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# *Determination of Relationships and Allocation of Responsibilities—Taking the Adjudication of Household Service Contract Disputes as an Example*

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**Abstract:** The combination of the realistic demand of urban families to raise children and provide for the aged and the employment demand of rural migrant workers will inevitably lead to the continuous growth of the market demand for household care services. The determination of the tripartite legal relationship between household workers, household service agencies, and families (individuals) is an important issue for the normative development of the household service industry. In specific judicial practice, local courts perform differently in the determination of the relationship between “household workers and household service agencies.” The application of law in relevant cases also often swings between the civil law and the labor law. *The Civil Code of the People’s Republic of China* (hereinafter “the *Civil Code*”) does not retain the concept of “employment relationship” used in the original *Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Personal Injury Compensation Cases*. Then, what is the relationship between household workers, household service agencies, and families (individuals) after the *Civil Code* came into force? This article shows the judicial dilemma currently faced by the household workers in the protection of labor rights and interests through an empirical analysis of the victim liability disputes of household workers and puts forward countermeasures and suggestions for improving the occupational injury protection mechanism of household workers in China through a comparative study of the occupational injury risk sharing mechanism of household workers and an analysis of the local exploration of the occupational injury protection system of flexible employees in China.

**Keywords:** employee-based household service, intermediary contract relationship, labor relations, employment relationship

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According to the definition of the United Nations, when the 60-year-old population approaches 10 percent and the 65-year-old population approaches 7 percent, society has entered the aging society phase. The Seventh National Population Census released by the National Bureau of Statistics shows that the aging of China's population has further deepened. The population of the elderly aged 60 and above is 264.02 million, accounting for 18.70 percent, of which the population aged 65 and above is 190.64 million, accounting for 13.50 percent (Office of the Leading Group of the State Council for the Seventh National Population Census, 2021). Aging has become the basic national condition of China. With the adjustment of the birth policy and the successive introduction of supporting measures, the phenomenon of the present low birth rate may be changed. The combination of population aging and long-term care demand, family childcare needs, and the employment demand of rural migrant workers will inevitably lead to the continuous growth of market demand for household care services. It is also based on this background that China's policy on promoting the quality and expansion of the household service industry came into being. Subsequently, the Ministry of Commerce and the National Development and Reform Commission jointly issued the *Guiding Opinions on Establishing a Credit System for the household Service Industry* to promote the normative development of the household service industry from the perspective of the guarantee of the credit working mechanism for the household service industry.

## Problem Formulation and Literature Review

### Problem Formulation

In China's normative documents on promoting the quality and expansion of the household service industry, the household service industry is defined as a service industry meeting the needs of living care for families, which takes the family as the service object, and the professionals provide paid services such as care for pregnant women, infants, the elderly, the patients and the disabled, as well as cleaning and cooking by entering the residence of family members or in fixed places. A service industry that meets the needs of family life and care, as well as care for the disabled, as well as paid services such as cleaning and cooking. Paragraph 2, Article 2 of the *Interim Measures for the Administration of the household Service Industry* stipulates: "The term household service industry mentioned in these Measures refers to the service industry meeting the needs of living care of families, which takes the family as the service object, and the household service agency assigns or introduces household workers to enter the residence of family members to provide paid services such as cooking, cleaning, home moving, family education, child care and cares for pregnant and lying-in women, infants, the elderly and the patients."<sup>①</sup> In fact, household service itself is diverse, and it is for this reason

<sup>①</sup> Notably, the "Interim Measures for the Administration of the household Service Industry" defines the employers of household workers as "consumers of household services".

that what is household service can only be defined by the workplace and not by the content of the service itself. The “Decent Work for Household Workers” (C189) of the International Labor Organization also makes an inclusive definition of “household work,” defining it as “work in or for one or more households based on an employment relationship or occupation.” A person who does household work only occasionally or provisionally but not as an occupation is not a household worker. The determination of the legal relationship among household workers, household service agencies, and families (individuals) is an important issue for the normative development of the household service industry.<sup>①</sup> The core of the determination of a tripartite legal relationship is the determination of the relationship between “household workers and household service agencies.” In specific judicial practice, local courts perform differently in the determination of the relationship between “household workers and household service agencies.” The application of law in relevant cases also often swings between the civil law and the labor law. Employers in the sense of labor law refer to organizations<sup>②</sup> such as enterprises, individual economic organizations, and private non-enterprise organizations. Families or individuals who are the subject of “private employment” cannot obtain employer personalities under the current institutional framework. Therefore, the family (individual) does not have the personality of the employer under the labor law, and the household worker and the family (individual) cannot establish a labor relationship. Thus the disputes between the two are not labor disputes.<sup>③</sup> Then, what is the nature of the legal relationship between household workers and families (individuals)? Besides, what is the nature of the legal relationship between household workers and household service agencies? The answers to the above two questions are directly related to the allocation of responsibility in “disputes over the liability for damage to labor service providers” or “disputes over the liability for damage caused by labor service providers” when household workers engage in household service work.

