# *Taming the Beast*

## Making the 'Gig Economy' Work for Workers

## December 2021

A report by Jason Moyer-Lee[1], commissioned by the International Transport Workers' Federation (ITF), and submitted to the Australian Senate Select Committee on Job Security

[1] Jason Moyer-Lee, PhD. Practitioner Fellow, Kalmanovitz Initiative for Labor and the Working Poor, Georgetown University; Associate Member, University of Bristol Law School's Centre for Law at Work; General Secretary Emeritus of the Independent Workers' Union of Great Britain (IWGB). The author would like to acknowledge the input of the numerous interviewees as well as those who, whilst not via formal interviews, took the time to discuss the regulatory interventions in the various jurisdictions. The author also thanks the following people for providing valuable feedback on a draft (or part thereof) of the report: Professor Wilma Liebman, Professor Antonio Baylos, Professor Anthony Forsyth, Sheryn Omeri (barrister, England & Wales, and Australia), Baker Khundakji (ITF Young Transport Workers' Officer), Ruwan Subasinghe (ITF Legal Director), and Ken Jacobs (Chair, UC Berkeley Center for Labor Research and Education). Any errors or omissions are entirely the author's responsibility.

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## Foreword by Stephen Cotton, ITF General Secretary

The International Transport Workers' Federation (ITF) is a democratic trade union federation known as a world-leading transport authority. We have nearly 700 affiliated trade unions, representing around 20 million workers from 150 countries. Among our affiliates are many Australian trade unions, including the Transport Workers' Union (TWU). Through its advocacy in international fora and its support for affiliates, the ITF plays a robust role in the defence of transport workers' rights and working conditions. One of the ITF's priorities is pushing back against 'gig economy' companies' assault on workers' rights. In the past decade we have seen an explosion of companies deploying couriers and drivers by app to provide convenient services for consumers whilst depriving these workers of rights that traditional employees take for granted. Although unions, courts, and governments have played an increasingly muscular role in challenging these practices, there is still much more work to be done. The ITF has therefore been advocating for 10 key principles for 'gig economy' companies to adhere to in order to ensure decent working conditions. These are set out at Appendix B of this report.

The issue of workers' rights in the Australian 'gig economy' has been particularly contested; at the time of writing there have been several legal cases (some of which are still pending) as well as government inquiries. One of these inquiries – the Senate Select Committee on Job Security, led by Senator Tony Sheldon – has been considering possible forms of regulating the Australian 'gig economy'. In order to provide evidence of different forms of 'gig economy' regulation abroad, the ITF has commissioned Dr. Jason Moyer-Lee, the former General Secretary of the Independent Workers' Union of Great Britain (IWGB), to write this report. The report discusses the relevance of international law to 'gig economy' workers and provides a detailed analysis of various examples of 'gig economy' regulation in the US and Europe. The report also provides a number of policy recommendations for regulators, whilst bearing in mind the ITF's 10 key principles. The report is hard-hitting and should be mandatory reading for any government contemplating intervention in the 'gig economy'.

As has been the case throughout modern history, trade unions have been – and must continue to be - at the forefront of the push for structural change in the 'gig economy'. The ITF will continue to support its affiliates around the world who are representing, organising, and working with 'gig economy' workers as they campaign for such change. And we would strongly encourage all 'gig economy' companies to come to the negotiating table with our affiliates as a matter of urgency. The ITF will also be open to dialogue and negotiation with employers as we continue to advocate on our core principles and push for regulation to ensure that 'gig economy' workers are indeed treated as workers and provided the rights they deserve.

Stephen Cotton
ITF General Secretary
London, UK
6 December 2021

# 'Toe-stepping' and 'Always be hustlin'': An Introduction to Regulating the 'Gig Economy'

One evening in early February, 2017, Uber driver Fawzi Kamel drove the company's then CEO, Travis Kalanick – and two of his colleagues – to their destination. As Kalanick was getting out of the car, Kamel tried to raise an issue with him about pay and how Uber was lowering prices. 'We have to, we have competitors, otherwise we'd be out of business,' retorted Kalanick, already exhibiting some of the testy arrogance for which he became internationally infamous. 'I lost 97,000 dollar because of you,' Kamel went on to tell him. 'I'm bankrupt because of you.' As the exchange progressed, Kalanick started raising his voice and getting angry, spurting out 'bullshit!' and 'hold on a second!' and culminating with his bottom line as he wagged his finger in Kamel's face: 'you know what? Some people don't like to take responsibility for their own shit. They blame everything in their life on somebody else!'[2] Unbeknownst to Kalanick, the whole episode was being filmed on Kamel's dashcam. The footage made its way to *Bloomberg News*, and then to the internet. It came to the attention of Uber executives as they sat in a meeting with Kalanick in a San Francisco hotel, trying to convince him he needed to change his ways. Indeed, Jeff Jones, the company's new president, argued – according to *Bloomberg* - that 'Uber's riders and drivers viewed the company as made up of a bunch of greedy, self-centred jerks'. And then the footage dropped. Two executives and Kalanick watched the video on a laptop in the hallway outside the meeting room, after which Kalanick reportedly 'got down on his hands and knees and began squirming on the floor,' saying 'This is bad' and 'I'm terrible'.[3] Kalanick apologised publicly and then set out to rectify matters with Kamel by meeting to apologise personally. This short apology morphed into an hour-long debate. Kalanick also wanted to gift Kamel Uber stock

[2] Bloomberg Quicktake. (2017). 'Uber CEO Kalanick Argues With Driver Over Falling Fares'. In: *YouTube*. 28 February. https://www.youtube.com/watch?v=gTEDYCkNqns. [Accessed 26 October 2021]; Newcomer, E. & Stone, B. (2018). 'The Fall of Travis Kalanick Was a Lot Weirder and Darker Than You Thought'. In: *Bloomberg*. 18 January. https://www.bloomberg.com/news/features/2018-01-18/the-fall-of-travis-kalanick-was-a-lot-weirder-and-darker-than-you-thought. [Accessed 25 October 2021]; Carrie Wong, J. (2017). 'Uber CEO Travis Kalanick caught on video arguing with driver about fares'. In: *The Guardian*. 1 March. https://www.theguardian.com/technology/2017/feb/28/uber-ceo-travis-kalanick-driver-argument-video-fare-prices. [Accessed 25 October 2021].

[3] Newcomer, E. & Stone, B. (2018). 'The Fall of Travis Kalanick Was a Lot Weirder and Darker Than You Thought'. In: *Bloomberg*. 18 January. https://www.bloomberg.com/news/features/2018-01-18/the-fall-of-travis-kalanick-was-a-lot-weirder-and-darker-than-you-thought. [Accessed 25 October 2021].

but was rebuffed by his own executives; so instead he gave Kamel US$ 200,000 of his own money[4] – as one reporter put it – 'taking responsibility for his own shit'.[5]

*DriverGate* can actually tell us quite a bit about 'gig economy' company *modus operandi*. First, the promise to workers of decent earnings and working conditions often goes unkept. As Bhairavi Desai, the Executive Director of the firebrand New York Taxi Workers Alliance (NYTWA) said in response to the incident:

> Fawzi Kamel's plight is far from unique… We've talked to so many drivers who have been left in insurmountable debt after purchasing or leasing vehicles based on promised income from Uber then unable to make the payments as Uber has slashed fares, increased its commission, and flooded the streets with too many vehicles.[6]

Second, the companies play dirty. As unpleasant and rude as it was, angrily berating a driver was one of Uber's more mild faux pas; perhaps unsurprising for a company whose stated values included 'toe stepping' and 'always be hustlin''. The list is too long for this report, but some of the more shocking examples include a scandal over systemic sexual harassment, the use of Greyball software to avoid Uber drivers picking up regulatory inspectors, a senior Uber manager allegedly carrying around confidential medical records of a woman who had been raped by an Uber driver in India (and Uber execs theorising that Ola - their main rival in India - had something to do with the incident),[7] and a senior executive suggesting – thinking he was speaking off the record – that Uber spend US$ 1 million to dig up dirt on journalists and their families.[8] As the *Late Night* show comedian Seth Meyers later joked:

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[4] Newcomer, E. & Stone, B. (2018). 'The Fall of Travis Kalanick Was a Lot Weirder and Darker Than You Thought'. In: *Bloomberg*. 18 January. https://www.bloomberg.com/news/features/2018-01-18/the-fall-of-travis-kalanick-was-a-lot-weirder-and-darker-than-you-thought. [Accessed 25 October 2021].

[5] Griswold, A. (2018). 'Uber's Travis Kalanick paid $200,000 to the driver he insulted in a viral video'. In: *Quartz*. 18 January. https://qz.com/1182896/ubers-travis-kalanick-paid-200000-to-fawzi-kamel-the-driver-he-insulted-in-a-viral-video/. [Accessed 25 October 2021].

[6] Quoted in: Carrie Wong, J. (2017). 'Uber CEO Travis Kalanick caught on video arguing with driver about fares'. In: *The Guardian*. 1 March. https://www.theguardian.com/technology/2017/feb/28/uber-ceo-travis-kalanick-driver-argument-video-fare-prices. [Accessed 25 October 2021].

[7] Newcomer, E. & Stone, B. (2018). 'The Fall of Travis Kalanick Was a Lot Weirder and Darker Than You Thought'. In: *Bloomberg*. 18 January. https://www.bloomberg.com/news/features/2018-01-18/the-fall-of-travis-kalanick-was-a-lot-weirder-and-darker-than-you-thought. [Accessed 25 October 2021].

[8] Smith, B. (2014). 'Uber Executive Suggests Digging Up Dirt on Journalists'. In: *BuzzFeed*. 17 November. https://www.buzzfeednews.com/article/bensmith/uber-executive-suggests-digging-up-dirt-on-journalists. [Accessed: 26 October 2021].

> [I]t's bad to dig into people's personal lives, but *their families*?!? You sound like Polly Walnuts from the Sopranos. Then again, I think I saw a *Sopranos* episode once where Polly said "remember, we don't go after their families; that's not us!"[9]

Indeed, lawbreaking and litigating for Uber and other 'gig economy' companies is simply part of doing business; Uber alone accrued around US$ 500 million in legal fees in just a couple years.[10]

Third, the companies often appear to have no shortage of money to throw at whatever problem besets them. Traditionally loss-making, they have been spurred on by eyewatering levels of venture capital investment, allowing them to burn through cash like water.[11] As will be seen throughout this report, this means enough money to lobby, fund campaigns which succeed in convincing voters that depriving workers of rights is in the workers' interest, and fund litigation. Foolish is the regulator who underestimates the depth of Silicon Valley's pockets.

Fourth, and although Dara Khosrowshahi - Kalanick's genteel, soft-spoken successor as CEO of Uber - would not be caught dead berating a driver aggressively and telling him to take responsibility for his own shit, Uber policy – and indeed 'gig economy' company policy more generally – very much continues to be premised on drivers needing 'to take responsibility for their own shit'. In no area is this clearer than the length to which these companies go to

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[9] Late Night with Seth Meyers. (2014). 'Uber's Latest Controversy: Couple Things'. In: *YouTube*. 20 November. https://www.youtube.com/watch?v=Hmy5j8FgmYA. [Accessed 26 October 2021]. The matter cannot be taken too lightly though; over the years Uber hired a number of former CIA and law enforcement officials to conduct surveillance and even outsourced some intelligence work to firms who were tasked with infiltrating driver protests. See: Conger, K. (2021). 'Uber Survived the Spying Scandal. Their Careers Didn't.' In: *New York Times*. 28 November. https://www.nytimes.com/2021/11/28/technology/uber-spying-allegations.html?referringSource=articleShare. [Accessed 29 November 2021].

[10] Newcomer, E. & Stone, B. (2018). 'The Fall of Travis Kalanick Was a Lot Weirder and Darker Than You Thought'. In: *Bloomberg*. 18 January. https://www.bloomberg.com/news/features/2018-01-18/the-fall-of-travis-kalanick-was-a-lot-weirder-and-darker-than-you-thought. [Accessed 25 October 2021].

[11] Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 26 October 2021], p7. For the particular role of SoftBank, which - through its investments - has had an outsized influence on the global 'gig economy', see: Zhou, Y. & Guest, P. (2021). 'The investors pushing the gig model around the world'. In: *rest of the world*. 21 September. https://restofworld.org/2021/global-gig-workers-investors-behind-gig-work-model/. [Accessed: 26 October 2021].

refuse their workers decent pay and working conditions, most often by denying the existence of an employment relationship. As Martin Manteca, the Organising Director for the Service Employees International Union's (SEIU) Local 721, says: when it comes to the drivers, 'toe-stepping' is more like 'stepping on the throats…of working people'.[12]

In *The "Gig Economy": Litigating the Cause of Labour*,[13] a report Professor Nicola Kontouris and I co-authored for the International Lawyers Assisting Workers (ILAW) Network, we assessed the various methods the companies use to prevent courts and regulators from finding that their workers were legally entitled to rights. For starters, company contracts – to which workers have no choice but to adhere – classify the workers as independent contractors, thereby denying them workers' rights unless they choose to litigate or the state enforces the law.[14] So as to minimise the chances of workers litigating, these contracts also often include indemnity clauses, warning the worker they will be responsible for all of the companies' legal costs should they choose to assert their rights.[15] In case that scare tactic doesn't work, there are often mandatory arbitration clauses, seeking to oust the jurisdiction of the courts and compel workers to pay large upfront costs in order to go to arbitration in a foreign country,[16] something the Canadian Supreme Court held to be unconscionable as a matter of law and therefore unenforceable.[17] Even if the arbitration clause becomes unenforceable, Uber's contracts purport to be subject to Dutch law, regardless of the country in which the worker is working.[18] To further complicate things, some of the companies who transport passengers or food purport not to be transportation or delivery companies at all, but rather technology companies who merely act as intermediaries between passengers and drivers, or between customers, restaurants and couriers, respectively.[19]

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[12] Manteca, M. (2021). Author interview. 15 October.
[13] Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 26 October 2021].
[14] Ibid., p12.
[15] Ibid., p13.
[16] Ibid., p16.
[17] *Uber Technologies Inc. v Heller,* 2020 SCC 16.
[18] Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf, p16.
[19] Ibid., pp13-14.

As assessed in the report, the companies have had varying degrees of success with using these tactics to defeat rulings that their workers are entitled to rights. They have indeed been particularly unsuccessful in Europe, and were unable – despite their lobbying – to prevent the coming into force of California law AB 5, which necessarily classed these workers as employees under state law (more on which below). However, when the law does not go their way, these companies have a tendency to either try and undo the law (as they succeeded in doing in California), or simply ignore the law.[20]

In sum, these companies are unconcerned with the plight of their workers. They are also well-monied, powerful, unintimidated by the rule of law, and prepared to fight. The focus of this report is on how to regulate these companies such that they are compelled to provide decent wages and workers' rights to the people on whose labour they depend. For the reasons outlined above, this is an uphill battle for regulators and legislators. And yet, by surveying a selection of attempts at "gig economy" regulation, one can understand what has worked and what has not. For at the time of writing there are places where Uber is paying pension contributions for their drivers, where rideshare companies are paying the equivalent of a minimum wage of US$ 16.39 per hour – one of the highest minimum wages in the US - and sick pay, and where courier companies are negotiating collective agreements with trade unions and providing employee rights to food delivery couriers. No regulation is perfect, and many are particularly ineffective, but even the 'gig economy' can be made to bend to the rule of law and provide rights to workers when government has political will and is strategic about its regulation. It is possible, in other words, to Tame the Beast.

## The 'gig economy' and job security in Australia

The Senate Select Committee on Job Security, appointed by the Australian Senate by resolution on 10 December 2020,[21] is tasked with inquiring into and reporting

[20] Ibid., p17.
[21] Parliament of Australia. (n.d.) 'Select Committee on Job Security'. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity. [Accessed 26 October 2021].

on the impact of insecure or precarious employment on the economy, wages, social cohesion and workplace rights and conditions, with particular reference to:

a. the extent and nature of insecure or precarious employment in Australia;
b. the risks of insecure or precarious work exposed or exacerbated by the COVID-19 crisis;
c. workplace and consumer trends and the associated impact on employment arrangements in sectors of the economy including the 'gig' and 'on-demand' economy;
d. the aspirations of Australians including income and housing security, and dignity in retirement;
e. the effectiveness, application and enforcement of existing laws, regulations, the industrial relations system and other relevant policies;
f. accident compensation schemes, payroll, federal and state and territory taxes;
g. the interaction of government agencies and procurement policies with insecure work and the 'on-demand' economy; and
h. any related matters.[22]

This is not the first governmental inquiry into the so-called 'gig economy' in Australia; indeed, just 6 months earlier, the *Report of the Inquiry into the Victorian On-Demand Workforce* (the '*Victoria Inquiry*') was released, an inquiry at the heart of which sat '[t]he 'work status' of platform workers and the consequences that flow for the workers, businesses and the labour market'.[23] Indeed, employment status – 'the primary portal through which a labourer enters the world of workers' rights'[24] – is often the main focus in debates over working conditions in the 'gig economy'. By 2020 the Australian 'gig economy' was already embarking on its third wave with the arrival of parcel delivery companies; the first two waves constituted by rideshare in 2011 and food delivery in 2015.[25] So, it is somewhat surprising that, according to the *Victorian Inquiry*:

[22] Parliament of Australia. (n.d.). 'Terms of Reference'. https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Job_Security/JobSecurity/Terms_of_Reference. [Accessed 26 October 2021].
[23] James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p1.
[24] Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf, p8.
[25] Transport Workers Union (TWU). (2021). 'Submission to the "Select Committee on Job Security"'. Submission 39. 5 April, p5.

> In spite of hotly contested assertions, there has been little deliberate, transparent consideration of these issues by Australian Governments prior to this inquiry, and limited research in the Australian context.[26]

As part of this investigation, the Victorian Government commissioned a national survey – undertaken in partnership with several universities – into the 'platform workforce': *Digital Platform Work in Australia – Prevalence, Nature and Impact*. Whilst a majority of those surveyed said they got into 'platform work' to earn extra money, the *Victoria Inquiry* pointed out that:

> There are distinctions across different sectors, with transport and food delivery drivers more likely to say that platform work generated 100 per cent of their income and was essential for meeting basic needs.[27]

It is indeed couriers and for-hire drivers who are the focus of the present report. Of the 'on-demand' workers who could estimate their earnings, the survey found that 14.8% of them earned 'near or below the minimum wage'[28]. The *Victoria Inquiry* also revealed that migrant workers were disproportionately represented among the 'gig economy' workforce; for example, at Deliveroo alone, 80% of its riders were visa holders.[29] And that expenses consumed an enormous proportion of rideshare driver income; '[e]stimates of driver costs, including platform fees, ranged from half to two thirds of revenue'.[30]

Other sources have demonstrated a particularly grim working experience for Australia's food delivery, courier, and rideshare workforce; exemplified by a spate of high-profile deaths of

[26] James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p12.
[27] James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p48.
[28] James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p57.
[29] James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p79. Note as well that a survey of 'on-demand food delivery riders' by the Victorian Trades Hall Council in 2019 found that only 10% of those surveyed were Australian citizens; see Select Committee on Job Security. (2021). *First interim report: on-demand platform work in Australia*. June, p38.
[30] James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p95.

food delivery riders.[31] Also, a survey by the Transport Workers Union (TWU) found that over a third of delivery drivers had been injured at work; of these, eight in ten did not receive support from the company for whom they worked.[32] The TWU survey also indicated that the average gross – before taxes and expenses – earnings of rideshare drivers was $23[33] per hour, over 7% less than the minimum wage for casual employees. However, given the massive expenses these workers incur, it is the post-expense income that provides for relevant comparison; the TWU estimated this to be a mere $12.85 per hour, just over half the relevant minimum wage.[34] Similarly, the TWU survey data indicated post-expense income for food delivery drivers averaged $10.42, less than half the relevant minimum wage.[35] Unsurprisingly, the TWU also found that nearly three quarters of them 'struggle to pay bills and buy groceries'.[36] In terms of parcel delivery, the TWU has provided evidence to suggest that Amazon Flex workers were receiving $15 - $20 per hour, also below the minimum wage.[37]

One need look no further than the evidence of employers themselves to see how the deprivation of decent wages and basic rights of this workforce is of direct financial benefit to the companies for whom they work; according to Domino's Pizza, using employed delivery workers in compliance with relevant laws cost about twice as much as classifying the workers as independent contractors. Marketing4Restaurants on the other hand estimated the costs savings to be only about one third.[38]

But the importance of regulating the sector lies not just in providing rights for the sector's current workers, as meritorious as that is; using technological innovation and creative lawyering to acquire a workforce without legally becoming an employer is a corporate

[31] Zhou, N. (2021). 'Call for federal regulator for Australia's gig economy after sixth delivery rider death revealed'. In: *The Guardian*. 26 June. https://www.theguardian.com/australia-news/2021/jun/27/call-for-federal...or-for-australias-gig-economy-after-sixth-delivery-rider-death-revealed. [Accessed 29 November 2021].
[32] Select Committee on Job Security. (2021). *First interim report: on-demand platform work in Australia*. June, p4.
[33] Unless indicated otherwise, the $ symbol in this report refers to Australian dollars.
[34] It should be noted that Uber, as expected, disputed the figures so far as its own drivers were concerned; see Select Committee on Job Security. (2021). *First interim report: on-demand platform work in Australia*. June, p35.
[35] Ibid., p40.
[36] Ibid., p66. The TWU surveys were undertaken in partnership with, respectively, the Rideshare Drivers Network and the Delivery Riders Alliance; see: Ibid., p66.
[37] Ibid., p68.
[38] Ibid., p37.

strategy which will continue to gain currency unless robustly checked. So, notwithstanding the resistance of some – Self-Employed Australia (SEA), an advocacy group whose objectives include protecting self-employed people 'from intimidation or harassment from bureaucrats' and unions,[39] has said 'much of the discourse around both the platform economy and the independent workforce is inflated, overstated and alarmist,' adding that '[a] good bucket of icy-cold water needs to be tipped over the protagonists of this hyperbole'[40] – the 'gig economy' business model is indeed alarming.

In Australia the existing regulatory infrastructure has done a rather mediocre job of protecting workers in the 'gig economy'. A handful of unfair dismissal cases against 'gig economy' companies have been brought before the Fair Work Commission (FWC), around half of which of which resulted in vindication for the companies.[41] The Foodora case however held that the worker in question was an employee under the Fair Work Act 2009 (FWA).[42] The Australian Tax Office (ATO) also held that the company had misclassified its workers as independent contractors under tax law.[43] In response, Foodora pulled out of the country, just as they had done after a similar ruling in Ontario, Canada.[44] In *Gupta v Portier Pacific Pty Ltd*, Uber Eats driver Amita Gupta appealed her case to the Federal Court after having lost at both the first instance[45] and appellate level[46] before the FWC. After a day of argument before a full court of the Federal Court in which Uber's lawyer was repeatedly scolded by the judges,[47] Uber settled the claim for $400,000.[48] Paying that amount of money for a claim unlikely to be

[39] Self-Employed Australia. (n.d.). 'Who We Are'. https://selfemployedaustralia.com.au/who-we-are/. [Accessed 26 October 2021].
[40] Quoted in: James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p25.
[41] *Kaseris v Raisier Pacific V.O.F.* [2017] FWC 6610; *Pallage v Raisier Pacific Pty Ltd* [2018] FWC 2579; *Suliman v Raisier Pacific Pty Ltd* [2019] FWC 4807.
[42] *Klooger v Foodora Australia Pty Ltd* [2018] FWC 6836.
[43] James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p128.
[44] Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 26 October 2021], p18.
[45] [2019] FWC 5008.
[46] *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698.
[47] *Gupta v Portier Pacific Pty Ltd. & Another* (No. NSD 556 of 2020). *TRANSCRIPT OF PROCEEDINGS*. 27 November 2020.
[48] Select Committee on Job Security. (2021). *First interim report: on-demand platform work in Australia*. June, p107.

worth more than $15,000[49] is either a rather obvious indication of Uber's expectation it would lose, with resultant implications for its business model, or it was a particularly poor instance of fiscal responsibility. Either way, Amita Gupta won big. Finally, in *Franco v Deliveroo*,[50] the FWC upheld the rider's claim that he was an employee and had been unfairly dismissed. It should also be noted that at the time of writing there are pending before the Federal Court and Federal Circuit Court employment status cases against Uber[51] and Deliveroo[52], respectively. The Fair Work Ombudsman (FWO) on the other hand, has conducted only a couple publicly known inquiries into the 'gig economy' business model; into Foodora (which was abandoned after the company pulled out of Australia),[53] Hungry Panda,[54] and Uber (where the FWO upheld the company model). The ATO has also reportedly looked into some of the companies in the sector, however the results are not publicly available.[55]

Menulog (owned by Just Eat) is a notable exception to the companies' tendency to fight workers' rights tooth and nail. The company has trialled employing some of its couriers[56] and has even applied to the FWC for a modern award – pursuant to s157(1)(b) FWA - to apply to employees and employers in the 'on demand delivery services industry'. However, the application was not as much the mark of a truly progressive employer as it was a bid to ensure that the company was exempted from the more onerous conditions contained in other modern awards, such as Road Transport and Distribution Award 2020 (RTD Award).[57]

[49] Select Committee on Job Security. (2021). *First interim report: on-demand platform work in Australia*. June, p107.
[50] [2021] FWC 2818.
[51] *Weddall & Ors v Rasier Pacific & Ors* VID427/2021.
[52] *Jeremy Rhind v Deliveroo Australia Pty Ltd*, Federal Circuit Court Proceeding No: CAG38/2019.
[53] In these proceedings the company conceded that the Fast Food Award applied to its employed couriers; see: Menulog Pty Ltd. (2021). *Form F1 – Application*. Application to Fair Work Commission. 24 June, at [30]-[32].
[54] Referred to in: Parker, S. (2020). *Fair Work Ombudsman submission to Senate Select Committee on Job Security*. 31 March.
[55] James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p85.
[56] Adams, D. (2021). 'Menulog's proposed delivery rider industry award has been revealed, including plans for a minimum wage and employee entitlements'. In: *Business Insider*. 26 August. https://www.businessinsider.com.au/menulog-award-fair-work-commission-delivery-rider. [Accessed 29 November 2021].
[57] See: Menulog Pty Ltd. (2021). *Form F1 – Application*. Application to Fair Work Commission. 24 June. At the time of writing the FWC had not taken a final decision on the matter. However, in a 'Statement' in which the Full Bench of the FWC set out some provisional views on Menulog's application, it noted (at [38]-[39]) that:

Although Menulog's original application to the FWC did not set out the details of its proposed award, it was later reported that the company envisaged a minimum wage of $20.33 per hour, the lowest minimum wage in the country.[58] It should be noted however, that despite a handful of cases in which the workers were held to be employees, most food delivery and rideshare companies in Australia are still not providing employee rights to their workforces.

Australia's failure to effectively regulate the 'gig economy' has had deadly consequences. For example, in 2017 an Uber driver who had been working a 21 hour shift without substantial rest accidentally sped off before a passenger could fully get out of the car. The passenger was hit by a bus and killed. A few months later Uber brought in a system to prohibit such long uninterrupted shifts in New South Wales.[59]

In light of the discussion above, it is unsurprising that in its first interim report, the Select Committee stated:

> …the committee feels strongly that the current arrangements, conditions and pay rates for gig workers are not acceptable and do not provide them with sufficient income and other protections to provide for themselves and their families.

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> **[38]** It seems to us that differentiating the on demand delivery services industry from the transport industry more broadly, of itself, is of limited assistance in making the case that a new modern award should be made for the industry. The more relevant consideration is whether the characteristics of the industry necessitate different award minimum terms and conditions of employment to those provided by existing modern awards that do or could cover employers and their courier employees in the industry. In that respect, the material presently before us does not go far beyond an assertion that as a result of working times in the on demand delivery services industry, the spread of hours in any such existing awards would not be fit for purpose.
>
> **[39]** Menulog will need to expand upon these considerations in order to satisfy us that it is necessary to make a new modern award for the on demand delivery services industry to achieve the modern awards objective.

*Menulog Pty Ltd* [2021] FWCFB 4053.

[58] Adams, D. (2021). 'Menulog's proposed delivery rider industry award has been revealed, including plans for a minimum wage and employee entitlements'. In: *Business Insider*. 26 August. https://www.businessinsider.com.au/menulog-award-fair-work-commission-delivery-rider. [Accessed 29 November 2021].

[59] Omeri, S. (2019). 'Uber-careful: Implications of Modern "Gig Economy" Litigation for the Employer's Common Law Duty of Care'. In: *Journal of Personal Injury Law*, Issue 1, pp59-65, reference at p64.

> The committee considers that it is essential for gig workers – and all workers for that matter – to be paid at a rate that rightly recognises the value of the work that they do, that they are provided with other conditions that ensure they do not have to work when they are sick, they are safe at work and their families are not left destitute when they are injured or killed, that they are paid superannuation to underpin a financially stable future, and that they can access other labour protections providing dispute resolution and mechanisms for addressing discrimination and harassment. …[60]

Learning lessons from abroad therefore is particularly critical for an Australia that wishes to change that reality.

## Remit and structure of this report

The International Transport Workers' Federation (ITF) – a Global Union Federation (GUF) representing nearly 700 affiliated trade unions from 150 countries[61] – has commissioned me to write this report on 'gig economy' regulation. The aim is to undertake a review of regulatory approaches to providing workers' rights for 'gig economy' workers, in a selection of jurisdictions, and from this draw conclusions on key principles, whilst bearing in mind the ITF's 10 'gig economy employer principles' (set out at Appendix B).[62] The ITF will then submit the report to the inquiry of the Australian Senate Select Committee on Job Security.

Much ink has been spilled and many a tree has been felled in policy circles debating the merit of the 'third category' in employment law, usually conceived of as a halfway house between 'employee' and 'independent contractor' status which would provide some, but not all, of the rights employees have. Taken in the abstract there are respectable arguments for and against a third status; the problem is workers don't live in the abstract. As Professor Kontouris and I wrote in *The "Gig Economy": Litigating the Cause of Labour*:

> What the cases we have analysed appear to suggest however, is that what matters most is not the number of categories but rather the width of the

[60] Select Committee on Job Security. (2021). *First interim report: on-demand platform work in Australia*. June, pp71-72; paragraph number omitted.
[61] ITF. (n.d.) 'Who we are'. https://www.itfglobal.org/en/about-us/who-we-are. [Accessed 2 November 2021].
[62] ITF. (n.d.). 'Gig economy principles'. https://www.itfglobal.org/en/focus/future-work/gig-economy-principles. [Accessed 2 November 2021].

> definitions, the rights associated with each status, and the purposiveness of the jurisprudential approach to their interpretation.[63]

We made the point that just because a jurisdiction – for example, the United States – may only use the terms 'employee' and 'independent contractor' to denote the legal category pursuant to which one works, this does not necessarily mean that in practice there are only two categories. Indeed, in the US there are multiple definitions of 'employee' enshrined in various state and federal statutes,[64] meaning, for example, an employee for the purposes of California law is not necessarily an employee for the purposes of federal collective bargaining law (more on which below). The same point could be made about Australia. Whilst the country may in theory only use the two categories of 'employee' and 'independent contractor', in practice there are multiple legal categories, with varying entitlements to rights, into which a worker might fall. Whilst the 'national systems employee' in the FWA – which applies to the private sector, Commonwealth employees, and some state employees, may be the predominant 'work status' entitling a worker to rights, a 'casual employee' is – the term 'employee' notwithstanding – undeniably a different category of worker with a different set of rights. As the *Victorian Inquiry* summarised the status:

> Unlike workers engaged under standard employment arrangements, these workers are generally not entitled to paid leave. They are often not able to access remedies for unfair dismissal or entitled to redundancy payments. Their 'term' of employment is essentially shift to shift or, at most, rostered period to rostered period, subject to the exceptions below. Casuals are legally entitled to a higher hourly rate of pay than those employed under 'standard' arrangements – a 'loading' provided for under modern awards to compensate for lack of other entitlements.[65]

Similarly, the anti-bullying provisions in the FWA apply to a broader category of workers than just 'national systems employees'.[66] Further, the definition of employee in workers' compensation laws – which exist at the state level – vary and are often considered wider than

[63] Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf, p34.
[64] Ibid.
[65] James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p21. For a recent High Court authority on the jurisprudential approach to distinguishing between standard employees and 'casual employees', see: *WorkPac Pty Ltd v Rossato* [2021] HCA 23.
[66] Section 789FC(2); see also: Select Committee on Job Security. (2021). *First interim report: on-demand platform work in Australia*. June, p69.

the FWA 'national systems employee'.[67] The worker health and safety laws (WHS) – developed by Safe Work Australia and adopted voluntarily by most Australian states - on the other hand, require a person conducting a business or undertaking (PCBU) to provide employee-like health and safety rights to a broad category of 'workers', which includes 'those that extend beyond the traditional employer-employee relationship'.[68] Similarly, the obligation on employers to contribute towards an employee's pension under the *Commonwealth Superannuation Guarantee (Administration) Act 1992 (Cth)* (SG Act) extends to some workers who would not be employees under the FWA.[69] Further, there are industry and state-specific sectors where some employee-like rights are provided to otherwise 'independent' contractors, for example taxi drivers and those covered by the *Owner Drivers and Forestry Contractors Act 2005* in Victoria.[70] This report expresses no view on the number or name of the labels that should be ascribed to the employment relationships which characterise courier, food delivery, and private hire work in Australia; rather, this report takes as given that an employment relationship of some sort exists and that these workers should be entitled to workers' rights. And, in light of the lessons that can be learned from the successes and failures in other jurisdictions in forcing these companies to provide said rights, suggests some guiding principles for how to approach such regulation.

In Section 2, the report will set out some key principles of international law which are relevant to regulating workers' rights in the 'gig economy'. Sections 3 and 4 set out the case studies. Section 3 covers the American case studies: driver caps and minimum pay rates in New York City; AB 5 and Proposition 22 in California; a failed attempt at collective bargaining and successful attempts at minimum pay, sick pay, and de-activation procedures in Seattle. Of these examples, only AB 5 in California sought to classify 'gig economy' workers as 'employees'; the others provided employee-like rights to workers who were otherwise categorised as 'independent contractors'. Section 4 covers the European cases: worker status

[67] For example, the *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* in Victoria; James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p115.
[68] Safe Work Australia. (n.d.). 'Submission to the Senate Select Committee on Job Security' (Submission 22), p1.
[69] James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p132.
[70] Ibid., p23. It should be noted however that the federal *Independent Contractors Act 2006 (Cth)* presents a formidable barrier to states providing for employee-like protections to independent contractors, subject to certain exceptions; see: Ibid., p114.

in the UK, the agency worker law and Uber Eats in Geneva, and the *Rider Law* in Spain, the latter two classifying the workers concerned as 'employees'. The list of case studies chosen is by no means exhaustive; indeed, there have been (and there continue to be) multiple attempts at 'gig economy' regulation around the world.[71] And there are other countries where 'gig economy' workers are in practice enjoying workers' rights. As Professor Valerio De Stefano and co-authors wrote, in their comprehensive assessment of 'platform work and the employment relationship'[72]:

> …many national examples reviewed in this paper show that platform work can also be performed within the framework of an employment relationship, whether as a result of collective agreements, as it is the case in some Scandinavian countries, or statutory law as enforced through litigation. In addition, the many instances discussed in this paper, in which platforms adhere to employment laws also indicate that the employment relationship can, indeed, still serve its purpose to protect workers and benefit society at large, also in this realm…[73]

However, taken together, what the case studies do provide are examples of regulation: i) in both civil[74] and common law[75] systems; ii) at municipal[76], state (cantonal)[77], and national[78] level; iii) classifying workers as employees[79], an intermediate category[80], or independent contractors with employee-like rights[81]; iv) which inserts 'gig economy' workers into the broader employment law regime[82] as well as regulations which are tailor-made for the 'gig

[71] For an analysis with a particular focus on strategic litigation, see: Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf; for an analysis with a particular focus on international law, see: De Stefano, V., Durri, I., Stylogiannis, C., & Wouters, M. (2021). 'Platform work and the employment relationship'. *ILO Working Paper 27.* (Geneva, ILO). March.

