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博 士 学 位 论 文

用人单位劳动规章制度研究

On Labor Rules and Regulations at Employment Units

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## 内容摘要

劳动规章制度是用人单位基于劳动用工自主权，在符合国家法律、法规精神的前提下制定的，调整用人单位用工行为和劳动者劳动行为，并进而对全体管理者和劳动者都具有法律效力的成文化规则和制度的总称。劳动规章制度与劳动合同、集体合同一样，都是确立劳动关系当事人权利义务的重要依据和协调劳动关系的有效手段。在实践中，劳动规章制度对劳资双方权利义务都有重大影响，是用人单位组织社会化劳动所必需的制度。一方面，建立和完善劳动规章制度是用人单位的义务，是保障劳动者充分享有权利和履行义务的制度基础。另一方面，现代化的产业劳动以集体劳动为特征，为了更好地组织不同劳动者进行协作劳动，需要运用劳动规章制度对现代化的劳动进行组织和管理。没有劳动规章制度有没有现代化的集体劳动，就无法保障劳动效率和产品或服务的质量。因此，在现代社会里，每个用人单位制定的劳动规章制度不仅对该单位有着重要意义，也对社会发展有着深远的影响。

在我国传统计划经济时期，用人单位成为国家行政系统的组成部分，劳动关系成为行政关系的延伸，当时适用的劳动规章制度称为“内部劳动规则”，实质上是有关劳动法方面的行政规章。在这一时期，作为劳动规章制度组成部分的劳动纪律得到了突出强调，而劳动规章制度维护劳动者劳动条件的功能被削弱，呈现出劳动权利和劳动义务不对等，片面关注劳动义务的特征。20世纪90年代中后期，为了提高国民经济的素质，应对即将到来的新世纪全球经济发展的挑战，我国政府提出国有企业改革和发展非公有制经济的政策，对社会劳动关系产生了重大影响。随着国有企业改革的逐步完成和非公有制经济的大力发展，社会拥有了较为雄厚的经济基础。在企业利益和经济发展得到实现的同时，劳动者权益保护问题却越发突显出来。在改革过程中，许多用人单位获得了生产经营自主权，拥有了自主制定和实施劳动规章制度的权力。但部分用人单位为谋取非法利益滥用劳动规章制度，致使劳动者的权益受到侵害。鉴于这种状况，《劳动合同法》在《劳动法》原有规定的基础上，结合劳动规章制度的具体实践，增加了实体内容、民主程序和公示等方面的限制，从而完善了劳动规章制度立法。

现行劳动立法的完善，促进了劳动规章制度在用人单位劳动用工实践中的运

用。劳动规章制度既是现代社会中用人单位组织和管理劳动所必需，则如果其制定和实施得当，就能够有效组织劳动过程，促进劳动效率提高和维护劳动关系和谐。反之，如果用人单位劳动规章制度制定和实施不当，不但不能达到上述目标，还会导致劳动者权益受到侵犯或威胁，从而引发大量劳动纠纷和矛盾。因此，劳动规章制度问题值得深入探讨。

与劳动规章制度在实践中的重要性不相符的是，长期以来，劳动规章制度研究在我国劳动法理论中处于比较边缘的位置，许多重大的理论问题还缺乏深入的探讨。随着我国劳动关系的转型，劳动规章制度问题已经成为用人单位劳动用工实践中争议较大的一个问题，近年来逐渐开始引发理论界的关注。但迄今为止理论界对相关问题的研究仍显薄弱。本文作为改变这种现状的一种尝试，力图运用劳动法学基本原理，从保护劳动者利益的立场出发，结合比较分析、类型分析、实证分析等研究方法，讨论用人单位劳动规章制度的主要法律问题，具体涉及劳动规章制度的法律性质、基本类型、制定与变更程序、法律效力、司法适用等各个方面。

