

WorkLife 2.0

# Where do the platform workers stand? – Status and protection in Europe and the US

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## 1. Recent trends

Over the last 15 years the ongoing globalization and digitalization of many industries have created a new working environment. The global pandemic has accelerated that development even further as more and more businesses and operations are being digitalized.

As a consequence, the gig economy is constantly growing. A core element of this gig economy are companies that have established online platforms that allow demand and supply for certain services to meet. Based on these platforms, individuals (“crowdworkers” or “platform workers”) – as service providers – can offer and render their services to customers. The services rendered by those platform workers vary greatly and include tasks such as:

- designing websites
- software development
- driving
- management consulting
- care work
- product testing
- cleaning
- running errands
- rendering repair services
- delivery services

Recent surveys have also analyzed and noticed a shift in the demographic composition of the crowdworkers. These studies have shown that the assumption that crowdworking is mainly a field of activity for students looking for some additional income is no longer correct. For example, studies conducted in 2017 have shown that the average crowdworker in the U.S. was nearly 33 years old. Almost half of the crowdworkers were married or cohabiting and about 43% of the respondents of the respective surveys had children living in their household. The fact, that 37% of the respondents had a Bachelor’s degree and nearly 50% worked as an employee prior to beginning crowdwork, emphasizes the demographic shift and the diversity of this workforce.

## 2. Relevance in Europe and the US

The exact number of platform workers can only be estimated due to a lack of official data and the fact that platform workers may be registered and work

with several platform operators at the same time. Nevertheless, the growing (global) importance of the gig economy cannot be denied.

European and US markets are equally affected here, given the high degree of digitalization of the economies and their well trained and educated workforce. For example, 32 platform providers for various services exist in Germany, the biggest national economy in the European Union, alone and nearly 100,000 platform workers are registered at those platforms. An increasing number of traditional companies – such as auto manufacturers – make use of crowdworkers instead of traditional employees, in particular for R&D work.

Studies for the UK, Germany, The Netherlands, Portugal, Spain and Italy also show that crowdworking is becoming more important and continues to make up a growing portion of the labor workforce (with varying information about the exact number of crowdworkers in Europe).

The market for the platform economy is even bigger in the US, although authorities and researchers differ on certain aspects of participation in the gig economy due to the general lack of reporting and recordkeeping requirements for companies engaging platform workers. While figures vary, what is clear is that the proliferation of technology has led to a significant increase in platform economy participation in the US, as research has shown that approximately 70% to 75% of the estimated 55 million independent contractors in the US indicated that they find work through the use of technology such as online markets, gig economy websites and platform company applications.

## 3. Contractual status of platform workers

The contractual status of platform workers remains a critical question in various jurisdictions. Platform companies have traditionally qualified platform workers as independent workers or contractors but not as employees.

Surveys have shown that platform workers have also traditionally qualified themselves in that manner as it provides a substantial amount of freedom and flexibility on how / when and if at all certain assignments will be accepted. In an economic crisis or at least a downturn, however, platform workers may try to assert their status as employees more frequently as less opportunities for work can be found.

Examples can be found in numerous instances:

- The Federal Labor Court in Germany has recently ruled that a gig worker may be qualified as employee under certain circumstances. In this

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case, a worker was working for a platform company, checking the presentation of certain products at retail outlets and gas stations on behalf of various companies. In order to fulfil those contractual obligations, the platform company (the defendant in the case) contracted with platform workers, one of them being the plaintiff. The tasks of the plaintiff included taking photos of the presentation of goods and answer questions about the promotion of products. During an eleven-months period the crowdworker accepted and performed nearly 3,000 orders. In every single case the platform operator handed out detailed instructions. When the platform worker was denied further assignments, the worker sued to have his status as employee confirmed. The Federal Labor Court ruled in favor of the plaintiff. According to the press release the ruling was mainly based on an assessment of the contractual relationship between the worker and the platform operator and the actual implementation of this relationship. Along with the rather specific and detailed instructions for carrying out the various assignments, the Federal Labor Court put special emphasize on the fact that the compensation system of the platform operator created a system that incentivized the worker to take on multiple assignments at the same time to get access to bigger and better paid assignments. It remains to be seen whether this (somewhat new) aspect will continue to play a role in the classification assessment.