[72] De Stefano, V., Durri, I., Stylogiannis, C., & Wouters, M. (2021). 'Platform work and the employment relationship'. *ILO Working Paper 27.* (Geneva, ILO). March.

[73] At p42.

[74] Geneva, Spain.

[75] New York City, Seattle, California, UK.

[76] New York City, Seattle.

[77] California, Geneva.

[78] Spain, UK.

[79] Spain, California AB 5, Geneva.

[80] UK.

[81] California Proposition 22, New York City, Seattle.

[82] California AB 5, UK, Spain, Geneva.

economy'[83]; and v) which have failed[84], been partially successful[85], and wholly successful[86]. It is also worth pointing out that the case studies include some of the most important markets for 'gig economy' companies. Indeed, in 2018 just under a quarter of Uber's rideshare gross bookings came from 5 metropolitan areas, of which all but one (San Francisco, Los Angeles, New York City, London) are covered to some degree in this report.[87] In each case study we review a limited selection of regulatory interventions; in the interest of going more into depth while limiting length, reviewing every intervention undertaken in these jurisdictions is simply beyond the scope.[88] The case studies therefore provide a substantial evidential basis from which to synthesise key principles on how to successfully regulate an industry which so badly does not want to be regulated; this will be done in Section 5. In light of the foregoing, Section 6 will respond to the concerns over regulation expressed by the conservative senators of the Select Committee. Section 7 will conclude.

[83] California Proposition 22, New York City, Seattle, Spain.
[84] California AB 5, California Proposition 22.
[85] UK, Spain, Geneva, New York.
[86] Seattle.
[87] Although the report does not assess municipal level regulation in San Francisco and Los Angeles, both cities are of course in California, one of the case studies here and itself the largest US market for 'gig economy' labour (see: Siddiqui, F. & Tiku, N. (2020). 'Uber and Lyft used sneaky tactics to avoid making drivers employees in California, voters say. Now, they're going national.' In: *Washington Post*. 17 November. https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/. [Accessed 30 November 2021]). In the case of London – as will be seen further below – there is no London-specific regulation of 'gig economy' workers' rights; as such, it is covered by the case study on worker status in the UK. The one metropolitan area left out is São Paolo, Brazil. See: Uber Technologies, Inc. (2019). 'Form S-1 Registration Statement'. Filed with the Securities and Exchange Commission. 11 April. https://www.sec.gov/Archives/edgar/data/1543151/000119312519103850/d647752ds1.htm. [Accessed 31 October 2021]. One 2020 report suggested that Seattle – the 15th largest metro area in the US – was likely one of the top ten cities for app-based rideshare in the country, and that NYC was indeed the largest. See: Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, pp10-11.
[88] For example, both Seattle and San Francisco have capped the commissions that food delivery companies can take from their couriers, a matter not covered in this report. Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p63. And at the time of writing, the San Francisco Office of Labor Standards Enforcement had just secured its largest settlement ever; food delivery company DoorDash had to pay out US$ 5.325 million for alleged violation of local labor laws; see: CBS SF BayArea. (2021). 'San Francisco Reaches $5.3 Million Settlement In DoorDash Labor Dispute'. 22 November. https://sanfrancisco.cbslocal.com/2021/11/22/san-francisco-reaches-5-3-million-settlement-with-doordash-in-labor-dispute/. [Accessed 2 December 2021]. Similarly, New York City has recently brought in a package of laws to improve working conditions for food-delivery couriers; this is also beyond the scope of this report. For more on this, see: Mays, J.C. (2021). 'New York Passes Sweeping Bills to Improve Conditions for Delivery Workers'. In: *New York Times*. 23 September. https://www.nytimes.com/2021/09/23/nyregion/nyc-food-delivery-workers.html?referringSource=artcileShare. [Accessed 29 November 2021] and Cordero, M. (2021). 'Son 65,000 y ahora lograron ingreso mínimo: quiénes son 'Los Deliversitas Unidos'. In: *Univision*. 23 September. https://www.univision.com/noticias/estados-unidos/deliveristas-nue...aign=digmtk_noticiassep23&utm_term=na&utm_content=Estados%20Unidos. [Accessed 29 November 2021].

## International Law

International workers' rights law does not limit entitlement to all workers' rights to only those working pursuant to an employment relationship. This is notwithstanding the International Labour Organization's (ILO's) promotion of the 'employment relationship' as an institution.[89] And, like the messiness of the Australian and American definitions alluded to above and explored in more detail below, even the concept of 'employment relationship' takes on different meanings in different international legal instruments.[90] As such, international law unequivocally provides at least some workers' rights to those labouring in the 'gig economy'.

### Rights for all workers

There are several international legal instruments which provide workers' rights to individuals irrespective of employment status. For example, Article 2 of the International Covenant on Civil and Political Rights states (emphasis supplied):

> 1. **Everyone** shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
>
> 2. **No restrictions** may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
>
> …[91]

The same applies to some of the most important legal instruments emanating from the ILO, the main source of international workers' rights law.[92] Indeed, as labour law professor Valerio De Stefano writes:

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[89] ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, p24.
[90] See: De Stefano, V. (2021). 'Not as simple as it seems: The ILO and the personal scope of international labour standards'. In: *International Labour Review*, Vol. 160, No 3, pp387-406.
[91] https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx. [Accessed 27 October 2021].
[92] The ILO has produced nearly 200 conventions and over 200 Recommendations in its over 100 years of existence; De Stefano, V. (2021). 'Not as simple as it seems: The ILO and the personal scope of international labour standards'. In: *International Labour Review*, Vol. 160, No 3, pp387-406, citation at p388.

> …if the ILO standards only addressed employees, their relevance would be at risk of steadily declining in industrialized countries and would be negligible in those countries where the employment relationship involves only a small part of the workforce…[93]

For example, the ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) provides (at Article 2) that (emphasis supplied):

> **Workers** and employers, **without distinction whatsoever**, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.[94]

ILO Fundamental Principles and Rights at Work (FPRW) more broadly – which include protections of freedom of assembly,[95] the right to organise and bargain collectively,[96] the elimination of forced or compulsory labour,[97] the abolition of child labour,[98] and protection against discrimination[99] - have also been held to apply to 'all workers, without discrimination, irrespective of their employment status'.[100] This is apropos for present purposes as – as will be expanded on below – the 'gig economy' workers' quest for rights around the world often

[93] De Stefano, V. (2021). 'Not as simple as it seems: The ILO and the personal scope of international labour standards'. In: *International Labour Review*, Vol. 160, No 3, pp387-406, citation at p389.
[94] ILO. (n.d.) 'CO87 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)'. https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312232. [Accessed 27 October 2021].
[95] C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).
[96] C098 – Right to Organise and Collective Bargaining Convention, 1949 (No. 98).
[97] C029 – Forced Labour Convention, 1930 (No. 29); P029 – Protocol of 2014 to the Forced Labour Convention, 1930; C105 - Abolition of Forced Labour Convention, 1957 (No. 105).
[98] C138 – Minimum Age Convention, 1973 (No. 138); C182 – Worst Forms of Child Labour Convention, 199 (No. 182).
[99] C100 – Equal Remuneration Convention, 1951 (No. 100); C111 – Discrimination (Employment and Occupation) Convention, 1958 (No. 111). Also see: ILO. (n.d.). 'ILO Declaration on Fundamental Principles and Rights at Work'. https://www.ilo.org/declaration/lang--en/index.htm. [Accessed 27 October 2021].
[100] See: ILO. (2020). 'Promoting employment and decent work in a changing landscape: International Labour Conference, 109th Session'. *Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution), Report III (Part B)*, p18. The term 'held' is used loosely here; the Committee of Experts on the Application of Conventions and Recommendations (CEACR) is an ILO body that issues reports on countries' compliance with conventions and recommendations. Their decisions and observations are not legally binding; technically, pursuant to Article 37 of the ILO Constitution, binding decisions on convention interpretation may emanate solely from the International Court of Justice (ICJ) or from a 'tribunal'. However only one case in the history of the ILO has ever been decided by the ICJ and the 'tribunal' was never created. In practice, the CEACR often prove influential with country governments as well as judicial and quasi-judicial bodies; see: De Stefano, V. (2021). 'Not as simple as it seems: The ILO and the personal scope of international labour standards'. In: *International Labour Review*, Vol. 160, No 3, pp387-406, citation at p388, 396.

occurs in a context of trade union mobilisation.[101] And given the disproportionate representation of migrant workers and people of colour in Global North 'gig economies', protection against discrimination is particularly pertinent. The ILO fundamental principles and rights are also significant as they are applicable to all ILO member states, regardless of whether the member state in question has ratified the corresponding conventions.[102] It should also be noted that at the time of writing, there is a move afoot to add occupational safety and health to the list of fundamental principles and rights,[103] another matter of particular relevance to 'gig economy' workers. The importance of said fundamental rights was reiterated by the ILO in its *Centenary Declaration for the Future of Work* (at [3(B)]):

> The Conference calls upon all Members, taking into account national circumstances, to work individually and collectively, on the basis of tripartism and social dialogue, and with the support of the ILO, to further develop its human-centred approach to the future of work by:
>
> …
>
> B. Strengthening the institutions of work to ensure adequate protection of all workers, and reaffirming the continued relevance of the employment relationship as a means of providing certainty and legal protection to workers, while recognizing the extent of informality and the need to ensure effective action to achieve transition to formality. All workers should enjoy adequate protection in accordance with the Decent Work Agenda, taking into account:
>
> (i) respect for their fundamental rights;
>
> …

[101] Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 26 October 2021], p33.

[102] ILO. (2010). 'ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up'. Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010). https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm. [Accessed 27 October 2021].

[103] De Stefano, V. (2021). 'Not as simple as it seems: The ILO and the personal scope of international labour standards'. In: *International Labour Review*, Vol. 160, No 3, pp387-406, citation at p402.

The CEACR has in practice held these conventions to apply to workers in atypical forms of employment, analogous to some 'gig economy' workers. For example, in relation to the Worst Forms of Child Labour Convention, 1999 (No. 182), the CEACR recalled observing:

> cases where the legislation is not comprehensive enough to protect all children from becoming engaged in work that is dangerous to their health, safety and morals. This is particularly true for self-employed children or children working in the informal economy, as national legislation often fails to cover children properly who perform hazardous work outside a labour relationship or contract.[104]

With regard to the right to freedom of association, the Committee on Freedom of Association (CFA), another ILO supervisory body, has stated:

> By virtue of the principles of freedom of association, all workers with the sole exception of members of the armed forces and the police should have the right to establish and join organisations of their own choosing. The criterion for determining the persons covered by that right, therefore, is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practise liberal professions, who should nevertheless enjoy the right to organize.[105]

ILO standards are also of particular relevance as they are increasingly being incorporated into a plethora of legal – and non-legal - instruments. As Law Professor Keith Ewing has written:

> One of the most notable developments in relation to the ILO for more than 20 years has been the reference to ILO standards in an increasingly diverse range of sources. These include corporate codes, global framework agreements, judicial decisions, the OECD Guidelines on Multinational Enterprises, and the UN Guiding Principles on Business and Human Rights, as well as bilateral and pluri-lateral free trade agreements and elsewhere.[106]

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[104] ILO. (2012). *Giving Globalization a Human Face: General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization*, 2008. ILC.101/III/1B. Geneva, p234; cited in De Stefano, V. (2021). 'Not as simple as it seems: The ILO and the personal scope of international labour standards'. In: *International Labour Review*, Vol. 160, No 3, pp387-406, citation at p399.

[105] ILO. (2018). *Freedom of Association: Compilation of Decisions of the Committee on Freedom of Association*, 6th Edition, International Labour Office, Geneva, p387; cited in: Murray, J., Boisson de Chazournes, L. & Lee, J. (2021). *Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement: Report of the Panel of Experts.* 20 January, p42.

[106] Ewing, K.D. (2021). 'The EU-UK Trade and Cooperation Agreement: Implications for ILO Standards and the European Social Charter in the United Kingdom'. In: *King's Law Journal*, Vol. 32, No.2, pp306-343, citation at

For example, the Australia – United States Free Trade Agreement of 2004 required the parties to comply with their obligations as ILO member states.[107] Judicial and quasi-judicial bodies outwith the ILO structures have therefore also interpreted these core conventions to be of broad application, bringing under their protective cover those who would not ordinarily be considered to be party to an employment relationship. This is seen, for example, in a dispute which arose between South Korea and the European Union (EU) under the EU – Korea Free Trade Agreement, which incorporated ILO principles on freedom of association. The EU alleged, in part, that South Korea was in violation of these principles – and hence in violation of the EU-KFTA – because the country's trade union laws excluded from coverage some self-employed workers. The Panel of Experts tasked with resolving the dispute found in favour of the EU on this point.[108]

And it is not just the FPRW which apply to all workers. Indeed, the ILO's own official *Manual for Drafting ILO Instruments* states:

> On many occasions, it has been emphasized that, if the subject matter of a given instrument is not limited only to employed workers, or the instrument does not provide for any specific exclusion in respect of one or more categories of workers, then 'worker' is understood to cover all workers.[109]

For example, and although Member States may in practice exclude many self-employed workers from coverage, the Labour Inspection Convention, 1947 (No. 81) does not require the exclusion of such workers.[110] Other ILO legal instruments apply specifically to

p306. Also on the topic of the incorporation of ILO standards into the UK-EU Brexit treaty, see: Moyer-Lee, J. (2021). 'Brexit gives the Tories a free hand to dismantle workers' rights'. In: *Al Jazeera*. 9 January. https://www.aljazeera.com/opinions/2021/1/9/brexit-deal-tories-uk-workers-rights. [Accessed 27 October 2021].

[107] Stewart, A., Forsyth, A., Irving, M., Johnstone, R. & McCrystal, S. (2016). *Creighton and Stewart's Labour Law*. 6th Edition. The Federation Press, p79.

[108] Murray, J., Boisson de Chazournes, L. & Lee, J. (2021). *Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement: Report of the Panel of Experts.* 20 January. Also see the discussion in: Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 26 October 2021], pp19-20.

[109] 2006, para 125, cited in: De Stefano, V. (2021). 'Not as simple as it seems: The ILO and the personal scope of international labour standards'. In: *International Labour Review*, Vol. 160, No 3, pp387-406, citation at p393.

[110] ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, p329.

'independent' or 'self-employed' workers.[111] So, whilst the scope of some 'gig economy'-relevant ILO legal instruments is indeed restricted to those working pursuant to an employment relationship,[112] – other non-FPRW instruments are also of universal scope. For example, the Violence and Harassment Convention, 2019 (No. 190) provides (at Article 2) that (emphasis supplied):

> 1. This Convention protects workers **and other persons in the world of work**, including employees as defined by national law and practice, **as well as persons working irrespective of their contractual status**, persons in training, including interns and apprentices, workers whose employment has been terminated, volunteers, jobseekers and job applicants, and individuals exercising the authority, duties or responsibilities of an employer.
>
> 2. This Convention **applies to all sectors, whether private or public, both in the formal and informal economy**, and whether in urban or rural areas.[113]

This convention is of particular relevance to 'gig economy' workers given the well-documented and extreme levels of violence and harassment to which they are often subject.[114] For example, the convention requires (at Article 4) that:

> Each Member shall adopt, in accordance with national law and circumstances and in consultation with representative employers' and workers' organizations, an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work. Such an approach should take into account violence and harassment involving third parties, where applicable, and includes:

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[111] For an example of independent workers: the Human Resources Development Recommendation, 1975 (No. 150). For an example of self-employed workers: the Asbestos Recommendation, 1986 (No. 172). See: ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, p85.

[112] For example, the Termination of Employment Convention, 1982 (No. 158); see ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, p85. For the argument that the meaning of 'employment relationship' in those ILO conventions whose scope is restricted to employed workers depends on the context of each such individual convention, see: De Stefano, V. (2021). 'Not as simple as it seems: The ILO and the personal scope of international labour standards'. In: *International Labour Review*, Vol. 160, No 3, pp387-406.

[113] C190 – Violence and Harassment Convention, 2019 (No. 190). https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190. [Accessed 28 October 2021]; also cited in: De Stefano, V. (2021). 'Not as simple as it seems: The ILO and the personal scope of international labour standards'. In: *International Labour Review*, Vol. 160, No 3, pp387-406, citation at p401.

[114] For example, see: O'Brien, S.A. (2021). 'Lyft releases sexual assault data: 4,158 incidents, including 360 rape reports over three year period'. In: *CNN*. 22 October. https://edition.cnn.com/2021/10/21/tech/lyft-safety-transparency-report-sexual-assault/index.html. [Accessed 4 December 2021].

> (a) prohibiting in law violence and harassment;
>
> (b) ensuring that relevant policies address violence and harassment;
>
> (c) adopting a comprehensive strategy in order to implement measures to prevent and combat violence and harassment;
>
> (d) establishing or strengthening enforcement and monitoring mechanisms;
>
> (e) ensuring access to remedies and support for victims;
>
> (f) providing for sanctions;
>
> (g) developing tools, guidance, education and training, and raising awareness, in accessible formats as appropriate; and
>
> (h) ensuring effective means of inspection and investigation of cases of violence and harassment, including through labour inspectorates or other competent bodies. [115]

In sum, whether or not 'gig economy' workers fall into a domestic legal category which provides them with workers' rights in an individual country, if the country is not providing them with certain trade union rights, protection from discrimination, and other rights (subject to country ratifications), the country is in violation of international law. ITF Principle 4 (ITF P4) specifically calls on 'gig economy' employers to respect such international legal rights.

## Recommendation 198

There does not exist – either in ILO legal instruments or in international law more generally – a single definition of the 'employment relationship'. As Professor De Stefano has written:

> …the ILO legal system contains no single, universal and conclusive definition of the term "employment contract or relationship", or a consequent international definition of the term "employee". It would probably be impossible to reach an agreement upon a legal definition that will be generally suitable for all the Member States of the Organization. The significant divergences in legal traditions and economic development that exist among the 187 ILO Member States frustrate any effort in this direction.[116]

[115] C190 – Violence and Harassment Convention, 2019 (No. 190). https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190. [Accessed 28 October 2021].

[116] De Stefano, V. (2021). 'Not as simple as it seems: The ILO and the personal scope of international labour standards'. In: *International Labour Review*, Vol. 160, No 3, pp387-406, citation at p390.

However, given the extent to which the institution of the employment relationship remains relevant in ILO Member States to the provision of workers' rights, the organisation has indeed attempted to provide guidance. The origins of Recommendation 198 (R198) are summarised by the CEACR (footnotes and paragraph numbers omitted):

> In 1997 and 1998, the [International Labour Conference (ILC)] examined an item on contract labour. The ILC discussion examined the situation of persons excluded from the employment relationship, including those in "triangular" relationships, as well as workers who perform work or provide services to other persons within the legal framework of a civil or commercial contract, but who are in fact dependent on or integrated into the firm for which they perform work or provide services. The objective of the ILC discussion was to protect certain categories of unprotected workers through the adoption of a Convention and Recommendation on the subject. The proposal ultimately failed, primarily because the proposed instruments did not clarify the scope of the employment relationship, and did not define who should be deemed to be covered by the employment relationship. Moreover, differences arose in concepts and terminology between countries and languages. Nevertheless, delegates from all regions referred to the employment relationship in its various forms and with different meanings, as a concept familiar to everyone. In addition, some of the tripartite constituents considered that the proposed Convention created a third category of workers who fell between the employed and the self-employed, which risked undermining workers' rights.
>
> In 1998, following the second discussion, the ILC adopted a resolution inviting the Governing Body to place the issue of the employment relationship on the agenda of a future session of the Conference. It also requested the Office to hold meetings of experts to examine: which workers in the situations that were being identified were in need of protection; and appropriate ways to protect these workers and how to define them, taking into consideration differences in national legal systems and language differences existing between countries.[117]

After several more studies, meetings, and a healthy dose of bureaucracy, the ILC in 2003

> recommended that the ILO envisage the development of a Recommendation to combat disguised employment relationships, which would provide for mechanisms to ensure that those in an employment relationship enjoy the rights to which they are entitled.

[117] ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, pp82-83.

> Subsequently, in 2006, following extensive discussions, the ILC adopted Recommendation No. 198.[118]

According to the CEACR, Recommendation 198 has three main aims:

1. the formulation and application of a national policy to review, clarify and adapt the scope of relevant laws and regulations, and to guarantee effective protection for workers in an employment relationship;
2. the establishment of criteria for the determination of the existence of an employment relationship (conditions and indicators); and
3. the establishment of an appropriate mechanism for monitoring developments in the labour market and the organization of work.[119]

As such, it is interesting to note that the CEACR's emphasis is more on the processual elements of R198, rather than on the content of what constitutes an employment relationship. More specifically on the processual aspect, paragraphs 2 and 3 of R198 state:

> 2. The nature and extent of protection given to workers in an employment relationship should be defined by national law or practice, or both, taking into account relevant international labour standards. Such law or practice, including those elements pertaining to scope, coverage and responsibility for implementation, should be clear and adequate to ensure effective protection for workers in an employment relationship.
>
> 3. National policy should be formulated and implemented in accordance with national law and practice in consultation with the most representative organizations of employers and workers.[120]

According to R198, the content of such a national policy should, among other things, 'combat disguised employment relationships',[121] 'ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties',[122] 'ensure that standards applicable to all forms of contractual arrangements establish who is responsible for

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[118] ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, p84; paragraph numbers and footnotes omitted. Also, see the procedural/legislative history of R198 outlined in: De Stefano, V., Durri, I., Stylogiannis, C., & Wouters, M. (2021). 'Platform work and the employment relationship'. *ILO Working Paper 27.* (Geneva, ILO). March, pp5-6.

[119] ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, p86; numbering inserted by author.

[120] R198 – Employment Relationship Recommendation, 2006 (No. 198). https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535. [Accessed 28 October 2021].

[121] Ibid., para 4(b).

[122] Ibid., para 4(c).

the protection contained therein',[123] and 'ensure compliance with, and effective application of, laws and regulations concerning the employment relationship'.[124] On this last point, para 17 of R198 further states that countries should develop 'effective measures aimed at removing incentives to disguise an employment relationship'.[125] And of particular import to the notoriously law-breaking 'gig economy' companies, para 15 admonishes governments that 'national labour administrations and their associated services should regularly monitor their enforcement programmes and processes'.[126] Also, of direct relevance to the 'gig economy', para 7(a) calls on countries to 'provide effective protection to and prevent abuses of migrant workers in its territory who may be affected by uncertainty as to the existence of an employment relationship'.[127] The CEACR has similarly emphasised, in relation to R198:

> … the importance of taking into account the situation of other specific groups, including the most disadvantaged workers, young persons, older workers, workers in the informal economy, migrant workers and persons with disabilities. It is also essential to consider the impact of multiple discrimination, as people who are subject to multiple forms of discrimination are more likely to be working under precarious conditions in which disguised employment relationships are prevalent, or where the employment relationship is uncertain.[128]

Finally, of particular relevance to regulating the 'gig economy' (as will be seen further below), R198 states that Member States should consider:

> determining, following prior consultations with the most representative organizations of employers and workers, that workers with certain characteristics, in general or in a particular sector, must be deemed to be either employed or self-employed.[129]

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[123] Ibid., para 4(d).
[124] Ibid., para 4(f).
[125] Ibid.
[126] Ibid.
[127] Ibid. See also in this regard Para 43 of R169 – Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169) (https://www.ilo.org/dyn/normlex/en/f?p=1000:12100:::NO:12100:P12100_INSTRUMENT_ID:312507. [Accessed 28 October 2021]). Also referred to in: ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, p97.
[128] ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, p96; footnotes omitted.
[129] R198 – Employment Relationship Recommendation, 2006 (No. 198). https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535. [Accessed 28 October 2021], para 11(c).

Whilst para 8 of R198 warns that 'National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships',[130] the CEACR points out that 'in true civil or commercial relationships the parties are deemed to have equal bargaining power',[131] thereby providing some insight into the extensive breadth of coverage of the 'employment relationship' under R198.[132]

In terms of the actual content of the employment relationship, R198 calls on countries to consider 'allowing a broad range of means for determining [its] existence',[133] suggests that 'subordination or dependence' may be factors countries take into consideration,[134] and provides a list of further possible indicators (at para 13):

> (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;
>
> (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.[135]

[130] Ibid.
[131] ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, p99.
[132] Although note that the International Organisation of Employers (IOE), the body which represents employer views before the ILO, does indeed believe that R198 interferes with civil and commercial relationships; see ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, p110.
[133] R198 – Employment Relationship Recommendation, 2006 (No. 198). https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535. [Accessed 28 October 2021], at para 11(a).
[134] Ibid., at para 12.
[135] Ibid.

The CEACR has pointed out that R198 'provides guidance on the substance of the employment relationship, but does not attempt to define it',[136] has indeed emphasised that the list of indicators cited above 'should not be considered exhaustive,' and that Member States should 'consider the need to establish new criteria and disregard existing criteria when they are no longer useful'.[137] Notwithstanding the non-binding and fluid nature of the indicia in R198, some countries' courts have construed the meaning of 'employment relationship' in domestic law on the basis of the Recommendation, for example, the Supreme Court of Russia.[138]

So far as concerns the applicability of R198 to 'platform workers', the CEACR has stated:

> The Committee notes the very diverse criteria used to determine the status of platform workers, and the varied outcomes. It considers that this new form of work calls for a thorough examination of the real conditions of such workers, which is not always readily apparent.
>
> The Committee considers that the common characteristic of the use of technological means to distribute tasks to an indeterminate workforce cannot justify these activities being considered forms of work separate from the rest of the labour market. In any case, the Committee recalls that the full range of fundamental principles and rights at work are applicable to platform workers in the same way as to all other workers, irrespective of their employment status.[139]

In Uruguay, the Labour Appeal Court specifically upheld the finding that an Uber driver was an employee on the basis of R198, stating:

> [t]he Chamber agrees with the first instance ruling that, at the present time and at the time of the occurrence of the facts in question, ILO Recommendation No. 198 should be considered as the theoretical framework applicable in Uruguay when there is a dispute over the qualification of a legal relationship involving employment.[140]

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[136] ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, p101.
[137] Ibid., p113.
[138] Ibid., p346.
[139] Ibid., p142; internal paras and footnotes omitted.
[140] Tribunal de Apelaciones de Trabajo de Montevideo de 1° Turno, 3 de junio de 2020, Case No. 0002-003894/2019, cited in: De Stefano, V., Durri, I., Stylogiannis, C., & Wouters, M. (2021). 'Platform work and the employment relationship'. *ILO Working Paper 27.* (Geneva, ILO). March, p31. Also see: Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March.

In sum, R198 outlines a purposive approach to construing an employment relationship and is of direct relevance to recognising the correct employment status of 'gig economy' workers, as called for by ITF P2. However - as the International Trade Union Confederation (ITUC) has pointed out – it has had limited application in practice and its effectiveness is compromised by the fact that it is not legally binding.[141]

## The American Cases

### A note on American law

Employment and labour law in the United States operate at the federal, state, county, and municipal level, together constituting a complex patchwork of overlapping regulations. As federal law reigns supreme,[142] some federal statutes operate in such a way as to prevent states and other political subdivisions from legislating in a given area. For example, the 1935 National Labor Relations Act (NLRA), which concerns collective bargaining in the bulk of the private sector,[143] notably pre-empts – subject to certain exceptions – states and cities from legislating for separate collective bargaining regimes.[144]

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https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 28 October 2021], p19.

[141] ILO. (2020). *Promoting employment and decent work in a changing landscape.* International Labour Conference, 109th Session, p367. Although note that the Recommendation has had some application in 'soft law'; for example, the *OECD Guidelines for Multinational Enterprises* (2011 Edition) refers multinationals to the indicia of R198 for the purposes of determining the existence of the employment relationship (at p38). See: https://www.oecd.org/daf/inv/mne/48004323.pdf. [Accessed 1 December 2021].

[142] Pursuant to the Supremacy Clause of the United States Constitution (Article VI, Cl. 2).

[143] There are some notable – and infamous - exceptions, such as for farmworkers and domestic workers, a legacy of the nasty compromise made between President Franklyn Delano Roosevelt and the racist southerners from his own party in the Senate who didn't want to alter the power balance between the white bosses and the predominantly African American workforces in these important sectors in the 1930's South, thereby upsetting the 'racial order'. The Fair Labor Standards Act (FLSA), from the same time period - which concerns minimum wage, among other rights - contained a similar exemption. See: Farhang, S. & Katznelson, I. (2005). 'The Southern Imposition: Congress and Labor in the New Deal and Fair Deal'. Spring. In: *Studies in American Political Development*, 19, pp1-30; and Perea, J.F. (2011). *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J.195.

[144] As the Supreme Court has stated: 'Although the NLRA itself contains no express pre-emption provision, [the Supreme Court] ha[s] held that Congress implicitly mandated two types of pre-emption as necessary to

Other federal statutes provide a floor upon which states can build, for example the right to a minimum wage enshrined in the 1937 Fair Labour Standards Act (FLSA). So, for example, at the time of writing, a qualifying worker in Chicago (located in Cook County in the state of Illinois) is entitled to a minimum wage of US$ 15 per hour. A qualifying worker who works in Cook County but outside of Chicago is entitled to a minimum wage of US$ 13 per hour. Meanwhile, the minimum wage for qualifying workers in the state of Illinois (who are not subject to some other county or local minimum wage) is US$ 11 per hour.[145] Workers in the next-door state of Wisconsin are entitled only to the federal minimum wage of US$ 7.25 per hour.[146]

Under the US Constitution, states are sovereign entities which can legislate in any area not reserved to the federal government. Municipalities and counties, on the other hand, only have the power gifted to them by the states in which they reside. So while it is common for cities in the more progressive states – such as New York and California – to have the power to set their own minimum wage rates above the state level, in states such as Alabama and Georgia, this is prohibited; Republican-backed state law prevents Democratic cities such as Birmingham and Atlanta from legislating for higher minimum pay for their citizens.[147]

As one might expect with this regulatory patchwork, there are – as alluded to above – multiple (and contested) definitions of the term 'employee' in US law. For example, the definition of 'employee' in the National Labor Relations Act (NLRA) - and hence the scope of coverage of basic trade union rights in the US private sector – was contentious long before the apparition

implement federal labor policy'; *Chamber of Commerce of the U.S. v Brown*, 554 U.S. 60, 65 (2008). The two types of pre-emption referred to concern cases where the NLRA regime specifically intended to leave matters to the play of market forces (*Machinists* pre-emption), as well as to areas the NLRA specifically intended to regulate (*Garmon* pre-emption); see: *Chamber of Commerce of the United States v City of Seattle* 890 F.3d 769, at p37-38.

[145] Hope, L. (2021). 'Chicago minimum wage increase to $15-an-hour takes effect'. In: abc7 Eyewitness News. 2 July. https://abc7chicago.com/minimum-wage-chicago-illinois-2021-cook-county/10849920/. [Accessed 28 October 2021].

[146] Economic Policy Institute. (n.d.). 'Minimum Wage Tracker'. https://www.epi.org/minimum-wage-tracker/#/min_wage/Wisconsin. [Accessed 28 October 2021].

[147] In the case of Birmingham this led to a legal case challenging the impugned law (Act No. 2016-18) on discrimination grounds (given the disproportionate impact on Birmingham's African American population. See: *Lewis v Governor of Alabama*, 944 F.3d 1287 (2019). In the case of Georgia, the law is § 34-4-3.1(b) (2017).

of the 'gig economy' in its modern form. Indeed, as far back as 1944, the US Supreme Court held that the meaning of employee under the NLRA was a matter of 'economic and policy considerations within the labor field', going on to hold that although a group of newsboys were independent contractors under the common law-derived definition of the term, they were nevertheless employees for the purposes of the NLRA.[148] Congress was less than happy and responded with the Labor Management Relations Act 1947 (known as the Taft-Hartley Act), which, among other things, specifically excluded 'any individual having the status of an independent contractor' from the definition of employee in the NLRA.[149] The report of the House of Representatives on the amendment explained the reasoning:

> An "employee," according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of [*NLRB v. Hearst Publications*, 322 U.S. 111 (1944)], the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board. … It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. ... It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee". [sic][150]

The consequence of this is that the NLRA now uses the common law-derived definition of employee - considered to be the narrowest definition available.[151] Combined with the fact that the NLRA pre-empts regulation in the field, this means that states and municipalities

[148] *NLRB v Hearst Publications*, 322 U.S. 111 (1944), pp131-132. Also, see discussion in: *Chamber of Commerce of the United States v City of Seattle* 890 F.3d 769, at p39.
[149] *Chamber of Commerce of the United States v City of Seattle* 890 F.3d 769, at p40.
[150] H.R. Rep. No. 80-245, at 18 (1947), quoted in: *Chamber of Commerce of the United States v City of Seattle* 890 F.3d 769, at p41-42.
[151] Note however, that notwithstanding the Taft-Hartley amendments, and although this concerns the definition of 'employer' rather than 'employee', the NLRA has still recognised the concept of 'joint employer' (whereby an employee can have more than one employer) throughout the history of the legislation. Although the width of the term has tended to vary in line with the political makeup of the (presidentially nominated) Board. See: *Browning-Ferris Indus. Of Cal. V NLRB*, 911 F.3d 1195.

cannot legislate to make private sector workers employees for the purposes of collective bargaining; this is the purview of the NLRA as interpreted by the National Labor Relations Board (NLRB). The only alternative is to set up a collective bargaining mechanism designed for independent contractors (as Seattle attempted to do), which is subject to strict rules in order to overcome antitrust laws (as will be seen below).[152]

The FLSA on the other hand, was intended by Congress to have 'the broadest definition of 'employee'',[153] meaning that a worker may be entitled to the federal minimum wage but not to collective bargaining or state employment protections.[154] Other federal policy initiatives have also influenced the rights of workers who may not be considered employees under the narrow common law-derived definition. For example, during the pandemic, the government provided unemployment benefits to independent contractors by way of the Coronavirus Aid, Relief and Economic Security Act (CARES).[155] In sum, and although this is a rather crude simplification, federal law often acts as the ceiling of worker protections in more conservative states and as a barrier to better worker protections in more progressive states.

