

Research on the Protection of Labor Rights and Interests of Retirees' Re-employment

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Abstract

With the deepening of the development of China's aging society, the insufficient supply of the labor market has become increasingly apparent. The protection of the labor rights and interests of retirees in their re-employment can effectively respond to the strategic requirements of active aging, which is in line with the principle of respecting labor and opposing discrimination. Specific measures can be taken to clarify the labor subject status of the elderly retirees, improve the system of receiving and issuing pensions, clarify the composition of the labor remuneration of the retired re-employed personnel and protect it reasonably, establish a special labor safety system, and improve the protection of the labor rights and interests of the retired re-employed personnel with the collective protection of trade unions.

Keywords

Reemployment after Retirement; Labor Rights and Interests; Active Aging.

1. Introduction

The report of the 20th National Congress of the Communist Party of China in 2022 put forward the idea of "implementing the national strategy of actively responding to the aging of the population and developing the old-age undertakings and industries". China's aging population is a development trend that can not be ignored, which will not only bring huge financial burden to the country on the issue of pension, but also cause a huge impact on human resources due to the shortage of labor market. To this end, encouraging retirees with spare capacity to continue to shine in their posts can not only alleviate the current situation of labor market shortage, but also give full play to the social resource attributes of the group, explore new ways of social pension, and echo the theme of active aging in the country. In this context, efforts to tap the development potential and value potential of the elderly group, and further develop their knowledge, experience and skills have become a new social issue, and the re-employment of the elderly after retirement should be focused on.

Therefore, this paper starts with the current situation of the development of China's aging society, analyzes the shortcomings of the system when retirees are re-employed, and puts forward suggestions for improvement.

2. Legitimacy of the right to reemployment after retirement

2.1. To meet the needs of the development of an aging society

It is the core of active aging that the elderly can participate in the construction of social affairs based on basic human rights, relying on their own needs, skills and interests. In the early stage of aging in China, the focus is mostly on the protection of the health of the elderly and the development of the pension industry, so health care has become the focus of national support, coupled with the adequate supply of young labor force, the employment of the elderly is less concerned[1]. In 2011, the Outline of the Twelfth Five-Year Plan for National Economic and Social Development first put forward the idea of "developing and utilizing the human resources

of the elderly", and then in 2018, the Outline of the Thirteenth Five-Year Plan for National Economic and Social Development further incorporated the construction of the "employment system" into the construction elements of the "population aging response system". In the National Medium and Long-term Plan for Actively Responding to Population Aging in 2019, more specific plans have been made for the employment of the elderly to ensure the adequacy and safety of human resources for the elderly and to improve the quality and satisfaction of the employment of the elderly. In the Outline of the 14th Five-Year Plan for National Economic and Social Development and the Vision for 2035, issued in 2021, "actively responding to the aging of the population" has been included in the scope of the national strategy, and it is clear that "promoting the full use of human resources". The connotation of active aging is more abundant, and the re-employment of the elderly is the proper meaning and important embodiment of the elderly. In line with the background that active aging has been promoted to the national strategy, the legal protection of the re-employment rights and interests of the elderly is not only the need to promote the healthy development of the cause of aging, but also the need to implement the connotation of active aging[2].

2.2. Principle requirements of the Labor Law

2.2.1. Respect the principle of labor

Retirement is only a legal fact. As far as the social value and economic attributes of labor are concerned, there is no difference between the labor of the same natural person before and after retirement, and the labor and labor rights of retirees should be respected. On the basis of following the labor principles, retired and re-employed workers should have the ability needs to adapt to their jobs and be able to create the same value as workers of the right age. Therefore, we should abandon the age discrimination against the retired and re-employed workers, establish the concept that the retired and re-employed workers enjoy the right to work, and the government and society should fully consider the desire of enterprises to employ retirees and the re-employment of retirees[3].

2.2.2. Principle of equal protection

The core connotation of the principle of equal protection is to give equal respect to retirees and workers of the right age in attitudes and concepts, and to implement the same protection as workers of the right age in specific labor rights and interests such as labor standards[4]. Like other workers of the right age, we should also recognize and attach importance to the equal protection they enjoy, confirm their labor rights, become the main body of labor in accordance with the provisions of the Labor Law, and give the same protection to specific rights.

