news.china.com/news100/11038989/20170510/30506621.html>.

Another big concern is the long working hours. Due to the hard competition caused by increasing number of drivers joining DIDI, it takes much longer waiting time or on-call time for drivers to “grab” an order than before. The drivers have to extend their working hour to maintain a decent income. It is not rare that a DIDI driver would drive 16 or 17 hours a day to increase their incomes and get some reward from DIDI. The extreme long working hours are both harmful to the drivers’ health and a potential threat to public safety.

Things are even worse in another major group of web platform workers in China—the takeout delivery riders, or “Delivery Buddies.” Unlike the DIDI drivers, who are mostly made up of white collar people (because at least, to be a DIDI driver, one must be able to afford a car, estimated at 100,000 yuan, =US\$13,000), the barrier to become a takeout delivery buddy is much lower, which basically only requires an electric bicycle worth about 1,000 yuan (=US\$150).



Picture 2. Three delivery buddies working for different web platforms are lining up to pick up takeout meals.¹¹

It is not unusual that a delivery buddy works 12 hours or more every day (from 10:00 to 24:00). Compared with the working condition of DIDI drivers, or other web platform workers, delivery buddies are in a much worse place. They have to complete their job regardless of how bad the weather is. In summer, they have to suffer the high temperature (37°C-42°C) when delivering lunch without the high temperature subsidy guaranteed in Chinese Labor Law. In winter, they have to deliver food on frozen roads. It is often seen that a delivery buddy fell on the ice and get up immediately without any treatment to catch the tight schedule. Besides, they also have to suffer the potential accident risk since they have to drive really fast in order to keep them on time to complete the job.



Picture 3. A delivery buddy is on his way to the customers in heavy rain.¹²

11. Picture 2 is from <https://baijiahao.baidu.com/s?id=1564462953516866&wfr=spider&for=pc>.

12. Picture 3 is from <https://baijiahao.baidu.com/s?id=1564462953516866&wfr=spider&for=pc>.

The delivery buddies are also skeptically underpaid. It normally takes 30 minutes to one hour to finish an order. That means their hourly rate is 7-14 yuan. That could hardly beat the average minimum rate in most cities of China. The average working hour for the delivery buddy is about 13 hours per day,¹³ exceeding the maximum working hour in Chinese Labor Law (8 hours per day). They have no overtimes or any other forms of subsidy paid by the web platforms. Plus, they are constantly being penalized by web platforms for various reasons. (See Picture 4.)



Picture 4. The “penalty list” of a food delivery web platform. It shows that the food delivery riders would earn 7 yuan for each completed assignment, but the penalty of every 10 minutes’ late delivery for each assignment is 5 yuan. If they receive negative reviews from the customer, they will receive a penalty of 300 yuan from the “company,” which would make them take 43 more orders to cover it.¹⁴

B. The “invisible hands” behind—The right to punish

In *O’Connor v. Uber*, one of the defenses used is that Uber is a technology company not a common carrier, and it has no *control* over the work of its drivers. Many scholars agree with that.¹⁵ A distinction between an independent contractor and employee is that the independent contractor is free from the control by the “employer.” Or in other words, no dependency exists between the two parties. However, for the web platform workers in China, they are dependent on web platforms. In *Uber*, the court applied the *Borello Test*: include whether there are requirements to wear a uniform, freedom to pick up or reject an order, or whether negative outcomes result when the star rating is under a certain threshold. Many Chinese scholars followed this test and concluded that no overall control exists between Uber and the drivers in their researches.¹⁶ Since the leading

13. https://news.fh21.com.cn/jksd/765834_3.html.

14. Picture 4 is from <https://baijiahao.baidu.com/s?id=1564462953516866&wfr=spider&for=pc>.

15. See Brishen Rogers, *The Social Costs of Uber*, 82 U. Chi. L.Rev. Dialogue 85, 2015-2016.

16. The representative viewpoint of Chinese scholars, please see WANG Tianyu, *On Labor Relationship Recognition of Providing*

case like *O'Connor v. Uber* has not happened yet, the following analysis is more of a prediction from author himself rather than a description of reached conclusions in Chinese scholarship.