Whilst the examples in this report are of states and cities that have legislated to provide 'gig economy' workers with rights, various conservative states – in particular, and as expected, in the South and Midwest - have put forth proposals to do the oppositive, making it harder for these workers to qualify as employees in state law.[156] Indeed, at the time of writing, half of US states provide companies with partial or complete exemptions from state employment laws for 'gig economy' workers.[157]

[152] For a more extensive discussion on the history of collective bargaining law and its application to non-employee workers, see: Estlund, C. & Liebman, W. (2021). 'Collective Bargaining Beyond Employment in the United States'. In: *Comparative Labor Law & Policy Journal*, Vol. 42, Issue 2.
[153] 81 Cong. Rec. 7657 (remarks of Senator Hugo L. Black); cited in: *Razak v Uber Techs., Inc., 951 F.3d 137,* at p142.
[154] For a detailed discussion on the width of the employee definition in the FLSA and its legislative history, see: Department of Labor (Wage and Hour Division). (2021). 'Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal. In: *Federal Register*, Vol. 86, No. 86. 6 May.
[155] Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p4.
[156] De Stefano, V., Durri, I., Stylogiannis, C., & Wouters, M. (2021). 'Platform work and the employment relationship'. *ILO Working Paper 27.* (Geneva, ILO). March, pp18-19.
[157] NELP. (2021). *App-Based Workers Speak: Studies Reveal Anxiety, Frustration, and a Desire for Good Jobs*. October.

## New York City

### The Big Apple's explosion of app-based services

Shortly after the birth of the modern 'gig economy' model, rideshare companies descended on the streets of New York City (NYC) – fittingly - the headquarters of global capitalism. Uber's standard UberX service was introduced in 2012, Via arrived in 2013, Lyft the year after, and Juno[158] in 2016.[159] As economists James A Parrot and Michael Reich summarised in their seminal report on NYC app-based driver earnings (more on which below; internal citations omitted):

> In just a few years, the app-based industry has transformed urban transportation in New York City. In 2015, Uber alone had about 25,000 cars in its New York City fleet, twice the number of taxicabs. The app-based industry's growth accelerated in 2015 and has continued since. …the total number of app-dispatched trips grew by double digits in 2016 and 2017, with the number of app trips surpassing the medallion sector in December 2016. The four major app-based companies provided nearly 160 million trips in 2017, almost four times the 2015 number. By February of 2018, the number of app-dispatched trips was double the number of medallion trips. However, the growth in app-dispatched trips far exceeded the decline in medallion trips. Apparently, the rapid growth of the app-based sector has diverted some passengers from mass transit, contributing to the first non-recession declines in New York City subway and bus ridership.[160]

This growth in app-based rideshare resulted in roughly 80,000 vehicles (compared to fewer than 14,000 yellow taxis)[161] and drivers.[162] The authors further pointed out that:

> The industry provides more jobs than many prominent industries, including commercial banking, hotels, and publishing. Uber alone would be the largest for-profit private employer in New York City—if Uber drivers were classified as employees rather than independent contractors.[163]

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[158] Acquired by Gett in mid-2017; Parrot, J. A. & Reich, M. (2018). *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment.* Report for the New York City Taxi and Limousine Commission. July, p63.
[159] Parrot, J. A. & Reich, M. (2018). *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment.* Report for the New York City Taxi and Limousine Commission. July, p7.
[160] Ibid., p7.
[161] *Ibid.*, p6.
[162] *Ibid.*, p15.
[163] *Ibid.*, p6.

And who were all these drivers? '[P]rincipally immigrants without a four-year college degree and who face restricted labor market opportunities'. Indeed, for hire drivers generally (which includes a minority of drivers who do not work for an app-based company) were nearly entirely male and over 90% were immigrants, roughly half of whom hailed from just a few countries: the Dominican Republic, Haiti, Pakistan, India, and Bangladesh.[164] The for-hire industry relied on full-time workers; 80% of rides were provided by the 60% of drivers who worked full time.[165]

In a report a year later, the New York City's Taxi and Limousine Commission (TLC) and Department of Transportation (NYC DoT) blamed the growth of for hire vehicles – in part - for the slowing of average traffic speeds in mid-town Manhattan from 6.1 miles per hour (mph) in November 2010 to 4.3mph in November 2018. As the regulatory bodies pointed out, the app-based companies had 'saturated the market with vehicles to ensure low wait times and spur demand, causing drivers to spend over 40% of total work time empty and cruising for passengers'.[166]

In addition to causing congestion, the unlimited growth in vehicles and drivers was driving down pay. 'Even though Uber, Lyft drivers and yellow cab owner-drivers are at different stages of their struggle for life out of poverty,' commented Bhairavi Desai, Executive Director of the NYTWA, 'stopping the oversaturation of cars is the starting point for all drivers to recover in this race to the bottom.' After all, more cars meant fewer fares 'and the less reason App companies have to stop Deactivations or to guarantee job security to their drivers.'[167] And without the protective coverage provided by the effective recognition of drivers as employees, the only limit on how low their wages could fall was that set by the 'reservation

[164] *Ibid.*, p15.
[165] *Ibid.*, p3. Indeed, and despite the employer rhetoric of 'gig economy' work being little more than a side-hustle for otherwise economically independent and autonomous individuals, company policy often encouraged full time work. For example, for years, Lyft rewarded drivers who worked 30-49 hours per week by taking only 50% of the company's normal commission. For those drivers who worked 50+ hours per week, Lyft took no commission at all. See: *Islam v Lyft, Inc.*, Plaintiff's Complaint. Filed: 13 April 2020, at [3].
[166] NYC TLC & DoT. (2019). *Improving Efficiency and Managing Growth in New York's For-Hire Vehicle Sector: Final Report*. June, p2.
[167] NYTWA. (n.d.) 'NYTWA Statement: TLC Votes Yes to Extend Vehicle Cap!' https://www.nytwa.org/statements/2019/8/7/nytwa-statement-tlc-votes-yes-to-extend-vehicle-cap. [Accessed 19 October 2021].

wage', economic parlance for what the drivers may be able to earn elsewhere (taking into account the costs of switching jobs).[168]

The pressure of these forces was becoming unbearable for drivers; 'we have no money to feed our families,' said app-based driver Shakeel Shabbir, at a rally outside City Hall in the Summer of 2018. 'I have no money,' he added, 'that's why I'm here'.[169] Indeed, in the months leading up to this rally, six drivers had died by suicide (at least half of them taxi drivers), something the NYTWA attributed – in part – to the financial stress caused by 'unregulated app companies'.[170] And drivers were rallying; in less than a year leading up to the City Hall protest, the NYTWA alone organised over 25 actions, including 12 demonstrations since February.[171] The situation was dire. As NYC Mayor Bill de Blasio recognised: 'Our city is directly confronting a crisis that is driving working New Yorkers into poverty and our streets into gridlock.' Something had to be done.[172]

## Cap it!

The legal power to cap 'for-hire vehicle' (FHV) license numbers lay with New York City,[173] rather than with the TLC.[174] The concept of capping the number of cars permitted to transport passengers in the city was not a new one; the taxi medallion system was born during the Great Depression in the 1930s as a method of dealing with the problem of too many drivers chasing

[168] Parrot, J. A. & Reich, M. (2018). *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment.* Report for the New York City Taxi and Limousine Commission. July, p7.
[169] Quoted in: Ottaway, A. (2018). 'NYC Cracks Down on Uber, Lyft With New-Driver Cap'. In: *Courthouse News Service*. 8 August. https://www.courthousenews.com/nyc-to-crack-down-on-uber-lyft-with-new-driver-cap/. [Accessed 20 October 2021].
[170] Ibid.
[171] NYTWA. (n.d.). https://www.nytwa.org/litigation. [Accessed 19 October 2021].
[172] Quoted in: Ottaway, A. (2018). 'NYC Cracks Down on Uber, Lyft With New-Driver Cap'. In: *Courthouse News Service*. 8 August. https://www.courthousenews.com/nyc-to-crack-down-on-uber-lyft-with-new-driver-cap/. [Accessed 20 October 2021].
[173] Such power having been authorised by the State of New York pursuant to section 10(1)(ii)(a)(12) of the Municipal Home Rule Law, which provided the power to enact local laws including but not limited to 'the power to adopt local laws providing for the regulation or licensing of occupations or businesses'; see *Zehn-NY LLC & Ors v the City of New York & Ors*, Supreme Court of the State of New York (New York County), 151730/2019 at pp5-6.
[174] See: *Zehn-NY LLC & Ors v the City of New York & Ors*, Supreme Court of the State of New York (New York County), 151730/2019.

too little pay.[175] Indeed, the City had considered capping FHV numbers in 2015 but was met with the onslaught of Uber's campaigning and lobbying efforts[176] - 'Uber is a multibillion-dollar corporation, and they're acting like one,' Mayor de Blasio had said in the midst of the struggle[177] – eventually forcing the mayor to back down. He 'just basically caved,' as Bhairavi Desai, leader of the NYTWA, put it. By 2018, however, the City was ready to push it through. As such, the NYC Council voted on 8 August 2018, by a margin of 39-6,[178] to pass Local Law (LL) 147 of 2018.[179] Less than a week later, on the 14th of August, Mayor de Blasio signed the bill into law;[180] it came into effect that same day. LL 147 forbade the TLC from issuing:

> …new for-hire vehicle licenses for 12 months after the effective date of this local law, during which period the commission shall submit a report to the council every 3 months on the impact of this section on vehicle ridership throughout the city.[181]

Section 3 of the law further required the TLC to annually review and regulate FHV license numbers on the basis of a number of listed variables. The TLC had to report back to the NYC Council every year on its findings and decisions in this regard.[182] This was the first time any major American city had implemented such a cap.[183]

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[175] Editorial Board of the New York Times. (2018). 'What Will New York Do About Its Uber Problem?' In: *New York Times*. 7 May. https://www.nytimes.com/2018/05/07/opinion/new-york-uber-problem.html. [Accessed 31 October 2021].

[176] Parrot, J. A. & Reich, M. (2018). *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment.* Report for the New York City Taxi and Limousine Commission. July. p47.

[177] Quoted in: Flegenheimer, M. (2015). 'De Blasio Administration Dropping Plan for Uber Cap, for Now'. In: *New York Times*. 22 July. https://www.nytimes.com/2015/07/23/nyregion/de-blasio-administration-dropping-plan-for-uber-cap-for-now.html. [Accessed 20 October 2021].

[178] Ottaway, A. (2018). 'NYC Cracks Down on Uber, Lyft With New-Driver Cap'. In: *Courthouse News Service.* 8 August. https://www.courthousenews.com/nyc-to-crack-down-on-uber-lyft-with-new-driver-cap/. [Accessed 20 October 2021].

[179] *Zehn-NY LLC & Ors v the City of New York & Ors*, Supreme Court of the State of New York (New York County), 151730/2019.

[180] Lumb, D. (2018). 'NYC mayor signs ride-hailing vehicle cap into law'. In: *engadget*. 14 August. https://www.engadget.com/2018-08-14-nyc-mayor-signs-ride-hailing-vehicle-cap-into-law.html. [Accessed 31 October 2021].

[181] § 1(a); cited in: *Zehn-NY LLC & Ors v the City of New York & Ors*, Supreme Court of the State of New York (New York County), 151730/2019, at p3.

[182] Summary draws on description in *Zehn-NY LLC & Ors v the City of New York & Ors*, Supreme Court of the State of New York (New York County), 151730/2019, at p3.

[183] Stempel, J. (2019). 'Judge dismissed Uber lawsuit opposing New York City vehicle license caps'. In: *Reuters*. 1 November. https://www.reuters.com/article/us-uber-new-york-idUSKBN1XB51W. [Accessed 19 October 2021].

LL 147 provided for some exemptions however; it was not a strict prohibition. For example, the TLC was allowed to issue new licenses for wheelchair-accessible vehicles (WAVs). Another exemption provided for the issuance of licenses to those drivers who leased vehicles under conditional purchase agreements. This is because once they had paid for and acquired ownership of their vehicles, they had to apply for their own vehicle licenses as FHV licenses were non-transferable.[184]

Meera Joshi, the then Chair of the TLC, was to characterise LL 147 as:

> …smart legislation that addressed the core problems, and wisely delegated the complexities of detailed rule and decision making to the subject-matter experts, the TLC. This apolitical, data-driven approach to crafting local law was a fine example of both good government and good policy. It is an effort I am proud to have been a part of.[185]

The rideshare companies and their allies were less enamoured. Foreshadowing what Uber et al. would develop into a sophisticated comms strategy, the companies sought to portray the measure as bad – not because it harmed their potential profits, but - because it harmed drivers and underserved communities. For example, the *New York Post* reported in August 2019 – in the lead up to the City's decision on whether to extend the cap – that seven 'ethnic and religious groups' had sent letters to the TLC arguing against the cap. The article also reported that Uber had admitted to having 'financial relationships with three of the letter-writing organizations…but a company spokesperson said those relationships don't extend to regulatory issues…'[186] But more than just fighting the matter on the airwaves, Uber even brought a lawsuit against the City of New York to have the law struck down.[187] The City was defiant in the face of the suit; 'No legal challenge changes the fact that Uber made congestion on our roads worse and paid their drivers less than a living wage,' Seth Stein, Mayor de Blasio's

[184] Joshi, M. (2019). *First Quarter Report on Impact of Local Law 147 Moratorium*. Letter to NYC Council Speaker Corey Johnson. 4 January.
[185] NYC TLC. (2019). 'End of tenure remarks from Meera Joshi, the outgoing Chair of the New York City Taxi and Limousine Commission, at Crain's New York Business Breakfast, January 8, 2019'. In: *Medium*. 25 January. https://medium.com/@NYCTLC/end-of-tenure-remarks-from-meera-joshi-the-outgoing-chair-of-the-new-york-city-taxi-and-limousine-a414eb3bd7f5. [Accessed 20 October 2021].
[186] Meyer, D. (2019). 'Ethnic community groups fighting city on Ubers, Lyfts cap'. In: *New York Post*. 1 August. https://nypost.com/2019/08/01/ethnic-community-groups-fighting-city-on-ubers-lyfts-cap/. [Accessed 20 October 2021].
[187] *Zehn-NY LLC & Ors v the City of New York & Ors*, Supreme Court of the State of New York (New York County), 151730/2019.

deputy press secretary, commented days after the suit had been filed.[188] In the case, which was argued before the Supreme Court of the State of New York (New York County),[189] Uber argued that: i) NYC had impermissibly delegated its legislative authority to the TLC; and ii) NYC was in any case pre-empted by state law from enacting LL 147. The Court dismissed the case.[190]

In August of 2019, at the expiry of the initial one-year cap, the TLC voted to make the cap permanent.[191] Mayor de Blasio, who by this time was running for President in the Democratic Party primaries, lent his robust support for the move:

> For far too long, ride-share apps took advantage of their drivers…Their wages plummeted and families struggled to put food on their tables. We stood up and said no more. We will not let big corporations walk all over hardworking New Yorkers and choke our streets with congestion. Our caps have resulted in increased wages and families finally have some relief.[192]

## Poverty pay no more

Despite its intention, the effect on driver pay of capping FHV licenses could only be indirect. So the TLC and NYC government wanted to implement a policy which would specifically provide for minimum rates of pay, despite the drivers being treated as independent contractors. This is in line with ITF P4. Prior to the passing of the driver minimum pay

[188] Quoted in: Russell, J. (2019). 'Uber Says NYC License Cap Hinges on Bogus Traffic Data'. In: *Courthouse News Service*. 19 February. https://www.courthousenews.com/uber-says-nyc-license-cap-hinges-on-bogus-traffic-data/. [Accessed 20 October 2021].
[189] Which, despite the name, is actually a trial court.
[190] On 31 October 2019. A couple months later Lyft rehashed some of the same arguments in relation to LL 147 before the same court, which – unremarkably – agreed with itself; *Tri-City, LLC v New York City Taxi & Limousine Commn., 2019 N.Y. Misc. LEXIS 6774.* The latter case concerned a separate rule issued by the TLC - pursuant to the enabling power of LL 147 – to impose minimum utilisation rates on the app-based companies for cars operating south of 96th Street in Manhattan. Although Lyft's LL 147 arguments were rejected, it did end up winning the case; the Court struck down the aforementioned TLC rules on the basis that they were arbitrary and capricious.
[191] Ottaway, A. (2019). 'NYC Cap on Ride-Hail Vehicles Made Permanent'. In: *Courthouse News Service*. 7 August. https://www.courthousenews.com/nyc-cap-on-ride-hail-vehicles-made-permanent/. [Accessed 20 October 2021].
[192] Ibid.

standard, the TLC held a public hearing on the 6th of April 2017 which dealt – in part – with driver income and expenses.[193] The TLC also commissioned Dr. James A. Parrot, Director of Economic and Fiscal Policy at The New School's Center for New York City Affairs, and Professor Michael Reich, Chair of the Center on Wage and Employment Dynamics at the University of California, Berkeley, 'to evaluate and provide feedback on a proposed policy' on minimum earnings for FHV drivers 'and to analyze the likely effects'.[194] Importantly, and unlike the FHV license cap, the proposed policy would apply only to FHV companies that dispatched more than 10,000 trips per day, i.e. the Big Four of Juno, Via, Uber, and Lyft[195] (the latter two accounting for 87% of all app-company trips in 2017).[196] The resultant report – *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment* – proved highly influential in all that followed.

The aim of the policy the economists assessed was to leave drivers with the independent contractor equivalent of at least US$ 15 per hour, which was based on the NYC minimum wage for employees of large companies, due to come into effect at the end of 2018. Once making an allowance for paid time off[197] and additional payroll taxes required of independent contractors (but not of employees),[198] this meant a minimum rate of US$ 17.22 per hour (or US$ 0.287 on a per minute basis), *after expenses.*[199] The expenses component aimed to take into account all of the costs drivers incurred to do their work, including regulatory licenses, gas, insurance, and vehicles (and their depreciation),[200] among others. On the basis that the average driver drove 35,000 miles per year (including when they were cruising, waiting for a

[193] *Tri-City, 2019 N.Y. Misc. LEXIS 12703*, at p3.
[194] Parrot, J. A. & Reich, M. (2018). *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment.* Report for the New York City Taxi and Limousine Commission. July, p3.
[195] Ibid., p4. Indeed, the authors noted (at p38) that to date the TLC did not have enough data from non-app FHV companies to develop a pay standard for them. At the same time, the City enacted LL 149, which created a new licensing regime for these so-called High-Volume For-Hire Service (HVFHS) Providers, requiring, among various other provisions, that the companies remit all tips/gratuities to drivers (at § 59D-17(b)).
[196] Ibid., p42.
[197] 90 cents per hour, according to Bureau of Labor Statistics (BLS) estimates for average paid time off for the relevant occupational groups.
[198] US$ 1.32 per hour.
[199] Ibid., p34.
[200] According to a survey administered by the report authors, only 20% of drivers had acquired their vehicles mainly for personal use; 62% bought their vehicles mainly to provide transportation services. Ibid., p24.

passenger), and using the Toyota Camry model,[201] the expenses were calculated at a 'conservative' value of US$ 20,295 per year (or US$ 0.58 per mile).[202]

Importantly, although the policy was designed to leave drivers with a certain minimum amount of hourly pay, it proposed compelling companies to pay a minimum amount *per trip*. To reconcile the two approaches, the economists estimated – based on abundant TLC data[203] – the average proportion of a driver's working time that the driver spent with a passenger in the car, known as the 'utilisation rate'. They did this by first estimating the 'actual driver working time' by measuring the time from the first passenger pick-up in the day to the last passenger drop-off, for those drivers who only drove for one app. Then, they measured the company utilisation rate by calculating the proportion of 'actual driver working time' that single-app drivers had passengers in the car. This calculation was used notwithstanding the large minority of multi-app drivers[204] on the premise that all drivers would spend a similar proportion of time cruising in wait of a job.[205]

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[201] 'the most widely used model in New York City'; ibid., p33.

[202] Ibid., p26. The authors also pointed out that some drivers, for example, many young immigrants without much credit history, would likely be paying high leasing rates. Also, the economists used a separate expense calculation for WAV's (at p36).

[203] Including, among other things, data obtained by the TLC from the Big Four app-based companies on passenger fares, driver payments, and combined minutes and miles of trips undertaken by drivers, for sample weeks across one year. Ibid., pp20-21. The TLC also had data on the time of drivers' first and last trips, providing a rough proxy for start and finish times of drivers' working days. Ibid., p22. As Meera Joshi, the then Chair of the TLC, was to remark in January 2019:

> Five years ago, we began the process of increasing transparency in the for-hire sector through the collection of trip records. Our focus and growth in this area has garnered us a well-deserved reputation for sophisticated data collection and analysis, and the ability to use this information to produce balanced policy.

NYC TLC. (2019). 'End of tenure remarks from Meera Joshi, the outgoing Chair of the New York City Taxi and Limousine Commission, at Crain's New York Business Breakfast, January 8, 2019'. In: *Medium*. 25 January. https://medium.com/@NYCTLC/end-of-tenure-remarks-from-meera-joshi-the-outgoing-chair-of-the-new-york-city-taxi-and-limousine-a414eb3bd7f5. [Accessed 20 October 2021].

[204] Although the presence of multi-apping is often relied upon by 'gig economy' companies to make the case that their workers are indeed independent contractors (*how can they be our employees when we let them work for the competitor at the same time?!?)*, Parrot and Reich pointed out that multi-apping is actually to the companies' benefit (at p50):

> The companies encourage multi-platform driving as it provides them with an additional supply of potentially idle drivers. … The larger companies benefit from having drivers available to them even if they work primarily for another app.

[205]The presence of multi-apping did influence the measure of working time the economists used to calculate hourly earnings however. In particular, they used the utilisation rates deduced from the data of single-app

In 2017, the companies were estimated to have the following utilisation rates: Juno – 50%; Lyft – 58%; Uber – 58%; Via – 70%. Therefore, in order to end up with an average minimum pay of US$ 17.22 per hour, the policy proposed the following formula:

$$\textit{Driver pay per trip} = \frac{\textit{(0.58 * trip miles)}}{\textit{utilisation rate}} + \frac{\textit{(0.287 * trip minutes)}}{\textit{utilisation rate}}$$

For example, for a Lyft driver undertaking a 10-mile trip which took 20 minutes to complete, the proposed standard would require Lyft to pay the driver:

$$\frac{\textit{(0.58 * 10)}}{\textit{0.58}} + \frac{\textit{(0.287 * 20)}}{\textit{0.58}} = \textit{US\$ 19.90}$$

The proposed policy also intended to incentivise companies to increase their utilisation rates. Increased utilisation means fewer cars cruising empty, which is better for managing congestion and climate change, among other things. It also means a higher level of economic efficiency; 'effectively a productivity increase since drivers will be logging more passenger time each hour'.[206] And importantly for present purposes, if a load of new drivers came on board in response to the higher rates then, without any incentive to control utilisation rates, utilisation rates and take home pay would decrease. In other words, the well-paying jobs may become so far and few between that the drivers' net pay might fall below the US$ 17.22 per hour standard. So, the policy proposed that the formula be dynamic; utilisation rates would be measured every three months on a per-company basis. In practice, this would mean that the more time a company had its drivers cruising without passengers in a three month period, the higher the amount it would have to pay them per trip in the following three month period.

drivers to calculate the 'imputed driver working time' by dividing total trip time for one company in a week by the company's utilisation rate. This accommodated for the fact that 'actual driver working time' was not readily availbe for the multi-appers otherwise. Parrot, J. A. & Reich, M. (2018). *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment.* Report for the New York City Taxi and Limousine Commission. July, pp20-21, 37.

[206] Ibid., p56.

Finally, and also to incentivise increased utilisation, the policy proposed an additional payment of US$ 1 for every shared ride trip.[207]

The Parrot and Reich report estimated that drivers' median after-expense earnings were just US$ 14.25 per hour[208] (nearly 20% below the proposed wage rate), and that a whopping 85% of drivers earned less than the proposed standard. In an update to the report in January 2019 the authors revised the figure upward; 96% of drivers had been paid for trips at a rate below the proposed standard.[209] For these drivers, their take-home pay would increase by 22.5% (on average US$ 6,345) per year. The economists also suggested that – although this is of course ultimately the remit of the companies – the standard could be paid for by a modest increase in fares (at most 5%), a reduction in the commissions the companies took, and increasing utilisation rates (which would result in a negligible increase in customer waiting time of 12 to 15 seconds).[210] Notwithstanding the expectation that some drivers would respond to the increased rates by working longer hours,[211] and that some customers would respond to higher fares by decreasing the number of trips they took,[212] the report authors still forecast that utilisation rates would increase by 4%.[213] Interestingly, the report also suggested a net benefit to the New York City economy. Assuming fares and driver pay increased and commissions reduced, this would mean a transfer of wealth from passengers and companies to drivers. Passengers, on average, had higher incomes than drivers and so tended to spend a lower percentage of their money on consumption – they had a lower 'propensity to consume' in the economics jargon – than low-income drivers. The companies on the other hand tended to divert the bulk of their commissions income out of New York. As such, under the standard, the economists suggested consumption expenditure in New York

[207] Ibid., p11.
[208] Ibid., p30.
[209] Parrot, J.A., Reich, M., Rochford, J. & Yang, X. (2019). *The New York City App-based Driver Pay Standard: Revised Estimates for the New Pay Requirement*. January, p6.
[210] Parrot, J. A. & Reich, M. (2018). *An Earnings Standard for New York City's App-based Drivers: Economic Analysis and Policy Assessment.* Report for the New York City Taxi and Limousine Commission. July, p1.
[211] This is known in the economics jargon as the 'labour supply elasticity'. The economists assumed a labour supply elasticity of 0.4, meaning that for every 10% increase in pay, drivers would increase their working hours by 4%.
[212] Known in the economics jargon as 'consumer demand elasticity'. The authors assumed a consumer demand elasticity of -1.2, meaning that for every 10% increase in passenger fares, customers would decrease their use of app-based FHV's by 12%.
[213] Ibid., p61.

City would increase, meaning a boost to the economy in the form of a US$ 300 million stimulus.[214]

The Parrot and Reich report was submitted in July 2018. The following month, at the same NYC Council meeting where LL 147 was passed, the Council also passed LL 150, this time by a 42-3 vote,[215] instructing the TLC to 'by rule establish a method for determining the minimum payment that must be made to a for-hire vehicle driver for a trip dispatched by a high-volume for-hire service to such a driver.'[216] The bill provided that in formulating such a pay standard the TLC needed to take into consideration the duration and distance of the trip, the expenses incurred by the driver, and the relevant utilisation rate, among other things.[217] The law also instructed the TCL to study payments to FHV drivers who did not work for the high-volume companies and allowed for the TLC – but did not require it – to promulgate a rule on minimum pay for these drivers as well.[218]

Just a few months later, on 4 December 2018, the TLC promulgated its Minimum Payment Rule;[219] 'we made history and became the first city in the world to enact pay protection for this large group of professional drivers,' Meera Joshi, then Chair of the TLC, was to later comment.[220] The Rule stated the purposes of ensuring a living wage for drivers as well as decreasing congestion. The Notice of Promulgation stated:

> Over 80,000 drivers now drive for the four largest FHV companies in New York City, which operate through apps Uber, Lyft, Gett/Juno, and Via. … These four companies account for 75% of FHV trips. Despite economic success of these companies, reflected in the massive growth in the number of trips in recent

[214] Ibid., pp70-71. Although the authors do not cite the theory, this is based on simple Keynesian economics, in which an increase in expenditure ('aggregate demand') spurs economic growth. See: Keynes, J.M. (1936; 2008). *The General Theory of Employment, Interest, and Money*. BN Publishing (Reprint edition 21 July, 2008).
[215] Ottaway, A. (2018). 'NYC Cracks Down on Uber, Lyft With New-Driver Cap'. In: *Courthouse News Service*. 8 August. https://www.courthousenews.com/nyc-to-crack-down-on-uber-lyft-with-new-driver-cap/. [Accessed 20 October 2021].
[216] At § 19-549(b), Chapter 5 of the administrative code of the city of New York (newly inserted by LL 150).
[217] Ibid.
[218] At § 1(C).
[219] 35 RCNY § 59B-24.
[220] NYC TLC. (2019). 'End of tenure remarks from Meera Joshi, the outgoing Chair of the New York City Taxi and Limousine Commission, at Crain's New York Business Breakfast, January 8, 2019'. In: *Medium*. 25 January. https://medium.com/@NYCTLC/end-of-tenure-remarks-from-meera-joshi-the-outgoing-chair-of-the-new-york-city-taxi-and-limousine-a414eb3bd7f5. [Accessed 20 October 2021].

> years from roughly 42 million trips in 2015 to nearly 159 million trips in 2017, the majority of drivers have not shared in this success.[221]

With only a few exceptions, the Rule essentially enacted the proposed payment standard studied by Parrot and Reich. For example, the minimum per mile rate was – on the basis of new information and the update to the original Parrot and Reich report[222] - revised upwards to US$ 0.631,[223] and industry-wide (rather than company-specific) utilisation rates would be applied for the first 12 months; thereafter they, along with trip volumes, would be assessed every six months.[224] Importantly, the rates were indexed to inflation[225] (to be assessed annually)[226] and provided for a fine for every instance of underpayment (in addition to paying the driver the owed money). The rule was to be enforced both by way of the TLC regularly reviewing data on driver pay, as well as by drivers filing complaints directly with the TLC's driver protection unit.[227]

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[221] Cited in: *Tri-City, 2019 N.Y. Misc. LEXIS 12703,* at p3; internal citations omitted.

[222] Parrot, J.A., Reich, M., Rochford, J. & Yang, X. (2019). *The New York City App-based Driver Pay Standard: Revised Estimates for the New Pay Requirement*. January.

[223] For non-WAV's, with higher rates for trips ending outside of NYC. The TLC website specifically states that the purpose of this is 'to compensate drivers for the time spent returning to the city without a passenger'; TLC. (n.d.). 'Driver Pay for Drivers'. https://www1.nyc.gov/site/tlc/about/driver-pay-drivers.page. [Accessed 9 October 2021].

[224] *Tri-City, 2019 N.Y. Misc. LEXIS 12703*, at pp3-4. Also, the TLC stated its intention to split multi-apping drivers' idling time evenly between companies, which appears to depart from the analysis in the Parrot and Reich report in which each company's utilisation rates were based on data from the single-apping drivers working for those companies. Ibid., p9. As Rodney Stiles, former Assistant Commissioner at the TLC, explained:

> We wanted to make sure that our policy could address that, and we knew that one of the criticisms, if we targeted it to logged-on hours, is that drivers would be double-paid for time they were logged into, say, both Uber and Lyft. So what we did is we looked at the log-on time and we counted the amount of time where drivers were logged into both Uber and Lyft and basically deduplicated that. If you had spent an hour logged into Uber while logged into Lyft and you counted it separately, it'd be two hours, but we made sure it was just one hour and then looked at overall utilisation, so that ratio of trip time to log-on time, after we had done that. We calculate the per-trip rate per company, reflecting the dual-apping that happened, so they get the benefit of the increased utilisation of drivers when you look at them holistically, including the time they spent on other apps. So that was a key part of how we actually defined the policy.

Quoted in: Select Committee on Job Security. (2021). *First interim report: on-demand platform work in Australia*. June, p163; internal citation omitted.

[225] Based on the Consumer Price Index for Urban Wage Earners and Clerical Workers for the NY-NJ-PA metro area.

[226] For example, the target wage of post-expense hourly pay went up to US$ 17.47 on 1 February 2020. Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p15.

[227] NYC TLC. (2019). 'End of tenure remarks from Meera Joshi, the outgoing Chair of the New York City Taxi and Limousine Commission, at Crain's New York Business Breakfast, January 8, 2019'. In: *Medium*. 25 January.

Lyft challenged the rules, bringing a suit against the TLC before the Supreme Court of New York (NY County).[228] In addition to not wanting to have to pay drivers the minimum rates, the company was particularly wound up by the fact that the pay standard was calculated on a per-trip - rather than on a per-week - basis. Measuring payment on a weekly basis would allow those trips which paid above the standard to compensate for those trips that paid below the standard, rather than having to top up each individual trip that fell below the minimum rate. This would mean less take home pay for drivers though; as Meera Joshi, then Chair of the TLC, explained:

> [m]y concern with a per-week is that you will then have incentives that are used to help you reach the minimum, rather than when you're judged on a per-trip you have to pay incentives on top of the minimum.[229]

Lyft was also bothered by the TLC's use of company-specific utilisation rates (after the first year), which it said would be anticompetitive and to the benefit of Uber. Lyft argued that the Rule was irrational, arbitrary, and in conflict with LL 150, among other things. Lyft lost. When the company appealed to the Appellate Division of the Supreme Court of New York, it lost again.[230]

### Life-saving or malarkey?

A good place to start with any assessment of the effectiveness of a policy designed to protect workers is the reaction of workers, the organisations that represent them, and employers. For example, Bhairavi Desai, the Executive Director of the NYTWA Tweeted that the cap 'has been life saving & is the basis for any group of drivers - Uber or yellow cab - to come out of poverty & instability.[231] Though, six months into the enforcement of the new minimum pay standard, she stated wages had not risen enough, pointing out that 'App drivers on the road

https://medium.com/@NYCTLC/end-of-tenure-remarks-from-meera-joshi-the-outgoing-chair-of-the-new-york-city-taxi-and-limousine-a414eb3bd7f5. [Accessed 20 October 2021].

[228] *Tri-City, 2019 N.Y. Misc. LEXIS 12703.*

[229] Quoted in: *Tri-City, 2019 N.Y. Misc. LEXIS 12703* at p6.

[230] *Matter of Tri-City, LLC v New York City Taxi & Limousine Comm., 189 A.D.3d 652*.