### Literature review

The research on the protection of labor rights and the interests of household workers is related to the macro-level research such as the legislative model (Wei, 2011). From the perspective of

① In the treatises analyzing the legal relationships among household workers, household service agencies, and families (individuals), the names of the recipients of household services are not uniform. One study called it “service-dependent families,” see Zheng, S. Y. (2021). The professionalization of household workers and the socialization of urban home-based care for the aged—Also On the shaping of laborer’s personality and social insurance coverage. *Law and Economy*, (1); One study called it “household employers,” see Hu, D. W. (2011). The “vulnerability” of informal workers and its legal regulation: Taking household workers as the object of investigation. *Social Science Front*, (8).

② Paragraph 1, Article 2 of the Labor Law of the People’s Republic of China stipulates that this Law shall apply to enterprises and individual economic organizations, hereinafter collectively referred to as employers, and laborers who have formed labor relations with them within the territory of the People’s Republic of China. Paragraph 1, Article 2 of the Labor Contract Law of the People’s Republic of China stipulates that this Law shall apply to enterprises, individual economic organizations, private non-enterprise organizations and other organizations within the territory of the People’s Republic of China, hereinafter referred to as employers, which establish labor relations with laborers, and enter into, perform, modify, rescind or terminate labor contracts.

③ Paragraph 4, Article 2 of the “Interpretation of The Supreme People’s Court on the Application of Law in the Trial of Labor Dispute Cases (I)” stipulates that “disputes between families or individuals and household workers” are not labor disputes. This provision is a continuation of Paragraph 4, Article 7 of the “Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Labor Dispute Cases (II)” promulgated on August 14, 2006.

legislative technology, a study believes that legislation or corresponding public policies should be introduced to establish the unique status of household service. Meanwhile, making the unique status of household workers consistent with the existing traditional labor legal relations (Tu, 2013). Another study has reported that the promulgation of the “Labor Contract Law” is a major revision of the “Labor Law” referring to the subject qualification of employers, granting the qualification of a natural person as an employer with no legal obstacles. Therefore, family and natural person employers should assume the responsibility of employers for the household workers they employ (Hu, 2014). Still another study has studied the legal relationship between family (individual) and household workers who are directly employed by the family (individual), believing that the relationship between the two belongs to a special employment relationship between the traditional employment relationship and labor relationship, and has proposed that the legislative protection rules for household workers should go beyond the general employment contract rules and labor contract rules (Xie, 2012).

In recent years, research on the protection of labor rights and interests of household workers has shown a more diversified trend, ranging from the right to rest (Hu, 2012) and the privacy rights of live-in household workers (Hu, 2013) to the rights and interests of household workers’ pension insurance (Zheng, 2020) and the work-related injury insurance rights of household workers employed by families (Hu, 2012). In terms of research methods, there are many research results from comparative studies. There are studies on the work-related injury insurance system for household workers in various states in the United States (Hu, 2010) and the protection mechanism of labor rights and interests of household workers in New Zealand (Li, 2014). The rich comparative research results provide useful experience for the construction of the labor rights protection system for household workers in China.

Compared with an endless stream of research in various disciplines on the new occupational groups such as car-hailing drivers and takeaway riders in the new employment forms brought about by the digital economy, the occupational group of household workers seems to lack enough theoretical research. On September 26, 2010, the *Guiding Opinions of the General Office of the State Council on the Development of the Household Service Industry* proposed that “it is necessary to study and formulate labor employment policies and labor standards that adapt to the characteristics of household service, and promote decent work for household workers,” and to protect the legitimate rights and interests of employees in the household service industry from the four aspects of “regulating the relationship between household service agencies and families and employees,” “protecting the rights and interests of household workers in terms of labor remuneration,” “encouraging employees to participate in social insurance in a flexible way,” and “establishing a multi-channel mechanism to protect the rights and interests of employees.” Therefore, the research on the protection of labor rights and the interests of household workers is of great practical significance.

## **Normative Analysis of the Tripartite Legal Relationship in Household Service: Determination of Relationship and Allocation of Responsibilities**

*The Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Personal Injury Compensation Cases*, which came into effect on May 1, 2004, was revised by the *Decision of the Supreme People's Court on Amending 27 Civil Judicial Interpretations Including the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Trade Union Law of the People's Republic of China in Civil Trial Work."* The provisions of Articles 9 and 11 concerning "Employers shall be liable for compensation if employees cause harm to others in the course of employment activities" and "Employers shall be liable for compensation if employees suffer personal injury in the course of employment activities" are deleted.<sup>①</sup> Before the *Civil Code* came into effect, in the judicial practice of disputes over the liability for damage caused by household workers and disputes over the liability for damage to household workers, the courts would basically refer to the relevant provisions of Paragraph 1 of Article 9, or Paragraph 1 of Article 11 to determine the responsibility and adjudicate the disputes over the liability for damage caused by or to the household workers during household service. However, the original provisions of Articles 9, 10, and 11 have been deleted from the *Decision of the Supreme People's Court on Amending 27 Civil Judicial Interpretations Including the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of the Trade Union Law of the People's Republic of China in Civil Trial Work,"* which came into effect on January 1, 2021. They have been replaced by the provisions of Article 1191 (employment responsibility of organizations), Article 1192 (employment responsibility of individuals), and Article 1193 (employment responsibility for contracting employment responsibility) in the *Civil Code*. However, in the provisions of Articles 1191, 1192 and 1193 of the *Civil Code*, the concept of "employment relationship" used in the original *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Personal Injury Compensation Cases* is not retained. Then, what is the relationship between household workers and families (individuals) after the *Civil Code* comes into effect?

