

CORPORATE LAW IN THE GIG ECONOMY: LEGAL CHALLENGES FOR EMANATING BUSINESS MODELS

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ABSTRACT

“Before the Internet, it would be really difficult to find someone, sit them down for ten minutes and get them to work for you, and then fire them after those ten minutes. But with technology, you can actually find them, pay them the tiny amount of money, and then get rid of them when you don’t need them anymore.”¹ The gig economy, facilitated by digital platforms, has revolutionized the traditional labour market by offering flexible work arrangements. However, it also presents significant legal and regulatory challenges. The distinction between employees and freelancers is inconsistent across jurisdictions, and gig work often lacks legal protections like minimum wage, health insurance, and unemployment benefits. This raises concerns about worker rights, as platforms exert varying degrees of control over gig workers, questioning their autonomy. Judicial scrutiny of gig platforms underscores the tension between labour market flexibility and worker protections. The gig economy, which fragments jobs into discrete tasks and encourages competition, is causing a wage and working conditions race. Critics argue this trend, known as “digital Taylorism,”² echoes outdated worker exploitation models. This article explores the legal, economic, and social implications of the gig economy, focusing on the evolving debate over gig worker classification and potential reforms. It calls for a re-evaluation of labour laws to ensure fair treatment and adequate protections for gig workers, based on case law and recent research.

Keywords: Freelancer, Labour Laws, Employee, Employer.

INTRODUCTION

“The activities implemented under the name ‘gig economy’ or ‘platform economy’ vary from each other; numerous divergent classifications exist. Nonetheless, the most straightforward

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¹ Valerio De Stefano ‘THE RISE OF THE “JUST-IN-TIME WORKFORCE”’: ON-DEMAND WORK, CROWDWORK, AND LABOR PROTECTION IN THE “GIG-ECONOMY”’ (Comparative Labour Law and Policy Journal, 06 Feb 2016) <<file:///C:/Users/Lenovo/Downloads/De-Stefano-CLLPJ%20-%2037-3-FINAL.pdf>>

² ‘Digital Taylorism’ (The Economist, 10 Sep 2015) <<https://www.economist.com/business/2015/09/10/digital-taylorism>>

classification includes, in one group, the so-called ‘offline activities’ that may be re-directed to the idea of ‘work on demand’, and, in the other group, the so-called ‘online activities’ that may be tagged as ‘crowded’.”³

“The advent of online platforms has been considered to be one of the most significant economic changes of the last decade, with their emergence reflecting a longer trend of increasing contingent work, labour market flexibility, and outsourcing work to independent contractors”.⁴

Lawyers and economists have shown significant interest in studying the "sharing economy." Companies in the gig economy are exploring innovative Corporate Governance models that balance flexibility with accountability to address challenges. The Gig Economy has witnessed a burst in recent years. The number of individuals is increasing in favour of flexible work arrangements and embracing the opportunities offered by digital platforms. The sudden surge is due to flexibility in working hours and the way of working totally depends on the freelancer, the traditional employer-and-employee relationship is not there. The gig economy offers numerous benefits, but it also has its own set of drawbacks, independent contractors face challenges in work stability and benefits from employers, such as insurance and retirement plans. They are not entitled to the same protections as employees, such as minimum wage, overtime pay, and health insurance. While some appreciate the flexibility and autonomy of gig work, others are concerned about the lack of benefits.

One of the main findings of the COGENS project is that at least in some countries, collective bargaining for gig workers is possible in theory or actually happens. In some cases, the law allows, apart from collective bargaining for employees, collective bargaining for economically dependent employee-like workers.⁵

EMPLOYEE V. FREELANCER: THE INCONSISTENCY

The OECD Digital Economy Outlook 2017 estimates that of the 49 million users of the digital services of “Upwork” and “Freelancer” in 2016, there were 10 times as many clients of the

³ Nikos Koutsimpogiorgos, Jaap van Slageren, Andrea M. Herrmann, Koen Frenken ‘CONCEPTUALIZING THE GIG ECONOMY AND ITS REGULATORY PROBLEMS’ (Policy & Internet, 02 MAY 2020) <<https://onlinelibrary.wiley.com/doi/full/10.1002/poi3.237>> accessed 06 OCT 2024