[231] Quoted in: Stempel, J. (2019). 'Judge dismissed Uber lawsuit opposing New York City vehicle license caps'. In: *Reuters*. 1 November. https://www.reuters.com/article/us-uber-new-york-idUSKBN1XB51W. [Accessed 19 October 2021].

still aren't earning minimum wage, cruising the streets empty 41% of the time'.[232] Dara Khosrowshahi, Uber's CEO, on the other hand, stated: 'I think anyone who tells you that the changes in New York City are good is …It's malarkey, frankly.'[233]

Disentangling and quantifying the impact of the two policies with overlapping purposes which came in just months apart, is difficult.[234] Adding to the difficulty is that there is no counter-factual to which one may compare the end result. In other words, we don't know for sure what would have happened had these policies not been implemented. Compounding it all is the shock effect of the pandemic, which hit the rideshare industry particularly hard. Measuring the impact of the cap is made more difficult by the fact that in reality FHV license numbers actually *went up* by 3,000 during the first year of the 'cap'. This is mainly due to the approval of FHV license applications which were made before the cap went into effect and because more people than usual renewed their licenses during the cap (rather than let them expire as they might have done otherwise). It is probably safe to assume however, that the increase of 3,000 FHV licenses during the cap is far fewer than would have happened without the cap. And the impact of this did not result in fewer rides or longer waiting times; to the contrary, during the first year of the cap rides increased and wait times decreased in all five boroughs of New York City.[235]

In December 2020 economics Professor Dmitri Koustas co-authored a report with Reich and Parrot assessing the impact of the driver pay standard.[236] In the report they compared pre- and post-standard pay; the results were encouraging. The economists estimated that the pay standard put an additional US$ 340 million into drivers' pockets in 2019, corresponding

[232] Quoted in: NYTWA. (n.d.) 'NYTWA Statement: TLC Votes Yes to Extend Vehicle Cap!' https://www.nytwa.org/statements/2019/8/7/nytwa-statement-tlc-votes-yes-to-extend-vehicle-cap. [Accessed 19 October 2021].
[233] Quoted in: Marshall, A. (2019). 'Surprise! Uber and Lyft Don't Like NYC's New Ride-Hail Rules'. In: *Wired*. 16 August. https://www.wired.com/story/surprise-uber-and-lyft-dont-like-nycs-new-ride-hail-rules/. [Accessed 1 November 2021].
[234] Further, a state-imposed congestion charge of US$ 2.75 on app-based FHV rides in Manhattan south of 96th street came into effect the day after the TLC started enforcing the minimum pay standard; Koustas, D., Parrot, J. & Reich, M. (2020). *New York City's Gig Driver Pay Standard: Effects on Drivers, Passengers, and the Companies*. December, p1.
[235] Heinzen, B. (2020). *Fourth Quarter Report on Impact of Local Law 147.* Letter to NYC Council Speaker Corey Johnson. 30 January.
[236] Koustas, D., Parrot, J. & Reich, M. (2020). *New York City's Gig Driver Pay Standard: Effects on Drivers, Passengers, and the Companies*. December.

to an average increase of 9% in driver pay.[237] This was due in part to a very high level of compliance; shockingly high when compared to these companies' normal rates of compliance with workers' rights law. In the first month of the pay standard, 96% of trip payments complied; for the rest of 2019 the compliance rate was 99%.[238] Also, driver utilisation remained the same or increased slightly between June 2018 and June 2019, which, when taken with higher pay per job, implies an increase in hourly earnings.[239] And, although of secondary importance when one is assessing the situation from the perspective of driver livelihood, passenger fares increased only modestly and along similar trends as fares in Chicago, which did not have a minimum pay standard.[240] The economists concluded:

> Our findings here are consistent with a conclusion that New York City's driver pay standard achieved its main objectives. The standard raised driver pay, without significantly dampening growth in trip volume, beyond what might be expected in a maturing market. Moreover, passenger wait times declined significantly.[241]

The manner in which the companies have gone about responding to the pay standard has, however, been problematic. Whilst it is welcome that Uber and Lyft stopped taking on new drivers shortly after the standard became effective, it is much less welcome that they started restricting log-in times for their existing drivers.[242] For example, in June 2019, Lyft posted a blog on its website entitled 'What the New TLC Rules Mean for You', in which it informed drivers that 'Starting on June 27, the number of drivers who can be on the road at any given time will be determined by passenger demand and spots may be limited.'[243] Some drivers would be exempt, such as those who accepted at least 90% of trips offered to them and had performed at least 100 trips in the previous 30 days. By October, the requirement had shifted to 180 trips in the previous 30 days.[244] This is despite the fact that the contracts in force at the relevant time between Lyft and its drivers stated:

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[237] Ibid., p2. Though, the authors point out, some of this increase may be because of new drivers entering the field (p8).
[238] Ibid., p4.
[239] Ibid., p7.
[240] Ibid., p11.
[241] Ibid., p14.
[242] Ibid., p3.
[243] Quoted in: *Islam v Lyft, Inc.*, Plaintiff's Complaint. Filed: 13 April 2020, at [66].
[244] Ibid., at [67]-[68].

> Lyft does not, and shall not be deemed to direct or control you generally or in your performance under this Agreement specifically, including in connection with your provision of Rideshare Services ...You retain the sole right to determine when, where and for how long you will utilize the Lyft Platform.[245]

The impact of Lyft's policy was dire. For instance, after going to visit his ill mother in Bangladesh for several weeks,[246] driver MD Islam was caught out by the policy on his return to New York, unable to work his previous full-time schedule.[247] Islam was only able to work about half of his regular hours, resulting in a substantial drop in his income.[248] With the backing of the NYTWA he tried to bring a class action breach of contract suit against Lyft. As his lawyers argued in the complaint (at [76]-[78]):

> 76. As a result of this illegal policy, drivers who would often receive work in the outer boroughs to start their day, now find themselves unable to log on until they reach Manhattan.
> 77. Drivers who take a break in the middle of the shift to eat, re-fuel, or relieve themselves, have found themselves unable to log back in to the Lyft app after even brief log-offs, even in the middle of Manhattan.
> 78. As a result of Lyft's breach of contract, many Lyft drivers have found themselves unable to work as many hours as they previously had, and their weekly Lyft earnings have decreased significantly.

Unfortunately, the case appears to have been hung up in satellite litigation over the enforceability of the arbitration clause in the contract with Lyft[249] – inserted precisely to prevent drivers like Islam from asserting rights like this, against the company. Uber on the

[245] Section 19 of various versions of the contract. Quoted in: *Islam v Lyft, Inc.*, Plaintiff's Complaint. Filed: 13 April 2020, at [62].
[246] Ibid., at [89].
[247] Ibid., at [90].
[248] Ibid., at [93].
[249] In *Islam v Lyft, Inc. 2021 U.S. Dist. LEXIS 43839*, the US District Court for the Southern District of New York granted Lyft's motion to stay the litigation and compel arbitration. Despite the fact that the Court held the contract to be exempt from the provisions of the Federal Arbitration Act (FAA), it was nevertheless subject to New York law on arbitration, which led to a similar result. In *Islam v Lyft, Inc. 2021 U.S. Dist. LEXIS 120070*, the District Court denied Islam's motion for reconsideration but granted permission to appeal the matter to the Court of Appeals for the 2nd Circuit. For more on how 'gig economy' companies use arbitration clauses to fight workers' rights, see: Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 28 October 2021], pp16, 29-30.

other hand had followed Lyft's lead in restricting driver access but had reportedly lifted the restrictions during the beginning of the pandemic.[250]

## Seattle

### The global role model

'I think what happened in Seattle is a…role model for all the cities. Globally. …you should see what we are doing here in Seattle,' says Peter Kuel, President of the Seattle Drivers Union. It's easy to understand why he says that. Originally from South Sudan, he used to ply the streets of the Rain City as a traditional cab driver. 'I joined Uber because my business was not providing me nothing. Because Uber took all the business from us.' He had to get rid of his car and then 'I [didn't] have anything to do. That's why I joined them.' [251] He wasn't the only one; the companies mushroomed from just 2,000 drivers in early 2014 to over 30,000 four years later.[252] By 2019 the number of vehicles driving for these companies was more than 40 times greater than the number of taxis. The market was a duopoly; Uber and Lyft alone provided more than 99% of app-based rides.[253] And as we have seen throughout this report, working for these companies was no picnic. As *Fare Share Seattle* – a coalition of organisations pushing for social justice for drivers and the city more broadly – put it:

> Seattle's more than 30,000 Uber and Lyft drivers – many of whom are immigrants and people of color for whom driving is their only source of income - lack minimum wage protections or paid sick leave, and bear

[250] Hawkins, A. J. (2020). 'Uber is lifting restrictions on drivers in NYC in response to coronavirus'. In: *The Verge*. 19 March. https://www.theverge.com/2020/3/19/21187261/uber-lift-restrictions-driver-app-nyc-coronavirus. [Accessed 1 November 2021].
[251] Kuel, P. (2021). Author interview. 15 October.
[252] Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p4. Although there were other FHV drivers working for traditional for-hire companies, for example, Eastside, which in early 2018 was 'the largest dispatcher of taxicab and for-hire vehicles in the Pacific Northwest' (*Chamber of Commerce of the United States v City of Seattle* 890 F.3d 769, at p8), the overwhelming majority of drivers in Seattle ended up driving for Uber and Lyft; Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p17.
[253] Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p9.

> all of the costs and risks associated with their jobs. 58% of gig economy workers can't even afford a $400 emergency expense.[254]

Indeed, by the end of 2019 one survey indicated that drivers were earning on average only US$ 9.73 an hour after expenses, just under 60% of the relevant minimum wage for employees.[255] And the customers didn't always make up for the poor working conditions with merry cheer. Sometimes if a 'customer is getting angry' they 'might tell you "go back to your country",' says Kuel. Economists Parrot and Reich summarise some of the economic forces at play:

> The three components of the TNC industry's business model—its duopolistic structure, treating drivers as independent contractors, and intentional excess capacity—generate three corresponding market failures. First, high company mark-ups over local operating costs indicate significant market and pricing power. Second, this market power extends to control over their drivers, allowing them to treat drivers as independent contractors. In addition, the drivers' investments in their vehicles make it difficult to switch their work to other industries. This barrier keeps driver supply high and driver compensation lower than it would be otherwise. Third, inefficient utilization of driver working hours results in lower driver compensation and more cars on the streets.[256]

So Kuel started organising. With the help of Teamsters Local 117, drivers have – in less than a decade – won some of the highest minimum rates of pay in the country, a right to sick pay during the pandemic, the right to a fair dismissal process, and access to unemployment benefits.[257] The Seattle City Council has adopted these policies notwithstanding the fact that the drivers remain classified as independent contractors. Meanwhile, the Drivers Union provides representation to drivers and assists them with permit applications. And, although ultimately unsuccessful, the Seattle Council also legislated to provide drivers with a collective bargaining regime.[258] As Kuel puts it: '[f]air pay, deactivation, paid sick [leave], unemployment, for hire permit, all these things…combined is amazing for the people.'

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[254] Fare Share Seattle. (n.d.). 'Let's Make Seattle's Growth Work for Everyone'. https://www.fareshareseattle.org/vision. [Accessed 15 October 2021]. Internal citation omitted.
[255] Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p1.
[256] Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p22.
[257] Although the unemployment win was also a result of Seattle driver organising, as it was implemented by the State of Washington, rather than the city of Seattle, it is beyond the scope of this report.
[258] Kuel, P. (2021). Author interview. 15 October; Smith, L. (2021). Author interview. 13 October.

## Creative thinking on collective bargaining

'If we're not thinking creatively, we'll die traditionally,' says Leonard Smith, the Director of Organising and Strategic Campaigns for Teamsters Local 117.[259] And Seattle's proposed collective bargaining regime for app-based drivers – one of its first major policy initiatives in this area - was certainly creative. But their regime didn't just come about by happenstance; as Kuel tells it:

> Uber…every 2 month[s], they change the rate, every…3 month[s], they change the rate. So that was the reason why…we say hey, let us organise, join the union, union will help us, and let us do something about this. So we put down all our our phone[s]…majority of drivers put down their phone[s]…we struck on that and we campaigned on that, and we succeed[ed].[260]

At the end of 2015, the Seattle City Council enacted into law *Ordinance 124968, an Ordinance Relating to Taxicab, Transportation Network Company, and For-Hire Vehicle Drivers*,[261] whose stated purpose was to:

> …allow[] taxicab, transportation network company, and for-hire vehicle drivers ('for-hire drivers') to modify specific agreements collectively with the entities that hire, direct, arrange, or manage their work…

so that for-hire drivers 'can perform their services in a safe, reliable, stable, cost-effective, and economically viable manner.'[262]

As has been seen above, collective bargaining for employees in the private sector is governed by the NLRA; so, uniquely, the Ordinance's collective bargaining regime applied to drivers who were independent contractors.[263] Nevertheless, in many ways, it mirrored the NLRA regime. In a brief nutshell, the Ordinance regime worked like this:[264] entities who wished to collectively bargain on behalf of drivers, e.g. unions, would obtain authority from the City's

[259] Smith, L. (2021). Author interview. 13 October.
[260] Kuel, P. (2021). Author interview. 15 October.
[261] The Ordinance added section 6.310.735 to, and amended section 6.310.110 of, the Seattle Municipal Code. See: *Chamber of Commerce of the United States v City of Seattle* 890 F.3d 769, at p6.
[262] Quoted in: Ibid., p9.
[263] Ibid.
[264] The following description draws on *Chamber of Commerce of the United States v City of Seattle* 890 F.3d 769, at pp9-13.

Director of Finance and Administrative Services[265] and then notify the company for whom the drivers worked of the same.[266] The company was then required to provide the organisation with the name, address, email, and phone number of every driver who had driven at least 52 Seattle-based trips[267] for the company in any three month period during the prior year.[268] Once it had obtained this information, the driver organisation could go about seeking to persuade drivers to choose to be represented by it. The organisation would have 120 days[269] to gather statements of interest from a majority of drivers,[270] after which point the Director would certify the organisation as the exclusive representative of all drivers working for that company.[271] After certification, according to the Ordinance:

> …the [company] and the [driver organisation] shall meet and negotiate in good faith certain subjects to be specified in rules or regulations promulgated by the Director including, but not limited to, best practices regarding vehicle equipment standards; safe driving practices; the manner in which the [company] will conduct criminal background checks of all prospective drivers; the nature and amount of payments to be made by, or withheld from, the [company] to or by the drivers; minimum hours of work, conditions of work, and applicable rules.[272]

If an agreement is reached, it must be approved by the Director to become binding;[273] if the parties don't come to agreement the matter is sent to arbitration.[274] Any agreement coming out of arbitration would also need to be approved by the Director.[275]

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[265] § 6.310.735(C).
[266] § 6.310.735(C)(2).
[267] i.e., originating or ending in Seattle.
[268] § 6.310.735(D); Seattle, Wash., Qualifying Driver and Lists of Qualifying Drivers, Rule FHDR-1.
[269] § 6.310.735(F)(1).
[270] § 6.310.735(E).
[271] § 6.310.735(f)(2). Note here an important difference with the NLRA regime in that the latter may require a ballot to determine if the union has majority support among the relevant workers. With a robust union-busting industry, so-called 'captive meetings' where employers force workers during working time to listen to anti-union propaganda in anticipation of such a vote, and various other shenanigans, it is common for the union to lose considerable support by the time a ballot occurs. For a recent example of this, see the case of the Retail, Wholesale and Department Store Union's (RWDSU) attempt to organise an Amazon warehouse in Bessemer, Alabama; Morrison, S. (2021). 'How a mailbox could get the Amazon union vote overturned'. In: *Vox*. 21 May. https://www.vox.com/recode/22446206/amazon-union-mailbox. [Accessed 3 November 2021].
[272] At § 6.310.735(H)(1); quoted in: *Chamber of Commerce of the United States v City of Seattle* 890 F.3d 769, at p7. The terminology used in the Ordinance has been replaced for ease of understanding.
[273] § 6.310.735(H)(2)(a).
[274] § 6.310.735(I).
[275] § 6.310.735(I)(3).

The Ordinance came into effect at the end of January, 2016. Within less than two months the US Chamber of Commerce filed suit to try and invalidate it, but the suit was thrown out as being 'unripe'; no driver organisation had yet applied to the Director to represent drivers.[276] A year later the Director approved Teamsters Local 117 as a driver representative organisation. Teamsters 117 then notified Uber, Lyft, and ten other companies that it wished to represent their drivers, thereby commencing the process under the Ordinance.[277] However, not keen to have to negotiate pay with drivers, Uber teamed up with the US Chamber of Commerce and – two days later - sued the city of Seattle on various grounds, trying to invalidate the Ordinance. The next month, the Chamber and Uber obtained a preliminary injunction, preventing the collective bargaining regime from coming into effect,[278] although on the 1st of August, 2017, the U.S. District Court for the Western District of Washington dismissed the case.[279] The boss club then appealed to the Court of Appeals for the 9th Circuit and obtained an injunction preventing the Ordinance from being enforced pending appeal.[280] Their case rested on antitrust and labour law grounds. In particular, they argued that the Ordinance: i) was in violation of, and pre-empted by, section 1 of the Sherman Antitrust Act[281] on the basis that the drivers were forming a price-fixing cartel; and ii) was pre-empted by the NLRA.[282] On appeal, the Court held that the NLRA did not in fact pre-empt the Ordinance, but also held that the City's collective bargaining regime was not exempt from scrutiny under federal antitrust law as "state action".[283] As a matter of law, this did not necessarily mean the end of the Ordinance. The Court did not expressly hold that the collective bargaining regime was unlawful on antitrust grounds; it simply held that the Ordinance wasn't exempt from scrutiny under the federal antitrust legislation and remanded the proceedings back to the district court to decide the matter.[284] But in practical terms, it

[276] *Chamber of Commerce of the U.S. v City of Seattle*, No. C16-0322RSL, 2016 WL 4595981.
[277] *Chamber of Commerce of the United States v City of Seattle* 890 F.3d 769, at p13.
[278] Ibid., p14.
[279] *Chamber of Commerce of the United States v. City of Seattle*, 274 F. Supp. 3d 1155.
[280] *Chamber of Commerce of the United States v City of Seattle* 890 F.3d 769, at p15.
[281] 15 U.S.C. § 1.
[282] 29 U.S.C. §§ 151-169. See: *Chamber of Commerce of the United States v City of Seattle* 890 F.3d 769.
[283] The City had argued for an exemption on the basis of the *state action immunity doctrine* but fell short in this regard as the State of Washington did not meet the requirements of having 'clearly articulated and affirmatively expressed as state policy' the anticompetitive acts entailed by the collective bargaining regime, nor had the State 'actively supervised' the collective bargaining regime. See: Ibid. (quoting dicta from the Supreme Court at p20).
[284] Ibid.

was the end of the matter. As Smith recounts, even though the city council responded to the decision by removing bargaining over pay from the regime, it still wasn't going to work and 'the process was pretty bad because the platforms really took it on themselves during the rule-making process to just really gum up the works pretty badly.'[285] The City ended up settling the legal matter with the Chamber of Commerce and Uber and the collective bargaining infrastructure never became operative.[286] But that certainly didn't mean the drivers were just going to give up on their quest for decent pay; 'when we saw that…[there's] no way that this law would be permitted, we went another way,' explains Kuel. 'We call it Fair Pay.'

### Fair Pay and Emergency Sick Pay

Although this was not the first time the city had legislated to provide statutory rights and minimum pay for groups of independent contractors,[287] Seattle's minimum pay standard for app-based drivers was largely inspired by and based on New York City's, which was discussed in detail above. Indeed, Seattle even commissioned the same economists – Parrot and Reich – to undertake a study 'to inform the development of a minimum compensation standard' for app-based drivers.[288] One important difference however is that unlike NYC's two main airports – LaGuardia and JFK – which lie within city bounds,[289] the Seattle-Tacoma Airport is outside the city; trips which originate there extend beyond the regulatory reach of Seattle, no small matter given the proportion of work drivers do ferrying passengers to and from airports.[290]

On 25 November 2019 Seattle adopted the Transportation Network Company Driver Minimum Compensation Ordinance.[291] It's aim – like that of LL 150 in NYC – was to leave

[285] Smith, L. (2021). Author interview. 13 October.
[286] Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p16.
[287] For example, various Domestic Workers Bill of Rights ordinances; City of Seattle, Municipal Code, Chapter 14.23; see: Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p48.
[288] Ibid., p4.
[289] Both are located in the borough of Queens. Although note that Newark Liberty International Airport – which is also used to access the city – is located in New Jersey.
[290] Ibid., p7, 14.
[291] Ordinance 125977.

drivers with the equivalent of the city's minimum wage, after expenses.[292] The relevant minimum wage in Seattle for 2020 was higher than NYC's – and indeed higher than any other major city in the country - at US$ 16.39 per hour.[293] Interestingly, the Ordinance framed the issue in terms of ensuring the safety and reliability of the industry, stating that:

> establishing a minimum compensation standard will help ensure that the compensation that thousands of drivers who provide vital transportation services in Seattle every day receive for their services is sufficient to alleviate undue financial pressure to provide transportation in an unsafe manner… …drivers who have the protection of a minimum compensation standard will be more likely to remain in their positions over time… …such experienced drivers will improve the safety and reliability of the TNC services ... and thus reduce safety and reliability problems created by frequent turnover in the TNC services industry.[294]

Economists Parrot and Reich presented the City with two options for the minimum pay standard: i) Option A aimed to leave the driver with the equivalent of US$ 16.39 per hour; while ii) Option B targeted an hourly rate of US$ 19.76, to account for a number of other employee benefits such as sick pay, and workers' comp, among others.[295] Parrot and Reich's Seattle model was also slightly more sophisticated than the New York one in that it recognised that the proportion of working time that a driver spent with a passenger in the car (estimated at 49.2%) was different from the proportion of miles that a driver drove with a passenger (estimated at 62.2%). This is because average speeds were higher when the passenger was in the car.[296] So, using the post-expense hourly target rate US$ 16.39 (US$ 0.273 per minute), and providing for expenses of US$ 0.725 per mile, the per-minute rate worked out to US$ 0.56[297] and the per-mile rate to US$ 1.17.[298] So the formula looked like this:[299]

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[292] Although, unlike the NYC standard, the Seattle standard did not account for paid time off and additional independent contractor taxes in the time component.
[293] Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p5, 14.
[294] Section 14.31.060, City of Seattle, Municipal Code, Chapter 14.31, "Transportation Network Company Driver Minimum Compensation Ordinance," Ordinance 125977 adopted November 25, 2019, cited in: Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, pp48-49.
[295] Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p48.
[296] Ibid., pp52-53.
[297] O.273/0.492.
[298] 0.725/0.622.
[299] Ibid., pp53-54.

*Driver pay per trip = (1.17 * trip miles) + (0.56 * trip minutes)*

To use the same example as in the NYC section above, for a Lyft driver undertaking a 10-mile trip which took 20 minutes to complete, the proposed standard would require Lyft to pay the driver:

*(1.17 * 10) + (0.56 * 20) = US$ 22.90*

The economists estimated that 84.1% of app-based drivers earned below the standard; for those drivers the standard would increase pay by 42.7% on average. When considering the Option B standard, they estimated that 93% of drivers fell below. [300] Net pay for the entire driver group, on the other hand, was forecast to increase by a stunning 68% under Option A.[301]

But while Parrot and Reich were polishing off the final draft of the report, and as 'gig economy' workers became key workers helping to keep society functioning during a global pandemic, Seattle City Council took action to provide sick pay for said workers, including drivers; the emergency measure passed by a 9-0 vote[302] and was later signed into law by Mayor Jenny Durkin. 'Before that, drivers sometime[s]…they feel sick. And they wanna go to work,' explains Kuel. 'They may have corona. … If they are sick, they wanna force themselves to go. They don't know…whether they have corona or not.'[303] The sick pay ordinance provided for drivers to earn one paid sick day for every 30 days they worked, with an initial amount of sick days already earned based on previous work.[304] 'When the law was passed, Uber refused to pay some drivers. They say "ah, the system crashed" and all this thing. … The driver came and

[300] Ibid., pp56-57.
[301] Ibid., pp59.
[302] Welter, J. (2020). 'Victory! Uber/Lyft Drivers Win Sick Pay'. 2 June. https://www.driversunionwa.org/victory_for_driver_sick_pay. [Accessed 15 October 2021].
[303] Kuel, P. (2021). Author interview. 15 October.
[304] Welter, J. (2020). 'Victory! Uber/Lyft Drivers Win Sick Pay'. 2 June. https://www.driversunionwa.org/victory_for_driver_sick_pay. [Accessed 15 October 2021].

report that to us…we went to [the Seattle Office of Labor Standards (OLS)],' says Kuel.[305] The result? The OLS obtained US$ 3.4 million in payment for drivers; it was the largest settlement in the history of the OLS.[306]

But back to Fair Pay. The Seattle City Council passed the pay standard in late September 2020 in another blowout 9-0 vote.[307] A little over a week later, Mayor Jenny Durkan signed it into law.[308] It was to take effect on the 1st of January 2021.[309] By this time the minimum rates had gone up to US$ 1.33 per mile and US$ 0.57 per minute. Further, and importantly, the ordinance provided for a minimum fare of US$ 5, prohibited companies from using tips to satisfy the standard, and made the companies responsible for drivers' personal protective equipment (PPE) and disinfectant supplies during the covid civil emergency, among other things.[310] And, subject to limited exceptions, companies were prohibited from making deductions from a driver's earnings without written authorisation from the driver, *in the driver's primary language*.[311] Also of note, the OLS – charged with enforcing the pay standard – made clear that the 'ordinance covers TNC drivers performing TNC services in Seattle regardless of immigration status'.[312]

[305] Kuel, P. (2021). Author interview. 15 October.
[306] Welter, J. (2021). '$3.4M Uber Paid Sick Days Settlement'. 24 June. https://www.driversunionwa.org/3_4m_uber_paid_sick_days_settlement. [Accessed 15 October 2021].
[307] Welter, J. (2020). 'Uber and Lyft drivers celebrate passage of fair pay in Seattle'. 29 September. https://www.driversunionwa.org/uber_and_lyft_drivers_celebrate_passage_of_fair_pay_in_seattle. [Accessed 15 October 2021].
[308] Transportation Network Company (TNC) Driver Minimum Compensation Ordinance, Seattle Municipal Code (SMC) 14.33.
[309] Welter, J. (2020). 'We did it! Seattle Mayor Jenny Durkan signs Fair Pay into law'. 8 October. https://www.driversunionwa.org/we_did_it. [Accessed 15 October 2021]. Although note that the per minute element of the standard was phased in over the first three months; Office of Labor Standards. (n.d.). 'Transportation Network Company Minimum Compensation Ordinance'. https://www.seattle.gov/laborstandards/ordinances/tnc-legislation/minimum-compensation-ordinance. [Accessed 9 October 2021].
[310] Office of Labor Standards. (n.d.). 'Transportation Network Company Minimum Compensation Ordinance'. https://www.seattle.gov/laborstandards/ordinances/tnc-legislation/minimum-compensation-ordinance. [Accessed 9 October 2021].
[311] SHRR 210-120(2), Seattle Human Rights Rules (SHRR) Chapter 210. 'Primary language' being defined as 'the language in which the TNC driver feels most comfortable communicating'; SHRR 210-100(11). Although note that the rules referred to here did not come into effect until 1 October 2021.
[312] Seattle Office of Labor Standards. (n.d.). *Transportation Network Company (TNC) Driver Minimum Compensation Ordinance – SMC 14.33.*

The biggest drawback of the pay standard – as alluded to above – was its narrow impact on trips outside of Seattle limits, for example from the airport. Trips originating in Seattle and ending outside the city were covered, however trips originating outside and terminating in Seattle were only covered by the pay standard for the time and miles of the trip occurring within city bounds.[313] However, notwithstanding the above, the union officials say the standard is working as intended. Smith, the Teamsters official, hasn't received any negative feedback from drivers.[314] 'Drivers are so happy with it,' adds Kuel. 'It's been good!' Nor have there been issues with the companies restricting drivers' working hours; '[d]rivers are working as usual, says Kuel; 'nothing [has] changed.'[315]

## From deactivations to reinstatement

'I lost my job after I was the victim of being hit by an uninsured driver,' was to say Nurayne Fofana, whom Uber deactivated in 2018. 'Even though investigations by both the police and Uber's own insurance company found that I was not at fault, I still lost my job.'[316] Fofana's was not an unusual experience. 'Before, when driver is deactivated, they don't have nowhere to go,' Kuel says. And there are myriad factors which could lead to the app-companies deactivating people without due process, not least the insidious issue of customer ratings. Customers may rate a driver badly for all sorts of reasons, many of which are no fault of the driver's, such as the price Uber charges. The predominantly immigrant workforce sometimes faces language barriers as well, and 'the race issue also is there,' says Kuel.

> You can find that from the rating… When a customer give[s] you a rat[ing], it will be different from…other people, like white folk, you know. Honestly. … One can say yeah because of lack of language…but…even if you speak good English…the thing still remain[s] the same.

[313] SHRR 210-110(1), Seattle Human Rights Rules (SHRR) Chapter 210.
[314] Smith, L. (2021). Author interview. 13 October.
[315] Kuel, P. (2021). Personal communication to author. 21 October.
[316] Quoted in: Welter, J. (2021). 'Drivers Union to Launch New Support Services July 1'. 17 June. https://www.driversunionwa.org/drivers_union_to_launch_new_support_services_july_1. [Accessed 15 October 2021].

Seattle drivers' experiences were not unique; as the National Employment Law Project (NELP) – a leading progressive US think tank – has pointed out: 'Extensive social science research finds that consumer-sourced rating systems are highly likely to be influenced by bias on the basis of factors such as race or ethnicity.'[317]

Not keen to rest on their laurels after just a handful of innovative interventions, in the Summer of 2021 Seattle introduced a new deactivations process – via the TNC Driver Deactivation Rights Ordinance[318] - pursuant to which drivers could challenge both temporary and permanent deactivations (i.e. suspensions and dismissals) occurring after 1 July. According to the Drivers Union summary, an 'unwarranted deactivation'

> …happens when a TNC deactivates a driver without meeting new City Labor Standards for fair notice, reasonable rule or policy, fair and objective investigation, confirmation of violation, consistent application of rule or policy, and proportionate penalty.[319]

The City put out a tender for a competitive bid for an organisation to provide support services and representation to drivers under the new deactivation procedures.[320] The Drivers Union was the sole bidder and hence got the contract.[321] So the Drivers Union in turn provided free consultation, support services, and legal representation (as the case may be) for deactivated drivers,[322] as well as outreach and education on drivers' rights more generally.[323] Kuel describes the process of representation:

> If they got deactivated they come to us. What we do, we interview them; we have an intake form. So they [tell] us what happened to them. … When they do that we give them a form to sign…authorising us to get other information from the company. … When we get…those information from the company we

[317] NELP. (2021). *App-Based Workers Speak: Studies Reveal Anxiety, Frustration, and a Desire for Good Jobs*. Data Brief: October, citation at p12.
[318] Seattle Municipal Code Chapter 14.32.
[319] Welter, J. (2021). 'FAQ – New Deactivation Protections Start July 1'. 17 June. https://www.driversunionwa.org/faq_new_deactivation_protections_start_july_1. [Accessed 15 October 2021].
[320] Ibid.
[321] Smith, L. (2021). Author interview. 13 October.
[322] Welter, J. (2021). 'FAQ – New Deactivation Protections Start July 1'. 17 June. https://www.driversunionwa.org/faq_new_deactivation_protections_start_july_1. [Accessed 15 October 2021].
[323] Welter, J. (2021). 'Drivers Union to Launch New Support Services July 1'. 17 June. https://www.driversunionwa.org/drivers_union_to_launch_new_support_services_july_1. [Accessed 15 October 2021].

> compare what the driver says and what [the] company provide[s] us. … Some company, they refuse…to provide us any information, or they give us …little. … If we see [a driver's case] has merit, then we…send it for arbitration.[324]

Indeed, during the short time in which the procedure has been operative, the Drivers Union has been quite active. 'We have a lot of driver[s] that went back to work, they are so happy,' says Kuel.[325] In addition, at the time of writing, the Drivers Union had about 40 cases awaiting arbitration.[326] And winning a deactivation case isn't just about reinstatement; 'all those people that are in arbitration, if they are [all] found…not guilty, Uber will be paying a lot of fine,' Kuel explains. 'Because if driver was there for two months or three months [and] was not working…they have to pay them back for all that three months or two months.'[327] Somewhat out of character, the companies appear to be complying with the procedure, if anything but enthusiastically. 'On deactivation, they are following the letter of the law but are somewhat less than fully cooperative when it comes to providing information for investigations,' explains Smith. And 'they have, at least so far, been insisting on moving to private arbitration to settle disputes rather than the City process.'[328]

## The quest for dignity continues

As impressive as the list of victories in Seattle is, it does not constitute a battle fully won. The Drivers' Union wants to get the city-specific policies extended state-wide, or even nationwide, and they are advocating for pensions and insurance, among other things.[329] But above and beyond specific workers' rights, as Kuel says, drivers 'deserve respect, not to be like…somebody that is just…driving. *Oh, he's nothing, he's just a driver*. No…they deserve to have…dignity in what they do.'[330]

[324] Kuel, P. (2021). Author interview. 15 October.
[325] Ibid.
[326] Ibid.
[327] Ibid.
[328] Smith, L. (2021). Personal communication to author. 19 October.
[329] Kuel, P. (2021). Author interview. 15 October.
[330] Ibid.

## California

### Dynamo Dynamex

*'Gig economy faces shakeup after high court ruling*,' blared the headline in the San Francisco Chronicle.[331] It was early May 2018 and the California Supreme Court had just ruled in the case of *Dynamex Operations W. v Superior Court*.[332] The case concerned the employement status of a group of delivery drivers for the purposes of wage orders issued by the Industrial Welfare Commission (IWC). California wage orders 'impose obligations relating to the minimum wages, maximum hours, and a limited number of very basic working conditions (such as minimally required meal and rest breaks)' for those classified as employees in state law.[333] In particular, the court considered the classification issue under the 'suffer or permit to work' definition in the orders. Materially, the Court held:

> …we conclude that in determining whether, under the suffer or permit to work definition, a worker is properly considered the type of independent contractor to whom the wage order does not apply, it is appropriate to look to a standard, commonly referred to as the "ABC" test, that is utilized in other jurisdictions in a variety of contexts to distinguish employees from independent contractors. Under this test, a worker is properly considered an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.[334]

Before *Dynamex*, Californian courts charged with deciding on which side of the employee-independent contractor line a worker fell, followed the standard set by the California

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[331] Said, C. (2018). 'Gig economy faces shakeup after high court ruling'. In: *San Francisco Chronicle*. 6 May. https://www.sfchronicle.com/business/article/Gig-economy-faces-shakeup-after-California-high-12892622.php. [Accessed 4 November 2021].
[332] 4 Cal. 5th 903.
[333] *Dynamex Operations W. v. Superior Court,* 4 Cal. 5th 903, pp913-914. But note that classification as an employee under the wage orders could also have even further-reaching consequences; IWC Wage Order No. 4-2001(9)(B) renders employers responsible for the provision of employees' tools and equipment. Also see: *Cal. Trucking Ass'n v Bonta, 2021 U.S. App. LEXIS 12629,* p21.
[334] At pp916-917.

Supreme Court in 1989 in the case of *S.G. Borello & Sons, Inc. v Department of Industrial Relations*,[335] which set out a number of indicia to be considered. Arguably the most important indicator was the extent to which a putative employer exerted control over the putative employee. However, it was indisputably harder to be classed as an employee under *Borello* than under than ABC test. While the *Borello* standard included the components of the ABC test among various other indicia to be considered, the ABC test presumed the worker to be an employee unless the employer could disprove all three components.[336] In practical terms, relevant to the present inquiry, there had been instances of 'gig economy' workers being held to be independent contractors under the *Borello* test,[337] whereas such a finding under the ABC test would be next to impossible.