### **Legal Relationship Between Household Workers and Families (Individuals)**

According to Articles 9 and 11 of the original *Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Personal Injury Compensation Cases*, "employers shall be liable for compensation if employees suffer personal injury in the

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<sup>①</sup> Paragraph 1, Article 9 of the original "Interpretation of The Supreme People's Court on Several Issues , concerning the Application of Law in the Trial of Personal Injury Compensation Cases" stipulates that employers shall be liable for compensation if employees cause harm to others in the course of employment activities; if an employee causes damage intentionally or through gross negligence, he/she shall be jointly and severally liable with the employer for compensation. If the employer bears joint and several liability for compensation, it may claim compensation from the employee; Paragraph 1, Article 11, stipulates that employers shall be liable for compensation if employees suffer personal injury in the course of employment activities. If a third party outside of the employment relationship causes personal injury to the employee, the holder of the compensation right may request the third party to assume the responsibility for compensation, or request the employer to assume the responsibility for compensation. After the employer assumes the liability for compensation, it can claim compensation from the third party.

course of employment activities.” Therefore, if an employment relationship is established between the household worker and the family (individual), the family or individual should bear the employer’s responsibility for the personal injury of the household worker engaged in household services. However, Chapter 3 “Special Provisions on Subjects of Liability” in Part 7, Tort Liability of the *Civil Code* basically inherits Chapter 4 “Special Provisions on Subjects of Liability” of the “Tort Law of the People’s Republic of China” (Zhang, 2020), and “abandons” the concept of employment relationship. Then, whether a labor relationship is established between household workers and families (individuals), and when household workers are injured in household services, is the allocation of responsibility in accordance with Article 1192 of the *Civil Code*?

The labor relationship is a civil legal relationship based on the full willingness and equality of both parties. In a labor relationship, both parties are equal civil subjects, with no personal control or affiliation. According to the provisions of Article 1192 of the *Civil Code* on tort liability in individual labor relations, when a labor relationship is established between individuals, if the party providing labor service suffers damage due to the labor service, both parties shall bear corresponding liabilities according to their respective faults. This article is the successor to the Article 35 of the original “Tort Liability Law.”<sup>①</sup> If a labor relationship is established between the household worker and the family (individual) receiving the household service, the household worker should bear the corresponding responsibility based on the respective faults of the household worker and the family (individual) for damage to the household worker. In the labor service, if the family (individual) as the recipient of the labor service is not at fault for the damage to the household worker, it does not need to assume the responsibility. In other words, the liability of families (individuals) for internal protection of the service provider is based on the premise that the service recipient is at fault. This is completely different from the consequence of applying the Paragraph 1, Article 11 of the original “Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Personal Injury Compensation Cases” for determination of employment relationship. According to the provisions of the Paragraph 1, Article 11, “employers shall be liable for compensation if employees suffer personal injury in the course of employment activities.”

In the case of Xu suing Deng and a household service center in Hengyang High-tech Industrial Development Zone (hereinafter referred to as the household service center)<sup>②</sup> (*Xu v. Deng*, 2020), the court determined that the household worker Xu had established an intermediary contract relationship with the household service center and a labor relationship with Deng, the recipient of household services, and the provisions of Article 35 of the original “Tort Liability Law” were applicable. According to the respective faults of both parties, the corresponding responsibilities

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① Article 35 of the original “Tort Liability Law”: if a labor relationship is established between individuals and the party providing labor service causes damage to others due to the labor service, the party receiving labor service shall bear the tort liability. If the party providing labor service suffers damage due to the labor service, both parties shall bear corresponding liabilities according to their respective faults.

② Please refer to the Civil Judgment of People’s Court of Zhengxiang District, Hengyang, Hunan Province. No. 17 [2020] First Instance of Civil Procedure.

were allocated: it was believed that in this case, the household worker Xu himself had major fault for the damage and should bear the main responsibility; Deng, as an employer, could not be exempted from responsibility for Xu's personal injury due to inability to prove that he had fulfilled the reasonable and necessary obligations for the security of Xu. Based on the above reasons, it was determined that Xu would bear 70 percent of the civil liability and Deng would bear 30 percent as appropriate.

