

Research on the Employer's Right of Recourse Against Laborers

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Abstract

Paragraph 1 of Article 1191 of the Civil Code for the first time established the right of recourse in the form of legislation, but the relevant provisions are still relatively abstract, and the focus of the dispute mainly focuses on the unclear requirements and scope of the exercise of the right of recovery. Therefore, it is necessary to conduct analytical studies on these questions. In terms of exercise requirements, "staff" is the object of the right of recovery, and the laborer in labor relations is its only connotation; "performing duties causes damage" is the objective requirement of the right of recovery; the worker has "intentional" or "gross negligence" is the subjective requirement of the right of recovery. In the scope of recovery, the limit recovery shall be adopted, and the specific recovery ratio shall be determined from the fault weighing of the employer and the laborer, the interests of the employer and the laborer, the economic strength of the employer and the laborer, the position of the laborer and the occupational risk.

Keywords

Employer; Laborer; Right of Recourse.

1. Basic Theory of the Employer's Right of Recourse

1.1. Legislative Provisions on the Employer's Right of Recourse

1.1.1. Establishment of the Employer's Right of Recourse in the Civil Code

The right of recovery of the unit of choose and employ persons refers to, after the laborer causes damage to the third person because of duty behavior, by the unit of choose and employ persons assumes the liability for compensation first, the right to recover the economic loss from the laborer again. Before the promulgation of the civil code, article 34 of the tort liability law in China only clear the alternative liability of unit of choose and employ persons, but on whether it has the right of recourse on the legislation, only the personal injury compensation judicial interpretation has similar provisions in article 4, namely unpaid helper, the help workers' right of recourse. In judicial practice, although most courts recognize the rationality of employers' recovery, there is always a lack of relevant legal basis as support. Until paragraph 1 of Article 1191 of the Civil Code stipulates: " If the staff of the employer causes injury to others due to the execution of work tasks, the employer shall bear the tort liability. After assuming the tort liability, the employer may recover from the staff member who has committed intentional or gross negligence." At this time, the employer to the workers to recover the loss of the claim basis to be formally established. The introduction of the civil code of the right of recourse to unit of choose and employ persons, user units, workers and the interests of the third world balance, on the one hand, can prevent workers malicious defense to evade liability, reduce the burden of unit of choose and employ persons and ensure the third party damages, on the other hand, through the staff "intentional or gross negligence" this elements, effectively limit the exercise of recourse of unit of choose and employ persons, in order to avoid the abuse of rights.

1.1.2. An Analysis of Article 1191, Paragraph 1, and Article 62 of the Civil Code

Article 62 of the Civil Code stipulates: " If the legal representative causes damage to others due to the performance of his duties, the legal person shall bear civil liability. After a legal person

bears civil liability, it may recover from the legal representative at fault in accordance with the law or the articles of association of the legal person."Compared with paragraph 1 of Article 1191 of the Civil Code, the employer includes the legal person, and the staff includes the legal representative. The two adjusted contents are the same, but there are differences in the subjective fault degree of the recovery object, which causes the competition and even conflict of the law. So when the legal person recovers to the legal representative, which clause should the court apply as the priority?

Based on the principle of law application that "special law is superior to general law", from the position of the law, article 62 of the Civil Code is located in the general section and can be regarded as general law, and paragraph 1 of Article 1191 is located in the tort liability section, which can be regarded as special law. From the perspective of applicable objects, the applicable objects of article 1, Article 191, paragraph 1 of the Civil Code include but are not limited to the provisions of article 62, article 1191 is the general law and article 62 is the special law. In this paper, article 62 of the civil code is superior to paragraph 1 of article 1191, the reason is that the legal representative as a legal person in charge of the authority, its management risk control and resolve ability is significantly stronger than ordinary staff, and according to the "compensation theory", since the legal representative enjoys much higher compensation than other employees, so the degree of the legal representative's subjective fault is stricter requirements.

