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Non-Discrimination Clauses in Employment Contracts: A Study on the Private Law Mechanism for Protecting the Labor Rights of Gender-Diverse Employees in China

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Abstract. In China's workplace, lesbian, gay, bisexual, transgender and queer or questioning (LGBTQ+) employees frequently suffer from implicit and indirect discrimination based on sexual orientation and gender identity (SOGI). The current public law system lacks clear anti-discrimination provisions and effective protection mechanisms, leaving this group in a legally vulnerable position. This study focuses on the supplementary role of private law mechanisms, including non-discrimination clauses in employment contracts and corporate internal rules. It clarifies the legal binding force of SOGI anti-discrimination clauses, explains the horizontal effect of fundamental rights and the application of the equality principle in labor relations, and analyzes the practical dilemmas of small and medium-sized enterprises. It further constructs a compliance system embedded with environmental, social and governance (ESG) concepts to improve contract clauses, internal complaint mechanisms and judicial identification rules. The study concludes that private law arrangements can remedy the insufficiency of public law protection, and that a standardized, enforceable and judicially recognized private law system can safeguard the equal employment rights of gender-diverse employees.

Keywords: gender inclusion, rights of sexual minority employees, equal rights, private law protection mechanism

1. Introduction

In China, the labor rights of gender-diverse employees are a complex issue, influenced by legal frameworks, social attitudes, and cultural background. Currently, China does not have clear laws prohibiting harassment based on sexual orientation in employment, education, or public services [1]. Although the Constitution guarantees equality, there is still no comprehensive anti-discrimination legislation covering lesbian, gay, bisexual, transgender and queer or questioning (LGBTQ+) individuals; for example, labor law prohibits discrimination in recruitment and employment, but due to the lack of explicit protections, enforcement regarding sexual orientation remains weak [2]. Many companies lack policies addressing sexual orientation harassment, leaving employees in a vulnerable position. Some multinational companies operating in China have adopted inclusive policies, but local enterprises often lag behind. In this context, gender-diverse employees in the modern

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workplace face hidden discrimination and, unable to seek effective protection under the existing legal framework, find themselves in a disadvantaged position.

When the protection provided by public law is limited, how private law agreements within enterprises can play a complementary role is the focus of this study. First, it examines whether non-discrimination clauses and gender inclusion commitments in employment contracts can produce private law effects; second, how fundamental rights such as constitutional equality can permeate labor relations through private law principles and contract rules; third, the effectiveness of the enterprise's internal private law autonomy systems, such as clauses in employment contracts, employee handbooks, and internal disciplinary and complaint mechanisms.

This article focuses on corporate self-discipline and civil contracts, and does not involve grand political narratives. It will first raise questions, then explain the theory, analyze the current situation, and finally develop rules to improve remedy pathways. Ultimately, it aims to form a private law protection system for labor rights of employees of diverse genders that is grounded in Chinese practice, operable, and capable of judicial implementation.

2. The conflict and balance between freedom of contract and the right to equality

2.1. The nature of non-discrimination clauses in employment contracts

To give full play to the complementary role of privately issued agreements within enterprises, it is of great significance to explore whether such clauses are considered aspirational statements (moral slogans) or legally binding contractual obligations. Non-discrimination clauses in employment contracts, such as statements like 'advocate equality' or 'oppose discrimination,' do not necessarily have legal effect because they may simply be moral slogans, that is, aspirational statements, which prevent employees from claiming remedies for breach. Contractual obligations, on the other hand, are legally binding; once violated by the enterprise, it constitutes a breach, allowing employees to seek remedies through breach of contract liability.

2.1.1. Distinction between initiative statements and contractual obligations

There are significant differences between declaratory statements of initiative and contractual obligations in terms of legal binding force, content nature, responsibility consequences, legal basis, performance methods, and intended purpose. The core distinction lies in whether a clause contains definite rights and obligations, enforceability, and an intention to be legally bound. Statements that only convey moral guidance without specific behavioral requirements are considered declaratory statements of initiative. Provisions that explicitly prohibit certain discriminatory behaviors, establish obligations for the company, and can have their fulfillment judged by objective standards should be recognized as contractual obligations.