### **Legal Relationship Between Household Workers and Household Service Agencies**

According to Article 1191 of the *Civil Code*, if a labor relationship is established between a household worker and a household service agency, then when the household worker causes damage to the family (individual), the household service agency, as an employer, shall assume vicarious responsibility. If the household worker has intentional or gross negligence, the household service agency may seek compensation from the household worker. For household workers and household service agencies with labor relations, if the household worker is injured due to work, it should undoubtedly fall into the scope of legal relationship adjustment of work-related injury insurance. According to Paragraph 1, Article 2 of the "Regulations on Work-Related Injury Insurance," enterprises, institutions, social groups, private non-enterprise organizations, foundations, law firms, accounting firms and other organizations and individual businesses with employees within the territory of the People's Republic of China shall participate in work-related injury insurance in accordance with the provisions of this Article, and pay work-related injury insurance premiums for all employees of the unit. Under the above circumstances, the damages caused by household workers to themselves and the families (individuals) due to household services can all be remedied under the existing legal framework. This is also the essence of the national advocacy for the development of employee-based household enterprises.

At present, intermediary household service agencies still occupy the vast majority in China's household service market (Mo, 2018). household workers enter households to provide services through intermediary agencies or informal social networks, and most of them do not sign labor contracts (Sa, 2020). If a household worker who enters the household through an informal social network to engage in household service suffers personal injury, it will be difficult to obtain legal support if he appeals to the court to establish a labor relationship with the household service agency.

### **Judicial Judgment Analysis of Household Service Contract Disputes Involving Damage to the Rights and Interests of Household Workers**

After the promulgation of the *Civil Code*, there is still a lack of clear rules and regulations for the employment relationship. According to the current laws and regulations, the possible relief paths for household workers victimized in household services are as follows.



Path 1: The household worker establishes a labor relationship with the household service agency. In this case, the household worker is an employee-based household worker, who can obtain corresponding relief through the work-related injury insurance system;

Path 2: If the household worker does not establish a labor relationship with the household service agency, the household worker in this case is a non-employee household worker, and the relief cannot be covered by the work-related injury insurance system. The party's relief will turn to seeking a court order for the family (individual) receiving household services to assume responsibility for the damage. If a labor relationship is established between the household worker and the family (individual) receiving the household service, the responsibility will be allocated through the civil tort system.

The following is a further analysis of the dilemma of the protection of household workers' labor rights and interests through the specific judicial practice of household service contract disputes involving household workers' own responsibility for injuries. The case samples in this part come from the China Judgment Online. Taking "household service contract disputes" as the dimension, the following 9 cases involving household workers' injuries were obtained as analysis samples

Table 1. *List of Household Worker Injury Cases*

Number	Case number	Service type	Relationship between household workers and household service agencies	Relationship between household workers and families (individuals)	Allocation of responsibility
1	No. 17 [2020] First Instance, the Primary People's Court of Zhengxiang District of Hengyang City, Hunan Province	housekeeping	intermediary contract relationship <sup>①</sup>	labor contractual relationship	Family: 30 percent; household worker: 70 percent
2	No. 3884 [2020] First Instance, the Primary People's Court of Yushui District of Xinyu City, Jiangxi Province	maternal and childcare	labor contractual relationship	/	household service agency: 80 percent; household worker: 20 percent
3	No. 4715 [2020] First Instance, the Primary People's Court of Louxing District of Loudi City, Hunan Province	live-in baby-sitter	intermediary contract relationship	factual labor relation	Family: 60 percent; household worker: 40 percent
4	No. 1229 [2019] Final Judgment, the Intermediate People's Court of Suihua City of Heilongjiang Province	cleaning	intermediary contract relationship	/	household service department: 40 percent; household worker: 60 percent

<sup>①</sup> In the *Civil Code*, "intermediary contract" is adopted to replace "mediate contract." For the convenience of argumentation, this article also adopts the "intermediary contract" to replace the "mediate contract" in the original judgment.

Number	Case number	Service type	Relationship between household workers and household service agencies	Relationship between household workers and families (individuals)	Allocation of responsibility
5	No. 12014 [2019] Final Judgment, the Third Intermediate People's Court of Beijing Municipality	live-in housekeeping	First instance: labor relation Second instance: employment relationship	/	household service agency: main responsibility; household worker: Secondary responsibility
6	No. 1855 [2018] Final Judgment, the Intermediate People's Court of Yibin City of Sichuan Province	part-time worker	First instance: intermediary contract relationship Second instance: employment relationship	labor contractual relationship	Family: 60 percent; household worker: 40 percent
7	No. 18737 [2018] First Instance, the First Primary People's Court of Zhongshan City of Guangdong Province	general household services	intermediary contract relationship	labor contractual relationship	Family: 100 percent
8	No. 12200 [2018] First Instance, the Primary People's Court of Yuecheng District of Shaoxing City, Zhejiang Province	cleaning	labor relation	/	Family: 40 percent; household service agency: 40 percent; household worker: 20 percent
9	No. 846 [2017] First Instance, the Primary People's Court of Xinghualing District of Taiyuan City, Shanxi Province	cleaning	labor relation	/	household worker: 20 percent; household service agency: 70 percent; Family: 10 percent