1.2. The Legal Basis of the Right of Recourse

Professor Yang thinks, according to the different of tort liability type, can be divided into joint liability recourse (such as paragraph 2 of article 178 of the civil code), not real joint liability right of recourse, high right of parabolic liability (article 1245 of the civil code) and alternative liability of recourse (such as the civil code of article 1191, paragraph 1, paragraph 1, article 1192) four kinds. Among them, the real joint and several liability can be further refined into the typical not real joint and several liability of right of recourse (such as article 1203), supplementary liability of recourse (such as paragraph 2 of article 1198 of the civil code), pay liability of recourse (article 1204 of the civil code) and conditional not real joint and several liability right of recourse.

The legal basis of the above right of tort liability is the so-called "blame" theory, that is, the person responsible is "blame" the damage caused by the actor, but he is not the real infringer with 100% of the cause, so he has the right to recover from the actor who should bear the ultimate responsibility. The specific content of this theory is mainly reflected in the following four aspects: first, the obligee and the obligor of the right are the infringer and should bear the tort liability; second, the obligee of the right and the obligor have logical correlation; third, the liability of the obligee of the right is intermediate rather than final; fourth, the obligor of the right shall bear the ultimate responsibility. The right of recourse of the employer studied in this paper is a typical right of the alternative liability, and the employer takes the responsibility of the staff as the premise and objective basis of the recovery of the right. And the provisions on the alternative responsibility of the employer can be traced back to Article 43 of the General Principles of the Civil Law issued in 1986. According to the "blame" theory, after the employing unit carries the blame for the laborer, it has the right to recover from the laborer.

1.3. The Institutional Function of the Right of Recourse

1.3.1. Clarify the Attribution of Liability for Damage Filling

Damage filling is the primary function of tort liability law, aiming to restore the third person to the predamaged state by transferring the damage suffered by the tort to the determined responsible person. The emergence of the alternative responsibility system is to use the employers to disperse the loss, which can ensure that the victims can get adequate relief in time,

and will not make the workers fall into trouble because of the damage compensation. Unit of choose and employ persons "carry the pot" after, have the right to undertake recourse to laborer, this is the loss essentially fill responsibility transfer again. For this, ought to try necessary limit to the exercise of the right of recourse of unit of choose and employ persons, in order to realize the fair distribution between unit of choose and employ persons and laborer.

1.3.2. Distribution Risks and Benefits

The employer is an important manufacturing subject of social risks, and its business activities themselves bring their own risk attributes. Therefore, it is reasonable for the employer to take responsibility for the potential risks caused by the job behavior of its staff. In addition, in the labor relationship, the employer, as the ultimate beneficiary of the employment activities, according to the "compensation theory", the risk brought by the laborer should also belong to the employer, that is, the employer needs to participate in the sharing of responsibility to the victim and assume the consideration of the risk.

1.3.3. Control the Danger of Behavior

Employers are not only the manufacturer of social risks, but also the controller of risks, with the obligation to control the behavior risk of workers. This requires its to take reasonable measures to undertake necessary supervision and management to the work activities of laborer. Based on the "danger control theory", in order to ensure that the employer can effectively control the danger, the right of recourse should be limited to a certain extent, so as to encourage the unit to take corresponding preventive measures to protect the third person in the society.

2. Identification and Analysis of the Requirements of the Right of Recourse

The exercise of the right of recourse should meet certain conditions, otherwise it will cause the abuse of rights. From the perspective of legal provisions, paragraph 1 of Article 1191 of the Civil Code stipulates that employers can recover from workers, but it does not clarify the specific elements such as "performing work tasks" or "intentional or gross negligence". In practice, it also relies on the judge to judge whether the employer has the right of recourse, so that the situation of "different judgments in the same case" appears, causing judicial injustice. Therefore, it is of great significance to standardize the exercise requirements of the right of recourse.

2.1. The Object of the Right of Recourse

In the right of recourse of the employer, the right holder is the employing unit, and the obligor is the staff of the unit. In terms of "employer", there are two academic views: first, "employer" in labor law, including state organs, enterprises, social organizations and some non-profit organizations, and the claim that "employer" is not limited to labor law, family and rural contractors can be identified as "employer". From the perspective of tort liability law, understanding the "employer" as the general term of non-natural person organizations that use others' labor is more helpful to determine the attribution of liability and realize the compensation for losses.