Although *Dynamex* did not hold the ABC test to apply to the determination of employee status for the purpose of all state-level workers' rights in California, it was clear that for the purposes of California wage orders, 'gig economy' companies had some reclassifying to do. 'A huge number of businesses will be calling their lawyers saying "What should I do?"' law professor[338] Michael Chasalow commented in response to the decision.[339] But if the 'gig economy' companies were among them, they didn't appear to listen to their lawyers' answers.[340]

## Righting the ship that's gone wrong: AB 5

Workers' groups jumped off of the massive judicial springboard the *Dynamex* decision provided in order to push for legislation codifying the ABC test into statute and extending its

[335] 48 Cal., 3d 341.
[336] Also see discussion in: *Cal. Trucking Ass'n v Bonta, 2021 U.S. App. LEXIS 12629*.
[337] E.g. *Lawson v Grubhub Inc., 302 F. Supp.3d 1071 (N.D. Cal. 2018)*. Although note that 'gig economy' workers were not necessarily classified as independent contractors for all purposes of state law pre-*Dynamex*. For example, the California Employment Development Department had various times found drivers to be employees for the purposes of unemployment benefits; see: Jacobs, K. & Reich, M. (2020). *What would Uber and Lyft owe to the State Unemployment Insurance Fund?* Institute for Research on Labor and Employment, University of California, Berkeley. Data Brief. May.
[338] At the University of Southern California's Gould School of Law.
[339] Quoted in: Dolan, M. & Khouri, A. (2018). 'California's top court makes it more difficult for employers to classify workers as independent contractors'. In: *Los Angeles Times*. 30 April. https://www.latimes.com/local/lanow/la-me-ln-independent-contract-20180430-story.html. [Accessed 4 November 2021].
[340] Note also that in the case of *Vazquez v. Jan-Pro Franchising International, Inc., 2021 Cal. LEXIS 1*, the California Supreme Court later held the *Dynamex* decision to apply retroactively to all nonfinal cases which predated it.

application to the rest of California workers' rights law. This turned into Assembly Bill (AB) 5.[341] As the bill's sponsor, California Assemblywoman Lorena Gonzalez – a prolific sponsor of workers' rights legislation - put it: 'This is an effort to right a ship that's gone wrong.'[342]

'We had multiple in-person lobby visits…busloads of workers travel[ed] up from [Los Angeles (LA)] to [the state capitol] Sacramento on committee hearing days to testify,' says Wendy Knight, Research and Policy Analyst for SEIU Local 721 (to which the driver and riders' group Mobile Workers Alliance is affiliated). And the lobbying efforts had a grand finale:

> All of that effort…culminated in this massive…car caravan up from…LA, with various stops… we stopped in Fresno and…San Francisco and had a big action in front of the Uber headquarters on market street there, and then the following day went up to…Sacramento, to the capital, where we converged with a bunch of different labour organisations in a massive lobby day…and press conferences with Assembly Member Lorena Gonzalez and other supportive legislators.[343]

Although AB 5's scope was not limited to the 'gig economy', it certainly had the sector in mind. As the California Assembly Committee on Labor and Employment noted in a bill analysis, prior to passage (emphasis supplied):

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[341] Controversially, the bill – and amendments to it after it had been passed - contained various exemptions to the applicability of the ABC test. When an exemption applied the classification issue was to be determined pursuant to the *Borello* test. *Cal. Trucking Ass'n v Bonta, 2021 U.S. App. LEXIS 12629*, p8. For example, newspaper distributors were exempt from the application of the ABC test for the first year, something bill sponsor Assemblywoman Lorena Gonzalez referred to as 'shameful' but that was nevertheless a 'condition of AB 5's passage'; quoted in: *Olson v Bonta, 2021 U.S. Dist. LEXIS 133111*, at p3. In that respect, AB 5 actually constituted a step backwards in terms of workers' rights for a minority of workers to whom the *Dynamex* decision extended rights under the Industrial Welfare Commission's wage orders. The exemptions restored these workers to their pre-*Dynamex* position. One University of California, Berkeley Center for Labor Research and Education analysis of the applicability of AB 5's ABC test to people who derived their main source of income from independent contractor work, found that the ABC test would apply to 64% of independent contractors. It would apply to a further 27% of independent contractors if strict criteria were met. And only 9% of independent contractors were subject to full exemptions. On average, and as one would hope, those subject to full exemption tended to work in higher-paid professions. See: Thomason, S., Jacobs, K. & Jan, S. (2019). *Estimating the Coverage of California's New AB 5 Law*. Center for Labor Research and Education, University of California, Berkeley. November. http://laborcenter.berkeley.edu/estimating-the-coverage-of-californians-new-ab-5-law/. [Accessed 30 November 2021].

[342] Quoted in: Myers, J. (2020). 'Lorena Gonzalez likes a good fight. She got it with hotly debated AB5'. In: *Los Angeles Times*. 8 February. https://www.latimes.com/california/story/2020-02-08/lorena-gonzalez-california-assembly-ab5-profile. [Accessed 2 December 2021].

[343] Knight, W. (2021). Author interview. 15 October.

> …some of the highest misclassification rates [occur] in the economy's growth industries, including homecare, janitorial, trucking, construction, hospitality, security, *and the app-based 'on demand' sector*.[344]

The 'gig economy' companies attempted – unsuccessfully – to obtain an exemption from the law. When that didn't work, they basically chose to ignore it.[345] 'When AB5 went into effect, our job was to…go out there and make sure that…state bodies… actually push[ed] and enforce[ed] AB5,' says Martin Manteca, the Organising Director for SEIU Local 721. This was all the more important 'since the companies decided that they were not going to abide by the law, and they were very open about it.'[346] This is an issue to which lawmakers were alive before legislating; '[t]hat's why we added enforcement through injunctive relief to #AB5,' tweeted California Assemblywoman Lorena Gonzalez.[347] As Uber and Postmates would later complain to federal district court:

> AB 5 states that it may be enforced by the California Attorney General or "a city attorney of a city having a population in excess of 750,000, or by a city attorney in a city and county or, with the consent of the district attorney, by a city prosecutor in a city having a full-time city prosecutor in the name of the people of the State of California upon their own complaint or upon the complaint of a board, officer, person, corporation, or association." AB 5 § 2(j). The law- suits may seek injunctive relief "to prevent the continued misclassification of employees as independent contractors," "[i]n addition to any other remedies available." Id[348]

Nevertheless, the State did not act without persuasion. 'We were hoping that the folks with the authority to [enforce the law] would be a little bit quicker on the uptake,' says Knight.

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[344] Assemb. Comm. Rep., AB 5, 2019-2020 Reg. Sess., at 2 (Cal. July 5, 2019); quoted in: *Olson v Bonta, 2021 U.S. Dist. LEXIS 133111*, at p4.

[345] Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 28 October 2021], p17. Uber did make a few – what I would term 'tweaks' – to its model in a fruitless attempt to escape the reach of AB 5; see: Hawkins, A. J. (2020). 'Uber is making big changes to its app in California as new gig work law goes into effect'. In: *The Verge*. 9 January. https://www.theverge.com/2020/1/9/21058356/uber-app-changes-california-ab5-gig-work-law-driver. [Accessed 13 October 2021].

[346] Manteca, M. (2021). Author interview. 15 October.

[347] Gonzalez, L. (2019). 11 September. https://twitter.com/LorenaSGonzalez/status/1171887498043117568?s=20. [Accessed 4 November 2021].

[348] In the case of *Olson v California, 2020 U.S. Dist. LEXIS 34710*. Cited in: Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 28 October 2021], p31.

> But we did do some on the ground organising with the city attorneys and I think that pressure was what brought them…to…make a landmark decision to coordinate in their enforcement efforts…you don't normally see them pooling their resources in the way that they did where the city attorneys of LA, San Francisco, San Diego, *and* the State attorney general are coming together to bring a suit against Uber and Lyft.[349]

The suit Knight refers to successfully obtained a preliminary injunction from the Superior Court of California, compelling the two companies to classify their drivers as employees.[350] As the Court stated of the rideshare companies:

> While they undoubtedly will incur costs in order to restructure their businesses, the costs are only those required in order for them to bring their businesses into compliance with California law. Moreover, these are costs that Defendants should have begun incurring more than two years ago, when the Supreme Court handed down its unanimous Dynamex decision. As another court has observed, "rather than comply with a clear legal obligation, companies like [Uber and] Lyft are thumbing their noses at the California Legislature, not to mention the public officials who have primary responsibility for enforcing A.B. 5"[351]

Although the order was stayed pending appeal, the companies lost on appeal before California's Court of Appeal,[352] and the state's Supreme Court denied the companies' petition for review.[353] In the end, however, the rideshare and food delivery workers for the main 'gig economy' companies did not actually spend a single day as employees; the companies refused to implement the law, then litigated it, and then overturned it via Proposition 22 (more on which below). So, despite the enforcement provisions appearing quite robust, they were not robust enough to actually force reclassification in practice. 'The enforcement issue should [have been] stronger,' says Manteca, but other than that, AB5 'was solid law'.[354]

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[349] Knight, W. (2021). Author interview. 15 October.
[350] *People v Uber Techs.,* Superior Court of San Francisco City and County, No. CGC-20-584402.
[351] Quoted in: Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 28 October 2021], p31.
[352] *People v Uber Technologies, Inc., 56 Cal. App. 5th 266*. Also note that when the companies later petitioned the Court of Appeal for a re-hearing after Proposition 22 had passed (more on which below), this was also denied (although the companies had the option of seeking to persuade the trial court to vacate the preliminary injunction). See: *People v Uber Technologies, Inc., 2020 Cal. App. LEXIS 1115.*
[353] *People v Uber Technologies, Inc., 2021 Cal. LEXIS 913.*
[354] Manteca, M. (2021). Author interview. 15 October.

Indeed, these companies made a couple attempts at invalidating AB 5 in federal court, arguing – among other things – that the law violated the California and US Constitutions. In what could be characterised as a rare moment of self-awareness, one of their arguments was premised on them demonstrating that they were a 'politically unpopular group'. Notwithstanding the increasing veracity of that statement, the companies' arguments were rejected by federal district court.[355] The matter is currently under appeal before the 9th Circuit Court of Appeals.[356] But undoubtedly aware of the weakness – or to put it less charitably, the ludicrousness – of their legal arguments, the companies looked for another way to invalidate AB 5.

## Crafting their own little kingdom: the catch of Prop 22

The companies threw over US$ 200 million into the campaign to classify their workers as independent contractors, asking Californians to vote in a referendum for Proposition 22 – the 'Protect App-Based Drivers and Services Act' (henceforth 'Prop 22'),[357] which would exempt them from the effect of Dynamex and the scope of AB 5. The figure undoubtedly would have been dwarfed by the costs to the companies of treating their drivers as employees.[358] 'I knew…it was going to be difficult to defeat because you couldn't turn on a TV without seeing…a hundred ads… They owned the airwaves,' says Manteca. As alluded to above in the

[355] *Olson v California, 2020 U.S. Dist. LEXIS 34710*; *Olson v Bonta, 2021 U.S. Dist. LEXIS 133111*.
[356] See: *Olson v California, 2021 U.S. App. LEXIS 28012*.
[357] Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 28 October 2021], p32.
[358] Hawkins, A. J. (2020). 'Uber is making big changes to its app in California as new gig work law goes into effect'. In: *The Verge*. 9 January. https://www.theverge.com/2020/1/9/21058356/uber-app-changes-california-ab5-gig-work-law-driver. [Accessed 13 October 2021]. Indeed, in one analysis, if Uber and Lyft alone had treated their drivers as employees between 2014 and 2019, they would have paid US$ 413 million into California's Unemployment Insurance Fund; Jacobs, K. & Reich, M. (2020). *What would Uber and Lyft owe to the State Unemployment Insurance Fund?* Institute for Research on Labor and Employment, University of California, Berkeley. Data Brief. May. Similarly, according to Morgan Stanley, the difference between independent contractor and employee status for app-based drivers was massive; AB5 would mean an increase in labour compensation costs of 37%. Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p20, citing: Morgan Stanley Research, "The ABCs of AB5," September 5, 2019, p3. For another analysis of the financial impact of classifying Uber and Lyft drivers as employees - which estimated an increase in total driver compensation of around 30% - see: Reich, M. (2020). 'Pay, Passengers and Profits: Effects of Employee Status for California TNC Drivers'. IRLE Working Paper No. 107-20. http://irle.berkeley.edu/files/2020/10/Pay-Passengers-and-Profits.pdf. [Accessed 2 December 2021].

section on NYC, the companies were by this stage slick enough to understand that – especially in the more politically progressive parts of the country like NYC and California – they would be more likely to win people over by presenting their proposals as being in the interests of the workers. As the *Washington Post* reported:

> Voters were exposed to ads that showed drivers lauding the independence and earnings opportunities that gig work gave them, and asking Californians not to take away their flexibility. Voters were told they could grant drivers guaranteed earnings and health-care benefits by voting "yes," but if they voted "no" up to 90 percent of gig-work driving jobs could disappear.[359]

More specifically, Prop 22's expressed purpose was to 'protect the basic legal right of Californians to choose to work as independent contractors with rideshare and delivery network companies throughout the state'. The reference to workers' ability 'to choose' notwithstanding,[360] the bill did this by declaring by fiat that 'an app-based driver is an independent contractor'.[361] Also, in recognition of the fact that it would be difficult to sell the proposal as in the interest of riders and drivers without tossing in a few crumbs, Prop 22 outlined a number of obligations which would be imposed on the companies, e.g. on provision of training, healthcare subsidies, and – first among equals – minimum wage. The companies' proposed minimum wage however would be equivalent to 120% of the state minimum wage *for the time the driver was en route to pick up a passenger, or had a passenger in the car*. In other words, cruising time, in between jobs, would not be compensated. Similarly, although the companies proposed to make some allowance for expenses, the measure fell short.[362] In an analysis of the proposed pay standard, Ken Jacobs – Chair of the UC Berkeley Labor Center – and Professor Michael Reich wrote:

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[359] Siddiqui, F. & Tiku, N. (2020). 'Uber and Lyft used sneaky tactics to avoid making drivers employees in California, voters say. Now, they're going national.' In: *The Washington Post*. 17 November. https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/. [Accessed 30 November 2021].

[360] Note that the law also stated that AB 5 'threatened to take away the flexible work opportunities of hundreds of thousands of Californians,' including 'their ability to make their own decisions about the jobs they take.' Cal. Bus. & Prof. Code § 7449(d); quoted in: *Olson v Bonta, 2021 U.S. Dist. LEXIS 133111*, at p6.

[361] §§ 7450(a), 7451; quoted in: *Olson v Bonta, 2021 U.S. Dist. LEXIS 133111*, at p6.

[362] Jacobs, K. & Reich, M. (2019). 'The Uber/Lyft Ballot Initiative Guarantees only US$ 5.64 an Hour'. 31 October. https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/. [Accessed 29 September 2021].

> Much of the drivers' waiting time is spent driving and cruising. Drivers may be heading back from a drop off to an area where they are more likely to have a pick up, or they may be circling in downtown areas where there is no place to park. Under the companies' proposal, none of the costs (gas, wear and tear on the vehicle, etc.) of driving while waiting would be covered as reimbursed employee expenses. Uber drivers average 20 miles an hour. Therefore, they drive 6.6 miles each hour (33 percent of 20) that would not be reimbursed.[363]

Taking all of its shortcomings into account, the authors estimated that the proposed minimum pay standard would average out to around only US$ 5.64 an hour, just over a third of what California's minimum wage would be in 2021.[364] 'Harry Truman was president the last time the inflation-adjusted value of the minimum wage was that low,' the authors added, to pack in a slightly heftier punch. The article came out nearly a year before the Prop 22 vote.[365]

Notwithstanding the above, anecdotal evidence suggests that the companies were successful in convincing some voters that Prop 22 was in the workers' interest. For example, one poll of by-mail voters in California – a constituency which leans Democratic and left – showed 52% support for the Proposition. Of those who voted in favour, 40% said they did so to ensure that 'gig economy' employees 'can earn liveable wages'.[366] Similarly, some of the phone bankers for the No campaign found themselves speaking to voters who thought that voting for Prop 22 was the only way to give 'gig economy' workers a minimum wage.[367] 'I definitely feel deceived,' was to say Lindsey Schaffran, a 27 year-old who had been persuaded to vote

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[363] Ibid.

[364] Although note that in a separate publication, after Prop 22 had been implemented, the authors revised some of their assumptions as they had been overly favourable to the companies! See: Jacobs, K. & Reich, M. (2021). *Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage*. Institute for Research on Labor and Employment, University of California, Berkeley. Brief: September. Also on the California analysis, see: Jacobs, K. & Reich, M. (2020). 'The Effects of Proposition 22 on Driver Earnings: Response to a Lyft-Funded Report by Dr. Christopher Thornberg'. Institute for Research on Labor and Employment, University of California, Berkeley. Research Brief, 26 August. https://laborcenter.berkeley.edu/the-effects-of-proposition-22-on-driver-earnings-response-to-a-lyft-funded-report-by-dr-christopher-thornberg/. [Accessed 2 December 2021].

[365] Jacobs, K. & Reich, M. (2019). 'The Uber/Lyft Ballot Initiative Guarantees only US$ 5.64 an Hour'. 31 October. https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/. [Accessed 29 September 2021].

[366] Howard, J. (2020). 'An early-voting survey of the ballot propositions'. In: *Capitol Weekly*. 28 October. https://capitolweekly.net/an-early-voting-survey-of-the-ballot-propositions/. [Accessed 30 November 2021].

[367] Siddiqui, F. & Tiku, N. (2020). 'Uber and Lyft used sneaky tactics to avoid making drivers employees in California, voters say. Now, they're going national.' In: *The Washington Post*. 17 November. https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/. [Accessed 30 November 2021].

in favour. 'We all felt that Prop 22 was going to help the drivers, and Uber and Lyft were going to be paying them more, when really they're just trying to save their own pockets.'[368]

California voters approved Prop 22 on the 3rd of November 2020;[369] 58% voted in favour. In the days following the vote, the value of Uber's and Lyft's stock grew by double digits.[370] This epitomized the 'gig economy' business model: the workers' loss was the shareholders' gain. Within a few months Uber was already rolling back some of the limited additional freedoms it had provided drivers when it was trying to emphasize how independent they were. In Uber's own words:

> Last year, Uber made a series of changes to our app in California, including letting drivers set their own price as well as removing upfront fares for riders. While these changes gave drivers more freedom than any other ride-share app provides, they also led to a third of drivers declining more than 80% of trip requests, making Uber very unreliable in the state. As the recovery from the pandemic picks up steam, we want to make sure riders can get a ride when they need one, and all drivers get more trips on a regular basis. To that end, we're beginning to roll back some of the changes.[371]

Put differently: 'we need to control how drivers work in order for our business to function, and the proposition that they are independent entrepreneurs is utter poppycock'.[372] And what of that price hike to customers that the companies fearmongered would occur if they had to treat their workers as employees? Oops! As the California Labor Federation tweeted:

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[368] Quoted in: Ibid.

[369] *Olson v Bonta, 2021 U.S. Dist. LEXIS 133111*, at p2. For another account and analysis of the history of Prop 22, see: Cherry, M.A. (2021). 'Dispatch – United States: "Proposition 22: A Vote on Gig Worker Status in California". In: *Comparative Labor Law & Policy Journal*, forthcoming, Saint Louis U. Legal Studies Research Paper No. 2021-03.

[370] Siddiqui, F. & Tiku, N. (2020). 'Uber and Lyft used sneaky tactics to avoid making drivers employees in California, voters say. Now, they're going national.' In: *The Washington Post*. 17 November. https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/. [Accessed 30 November 2021].

[371] Quoted in: Sainato, M. (2021). ''A slap in the face': California Uber and Lyft drivers criticize pay cuts under Prop 22'. In: *The Guardian*. 16 May. https://www.theguardian.com/us-news/2021/may/16/uber-lyft-drivers-california-prop-22. [Accessed 16 October 2021].

[372] Author's translation from the Siloconese. Also note that recent news reports have indicated that Uber intends to tighten up its control over UK drivers' ability to refuse jobs as well, after arguing for years in the tribunals and courts that it did not so control these drivers; see: Montebello, L. (2021). 'Uber begins crackdown on driver cancellations'. 21 November. https://www.cityam.com/uber-begins-to-crackdown-on-driver-cancellations/. [Accessed 29 November 2021].

> Instead of paying their workers, gig corporations pumped $200M to pass prop 22, claiming the worker protections guaranteed under the law would force them to drive up cost & pass it on to customers. Well guess what? They did it anyways. It's honestly disgusting at this point.[373]

Although whether the price increases were really caused by the marginal worker additional benefits required by Prop 22, or were rather simply a pretext for the inevitable, must be the cause of considerable circumspection. 'Customers have been experiencing artificially low prices because of venture capital subsidies,' law professor and 'gig economy' expert Veena Dubal said. 'We've known for a long time that service fees were going to have to go up,' she added, 'because the entire business model is based on capturing the market, addicting consumers to the service and then raising fees.'[374]

It was self-evident from the get-go that the protections provided by Prop 22 would fall short of employee status. But the implementation of Prop 22 has fallen even farther short of its promise. Indeed, some workers' groups have gone from campaigning for the adoption of AB 5, to campaigning against Prop 22, to campaigning for companies to at least deliver what they promised in Prop 22.[375] In some cases, pay even *decreased* after Prop 22 came into effect. For example, in May 2021 *The Guardian* reported on Uber drivers saying rates for trips from Los Angeles International Airport (LAX) had gone down, with the mileage component dropping by more than half.[376]

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[373] California Labor Federation. (2020). 14 December. https://twitter.com/CaliforniaLabor/status/1338588542004391936. [Accessed 4 November 2021]; quoted in: Batey, E. (2020). 'That Price Hike Delivery Apps Threatened If Prop 22 Failed? It's Happening Anyway'. 15 December. In: *SF Eater*. https://sf.eater.com/2020/12/15/22176413/uber-eats-doordash-price-hike-fee-december-prop-22. [Accessed 16 October 2021]. Also, see: Sandler, R. (2021). 'Every Major Gig Company Has Now Raised Prices In California After Prop. 22'. In: *Forbes*. 19 February. https://www.forbes.com/sites/rachelsandler/2021/02/19/every-major-gig-company-has-now-raised-prices-in-california-after-prop-22/?sh=31f959632d7c. [Accessed 16 October 2021].

[374] Quoted in: Sandler, R. (2021). 'Every Major Gig Company Has Now Raised Prices In California After Prop. 22'. In: *Forbes*. 19 February. https://www.forbes.com/sites/rachelsandler/2021/02/19/every-major-gig-company-has-now-raised-prices-in-california-after-prop-22/?sh=31f959632d7c. [Accessed 16 October 2021].

[375] Mobile Workers Alliance. (2021). 'DRIVERS RALLY STATEWIDE TO PROTEST BROKEN PROP 22 HEALTHCARE PROMISES'. 4 June. https://mobilealliance.org/2021/06/drivers-rally-statewide-to-protest-broken-prop-22-healthcare-promises/. [Accessed 15 October 2021].

[376] Sainato, M. (2021). ''A slap in the face': California Uber and Lyft drivers criticize pay cuts under Prop 22'. In: *The Guardian*. 16 May. https://www.theguardian.com/us-news/2021/may/16/uber-lyft-drivers-california-prop-22. [Accessed 16 October 2021].

One particular area of Prop 22's over-promising and under-delivering is the healthcare stipend, which was intended for workers meeting certain eligibility requirements. 'I'm the person that Californians thought they were helping when they voted yes on Prop 22,' said Neide Tameirão, an Uber and Lyft driver. 'I'm a working mom trying to provide for my family.' But she was unable to access the stipend; 'According to Uber, I'm too poor to be eligible for a health insurance stipend. I worked all of the engaged hours required for the stipend, but because I'm on Medi-Cal, I'm not eligible'.[377] Tameirão was far from alone; 'With Uber I have to spend 20 hours with a passenger to qualify, weekly,' said a 36 year-old driver in LA. 'They lied to drivers about the medical insurance because I'm out here working and I don't have insurance.'[378] Indeed, one survey of drivers undertaken by Tulchin Research[379] – in conjunction with SEIU Local 721 – a few months after Prop 22 had come into effect, found that only a paltry 15% of drivers had signed up for the healthcare stipend. This is something the study authors largely put down to a lack of information; 66% of drivers reported not receiving enough information from the companies on how to apply for the stipend. Unsurprisingly, in light of the above, 62% of respondents believed that Prop 22 had not made it easier to receive health insurance benefits.[380]

Another driver survey – undertaken by Rideshare Drivers United (RDU) – a few months later found that 16% of respondents were uninsured, a figure twice as high as the national average. For Latinx drivers, 25% of respondents reported being uninsured.[381] And, similar to the Tulchin Research survey finding on lack of information, 40% of respondents did not even recall being notified about the stipend; among Latinx drivers the figure was around 50%. 'Many

[377] Quoted in: Mobile Workers Alliance. (2021). 'MOBILE WORKERS ALLIANCE & WE DRIVE PROGRESS SURVEY FINDS 86% OF GIG WORKERS INELIGIBLE FOR PROP 22 HEALTHCARE BENEFIT'. 30 April. https://mobilealliance.org/2021/04/mobile-workers-alliance-we-drive-progress-survey-finds-86-of-gig-workers-ineligible-for-prop-22-healthcare-benefit/. [Accessed 15 October 2021].

[378] Quoted in: McCullough, E. & Dolber, B. (2021). 'Most California Rideshare Drivers Are Not Receiving Health-Care Benefits under Proposition 22'. In: *National Equity Atlas*. 19 August. https://nationalequityatlas.org/prop22. [Accessed 11 October 2021].

[379] Tulchin Research. (2020). *Polling Finds App Drivers Eligible for Benefits Under Prop 22 Largely Unaware and Uninformed About Application and Receipt of Earned Health Care Stipend Promised by Gig Companies like Uber, Lyft, DoorDash and Postmates*. 20 April.

[380] This is particularly striking as the status quo against which the drivers were comparing was that of independent contractor – rather than employee – status.

[381] McCullough, E. & Dolber, B. (2021). 'Most California Rideshare Drivers Are Not Receiving Health-Care Benefits under Proposition 22'. In: *National Equity Atlas*. 19 August. https://nationalequityatlas.org/prop22. [Accessed 11 October 2021].

drivers we interviewed expressed frustration with the challenges in getting insurance under Prop 22,' wrote Eliza McCullough and Professor Brian Dolber, the study's authors. '[A]nd most saw it as part of a larger pattern of deception and disregard for the workforce by Uber and Lyft.' As a 31 year-old Latino driver in LA put: 'To be honest, they don't care about drivers. I knew [the promises of Prop 22 weren't] going to come true.'[382] The study authors emphasised the impact that the onerous eligibility requirements was having on access to the stipends:

> … the vast majority of drivers do not receive health-care stipends. This is largely due to the narrow requirements to qualify for stipends under Prop 22. In order to qualify, drivers must not receive health care through Medicare, Medi-Cal, another job, or a partner or spouse. Drivers also must drive at least 15 engaged hours per week on one app to receive the minimum stipend. Drivers have also reported that they must "show a proof of health insurance within a certain time frame prior to applying for the stipend," indicating that drivers who are uninsured may also not qualify. Together, these requirements prevent the vast majority of drivers from accessing the health-care stipends promised under Prop 22.[383]

The requirement on engaged time was not the only explanation: '[e]ven if only 50 percent of drivers are meeting Prop 22's engaged-time qualifications (an estimate we think is conservative),' they pointed out, 'a shockingly low share of drivers are receiving health care stipends.' Some survey respondents indicated that even if they were to receive the stipend, it still did not make purchasing healthcare insurance feasible as the stipend didn't cover all the costs.[384]

Another area where Prop 22 hasn't lived up to expectations is health and safety training. 'Drivers weren't being given the information they needed in order to locate the training in the app,' says Knight. Or if they were, it was only through searching for it or the information wasn't very clear. In terms of the content of trainings:

> they provided the bare minimum, where each platform had their different…curriculum, but it could range from anywhere from like two to five minutes, it could…simply be a landing page with a link to another

[382] Ibid.
[383] Ibid.
[384] Ibid.

> resource…without any explanation. And then a lot of the time what we saw is that where drivers might have the ability to toggle between languages in-app, sometimes the trainings were outside of it, so then it was only being provided in English. And so obviously we know this is a very…heavily immigrant workforce where English isn't their first language. And so what value is a training to them if it's not something they can understand?[385]

Indeed, the RDU survey mentioned above found that as many as one in six respondents had not received any safety training from the companies. As the study authors wrote:

> This oversight is particularly harmful to women and LGBTQ drivers, who are more likely to experience harassment and violence while working. Without adequate training on how to respond to and report instances of harm, drivers are at risk of danger while on the job.[386]

In sum, 'gig economy' companies put millions into arguing that Prop 22 would be better for workers than employment status. The reality has been a disaster; but one with which the companies are content. As Manteca puts it: 'they crafted their own little kingdom'[387]. And what would a kingdom be without an eye to territorial expansion? As the *Washington Post* reported shortly after Prop 22 was approved:

> Uber chief executive Dara Khosrowshahi said the company would be "more loudly advocating" for laws like Prop 22, while Lyft Chief Policy Officer Anthony Foxx said Prop 22 demonstrated a model that could be "replicated and can be scaled." Lyft President John Zimmer told Axios last week that the company saw an "easier" path to cementing drivers' contractor status at the federal level but was prepared to go state by state.[388]

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[385] Knight, W. (2021). Author interview. 15 October.

[386] McCullough, E. & Dolber, B. (2021). 'Most California Rideshare Drivers Are Not Receiving Health-Care Benefits under Proposition 22'. 19 August. In: *National Equity Atlas*. https://nationalequityatlas.org/prop22. [Accessed 11 October 2021].

[387] Manteca, M. (2021). Author interview. 15 October.

[388] Siddiqui, F. & Tiku, N. (2020). 'Uber and Lyft used sneaky tactics to avoid making drivers employees in California, voters say. Now, they're going national.' In: *The Washington Post*. 17 November. https://www.washingtonpost.com/technology/2020/11/17/uber-lyft-prop22-misinformation/. [Accessed 30 November 2021]. Note also that at the time of writing the companies are currently pushing an initiative in Massachusetts which is modelled on Prop 22. Ken Jacobs and Professor Michael Reich have done an analysis of the Massachusetts proposal, under which they suggest a majority of Uber and Lyft drivers could earn as little as US$ 4.82 per hour; Jacobs, K. & Reich, M. (2021). *Massachusetts Uber/Lyft Ballot Proposition Would Create Subminimum Wage*. Institute for Research on Labor and Employment, University of California, Berkeley. Brief: September.

In the battle between the exploiters and the exploited, the former had just won a massive victory.

### Abolish the monarchy!

And yet, that monarch may still be deposed and that Kingdom made a republic. For on 20 August 2021, in a case backed by the SEIU, the California Superior Court in Alameda County ruled that Prop 22 was in violation of the Californian Constitution and invalid. Importantly, the court held that the requirement in Prop 22 for changes to it to be subjected to a seven eighths majority vote in the California Assembly violated the constitutional power of the Assembly to determine who is an employee for the purposes of workers' compensation.[389] 'The court ruling isn't just about us drivers or Uber or Lyft. To me it also means that corporations can't spend their way out of following the law,' said Hector Castellanos, an Uber and Lyft driver who is a leader with the group We Drive Progress, and was involved in the case. 'The gig companies spent a lot of money to try to take away our rights, and thankfully the court saw right through what the companies were trying to do.' The companies will of course continue to litigate the issue - which will likely end up before the California Supreme Court – and they won't be reclassifying workers any time soon. But for now, the decision is excellent news. As Castellanos put it: 'There's a lot to celebrate, and now I feel like I can breathe a little easier.'[390]

## The European Cases

### A note on European law

There are various sources of pan-European law – with varying scope – which are material to workers' rights. For example, the European Convention on Human Rights (ECHR)[391] and the

[389] *Castellanos et al. v State of California*, Case No. RG21088725.
[390] Quoted in: SEIU/1021. (n.d.). https://www.seiu1021.org/post/app-workers-secure-huge-victory-friday-alameda-county-judge-strikes-down-proposition-22. [Accessed 7 November 2021].
[391] https://www.echr.coe.int/documents/convention_eng.pdf. [Accessed 28 October 2021].

European Social Charter (ESC), both treaties of the Council of Europe,[392] provide a range of workers' rights, such as protection from discrimination (Article 8 ECHR, at least so far as concerns the enjoyment of convention rights), just conditions of work (Article 2 ESC), health and safety at work (Article 3, ESC), and the right of migrant workers and their families to protection and assistance (Article 19 ESC), among others. Of particular import, is the protection of trade union rights enshrined in Article 11 ECHR:

> 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

The European Court of Human Rights (ECtHR) in Strasbourg, France, which gives binding interpretations of the ECHR, relies heavily on international law, in particular ILO legal instruments and their interpretation by ILO supervisory bodies.[393] Of particular relevance to this report, the ECtHR has relied on ILO Recommendation 198 to construe the meaning of 'employment relationship' and as such render applicable the trade union rights enshrined in Article 11. For example, in the case of *Sindicatul "Păstorul cel Bun" v. Romania*[394] - which concerned the right of a group of Orthodox priests to form a trade union in Romania[395] - the ECtHR's Grand Chamber held:

> 141. It is not the Court's task to settle the dispute between the union's members and the Church hierarchy regarding the precise nature of the duties they perform. The only question arising here is whether such duties, notwithstanding any special features they may entail, amount to an employment relationship

[392] Council of Europe. (n.d.). 'The European Social Charter'. https://www.coe.int/en/web/european-social-charter. [Accessed 28 October 2021].
[393] See, for example, the case of *Demir and Baykara v Turkey* Application no. 34503/97.
[394] Application no. 2330/09.
[395] Ibid., at [1].

> rendering applicable the right to form a trade union within the meaning of Article 11.
>
> 142. In addressing this question, the Grand Chamber will apply the criteria laid down in the relevant international instruments (see, *mutatis mutandis*, *Demir and Baykara*, cited above, § 85). In this connection, it notes that in Recommendation no. 198 concerning the employment relationship (see paragraph 57 above), the International Labour Organisation (ILO) considers that the determination of the existence of such a relationship should be guided primarily by the facts relating to the performance of work and the remuneration of the worker, notwithstanding how the relationship is characterised in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties. In addition, the ILO's Convention no. 87 (see paragraph 56 above), which is the principal international legal instrument guaranteeing the right to organise, provides in Article 2 that "workers and employers, without distinction whatsoever" have the right to establish organisations of their own choosing. …[396]

All three of the European countries in this report are party to the ECHR[397] and Spain and the UK are party to various provisions of the ESC.[398]

Undoubtedly, however, the most relevant source of European law to workers in the 'gig economy' is that which emanates from the European Union (EU) and is interpreted by the Court of Justice of the European Union (CJEU) in Luxembourg.[399] Of particular importance – and as will be seen further below in the case of the UK – is the EU law concept of the 'employment relationship' and its definition(s) of the term 'worker'. For example, in *Sindicatul Familia Constanta & Ors v Direcția Generală de Asistență Socială și Protecția*

[396] One should note, however, that there is some tension in the ECtHR jurisprudence as to whether or not one must work pursuant to an employment relationship at all in order to benefit from Article 11 rights. For example, in the case of *Manole and "Romanian Farmers Direct" v Romania* (Application no. 46551/06), which concerned a group of self-employed farmers who challenged the state's refusal to permit them to form a union on the basis that they were not employees, the ECtHR held that this constituted an interference with their Article 11(1) rights, albeit one which was legally justified pursuant to Article 11(2). See also in this regard – for an alternative explanation of the supposed tension - the discussion in the judgment Underhill LJ in *Independent Workers' Union of Great Britain v Central Arbitration Committee & Roofoods Ltd t/a Deliveroo* [2021] EWCA Civ 952 at [45]-[53].