除引言及结论外，本文的正文部分共分为下列五章。

第一章探讨劳动规章制度法律性质问题。关于劳动规章制度的法律性质，目前已经形成了“法律规范说”、“契约规范说”、“集体合意说”、“根据二分说”四种主要学说。笔者首先分别展开对上述主要学说基本观点的论述，理清各主要学说所包含的分支学说的内容。在此基础上，结合劳动法的基本原理与劳动立法和司法实践，对这些主要学说及其分支学说的观点、立场和方法进行法理方面的评析。本章第二部分转入探讨我国现行法上劳动规章制度的法律性质。笔者首先对我国劳动规章制度立法进行了实定法层面的分析，指出《劳动合同法》赋予了劳动规章制度某些契约的性质。然后，笔者在分析国内学者基本见解的基础上，运用“契约规范说”对传统“法律规范说”进行修正，论证我国现行法上劳动规章制度的法律性质是定型化劳动合同。

第二章展开对劳动规章制度的分类研究，从类型的角度深化对劳动规章制度的理解。在劳动法上，劳动规章制度是一个很有张力的概念，法律规范不可能穷尽它所包含的内容，结合劳动用工实践展开对劳动规章制度的分类研究实有必要。继劳动规章制度法律性质分析之后，本章展开对劳动规章制度基本类型的探讨。笔者首先通过对国内劳动立法和学界所持分类根据进行批判，确立劳动规章

制度内容和功能这一分类根据。笔者指出,根据内容及与其相对应的功能,可以将劳动规章制度区分为劳动条件类、纪律奖惩类和程序管理类三种主要类型。在确定上述主要分类的基础上,笔者分别对三种类型的规章制度进行探讨。主要结合用人单位劳动用工实践,从涵义、内容、功能等方面展开对每种类型劳动规章制度的分析,揭示实务运作中劳动规章制度所反映出来的用人单位劳动管理的关注点,分析某些类型劳动规章制度可能存在的问题。

第三章转入对用人单位劳动规章制度制定和变更问题的研究。本章首先对劳动规章制度制定和变更权的性质展开分析。在该部分,笔者首先探讨了作为产业民主主要表现形态的劳动者参与制度,揭示了劳动者参与制度的主要形式和本质。在此基础上,笔者展开对劳动规章制度制定和变更的“单决权”和“共决权”的分析,指出“共决制”是劳动者参与的最高级形态,认为我国《劳动合同法》规定的劳动规章制度平等协商程序在本质上不属于劳资共决。在探讨“单决权”和“共决权”时,为避免不必要的混淆,笔者专门辨析了集体谈判和劳资协商的区别,指出它们所反映出的劳动者参与层次的差别。最后,笔者回顾了《劳动合同法》立法过程中关于劳动规章制度制定和变更“单决权”和“共决权”的论争,认为虽然现行法受各种因素限制将劳动规章制度的制定定位为“单决权”,但这种“单决权”已经受到相当程度的限制,存在向“共决权”转化的基础和可能。在未来,借鉴市场经济发达国家的做法,从“单决权”迈向“共决权”是我国劳动规章制度制定程序立法发展的基本路向。然后,本章简要描述了我国立法上劳动规章制度制定程序的演变,对劳动规章制度的制定程序进行了较为详尽的分析,力图揭示出法律条文背后所隐藏的深层次因素。接着,本章第三部分侧重讨论了劳动规章制度变更问题,对变更的必然性、合理性判断标准、法律后果等分别进行了阐述。在本章的最后,笔者从完善现行立法的目的出发,对现行法劳动规章制度制定和变更程序的若干规定进行了专门评析,指出其存在的缺陷,并提出了相应的改进建议。

第四章专门分析劳动规章制度的法律效力问题。在实践中,调整劳动关系的劳动规范有劳动基准、集体合同、劳动合同和劳动规章制度,后三者均属于自治性劳动规范,三者的效力关系对其适用具有重要影响。在本章中,笔者将劳动规章制度法律效力问题分解为劳动规章制度与劳动合同的效力关系、劳动规章制度集体合同的效力关系以及用人单位惩戒权三个具体问题。首先,笔者探讨了劳动