2.2.3. Principle of special treatment

Equal treatment in the same situation is the proper meaning of the principle of equal protection, but different treatment in different situations also needs to be followed, which is to adhere to the principle of special treatment. Influenced by age and other factors, the elderly workers should have some special needs in employment industry, employment posts, labor safety and other aspects, which need special policy protection from the state. The principle of special treatment for the establishment of the labor rights and interests protection system for retired and re-employed workers is determined by the subordination of workers and the fact that retired and re-employed workers also belong to special types of workers. The principle of special treatment is to provide special protection for the retired and re-employed personnel, establish a special system to protect the labor rights and interests of the retired and re-employed personnel, and reflect the differences in order to achieve substantive equality.

2.3. Coverage and support of the theory of labor right

Article 42 of the Constitution of the People's Republic of China stipulates that citizens enjoy the right to work. The meaning of the word "labor" includes not only the physical labor represented

by farmers and workers, but also the mental labor represented by intellectuals from all walks of life. Thus, from the perspective of the Constitution, workers are "all holders who contribute to the construction of the socialist cause", retirees even in some key areas, relying on their own experience and knowledge, belong to the status of "mentor" in their industry, of course, they can not obliterate their labor rights only by "retirement system". Retired old people's choice of re-employment is the natural embodiment of the constitutional protection of labor rights.

The Civil Code stipulates the capacity for civil rights and capacity for civil conduct of natural persons, and the Labor Law, which runs through the whole line of labor rights, also stipulates the capacity for labor rights and capacity for labor conduct. The lower age limit for a natural person to have the capacity for labor rights and labor conduct is 16 years old, and there is no restriction on the upper age limit in China's law. That is to say, in the design of labor law system in our country, when workers reach retirement age and enjoy retirement benefits, their labor rights are not necessarily lost. As a result, the ability of retirees to work does not necessarily disappear because they enjoy retirement benefits, and they still belong to the category of workers in the labor law. The author believes that the critical point of retirement age is an important consideration factor for continuing or terminating the labor contract, and the existence or abolition of labor capacity can not be determined only by Article 21 of the Regulations on the Implementation of the Labor Contract Law, which States that "when a worker reaches the legal retirement age, the labor contract shall be terminated". In other words, the growth of the age of workers may bring about the weakening of their ability to work, and we can not simply oppose the age of the elderly workers to their ability to work. The relationship between the right to retire and the right to work is not "cause and be caused", and the two can not be mutually exclusive, even if workers choose to retire, it only means that they give up the opportunity to work, the right to work comes from the Constitution and is authoritative, if the law does not expressly provide that it can not be arbitrarily deprived.

3. Legal Dilemma of Reemployment of Retirees

3.1. Legal status of protection of labor rights and interests in retirement and reemployment

In 2010, the Supreme People's Court formulated and implemented the Interpretation (III) on Several Issues Concerning the Application of Law in the Trial of Labor Dispute Cases (hereinafter referred to as the Judicial Interpretation III), which stipulates that the relationship between retirees who have enjoyed social insurance benefits and employers belongs to labor relations. The relevant provisions of the Labor Contract Law and the Implementation Regulations of the Labor Contract Law (hereinafter referred to as the Implementation Regulations) have led to legislative obstacles to the recognition of the employment relationship of the retired re-employed persons who have enjoyed social insurance benefits as labor relations.

Judicial Interpretation III only stipulates the employment relationship of retirees who have already enjoyed social insurance benefits, which leads to the unresolved employment relationship of retirees who have not enjoyed social insurance benefits. The Understanding and Application of the Judicial Interpretation of the Supreme People's Court on Labor Disputes (III) compiled by the First Court of Civil Trial of the Supreme People's Court answers this question: The employment relationship between a person who has reached the legal retirement age and has not begun to enjoy the basic old-age insurance benefits in accordance with the law and the employing unit is still a labor relationship. Judicial Interpretation III adopts a "one-size-fits-all" solution and takes social insurance benefits as the standard to solve the problem of re-employment after retirement, which seems to violate the principle of fairness and is still controversial in the theoretical circles. Retirees are employed by enterprises, engaged in

business activities by enterprises, and enjoy labor qualifications and labor rights and interests, which are not essentially different from ordinary workers and should be equally protected by law. It is necessary to deal with the conflict between the provisions related to social security benefits through subsequent legal means. The relevant provisions of the Third Judicial Interpretation do not conform to the legislative spirit of the Labor Law, but also violate the legal principles, and do not conform to the policy direction of protecting the social participation of the elderly under the background of active aging.

