

Protecting Older Workers in China: A Path Forward

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I. The Origin of Older Workers

Older workers represent a unique demographic within China's labor market. They are defined as individuals who continue to participate in the workforce and earn income beyond the state-mandated retirement age. This group is not limited to retired urban employees but includes migrant workers and others who remain employed past their statutory retirement age. Older workers are a distinct group shaped by the statutory retirement age system. Reaching this age legally classifies them as elderly.

The statutory retirement age in China was established in 1978 by the "Provisional Measures of the State Council on the Retirement and Resignation of Workers." Article 1 of these measures stipulated that workers in state-owned enterprises, public institutions, and government agencies who met certain conditions should retire. Specifically, male workers aged 60 or older and female workers aged 50 or older, with at least 10 years of continuous service, were eligible for retirement.

On September 13, 2024, the "Decision of the Standing Committee of the National People's Congress on the Implementation of a Progressive Delay in the Statutory Retirement Age" was passed. Starting from January 1, 2025, China will implement a progressive delay in the statutory retirement age and a flexible retirement system. The specific regulations are as follows:

- For male employees, the retirement age will gradually increase from 60 to 63, with a delay of one month every four months.
- Female employees initially with a statutory retirement age of 50 years old will be progressively delayed to 55 years old, with a delay of 1 month every 2 months.
- For those initially with a statutory retirement age of 55, it will be progressively delayed to 58 years old, with a delay of 1 month every 4 months.

In addition, employees who reach the minimum contribution period for basic pensions as stipulated by the state can voluntarily choose to retire early, with the early retirement period not exceeding 3 years from the statutory retirement age and the retirement age not being lower than the original statutory retirement age. When employees reach the statutory retirement age, they can agree with their employer to delay retirement, with the maximum delay being 3 years.

II. Employment Status of Older Workers

According to the seventh national population census, the number of people aged 60 and above in China has surpassed 264 million, accounting for 18.7% of the population. Those aged 65 and above

total 191 million, making up 13.5% of the population.¹ A report titled "2022 Survey Report on the Re-employment of the Elderly Group," released by the recruitment platform "51job" in October 2022, shows that 68% of older adults are strongly willing to seek - employment after retirement. Specifically, 46.7% of them return to the job market to pursue personal and social value, 19% of job seekers hope to utilize their professional skills to continue their career development, and 34.3% of job seekers seek re-employment to supplement household income and meet higher-level consumption needs.²

The law does not deny older adults' labor capacity and qualifications. Article 70(1) of the "Law on the Protection of the Rights and Interests of the Elderly" stipulates that the lawful income of older adults from participating in labor is protected by law. The re-employment motivation of older workers mainly comes from three aspects: economically, they increase income and supplement household needs through re-employment; in terms of value pursuit, they hope to continue leveraging their professional skills to achieve self-worth; and there is also a flexible employment-based adjustment demand, which can balance work and life.

Empirical research shows that among older workers, 34.3% are motivated by economic needs, 46.7% by value-related needs, and 19% by spiritual needs. For women who retire at 50 or 55, they have not yet entered the elderly stage. They possess relatively good working abilities and have a strong desire for employment. Additionally, elderly groups without or with low pensions are willing to work to provide economic support for themselves or the next generation.³

III. Rights and Interests Protection Issues Faced by Older Workers

1. Labor Disputes

The labor rights protection disputes encountered by older workers are increasing and have become a significant type of labor and personnel dispute in China. Research by the Supreme People's Court indicates that from 2018 to 2022, there were approximately 50,000 labor and personnel dispute cases involving older workers yearly, with a year-on-year upward trend since 2020, accounting for about 11% of all labor and personnel disputes.⁴

These disputes predominantly involve employers in physically intensive industries such as manufacturing, wholesale and retail, and accommodation and catering. The key issues in dispute include the pursuit of labor remuneration, confirmation of labor relations, and work-related injury insurance benefits. As the number of older workers grows and their legal awareness increases, more

¹ National Health Commission, Department of Aging Health: "2020 National Aging Development Bulletin", <http://www.nhc.gov.cn/ljk/pq/202110/c794a6b1a2084964a7ef45f69bef5423.shtml>.