2.1.2. Criteria for determining the binding force of non-discrimination clauses

The content of the non-discrimination clause is clear, explicitly setting out the preset discriminatory scenarios and types, as well as the company's anti-discrimination obligations and other enforceable content; furthermore, its content is highly aligned with the principles of fairness and good faith in the Civil Code, providing a legal basis; employees can seek legal remedies based on this clause; therefore, it is a binding clause.

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2.2. The private law effect of fundamental rights

2.2.1. The applicable logic of the third-party effect of fundamental rights

After it is clarified that the non-discrimination clause has private law binding force, the legitimacy of this binding force is based on the private law effect of fundamental rights and their specific application in labor relations.

The third-party effect of fundamental rights (Drittwirkung) concerns whether fundamental rights, such as equality, are not only binding on the state in its relationship with individuals (vertical effect), but also have implications for relationships between private parties (horizontal effect). This concept originated from the German language [3]. The controversy over direct effect and indirect effect concerns whether fundamental rights can be directly applied to private relationships, and how their effect can be realized [4]. The theory of direct effect holds that fundamental rights can be directly used as a basis for judgment; the theory of indirect effect, on the other hand, believes that fundamental rights need to be applied indirectly through general clauses and basic principles in private law. In practice, the realization of the third-party effect of fundamental rights on private law relationships needs to be achieved through methods of legal interpretation, such as purposive interpretation and systematic interpretation.

2.2.2. The penetration of the principle of equality in the Civil Code into labor relations

Based on the applicability of the third-party effect of fundamental rights and the principle of equality established in China's Civil Code, methods are provided for embedding the right to equality into labor relations, which can be used to address issues of discrimination. Employment contracts are civil contracts and are regulated by the Civil Code. China's Civil Code clearly stipulates that citizens' civil rights capacity is equally applicable to all, providing a legal basis for equal employment rights. In workplace relationships, employers and employees establish their rights and obligations through contracts. The principle of equality requires that both parties maintain equal status during the formation and performance of contracts, and that the fairness of the contract is not affected by any discriminatory factors. Moreover, the principle of equality can be incorporated into labor relations through anti-discrimination principles. In practice, when other specific laws and regulations are lacking, the courts can invoke the principle of equality as a basis for judgment.

2.3. Corporate governance logic

2.3.1. Diversity and gender protection and their relevance to the long-term interests of enterprises

Ensuring the protection of employees of diverse genders not only fulfills social obligations but also aligns with the long-term economic interests of the company, promoting the adoption of various policies. The implementation of these policies is related to improving job satisfaction, productivity, retention rates, and the overall well-being of all employees. First, gender diversity protection policies can help companies or employers attract talent and increase employee retention; second, diversified teams bring different perspectives, enhancing product innovation and decision-making diversity; third, creating an inclusive corporate culture and image increases social recognition; and finally, it helps avoid judicial and administrative disputes, protecting the company's social reputation and reducing economic losses [5].

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2.3.2. The enterprise anti-discrimination obligation under private law autonomy

The anti-discrimination obligations of enterprises under private autonomy reflect the dynamic interaction between the freedom of contract and the necessity to protect fundamental rights. Private autonomy is a core principle of civil law, emphasizing individual free will in civil relations. However, the introduction of anti-discrimination obligations challenges this principle. Although enterprises enjoy considerable freedom in organizing private relations, this autonomy is increasingly restricted by the principle of equality enforced through statutory law, judicial oversight, and evolving social expectations. The Chinese Civil Code stipulates that the exercise of private autonomy must not violate mandatory legal provisions or infringe upon the legitimate rights and interests of others. The right to equal employment is a fundamental right of workers, and its violation constitutes discrimination and a breach of mandatory legal measures. While such provisions may seem to undermine the right to equality (requiring enterprises not to discriminate based on certain factors such as race or gender in contractual relations), they actually arise from social expectations, demands, and the long-term economic interests of enterprises. Therefore, how enterprises balance judicial autonomy and the protection of fundamental rights is key to their long-term survival and development [6].