### Determination of Relationship

In the sample cases, 50 percent determined that household workers and household service agencies had established an intermediary contract relationship, 30 percent determined that they had established a labor relationship, and the other 20 percent determined that the two had established an employment relationship (both were changed to employment relationship in the second instance, and they were determined as a labor relationship and an intermediary contract relationship in the first instance, respectively). What remains in doubt here is that 30 percent of the cases in the above sample determined that the two had established a labor relationship. However, Article 1192 of the *Civil Code* only regulates the employment responsibility in the formation of labor relations between individuals, and does not regulate the employment responsibility in the formation of labor relation between units and individuals. If a labor relation is established between a household worker and a household service agency, how to apply the law to the damage caused by provision of labor services? Although some studies have pointed out that this deficiency can be filled by legal

interpretation, that is, “labor relation between individuals” and “labor relation between units and individuals” are both “labor relation” for provision of labor services. Except for the difference in the party receiving the service, there is no essential difference. The legal principle that individuals should bear vicarious liability when receiving labor services is also fully applicable to the situation where units receive labor services.

### Allocation of Responsibility

When the judiciary determined that the household worker and the household service agency had established an intermediary contract relationship, the court also determined that the household worker and the family (individual) had formed a labor relation (see Table 2 for details).

Table 2. *Formation of Intermediary Contract Relationship Between household Workers and household Service Agencies and Allocation of Responsibility*

Determination of relationship	Case number	Allocation of responsibility		
		Family (individual)	household worker	household service agency
Intermediary contract relationship	#1	30 percent	70 percent	/
	#3	60 percent	40 percent	/
	#4		60 percent	40 percent
	#7	100 percent	/	/

Cases #1 and # 3 allocated responsibilities according to the degree of fault of the family (individual) and household worker, respectively. In case #7 , the court determined that the recipient of the household service bore full responsibility, which was based on the belief that the household worker did not have intentional or gross negligence as the reason for his own injury, and the court ordered the recipient of the household service to bear full responsibility for the household worker’s injury. Notably, the responsibilities in case 4 was not allocated between the family (individual) and the household worker, but made the household service agency bear 40 percent of the responsibility according to the principles of fairness and fault. However, if the household service agency is only an intermediary agency, there is no legal basis for the intermediary agency to bear the liability for injury in the labor relations.

The judiciary determined that household workers and household service agencies had formed a *labor contractual relationship* (see Table 3 for details).

Table 3: *Formation of a Labor Contractual Relationship Between Household Workers and Household Service Agencies and the Allocation of Responsibilities*

Determination of relationship	Case number	Allocation of responsibility		
		Family (individual)	household worker	household service agency
Labor relation	#2		20 percent	80 percent
	#8	40 percent	20 percent	40 percent
	#9	10 percent	20 percent	70 percent

In case #2, the court determined that the household worker had completed the work tasks according to the instructions of the household service agency and accepted the supervision and management of the household service agency. After the service had been completed, the household service agency issued labor remuneration to the household worker according to the service situation of the household worker. Therefore, a labor contractual relationship was formed between the household worker and the household service agency, and a *service contract relationship* was established between the household service agency and the family (individual). In this case, the household worker was one who had received basic pensions. Thus, even if there was “subordination” between the household worker and the household service agency, it was impossible to establish a labor relation. Therefore, in this case, the court determined that a labor contractual relationship was formed between the household worker and the household service agency. In cases #8 and #9 the recipients of household services also assumed part of the responsibility.

The judiciary determined that household workers and household service agencies had formed an employment relationship (see Table 4 for details).

Table 4: *Formation of and Employment Relationship Between household Workers and household Service agencies and the Allocation of Responsibilities*

Determination of relationship	Case number	Allocation of responsibility		
		Family (individual)	household worker	household service agency
Employment relationship	#5		Secondary	Primary
	#6	60 percent	40 percent	

In case #5, the court determined that a labor relation was established between the household worker and the household service agency in the first instance. In the trial of this case, the litigation strategy of the household worker was to claim that he/she had formed a labor relation with the household service agency. On this point, the family (individual) receiving the household service and the household worker had a certain level of “collusion.” Because if there was no labor relation between the household worker and the household service agency, the family (individual) was at risk of bearing the responsibility for the injuries of the household worker. It is worth noting that this case was the only one in the sample where a household service agency had insured employer’s liability insurance for household workers. Case #6 allocated responsibilities between the household worker and the family (individual), and the household service agency did not assume the responsibility of the employer.

In summary, the following problems were found after analyzing the sample cases. First, if an intermediary contract relationship is established between the household worker and the household service agency, does the household service agency meet the qualification requirements for an intermediary agency? Second, according to the *Civil Code*, only

individuals can establish labor relations. What is the basis for the establishment of labor relations between household workers and household service agencies? Third, through legal interpretation, labor relations can be established between individuals and units, so how can the injury in labor services spread and affect families or individuals receiving household services? The existence of these problems is exactly the dilemma currently faced by the occupational injury risk sharing mechanism for household workers.