² 51job: "2022 Survey Report on the Re - employment of the Elderly Group", <https://www.199it.com/archives/1507664.html>.

³ Lin Jia: "Beyond Labor Relations: Protecting the Labor Rights of Older Workers", "Law Application", Issue 7, 2024.

⁴ Zhang Yan: "Research on the Legal Application of Protecting the Labor Rights of Older Workers", "China Applied Jurisprudence", Issue 3, 2024.

disputes are expected to enter the litigation process in the future, which may lead to more serious social conflicts.

2. Employment Restrictions

Local authorities have introduced policies to restrict labor access for over-aged migrant workers in high-risk industries like construction. They aim to prevent construction companies from employing over-aged workers in dangerous jobs through administrative supervision and penalties. While this approach can prevent accidents involving older workers due to physical or other reasons and protect their lives, it also has a "one-size-fits-all" problem. Although the construction industry is high-risk, construction sites have many different types of work, some suitable for older workers. The local "blanket ban" approach restricts the labor access of older workers, putting their interests at risk while ensuring their safety.

Currently, aging is also prominent among migrant workers. According to the "2022 Migrant Worker Monitoring and Investigation Report", 29.2% of migrant workers are aged 50 or above, an increase of 1.9 percentage points compared to the previous year.⁵ As the number of over-aged migrant workers grows, labor access restrictions affect this group and decrease the industry's labor force.

Labor law grants workers the right to free choice of occupation. Employers and workers can independently decide whether to establish an employment relationship, provided they do not violate laws and regulations. Older workers are willing to work, and employers have labor demands. Despite specific safety and age issues, both parties agree to establish an employment relationship, mainly due to employers' interests and workers' economic needs. Due to urgent financial needs, older workers continue to work beyond the statutory retirement age to earn income. In such cases, should there be compulsory intervention in employment relationship establishment, prioritizing labor safety over labor freedom, or should safety protection during labor be strengthened to prevent accidents? This issue needs discussion, with the underlying legal controversy being whether differential treatment based on age and safety in labor employment is reasonable.

3. Occupational Injury Protection

Older workers face difficulties in ensuring occupational injury protection. China's labor relations are linked to the traditional social insurance system, with work-related injury insurance based on labor relations. Traditional work-related injury insurance covers workers with a labor relationship with their employer. If older workers cannot establish this relationship, they will unlikely be protected by work-related injury insurance. Regional standards vary on whether older workers' employment relationships are labor relations. For instance, Jiangsu and Hebei provinces recognize such relationships, while Beijing and Guangdong provinces do not. Since labor relations determine whether older workers can receive work injury and claim support, judicial practice differences in labor relation determination make it hard for them to recognize work-related injuries and enjoy insurance benefits when accidents occur.

⁵ National Bureau of Statistics: "2022 Migrant Worker Monitoring and Investigation Report", <https://www.stats.gov.cn/sj/zxtb/202304/202304271939124.html>.

The Supreme People's Court has clarified that over-aged rural migrant workers can apply for work injury identification, but this does not cover all older workers.⁶ To address the difficulties in work injury identification and compensation for older workers, the "Opinions of the Ministry of Human Resources and Social Security on Several Issues concerning the Implementation of the Work Injury Insurance Regulations (II)" stipulates that "Where workers who have reached or exceeded the statutory retirement age but have not retired or legally enjoy basic old-age insurance benefits for urban employees continue to work with their original employer and suffer accident injuries or occupational diseases, the employer shall bear the work injury insurance liability by the law."⁷ Older workers can receive work injury compensation after occupational injury without a labor relationship.