As far as the "staff" is concerned, its connotation usually exists in the broad sense and the narrow meaning. In the broad sense, "staff" refers to the natural person who provides labor services for the employer, while in the narrow sense, "staff" only refers to the laborer who has established a labor relationship with the employer. What explanation for the "staff" in paragraph 1 of Article 1191 of the Civil Code can be discussed from the object of the alternative responsibility. This divides the "staff" of the employing unit into three categories: workers in labor relations, workers and contractor in labor relations. There has been a consensus between the first and practical circles of the group, but there are great disputes in the latter two. The

laborer in labor service relation does not belong completely subordinate to unit of choose and employ persons, may receive the instruction and control of unit of choose and employ persons to a certain extent only, if regard it as "staff member", increased the responsibility burden of unit of choose and employ persons undoubtedly. The contractor does not have dependence on the employer, and the employer can not control and control it, so the employer does not need to assume alternative liability for the infringement of the contractor, and there is no problem of recovery. To sum up, the "staff" in paragraph 1 of Article 1191 of the Civil Code should only refer to the workers in labor relations.

2.2. Objective Elements for the Exercise of the Employer's Right of Recourse

The core problem in the objective requirements of the exercise of the recovery right is in the identification of "performing work tasks". According to the provisions of paragraph 2 of article 9 of the judicial interpretation of personal injury compensation, the behavior of the laborer under the instruction of the employer should be included in the category of "duty behavior". However, it is still controversial whether the behavior that is beyond the scope of authorization and is internally related to the work task can be identified as "duty behavior", which needs to be further studied.

When reviewing the behavior of the staff causing damage on the way to work normally, we can refer to the "industrial injury" identification rules to determine whether it belongs to the "duty behavior". "Industrial injury Insurance Regulations" Article 14, 15, 16 and "the Supreme People's Court on the trial of administrative cases" Article 4 all show that the identification of "industrial injury" should be comprehensively considered around the three elements of working time, place and reason. Generally speaking, the commuting behavior of employees should be included in the duty performance behavior, which is an indispensable part of it, and belongs to the normal business risk. In practice, most of the courts also think so, such as the "dispute over Jiangxi Heermei Property Management Co., Ltd. and Li Xin's right of recourse" case. In addition, it can also identify the "duty behavior" from the subjective and objective aspects of the laborer and the predictability of the employer. If the laborer subjectively carries out the behavior beyond the scope of authorization for the purpose of maintaining or realizing the interests of the employer, the behavior objectively has the appearance of the duty behavior, and the employer has the possibility to foresee and prevent this behavior, it can be identified as the performance of duty behavior.

2.3. Subjective Requirements for the Exercise of the Employer's Right of Recourse

The subjective requirement of the exercise of the right of recovery is that the laborer has "intentional" or "gross negligence" on the occurrence of the damage. According to the organizational fault theory of German law, the general fault of the staff should be regarded as the fault caused by the organization failing to fulfill the duty of supervision and care, and the employer shall bear the liability for compensation by itself. "Deliberate" means that the laborer knows or should know in the execution of the task may constitute a breach of contract or infringement, hoping or allowing the result to occur. The identification of "gross negligence" is more complex, which needs to be judged in combination with subjective and objective standards. In terms of subjective standards, "gross negligence" is that the staff fails to fulfill their due duty of care. It is generally believed that according to the different degree of negligence liability, the duty of care can be divided into three types of care, the same duty of care as their own affairs, and the duty of care of a good manager. "Major negligence" means that the infringer does not only fulfill the duty of care of the good manager, but also fails to fulfill the duty of care of the average person. In other words, in the dispute of the employer's right of recourse, whether the staff has violated the ordinary duty of care should be taken as the subjective determination standard of "gross negligence". In terms of objective standards, if the staff

seriously violates relevant laws and regulations or common sense in the industry, it constitutes "gross negligence".