- In Italy, a worker of a food delivery platform operator in another landmark case brought to the tribunal of Palermo, was reclassified by the court as an employee. In this case, the court held that the algorithm behind the platform operator's app controlled, managed and issued quasi-disciplinary sanctions against the worker that had to be thus classified as an employee, irrespective of the will of the parties to classify him as contractor.
- In the UK, the UK Supreme Court has recently ruled in favor of two drivers of another platform company. The drivers claimed to have been misclassified as contractors. In this ruling, the court qualified them "workers". The platform company argued that the drivers were self-employed contractors who contracted directly with customers. The UK Supreme Court's decision was mainly based on the fact that it found that (based on the facts that existed at the relevant time), among other elements, (i) the drivers were not determining the fares for the rides on their own and that (ii) the platform company restricts communications between the driver and passenger in such way that drivers are

not free to develop individual relationships with customers.

- In the US, the Coronavirus Aid, Relief, and Economic Security Act implemented the Pandemic Unemployment Assistance program (the "PUA Program"), which sought to provide federal unemployment benefits to individuals unable to work as a result of the COVID-19 pandemic. While unemployment benefits in the US have historically been limited to out-of-work employees, the PUA Program also extended such benefits to independent contractors (including platform workers) who had experienced a significant decrease in work, in what many viewed as an implicit acknowledgement by the federal government of the breadth and pervasiveness of the gig economy in the US.
- In the State of California, in September 2019 legislators passed, and the governor signed into law, California Assembly Bill 5 ("AB5"), which acted to draft into the legislature a previous ruling by the California Supreme Court. AB5 would have resulted in California businesses being required to utilize a three-part "ABC test" in order to determine whether to classify its workers as employees or independent contractors. Under the ABC test, all of the following three requirements must be satisfied in order for a company to properly classify a worker as an independent contract: (1) the worker is free from the control and direction of the company in connection with the performance of the work, both under the contract for the performance of the work and in fact; (2) the worker performs work that is outside the usual course of the company's business; and (3) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed. The ABC test was widely viewed as setting a more exacting standard for companies than California's existing employee classification standards, although there was significant debate and ongoing litigation as to whether application of the ABC test would in fact require companies to classify their platform workers as employees. While there was optimism amongst certain interest groups connected to platform workers in California that it would do so, many others expressed skepticism in such an outcome given that the Commonwealth of Massachusetts had been utilizing a similar ABC test for nearly a decade and platform workers in Massachusetts continue to be classified as independent contractors. Before the application of AB5 to platform workers could be fully resolved in the California state judicial system, in November 2020 Californian voters voted in favor of a ballot

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measure called California Proposition 22 (“Proposition 22”). Proposition 22 effectively codified as California state law that a certain subset of platform workers (specifically application-based transportation (rideshare) and delivery drivers) would automatically be considered independent contractors that are not subject to application of the ABC test.

In addition, labor unions have traditionally been opposed to the concept of (contractor-based) platform work, in part due to the fact that it deprives them of new union members as contractors normally do not have the right to unionize. In light of this, unions are rather active in this area, trying to restrict the respective activities and seeking policy changes.

For example, ver.di (a major German labor union) has called for legislative measures in Germany and the EU in order to end “sham self-employment” in the gig-economy. Referring to AB5, to treat “independent contract” workers as employees, ver.di and other German labor unions have made clear that they will intensify their push for a change/legislative measures in Germany. Inter alia, ver.di proposes to shift the burden of proof whether or not a gig-worker is an employee, to the potential employer. In addition to that, crowdworking platforms should be mandated to pay social security contributions for any gig-worker they hire. The German Federal Ministry of Labor argues similarly and presented a [key issues paper](#) in November 2020, containing proposals for fair working conditions and a greater social protection in the platform economy. The paper includes, inter alia, the following proposals: (i) inclusion of platform workers in the social security systems, (ii) a shift of the burden of proof to the respective platform in litigation to clarify the status of workers and (iii) open up the possibility for platform workers to organize themselves and jointly negotiate basic conditions of their work with the platforms.

