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## **THE PANDEMIC AND THE PLATFORM: REGULATING THE « WORKPLACE » AFTER COVID-19**

Since the the start of the COVID-19 pandemic, many gig companies continue to have dominance in their respective industries. Companies like Uber, Lyft, Handy, TaskRabbit and DoorDash formed the pre-Pandemic generation of the « gig economy », thorough internet apps that distributed workers classified as « independent contractors » to provide services to their customers. Several of those companies have been hauled into court and before regulatory bodies for failure to afford their workers the legal rights to which all other employees are entitled, such as minimum wage, workers' compensation, and safety protections.

In this Article, I examine the of the state of the gig economy in the latter half of 2023, which is marked by the normalizing stage of the pandemic which saw many workers returning to the typical work locations they occupied before the pandemic. Here, I argue that the gig economy of the pandemic has now gone through a transition because of the ubiquity of technology in the workplace. Now, the Platform is where many workers now participate in out of necessity and convenience. I use the term Platform here as a single virtual place for work, just as the term « workplace » is an eponym for the collection of work relationships between individuals in physical space.

While this Article focuses primarily on the platform economy in the United States and the European Union, the economy in the rest of the world is also changing due to three factors. First, there is a renewed interest among workers in many countries in collective action, strikes, and unionization. Second, there are growing demands on regulators, both from workers and unions, and the regulated themselves, to formalize the gig economy into the Platform economy. Finally, the changing and often ethereal location of the workplace after the COVID-19 Pandemic (« the bPandemic ») has led to an ever-growing number of workers who were not considered part of the gig economy, but who will be part of the institutionalized platform economy. These phenomena are present even while the governments at various levels move to regulate the platform economy, which will affect many more workers in the future.

### **I - THE SHIFT BROUGHT BY THE COVID-19 PANDEMIC**

The gig economy of today is marked by an informality that dates to well before the dawn of the internet or computers. The shape-up line for labor in the early

industrial age has been replaced today with day laborer gatherings on street corners in cities such as Las Vegas, Los Angeles, and El Paso, Texas.

Today, the gig economy is associated with technological platforms and a labor model that eschews the legal model of employment in favor of a regulatory arbitrage that avoids liabilities in wages, taxes and litigation.

## II - UNITED STATES: THE MOVE TOWARD A NEW CATEGORY OF WORKERS

In the United States, much of the focus is centered in California, which has seen large scale regulatory shifts through state Supreme Court decisions, legislation, a popular ballot initiative, and resultant litigation about the constitutionality of the ballot initiative. Some other states will look to the outcomes in California as a positive or negative model, but the actual outcomes will have little impact on how other states or the federal government regulate the gig economy. Instead, much enforcement of United States federal laws will be based on the standards applied by agencies such as the National Labor Relations Board and the Department of Labor<sup>1</sup>. These new rules will be the source of comment and litigation in the coming year, and it will be some years before the United State Supreme Court will resolve whether the agencies' rules will be upheld or not.

Because there will be no federal legislation at the federal level with the current political divide in government, there is no need to go through the possibilities for legislation at this time. As in many areas, the action will mostly be in the states. Besides California, the most salient of these is in the State of Washington in the northwestern United States<sup>2</sup>. This is an example of a statewide rule that aims to ensure that workers will be treated as independent contractors, rather than employees<sup>3</sup>. As with Proposition 22, however, the Platform companies are required to ensure some minimum standards to workers. The trouble will be the gaps or margin between the standards for employees and those provided to Platform workers.

## III - EUROPEAN UNION: AN EMPHASIS ON CATEGORIES AND TRANSPARENCY

Most of the recent activity has been at the international level, or in state governments in the United States. Even early on in the Pandemic, the International Labour Organization in a 2021 report concluded that « it is safe to assume that gig work is here in the long run », especially for young people on crowd-working platforms<sup>4</sup>. In partial response to these trends, the European Commission in 2021

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1 See R. Rainey, « Labor Department Moves to Change Independent Contractor Classification Rule » (3), Bloomberg Law (Oct. 11, 2022).

2 See Transportation Network Companies Act of 2022, H.B. 2076, 67<sup>th</sup> Leg. (2022-2023).

3 See Washington State Passes Contentious Gig Worker Bill Supported by Uber Lyft that Cements Independent Contractor Status, Business & Human Rights Resource Center (April 8, 2022).