⁴ Nikos Koutsimpogiorgos, Jaap van Slageren, Andrea M. Herrmann, Koen Frenken ‘CONCEPTUALIZING THE GIG ECONOMY AND ITS REGULATORY PROBLEMS’ (Policy & Internet, 02 MAY 2020) <<https://onlinelibrary.wiley.com/doi/full/10.1002/poi3.237>> accessed 06 OCT 2024

⁵ José María Miranda Boto and Elisabeth Brameshuber ‘Collective Bargaining and the Gig Economy A Traditional Tool for New Business Models’ <<https://library.oapen.org/bitstream/handle/20.500.12657/58885/1/9781509956210.pdf>>

services in high-income countries and 4.5 times more providers of services from low-income Countries.⁶

The gig economy raises concerns about worker classification, as traditional employment law⁷ differentiates between employees and freelancers, each with unique rights and obligations. Employees receive benefits like minimum wage, overtime pay, health insurance, and unemployment perks, but Freelancers don't. Financial volatility and limited access to benefits are significant challenges. The lack of congruous and expected earnings leads to psychological and financial stress.

The legal status of “independent contractor”⁸ implies a certain amount of autonomy, which may be questioned in this case. While some platforms only act as a simple bulletin board for gigs, others are more actively involved in the transaction (including matching, contracting, and pricing) as well as the evaluation of a gig (through timing, ratings, and reviews)—which may, in turn, be fed back into the matching algorithm. The control that such platforms exert over workers casts doubt on the autonomy of workers and has in several court cases provided legal grounds for a reclassification of independent contractors as employees.⁹ The legal tests for distinguishing employees and contractors are famously ambiguous. They involve many factors that often point in different directions and that firms can manipulate. The main problem is not the factors themselves but the failure of courts and regulators to understand how those factors relate to the goal of labour market regulation. The discrete/relational distinction provides guidance for identifying workers as contractors (discrete) or employees (relational).¹⁰

Recent research shows that there is anxiety among workers in the gig economy sector, especially those related to their status as partners or independent contractors. The diversification of work aided by gig economy business patterns that reduce labour expenses regarding workers as ‘independent contractors’ (whereby circumventing employment-related

⁶ ‘OECD Digital Economy Outlook 2017’ (OECD Publishing, 11 Oct 2017) <https://www.oecd-ilibrary.org/science-and-technology/oecd-digital-economy-outlook-2017_9789264276284-en>

⁷ ‘LABOUR LAWS IN INDIA’ <https://ncib.in/pdf/ncib_pdf/Labour%20Act.pdf>

⁸ ‘INDEPENDENT CONTRACTOR DEFINED’ (IRS) <<https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-defined#:~:text=The%20general%20rule%20is%20that,then%20you%20are%20self%20employed.>>

⁹ Nikos Koutsimpogiorgos, Jaap van Slageren, Andrea M. Herrmann, Koen Frenken ‘CONCEPTUALIZING THE GIG ECONOMY AND ITS REGULATORY PROBLEMS’ (Policy & Internet, 02 MAY 2020) <<https://onlinelibrary.wiley.com/doi/full/10.1002/poi3.237>> accessed 06 OCT 2024

¹⁰ Eric Posner ‘THE ECONOMIC BASIS OF THE INDEPENDENT CONTRACTOR/EMPLOYEE DISTINCTION’ (University of Chicago Law School, 2020) <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1039&context=law_and_economics_wp>

obligation) has fallen under intense scrutiny throughout the world. It has been argued that such diversification exhibits a trend, now perceived as the ‘fissuring’ of work.¹¹ Despite its increasing attractiveness, the gig economy is tormented by a series of judicial complications. The appearance and atomic growth of the sharing economy and the gig economy have triggered intense debate concerning its workers’ status.¹²