[397] Council of Europe. (n.d.). 'Chart of signatures and ratifications of Treaty 005'. https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=005. [Accessed 28 October 2021].

[398] Council of Europe. (n.d.). 'Signatures & ratifications'. https://www.coe.int/en/web/european-social-charter/signatures-ratifications. [Accessed 28 October 2021].

[399] European Economic Area (EEA) law – which applies to three of the four European Free Trade Association (EFTA) states (Norway, Lichtenstein, and Iceland) – essentially extends much of EU law, including provisions on workers' rights, to these states. For these states the law is subject to interpretation by the EFTA court in Luxembourg. See: EFTA Court. (n.d.). 'Introduction to the EFTA Court'. https://eftacourt.int/the-court/introduction/. [Accessed 28 October 2021].

*Copilului Constanța*,[400] a case concerning these definitions for the purposes of the Working Time Directive[401] – which limits maximum working hours and provides for a right to paid holidays, among other things – the CJEU held (at [41]-[42], references omitted):

> 41. For the purpose of applying Directive 2003/88, the concept of 'worker' may not be interpreted differently according to the law of Member States but has an autonomous meaning specific to EU law. It must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration...
>
> 42. It follows that an employment relationship implies the existence of a hierarchical relationship between the worker and his employer. Whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties…

These broad definitions do not apply for all EU law purposes. Indeed, some EU law, such as the Acquired Rights Directive[402] – which provides for the protection of workers when their employment transfers to a new entity – defines its scope of coverage by reference to 'employees', defined as 'any person who, in the Member State concerned, is protected as an employee under national employment law'.[403] However, the definitions in the *Sindicatul* case, referred to above, have been held to apply to a wide range of EU law-derived workers' rights, including but not limited to: freedom of movement,[404] equal pay,[405] and protections for agency workers,[406] while other provisions have been interpreted as having extremely similar definitions.[407]

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[400] ECLI:EU:C:2018:926 (Case C-147/17).
[401] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.
[402] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.
[403] Article 1(d). Also, see the discussion in: *Dewhurst & Ors v Revisecatch Limited (t/a Ecourier)* [2019] Central London Employment Tribunal Case numbers: 2201909, 2201910, 2201911/2018.
[404] *Lawrie-Blum v Land Baden-Württemberg* (Case 66/85).
[405] *Allonby v Accrington & Rossendale College* Case (C-428/09).
[406] *Betriebsrat der Ruhrlandklinik gGmbH v Ruhrlandklinik gGmbH*, EU:C:2016:883 (Case C-216/15). The preceding list draws from the discussion in: *Q(on the application of the Independent Workers' Union of Great Britain) v Secretary of State for Work and Pensions & Ors* [2020] EWHC 3050 (Admin), in particular at [82(m)].
[407] For example, health and safety at work rights; see *Q(on the application of the Independent Workers' Union of Great Britain) v Secretary of State for Work and Pensions & Ors* [2020] EWHC 3050 (Admin).

One recent case in which the EU law worker concept was applied to a 'gig economy' worker was *B v Yodel Delivery Network Ltd.*[408] The case concerned a courier in the UK who worked with a fair amount of flexibility and, importantly, had the right to use substitutes to perform his work. These features notwithstanding, the CJEU still held that what mattered was whether or not the courier worked in a relationship of subordination vis-à-vis the putative employer (at [48], emphasis supplied):

> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive, where that person is afforded discretion:
>
> – to use subcontractors or substitutes to perform the service which he has undertaken to provide;
>
> – to accept or not accept the various tasks offered by his putative employer, or unilaterally set the maximum number of those tasks;
>
> – to provide his services to any third party, including direct competitors of the putative employer, and
>
> – to fix his own hours of 'work' within certain parameters and to tailor his time to suit his personal convenience rather than solely the interests of the putative employer,
>
> **provided that, first, the independence of that person does not appear to be fictitious and, second, it is not possible to establish the existence of a relationship of subordination between that person and his putative employer.** However, it is for the referring court, taking account of all the relevant factors relating to that person and to the economic activity he carries on, to classify that person's professional status under Directive 2003/88.

Indeed, the CJEU considered the caselaw on the matter so settled that it issued the decision by way of reasoned order,[409] which allowed for an expedited decision without a hearing.

[408] Case C-692/19.
[409] Pursuant to Article 99 of its Rules of Procedure; at [21].

EU law has also proved problematic for some workers seeking basic rights. In particular, EU competition and antitrust law, in the form of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).[410] Notably, in the case of *FNV Kunsten Informatie en Media v Staat der Nederlanden*[411] - a case concerning the validity of a collective bargaining agreement covering self-employed musicians who substituted in for members of an orchestra in the Netherlands[412] - the CJEU held that whilst the 'false self-employed' were not prevented from collective bargaining by virtue of TFEU article 101(1),[413] the rather restrictive definition of the term meant that in practice many self-employed individuals would in fact be excluded (at [42]):

> …on a proper construction of EU law, it is only when self-employed service providers who are members of one of the contracting employees' organisations and perform for an employer, under a works or service contract, the same activity as that employer's employed workers, are 'false self-employed', in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU. It is for the national court to ascertain whether that is so.

Although when this particular case was sent back to the Dutch Court of Appeal that court held the collective bargaining agreement not to be precluded by competition law,[414] the CJEU decision has still had a lasting influence on the interpretation of self-employed workers' ability to lawfully collectively bargain in the EU. As the CEACR has noted:

> There is ample evidence of EU case law at the Court of Justice of the European Union (CJEU), which has determined that [self-employed] workers are regarded as undertakings from an EU competition law angle.[415]

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[410] 'Consolidated version of the Treaty on the Functioning of the European Union - PART THREE: UNION POLICIES AND INTERNAL ACTIONS - TITLE VII: COMMON RULES ON COMPETITION, TAXATION AND APPROXIMATION OF LAWS - Chapter 1: Rules on competition - Section 1: Rules applying to undertakings - Article 101 (ex Article 81 TEC)'. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E101&from=EN. [Accessed 28 October 2021].

[411] ECLI:EU:C:2014:2411 (Case C-413/13).

[412] At [7]-[8].

[413] At [41].

[414] CEACR. (2018). 'Observation (CEACR) – adopted 2017, published 107th ILC session (2018). https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3342047:NO. [Accessed 28 October 2021].

[415] CEACR. (2016). 'Individual Case (CAS) – Discussion: 2016, Publication: 105th ILC session (2016). https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3284597. [Accessed 28 October 2021].

This is notwithstanding the provisions of international law which apply to *all workers*, as seen above.

The distinction between e-commerce and transport services in EU law has also taken on distinct importance for the 'gig economy'. In particular, in the case of *Asociación Profesional Élite Taxi v Uber Systems Spain SL*[416], the CJEU held that Uber was not a technology company providing 'information society services' as it asserted, but rather a transportation company providing 'services in the field of transport'. As Professor Kontouris and I wrote:

> It is worth pointing out that under EU law this distinction has, potentially, far reaching consequences as the recognition of Uber as a technology company providing "information society services" would have entailed for Uber a wide-ranging right to provide services under the E-Commerce Directive 2000/31, without being subject to the national restrictive rules that, under the exception for transport services contained in Article 2(2)(d) of the Services Directive 2006/123, the Spanish authorities were permitted to adopt and enforce. In the more recent Case C-62/19, *Star Taxi App*, and in a very different factual set of circumstances, the CJEU took the view that it is possible for companies providing genuine (i.e. "does not transfer orders..., does not set the fare for the journey and does not collect that fare from the passengers, who pay the fare directly to the taxi driver"), digital facilitation and intermediary services to taxi drivers and their customers to be able to rely on the E-Commerce Directive.[417]

Although the provisions of this law have not yet entered into force, the Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union[418] may also affect 'gig economy' workers. Indeed, article 11 applies specifically to 'on-demand contracts':

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[416] Case C-434/15.

[417] Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 28 October 2021], p26. As such, this makes the prospect of Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services – designed, as the name suggests, to protect 'business users of online intermediation services' – serving to protect 'gig economy' workers rather doubtful; De Stefano, V., Durri, I., Stylogiannis, C., & Wouters, M. (2021). 'Platform work and the employment relationship'. *ILO Working Paper 27.* (Geneva, ILO). March, pp19-20.

[418] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019L1152. [Accessed 28 October 2021].

> Where Member States allow for the use of on-demand or similar employment contracts, they shall take one or more of the following measures to prevent abusive practices:
>
> (a) limitations to the use and duration of on-demand or similar employment contracts;
> (b) a rebuttable presumption of the existence of an employment contract with a minimum amount of paid hours based on the average hours worked during a given period;
> (c) other equivalent measures that ensure effective prevention of abusive practices.
>
> Member States shall inform the Commission of such measures.[419]

However, the effectiveness may be limited if the 'gig economy' workers concerned are held to fall outwith the employment relationship as conceived of in EU or member state law; Article 1(1) states the Directive applies to:

> every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each Member State with consideration to the case-law of the Court of Justice.[420]

Further, during 2021 the European Commission (EC) has been undertaking consultation with the social partners[421] 'on possible action addressing the challenges related to working conditions in platform work', part of Commission President Ursula von der Leyen's commitment to 'look at ways to improve the labour conditions of platform workers'.[422] The EC's legislative proposal on the same is expected by the end of this year.[423]

EU law is particularly important because it is binding on member states and in cases of conflict with domestic law, reigns supreme. As will be seen further below, EU law, and its binding interpretation by the CJEU, may therefore have extensive influence on the development of

[419] Ibid.
[420] Ibid. On this point, also see: De Stefano, V., Durri, I., Stylogiannis, C., & Wouters, M. (2021). 'Platform work and the employment relationship'. *ILO Working Paper 27.* (Geneva, ILO). March, pp27-28.
[421] Under article 154 TFEU.
[422] European Commission. (2021). *Consultation Document: First phase of consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work*. Brussels: 24 February.
[423] De Stefano, V. & Aloisi, A. (2021). 'Who will be covered by an EU instrument on platform work?'. In: *Social Europe*. 21 October. https://socialeurope.eu/who-will-be-covered-by-an-eu-instrument-on-platform-work. [Accessed 7 November 2021].

domestic law on employment status. Of the three European countries featured in this report, only Spain is currently bound by EU law. Switzerland is not a member of the EU and the UK – infamously – has left. However, as EU-derived employment law is usually implemented in member states by way of Directives - which require the member states to legislate in order to implement the Directive in domestic law – most EU-derived employment law still remains on the books in the UK.

## Worker status in the UK

### The half-way house and its origins

'Employee' status in the UK has its origins in the common law on the master and servant relationship; a relationship in which – as the name implies – the master exerted control over the servant. '[I]f a master gives correction to his servant, it ought to be with a proper instrument, as a cudgel, etc. And if by accident a blow gives death, this would be but manslaughter,' wrote Lord Holt in the case of *R v Keite* in 1679.[424] Thankfully, the concept has evolved, but it is still largely based on the extent to which the employer may exert control over the employee.[425] As such, the category has been construed somewhat narrowly by British courts.

'Limb b worker' status, on the other hand, is a half-way house between employees and independent contractors. The essence of the category is captured from the judgment of Mr Recorder Underhill QC (as he then was)[426] in the Employment Appeal Tribunal (EAT) case of *Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667:

[424] 1 Ld Raym 138 at 144; 91 ER 989 at 922; quoted in: Stewart, A., Forsyth, A., Irving, M., Johnstone, R. & McCrystal, S. (2016). *Creighton and Stewart's Labour Law*. 6th Edition. The Federation Press, at p45.
[425] See the classic case of *Ready Mixed Concrete Ltd v Minister of Pensions* [1968] 2 QB 497.
[426] At the time of writing, he is Lord Justice Underhill, Vice-President of the Court of Appeal (Civil Division) of England and Wales, and is arguably the most prominent conservative justice in employment law matters in the UK. Out of 13 members of the UK's tribunal and judiciary system to have ruled on the Uber drivers' workers' rights case (more on which below), he was a lone voice of dissent, whose rambling reasoning constituted more than half of the Court of Appeal's written decision in the case (the other two justices in the Court of Appeal sided with the workers). Nevertheless, there is not much in the *Byrne Bros* passage (cited below) with which I wish to quarrel.

> [t]he reason why employees are thought to need such protection is that they are in a subordinate and dependent position vis-a-vis their employers: the purpose of the Regulations is to extend protection to workers who are, substantively and economically, in the same position. Thus the essence of the intended distinction must be between, on the one hand, workers whose degree of dependence is essentially the same as that of employees and, on the other, contractors who have a sufficiently arm's-length and independent position to be treated as being able to look after themselves in the relevant respects.[427]

Of particular note, limb b workers are self-employed in UK law. As Lady Hale DPSC explained in the Supreme Court case of *Clyde & Co LLP & Anor v Bates van Winkelhof* [2014] UKSC 32 (at [31]):

> …employment law distinguishes between three types of people: those employed under a contract of employment; those self-employed people who are in business on their own account and undertake work for their clients or customers; and an intermediate class of workers who are self- employed but do not fall within the second class. …

This intermediate class are 'self-employed people who provide their services as part of a profession or business undertaking carried on by someone else'.[428] Despite this clear judgement, limb b worker status is often misconceived – including by government officials and employment lawyers, and nearly universally by the media – as separate from self-employment; a halfway house between employee and self-employment status.[429] And yet, this is a key point, not just because limb b workers benefit from preferential tax arrangements, facilitating their deduction for tax purposes of rather substantial expenditure on the tools of their trade, but also because private hire drivers and couriers in the UK tend to want to be categorised as self-employed, with workers' rights.[430] That's what limb b worker

[427] This passage was cited with approval by Lady Hale DPSC in the Supreme Court case of *Clyde & Co LLP & Anor v Bates van Winkelhof* [2014] UKSC 32 at [33].
[428] *Clyde & Co LLP & Anor v Bates van Winkelhof* [2014] UKSC 32 at [25].
[429] As Tayler J stated clearly in the EAT case of *Main v SpaDental Limited* (Case No: EA-2020-000023-AT) (at [14]): 'It is an error of law to assume that the answer to the question of whether a person is self-employed is determinative of whether the person is a limb (b) worker.'
[430] When the IWGB started organising couriers and litigating over employment status, we often pleaded that the couriers in question were employees, and limb b workers only in the alternative. However, this proved an unpopular proposition among workers and so these arguments were generally withdrawn. Instead, the IWGB focussed on advocating for the improvement of limb b worker status such that it would provide broadly comparable protection to employee status, for example on things like sick pay, maternity pay, and unfair dismissal rights.

status is. Indeed, limb b worker status provides for most of the rights that employees have, such as protection from discrimination, entitlement to minimum wage, paid holidays, and pension contributions, among others. Importantly, minimum wage law provides for workers to be paid at least a minimum wage *after* expenses. More specifically, Regulation 13 of the National Minimum Wage Regulations 2015, provides for any deductions made by the employer, payments made by the worker to the employer, or payments made by the worker to a third party, to be discounted against the minimum wage calculation if the payments were made 'in connection with the employment'. As the Employment Appeal Tribunal (EAT) stated in the recent case of *Augustine v Data Cars Ltd* (at [36]):

> [The expenditure] did not, in fact, have to be a requirement of the employment. It neither had to be necessarily incurred, nor wholly or exclusively incurred. The test that Parliament has determined appropriate in the context of a national minimum wage calculation is whether the expenditure is in connection with the employment.[431]

For present purposes, it is also important to emphasize that 'limb b worker' status in the UK was not a response to the 'gig economy', at least in its modern form.[432] As will be seen further below, the manner in which 'gig economy' companies engage their labour in the UK simply tends to fall within this pre-existing category. Indeed, as Lord Wilson JSC noted in the Supreme Court case of *Pimlico Plumbers Ltd & Anor v Smith* [2018] UKSC 29 (at [8]-[10]):

> 8. As long ago as 1875 Parliament identified an intermediate category of working people falling between those who worked as employees under a contract of service and those who worked for others as independent contractors. For in that year it passed the Employers and Workmen Act, designed to give the county court an enlarged and flexible jurisdiction in disputes between an employer and a "workman"; and, by section 10, it defined a "workman" as, in effect, a manual labourer working for an employer under "a contract of service or a contract personally to execute any work or labour".
>
> 9. From 1970 onwards Parliament has taken the view that, while only employees under a contract of service should have full statutory protection against various

[431] Case No: EA-2020-000383-AT.

[432] Similarly, the common law on employer liability in the law of negligence – which does not depend on the limb b worker definition – has extended beyond traditional employees for several decades; see: Omeri, S. (2019). 'Uber-careful: Implications of Modern "Gig Economy" Litigation for the Employer's Common Law Duty of Care'. In: *Journal of Personal Injury Law*, Issue 1, pp59-65.

> forms of abuse by employers of their stronger economic position in the relationship, there were self-employed people whose services were so largely encompassed within the business of others that they should also have limited protection, in particular against discrimination but also against certain forms of exploitation on the part of those others; and for that purpose Parliament has borrowed and developed the extended definition of a "workman" first adopted in 1875.
>
> 10. Thus in 1970 Parliament passed the Equal Pay Act which obliged employers to offer to any woman whom they "employed" terms equal to those upon which they "employed" men for the same or equivalent work; and, by section 1(6)(a), it defined the word "employed" as being under "a contract of service or of apprenticeship or a contract personally to execute any work or labour". Then, in section 167(1) of the Industrial Relations Act 1971, we find the birth of the modern "worker", defined there as a person who works "(a) under a contract of employment, or (b) under any other contract ... whereby he undertakes to perform personally any work or services for another party to the contract who is not a professional client of his ...".

The definition of worker status perhaps most commonly relied on in UK litigation is found at s230(3) of the Employment Rights Act 1996:

> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
>
> (a) a contract of employment, or
>
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;
>
> and any reference to a worker's contract shall be construed accordingly.

Whilst 'limb a' of section 230(3) refers to 'employees', 'limb b' refers to 'limb b workers', hence the name. As can be seen from the definition above, there are three constituent parts of the definition: i) there must exist a contract between the putative worker and putative

'employer'[433]; ii) the worker must render a personal service, i.e. not engage substitutes; and iii) the worker must not be running a business and contracting with customers or carrying out a profession and contracting with clients. Various other statutes use slightly different definitions of worker status; for example, the Trade Union and Labour Relations (Consolidation) Act 1992 – the principal statute regulating trade unions and trade union rights – omits the reference to individuals carrying out a business undertaking and engaging with customers.[434] Similarly, the Equality Act 2010 – the main statute providing workers with protection from discrimination – does not even use the term 'worker' but instead provides for an extended definition of the term 'employee' of 'employment under…a contract personally to do work'.[435] Similarly, the Transfer of Undertakings (Protection of Employment) Regulations 2006 - which protect workers from losing the bulk of their terms and conditions if their employment transfers to a new employer – also has an extended definition of employee as 'any individual who works for another person whether under a contract of service or apprenticeship or otherwise' but excluding 'anyone who provides services under a contract for services'.[436] However, for the most part, the jurisprudence has treated these varying definitions to be little more than a distinction without a difference.[437] Finally, some workers' rights provisions also extend to further categories of individuals who work, for example agency workers in various statutes,[438] homeworkers in the case of minimum wage[439] and various other categories in the case of whistleblowing,[440] among others.

The tendency of UK employment law to provide rights for workers - and not just employees - took on renewed vigour with the UK's entry into the EU and the latter's increasing legislation on workers' rights. As seen above, EU employment law often – but not always – extends to

[433] Although limb b workers are self-employed, the legislation uses the term 'employer' to describe the entity for whom the limb b worker works. So shall I.
[434] Section 296(1)(b).
[435] Section 83(2)(a).
[436] Regulation 2(1).
[437] For example, see: *Hashwani v Jivraj* [2011] UKSC 40, *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32, *Pimlico Plumbers Ltd & Anor v Smith* [2018] UKSC 29, and *Dewhurst & Ors v Revisecatch Limited t/a Ecourier* [2019] Central London Employment Tribunal Case numbers: 2201909, 2201910, 2201911/2018.
[438] For instance, Regulation 36 of the Working Time Regulations 1998.
[439] Section 35, National Minimum Wage Act 1998.
[440] Section 43K, Employment Rights Act 1996.

'workers' as the term is understood in EU law, which on any view, covers a broader group than just those who would qualify as 'employees' under UK law.[441]

EU law – and to a lesser extent, the European Convention on Human Rights - has also played a robust role in shaping the UK jurisprudence on worker status. For example, in *O'Brien v Ministry of Justice (formerly Department of Constitutional Affairs)* [2013] UKSC 6, a group of part-time judges who were denied the same access to a pension as full-time judges, argued that they were being discriminated against on the basis that they were part-time workers. The relevant EU law was the Part-Time Workers Directive (Council Directive 97/81/EC), which was transposed into UK law by way of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000/1551), which extended to limb b workers. Judges in the UK are not normally considered to work pursuant to a contract, and as such cannot satisfy that constituent element of the standard limb b worker definition. However, as EU law does not require the existence of a contract for an employment relationship to be present, and – as seen above – as EU law reigned supreme over domestic law, the judges were nevertheless held to be workers and entitled to protection. In *Gilham v Ministry of Justice* [2019] UKSC 44, a case concerning whistleblowing protection for a judge – the Supreme Court came to a similar conclusion on the basis of the ECHR.[442] Additionally, the Court of Appeal (of England and Wales) held in *National Union of Professional Foster Carers v Certification Officer & Ors* [2021] EWCA Civ 548 that the foster care workers in the case – who like judges did not qualify as limb b workers as they did not work pursuant to a contract – were nevertheless entitled to form a union despite the requirement in domestic law that they had to be mainly workers so to do.[443]

Further, EU law has been used to extend workers' rights to limb b workers when the domestic legislation had chosen only to extend the rights in question to employees. In the case of *R (on the application of the Independent Workers' Union of Great Britain) v the Secretary of*

[441] Of course, some purely domestic legislation, such as the National Minimum Wage Act 1998, also extends to workers.
[442] In particular, Article 10 (freedom of expression) taken with Article 14 (discrimination regarding the provision of Convention rights). In sum, the state did not legally justify the exclusion of judges from the whistleblowing protections contained in the Employment Rights Act 1996 on the basis that they did not work pursuant to a contract and as such were not workers in domestic law.
[443] Decided on the basis of Article 11 ECHR.

*State for Work and Pensions & Ors* [2020] EWHC 3050, the High Court held that the government was required to extend various health and safety rights to limb b workers as the EU directives underpinning them extended coverage to those considered 'workers' in EU law. European law has even been used to extend workers' rights to categories of individuals specifically excluded from those rights in the domestic legislation. So, in the Court of Appeal (of England and Wales) case of *Vining & Ors v London Borough of Wandsworth* [2017] EWCA Civ 1092, the Court held that parks police were entitled to statutory rights on collective consultation in situations of redundancy[444] despite the fact that the statute in question specifically excluded coverage for people 'in police service'.[445]

Although at the time of writing – by virtue of section 3 of the Human Rights Act 1998 – domestic courts must continue to interpret domestic legislation so far as possible in accordance with Convention law, the impact of Brexit on worker status in the UK remains to be seen.[446]

## 'Faintly ridiculous': How judges have applied worker status to the 'gig economy'

The courier and rideshare drivers' workers' rights cases began in earnest in the mid-2010's and – as workers kept winning – increased in pace.[447] Most – but by no means all – of these cases were backed or brought by trade unions. The first and most high profile of these cases

[444] On the basis of article 11 ECHR.
[445] Section 280, Trade Union and Labour Relations (Consolidation) Act 1992.
[446] For more on the connection between Brexit and workers' rights, see: Moyer-Lee, J. (2016). 'Holidays, equal pay – Brexit threatens these rights. We are fighting to keep them'. In: *The Guardian*. 6 December. https://www.theguardian.com/commentisfree/2016/dec/06/holidays-equal-pay-brexit-rights-union-iwgb. [Accessed 30 October 2021]; Moyer-Lee, J. (2017). 'At last, paid holiday for 'gig economy' workers. But what happens after Brexit?'. In: *The Guardian*. 30 November. [Accessed 30 October 2021]; Moyer-Lee, J. (2018). 'May's Brexit deal quietly gambles with our rights at work'. In: *The Guardian*. 26 November. https://www.theguardian.com/commentisfree/2018/nov/26/theresa-may-brexit-deal-rights-at-work-eu-protections. [Accessed 30 October 2021]; Moyer-Lee, J. (2021). 'Brexit gives the Tories a free hand to dismantle workers' rights'. In: *Al Jazeera*. 9 January. https://www.aljazeera.com/opinions/2021/1/9/brexit-deal-tories-uk-workers-rights. [Accessed 30 October 2021]; Ewing, K.D. (2021). 'The EU-UK Trade and Cooperation Agreement: Implications for ILO Standards and the European Social Charter in the United Kingdom'. In: *King's Law Journal*, Vol. 32, No.2, pp306-343.
[447] This is not to suggest that couriers and drivers never brought cases before this. Indeed, some important such cases were decided earlier; for example, *James v Redcats (Brands) Ltd* UKEAT0475/06/DM, an Employment Appeal Tribunal case concerning a courier's worker status, *Mingeley v Pennock (t/a Amber Cars)* [2004] EWCA Civ 328, a Court of Appeal case concerning the status of a private hire driver, and *Khan v Checkers Cars Ltd* UKEAT/0208/05 which also concerned the status of a private hire driver.

was *Aslam & Ors v Uber B.V. & Ors*, the worker status element of which was first decided by the London Central Employment Tribunal[448] in October of 2016. More noteworthy than the actual finding of worker status was the fact that that result appeared so obvious to the Tribunal. Indeed, Employment Judge (EJ) Snelson, who penned the decision, famously wrote: 'The notion that Uber in London is a mosaic of 30,000 small businesses linked by a common 'platform' is to our minds faintly ridiculous'.[449] The complexity of Uber's highly sophisticated contractual documentation, if anything, worked against the company in the eyes of the Tribunal (at [87], emphasis in the original):

> ... we have been struck by the remarkable lengths to which Uber has gone in order to compel agreement with its (perhaps we should say its lawyers') description of itself and with its analysis of the legal relationships between the two companies, the drivers and the passengers. Any organisation (a) running an enterprise at the heart of which is the function of carrying people in motor cars from where they are to where they want to be and (b) operating in part through a company discharging the regulated responsibilities of a PHV operator, but (c) requiring drivers and passengers to agree, as a matter of contract, that it does not provide transportation services (through UBV or ULL), and (d) resorting in its documentation to fictions, twisted language and even brand new terminology, merits, we think, a degree of scepticism. Reflecting on the Respondents' general case, and on the grimly loyal evidence of Ms Bertram in particular, we cannot help being reminded of Queen Gertrude's most celebrated line:
>
> **'The lady doth protest too much, methinks.'**

The second critical holding of this tribunal decision was that Uber drivers were considered to be working – and as such entitled to minimum wage – not just when they had a passenger in the car, but rather when they had the app on, were in their area of work, and were ready, willing, and able to accept jobs.[450] As the Tribunal reasoned (at [100], emphasis and footnote from the original):

> … It is essential to Uber's business to maintain a pool of drivers who can be called upon as and when a demand for driving services arises. The excellent 'rider experience' which the organisation seeks to provide depends on its ability to get drivers to passengers as quickly as possible. To be confident of satisfying

[448] Case Nos. 2202550/2015 & Ors.
[449] At [90].
[450] The Tribunal cited (at [48]) Uber's 'Welcome Packet' for new drivers which stated: 'Going on-duty means you are willing and able to accept trip requests. Rejecting too many requests leads to rider confusion about availability. You should be off-duty if not able to take requests.'

> demand, it must, at any one time, have some of its drivers carrying passengers and some waiting for the opportunity to do so. Being available is an essential part of the service which the driver renders to Uber. If we may borrow another well-known literary line:
>
> **They also serve who only stand and wait.**[451]

Uber appealed the decision several times over the following five years. Uber lost each time, on both the worker status and the working time points. During the pendency of the appeals process the company did not treat its drivers as limb b workers and hence continued to deprive them of the employment rights to which they were legally entitled.

In 2017 the Central London Employment Tribunal handed down a number of limb b worker status decisions in cases brought by bicycle couriers. These cases were supported by the IWGB; the strategy was to bring cases against four of the major courier companies (CitySprint, eCourier, Excel, and Addison Lee). The thinking was that if we won all four test cases, the courier industry would have no choice but to reform and treat its couriers as limb b workers. The strategy rested on the rather optimistic assumption that the companies would obey the law once its meaning had been put beyond any doubt.

All four cases were allocated to be heard by Employment Judge (EJ) Wade. In the first of these courier cases, *Dewhurst v CitySprint*,[452] EJ Wade held that the courier was a limb b worker and dismissed the company's contractual contentions as 'windowdressing'.[453] CitySprint appealed the decision and, similar to Uber, refused to reclassify its workforce in the meantime. The Excel[454] and Addison Lee[455] cases were similarly decided in the couriers' favour (Addison Lee appealed and again refused to reclassify its workforce in the meantime), and the eCourier case settled with the company recognising the courier had been misclassified, agreeing to pay him what he was owed, and agreeing not to include a confidentiality clause in the settlement agreement, all of which points to the rather obvious conclusion that the company knew it would lose should it go to trial. Also in 2017, the Central

[451] Milton, *On his blindness.* The line encapsulates our view, although we are alive to the fact that those to whom the poet referred were not seen as rendering "day-labour".
[452] Case No. 2202512/2016.
[453] At [55].
[454] *Boxer v Excel Group Services Ltd (in liquidation)*, Case No. 3200365/2016.
[455] *Gascoigne v Addison Lee Ltd,* Case No. 2200436/2016.

London Employment Tribunal decided the case of *Lange & Ors v Addison Lee Limited*,[456] holding that private hire drivers who worked for the largest private hire company in the UK after Uber, were also limb b workers whose working day consisted of the time during which they were 'logged onto [Addison Lee's] internal driver portal system'.[457] In a separate case brought on behalf of medical couriers at The Doctors Laboratory (TDL)[458] – who misclassified many of its couriers as independent contractors – TDL responded to the claim by conceding that its couriers were indeed limb b workers and ultimately settled the claims, even recognising some of its couriers as employees. Unlike the other companies, TDL did in fact start treating its couriers as workers; they all started receiving paid holidays and pension contributions, among other rights. And no, none of them lost their jobs as a result. In sum, by the end of 2017 the winds of worker status were blowing strongly against 'gig economy' companies.

In the years that followed, several more worker status cases were brought and/or decided,[459] and, importantly from a jurisprudential perspective, appellate level tribunals and courts started handing down decisions on appeals from the earlier cases, thereby crystalising in binding caselaw the principles of limb b worker status as they applied to the 'gig economy'. Indeed, in every single appeal of the above-mentioned cases in which a decision was taken, the appellate tribunals and courts upheld the finding that the individuals in question were workers in law.[460] Of these, undoubtedly the most significant was the Supreme Court decision

[456] Case Nos. 2208029/2016, 2208030/2016, 2208031/2016.
[457] Para 2 of the judgment.
[458] Butler, S. & Goodley, S. (2017). 'Blood couriers launch case challenging self-employed status'. In: *The Guardian*. 7 March. https://www.theguardian.com/business/2017/mar/07/medical-couriers-doctors-laboratory-nhs. [Accessed 30 October 2021].
[459] For example, *Augustine v Stuart Delivery Ltd*, London Central Employment Tribunal Case No. 2200757/2017, holding that the courier was a limb b worker; *Leyland & Ors v Hermes Parcelnet Ltd* ET/1800575/2017, holding the couriers were limb b workers, cases launched against private hire firms Green Tomato, A2B, and Blacklane (see: Butler, S. (2018). 'Taxi firms face claims over drivers' rights in wake of Uber case'. In: *The Guardian*. 20 April. https://www.theguardian.com/business/2018/apr/20/taxi-firms-face-claims-over-drivers-rights-in-wake-of-uber-case. [Accessed 30 October 2021]), as well as a case brought by a courier against her employer over discrimination due to the fact she was transgender, a claim which necessitated her first to be a limb b worker (see: Coleman, C. (2018). 'Transgender van driver sues for gig economy discrimination'. In: *BBC*. 17 July. https://www.bbc.com/news/uk-44847564. [Accessed 30 October 2021].
[460] See: *Stuart Delivery Limited v Augustine* UKEAT/0219/18/BA, *Stuart Delivery Ltd v Augustine* [2021] EWCA Civ 1514, *Uber B.V. & Ors v Aslam & Ors* [2017] UKEAT 0056_17_1011, *Uber B.V. & Ors v Aslam & Ors* [2018] EWCA Civ 2748, *Uber B.V. & Ors v Aslam & Ors* [2021] UKSC 5, *Addison Lee Ltd v Gascoigne* UKEAT/0289/17/LA, *Addison Lee Limited v Lange & Ors* UKEAT/037/18/BA, and *Addison Lee Limited v Lange & Ors* [2021] EWCA Civ 594 (in which Addison Lee was refused permission to appeal to the Court of Appeal).

in the Uber case. On the one hand, the Court recognised that drivers – notwithstanding the fact that they could chose when to log on and off the app – were still under Uber's control. They were not independent entrepreneurs; as Lord Leggatt JSC – writing the decision on behalf of a unanimous panel of six justices - held (at [101]):

> …the transportation service performed by drivers and offered to passengers through the Uber app is very tightly defined and controlled by Uber. Furthermore, it is designed and organised in such a way as to provide a standardised service to passengers in which drivers are perceived as substantially interchangeable and from which Uber, rather than individual drivers, obtains the benefit of customer loyalty and goodwill. From the drivers' point of view, the same factors - in particular, the inability to offer a distinctive service or to set their own prices and Uber's control over all aspects of their interaction with passengers - mean that they have little or no ability to improve their economic position through professional or entrepreneurial skill. In practice the only way in which they can increase their earnings is by working longer hours while constantly meeting Uber's measures of performance.

But the Uber decision was also significant as it provided guidance for lower courts on how they should approach situations in which a company's contractual documentation was expressly designed to create the appearance that the people who worked for it were independent contractors rather than limb b workers. Prior to this decision, the leading case in this regard was *Autoclenz Limited v Belcher & Ors* [2011] UKSC 41. In that case Lord Clarke JSC – on behalf of a unanimous Supreme Court - held that due to the inequality of bargaining power that characterised employment relationships, and the 'armies of lawyers'[461] that employers could deploy to produce contracts, courts and tribunals must assess the true agreement between the parties, even if that meant departing from the written terms of the contract.[462] The Uber decision reaffirmed and extended this; as Lord Leggatt JSC held (at [76]):

> …it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker". To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such

[461] Citing Elias J in *Consistent Group Ltd v Kalwak* [2007] IRLR 560 at [57].
[462] At [35].

> protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it.