### **Comparative Research on the Risk Sharing Mechanism of Occupational Injury for Household Workers**

“If household service is regarded as an occupation, then remedying the injury accidents occurring in household services as torts is not in line with the meaning of the modern social work-related injury insurance system, nor is it conducive to the protection of the interests of household workers and employers, thereby hindering the development of household service as an occupation (Mi, 2011).” In fact, promoting the transformation of the staff system of household service agencies is the carrier of formalizing household work. The logic here is to realize the transformation of household workers’ employment from informal employment to formal employment by formalizing household work. Once household workers are formally employed, their occupational injury risks can be shared through the social insurance system. China’s policy orientation on improving the quality and expansion of the *household service industry* in China is precisely the policy measures introduced to improve the professionalization of household work, which is the core element of the staff system transformation of household service agencies. On September 1, 2010, the special conference on the household service industry of the State Council of China proposed to “regulate the relationships of rights and obligations among household service agencies, families and household workers, and safeguard the labor remuneration and rest rights of the household workers.” Later, the intensive policies were introduced to promote the transformation of household service industry from linking by personal trust to an employee system, so as to make household workers obtain the legal status of “laborers” within the scope of the labor law, then achieving more effective sharing of occupational injury risks of household workers during work and providing more comprehensive protection for the household services through the legal system of work-related injury insurance. As some studies have pointed out, it is a major theoretical challenge as well as a complex practical problem to clarify and balance the rights and obligations of household workers, household service agencies and family employers, and to choose a legislative and regulatory model that is compatible with the unique attributes of household workers themselves (Hu, 2012).

According to the research report of the International Labor Organization in 2021,

“Making decent work a reality for household workers: progress and prospects ten years after the adoption of the Household Workers Convention,” of the 75.6 million household workers worldwide, 61.4 million (81.2 percent) are in informal employment. In terms of regional distribution, the Asia-Pacific region has 38.3 million household workers, the largest number of household workers in the world, accounting for 50.6 percent of the total number of household workers in the world.<sup>①</sup> How to ensure the occupational safety and health of this large group is indeed a problem that needs to be faced directly. In the world, 81.2 percent of household workers are in informal employment, and only 18.8 percent of household workers are effectively covered by social insurance systems based on labor relations, enjoying at least one kind of social insurance (Hu, 2012).<sup>②</sup> Only 6 percent of household workers have full social insurance coverage. Although household workers are legally justified in enjoying work-related injury insurance, but at the institutional level, there are differences in whether the enjoyment of this right should be based on the voluntary basis of household workers, or is it determined by collective bargaining of household workers, or is it mandatory to take uniform measures to be automatically included in work-related injury insurance, and there are also many differences in legislative choices between countries. In countries represented by France, collective contracts have normative effectiveness, and industrial collective contracts play an extremely important role in adjusting labor relations. The work-related injury insurance benefits for household workers are determined according to the collective contracts. Of course, the effective dispersion of occupational injury risk of household workers in this collective bargaining and collective contract model is based on the solidarity rights of household workers.

In June 2011, the International Labor Conference (ILO) adopted the *Decent Work for Household Workers* (C189) and its Recommendation of the same name (R201). In the past ten years, some progress has been made in protecting the labor rights and interests of household workers across the world. However, achieving the goal of decent work for household workers still requires sustained and multi-faceted efforts by governments, employers' organizations and employees' organizations. No matter what mechanism is to be established, it will be a complex systematic project. The first thing to consider is that the institutional design of the risk sharing mechanism of household work should match the diversity and flexibility of the content of household work itself. Second, it is necessary to determine the subject of social insurance obligations. Regarding employers, there are differences between families/individuals and household service agencies in whether the purpose is for profit and the actual

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① ILO. Making decent work a reality for household workers: Progress and prospects ten years after the adoption of the Domestic Workers Convention, 2011 (No. 189). Geneva: International Labour Office, 2021, p. 17 +31.

② ILO. Making decent work a reality for household workers: Progress and prospects ten years after the adoption of the Domestic Workers Convention, 2011 (No. 189). Geneva: International Labour Office, 2021, p. 193+272.

payment ability. Some studies have put forward specific suggestions on the construction of work-related injury insurance system for household workers in China. Based on whether the working time per week reaches 3 days or 24 hours as the standard, if the working hours of the household worker indeed meet the aforementioned standards, the family/individual employing the household worker shall pay the household worker's work-related injury insurance. If the weekly working hours of household workers do not meet the above-mentioned standards, the household workers may be allowed to pay the work-related injury insurance by themselves or the families/individuals are still responsible for the payment of the work-related injury insurance but with reduced payment standard, thereby resulting in reduced level of work-related injury protection available to the household workers accordingly (Hu, 2012). While this distinction may lead some household workers to obtain occupational safety protection, it may also lead to more informal employment of household workers. Brazil, for example, officially passed a law in 2015 obliging employers to pay social insurance for household workers who work more than two days a week, but this has led to a decline in participation rates.<sup>①</sup>