After entering the 21st century, the aging of the population has become a worldwide trend.

The United States does not carry out mandatory retirement by law, but decides whether to retire or not according to the subjective will of workers and workers after the age of workers has arrived, and with the development of social economy, the government must intervene in the employment of the elderly. The Age Discrimination in Employment Act does not allow companies to discriminate on the basis of age among workers 40 years of age or older, and it was amended in 1975 to require that employees 70 years of age should not be forced to leave early because of their age. Any individual who has been aggrieved by age discrimination can go to court. American law sets the flexible retirement age between 62 and 70 years old at 67 years old[5]. If you reach the retirement age and have reached a certain number of years of contribution, you can ask for a pension. However, because the pension rate is linked to the retirement age, if you retire early or postpone it, you can ask for a pension. Then the amount of the pension will be permanently reduced or increased[6].

In 1986, Japan promulgated the Law on the Stabilization of Employment for the Elderly, which aims to improve the working ability of the elderly by postponing the retirement age and introducing a continuous employment mechanism[7]. The Japanese government stipulates that the retirement age is 65 years old, but there is no need to terminate the labor relationship after retirement, and the pension can be received in advance or delayed.

Sweden implements a flexible retirement system. On the basis of the statutory retirement age of 65, the elderly can choose to receive a pension between the ages of 61 and 67, and the corresponding amount will change accordingly.

Compared with the laws of other countries, only the Law on the Protection of the Rights and Interests of the Elderly in China provides clear legal protection for them, and lacks clear legal protection for the implementation of some special rights in terms of wages, working environment and contract protection. The retirement system is rigid, the right attribute of retirement still needs to be further strengthened, and the relevant legislation on retirement lags behind.

3.2. Legal Dilemma in the Protection of Labor Rights and Interests in Retirement and Re-employment in China

3.2.1. The opposition between retirement system and labor relations

According to Article 44 of the Labor Contract Law of China, if a worker begins to enjoy the basic old-age insurance benefits according to law, the labor contract shall be terminated. Combining the current legislative system, judicial practice and legislative background to understand the provisions of Article 44 of the Labor Contract Law, we can know that its legislative intent is that the labor contract between the employer and the worker will automatically terminate if the legal retirement conditions are met. The Interim Measures of the State Council on the Retirement and Resignation of Workers promulgated in 1978 has been used up to now after 30 years of historical changes. Article 1 of the Interim Measures adopts the term "should", that is, workers who have reached retirement age must retire, which is legally mandatory. It can be seen that our country implements a rigid retirement system.

In recent years, whether "retirement" is a right or an obligation of employees has aroused heated debate in the legal circles. In a specific period, pension insurance can become a means for the government to regulate the labor market and promote the full employment of the labor force in line with the age. In the 1970s, China was in the period of planned economy. Under the control of the government, in order to make the surplus labor force fully employed and ensure the quality of human resources in the whole society, the government adopted a compulsory retirement policy. However, with the continuous changes in the market and employment conditions of China's market economy, as well as the aggravation of the aging trend of the population, the issue of providing for the aged has become the focus of global attention, and the nature of the right to provide for the aged has attracted more and more attention from the academic and practical circles, and the academic circles have made more discussions on the nature of the right to retirement, a constitutional right.

Correspondingly, whether the pension rights can be implemented has become the core issue of pension insurance. It is not credible to deny the working ability of workers simply by age. In the setting of labor rights, we can not think that age is a reasonable condition to restrict labor rights. Therefore, "retirement" is not the end of "labor rights", there is no "absolute" opposition between "retirement" and "labor rights", "retirement" is more a "right" to "receive pensions" than to withdraw from the labor market.