Labor unions and employer’ organizations are also involved at a European level. As of 24 February 2021, the European Commission has launched the first-stage consultation of the social partners for better protection for platform workers in the European Union. This first stage consultation could lead to negotiations among the labor unions and employer associations about this issue or – depending on the progress of such negotiations - further legislative action by the EU.

Also, in January 2021, the European Commission has published a so-called inception impact assessment that invites comments on the scope of allocation of the European Union competition law to collective bargaining for self-employed workers. The European Commission has identified that platform

work may introduce uncertainty regarding access to collective bargaining, given that competition law can be an obstacle for collectively bargaining to improve the situation of self-employed workers: While the Court of Justice of the European Union has recognized that collective bargaining between employers and employees is outside the scope of EU competition law, as employees do not qualify as undertakings under EU law, self-employed workers are considered undertakings. Therefore, any agreement between self-employed workers to negotiate collectively for better terms and conditions, in principle, would infringe Article 101 Treaty on the Functioning of the European Union (TFEU). In the inception impact assessment, the Commission has set out initial options to clarify that, provided that certain conditions are met, working conditions can be improved through collective bargaining agreements not only for employees but also for the self-employed contractors, in line with EU competition law. As of 5 March 2021, the European Commission launched a more detailed public consultation to gather further information about the current situation of self-employed workers and to identify the added value of EU actions in this regard. All stakeholders are invited to submit their views on the Commission’s consultation [website](#) until 29 May 2021. Subject to the outcome of the impact assessment, the adoption of an initiative is envisaged for the end of 2021.

In addition, on 21 April 2021 the European Commission proposed a draft regulation that intends to create for the first time a legal framework on AI. Should this draft be adopted as it is, it will have an impact on the platforms that will have to comply with extra regulatory requirements regarding the use of their algorithms. The draft regulation implies a better protection of gig workers, irrespective of their status (thus protecting the self-employed as well as the employees against algorithmic discrimination). Recitals of the draft directive go as far as exempting self-employed drivers, riders and other gig workers from having to comply themselves with the regulation. The latter should in principle not be considered users in the meaning of this draft legislation.

In the US, although the share of workers represented by a labor union has significantly decreased over the past few decades to its current level of approximately 10%, labor unions have been vocal critics of the current framework and implication of the gig economy for platform workers. As an example, in recent years, (i) California branches of the International Brotherhood of Teamsters aggressively lobbied for the enactment of AB5, and (ii) California branches of the Service Employees International Union have

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been party to various lawsuits seeking to overturn Proposition 22.

On a global level, the issue of classification of platform workers has also been identified by the International Labour Organization (ILO). According to a [report](#) published by ILO in February 2021, the gig economy has grown five times in the last decade, which, according to ILO, underlines the need for international dialogue and regulatory cooperation in order to ensure necessary protections and foster the growth of sustainable business more consistently.

#### **4. Implications of employee classification**

Being classified as an employee has numerous consequences in most European jurisdictions and in the US. This includes in particular that employee protection regulations apply which include the following:

- Anti-dismissal protection
- Sick pay, holiday benefits, leaves of absence
- Working time regulations
- Minimum wage
- Social security contributions (with a risk of criminal liability in the event of non-compliance)
- Eligibility for unemployment compensation and workers' compensation benefits
- Ability to participate in company-sponsored welfare benefit and retirement plans
- Ability to elect employee representatives (both at the level as well as on the board level) and to be elected to such representative bodies

Also, in case platform workers are wrongfully classified as contractors, there may even be criminal consequences.

In addition, under current US securities laws, employees are generally eligible to be granted awards under a company-sponsored equity incentive plan without having to meet certain accredited investor qualifications. This benefit has not historically been afforded to platform workers, which has acted to limit the tools by which companies can incentivize platform workers. However, in November 2020, the US Securities and Exchange Commission proposed rules that would permit companies to provide equity awards to their platform workers, at least on a limited basis.