However, the employer's liability for work injury insurance is different from insurance payments in the work injury insurance system. It directly increases the economic burden of enterprises, and once an enterprise goes bankrupt or cannot pay, the relief of workers is difficult to achieve. Moreover, excluding older workers from the work injury insurance system does not align with the system's risk-sharing goal. Significant employment risk differences exist between older workers and those of appropriate age. Older workers have weaker health and labor capacity, leading to higher employment risks. Including older workers in the work injury insurance or occupational injury protection system is urgent and necessary.

IV. Main Difficulties in Legal Protection for Older Workers

In practice, courts make different determinations on the nature of employment relationships of older workers. This discrepancy arises from inconsistent views on the termination conditions of labor contracts, rooted in contradictions within China's legislation.

Article 44 of the "Labor Contract Law" stipulates that a labor contract terminates when the worker begins to receive essential pension benefits ("social security standard"). According to Article 16(1) of the "Social Insurance Law," eligibility for essential pension benefits requires 15 years of contributions by the statutory retirement age. However, many workers reach retirement age without meeting the 15-year contribution requirement. In such cases, whether to terminate the labor contract becomes an issue. The "Implementing Regulations of the Labor Contract Law" Article 21 supplements this by setting the statutory retirement age as the condition for labor contract termination ("age standard"). Given the different applicability of the "social security standard" and the "age standard," there is disagreement on whether a labor contract must or automatically terminate when a worker reaches the statutory retirement age.

⁶ Supreme People's Court, Administrative Trial Chamber: "Reply on Whether to Apply the Work - related Injury Insurance Regulations to the Work - related Injuries and Deaths of Rural Migrant Workers Exceeding the Statutory Retirement Age" [(2010) xingtazi No. 10]; "Reply on Whether to Recognize Work - related Injuries for Rural Migrant Workers Exceeding the Statutory Retirement Age Who Suffer Injuries or Deaths at Work" [(2012) xingtazi No. 13].

⁷ Ministry of Human Resources and Social Security, Work - related Injury Insurance Department: "Opinions on Several Issues concerning the Implementation of the Work - related Injury Insurance Regulations (II)", http://www.mohrss.gov.cn/SYrlzyhshbzb/shehuibaozhang/zcwj/gongshang/201603/20160331_236984.html.

To unify judicial practice, the Supreme Court's "Explanations (I) on Several Issues concerning the Application of Law in Adjudicating Labor Dispute Cases" Article 32 stipulates that where an employer has a labor dispute with a person who has already legally enjoyed pension benefits or receives a pension, the people's court shall handle it as a service relationship. This clarifies the nature of labor disputes between employers and those already legally entitled to pension benefits or receiving pensions but does not resolve the nature of employment relationships between employers and older workers not legally entitled to such benefits. This has caused significant practical disputes and led to varied judgments.

1. Service Relationship Theory

This view holds that individuals over the statutory retirement age are not considered workers under China's labor law and thus cannot establish a labor relationship with employers. "Labor age is legally defined, encompassing both lower and upper limits. Legally defining these limits means that exceeding them renders the individual legally incapable of labor and unable to enter a labor contract."⁸ Therefore, the labor contract should terminate for those who reach the statutory retirement age but cannot yet legally receive essential pension benefits. Similarly, the labor contract should also be terminated for the few who have not reached the statutory retirement age but are already receiving lawfully pension benefits.⁹

2. Labor Relationship Theory

This view argues that the retirement age does not limit the eligibility of labor relationship subjects. Reaching retirement age should not deprive workers of their eligibility in a labor relationship. Recognizing a labor relationship is objective, and retirement age does not signify its end or the termination of a labor contract.¹⁰ Article 21 of the "Implementing Regulations of the Labor Contract Law" only specifies scenarios for labor contract termination, meaning the employer can initiate termination, but this does not equate to depriving the worker of labor rights.¹¹ A Supreme Court judge has noted: "Although the Implementing Regulations of the Labor Contract Law grant employers the right to terminate labor relationships when a worker reaches the statutory retirement age, exercising this right does not automatically terminate the labor relationship. The view that the labor relationship automatically terminates when the worker reaches the statutory retirement age does not align with the legal spirit."¹²

V. The System Development Path for the Rights Protection of Older Workers

⁸ Li Jianfei: "The Legal and Systematic Evolution from Employment Contracts to Labor Contracts", "China Legal Science", Issue 3, 2012.