规章制度与劳动合同的效力关系，分析了理论界对两者效力关系的不同主张，认为劳动合同优先应成为普遍原则，并以“有利原则”作为例外对其进行补充。其次，笔者从集体合同规制劳动规章制度的视角展开对集体合同与劳动规章制度效力关系的分析，先阐述了集体合同规制劳动规章制度的法律效力基础，进而指出因两者在功能、程序和内容上的近似性容易引发效力冲突。接着，从劳动规章制度部分内容无效时集体合同的直接适用和集体合同中工作规则条款这两个视角探讨集体合同直接规制劳动规章制度的问题。然后，对集体合同间接规制劳动规章制度效力问题进行分析，在反思传统思维的基础上构建集体合同间接规制劳动规章制度效力的理论基础。在实践中，用人单位惩戒权是劳动规章制度法律效力的最高体现，笔者在本章最后部分对用人单位惩戒权进行专门探讨，提出劳动规章制度是用人单位惩戒权的主要规范依据并进行了相应的论证。在这部分，笔者还对劳动者的违纪责任和违约责任之关系进行了专门清理，指出在《劳动法》背景下劳动者违纪责任与违约责任是竞合的，而《劳动合同法》则相当程度上促进了劳动者违纪责任与违约责任的分化。在此基础上，笔者结合劳动法基本理论，揭示出劳动者的违纪责任和违约责任之间存在的实质性区别。

第五章将劳动规章制度置于司法背景下，专门关注劳动规章制度的司法适用问题。根据最高人民法院司法解释规定，劳动规章制度不但可以作为劳动者日常行为规范而存在，在司法过程中还可以作为裁判规范得以适用。在本章的开始，笔者首先从司法的法律渊源角度入手，分析劳动规章制度在司法实践中的地位，指出它是特殊性质的民间法，依法制定的劳动规章制度可以作为法院审理劳动争议案件的裁判依据。其次，笔者专门探讨了劳动规章制度司法适用的基本理论，包括劳动规章制度司法适用的涵义、实现方式和实践争议，进而指出劳动规章制度作为司法裁判依据具有正当性。然后，笔者关注了司法适用中劳动规章制度的法院解释问题，指出法院解释是对劳动规章制度法律效力的限制，法院在解释过程中应当正确地适用格式条款解释规则。在本章的最后，着重探讨司法适用中劳动规章制度的司法审查问题，逐一分析了劳动规章制度司法审查的涵义、司法审查的一般范围和具体范围、审查过程中的司法自由裁量权等具体问题。

**关键词：**劳动规章；法律性质；基本类型；法律效力；司法适用

## ABSTRACT

Labor rules and regulations is a general term of documented rules and systems which can exert legal effect over the employment units and laborers. It is formulated by employment units on the basis of the decision-making power under the principles and spirit of national laws and regulations in order to regulate the employment units' employment practices and laborers' labor practices. Labor rules and regulations, labor contract and collective agreement are important labor norms for setting up rights and obligations between labor relation parties, and they are also effective methods for coordinating labor relations. In practice, employment unit's labor rules and regulations is a kind of behavioral norms which exert such significant impact on rights and obligations between labor and management that it is a necessary system for employment units to organize social labor. On one hand, institution and perfection of labor rules and regulations is a basic duty for employment units and institutional guarantee to ensure that laborers can enjoy their rights and carry out their obligations. On the other hand, modern industrial labor is characterized as collective labor. For the purpose of organizing diverse laborers' labor in coordination and ensuring the labor efficiency and quality of products and services, the application of labor rules and regulations is necessary to modern collective labor. Therefore, in modern society, labor rules and regulations in every employment unit is not only of great importance to this employment unit, but also exerts profound influence to the development of society.

In China's traditional planned economy period, national administrative system takes employment units as its parts, and labor relations became the extension of administrative relations. Labor rules and regulations used at that time were called Internal Working Rules; substantially it is some kind of administrative regulation on labor law. During this period, labor discipline, which is part of labor rules and regulations, was laid much emphasis, and the functions of labor rules and regulations



in ensuring labor condition was weakened. It paid too much attention to labor obligation, while neglects the rights and interests of laborers. As a result, the labor right didn't correspond with labor obligation as a whole. In the middle of and late 1990s, for the purpose of improving the quality of national economy and facing the challenges of global economy development in new century, Chinese government put forward the policy to carry out reform of state-owned enterprises and develop the non-public sectors of the economy, which influenced labor relations in society deeply and profoundly. With the accomplishment of state-owned enterprises reform and development of the non-public sectors of the economy, society has accumulated profound economy basis. While we realized the enterprises' interests and economic development, the problem of protecting laborers' rights and interests become serious and outstanding. During the time of reform, a lot of employment units have acquired decision-making power in management and production, and possessed independent power on formulating and implementing labor rules and regulations. Nevertheless, many employment units abused labor rules and regulations to get illegal benefits for themselves, and trespassed laborers' rights and interests widely. This situation directly contributed to the promulgation and implementation of Labor Contract Law in China. To meet the requirements of labor relation developments under the new situation, this law improved and perfected related provisions in several aspects such as main content, formulation and revision procedures on the basis of the original stipulations in Labor Law.