### **Suggestions on the Construction of Occupational Injury Protection Mechanisms for Household Workers**

At the legal level, the basic legal concepts of laborers, employers and workplaces cannot cover household workers and family/individual employers in household service, which directly or indirectly excludes household workers from the current labor law system of China. In China's "Social Insurance Law," the basic pension insurance and basic medical insurance provide an entrance for "individual industrial and commercial households without employers," "part-time employees," and "other flexible employment personnel" into the system.<sup>②</sup> However, the current work-related injury insurance system cannot cover flexible employment personnel, resulting in the mismatch between occupational risk and protection for household workers. If household service agencies adopt the employee-based operation mode, household workers are "laborers" based on the labor law system, and their occupational injuries and risks are insured by work-related injury insurance system. However, it is difficult for household service agencies to adopt the employee-based operation system in consideration of

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① ILO. Making decent work a reality for household workers: Progress and prospects ten years after the adoption of the Domestic Workers Convention, 2011 (No. 189). Geneva: International Labour Office, 2021, p. 206.

② Paragraph 2, Article 10, of the "Social Insurance Law" stipulates that "individual industrial and commercial households without employers, part-time employees who have not participated in basic pension insurance in the employing units, and other flexible employees can participate in basic pension insurance, and the basic pension insurance premiums shall be paid by individuals." Paragraph 2, Article 23 stipulates that "individual industrial and commercial households without employers, part-time employees who have not participated in basic medical insurance in the employing units, and other flexible employees can participate in basic medical insurance, and the basic medical insurance premiums shall be paid by individuals in accordance with state regulations."

the operation costs and operation risks. Although the government supports the development of household service industry through tax incentives and other policies,<sup>①</sup> employee-based household service agencies are still very scarce. A considerable number of household workers get jobs in household service through informal social networks, and the vast majority of household workers are non-employee household workers. It has been estimated that less than 10 percent of household workers in China's household service market are employed by "employee-based" household service agencies. In other words, very few household workers have full labor and social security rights (Liu, 2017).<sup>②</sup> Whether a household service agency is willing to sign a contract is essentially related to the professionalism of household work. With the lack of professionalism of household work, simply relying on external forces to make household workers contract with household service agencies cannot effectively promote the staff-system transformation of household service agencies. There is great uncertainty as to whether the employee-based household service agencies that survive relying on government intervention can obtain the endogenous power of sustainable development. Under the dual structure of standard labor relations and non-standard labor relations, employers also change their employment strategies in human resource management by adopting a "core-periphery" approach and giving priority to "adaptive" individuals, leading to the possibility of stratified employment, that is, standardized employment for core employees and non-standardized employment for other employees (He, 2012). This will lead to the strange situation in which employee-based household workers and non-employee household workers are engaged in the same household work, but obtain differentiated standards for rights protection due to their different legal relationships with household service agencies. Once the non-employee household worker suffers injury in the process of household work, he/she cannot resort to the work-related injury insurance system for relief, but can only bear the corresponding civil compensation liability according to their own fault with the household service agency or the family or individual receiving the household service under the item of labor relations. However, both household workers and the families that employ them are less able to resort to formal dispute resolution systems to resolve disputes, making it more difficult to obtain relief through litigation.

Objectively speaking, many beneficial institutional explorations have been carried out by the central government through the local government to resolve the risks in the

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① In July 2019, the Announcement No. 76 of 2019 (Announcement on Preferential Policies on Taxes and Fees for Community Family Service Industries such as Pension Service, Nursery, and Housekeeping) issued by the Ministry of Finance, the State Administration of Taxation, the National Development and Reform Commission, the Ministry of Civil Affairs, the Ministry of Commerce, and the Health Commission introduced preferential tax and fee policies such as exemption from value-added tax for the community household services, and increased preferential tax and fee support for employee-based household service enterprises.

② Liu, M. H. (2017). Migrants and cities: Research report on recruitment, employment, and working conditions of household workers in China. Conditions of Work and Employment Series No. 92. ILO, p. 20. It should be noted that this data was estimated by researchers based on the interview records of the Migrant Workers Division at Beijing Municipal Human Resources and Social Security Bureau.



service labor of household workers. Under the guidance of the industry development policy of “improving quality and expansion,” the state takes the “Leaders” action list as pilot sites,<sup>②</sup> and encourages the regions included in the list to take innovative measures in the development of the household service industry and the protection of household workers so as to realize the “expansion” of the number of employee-based household enterprises and employee-based household workers,<sup>③</sup> thereby promoting an overall “improvement of service quality” in the household service industry. Local normative documents have also been issued in various regions to regulate the social insurance rights and interests of household workers. For example, Article 7 of the *Regulations of Shenzhen Special Economic Zone on Household Service Industry* stipulates that operators of household service agencies should sign written labor contracts with household workers in accordance with law and pay social insurance premiums for them. Article 44 of the *Regulations of the Ningxia Hui Autonomous Region on Household Service Industry* also clearly stipulates that if a household worker designated by a household service operator suffers a work-related injury, it shall be dealt with in accordance with the “Regulations on Work-related injury insurance.” For those who fail to participate in work-related injury insurance in accordance with law, the household service operator shall pay for the household worker in accordance with the work-related injury insurance treatment items and standards stipulated in the “Regulations on Work-Related Injury Insurance.” The *Implementation Opinions of the General Office of the People’s Government of Heilongjiang Province on Further Promoting the Development of the Household Service Industry in Heilongjiang* (General Office of Heilongjiang Provincial People’s Government [2016] No. 18) stipulates how to safeguard the legitimate rights and interests of practitioners from the perspectives of “regulating the relationship between household service agencies and families and practitioners,” “maintaining practitioners’ labor remuneration, rest and vacation rights and interests,” “maintaining practitioners’ social insurance rights and interests,” and “establishing a protection mechanism for practitioners’ rights and interests.” The Opinions clearly states that “a household service agency that recruits and dispatches household workers to provide services to families shall sign labor contracts or simplified labor contracts with the employee-based household workers,” and “household service agencies and their employees shall participate in social insurance and pay social insurance premiums as required.” At present, China has basically established a fully functioning social security system, with social insurance as the main body, including social assistance, social welfare and social special care systems, making it the largest social security system in the world (Xi, 2022).