Web platforms in America and China do share certain similarities, however, many Chinese scholars have ignored one of the biggest differences between China and America, and this might be the deal breaker in relevant cases—Chinese web platforms’ powerful right to punish or penalize. For instance, DIDI drivers are asked to dress neatly, keep their cars clean and fragrant, open the door and carry the luggage for the passenger and provide bottled water and phone chargers in their cars. To make sure all the drivers are compliant, DIDI sends staff disguised as “secret passengers” to order a ride and check the conditions of drivers and cars. If the driver failed the secret test, DIDI would decrease the number of orders assigned to this driver or even “deactivate” his account for an indefinite period.¹⁷ A DIDI driver’s account could be deactivated for other reasons also, like average rating below 4.5 stars, reject orders assigned by the web platform too many times, caused car accident or received citation by transportation officers.¹⁸

The right to punish is even more powerful and “visible” in food delivery web platforms cases. The delivery buddies have no discretion to reject an assignment if the assignment happens to be on the route of the current assignment. Each violation of rules made by web platforms is priced, like Picture 4 shows: late delivery—5 yuan per 10 minutes, argue with customers—50 yuan per time, negative reviews—300 yuan per time, no helmets—500 yuan per time, click the “finish” button before actual delivery—1,000 yuan per time. The penalty does not distinguish whether the violation is caused by delivery buddy’s fault. Although most web platforms provide an appeal procedure, it is barely used due to its complicated process and low success rate. After the penalty paid to web platform, it could be often seen that the salary of a food delivery buddy that month is “negative.”¹⁹

The web platform’s right to punish impacts the actual working condition of most web platform workers. The extreme asymmetry in power between the web platform and its workers, plus the penalties, makes it unnecessary for the web platform to exert detailed control on the minutia of the work. In other words, under the threats of severe penalty, the workers would automatically finish the job in the fashion the web platform wants them to. The superficial freedom the workers enjoy comes with a price—you do have the full discretion to log off and reject an order dispatched by web platform, but you have to suffer low wages; the web platform stays out of the way with regard to how you perform the assignment, as long as the right to fine each violation is preserved by the platforms in the partnership agreement. Compared with Uber or Grubhub drivers, the DIDI drivers or Delivery Buddies in China might be in a more vulnerable place and need to be protected under Chinese labor laws.

IV. The future of web platform workers in China: A third option breaking the binary divide

It is understandable that web platforms are reluctant to be classified as employers. It would kill the sharing-economy, they claim. The comparative edge of web platforms over the traditional business model is that they can save the human resources cost by using the form of “sharing” but not “hiring.” It might be true, yet unjustified.

Service Through Web PlatformU+2014—From Judgment of E-Daijia Case in Beijing, Shanghai and Guangzhou, Law Science, no. 6, 2016.

17. <http://finance.sina.com.cn/chanjing/2017-11-15/doc-ifynshev6247191.shtml>.

18. Whether DIDI has the qualification to be engaged in public transportation business (which needs special permission) is still in debate so their legality is in some kind of grey area in China. Many DIDI drivers are caught and penalized by administrative departments for “illegally run business of public transportation.” The amount of penalty could be as high as 20,000 yuan. Sometimes DIDI would reimburse the fine to the drivers, sometimes would not. In January 2015, a DIDI driver is fined 20,000 yuan in Jinan, Shandong Province. Although the driver later won the administrative lawsuit against the transportation department, it is not rare that DIDI drivers are fined in high amount by administrative plants (regulatory authorities) and choose not to go to court. See http://www.sohu.com/a/126912869_119659.

19. <https://baijiahao.baidu.com/s?id=1564462953516866&wfr=spider&for=pc>.