Shortly after this decision was handed down, I commented on its significance in an article for *Al Jazeera*:

> The effect of the Uber decision is that it will now be even harder for employers to use their contracts to misclassify their workers and deprive them of basic rights. This means that any attempt by Uber to squirm out of the decision by changing the contracts – as the company has already hinted at – will be all but hopeless in the courts.
>
> With last week's decision against Uber, the Supreme Court also underlined its commitment to ensuring that the laws passed by Parliament – in this case laws that aim to protect vulnerable workers from exploitative employers – are being fully implemented.[463]

In sum, worker status, a concept developed over 100 years before the invention of the smartphone, has done a remarkable job in protecting 'gig economy' workers, in the jurisprudence if not in practice (more on which below). There is one significant problem with the courts' approach to construing worker status though, and that is the issue of substitution.

## Contractual snake oil: the substitution clause

Recalling that the requirement to perform work personally is one of the three constituent parts of the definition of limb b worker status, the ability for a worker to send a substitute to perform the work for them is, in theory, incompatible with this requirement. Courier companies in particular have therefore routinely inserted clauses into their workers' contracts providing for the right to use substitutes. These clauses often have nothing to do with the reality of the work; they have more to do with the hope that the loophole will allow the companies to get away with depriving their workers of rights. Indeed, courier companies

[463] Moyer-Lee, J. (2021). 'UK Supreme Court's Uber decision is a victory for all gig workers'. In: *Al Jazeera*. 25 February. https://www.aljazeera.com/opinions/2021/2/25/the-uk-supreme-courts-uber-decision-is-a-victory-for-all-workers. [Accessed 30 October 2021].

tried – unsuccessfully - to rely on substitution clauses in various of the 'gig economy' cases referred to above. However, the companies did succeed in one prominent case: *Independent Workers' Union of Great Britain v Central Arbitration Committee & Roofoods Ltd t/a Deliveroo* ('the Deliveroo case').

'Personal service' in the jurisprudence does not mean a worker can never have a right to send a substitute. The precise meaning of the concept is fluid and still developing. In the Court of Appeal case of *Pimlico Plumbers Limited & Anor v Smith* [2017] EWCA Civ 51, Sir Terrence Etherton MR summarised the existing principles in the jurisprudence (at [84]):

> Firstly, an unfettered right to substitute another person to do the work or perform the services is inconsistent with an undertaking to do so personally. Secondly, a conditional right to substitute another person may or may not be inconsistent with personal performance depending upon the conditionality. It will depend on the precise contractual arrangements and, in particular, the nature and degree of any fetter on a right of substitution or, using different language, the extent to which the right of substitution is limited or occasional. Thirdly, by way of example, a right of substitution only when the contractor is unable to carry out the work will, subject to any exceptional facts, be consistent with personal performance. Fourthly, again by way of example, a right of substitution limited only by the need to show that the substitute is as qualified as the contractor to do the work, whether or not that entails a particular procedure, will, subject to any exceptional facts, be inconsistent with personal performance. Fifthly, again by way of example, a right to substitute only with the consent of another person who has an absolute and unqualified discretion to withhold consent will be consistent with personal performance.

In the Deliveroo case, the company introduced a new contract just weeks before the hearing which provided for a very broad right of substitution (the previous contract only allowed for fellow Deliveroo riders to be substitutes). The company then paraded a couple loyal riders before the Central Arbitration Committee (CAC) – the first instance tribunal hearing the case – who gave evidence that they had indeed used a substitute. And on that basis, the CAC held that there was not a requirement of personal service and as such the riders could not be considered limb b workers. This is notwithstanding Deliveroo's obvious purpose in inserting the clause; as the CAC decision noted (at 99):

> Even if [Deliveroo] did it in order to defeat this claim and in order to prevent the Riders from being classified as workers, then that too was permissible: all that

> mattered was the terms of the agreement, analysed in the holistic and realistic way set out in Autoclenz.[464]

In the IWGB's various appeals[465] we had perhaps one the least lucky series of judicial draws, with one arch-conservative judge after another weighing in at various stages. Ultimately, the case was only given permission to proceed with one argument, based on the ECHR. In sum, we argued that in order for Deliveroo riders to enjoy their Article 11 ECHR trade union rights – the case concerned an application for statutory collective bargaining, which required that the riders be limb b workers for it to be admissible – they must be considered limb b workers for the purposes of Article 11 ECHR rights, even if they were not limb b workers within the meaning of domestic law.

As the case was working its way through the appellate process, the Supreme Court handed down its decision in the appeal of *Pimlico Plumbers Ltd & Anor v Smith* [2018] UKSC 29. Although the principles on personal service set out in the Court of Appeal decision (cited above) were not expressly disavowed, in the Supreme Court decision Lord Wilson JSC stated his own approach to deciding whether the personal service requirement was satisfied (at [32]):

> The sole test is, of course, the obligation of personal performance; any other so-called sole test would be an inappropriate usurpation of the sole test. But there are cases, of which the present case is one, in which it is helpful to assess the significance of Mr Smith's right to substitute another Pimlico operative by reference to whether the dominant feature of the contract remained personal performance on his part.[466]

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[464] *Independent Workers Union of Great Britain v RooFoods Limited t/a Deliveroo*, Case Number: TUR1/985(2016).

[465] Technically we challenged the CAC decision by way of judicial review before the High Court and thereafter appealed to the Court of Appeal.

[466] The IWGB had applied to intervene in this Supreme Court case, specifically to make submissions on the scope of the personal service requirement in limb b worker status. In particular, we sought to argue that the jurisprudential threshold set for satisfying the personal service requirement should be lower (i.e. easier to satisfy) for limb b workers than for employees. Thus far the case law had treated the personal service requirement as identical for both limb b worker and employee status. The Supreme Court initially granted the IWGB permission to make this argument in this case. Uber also applied to intervene however. Uber was uninterested in the personal service requirement but did want to try to influence the Supreme Court's approach to limb b worker status such as to have a better chance at winning its own case on the same (which was behind *Pimlico Plumbers* in the appeals process). Uber's proposed arguments were unappealing to the Court and so the Court denied them permission to intervene in the case. When Uber found out that the IWGB had been given permission it complained to the Court, arguing effectively that this would give the union an upper hand in the

It appeared as though the loophole had been closed; as long as a worker's job entailed doing most of the work themselves, the fact that a company could produce a couple of workers to say they had used a substitute before seemed unlikely to constitute a get-out-of-jail-free card for employers. As I wrote in an article for *The Guardian* on the decision at the time:

> There is, however, one area in which this judgment does helpfully take us forward. That regards the requirement that you have to do your work yourself to be a limb (b) worker and can't send someone else to do the job for you whenever you want. This issue has become the favourite focus of the courier companies' overzealous corporate lawyers: you simply introduce a clause in the person's contract saying they can have someone else do the work for them and you've miraculously transformed a low-paid bike courier into an independent business person! Luckily, tribunals and courts usually see through this nonsense, but every once in a while the company is able to get away with exploiting the loophole and the worker. Today's judgment has closed the loophole. As long as the dominant feature of the contract is one where the individual does the work themselves – which is the case in every courier business model I've ever seen – then the person is still covered by those legal protections.

And once again, my views proved to be overly optimistic, at least so far as concerned the Deliveroo case. Despite the *Pimlico Plumbers* ruling, both the High Court and the Court of Appeal after that, upheld the CAC decision, rejecting the Deliveroo riders' claim to be limb b workers. This is despite the fact that the case was being decided on the basis of Convention – and not just domestic – law. Indeed, despite holding that Article 11 ECHR rights were applicable if Deliveroo riders were in an employment relationship within the meaning of R198, Underhill LJ elided the difference between an employment relationship in international law and the worker concept in domestic law, stating (at [62]):

> Overall, the approach taken in ILO R198 to identifying an employment relationship broadly parallels that taken in domestic law in identifying the characteristics not only of a contract of service, but also of a "worker contract". It recognises an underlying concept of "subordination"; it identifies a number of familiar indicators of the existence of such a relationship; and it enjoins a focus on the realities of the relationship and being alert to attempts to disguise it.

litigation it was supporting against Uber, and the Supreme Court revoked the IWGB's permission to intervene in *Pimlico Plumbers.*

And despite Lord Wilson JSC's restating of the approach to personal service in *Pimlico Plumbers*, Underhill LJ still referred to the more restrictive principles on personal service set out by the Court of Appeal in that case,[467] then going on to state (at [77], endnote omitted):

> I do not think that the position taken in English law that an obligation of personal service is (subject to the limited qualifications acknowledged in *Pimlico Plumbers*) an indispensable feature of the relationship of employer and worker is a parochial peculiarity. On the contrary, it seems to me to be a central feature of such a relationship as ordinarily understood, and I see no reason why its importance should be any the less in the context of article 11.[468]

Underhill LJ recognised that his ultimate decision to deny Deliveroo riders limb b worker status – even on the basis of international law – may be considered by those not enthralled with the technicalities of jurisprudence to be a somewhat perverse result (at [86], endnote omitted):

> I am conscious that that conclusion may at first sight seem counter-intuitive. It is easy to see that riders might benefit from organising collectively to represent their interests as against Deliveroo, and it might seem to follow that they should have the right "to join and form a trade union for the protection of [those] interests".[469]

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[467] He justified this in an endnote, stating:

> Lord Wilson also reviewed the issue when the case went to the Supreme Court ([2018] UKSC 29, [2018] ICR 1511) – see paras. 20-34 of his judgment; but Sir Terence's summary is consistent with his conclusions and is more useful for our purposes.

[468] Underhill LJ also considered the decision of the CJEU in *B v Yodel Delivery Network Ltd*, case C-692/19, [2020] IRLR 550 (discussed above) to be influential (see [73]). *Yodel* was an IWGB-backed case. The strategy behind pushing for a reference to the CJEU was to obtain a clear ruling from the CJEU that the personal service requirement in UK worker status was inconsistent with the definition of worker in EU law. Arguably, the CJEU decision supports this reasoning. As seen above, a courier with the right of substitution will still be a worker in EU law if their independence is fictitious or if they work in a relationship of subordination vis-à-vis the courier company. This is not how Underhill LJ read the decision though.

[469] Coulson LJ, in his short concurring decision, made a similar point (at [96]):

> I understand why my lord says at para. 86 that the result may seem counter-intuitive: it may be thought that those in the gig economy have a particular need of the right to organise as a trade union. So I quite accept that there may be other cases where, on different facts and with a broader range of available arguments, a different result may eventuate.

Finally on the substitution issue, the Court of Appeal of England and Wales in another 'gig economy' case – *Stuart Delivery Ltd v Augustine* [2021] EWCA Civ 1514 – took a decidedly different approach. Indeed, when the company tried to rely on the principles set out by the Court of Appeal in *Pimlico Plumbers*, it was rebuffed robustly, with Lewis LJ noting (at [53]):

> …the difficulty, and the unreality, of treating the examples in [the *Pimlico Plumbers* Court of Appeal decision] as if they were rigid categories and then seeking to analyse subsequent cases by reference to those categories. The real issue is whether the claimant was obliged personally to perform the work or provide the services.

As seen above, the Court upheld the original finding that the courier was a limb b worker.

In sum, and whilst the Deliveroo decision appears increasingly anomalous in light of the hefty weight of jurisprudence concluding that those who work in the 'gig economy' are indeed limb b workers, the substitution issue nevertheless remains a problem with limb b worker status in the UK.

## The dead letter of the law

The fact that so few 'gig economy' workers in the UK are actually benefitting from workers' rights is striking, given the discussion above. Indeed, among many other examples, shortly before CitySprint's appeal was due to be heard, it unilaterally pulled out of the appeal, tweaked the contracts with its couriers, and then claimed the tribunal decision was only of historic importance and as such there was no need to reclassify its workforce.[470] The IWGB backed a new tribunal claim against them and won again,[471] and yet the company still did not reclassify the workers. Although Uber eventually agreed to classify its drivers as limb b

[470] *Dewhurst v CitySprint UK Ltd* (Case No: 2202512/2016) and Butler, S. (2017). 'CitySprint accused of 'making a mockery' of employment rights'. In: *The Guardian*. 15 November. https://www.theguardian.com/business/2017/nov/15/citysprint-employment-rights-courier-mini-mum-wage-holiday-pay. [Accessed 25 December 2020].
[471] *O'Eachtiarna & Ors v CitySprint (UK) Ltd* (Case No's: 2301176/2018 & Ors).

workers, providing a number of important rights,[472] it quite openly disregarded the obligation to pay drivers for time they were working without a passenger in the car.[473] It literally approached the law as if it was an à la carte menu, from which it could pick and choose the elements it desired to implement and say no thanks to the rest. *I'll have the fries and the milkshake please, but no Brussel sprouts because they leave a bitter taste.*

The first thing to note in this regard is that very few employment laws are enforced by any state body in the UK. And the main bits of employment law that are enforced are usually done so in an under-resourced and ineffective manner. The second thing to note is that the explosion of the 'gig economy' in the UK has coincided with over a decade of Tory rule. The Conservative Party is unashamedly anti-worker and has during this time made it harder for employees to claim unfair dismissal and minimum wage, and completely removed the ability of employees to bring tribunal claims over violations of health and safety legislation – part of David Cameron's effort to 'kill off health and safety culture for good'[474] -, among other things. In an article for *The Guardian* after the Uber Supreme Court decision was handed down[475], I summarised some of these issues (footnotes and sources added):

> David Metcalf, the former [D]irector of Labour Market Enforcement, pointed out that companies could expect a minimum wage inspection once every 500 years, and that around £1.8bn worth of holidays went unpaid each year.[476] To his credit he made a number of suggestions on how to address this, the most useful

[472] For example, several months after the Supreme Court ruling, Uber agreed to provide mandatory pension contributions for its private hire drivers, backdated to 1 May 2017; see: Butler, S. (2021). 'Uber to pay pensions to all its UK drivers, backdated to 2017'. In: *The Guardian*. 24 September. https://www.theguardian.com/technology/2021/sep/24/uber-to-pay-pensions-to-all-its-uk-drivers-backdated-to-2017. [Accessed 29 November 2021].

[473] Blackall, M. (2021). ''A lot are sceptical': Uber drivers' cautious welcome over worker status'. In: *The Guardian*. 18 March. https://www.theguardian.com/technology/2021/mar/18/a-lot-are-sceptical-uber-drivers-cautious-welcome-over-worker-status. [Accessed 31 October 2021].

[474] Woodcock, A., Bentley, D. & Glaze, B. (2012). 'David Cameron: I will kill off safety culture'. In: *The Independent*. 5 January. https://www.independent.co.uk/news/uk/politics/david-cameron-i-will-kill-safety-culture-6285238.html. [Accessed 31 October 2021].

[475] Moyer-Lee, J. (2021). 'After the Uber ruling, there's no excuse for government not to enforce workers' rights'. In: *The Guardian*. 20 February. https://www.theguardian.com/commentisfree/2021/feb/20/uber-ruling-government-workers-rights-conservatives-employers. [Accessed 31 October 2021]. For various earlier commentary on the enforcement issue, see: *The Guardian*. (n.d.) 'Jason Moyer-Lee'. https://www.theguardian.com/profile/jason-moyer-lee. [Accessed 31 October 2021].

[476] Metcalf, D. (2018). *United Kingdom Labour Market Enforcement Strategy 2018/19*. May. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf. [Accessed 31 October 2021].

> of which were rejected by Theresa May's government. Failing to make significant progress, he stepped down after less than three years.[477]
>
> Metcalf was replaced by Matthew Taylor, whose 2017 Taylor Review – which made a series of recommendations to the government on how to address precarious employment – was largely dismissed by trade unions as not going anywhere near far enough. Notably, it had almost nothing to say about the role of enforcement in protecting workers' rights.[478] But even Taylor has proved too much of a challenge for this government; his term has not been extended, despite him offering to stay on unpaid until a replacement was found, leaving the post vacant for several months.[479] "The whole thing is incompetent, irresponsible and suggests a disregard for vulnerable workers," Taylor tweeted about the debacle.[480]
>
> Not even a pandemic killing thousands is enough to force a rethink in approach: despite there being more than 3,500 workplace outbreaks of coronavirus, the Health and Safety Executive has failed to shut down or prosecute a single employer, preferring instead methods of "direct persuasion, advice and reprimand".[481]

As if this weren't enough, the Tories[482] also made it more difficult for workers and employees to bring *any* claims before an employment tribunal, introducing expensive fees in 2013. The

[477] Gov.uk. (n.d.). 'Professor Sir David Metcalf CBE'. https://www.gov.uk/government/people/david-metcalf. [Accessed 31 October 2021].

[478] Taylor, M. (2017). *Good Work: The Taylor Review of Modern Working Practices*. July. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627671/good-work-taylor-review-modern-working-practices-rg.pdf. [Accessed 31 October 2021]. For a critique of the uselessness of the Review, see: Moyer-Lee, J. (2017). 'Wishy-washy and full of fluff – the Taylor review offers little'. In: *The Guardian*. 18 July. https://www.theguardian.com/commentisfree/2017/jul/18/taylor-review-gig-economy-workers. [Accessed 31 October 2021], and Moyer-Lee, J. (2018). 'The Government Has Utterly Failed 'Gig Economy' Workers – Why Don't We Have A Vote Of No Confidence In The Business Secretary?'. In: *Huffington Post*. 21 December. https://www.huffingtonpost.co.uk/entry/gig-economy_uk_5c1cefcae4b0407e907a116c. [Accessed 31 October 2021]. For a debate between myself and Taylor over the Taylor Review, see: (2017). 'Episode 3 – Reviewing the Taylor Review'. *UNWORKABLE – a podcast on the hidden side of work*. https://soundcloud.com/unworkable/unworkable-episode-3-reviewing-the-taylor-review. [Accessed 31 October 2021].

[479] Partington, R. (2021). 'Deafening silence': UK government blasted over delays to employment reforms'. In: *The Guardian*. 18 February. https://www.theguardian.com/business/2021/feb/18/deafening-silence-uk-government-delays-covid-employment-reforms-legislation. [Accessed 31 October 2021].

[480] Taylor, M. (2021). In: *Twitter*. 1 February. https://twitter.com/FRSAMatthew/status/1356326088918650880?s=20. [Accessed 31 October 2021].

[481] Wall, T. (2021). 'Covid: HSE refuses to close workplaces that are putting employees at risk'. 14 February. In: *The Observer*. https://www.theguardian.com/world/2021/feb/14/hse-refuses-to-close-workplaces-that-are-putting-employees-at-risk. [Accessed 31 October 2021].

[482] With the help of the Liberal Democrats with whom they were in a coalition government.

fee regime was later struck down by the Supreme Court[483] as unlawful, with the decision noting (at [91]) that:

> The fall in the number of claims has in any event been so sharp, so substantial, and so sustained as to warrant the conclusion that a significant number of people who would otherwise have brought claims have found the fees to be unaffordable.

Even with the tribunal fees abolished, and a generally favourable costs regime in the employment tribunals (normally each party covers their own legal costs), leaving individual workers to bring claims as the main mechanism for enforcing the law is highly unsatisfactory and ineffective. The results of the quasi-non-existent enforcement are unsurprising. For example, in one recent survey of low-paid migrant workers undertaken by Focus on Labour Exploitation (FLEX), 44% of respondents reported not having been paid the correct wages at least once since the beginning of the pandemic.[484]

Private hire regulatory law (which applies to rideshare companies) – or better put, the political actors in charge of applying that law – have also proved incredibly unhelpful to the cause of employment rights for 'gig economy' workers. More specifically, section 3 of the Private Hire Vehicles (London) Act 1998 – which regulates private hire in the capital city[485] - requires a private hire company ('operator') to be a 'fit and proper person' in order to obtain from the regulator the necessary license to operate. The regulatory authority in London, Transport for London (TfL), has despite refusing Uber a license twice on separate grounds, and despite the Mayor of London paying lip service to the importance of workers' rights for private hire drivers,[486] notably refused to take Uber's flouting of employment laws into account when determining whether or not the company was 'fit and proper'. This is notwithstanding a legal opinion of distinguished counsel – as it happens the same counsel who represented the lead

[483] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51. Also see: Moyer-Lee, J. (2017). 'Victory on employment tribunal fees: this is what justice feels like'. In: *The Guardian*. 26 July. https://www.theguardian.com/commentisfree/2017/jul/26/employment-tribunal-fees-supreme-court-ruling. [Accessed 31 October 2021].
[484] FLEX. (2021). 'Social (in)security: FLEX's latest report highlights risk of labour exploitation during Covid-19'. 28 October. https://labourexploitation.org/news/social-insecurity-flex's-latest-report-highlights-risk-labour-exploitation-during-covid-19. [Accessed 20 November 2021].
[485] Separate but similar pieces of legislation regulate the trade in other parts of the UK.
[486] GMB. (2021). 'London Mayor, Uber and GMB call for all private hire drivers to be workers'. 8 November. https://www.gmb.org.uk/news/london-mayor-uber-and-gmb-call-all-private-hire-drivers-be-workers. [Accessed 20 November 2021].

claimants in the Uber litigation, Jason Galbraith-Marten QC and Sheryn Omeri – to the effect that (at [71]-[72]):

> 71. For the reasons set out above, it is our opinion that the 'fit and proper person' requirement for the issue of a PHV operator's licence does require the licensing authority to take account of the question of whether the applicant for a licence has in the past failed, or will in the future fail, to observe relevant employment law rights of its PHV drivers. While it is not the function of the licensing authority to enforce employment legislation in general, we consider that there is a sufficient overlap between the objectives of (i) the licensing regime and (ii) the Working Time Regulations and Minimum Wage legislation that breach of the latter is factor that can lawfully be taken into account when assessing fitness and propriety.
>
> 72. In addition we consider that Article 8 of the Convention, perhaps alone but most likely when read together with Article 14, is another source of obligation upon the licensing authority to consider the obedience of the applicant for a PHV operator's licence to employment law. That is, the licensing authority must secure the protection of the PHV drivers' right to form social relationships through work by ensuring that they are not prevented from undertaking such work or required to undertake it at an unacceptable risk.[487]

Granted, TfL does not have some of the broad powers that New York City's Taxi and Limousine Commission (TLC) has, and to obtain further power TfL would have had to seek authority not from the Labour Party-dominated London government but rather the Conservative-dominated national government. Nonetheless, TfL could and should have done more.

In sum, limb b worker status in the UK was not designed for the 'gig economy' in its modern form, yet it has been construed so as to cover most of the 'gig economy' workers who have litigated the issue. Limb b worker status falls short in that the coverage provided is not as good as employee status, in particular in the areas of sick pay, maternity pay, and unfair dismissal. The biggest problem with limb b worker status however, by a long shot, is its lack

[487] Galbraith-Marten QC, J. & Omeri, S. (2019). *In the Matter of: Section 3 of the Private Hire (London) Act 1998 and In the Matter of: the Independent Workers of Great Britain ('IWGB') and Transport for London: Opinion*. 5 November.

of enforcement. If given the choice, many companies will and do choose simply not to obey the law.

## Uber Eats in Geneva

### An unlikely duo

'For months I haven't received my salary. Zero, zero, zero,' said Karim, an Uber driver in Geneva on the eve of a strike in December, 2017. When he was paid, it was often less than he was legally owed; 'I've worked through the night, from 7pm until 5h45 in the morning, six days out of seven, for 2500 francs per month' – below the 3000 francs per month promised in his employment contract – something he compared to a form of 'slavery'. Karim had an employment contract but not with Uber; in response to the requirement that drivers had to be employed, they were outsourced to companies Pégase Léman and Starlimoluxe. Karim was not alone in his pay problems; 'I don't benefit from any social [insurance] contributions,' added Fracis, another driver. Indeed, an investigation by the news organisation Radio Télévision Suisse (RTS) found that the outsourcing companies were employing drivers 'without respecting employment law'. The trade union Unia, involved in organising the drivers, also stressed that the cap on maximum weekly working hours was not being respected either. 'The situation of the drivers employed by Uber's partner companies is very serious, almost dramatic from an economic and family point of view,' explained Umberto Bandiera, a senior official with Unia. As if to satirise the incompetence which so often characterises outsourcing arrangements in low paid work, one of the outsourcing companies attributed the pay problems to a 'conflict' between company partners; the other company attributed the issue to a 'problem with an accountant'.[488] Uber Eats couriers would soon have similar problems.

Uber had been controversial in Switzerland since its arrival, often – as in most countries where it has gone – embroiling itself in regulatory and legal problems. Indeed, in August 2014,

[488] The preceding paragraph and quotes draw from: RTS. (2017). 'Des chauffeurs Uber dénoncent des violations du droit du travail à Genève'. In: *RTS*. 8 December. https://www.rts.ch/info/regions/geneve/9144268-des-chauffeurs-uber-denoncent-des-violations-du-droit-du-travail-a-geneve.html. [Accessed 22 October 2021]. The quotes are the author's translation from the French.

before launching in Geneva, Uber engaged in communication with the cantonal trade department (part of the cantonal government, corresponding to Geneva's Department of Security and Finance) and put forth its plans for the canton. The canton officials warned Uber they would be in violation of cantonal transport laws, but Uber shrugged it off, asserting the laws didn't apply to them, and launched anyway in September 2014.[489] As the Federal Tribunal later described the incident – in words apt to describe 'gig economy' company *modus operandi* worldwide – Uber 'chose to present the authorities with a fait accompli, knowing full well that engaging in such an activity without authorisation would be considered illegal by the competent authorities'.[490] Unsurprisingly, the canton fined the company and prohibited their operation until they had obtained the necessary license to operate.[491]

However, while Uber in Geneva was running into problems with its passenger transport operations, its food delivery couriers were essentially being left to their own plight. By late 2020 there were an estimated 500 Uber Eats couriers in Geneva; for some of these workers it was the only option left. 'Before becoming a courier I looked for work, and given that I couldn't find any for two to three months, I said to myself *OK, I'll sign up for Uber Eats*,' said 28 year old Riffanul Miah, a former McDonalds employee who was let go during the pandemic. 'It's really not a choice to do Uber,' said Kevin, another courier; 'I do it because if I don't do it, I have nothing else.' And the pay was not that much better than nothing; on his first day he earned around only 80 francs for a full day. 'I said to myself, that's not a lot; it will go better tomorrow,' Kevin explained, but:

> …in the end, the more the days go by the more you adapt and the more you increase your work speed and intensity in order to earn more. So, you take risks on the road to save time on each delivery and you try to do as many deliveries as possible.

[489] *Uber Switzerland GmbH & Anor v Service du commerce de la République et canton de Genève*, Arrêt du 7 janvier 2016, Tribunal federal, at p1. Names of cantonal authorities are author's translation from the French.
[490] Ibid., p3; author's translation from the French.
[491] Ibid., pp1-2.

Or as another rider put it: 'the faster you go, the more you earn'.[492] And as per standard operating procedure, the companies flooded the field with more couriers than required to satisfy demand, thereby intensifying the pressure on each worker to earn; 'In Geneva there's an enormous amount of couriers, whether at Uber Eats or other brands, so there's an element of competition,' said Kevin. 'I think there's too many,' added Isaac Fontoura, another courier. The low barriers to entry and lack of viable alternatives facilitated the flooding;[493] as Isaac explained:

> When one looks a bit at the majority of couriers, we are people who do not necessarily have training, or in any case papers. And everyone can do it. There's no need to have a degree, no need to have a [professional qualification], or a [baccalaureate], or whatever.[494]

And after a large surplus of precarious low-paid workers had been lured in, Uber was in a position to lower courier pay throughout the market. 'What I regret, Uber has brought prices down,' said Alexandre Voegeli, a food delivery courier of 20 years. 'I don't know if they've wrecked the market but they've wrecked the price in any case.'[495] As the presenter of a documentary on Geneva's food delivery couriers on RTS put it:

> let's summarise: the first ones to work with Uber did tens of long-distance deliveries per day, and that ensured a somewhat decent hourly wage. Now, with fewer jobs and shorter distances, there's not much left.[496]

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[492] The preceding section and the quotes are drawn from: Temps Présent. (2020). 'Uber Eats, Deliveroo, Just Eat: l'exploitation à la cool des livreurs à domicile'. In: *YouTube*. 16 October. https://www.youtube.com/watch?v=w-Fl4fwdjBo. [Accessed 29 October 2021]. Quotes are author's translation from the French.

[493] Uber made no secret of the tactic; in evidence to the Court of Justice in Geneva (more on which below), senior Uber managers for 'Uber Eats Western & Southern Europe' stated that anyone who wanted to could sign up as a courier by simply downloading the app, responding to a questionnaire, producing an ID, a photo, and – if applicable – a driver's license. *Uber Switzerland GmbH v Office Cantonal de l'Emploi*, Cour de Justice (Chambre administrative) du République et canton de Genève, Arrêt du 29 mai 2020, at [16]. The above description is however somewhat attenuated by the fact that whilst it may have been easy to obtain a job as a courier, it was not necessarily easy to keep one, with unfair 'deactivations' a.k.a. dismissals, being one of the most common recriminations of 'gig economy' workers around the world.

[494] Quoted in: Temps Présent. (2020). 'Uber Eats, Deliveroo, Just Eat: l'exploitation à la cool des livreurs à domicile'. In: *YouTube*. 16 October. https://www.youtube.com/watch?v=w-Fl4fwdjBo. [Accessed 29 October 2021]. Quotes are author's translation from the French. The terms in brackets replaced Isaac's reference to 'certificat fédéral de capacité' and the term 'bac', respectively.

[495] Ibid.

[496] Temps Présent. (2020). 'Uber Eats, Deliveroo, Just Eat: l'exploitation à la cool des livreurs à domicile'. In: *YouTube*. 16 October. https://www.youtube.com/watch?v=w-Fl4fwdjBo. [Accessed 29 October 2021]. Quote is author's translation from the French.

With this background, it is unsurprising that Unia moved to take action. In a union resolution from as early as January 2016, Unia noted that 'During each industrial revolution, workers must fight for their rights and the protection of their working conditions. That is not different today to during the first industrial revolution.'[497] Pointing out that 'workers looking for a job or a complementary source of income become modern slaves in this new economy,'[498] the union also outlined the threat the model posed to more traditional forms of employment (emphasis supplied):

> Due to the impact of the *dumping* on working conditions, these [employer] actors of the new economy enjoy a competitive advantage compared to the traditional economy and can threaten working conditions throughout the economy.[499]

Separately, Unia called on the state to regulate the 'digital' economy in a number of areas, including working hours, social insurance contributions (similar to ITF P10), and workers' data (similar to ITF P7),[500] among others. On employment status the union stated:

> …we are not ready to accept the new forms of fictitious independence of the digital era ('uberisation'). The 'independent' [workers] in situations of dependence must be recognised as employees and subject to the protections enshrined in employment and social security legislation as well as in [sectoral collective bargaining agreements].[501]

Eventually, Unia was able to exert enough pressure for the authorities to take action. As Umberto Bandiera, then a Unia official, explained:

> Geneva is a bit of a laboratory for the rest of the country because it is here where this company came first, it's here where as a union we challenged them, we have demanded that the authorities intervene. The authorities have – after a while, it must be recognised – but the authorities have nonetheless taken a position on this issue and, in Geneva in 2019 they took the decision to demand that Uber

[497] Unia. (2016). 'L'économie collaborative doit garantir de bonnes conditions de travail'. *Résolution: Assamblée des déléqué-e-s du secteur des services d'Unia, 11 janvier 2016.* Author's translation from the French.
[498] Ibid., author's translation from the French.
[499] Ibid.
[500] The issue of workers' data for Unia was not one simply of data protection but the use of such data rather 'increasingly concerns a question of economic and political power'; see: Unia. (n.d.). 'La numérisation du travail'. *Thèses syndicales pour un débat de société*, p3. Author's translation from the French.
[501] Unia. (2016). 'Humanisation du travail plutôt que logique capitaliste de rationalisation'. *Congrès d'Unia 2016 – Résolution E «Numérisation de l'économie»*. Author's translation from the French.

> comply with Swiss law and as such recognise their collaborators as employees.[502]

And in the cantonal government Unia had the most unlikely of partners: Mauro Poggia of the of the hard-right populist – or as one journalist put it, 'the most xenophobic political party in Switzerland'[503] (a rather considerable threshold to attain) - Geneva Citizens Movement[504] (MCG by its acronym in French).[505] The MCG had a particular ire for French citizens who crossed the border into Switzerland, referring to them in the 2013 elections as an 'epidemic' they needed 'to eradicate'. Asylum seekers were also fair game for them; with the then party leader referring to them as 'vermin' who should be incarcerated 'in containers'.[506] As a result of the 2013 elections Poggia took over the large Department of Employment, Social Affairs, and Health in the cantonal government. As the historian Sébastien Chazaud put it at the time: 'What is certain is that Mauro Poggia will have his hands full and thus the possibility of proving himself'.[507]

And perhaps taking on Uber was his way 'of proving himself'; when he finally did take action – over the employment status of both Uber drivers and couriers - he certainly wasn't messing around. When a journalist asked him if he was trying to instil fear in these companies, he responded:

> Listen, if the alternative is to accept that people come impose on us economic models that violate our laws, under the pretext that there are customers for this sort of activity, and that there are drivers willing to [drive], and well, I don't agree. You know, if tomorrow you put up adverts for cleaning ladies for 10 francs per hour, you will have people who are willing to engage them for this

[502] Quoted in: Temps Présent. (2020). 'Uber Eats, Deliveroo, Just Eat: l'exploitation à la cool des livreurs à domicile'. In: *YouTube*. 16 October. https://www.youtube.com/watch?v=w-Fl4fwdjBo. [Accessed 29 October 2021]. Quote is author's translation from the French.
[503] Hamel, I. (2013). 'Genève: l'extrême droite aux portes du gouvernement'. In: *Le Point*. 9 November. https://www.lepoint.fr/monde/geneve-l-extreme-droite-aux-portes-du-gouvernement-09-11-2013-1753926_24.php. [Accessed 26 October 2021]. Author's translation from the French.
[504] Mouvement citoyens genevois.
[505] Of course, it is not unusual for a right-wing party to be pro 'law and order'; what is unusual is for a party right of centre to include 'employment law' within the 'law' bit.
[506] Hamel, I. (2013). 'Genève: l'extrême droite aux portes du gouvernement'. In: *Le Point*. 9 November. https://www.lepoint.fr/monde/geneve-l-extreme-droite-aux-portes-du-gouvernement-09-11-2013-1753926_24.php. [Accessed 26 October 2021]. Author's translation from the French.
[507] Chazaud, S. 'Le movement citoyens genevois entre au gouvernement'. *Aide-mémoire n° 68.* https://www.territoires-memoire.be/aide-memoire/aide-memoire-68/le-mouvement-citoyens-genevois-entre-au-gouvernement.html. [Accessed 26 October 2021]. Author's translation from the French.