3. Determination and Analysis of the Exercise Scope of the Employer's Right of Recourse

There has not been a unified conclusion in the academic circle on whether the scope of the exercise of the employer follows the principle of complete or incomplete compensation, and how the specific loss recovery ratio lacks clear provisions in legislation, which directly affects the judicial application of the right of recourse. Therefore, it is necessary to discuss the above issues.

3.1. The Reasonableness of the Limited Recovery

In the scope of the exercise of the employer's right of recourse, In the view of full recovery, Employers assume vicarious responsibility based on specific social identity relationships with workers, Thus ensuring that the loss of the victims can be filled in time, But the ultimate responsibility should remain in the worker, Namely, unit of choose and employ persons can undertake full recovery to laborer; The scholars holding the view of limit recovery believe that, According to the "return and compensation theory", The employer, as the ultimate beneficiary of the work interests of the laborer, Whether it itself is at fault or not, All need to take responsible for the damage caused by the workers' duties, And it is precisely because the employment behavior of the employer presses the "open button" for the risks that the workers may bring in the future, Therefore, the amount of recovery of the employer is bound to be limited, A full recovery cannot be pursued.

This article thinks, the unit of choose and employ persons to laborer limit recovery is more reasonable. First of all, the employer and the laborer form a long-term communication and mutual trust interpersonal relationship by signing labor contracts. Quota recovery reflects the unit of choose and employ persons to laborer reasonable treatment and protection, conforms to the psychological expectations of workers, promote the future cooperation between the two, share the interests of both sides, also can effectively avoid workers compensation into family difficulties, deepen laborer loyalty to unit of choose and employ persons, maintain the stability of labor relations. Secondly, the damage that the employer may cause in the execution of the task should be predictable and belongs to the category of normal operation risk, and the employer can spread the risk with the help of the price mechanism. For this, if let laborer bear all compensation responsibility finally show unfair, unit of choose and employ persons should assume corresponding loss share likewise. Practice, the court in unit of choose and employ persons right of recourse against disputes also mostly adopt incomplete compensation principle by unit of choose and employ persons and laborer to share losses, even in most cases unit of choose and employ persons compensation is higher than workers, such as "Zhang Yonghai, Bengbu supply chain management co., LTD., right of recourse dispute", "Guangxi Guilin huitong pharmaceutical co., LTD., Hu Guo right of recourse dispute", etc.

3.2. The Part of Insurance Compensation

It is usually considered that the role attributes of workers and employers are not related to contractual interests and damage compensation. The identity of the parties is not worth considering in damages, but they fulfill obligations as much as possible to separate the present, past and future in the labor relationship. However, a contractual relationship is not only a transaction of the exchange of values, the contract can establish a relationship between each other, which includes trust and unity and emphasizes the importance of the interpersonal relationship between the parties, rather than only focusing on the exchange of interests itself. This relationship itself has independent value.

The simple alternative liability of the employer is to transfer the damage between the laborer and the employer. This arrangement is only to transfer the compensation risk from one party to the other party. In this closed distribution structure, the risk is allocated to which party is difficult to complete. Compared with the traditional relief mechanism where the employer assumes alternative responsibility and then exercises the right of recourse, the open risk distribution of liability insurance can concentrate individual labor risks and then share by the majority of social members. Since unit of choose and employ persons has filled part loss through liability insurance compensation, reduced damage compensation liability, so can only assume the compensation liability to the loss that did not get insurance compensation only.

If the employer is allowed to recover for the part of the insurance compensation, the moral hazard of seeking double compensation occurs. When the claimant benefits from the same fact, the obligor has the right to deduct the benefits in the claim, otherwise it violates the principle of prohibited profit in damages. If after the employer recovers from the laborer, the employer obtains more benefits than before assuming the alternative liability, it damages the fair value of the law, and the compensation obtained by the employer because of the insurance must be deducted. Different from the short-term contract of penny-pinching, the employer deducted the insurance compensation when exercising the right of recourse to the laborer, which is conducive to meeting the common expectation of the labor contract parties to make the transaction relationship continue for a long time. From the value connotation of the labor relationship as the relationship contract, it can be concluded that the deduction of the insurance compensation of the employer conforms to the system purpose of the right of recovery, and the deduction of the insurance compensation is not an inappropriate liability reduction for the workers.