Labour law scholars have long observed that “employment” is no longer synonymous with full-time work in a single enterprise. Three decades ago, Pollert observed that many modern organisations are comprised of a small core of full-time workers supplemented by an array of peripheral or “distanced” workers engaged on a part-time, casual or contract basis.¹³ The combination of proposal, acceptance, and execution may affect other aspects such as the moment and place in which the contract is legally deemed to be concluded, which, in turn, may trigger important consequences on the applicable legislation. In some jurisdictions, the structure of the contracts concluded via the platforms or using the apps could also trigger the application of specific regulatory regimes governing contractual entitlements, obligations, and liabilities.¹⁴

LEGAL CHALLENGES Legal Research and Juridical Sciences

The legal challenge of whether to give freelancers or independent contractors the status of an employee has been quite debatable. The issue of how gig work is treated legally and the broader question of what rights and entitlements these workers should receive remains ‘live’ as authorities around the world pass judgments on platform companies. A further critique of the gig economy relates to its potential for accelerating ‘fragmentation’: breaking down once-whole jobs into discrete task elements, each of which is then auctioned to the lowest bidders.¹⁵ Indeed, gig work may be resurrecting a type of labour market that trade unions and regulators

¹¹ David Tan ‘A BRAVE NEW FRONTIER IN THE DICHOTOMOUS INDONESIAN LABOUR LAW: GIG ECONOMY, PLATFORM PARADOX AND WORKERS WITHOUT EMPLOYERS’ (Mimbar Hukum Universitas Gadjah Mada, 2021) <<file:///C:/Users/Lenovo/Downloads/1956-Article%20Text-8611-1-10-20210621.pdf>>

¹² Ibid

¹³ For example, see Anna Pollert, “The Flexible Firm: Fixation or Fact?” (1988) 2.3 Work, Employment & Society 281-316. See too John Atkinson, “Manpower Strategies for Flexible organisations”, Personnel Management, August 1984.

¹⁴ Valerio De Stefano ‘THE RISE OF THE “JUST-IN-TIME WORKFORCE”: ON-DEMAND WORK, CROWDWORK, AND LABOR PROTECTION IN THE “GIG-ECONOMY”’ (*Comparative labor law and policy journal*, 2016) <<file:///C:/Users/Lenovo/Downloads/De-Stefano-CLLPJ%20-%202037-3-FINAL.pdf>>

¹⁵ Joshua Healy, Daniel Nicholson & Andreas Pekarek ‘SHOULD WE TAKE GIG ECONOMY SERIOUSLY?’ (Labour & Industry: a journal of the social and economic relations of work, 01 Nov 2017) <<https://doi.org/10.1080/10301763.2017.1377048>>

have long resisted, one in which workers must undercut each other for advantage, precipitating a ‘race to the bottom’ on wages and other performance expectations.

In one high-profile expression of this view, Unions New South Wales¹⁶ (2016) argued that the online gig economy uses new technology as a ‘fig leaf’ to conceal old methods of worker exploitation. Its report characterises the platform business model as ‘unregulated Taylorism’, allied to a ‘Dickensian marketplace’ that is fragmenting working standards and disintegrating whole jobs into on-demand tasks, without the employment safety nets traditionally afforded to workers. The Economist (2015, 63) labelled this process ‘digital Taylorism’¹⁷: a modern-day version of ‘scientific management’, in which technology is used ‘to break complex jobs down into simple ones; measure everything that workers do; and link pay to performance, giving bonuses to high-achievers and sacking sluggards’¹⁸

Today, whether a worker is legally classified as an “employee” or an “independent contractor” defines whether he or she is entitled to any employment-law and labor-law protections. With the proliferation of the on-demand economy, the doctrinal definitions and legal analyses of these categories are fiercely contested. While businesses have attempted to confine the definition of employee to limit their financial and legal liabilities and risks, public-interest lawyers have worked to broaden the definition, ensuring that more workers are covered and protected by the law.¹⁹

The expanding scope of employment contracts and the emergence of new types of workers is a prominent issue being faced, self-employed workers are individuals who work directly for the market, offering their services to companies without becoming part of them. They are owners of their own organization and have the independence to choose whether to accept a task. The legal and judicial cases in the USA and UK argue that online platform workers are misclassified as self-employed, leading to potential conflicts and disputes between companies and workers.