3.2.2. Social insurance system and the right to work and employment are mutually exclusive

The relevant legislation of China's social insurance law links the retirement age with the receipt of pension insurance, and one of the conditions for retirement is to receive pension insurance. This provision shows that the termination of labor remuneration and employment rights of workers is at the same node, and there is a choice relationship between them. At the same time, China's "Social Insurance Law" Article 16 provides the basic conditions for individuals to receive basic old-age insurance: first, to participate in basic old-age insurance; second, to reach the legal retirement age; and third, to accumulate 15 years of payment. From the analysis of system explanation and purpose explanation, the employer can no longer pay social insurance for the retired and re-employed workers. On the issue of whether employees can receive wages while receiving pensions after retirement, according to Article 13 of the Notice on Several Issues Concerning the Implementation of the Labor Contract System, employers are allowed to sign contracts with employees after retirement on their own agreement on labor remuneration, but at the same time, this type of contract is included in the adjustment of civil law.

It denies the nature of the labor contract. Therefore, through the analysis of the current legislation, we can find that the legislation of our country puts the social insurance treatment and the protection of the labor rights of the retired people in an antagonistic position, the relevant legal provisions exclude the re-employed people after retirement, and the people over the retirement age can no longer pay the social insurance premium and enjoy the social insurance treatment. The labor rights and interests of those who have enjoyed social insurance benefits after retirement can not be guaranteed, so they need to enter the field of civil law and use the relevant provisions of contract law to adjust.

4. Improving the Path of Reemployment of Retirees

4.1. To clarify the status of retirees as the main body of labor

To protect the labor rights and interests of retirees, the most important issue is the legal nature of workers[8]. At present, the disputes about the subject identity of the retired re-employment personnel mainly come from the differences between the age, the social insurance system and the workers of the right age. First of all, about the retirement age: the retirement system does play an important role in the realization of labor replacement and the regulation of the human

resources market, but in the context of the current aging of China and the structural change of the labor force, it should highlight its "right attribute"[9].

Retirement system is the protection of workers' right to rest, but whether to rest or not should be decided by the workers themselves. They have the right to choose whether to enjoy retirement benefits or continue to work after reaching the legal retirement age, and continue to establish labor relations with employers. From this point of view, reaching retirement age is the right to obtain retirement benefits, not the inevitable loss of labor capacity. Next, about social insurance system: The social insurance system that is a delegate with annuities system, its purpose is the basic life that ensures retiree[10]. However, the current "pension pool" situation does not guarantee that every retiree will take care of himself, so the choice of re-employment is still the way for most elderly people to live a self-sufficient life. Therefore, the labor subject status of retirees should be affirmed. With the further development of China's market economy and the increasingly diversified forms of labor employment, China's labor law should expand the extension of the concept of workers according to the characteristics of workers themselves, including retired re-employment personnel and non-standard labor employers.

After the labor subject status of retirees is recognized, the labor relationship established between retirees and employers can be defined as "special labor relationship". With regard to the relationship between retirees and employers, the academic circles mostly focus on general labor relations and labor relations, and the author believes that this either-or approach does not conform to the essence of labor law. Firstly, based on the principle of labor subordination, the working time, place, content and mode of retired re-employment personnel are arranged by the employer, and they are subject to the rules and regulations of the employer. The control of the employing unit, that is, the employer, is highlighted, and the labor is subordinate to the employer. Secondly, workers rely on their own labor in exchange for remuneration, and the tools of production and means of production needed for labor are owned by employers, which is an economic subordination[11].

Finally, the behavior of labor payment makes labor a constituent element of the employer's business, which is organizational subordination. The above behaviors are the same as the characteristics of labor relations under the standard model, so it is theoretically legitimate to define the relationship between retirees and employers as "special labor relations". However, if it is included in the scope of labor relations, it will aggravate the inequality between employers and employees, which is not conducive to the protection of their labor rights and interests. For example, employers delay the payment of remuneration, terminate the employment relationship at will, and refuse to pay social insurance, which makes a large number of employers employ a large number of experienced and skilled retirees in reverse, resulting in negative social effects.