3. Gender inclusion provisions in the company employee handbook

3.1. Analysis of typical clauses

Sexual orientation and gender identity (SOGI) related treatment in labor contracts refers to unfair or unequal treatment of employees based on their sexual orientation, gender identity, or gender expression within the context of employment agreements and practices. In the field of labor law, the standard wording of SOGI anti-discrimination clauses needs to clearly define the scope of prohibited discrimination, the applicable subjects, and specific legal protection measures. Article 1 makes it operable by specifying applicable scenarios and prohibited behaviors, distinguishing it from vague moral declarations. It even draws on legislative models such as the Civil Code of the People's Republic of China and the Labor Law [7].

Such clauses need to transform abstract anti-discrimination commitments into concrete behavioral rules and remedies: First, the clause needs to clarify the applicable subjects and scope. Definitions of sexual orientation and gender identity should be specified to ensure coverage of all relevant groups. For example, gender identity includes but is not limited to male, female, non-binary, etc. In addition to recruitment, hiring, promotion, training, compensation, benefits, and dismissal, the scope should cover all employment relationships. The second element is the scope of prohibited discrimination, divided into direct discrimination (explicit discriminatory acts based on sexual orientation or gender identity) and indirect discrimination (policies or measures that appear neutral but actually adversely affect specific groups), as well as any sexual harassment or creation of a hostile work environment. Finally, specific legal protection procedures should be clarified. For example, when an employee experiences harassment, they can anonymously file a complaint through human resources, reporting mailboxes, or unions. After receiving the complaint, the organization should initiate an independent investigation, make a resolution within the statutory period, and strictly keep the information of both the complainant and the respondent confidential. Verified harassment behaviors will be punished in accordance with regulations, and any damages caused will be held accountable according to the law.

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3.2. Institutional spillover effect

The internal disciplinary mechanism of a company is a core component of the anti-harassment system and can effectively curb workplace discrimination, especially more systematic and persistent verbal or behavioral bullying. This mechanism includes verbal or behavioral bullying against sexual minority employees within the scope of disciplinary actions and clearly defines graduated punishment measures, which have a deterrent effect beforehand. For discrimination that has already occurred, the internal disciplinary mechanism can hold the responsible parties accountable, educate and discipline the perpetrators, while also serving as a warning to other employees. For minor verbal bullying, warnings can be issued; at the same time, the public implementation of the disciplinary mechanism can foster a more inclusive and open corporate culture, fundamentally preventing the occurrence of bullying.

A neutral complaint mechanism can significantly enhance the effectiveness of protections for employees of diverse genders. Anonymous complaint channels reduce employees' concerns about retaliation and increase their willingness to file complaints; by establishing independent investigation bodies or third-party agencies, their independent investigative procedures eliminate departmental interference and personal relations, avoiding unfairness in the complaint handling process caused by internal relationships; an efficient complaint mechanism can quickly handle complaints and provide feedback on results, enabling timely intervention and preventing the situation from worsening; during the complaint handling process, the company should strictly keep the complaint content and related information confidential to prevent employees from facing discrimination or retaliation from colleagues or supervisors due to filing a complaint. Practice has shown that a well-established complaint mechanism can serve as a supplement to public law remedies.