② For details of the list of cities (regions) to be promoted, please refer to the “Notice on Printing and Distributing the List of Key Cities (Regions) to be Promoted in the Action of ‘Leaders’ to Improve the Quality and Expansion of household Service Industry” (National Development and Reform Commission [2019] No. 1101).

③ According to the requirements of the “Three-year Implementation Plan of the ‘Leaders’ Action of Deepening and Promoting the Quality and Expansion of household Service Industry (2021-2023),” the proportion of employee-based household workers in an employee-based household service agency should exceed 50%.

The occupational injury risk of employee-based household workers can be resolved under the legal framework of work-related injury insurance.

For the occupational injury risk of the non-employee household workers in the employee-based household service agencies and the household workers in the non-employee household service agencies, it is necessary to explore the path of establishing an occupational injury protection system for flexible employees to disperse the risk. The practice of occupational risk management of flexible employment personnel in various regions of China has been developing. In December 2020, the Human Resources and Social Security Department of Guangdong Province and the Guangdong Provincial Taxation Bureau of the State Administration of Taxation, the Finance Department of Guangdong Province issued the *Measures on the Participation of Work-related Injury Insurance for Specific Personnel such as Workers Over the Legal Retirement Age (Trial)*, and included household service workers who were employed in household service agencies and had not established labor relations with the household service agencies in the scope of adjustment of the above-mentioned measures. That is, in accordance with the principles of territorial management and voluntary participation in insurance, the employer shall go through the procedures for individual participation in work-related injury insurance for its employees in the place of production and operation. The core of the above-mentioned model of participation in the work-related injury insurance for a single type of insurance is to unbind work-related injury insurance from labor relations. The Human Resources and Social Security Department of Jiangsu Province identified Wujiang District as the pilot area for the occupational injury insurance program for flexible employment personnel in Jiangsu Province. Since April 1, 2018, Wujiang District has launched a pilot occupational injury insurance program that is “led by the government, undertaken by commercial insurance companies, and guided and supervised by the Human Resources and Social Security Department of the district.” Article 7 of the “Specifications for the Implementation of Occupational Injury Insurance for Flexible Employment Personnel” (Human Resources and Social Security Department of Wujiang District [2018] No. 8) stipulates that the occupational injury insurance premium is RMB 180 per person per year, paid by the insured individual. During the trial period, those who participate in the basic pension insurance or the basic medical insurance for employees as flexible employment personnel will pay 60 RMB per person per year, and RMB 120 per person per year will be subsidized by the government after successful individual payment. Whether it is the “simultaneous payment” model of work-related injury insurance in Weifang City, Shandong Province and Nantong City, Jiangsu Province, or the single-insurance mode of participation in work-related injury insurance adopted by pilot areas in Zhejiang and Guangdong Provinces, or the new occupational injury insurance model in Taicang City and Wujiang District, Suzhou, to a certain extent, it has improved the occupational injury protection status of flexible employment personnel including household workers. However, it is undeniable

that there are multi-level conflicts and tensions in the construction of the occupational injury protection system for non-employee household workers. How to break through the conditions of participation set by the work-related injury insurance system and the complexity of the problems relating to these conditions are issues that need urgent attention.

To sum up, under the guidance of the policy of “improving quality and expansion” of household service industry, the occupational risks of an employee-based household worker will be relieved by the work-related injury insurance system under labor relations. The occupational injury risk sharing mechanism for non-employee household workers is covered by the occupational injury protection system for flexible employment personnel. This type of group is currently the focus of policy makers, and various regions have carried out pilot programs such as single work-related injury insurance or occupational injury protection system designs. In the end, it should be the protocol of the occupational injury protection system for flexible employment personnel to follow the concept of “government-led, established and implemented under the general framework of the current work-related injury insurance system.”<sup>①</sup> In addition, in order to meet the growing market demand for household services, government incentives should also be used to encourage insurance companies to provide employers’ liability insurance products commercially, as an effective supplement to the social insurance system for household workers.

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