3.3. Consideration Factors for Determining the Proportion of the Recovery

3.3.1. The Fault Balance between the Employer and the Laborer

According to the provisions of paragraph 1 of Article 1191 of the Civil Code, whether the employer itself is at fault does not affect the composition and assumption of its alternative liability. But when the unit of choose and employ persons to recover from laborer, need to offset its fault and the intentional or gross negligence of the staff to determine specific recovery proportion to show fair. This is because the employer is responsible for the prevention and control of the risks generated during the labor relationship. In practice, the court should determine the fault of the employer from the following aspects: the fault of the selection of the laborer; the negligence of the employer; the deficiency of the working conditions and the working environment; the negligence of the employer.

3.3.2. Balance the Interests of Employers and Workers

Generally speaking, the employing unit mainly relies on the staff labor activities to obtain operating profits, different nature of labor activities, can get the economic benefits are also different. Most of the income of workers comes from the wages paid by the employer, which are equivalent to the labor service. In accordance with the principle of "consistent with income and risk", when exercising the right of recovery, the income situation of the employing unit and the laborer shall be taken as the standard for dividing the compensation shares of their respective losses. That is to say, the laborer risk tolerance is directly linked to its income, if unit of choose and employ persons gives workers more labor remuneration, then the laborer of care and responsibility risk is greater, the unit of choose and employ persons can be higher, on the contrary, the laborer should share the compensation share will be lower.

3.3.3. The Economic Strength of Employers and Workers

The economic strength of workers is one of the important factors affecting the judge to determine the specific recovery ratio. Under normal circumstances, the economic strength of

workers is very limited, the amount of compensation is often higher than the economic level it can afford, so that the right of recourse is difficult to achieve. Therefore, taking the economic strength of the employer and the laborer as the element to measure the recovery ratio is not only to ensure the realization of the right of recovery, but also for the consideration of the survival of the laborer. If the economic condition of the worker is good, then the court can strictly judge on the amount of recovery, but if the economic condition of the worker is poor and unable to bear the high compensation, it can relax the amount of recovery appropriately. The same is true for employers.

3.3.4. Position Level of Workers and Occupational Risks

In employers, there are differences in the value they can create for the unit, the benefits and the responsibilities of the staff in different positions. For the backbone management of directors, supervisors, senior executives and other units, they can bring greater profits to the company and earn higher salaries, but also shoulder heavier responsibilities. Accordingly, according to the position of laborer, the condition that unit of choose and employ persons applies when exercising the right, standard and the proportion of recourse should be differentiated. In addition, workers engaged in different industries face different occupational risks, of course, high risk means that the probability of infringement events will be higher, and the two are positively related. In some industries with high occupational risks, it is difficult to take timely and effective relief measures even if staff have foreseen them in advance. In short, the recovery ratio of workers engaged in high-occupational-risk industries should be lower than that of workers in other low-risk industries.

4. Conclusion

The goal of the right of recovery system is to damage the filling responsibility, risk and interest, and how the danger control obligations are reasonably distributed between the employer and the laborer. Paragraph 1 of Article 1191 of the Civil Code makes it clear that the employer enjoys the right to recover against the laborer after assuming the alternative responsibility, which has positive significance both to the employer itself and to the laborer and the victim. However, the provision of paragraph 1 of Article 1191 of the Civil Code on the right of recourse is in principle. There is no special system construction, and there is no specific rules for the employer to recover losses from workers. The core problem of the employer to recover the loss is to determine the situation, scope and proportion of the recovery. In the case of recovery, the application of the right of recourse is clarified mainly according to the exercise requirements of the employer's right of recourse. In recovery scope and proportion, combine theory and judicial practice, unit of choose and employ persons ought to recover loss to take limit recovery, namely unit of choose and employ persons should participate in sharing the loss caused by laborer to the third person. This paper studies and analyzes the specific exercise of the employer's right of recourse, and aims to balance the responsibility conflict of employers and staff, and promote the stability and orderly development of society.

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