4 See L. pinedo Caro *et al.*, « Young People and the Gig Economy », Report, *International Labour Organization* (38) (May 7, 2021).

proposed a Directive on improving working conditions in platform work. The Directive sets a presumption that a technological platform « employs » a worker if two of five of criteria are met.

The criteria in the Directive were: 1) the platform operator determines the amount of remuneration or the maximum of remuneration; 2) the platform worker is required to adhere to specific rules with regard to appearance or conduct; 3) the platform operator supervises the performance of work or controls the quality of the results with regard to appearance or conduct; 3) the platform operator restricts, also by means of sanctions, the freedom of the platform worker to organize one's work in particular, the freedom to arrange one's working hours or substitution; and 5) the platform operator restricts the platform worker's ability to build up a client base or to perform work for any third party<sup>5</sup>. If the presumption applies, the employer can rebut the finding that the worker is an employee by carrying the burden that two or more of the factors are not present in their case.

After a period of consultation and negotiation, leaders in the European Parliament reached an agreement that eschewed the five factors in favor of an approach that allowed each EU member state to determine what is fair. This suggests that the platform companies, seeing the experience of many other multi-factor tests, were successful in making sure that the realities of many workers on the ground would not be applied into the factors of the proposed directive, and more frequently than not leading to the workers being found to be employees.

The Commission sought to ensure the correct classification of platform workers, as well as to improve the enforcement and transparency of gig worker determinations. The estimates of the number of workers affected by this regulation in the gig economy in the European Union, now approximately 28 million, is expected to reach 43 million by 2025. The European Commission estimates that nearly 20 percent of those workers may be misclassified<sup>6</sup>.

The Directive assumes that the technology that Platform companies use can be employed to improve the enforcement of labor rights. At the same time, the Directive requires that employers monitor compliance with the Directive with humans, rather than thorough artificial intelligence. With full transparency of data, in theory, the problem of misclassification should be avoided. Because the Directive has yet to take effect in most countries, it is early to determine whether the Directive will have an appreciable impact on the classification of workers.

#### IV - THREE GLOBAL PHENOMENA GOING FORWARD

The movement toward the EU Directive and changes at the federal and state levels in the United States occur as three phenomena take place throughout the global economy. First, there has been a growing movement toward collective organization and strikes in some unique contexts, such as at Starbucks Coffee and Amazon Warehouse. Then, there have been several industrial actions in the United

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5 See European Commission, Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work (2021).

6 See European Commission, Fact Sheet, The European Pillar of Social Rights Action Plan.

Kingdom resulting from workers' concerns over the high cost of living. These activities stem from the frustration of many workers, on platforms and otherwise, who have not been seeing the gains that they had hoped after the general recovery of the U.S. economy.

Second, in the pandemic, the amount of control that companies have over platform workers increased in myriad ways. Surveillance technology companies have rapidly swooped into the workspace to monitor worker productivity and control work time. Thus, the location of the « workplace » becomes the platform, and that is where more and more workers spend most of their time. Academics are just one of many examples, where online or Zoom teaching has become the norm for countless professors, and virtual conferences and lectures have replaced the traditional in-person meetings. Academic workers, then, are now on the Platform, and are more likely to be working in contingent and remote assignments than they are to have the stability of a regular paycheck and benefits.

Finally, and in response to the growing risk of misclassification and the lack of social protection, as has been described above, regulators are taking a renewed interest in the Platform economy. Some of this is dependent on political change at the federal and state levels. Nonetheless, in many legislatures, the goal seems to be to create alternative structures that depend less on the employee classification for a certain package of employment rights. This was the approach in the City of Seattle, for example, when it passed an ordinance giving Platform workers the right to collectively bargain without the need for employee classification. In a limited form, the ordinance was upheld by the federal court of appeals for the Ninth Circuit<sup>7</sup>.

## Conclusion

The foregoing is a snapshot of several of the changes that have occurred over decades, but have moved at an even more rapid pace because of the Pandemic. As discussed, these changes are ongoing, but the trend is toward more workers finding themselves on the Platform for some period of their work life. As Proposition 22 and the law in the State of Washington show, states have seen the need for some minimum package of social benefits like minimum wage, collective bargaining or portable benefits for gig workers. The challenge for Platform workers and unions will be to ensure that their rights closely approximate what other employees off the Platform receive, whether or not they are labelled as « employees ».

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7 [See](#) Chamber of Commerce v. City of Seattle, U.S. Ninth Circuit Court of Appeals (May 11, 2018) (upholding the ordinance against an attack that it was preempted by the National Labor Relations Act).