4.2. Improve the pension system.

In China, there are two major problems in the reform of the pension system: one is the payment of insurance premiums; The second aspect is the payment of pensions. With regard to the payment of insurance premiums, it was suggested that employers should not continue to be responsible for the contributions of retired workers who had already received social security. On this issue, the author holds objections. On the one hand, the payment of pension insurance premiums to employees is an unavoidable responsibility that employers must fulfill. If this part is cancelled, the employer's obligations will be reduced and the cost of employment will be reduced, which will lead to deviations in the employer's employment behavior, thus impairing the equal employment of other workers of the right age[12]. In addition, with the continuous growth of the population, the problem of insufficient pension funds will become more and more serious. If the retired re-employment group occupies jobs and can not provide enough pension

insurance for them, it will make the imbalance of income and expenditure of social pension insurance more serious, and in the long run, it will inevitably have a negative impact on the sustainable development of the social pension insurance system.

Although pension and re-employment are not mutually contradictory, it is a question worth pondering to solve the income difference caused by it and to ensure the legitimate rights and interests of re-employment groups so as to make them play a better role. To this end, we can refer to the relevant experience of foreign countries, combine it with the existing system of postponing retirement, and build a flexible pension system, so that re-employed persons who meet the conditions can freely decide whether to continue to enjoy or postpone the enjoyment, if it is postponed, they can correspondingly increase the allowance they can enjoy in the future. If it is a normal pensioner, there will be "double income", which has caused a lot of controversy. At present, there are two ways to solve this problem: one is the United States' practice of reducing the pension payment by age and income; the other is the practice of allowing double income in the normal pension payment in Britain. Some people say that allowing one person to earn two shares of money leads to economic injustice and social injustice for workers of the same age. However, we can not ignore that in reality, there are many retirees who are re-employed because of the low level of pension benefits and the difficulty of maintaining their living needs. If only to balance the income of workers of the right age, the reduction of the pension of all re-employed persons will undoubtedly increase the burden of life of such economically vulnerable groups[13].

For this reason, we can refer to the experience of the United States and adopt a compromise method to reconcile the income of re-employment and pension income reasonably, that is, to determine the standard of income according to the level of economic development and the cost of family life in each region, and to set different pensions according to different age groups and different income levels. Thus, in the case of balanced income differences, it takes into account the preferential care of the economically disadvantaged groups, and to some extent reduces the operational pressure of the old-age insurance.

4.3. To clarify the remuneration composition of retired and re-employed persons.

In order to protect the rights and interests of workers who sell their own labor force, the Labor Law stipulates the minimum wage system for workers, so it is also necessary to clarify the remuneration for retired and re-employed workers. Unlike standard labor relations, some people who have reached retirement age have enjoyed pension benefits. Therefore, in this case, "reasonable differences in remuneration" should be allowed. To this end, first of all, we should implement the principle of labor equality and avoid age discrimination. The employing unit shall not pay the remuneration of the persons who have enjoyed retirement benefits differently on the grounds of age, so as to distinguish the standard workers. Secondly, reasonable differences are allowed, and the re-employment groups can be reasonably divided according to their work efficiency, skill mastery and occupational groups. Finally, the minimum wage guarantee system should also be applied to re-employment activities, and the retired re-employed workers should be given the same protection as standard workers. Without the system, employers may squeeze the re-employed, making the retirees who lack physical fitness in a more passive position. In order to obtain job opportunities, re-employment personnel may choose to compromise on this. In this way, employers will be inclined to employ retirees, resulting in the exclusion of workers of the right age, which will lead to unhealthy competition in the labor market.

4.4. Differential protection for the reemployment of retirees

For those who have retired but have not participated in social endowment insurance, corresponding protection should be given according to labor relations, but there should be different ways to deal with some problems, rather than "one size fits all". Basically be divided for two kinds of circumstances: One kind is because be insured, fixed number of year is insufficient and cannot enjoy annuities. According to Article 16 of the Social Insurance Law, it can be solved through legal means, flexible working methods can be implemented, and retirement formalities can be handled after 15 years or 15 years. The second is that the employer and the employee negotiate whether the normal labor relationship of the employee who delays retirement is maintained or not, which is made by consensus between the employer and the employee. The remaining retirees who do not receive the basic pension can be included in the special labor relations if they are re-employed in the new jobs of the unit, and special provisions are given so as not to increase the burden of the new employers and make them encounter obstacles in their work after retirement. In view of the characteristics of retired and re-employed persons, special legislation should be made on their social insurance and labor contracts[14].