3.3. Faults in Chinese practice

3.3.1. Legislation 'one-size-fits-all' and mismatch in enterprise size

In practice in China, many domestic small and medium-sized enterprises (SMEs) have employment contracts that lack micro-level protective clauses against sexual harassment, mainly due to the mismatch between the uniformity of legal regulations and the actual capacity of enterprises, as well as the imbalance between costs and benefits. The contradiction between uniform legal obligations and differences in enterprise size: Current laws such as the Law on the Protection of Women's Rights and Interests and the Civil Code adopt a uniform approach to the employer's obligations to prevent sexual harassment, without differentiating according to enterprise size. However, enterprises of different sizes have significant differences in terms of funding, technology, and talent. Applying the same rigid rules to SMEs often appears unreasonable and difficult to implement; for SMEs, fulfilling strict obligations to prevent and control sexual harassment incurs high costs, which are disproportionate to the direct economic benefits they obtain, resulting in a lack of institutional incentives. Smaller enterprises have limited human resources, making it difficult to hire professional investigators and to bear the time costs required to handle such incidents. If complex and detailed investigation procedures are established, it may seriously affect the normal operation and development of the enterprise [8].

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3.3.2. Lack of industry guidance and cognitive bias

China has not yet introduced model texts and operational guidelines for gender inclusion clauses aimed at small and medium-sized enterprises, resulting in managers lacking specific operational guidance and directly referable templates, making them prone to cognitive misunderstandings. The legal awareness of small and medium-sized enterprises is generally weak, and there is insufficient understanding of obligations such as labor law regulations against sexual harassment. Therefore, most managers do not pay attention to this issue and consider it not a core matter of labor relations, thereby neglecting related protection clauses in employment contracts. At present, China has not established a legal system that grades the obligations of preventing and addressing sexual harassment based on the number of employees. In contrast, foreign legislation (such as the U.S. Civil Rights Act or relevant provisions in civil law jurisdictions like Japan) often uses the number of employees as a dividing line for the applicable obligations, exempting micro-enterprises from some of the more burdensome procedural duties. The lack of domestic legislation leads small and medium-sized enterprises, when facing uniform legal requirements, to often choose to omit related micro-level protection clauses in contracts to avoid potential compliance risks and management burdens [9].

4. Conversion of liability for breach of contract and burden of proof

4.1. Breach remedy pathway

If an enterprise violates its non-discrimination commitments in its handbook or labor contract, since the non-discrimination clauses are binding on the employer, employees can claim breach of contract damages according to the law. If the employer treats employees differently, harasses, or excludes them based on gender, it constitutes a breach of contract, and employees have the right to claim compensation for financial losses and mental damages.

According to the application of continued performance and remedial measures, employees may request the enterprise to stop discriminatory behavior, eliminate its impact, and restore promotion or position benefits. The court may, based on the Contract Law and the principle of equality in the Civil Code, order the employer to take remedial measures such as conducting internal investigations, intervening promptly, stopping discrimination, and protecting employee privacy.

4.2. Allocation of the burden of proof

Under the framework of private law, workers need to initially prove the existence of sexual harassment, and employers need to provide reasonable grounds to show that their actions are unrelated to sexual orientation or gender identity. Companies need to use internal evaluation records and investigation reports to identify discriminatory behavior.

Workers should not bear excessive burdens of proof due to their disadvantaged position. After workers complete the initial burden of proof, the burden of proof shifts to the employer. The employer must prove that their actions are based on legitimate, reasonable, and non-discriminatory reasons, such as work ability, job requirements, and business needs, and are unrelated to gender identity. If the employer cannot provide a reasonable explanation, discrimination is presumed to have occurred.

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4.3. Judicial stance

In relevant labor dispute cases in China, the courts refer to internal company rules and regulations to protect vulnerable employees. For example, in Hu Min Shen No. 1969 of 2023, the court explicitly used the publicly announced employee handbook and regulations of the company as the basis for judgment, recognizing their binding force on the employer and using this to protect workers' right to equal employment.

Relevant cases show that the courts have adopted a clear anti-discrimination stance in the protection of diverse gender rights, consistently upholding the position of protecting the vulnerable and maintaining equality, reflecting a judicial tendency to safeguard gender equality and diverse gender rights. Although China does not have cases related to LGBTQ sexual minority groups, the anti-discrimination stance of Chinese courts is still likely to favor the protection of vulnerable and minority groups in the future.

