



WILL EUROPE STRANGULATE ITS GIG ECONOMY?

European Union prepares legal framework for working through digital labor platforms

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INTRODUCTION

These days companies like Uber, Lyft or Deliveroo have become household names, and their business model, called the gig economy, for quite some time now has become part of people's everyday lives. In the European Union (EU) in 2021 alone, there were 28 million individuals working through digital labor platforms of the gig economy. A big part of this group are the couriers in the restaurant industry who, as independent contractors, partner with food delivery platforms. In 2025, it is expected there will be 43 million people working with the digital labor platform model. And in 2020, the whole platform economy in the EU generated around 14 billion in revenues. However, the growth of this gig economy is not only making a noticeable impact on businesses but also increasingly in the labor and employment law area. With more and more jobs being created, questions concerning the employment

status of the gig workers, their labor rights and their working conditions are being raised. This has become a topic of – sometimes heated – discussions in courtrooms and with EU lawmakers. Our article gives an overview of the current legal status-quo of the gig workers in Europe as well as the essential aspects of the new legal framework the EU has now begun to prepare. We also make a recommendation on how the gig economy can prepare.

COURTS IN EUROPE DISAGREE ON THE LEGAL STATUS OF GIG WORKERS

Currently, the EU sees major challenges concerning the legal classification of the 28 million gig workforce: Are they self-employed contractors, or are they employees after all? The EU's official bodies, like the European Commission, believe that 5.5 million gig workers could be incorrectly classified as self-employed. This raises questions

about employee rights, such as minimum wage, protection against unfair dismissal, sickness benefits or pensions. Although there are numerous court decisions on the employment status of gig workers, these decisions are often inconsistent in their results and, therefore, not able to provide reliable guidelines on how to address the legal question of potentially misclassified gig workers.

Most notably are court decisions in France, Germany, Spain and England that favor gig workers, where courts did recognize their employee status. In Spain, lawmakers went as far as introducing a new law classifying gig workers as employees. However, a court in Belgium only recently found the exact opposite – that gig workers are self-employed contractors. The court mainly argued that gig workers are free to organize their work performance themselves and are thus not in a legal subordinate relationship.

WHAT IS ON BRUSSELS' MIND?

The lack of a consistent legal framework within the EU has also been considered and discussed in EU institutions over the past year. To increase legal certainty, the EU, in December 2021, proposed a legal framework "to improve the working conditions of people working through digital labour platforms." The EU's overall goal is to reduce the risks of platform work, such as poor working conditions and inadequate access to social protection and ensure that platform workers can enjoy the labor rights they are entitled to (if they were employees). To achieve this, platform workers, who have so far been incorrectly classified as self-employed, should in the future be re-classified as employees. To determine whether the platform workers in question are employees, the draft includes a list of five criteria. If the platform meets at least two of these criteria, there is a rebuttable presumption that an employment relationship exists:

- Effectively determining the remuneration or setting upper limits for the level of remuneration.
- Requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work.
- Supervising the performance of work or verifying the quality of the results of work, including electronic means.
- Effectively restricting the possibility of freedom, including through sanctions, to organize one's work, in particular, the discretion to choose one's working hours or periods of absence, to accept or to refuse tasks or to use subcontractors or substitutes.
- Effectively restricting the possibility to build a client base or to perform work for any third party.

By using the above-mentioned presumption that gig workers are employees if two of five criteria are met, there will be a shift of the burden of proof. Currently, gig workers bear the burden of proof to establish their employment status in court. In the future, it will be the reverse, and digital labor platforms will have to establish that their associates are not employees but independent contractors.

The new framework also contains regulations against an overreach of the so-called "algorithmic management." Algorithmic management is widely seen in the gig economy, where platforms use automated systems and/or algorithms to assign tasks or jobs and to monitor and evaluate platform workers. To have more transparency with these automated decisions, the EU believes

platforms should be required to inform their workers about how their tasks are allocated and how they are being monitored and evaluated. Furthermore, the individuals would have the right to question and contest decisions that affect their working conditions.

A KILLER FOR EUROPE'S GIG ECONOMY?

Although the proposed framework is only a proposal and the directive (the EU's legal tool to have its members transpose the framework into their national laws) is not yet in place, it is estimated that approximately between 1.7 million and 4.1 million people could be classified as employees based on the above-mentioned criteria. Once those gig workers are classified as employees, they would have the rights and protections they are entitled to as employees, e.g., statutory minimum wage, regulated working hours etc.

Digital labor platforms will face far-reaching changes as well as legal and information obligations regarding their business model. Not everyone, not even all gig workers, may like the outcome: A recent study with couriers working as independent contractors on food delivery platforms found that up to 250,000 of them could lose the opportunity to work and correspondingly 800 million in earnings for these workers could be at stake. In this sense, the framework could block further development of the gig economy and also go far beyond common sense rules.

WHAT CAN DIGITAL PLATFORMS DO NOW?

Here are some measures companies connected to the gig economy can take to stay compliant and manage to avoid an all-too-serious impact on their business:

Review status of gig workers

Reviewing if their workers are independent contractors or employees will be a must for digital labor platforms in the gig economy. While doing so, it is important to keep in mind that the legal classification of gig workers depends on a case-by-case assessment:

- How exactly are the tasks assigned to the gig workers? Can they choose for themselves, or do they have to accept assigned jobs?
- Are there binding rules regarding appearance or behavior on the job that must be followed?
- Do the work assignments have to be executed within a certain time frame, or are the workers free to determine their time when they get the job done?

In this regard it will also be crucial for companies in the gig economy to pay particular attention to the five criteria introduced by the new EU framework and review whether any of them apply in order to avoid the rebuttable burden of proof shifting to the company, e.g., if a gig worker challenges her/his status in court. Digital platforms that exercise a certain degree of control over their workers may need to review and adjust the terms and conditions they use to ensure they manage their workers loosely enough to keep them genuinely self-employed.

Review algorithmic management

Companies in or connected to the gig economy should also evaluate how extensively they use algorithm-based management of their workers. While doing so, they should ensure that they have sufficient human resources available to guarantee human monitoring of their automated, algorithmic decisions. Companies should also inform their workers about how automated decisions influence their work conditions, such as their job assignments, earnings and how they are being monitored and evaluated.

CONCLUSION & OUTLOOK

The draft still has to go through the EU's law-making process. This process will take several months, and implementation by the member states will take another one to two years. Nevertheless, once the directive has been adopted, there will be significant changes that will affect the food delivery and ride-hailing industry and other sectors of the gig economy. Whether it will be dusk or dawn for digital labor platforms in Europe is yet to be seen.



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