Labor contract legislation needs to deal with the relationship between stability and flexibility. The purpose of non-fixed-term labor contract, economic compensation system and written labor contract system is to pursue the stability of labor relations on the basis of ensuring flexible forms of employment. However, one of the inherent meanings of the retirement system is to give both employers and employees the right to terminate the labor contract, and the employer has the right to unilaterally terminate the labor contract at any time. The elderly group presents the characteristics of physical function degradation, and their employment relationship is more changeable than that of ordinary workers, so it is too rigid to restrict both sides compulsorily by the relevant provisions of the Labor Contract Law. Therefore, in terms of the interests of both employers and employees, we can refer to the relevant provisions of the part-time labor contract, and both employers and employees do not have to abide by the relevant provisions of the Labor Contract Law concerning the written form of the labor contract, the non-fixed-term labor contract and the economic compensation for the termination of the contract.

4.5. Establishing a labor safety system for retired and re-employed persons

We must strengthen the labor security for retired and unemployed workers. First of all, to define the work involved, the key point is: not to engage in high-risk work that is not in line with their physical condition. For example, Shanghai requires that women over 50 years of age and men over 60 years of age are not allowed to engage in construction projects on construction sites, and that women over 45 years of age and men over 55 years of age are not allowed to engage in high temperature, high altitude, underground, affecting health or particularly heavy physical labor, as well as high-risk and high-risk special work on construction sites. Secondly, stricter national occupational safety and health standards have been formulated for re-employed persons, their working hours and working environment have been regulated, and they have been regularly examined in order to limit the hazards and hazards existing in production and work, and to prevent and detect the hazards to their health in time. Finally, enterprises need to establish and improve the corresponding labor safety and health system, carry out labor safety and health education and training for retired re-employed employees, improve their safety functions, prevent their illegal operations, so that they can detect and eliminate accidents. Only in this way can we prevent accidents from the root and realize the protection of the life and health of retired and re-employed workers.

4.6. Establish a special trade union for retired and re-employed persons.

Workers have the right to join and organize trade unions, and after the status of retirees as the main body of labor has been recognized, of course, there is reason to form their specialized trade unions. The trade union can improve the weak position of the retired reemployment personnel in the employing unit through the exertion of the collective strength. Therefore, the emergence of the trade union organization is conducive to the fair dialogue and negotiation between the workers and the employers, to the protection of the legitimate rights and interests of the workers, and to the establishment of harmonious and healthy labor relations. Trade unions can play an active role in safeguarding the legitimate rights of laid-off and unemployed workers. Because in the labor market, retired workers are a special occupational group, they have different special interests and needs from workers of the right age, and there are some commonalities in their labor disputes with employers and the rights and interests they face, so it is very important to establish a special trade union for them.

5. Conclusion

At present, the change of population structure in China has brought challenges to industrial upgrading and economic development, and the re-employment of elderly retirees can alleviate many problems faced by the "14th Five-Year Plan". This is an opportunity for retirees and a challenge for politicians. "Active aging" is becoming a new theory and strategy for the international community to deal with the aging problem in the 21st century. To improve the protection of the labor rights and interests of the reemployment of retirees, we need to clarify the status of the elderly retirees as the main body of labor, improve the system of receiving and issuing pensions, clarify the composition of the labor remuneration of the reemployment of retirees and protect it with reasonable differences, and establish a special labor safety system, together with the protection of the collective strength of trade unions. Employment is the foundation of people's livelihood, and a sense of security and learning for the elderly is not an empty talk. It is an important measure for the elderly to realize their personal values and protect their human rights to survive to let the elderly who have the desire to work give full play to their surplus heat, which makes the "Chinese characteristics" in the human resources structure of the labor market more obvious and escorts the construction of a strong socialist modernization country.

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