The improvement and perfection on the existing labor legislation promoted the application of labor rules and regulations in labor and employment practice of employment units. In practice, labor rules and regulations is so indispensable in labor organization and management for employment units that if they formulate and implement it reasonably, it will help to organize labor process effectively, improve labor efficiency and protect harmony of labor relations. Otherwise, if employment units formulate and implement it reasonably, it will infringe or threaten laborers' rights and interest and invoke many labor disputes and conflicts. For this reason, the

issue of labor rules and regulations in employment unit is of great value for us to investigate.

Nevertheless, inconsistent with the importance of employment unit's labor rules and regulations in practice, the research on this field lies in marginal position among the labor law theory in China for many reasons. With the transition of labor relations in China, labor rules and regulations have aroused lots of disputes in labor practice, and theoretical circle gradually began to pay attention to this issue. But till now, the research on labor rules and regulations is still weak, and many significant theoretical problems still need in-depth exploration. In order to better the situation, the author tries to apply fundamental principle of labor law to explore the main issues of employment unit's labor rules and regulations from the perspective of protection of laborers' benefits in this dissertation. Many analytical approaches, mainly include comparison analysis approach, type analysis approach and positive analysis approach, were employed to deepen the discussion. What is discussed involves the legal nature, fundamental categories, formation and revision procedure, legal effect and judicial application of labor rules and regulations.

Besides the preface and conclusion, this dissertation is divided into five parts as follows:

Chapter One mainly discusses the legal nature of labor rules and regulations and figures out its legal nature. The main theories on legal nature of labor rules and regulations involve *Theory of Legal Norms*, *Theory of Contract*, *Theory of Collective Agreement* and *Theory of Dichotomy in Content*. Firstly, the author tries to describe the fundamental viewpoints of these main theories, make clear the branching theories involved in above four main theories. On this basis, the author evaluates analyses these theories from the perspective of jurisprudential theory with the combination of labor legislation and judicial practice. The second part of this chapter discusses the legal nature of labor rules and regulation under the existing labor law in China. It analyses the legislation on labor rules and regulations under the positive law level, points out that Labor Contract Law has invested labor rules and regulations with some

nature of contract. Furthermore, the author applies *Theory of Contract* to revise traditional *Theory of Legal Norms*, proves that indicates that the legal nature of labor rules and regulations under existing labor law is standardized labor contract.

Following the analysis of legal nature on labor rules and regulations in Chapter One, Chapter Two focuses on sort research on labor rules and regulations to deepen our understanding on it from the perspective of category. Labor rules and regulations is a flexible concept in labor law theory, legal norms can't cover its contents. It's necessary to carry out sort research on labor rules and regulations with the combination of labor practices. In this chapter, the author firstly tries to criticize the existing classifications which were maintained by the circle of labor legislation and research, sets up the content and function of labor rules and regulations as classification basis. Under this classification basis, labor rules and regulations can be categorized into three types, which are *Labor-condition Type*, *Discipline - rewards and punishment Type* and *Procedural Management Type*. After defining these main types, the author investigates them respectively, reveals the main points of employment units' labor management which were reflected by their labor rules and regulations and analyses the possible problems in some types of them.