¹⁶ Unions New South Wales (NSW) V. Airtasker (2016)

¹⁷ ‘Digital Taylorism’ (The Economist, 10 Sep 2015) <<https://www.economist.com/business/2015/09/10/digital-taylorism>>

¹⁸ Joshua Healy, Daniel Nicholson & Andreas Pekarek ‘SHOULD WE TAKE GIG ECONOMY SERIOUSLY?’ (Labour & Industry: a journal of the social and economic relations of work, 01 Nov 2017) <<https://doi.org/10.1080/10301763.2017.1377048>>

¹⁹ Veene B. Dubal ‘EMPLOYMENT LAW: THE EMPLOYEE VS. INDEPENDENT CONTRACTOR DICHOTOMY’ (The Judges’ Book, 2018) <<https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1025&context=judgesbook>>

The literature suggests that the failure to apply the employee concept can be attributed to the novelty and misunderstanding of the digital world.

India has seen numerous cases addressing gig workers' rights under labour laws, focusing on their classification as employees or independent contractors.

In 2019, during Uber India's case²⁰, the Delhi High Court examined the relationship between Uber drivers and the platform but did not directly address the issue of employment classification.

In the Ola case from Bengaluru, the High Court temporarily halted an order issued by a single judge bench instructing ANI Technologies, the parent company of OLA Cabs to compensate a woman who alleged sexual harassment by one of their drivers with a sum of Rs 5 lakh, stating "under the POSH Act, the OLA driver would be considered an employee of the company". The single judge had ruled that Ola's refusal to act on the complaint based on the claim that drivers are not employees under the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (PoSH Act) was 'unjustified'.²¹

The cases highlight the ambiguities surrounding worker classification in the current economic landscape. The court ruled that Uber drivers are independent contractors, despite Uber's control over fares, incentives, and customer interactions. It emphasized that the lack of direct control over working hours or employment benefits does not establish an employer-employee relationship, despite Uber's control over these aspects.

Contrarily in the Ola case, the ruling acknowledges that Ola, despite not being a traditional employer, can still fulfil the duty of care under workplace safety laws, highlighting the blurred lines between independent contractors and employees, with legal protections for gig workers varying depending on their specific circumstances.

India's traditional employment laws classify gig workers based on factors like control, supervision, and company integration, necessitating a more structured and modern legal framework to identify their employment status. The digital gig economy is reshaping traditional labour law standards, with platforms like Uber and Ola claiming drivers as independent

²⁰ Uber India Systems Pvt Ltd v. Competition Commission Of India (2019)

²¹ 'Karnataka HC stays order declaring Ola's relationship with drivers as employer-employee' (The Economic Times, 05 Oct 2024) <<https://economictimes.indiatimes.com/jobs/hr-policies-trends/karnataka-hc-stays-order-declaring-olas-relationship-with-drivers-as-employer-employee/articleshow/113959232.cms?from=mdr>>

contractors, despite their significant control over their work conditions, challenging traditional criteria.

A hybrid classification model, adopted in Canada and the UK, could address uncertainties by balancing basic protections like minimum wage and benefits with flexibility, similar to the approach used in other jurisdictions like Canada and the UK. The India Code on Social Security, 2020²², acknowledges gig and platform workers's rights and benefits, but its full implementation remains subject to interpretation and future regulatory actions, indicating the need for further legal evolution.

CONCLUSION

Independent contractor enables the matching of work and service demand and supply at high speeds, minimizing transaction costs and reducing market friction, thereby enhancing the efficiency of these systems. The primary advantage of employing a self-employed worker over an employee is the potential avoidance of paying social security contributions.

The new business model does not warrant the implementation of all existing employment contract regulations, as workers working offline for an online platform face distinct risks compared to traditional employees. The tendency of workers' rights advocates to expand the employee category within the dualism of workers' rights. The new business model's competitive advantages are not necessarily due to improved organization and productivity, but rather to the non-application of employment standards.

²² CODE ON SOCIAL SECURITY, 2020