5. Building a workplace compliance system based on ESG dimensions

5.1. Improve the contract sample text

To achieve stability at the level of private law, gender inclusion clauses should be transformed from moral advocacy into normative structures with private law binding force. Companies can strengthen the binding power of clauses or internal rules through contract attachments, incorporation into employee handbooks, and clear public disclosure; on the other hand, companies should optimize the text to make obligations and responsibilities clear, and remedies clear.

5.2. Internal complaint and dispute resolution mechanism

The design of anonymous complaint and third-party investigation systems can provide confidential and prompt remedies, serving as a preliminary protection for public law remedies; at the same time, clarifying the participation channels for unions and employee representatives as third-party supervisors enhances the fairness and efficiency of handling procedures, effectively reducing the cost for workers to safeguard their rights.

5.3. Sublimation from an ESG perspective

5.3.1. Gender inclusion as a core ESG evaluation metric

Under the environmental, social and governance (ESG) framework, gender inclusiveness, as a part of the S (social) dimension, is related to a company's governance effectiveness, long-term economic benefits, and corporate reputation [10]. It is gradually being recognized as an important indicator of corporate social responsibility, drawing more attention from investors, policymakers, and the general public to fairness and an inclusive culture within companies [11]. Incorporating gender diversity protection into ESG indicators can promote companies to improve internal systems, disclose governance information, and strengthen self-discipline, turning gender inclusiveness from a moral choice into a mandatory market compliance requirement. Promoting the ESG integration of gender inclusiveness essentially embeds equality rights protection into corporate governance logic, forming a long-term protection mechanism driven by the market and self-implementation [12].

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5.3.2. Promote the transformation of corporate rules into judicial hard constraints

With the application of ESG indicators in the protection of gender diversity within enterprises, it promotes judicial recognition of such corporate regulations. When individuals of diverse genders are employed as senior managers or directors, they are more likely to formulate inclusive policies and disclose information, making gender inclusion a widely accepted governance standard [13]. Courts, when handling labor dispute cases, are more willing to consider the company's publicly disclosed gender inclusion and anti-discrimination clauses as binding contractual content, thereby supporting employees in asserting claims for breach of contract remedies, protection of personal rights, or requests for equal treatment based on internal rules [14].

The inclusion of gender inclusivity and diversity metrics can drive corporate responsibility towards 'hard law,' providing the judicial system with more specific evaluation criteria. This allows corporate self-regulatory rules to shift from advocacy slogans to legally binding bases for judgment; at the same time, in the absence of dedicated anti-discrimination legislation, ESG governance and private law autonomy can help build a judicially recognizable path for gender diversity protection [15].

6. Conclusion

This article analyzes the private law protection of labor rights for employees of diverse genders: SOGI non-discrimination clauses in employment contracts and employee manuals are not merely moral initiatives. Under the conditions of clear content, public disclosure, and compliance with public order and good customs, they have contractual binding force and can serve as a basis for workers to assert their rights; the third-party effect of fundamental rights and the principle of equality in the Civil Code can provide a legitimacy basis for private law protection. The right to equality, through contractual rules and judicial application, extends to labor relations, filling gaps in public law protection; the ESG governance concept can serve as a key driving force, transforming gender inclusiveness from a voluntary corporate choice into a market compliance requirement, and increasing the judicial recognition of internal rules.

The theoretical significance of this study lies in combining the private law effect of fundamental rights, the principle of contractual equality, and ESG governance, thereby expanding the normative application space of labor equality rights; its practical significance lies in providing enterprises with low-cost, operable solutions, offering clear criteria for judicial judgments, and giving vulnerable workers defined paths to defend their rights, helping to promote the construction of a more inclusive workplace environment.

This study still has certain limitations: the research focuses mainly on private law norms and internal corporate rules, without in-depth discussion of cross-departmental legal coordination or specialized anti-discrimination legislation; limited by the number of publicly available cases, empirical judicial analysis on SOGI discrimination needs further expansion. Future research should continue to explore detailed private law clauses and the collaborative protection in corporate law, among other aspects.

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