Chapter Three carries out the procedural study on formation and revision of labor rules and regulations. At first, this chapter makes clear the nature of formulation power and revision power on labor rules and regulations. The author firstly explores laborers participation system, which was the main manifestation of industrial democracy in practice, and reveals the forms and nature of this system. Furthermore, the author analyses the *Unilateral Decision-making Power* and *Bilateral Decision-making Power* in the formation and revision of labor rules and regulations, indicates that *Bilateral Decision-making System* is the highest level of labor participation in practice. The consultation on the basis of equality, which was stipulated in Labor Contract Law in China, is not *Bilateral Decision-making System* in nature. In order to avoid unnecessary confusion, the author especially distinguishes the collective bargaining and collective negotiation. At the final part of this chapter, the author

reviews the debates on the *Unilateral Decision-making Power* and *Bilateral Decision-making Power* in the legislation process of Labor Contract Law in China, holds that despite the existing law defines the power of making labor rules and regulations as *Unilateral Decision-making Power*, it also exerts considerable restrictions over it, this power can change into *Bilateral Decision-making Power* in the future. Using the experience of other developed countries for reference, the transition of *Unilateral Decision-making Power* to *Bilateral Decision-making Power* is a necessary routine for development of formulating procedure in labor legislation in China. Then this chapter focuses on the formulating procedure, after giving a brief account of the evolution of labor legislation in China, it analyses the formulating procedure of labor rules and regulations in detail. Afterwards, this chapter especially investigates the issue of unfavorable revision to labor rules and regulations, it discusses the contents which cover the necessity of revision, the standards of reasonable revision and the legal consequences of revision. At the final part, the author specially evaluates several provisions in the existing legislation and points out their defects and puts forward corresponding improvement recommendations.

Chapter Four tries to make clear the legal effect of labor rules and regulations. In practice, rules regulating labor relations consist of labor standard, collective agreement, labor contract and labor rules and regulations, and the latter three are labor rules of autonomy, and the relations in legal effect among them will exert much influence to their application. In this chapter, the author discusses the legal effect of labor rules and regulations in three aspects, that is, the relations in legal effect between labor contract and labor rules and regulations, the relations in legal effect between collective contract and labor rules and regulations, employment units' punitive power. First of all, the author explores the relations in legal effect between labor contract and labor rules and regulations, and analyses the diverse arguments on this topic in theoretical circle. The author advocates that the preference of labor contract over labor rules and regulations in legal effect should become general principle and "*the principle of preference*" should act as supplementary to it. Secondly,

the author carries out the analysis of the relations in legal effect between collective contract and labor rules and regulations from the perspective of collective contract regulating labor rules and regulations. After investigating the legal effect of collective contract, the author indicates that the resemblance of functions, procedures and contents between collective contract and labor rules and regulations will likely cause legal effect confliction between them. Then, from the perspectives of the direct application of collective contract to labor rules and regulations and the work rule articles in collective contract, the author discusses the direct regulation of collective contract to labor rules and regulations. Afterwards, the author analyses the indirect regulation of collective contract on labor rules and regulations on the basis of reflection on traditional thoughts, and makes up the theoretical foundation on the indirect regulation of collective contract on labor rules and regulations. In practice, employment units' punitive power is the highest embodiment of legal effect of labor rules and regulations. Finally, the author especially explores employment units' punitive power, and proposes that labor rules and regulations is main rules regulating employment units' punitive power. In this part, the author also makes clear the relations between laborer's disciplinary responsibility and responsibility for breach of contract, indicates their coincidence under Labor Law and differentiation under Labor Contract Law.

Chapter Five attempts to put labor rules and regulations under judicial background and examines the application of labor rules and regulations in judicial practice. According to the judicial interpretation issued by the Supreme People's Court, labor rules and regulations can not only act as regular code of conduct, but also judicial norm in judicial practice. At the first part of this chapter, the author analyses the status of labor rules and regulations in judicial practices from the perspective of source of law in justice, points out that it is some kind of special folk law, and labor rules and regulations legally formulated can be used as the basis of judicial judge in the trial of labor disputes. Secondly, the author discusses the fundamental theory of labor rules and regulations in judicial application, which covers the meaning, way of

realization, and controversies in practice, and points out that it is legitimate for labor rules and regulations to be judicial norm. At the same time, the author pays attention to the interpretation of courts in the application of labor rules and regulations, and indicates that the explanation of courts makes up the restriction to the legal effect of labor rules and regulations and the courts should implement the interpretation rule of standard clause in a reasonable way. In the final part of this chapter, the author investigates the issue of judicial review on labor rules and regulations in judicial practice, including many specific problems such as the meaning of judicial review, general and specific scopes in judicial review, discretion of judge of judicial review.

**Key Words:** Labor Rules and Regulations; Legal Nature; Fundamental Categories; Legal Effect; Judicial Application

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