#### **5. Consequences for platform operators**

The aforementioned circumstances show that companies engaging platform workers should

review and potentially modify their contractual terms and conditions with platform workers and the actual business practices in order to avoid a legal classification dispute.

This requires a review on a jurisdictional basis. However, local employment status tests are often quite similar to one another.

In many European jurisdictions, the aspects that are relevant to determine whether an individual is classified as an employee or as a freelancer or contractor are often quite similar even though local particularities need to be considered. Generally, whether or not somebody can be qualified as a contractor is often based on the level of flexibility and discretion a worker has in accepting assignments and how and when to carry out certain tasks. For example, in Germany, it is a significant indicator for an employment relationship if the worker lacks the freedom to self-determine the time and place of work. This lack of organizational flexibility in relation to the time and place of work typically leads to an integration of that worker into another organization which ultimately leads to the classification of the worker as a personally dependent employee. In contrast a contractor has the contractual freedom to mainly decide when, where and how he performs his or her duties (but the respective service contract may contain rather detailed provisions in that regard which can make it difficult to assess whether a contractor relationship can still be assumed). In addition, courts tend to take some additional aspects into account to determine the classification on a case-by-case basis.

At EU level, the above-mentioned legal initiative to regulate the use of AI, should be kept in mind. It might raise additional regulatory issues for platforms, irrespective of the status of their workers.

With respect to the US, whether an individual is classified as an employee or as a freelancer or contractor has historically been subject to facts and circumstances, with different tests often applied by different federal agencies, subject to stricter classification rules at the state level. However, there have been a number of actions that have occurred during the past few years that favor classifying platform workers as independent contractors rather than employees, which would also apply to states that do not have stricter protections in place. These include (i) proposed Department of Labor regulations that analysts widely expect would make it easier for employers to classify workers as independent contractors, (ii) a 2019 opinion letter issued by the Department of Labor (FLSA 2019-6) setting forth the position that service providers obtaining work from a virtual marketplace company (i.e., platform workers) are independent contractors for purposes of the Fair Labor Standards Act (which,

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among other things, governs federal minimum wage and overtime rules), (iii) an advice memorandum from the National Labor Relations Board concluding that drivers (and by extension, similarly situated platform workers) are independent contractors and therefore excluded from the rights afforded to employees under the National Labor Relations Act, including the right to form or join a union and the right to engage in protected concerted activity, and (iv) the launching of a “Gig Economy Tax Center” by the Internal Revenue Service, which broadly implies that gig workers are independent contractors and provides corresponding tax-related guidance. The foregoing may provide some comfort to companies that utilize platform workers, but it should be noted that some or all of the foregoing may be halted or overturned in the coming years (for example, the previously-referenced proposed Department of Labor regulations have been frozen prior to finalization). Thus, there would still be uncertainty regarding the classification status of platform workers absent affirmative laws, regulations or guidance to the contrary. Given the above, companies currently utilizing, or seeking to eventually utilize, platform workers as part of their business model should take great care to stay up-to-date on changes in law at the federal level, as well as at the state level for any states in which they conduct or plan to conduct operations.

In summary, companies engaging platform workers should - subject to the local specifics in the respective jurisdiction - continue to proactively take actions to potentially bolster independent contractor classification, including, without limitation, (a) entering into contracts with platform workers specifying their independent contractor status and containing language regarding no entitlement to future employment, (b) ensuring that platform workers have complete control over the manner and time in which they complete their work, their work schedule and the tools and materials used to complete their work, (c) not hiring employees that engage in the same type of work as the platform workers (e.g. a company that connects drivers and customers should not independently hire employees that act as drivers for the company), (d) only engage with caution platform workers who perform work solely for the company, and (e) especially in the US, engaging platform workers who have provided similar services previously and established an independent business to do so, which can be demonstrated, for example, by such worker forming an entity to perform the services, obtaining necessary licenses to perform the services and/or advertising to the general public.

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