⁹ Standing Committee of the National People's Congress, Legal Affairs Committee, Administrative Law Office: "Interpretation and Cases of the Latest Labor Contract Law of the People's Republic of China", People's Publishing House, 2013, p. 180.

¹⁰ Xie Zengyi: "Retirement Age and the Application of Labor Law", "Comparative Law Research", Issue 3, 2013.

¹¹ Lin Jia: "Legal Analysis and Systematic Arrangement of Retirement Age", "China Legal Science", Issue 6, 2015.

¹² Du Wanhua, Wang Linqing: "Understanding and Application of the Judicial Interpretation (III) on Labor Dispute Cases", "People's Justice", Issue 19, 2010.

The "Decision of the Standing Committee of the National People's Congress on the Implementation of a Progressive Delay in the Statutory Retirement Age" clearly stipulates that employers recruiting workers over the statutory retirement age should ensure their fundamental rights, including remuneration, rest, and vacation, labor safety and health, and work injury protection.

The Ministry of Human Resources and Social Security has also pointed out in its policy publicity that this is the first time from the legal level to propose requirements for the protection of workers' fundamental rights and interests over the statutory retirement age. The measure stipulates that employers recruiting workers over the statutory retirement age should ensure their fundamental rights, including remuneration, rest and vacation, labor safety and health, and work injury protection. This fills the gap in the current labor laws and regulations.

In December 2023, the Supreme People's Court released a draft of the "Explanations (II) on Several Issues concerning the Application of Law in Adjudicating Labor Dispute Cases" for public comments. It proposes that workers who have reached the statutory retirement age but do not yet enjoy essential pension benefits and provide labor for employers may request the application of labor laws and regulations to disputes over remuneration, working hours, rest and vacation, labor protection, occupational hazard prevention, and work injury insurance benefits. The people's courts should support such requests.

Based on these policy developments, older workers will become a special group in labor law, enjoying a series of rights enumerated by labor law. First, the labor qualifications of older workers do not automatically cease upon retirement age; they still have the right to employment. If their employment relationship with employers is compulsorily subject to civil law rather than labor law, it would significantly reduce employers' labor costs and tempt employers to prioritize workers beyond retirement age. Second, with the significant increase in life expectancy, the current retirement age, especially for women, seems too low. With the advent of the Internet era, many jobs require less physical labor. Third, a considerable portion of older workers are migrant workers whose pension problems have not been properly resolved. Continuing to work is essential for them to maintain their personal and family lives. A blanket ban on their employment relationship with employers would greatly weaken their labor rights. Therefore, the employment relationship of this part of workers can be incorporated into a special labor relationship for protection.

Since the labor contracts signed by these workers with employers violate the mandatory provisions of Article 21 of the "Implementing Regulations of the Labor Contract Law," they are invalid. As a result, their rights cannot be fully protected by labor law. For example, they cannot request employers to enter open-ended contracts with them, and employers may also be unable to pay them for basic old-age and other social insurance. However, if employers exercise dominant labor management over them, older workers should enjoy basic labor rights and protections corresponding to such management, just like workers in full-fledged labor relationships. Therefore, older workers' reference to labor law in claiming basic labor rights such as minimum wage standards,

overtime pay, rest and vacation, occupational hazard prevention, and work injury insurance benefits should be supported.¹³

¹³ Beijing No. 1 Intermediate People's Court Research Group: "Basic Ideas for Improving the Dichotomy of Labor Relationship Recognition", "People's Courts Daily", April 25, 2024, p. 7.