A. Attitude from Chinese regulatory authorities

In August 25, 2016, seven departments of the central government issued a temporary regulation for the web platform riding business. It suggests that “web platforms should sign *employment contract* or *other kinds of agreement*, to specify the rights and obligations of both parties,” to encourage sharing economy development rapidly and healthily.²⁰ Many experts believe this regulation make it clear that employment is just optional, not mandatory and it is totally legal for DIDI or other web platforms to keep the current arrangement (no written employment contract signed).

However, that might be a misreading of the regulation. It looks like that the regulation makers have no intention to answer the question of web platform workers’ classification. The government departments encourage different forms of service to be provided, only if that legal form does reflect the nature of their relationship. There might be partnership between the drivers and the web platforms if the drivers are free or independent enough to be independent contractor.²¹ In other words, if the nature of the relationship is outweighed by the employment factors, it is still employment. The attitude from administrative plants does not help much with regard to classification.

B. An opportunity to break the binary divide—A third option besides employee and independent contractor

The system of classification in China is not much different from the one in America, a binary one. Once you are classified as employee, all the benefits are automatically attached—the minimum wages, overtimes, protections from wrongful discharge, financial compensation after the termination, and social security benefits etc. Or nothing, if they “wound up” being classified as independent contractors.

Chinese scholars have discussed the possibility of a third option besides employees and independent contractor—“intermediate employee,” or “atypical worker.”²² The basic idea is that considering the remedial purpose of Chinese labor laws, the classification does not necessarily have to be binary, and the protections afforded by labor laws, particularly the social security benefits, should be unbound with the identity of the employee.²³ There might be room for a third option because the protections afforded by Chinese labor laws could be prioritized. For web platform workers, the minimum wages, the flexible hours and social security benefits are the protections they cherished. Other protections are “waiveable” to them, like the terms of employment, or the economic compensation for termination. The workers and web platforms might thus “split the half” and reach a satisfying deal.

Although the theories and legislative suggestions brought up by scholars have their merits, they have long way to go before being made into law. As a matter of fact, there might be a realistic choice, or a shortcut for a third option, hiding in Chinese Employment Contract Law, Chapter V, Section 3, “Part-time Employment.” It provides the employees with flexible hours, multiple employer options, no trial period, and social security benefits, which many web platform workers would appreciate. It exempts the employer from certain obligations owed to employees in typical employment: no economic compensation, termination at will, paid by hours, etc.

20. The full text of the regulation is available at <http://www.miit.gov.cn/n1146295/n1146557/n1146624/c5218603/content.html>.

21. For instance, DIDI also provide private car owners carpooling services (顺风车). The customer could send their order to the web platform and the web platform will arrange a driver on the same route to pick up. The car owner and the “hitchhiker” will split the gasoline and the web platform will draw the commission from each successful match-up. This is clearly a form of partnership, instead of employment.

22. See XU Xinpeng, GAO Fuxia, and ZHANG Xinyu, Dispassion Thinking on Sharing Economy—From Laborer Protection Perspective, *Journal of Socialist Theory Guide*, no. 11, 2016; WANG Qian, The Issue of Benefit Protection of Practitioners in Internet Platform Economy, *Social Science in Yunnan*, no. 4, 2017.

23. See LIN Jia, The Study on the Equitable and Sustainable Social Insurance System, *Wuhan University Journal (Social Science)*, no. 4, 2017. See also LIN Jia and YU Hui, The Jurisprudential Discussion and Suggestions on Legalization of Medical Insurance, *China Health Insurance*, no.12, 2017.

Both parties give up some benefits, in exchange for what they truly care about. However, there is a statutory cap regarding the maximum hours of part-time employment, 4 hours per day and 24 hours per week. As long as the cap is removed by amendments in future, it might be a more suitable “Third Option” to workers and web platforms.

The destiny of web platform workers in China is still in flux, but it does give us an incentive to re-examine the existing but forgotten questions in Chinese labor laws, like the test of classification, the flexibility of forms of employment and the possibility of breaking the binary divide. Hopefully this report is a humble start to further discussion, but not an end.

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