> price. Does that mean that it responds to a need? Certainly not. We have a longstanding culture of social partnership. Our laws are the same for all of Switzerland. We apply the Code of Obligations just like everywhere else in Switzerland. Today, Geneva is the first to take this decision, but tomorrow, everywhere in the other cantons, identical decisions could be taken. …[508]

Similarly, when the Geneva Court of Justice upheld his action against Uber Eats for misclassifying its couriers (more on which below) he responded (in part):

> …I think it's a victory which is more than just symbolic since the aim, obviously, is not just to strong arm a company which proposes a new economic model, against which, personally, I have nothing, as long as it obeys our legislation. … We understand that the uberisation of society looks to transfer onto precarious people the business risk that Uber doesn't take since it only takes a percentage of all the deliveries. So for [Uber], even if there's a plethora of pushbike couriers…it's not [Uber's] problem. What's important is to create the demand.[509]

## Employment/labour law à la Suisse[510]

Like some other federal states (such as the USA and Australia), Switzerland may only legislate at the federal level pursuant to competencies assigned to the federal government in the Federal Constitution of the Swiss Federation (henceforth the Swiss Constitution); otherwise, the cantons are sovereign.[511] As alluded to by Poggia above, Swiss employment and labour law (as well as social security law) is federal rather than cantonal. Article 122 of the Swiss Constitution provides the federal government with responsibility for legislating 'in the field of civil law and the law of civil procedure' whilst assigning the cantons with the general responsibility of organising the judiciary for civil matters.[512] This is important as it is the

[508] Lémanbleutv. (2019). 'Le conseiller d'Etat Mauro Poggia s'exprime sur l'affaire Uber'. 1 November. https://www.lemanbleu.ch/fr/News/Le-conseiller-d-Etat-Mauro-Poggia-s-exprime-sur-l-affaire-Uber.html. [Accessed 29 October 2021]. Author's translation from the French.

[509] Le Journal. (2020). 'Mauro Poggia à propos de la société Uber'. 12 June. https://www.facebook.com/watch/?v=268431424514455. [Accessed 29 October 2021].

[510] This section draws heavily on: Kurt Pärli (Professor of Social Private Law at University of Basel). (2021). Author interview. 26 October. (Direct quotes will be referenced separately).

[511] Pursuant to Article 3; see: *Federal Constitution of the Swiss Confederation of 18 April 1999 (Status as of 7 March 2021).* https://www.fedlex.admin.ch/eli/cc/1999/404/en. [Accessed 29 October 2021]. The translation is provided by the Swiss Government, with the proviso that: 'English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.'

[512] Ibid.

competence upon which the federal government relies when legislating to regulate employment contracts and the civil service, one of the three main sources of labour and employment law in the country.[513] It is also the reason why a cantonal court decision may interpret federal law without other cantons being bound to implement the same interpretation. Article 110 of the Swiss Constitution provides the federal government with the general ability to legislate in the field of employee protections - the second main source of Swiss labour/employment law[514] - and to declare 'collective employment agreements' -the third main source of labour/employment law[515] – 'to be generally applicable',[516] among others. The role of sectoral collective bargaining agreements is crucial; as Kurt Pärli, Professor of Social Private Law at the University of Basel, puts it:

> Collective agreements are a very, very important source of labour law in Switzerland. …if you just look at…the private contract labour law then you come to the end…wow, it's a paradise for employers, because you have hire and fire, and you can do not everything, but a lot of things. … Collective agreements are a manner to give a collective voice to the employees to defend their interests. But this will mean also that if there is no union, there is no social partnership, there's no collective agreement, then you will have just the law, with minimum standards.[517]

This above description is not exhaustive; for example, other articles of the constitution are relevant to employment/labour law such as providing for freedom of association and the right to strike (article 28) and for the federal government to legislate on occupational pensions (article 113).[518] On the other hand, some of the cantons have been able to legislate for minimum wages in their jurisdictions on the basis that the aim was one of social – rather than

[513] Pärli, K. (2021). Author interview. 26 October.
[514] Ibid.
[515] Ibid.
[516] *Federal Constitution of the Swiss Confederation of 18 April 1999 (Status as of 7 March 2021).* https://www.fedlex.admin.ch/eli/cc/1999/404/en. [Accessed 29 October 2021]. The translation is provided by the Swiss Government, with the proviso that: 'English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.'
[517] Pärli, K. (2021). Author interview. 26 October.
[518] *Federal Constitution of the Swiss Confederation of 18 April 1999 (Status as of 7 March 2021).* https://www.fedlex.admin.ch/eli/cc/1999/404/en. [Accessed 29 October 2021]. The translation is provided by the Swiss Government, with the proviso that: 'English is not an official language of the Swiss Confederation. This translation is provided for information purposes only and has no legal force.'

economic – policy.[519] For present purposes, the key point however, is that employment and labour law is predominantly a federal affair in the Helvetic Confederate.

Although employment/labour law and social security law in Switzerland are closely linked, they do not use precisely the same definition of the employment relationship. As Professor Kurt Pärli points out, the holding by the Supreme Court that an individual is an employee for the purposes of employment law would not bind the Supreme Court to hold that the same individual was an employee for the purposes of social security law.[520] The Swiss Code of Obligations defines the contract of employment (at Article 319) thus:

> 1. By the individual contract of employment, the worker is engaged, for a limited or indefinite period, to work in the service of the employer who in turn pays a salary based on the time or the work provided (piece rate salary).
> 2. A contract pursuant to which a worker is engaged to work regularly in the service of the employer by the hour, half-day or day (part-time work), is also considered an individual contract of employment.

In terms of how the definition is construed in the jurisprudence, Professor Kurt Pärli emphasises that 'subordination' is the most important criteria.

A final provision of Swiss employment law that must be considered – because, as will be seen below it is of direct relevance to the Uber Eats case – is the federal law on labour hire (or agency workers). The *Loi fédérale sur le service de l'emploi et la location de services* (LSE) is the primary piece of labour hire legislation and aims to, among other things, regulate labour hire and provide protection for labour hire workers.[521] Article 12(1) requires employers who provide labour to third parties to obtain authorisation from the cantonal office of employment (OCE using the French-language acronym).[522] Further information on what is meant by labour hire is provided by the *Ordonnance sur le service de l'emploi et la location de*

[519] Pärli, K. (2021). Author interview. 26 October.
[520] Ibid.
[521] Article 1.
[522] For Geneva's cantonal laws designating the canton's OCE, see: Article 2, *Loi sur le service de l'emploi et la location de services du 18 septembre 1992* - LSELS – J 2 05 and Article 1, *Règlement d'exécution de la loi sur le service de l'emploi et la location de services du 14 décembre 1992* – RSELS – J 2 05.01. Also, see: *Uber Switzerland GmbH v Office Cantonal de l'Emploi*, Cour de Justice (Chambre administrative) du République et canton de Genève, Arrêt du 29 mai 2020, at [5].

*services du 16 janvier 1991*.[523] Article 26(1) of the *ordonnance* provides that an entity is considered a labour hire provider when it 'hires out the services of a worker to a hiring company whilst surrendering to that company most of its managerial powers vis-à-vis the worker.'[524] Although the jurisprudence on this point has held that it is still possible for the hirer and hiree companies to share some managerial responsibilities vis-à-vis the workers hired out.[525] Article 26(2) adds that one can also identify a labour hire arrangement when i) the worker is integrated into the labour hiring company's organisation of work;[526] ii) the worker performs work with the hiring company's tools, materials or devices; iii) the hiring company bears the risk of bad performance. Put simply, as the Court of Justice of Geneva did: 'the principle characteristic of labour hire [is] the ceding, for lucrative purposes, meaning with regularity and in exchange for remuneration, of workers to other employers'.[527]

Article 12(3) of the LSE provides that if a branch's head office is not located in the same canton as the company's headquarters, the company must obtain authorisation for the branch. If, on the other hand, the branch operates in the same canton as that where the company is headquartered, it must simply be declared to the cantonal office of employment. According to Swiss jurisprudence, a 'branch' is:

> …a commercial establishment that, in dependence upon a head company of which it is legally a part, continually undertakes, on separate premises, similar activities, whilst enjoying a certain amount of autonomy in the economic and business arena.[528]

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[523] OSE – RS 823.111. An *ordonnance* in Swiss law is a form of secondary legislation, usually issued by the Executive (similar to an Executive Order or rule-making in the US or regulations in the UK), which has a lower legal status than federal statutes; see: L'Assamblée fédérale – Le Parlement Suisse. (n.d.). 'Ordonnances'. https://www.parlament.ch/fr/über-das-parlament/portrait-du-parlement/attributions-assemblee-federale/legislation/ordonnances. [Accessed 29 October 2021].

[524] Author translation from the French. Also, see: *Uber Switzerland GmbH v Office Cantonal de l'Emploi*, Cour de Justice (Chambre administrative) du République et canton de Genève, Arrêt du 29 mai 2020, at [5(b)].

[525] Arrêt du Tribunal federal 2c_356/2012 du 11 février 2013 at [3.6], cited in: *Uber Switzerland GmbH v Office Cantonal de l'Emploi*, Cour de Justice (Chambre administrative) du République et canton de Genève, Arrêt du 29 mai 2020, at [5(b)].

[526] Specifically, in the area of personnel, organisational, material, or temporal organisation.

[527] *Uber Switzerland GmbH v Office Cantonal de l'Emploi*, Cour de Justice (Chambre administrative) du République et canton de Genève, Arrêt du 29 mai 2020, at [5(c)]. Author's translation form the French.

[528] *Uber Switzerland GmbH v Office Cantonal de l'Emploi*, Cour de Justice (Chambre administrative) du République et canton de Genève, Arrêt du 29 mai 2020, at [7], summarising ATF 144 V 313. Author's translation from the French.

Divisions of companies that are not autonomous enough to qualify as 'branches' are instead considered 'sections'. Sections can attach their permission to operate to the cantonal authorisation granted to branch or headquarters of the company located in the same canton as the section. If however, there is not a branch or company headquarters located in the same canton, the section must convert itself to a branch or cease operations.[529]

### The Uber Eats case

Between the end of 2018 and the beginning of 2019, Geneva's OCE – which corresponded to Poggia – held meetings with Uber to determine if the company was engaging and deploying its food delivery couriers to restaurants as a labour hire organisation, rendering applicable the labour hire laws.[530] By the 21st of March, 2019 the OCE had preliminarily concluded that the labour hire laws were indeed applicable and informed Uber CH[531] of the same, notifying the company as well that this meant their Geneva office (located in the municipality of Carouge) must be converted into and registered as a 'branch office'. The OCE nevertheless provided a period of time for Uber to respond to the preliminary finding. The OCE reasoned that – due to the fact that Uber CH required them to follow multiple instructions and obligations - the couriers were in a relationship of subordination vis-à-vis Uber CH and as such were employees. This is notwithstanding the fact that the couriers were not required to work set shifts or accept individual jobs. And as the couriers received instructions from the restaurants regarding the time and location of deliveries, and made their deliveries under the license of the restaurants, the OCE found that they were integrated into the personnel of the restaurants. As such, the OCE found the arrangement to be one of labour hire.[532]

Labour hire may indeed appear an unusual route through which to pursue the employment status of 'gig economy' workers. Indeed, with the exception of one first instance judgment in

[529] *Uber Switzerland GmbH v Office Cantonal de l'Emploi*, Cour de Justice (Chambre administrative) du République et canton de Genève, Arrêt du 29 mai 2020, at [7(b)].
[530] Ibid., at [2].
[531] Uber Switzerland GmbH, one of Uber's subsidiaries operating in the country.
[532] Ibid., at [4].

Belgium, holding that the Uber driver in question was an employee of both Uber and the company – a corporate client of Uber – to which he was allocated,[533] I am not aware of other cases which have held 'gig economy' workers to be labour hire/agency workers. However – as seen above - labour/employment law is predominantly a federal matter in Switzerland, and as Professor Kurt Pärli points out, Poggia had limited legal options available to him to enforce employment law for Uber Eats couriers. In general, enforcement was either the purview of the courts (upon the bringing of a claim by a worker) or of the federal authorities. The labour hire law, on the other hand, provides a specific role for cantonal authorities in authorising labour hire companies to operate.[534] For example, in the neighbouring Canton of Vaud, the City of Lausanne – whilst regretting that the cantonal government did not follow Geneva's lead and apply the labour hire laws to Uber Eats – stated that their own labour inspectorate:

> …is following developments in the sector and believes that only a decision of the Federal Tribunal will definitively settle the employment status question for couriers operating on behalf of companies like Uber Eats and as such, the applicability of the statutes and ordinances which [the labour inspectorate of Lausanne] is mandated to enforce.[535]

So, in sum, labour hire was the best option available to Poggia. This is not to suggest this was wrong as a matter of law; it was simply unusual.

On the 2nd of May, 2019 Uber CH contested the preliminary finding, arguing that the couriers were not employees but rather independent actors, working pursuant to commercial relationships with the restaurants, without the interference of third parties. Uber Portier[536] performed the limited role of acting as 'payment collections agent' on behalf of the two parties.[537] A little over a month later – on 11 June 2019 – the OCE confirmed its preliminary finding in a final decision, to the effect that Uber Eats couriers were employees deployed to restaurants under a labour hire arrangement, hence rendering applicable the labour hire

[533] Dossier n°: 187 – FR – 20200707.
[534] Pärli, K. (2021). Author interview. 26 October.
[535] Ville de Lausanne. (2020). *Question n° 9 de M. Daniel Dubas, déposée le 7 mai 2019 « Quelle est la politique de la Municipalité par rapport à Uber Eats ? ».* 24 September.
[536] Uber Portier B.V.; a Dutch subsidiary of Uber, headquartered in Amsterdam. See: *Uber Switzerland GmbH v Office Cantonal de l'Emploi*, Cour de Justice (Chambre administrative) du République et canton de Genève, Arrêt du 29 mai 2020, at [2].
[537] Ibid., at [5].

laws. The OCE informed Uber that: i) it must register its branch office at the Geneva Trade Register (RC, from the acronym in French);[538] ii) abide by the labour hire laws; and that iii) the decision was to take effect notwithstanding any appeals Uber may make. Uber was given 30 days to present a complete application to be registered at the RC, failing which they would be penalised in accordance with the law and ordered to cease operations in Geneva.[539] However, Uber later obtained a stay of that decision pending its appeal before the Court of Justice.[540]

In the appeal,[541] Uber argued primarily that the OCE did not have jurisdiction to take the decision it did as Uber CH was headquartered in Zurich and did not have any 'branch' in Geneva. In the alternative, Uber argued that it was not subject to the labour hire laws, in part on the basis that Uber CH was not in any contractual relationship with the couriers or restaurants, that being the prerogative of Uber Portier.[542] But the Court was having none of it; on 29 May 2020 it rejected Uber's appeal. The Court held that the OCE's decision that Uber Eats couriers were employees was correct 'given the subordination to which [the couriers] were subject, which excludes any independent activity on their part'.[543] In particular the Court noted:

> Even if the couriers appear to be free to manage their trips, the fact remains that once they are logged into the app, they are subject to close supervision by Uber services, which obtain their geolocalisation information for the purpose of surveying them, tracking them, and sharing with third parties this information, something which can lead to, in the case of using an 'inefficient' route, the reduction in delivery fees, and as such of their remuneration. Such control is not compatible with the independence of the couriers alleged by the appellant…[544]

[538] Registre de commerce.
[539] Ibid., at [6].
[540] Le Temps. (2020). 'Uber Eats est considéré comme l'employeur de ses livreurs à Genève'. 12 June. https://www.letemps.ch/economie/uber-eats-considere-lemployeur-livreurs-geneve. [Accessed 17 October 2021].
[541] On 12 July 2019.
[542] *Uber Switzerland GmbH v Office Cantonal de l'Emploi*, Cour de Justice (Chambre administrative) du République et canton de Genève, Arrêt du 29 mai 2020, at [7].
[543] Ibid., at [9(a)]. Author's translation from the French.
[544] Ibid., at [9(a)]. Internal references to contractual documents removed for ease of reading. Author's translation from the French.

The Court also held that the arrangement between Uber and the restaurants was one of labour hire, noting in particular that Uber's contractual documentation foresaw that the couriers must follow the restaurants' instructions, 'which unambiguously constitutes a transfer of its power to give orders, with restaurants being able…to rate the couriers, in a manner which leads to their deactivation'.[545] The Court further held that Uber's Geneva office was a section of the company that must be converted into a branch and apply for authorisation to operate.

The decision was a bombshell. As Bandiera, the Unia official, put it: 'it's a great victory and a signal for the rest of Switzerland given that the decision of the Genevese judiciary is based on federal law'.[546] At the time of writing Uber has appealed the Geneva court decision, which means it will go to the Federal Tribunal.[547] Whilst the Federal Tribunal has not yet decided the substantive matter, it has already denied Uber's application to have the decision stayed pending the hearing of the appeal.[548] A decision against Uber in that forum would indeed have implications for the entirety of Uber's operations in Switzerland.

Unia responded to the Geneva Court of Justice decision by calling on Uber to respect the terms of the sectoral collective bargaining agreements for labour hire[549] and for the hotel and restaurant industries.[550] By September, Uber had responded to the Court decision by outsourcing its couriers to a third party – a newly created company named Chaskis[551] – who in turn employed them as employees.[552]

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[545] Ibid., at [9(b)]. Author's translation from the French.
[546] Quoted in: Le Temps. (2020). 'Uber Eats est considéré comme l'employeur de ses livreurs à Genève'. 12 June. https://www.letemps.ch/economie/uber-eats-considere-lemployeur-livreurs-geneve. [Accessed 17 October 2021]. Author's translation from the French.
[547] Swissinfo. (2020). 'Swiss court confirms Uber status as 'employer''. 16 September. https://www.swissinfo.ch/eng/swiss-court-confirms-uber-status-as--employer-/46036976. [Accessed 17 October 2021].
[548] Ville de Lausanne. (2020). *Question n° 9 de M. Daniel Dubas, déposée le 7 mai 2019 « Quelle est la politique de la Municipalité par rapport à Uber Eats ? ».* 24 September.
[549] Unia. (2020). 'Le tribunal administrative de Genève confirme qu'Uber Eats est un employeur'. 11 June. https://www.unia.ch/fr/actualites/actualites/article/a/16944. [Accessed 22 October 2021].
[550] ITF. (2020). 'Union win: Swiss Uber Eats workers reclassified as genuine employees'. 10 September. https://www.itfglobal.org/en/news/union-win-swiss-uber-eats-workers-reclassified-genuine-employees. [Accessed 13 October 2021].
[551] It was registered with the RC on 25 August 2019.
[552] Etienne, R. (2020). 'Des cuisines fantômes nourrissent les Genevois'. In: *Le Temps*. 6 October. https://www.letemps.ch/economie/cuisines-fantomes-nourrissent-genevois. [Accessed 30 October 2021].

## Et après?

Perhaps the most controversial aspect of the Geneva situation is that of supposed job losses. Indeed, according to Allison Stein, an Uber economist (emphasis in the original):

> **The immediate effect of this change was to put 77% of couriers, or 1,000 people, out of work.** Over the three months before September, around 1,300 couriers worked on Uber Eats in Geneva. Under the new operating model, couriers needed to formally apply for a position with the delivery company. The delivery company has only extended employment offers to 300 couriers. All others have lost the ability to earn money with Uber Eats.[553]

However, as with so much of Uber's claims, independent verification is quite the challenge. According to the news outlet *FranceInfo*, Uber sent a message to their 'around 500 'courier partners'' at the end of August regarding the outsourcing decision, and on the 1st of September, they became Chaskis employees.[554] Another article, in *Le Temps*, in early October – and quoting Chaskis's lawyer as a source – stated that the company employed 400 Uber Eats couriers.[555] Yet a further article, in *RTS* in December, cited a figure of 600 Uber Eats couriers as working for Chaskis.[556] Arguably the best placed people to assess whether or not jobs were lost are those who were on the ground working with the couriers on a regular basis. Indeed, as Bandiera, the (now former) Unia official, explains:

> Platforms companies HAVE NOT fired people, according to our information based on the official data (Regional Labour Office on collective dismissal) and our members. In some cases platforms have proceed to transfer people to a subcontractor just to employ directly a minimum possible of riders/drivers.[557]

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[553] Stein, A. (2020). 'Independent couriers' reaction to employee reclassification: learnings from Geneva'. In: *Medium*. 22 September. https://medium.com/uber-under-the-hood/independent-couriers-reaction-to-employee-reclassification-learnings-from-geneva-e3885db12ea3. [Accessed: 13 October 2021].

[554] Franceinfo. (2020). 'Video: "La bataille est gagnée": à Genève, les 500 livreurs d'Uber Eats sont désormais salariés'. 10 September. https://france3-regions.francetvinfo.fr/auvergne-rhone-alpes/video-bataille-est-gagnee-geneve-500-livreurs-uber-eats-sont-desormais-salaries-1871488.html. [Accessed 22 October 2021]. Author's translation from the French.

[555] Etienne, R. (2020). 'Des cuisines fantômes nourrissent les Genevois'. In: *Le Temps*. 6 October. https://www.letemps.ch/economie/cuisines-fantomes-nourrissent-genevois. [Accessed 30 October 2021].

[556] RTS. (2020). 'A Genève, les livreurs Uber eats ne reçoivent plus leurs pourboires'. 18 December. https://www.rts.ch/info/economie/11827985-a-geneve-les-livreurs-uber-eats-ne-recoivent-plus-leurs-pourboires.html. [Accessed 22 October 2021].

[557] Bandiera, U. (2021). Personal communication with author. 5 November.

Outsourcing the couriers may not have been the response envisaged, but it nevertheless represented an improvement in their working conditions. 'It suits me that we are employees: we have a fixed salary, paid holidays, and we are taken care of if we have an accident,' said Uber Eats courier Paul, just a few days after the decision. 'It's a step forward. And it's fairer like that.'[558] According to some estimates the salary increased nearly 60% from around 13 francs per hour to 20.65 francs per hour.[559] Another courier, Julien, also remarked on the wage increase: 'It's very satisfying in terms of hourly pay. It's a big step forward.'[560]

But whilst the transition from hyper-exploited bogusly self-employed worker to a low paid outsourced employee is undoubtedly an improvement, it must also be put in perspective; low paid, outsourced work is no nirvana. As Julien, the courier, added: 'Afterwards, they must respect the rules until the end and look at the facts in order to pay us a fair value for our work, guarantee social coverage for couriers. I am doubtful.'[561] Indeed, just a couple months after the outsourcing, complaints about the new company were abounding. As one reporter wrote:

> On WhatsApp, the critics fuse. Chaskis takes too long to sign contracts, working hours are announced at the last minute and September's pay was delayed (it was received on Friday 2 October). An 'Association of Food Delivery and Other Couriers' was formed to defend them but the couriers, divided, have mainly eschewed its inaugural meeting. They were on the other hand ready to go en masse on the 27th of September to the plaine de Plainpalais to show their anger, until Unia encouraged them to negotiate. The idea of not working more than 42 hours per week calmed them down, as they sometimes used to work double that illegally, according to Uni.[562]

To add insult to injury, after Geneva brought in a minimum wage law, increasing the couriers' hourly pay to 23 francs per hour, Chaskis responded by stealing the couriers' tips. This is despite the fact that the Uber Eats app continued to send messages to customers saying things like: 'Tips are optional and are another way of saying thank you. The entirety of your

[558] Quoted in: Franceinfo. (2020). 'Video: "La bataille est gagnée": à Genève, les 500 livreurs d'Uber Eats sont désormais salariés'. 10 September. https://france3-regions.francetvinfo.fr/auvergne-rhone-alpes/video-bataille-est-gagnee-geneve-500-livreurs-uber-eats-sont-desormais-salaries-1871488.html. [Accessed 22 October 2021]. Author's translation from the French.
[559] Ibid.
[560] Ibid.
[561] Ibid.
[562] Etienne, R. (2020). 'Des cuisines fantômes nourrissent les Genevois'. In: Le Temps. 6 October. https://www.letemps.ch/economie/cuisines-fantomes-nourrissent-genevois. [Accessed 30 October 2021].

tip is given to the courier,' and – after a customer gives a tip – 'Your tip for [courier's name]: without them, no delivery possible'.[563] The policy understandably sparked outrage; 'When we get a tip, it's an act of goodwill, it's for our work. Why are they taking this bit of our income away? It's a gift from the client,' said one courier in response. Chaskis's justification? 'This subject is linked to our breakeven point. … Our company obviously can't pursue its activities and keep its numerous employees without everyone doing their part.'[564] Unia responded with legal action.[565] As Bandiera, the Unia official had put it shortly after the couriers were outsourced: 'we are still a long way off from decent work'.[566]

There is also the question of whether this outsourcing was even lawful. According to Article 26(3) of the *Ordonnance*, subcontracting by labour hire companies is not permitted, subject to two exceptions. First, if the labour hire company (under the current arrangements, that is purportedly now Chaskis) cedes the employment relationship to the second company (presumably Uber) who in turn takes on the role of employer and has a labour hire licence from the OCE (i.e. everything Uber fought to prevent) and allocates the workers to a third parties (i.e. restaurants). The second exception is if the labour hire company (Chaskis) remains the employer, concludes a labour hire contract with third parties (restaurants) and the second company (Uber) assumes only the role of intermediary. Unia has denounced the current arrangements as being in violation of the *Ordonnance*[567] and according to Professor Kurt Pärli, the arrangements are indeed unlawful.[568]

The other aspect of arguably unlawful behaviour concerns the implementation of the two relevant sectoral collective bargaining agreements – which, as one will recall from Professor

[563] Quoted in: RTS. (2020). 'A Genève, les livreurs Uber eats ne reçoivent plus leurs pourboires'. 18 December. https://www.rts.ch/info/economie/11827985-a-geneve-les-livreurs-uber-eats-ne-recoivent-plus-leurs-pourboires.html. [Accessed 22 October 2021]. Authors' translation from the French.
[564] Ibid.
[565] Ibid.
[566] Quoted in: Franceinfo. (2020). 'Video: "La bataille est gagnée": à Genève, les 500 livreurs d'Uber Eats sont désormais salariés'. 10 September. https://france3-regions.francetvinfo.fr/auvergne-rhone-alpes/video-bataille-est-gagnee-geneve-500-livreurs-uber-eats-sont-desormais-salaries-1871488.html. [Accessed 22 October 2021]. Author's translation from the French.
[567] See, for example: Unia. (2021). 'Uber Eats: wages and working hours according to the CCNT of the hotel and restaurant industry'. 18 May. https://www-unia-ch.translate.goog/fr/actualites/actualites/article/a/18102?_x_tr_sl=auto&_x_tr_tl=en&_x_tr_hl=en-US&_x_tr_pto=nui. [Accessed 13 October 2021].
[568] Pärli, K. (2021). Author interview. 26 October.

Pärli's remarks, constitute a 'very, very important source of labour law in Switzerland'. Indeed, at the time of writing, the agreements have still not been implemented. As Bandiera describes:

> So, in effect, here in Geneva we [have] won the battle for the recognition of these people as workers, but we are now in a sort of second chapter of the battle, that is the recognition of the collective agreement status. … Again, we are in a mobilisation.[569]

## The *Rider Law* in Spain

### Third way? No way!

'My name is Ruben Ranz and I am the coordinator for the webpage *TuRespuestaSindical.es*, where we assist digital platform workers,' begins my interview with the trade union official from the Unión General de Trabajadores (UGT). 'Right now this page doesn't work well because it was cyber-attacked right after the *Rider Law* [was passed]. … They only attacked this page, not the entire UGT database,' he adds, which makes him believe that 'the attack came directly from the digital platforms' people.'[570] Of course, we can't know for sure whether 'gig economy' companies orchestrated a cyberattack on one of the main workers' organisations in Spain, but it's easy to understand why they'd want to, and not particularly far-fetched given the ethical standard (or lack thereof) to which they hold themselves. For when it comes to the issue of food delivery workers' rights in the past few years in Spain, things have been *picante!*

'In Spain there are more than 4,000 platforms,' says Ranz, with explosive growth since 2012. 'The economic crisis and labor [law] reform created a niche for the growth of these companies, which had a lot of demand from workers who had lost their jobs.'[571] The food

[569] Bandiera, U. (2021). Author interview. 13 October.
[570] Ranz, R. (2021). Author interview. 11 October. Author's translation (interview was conducted in Spanish).
[571] Ibid.

delivery sector in the country is dominated by the Big Five (in order of importance): Glovo, Just Eat, Uber Eats, Deliveroo, and Stuart. With the slight exception of Just Eat (more on which below), the companies have pulled the same tricks and played the same games as we've seen throughout this report, with the chief aim being to maximise revenues while denying their workers the full protection of employment and labour law. As a report from the UGT stated about the 'gig economy' company model:

> …given that their model allows them to incorporate many more workers than they need to cover demand – as [the workers] don't cost them anything -, they have continued to grow beyond their means, inflating a labour bubble which increases competition, reduces income, and has terrible consequences for the people.[572]

To understand how the battle for workers' rights has played out on the Iberian Peninsula, one must first look at the legal context. Pursuant to Article 149.1.7 of the Spanish Constitution – and similar to the other European case studies in this report - labour and employment law are national in scope. The *Estatuto de Trabajadores* (Workers' Statute, or ET by the Spanish-language acronym) is one of the key pieces of legislation regulating the employment relationship and providing for the rights of employees.[573] Article 1(1) of the ET defines – subject to some exceptions - the employment relationship:

> This law will be applicable to workers who willingly provide their paid services to others and within the scope of organization and management of another person, natural or legal, called employer or entrepreneur.[574]

Although the above-cited article uses the term *trabajadores*, which translates as 'workers', for the sake of some consistency in terminology throughout this report I shall refer to those individuals in an employment relationship in Spain as 'employees'. The Social Chamber of the Spanish Supreme Court has stated that 'The jurisprudence has repeatedly maintained that

[572] UGT. (2021). *Análisis de la Presión Política y Social de las Plataformas de Reparto,* p10. Author's translation from the Spanish.
[573] Baylos, A. (2021). Author interview. 12 October.
[574] Author's translation.

dependence and [working] for others are the essential elements that define the employment contract'.[575] Article 8(1) ET provides for a presumption of employment status:

> The employment contract may be in writing or oral. It will be presumed to exist between everyone who provides a service on behalf and within the scope of the organization and direction of another and the one who receives it in exchange for remuneration to the former.[576]

Those who are not classed as employees are – subject to exceptions which are immaterial for present purposes – self-employed (*autónomos*), generally falling outwith the protective scope of employment and labour law. However, Spain has a so-called 'third category', which like in the UK, is actually a sub-set of the self-employed category and provides some workers' rights. This category is called *TRADE*, the Spanish-language acronym for Economically Dependent Self-Employed Worker,[577] and was introduced by the Self-Employed Work Statute in 2007.[578] As the preamble to the law recognised, the regulation of TRADE followed the:

> … the need to provide legal coverage to a social reality: the existence of a group of self-employed workers who, despite their functional autonomy, carry out their activity with a strong and almost exclusive economic dependence on the businessperson or client who hires them.

In simple terms – and subject to some exceptions – a self-employed worker fell into the category of TRADE if the individual depended on a single client for at least 75% of their income, and did not employ or subcontract their own workers.[579] However, in contradistinction to the limb b worker in the UK, the TRADE does not carry out their work as part of, and integrated into, someone else's business. To the contrary, a TRADE is a genuinely autonomous self-employed worker who simply derives a large portion of their income from a single source.[580] A TRADE is therefore 'juridically autonomous and economically dependent,' says Antonio Baylos, Professor of Employment Law at the University of Castilla-

[575] *Sentencia n° 805/2020*, at p10. Author's translation. Note however that the term 'working for others' has been used to translate the Spanish word *ajenidad*, which – unhelpfully for present purposes given the frequency with which the word appears in the employment law jurisprudence - does not translate well into English.
[576] Author's translation.
[577] *Trabajador autónomo económicamente dependiente*.
[578] *Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo*.
[579] Ibid., Capítulo III, Artículo 11.
[580] See discussion in *Sentencia número: 40/2020, Tribunal Superior de Justicia de Madrid – Sección n° 01 de lo Social.*

La Mancha.[581] 'The idea of the 2007 law was to [provide coverage to] some of the categories [of worker] that had been excluded from the scope of employment legislation,' explains Professor Baylos. The aim was to provide 'a guarantee of some…rights…and above all the possibility of recourse to the social courts,' in the case of conflict.[582] Some of the limited rights provided to TRADEs include regulation of the termination of a contract (Article 15), 18 days off in a year and a cap on overtime (Article 14), and a limited form of collective representation (Article 13). But TRADE 'does not [stipulate] neither a minimum wage nor maximum [hours in a] working day,' says Professor Baylos. 'This is the key issue.'[583] The only positive thing in the TRADE category according to Professor Baylos is the fact that the workers concerned have recourse to the social courts. As he explains: 'the juridical culture of the civil court judge is not the same as that of the social court judge, who tends to see [inherent] in economic dependence a strong power asymmetry,' and is more accustomed to providing rights as a form of compensating for that asymmetry. 'And further….the civil courts are slower and costlier…while the social courts are free for workers'.[584] But the biggest problem with TRADE, according to Professor Baylos, is that it simply hasn't worked in practice.[585] Indeed, the figures for 2019 are stark; whilst there were some 400,000 self-employed workers in Spain who depended on a single client for at least 75% of their revenue, just over 10,000 people had their contracts registered as TRADEs, as required by law.[586]

Given its relatively weak level of obligations, the 'gig economy' companies were not necessarily opposed to TRADE. Indeed, the conflict between riders and Deliveroo began when that company 'changed the [rider] contract from [regular] self-employed to TRADE,' explains Ranz. 'And when they did TRADE, they changed the working conditions, so that's when there were the first revolts, the first protests, the first strikes.'[587] Deliveroo reacted badly to the worker mobilisation, reportedly sending spies to riders' meetings, firing worker leaders, offering incentives to work during protests, and developing relationships with riders who

[581] Baylos, A. (2021). Author interview. 12 October. Author's translation (interview was conducted in Spanish).
[582] Ibid.
[583] Ibid.
[584] Ibid.
[585] Ibid.
[586] Baylos Grau, A. (2021). 'Una breve nota sobre la ley española de la laboralidad de los riders'. In: *Labour & Law Issues*, vol. 7, no. 1, ISSN: 2421-2695, citation at C.3.
[587]Ranz, R. (2021). Author interview. 11 October. Author's translation (interview was conducted in Spanish).

would keep the company informed of developments.[588] (All of this, I might add, is highly resonant of my own experience with the company in response to the IWGB organising riders in London. Indeed, one of the riders, a super friendly and supportive guy with whom I would chat while recruiting others later showed up as a company witness in our legal case against them!)

And in the beginning of what would turn out to be a voluminous collection of employment status legal cases, it looked like the companies might get away with classifying the riders as self-employed (whether under TRADE or otherwise). '[Of] the first judgments that appeared…very few said [the riders] were [employees]; they started to say they were self-employed workers, they were TRADE's, etc.,' explains Professor Baylos. But then the State got involved; when the Labour Inspectorate started bringing cases, the quality of the pro-worker litigation improved dramatically: 'it was no longer the poor, marginalised cyclists who had been deactivated and therefore dismissed' who were bringing these cases but 'rather, an arm of the state…who prepared [the cases] much more formally…and explained that these people were [employees], and as such falsely self-employed.'[589] So, for example, on 11 January 2018, the Labour Inspectorate made an assessment that 532 of Deliveroo's riders were employees (rather than TRADE's) and as such the company owed money to the state for failure to make social security contributions from October 2015 to June 2017.[590] As part of the Labour Inspectorate's investigation, it interviewed around 60 riders,[591] a prime example of how access to resources permits the state to pursue the issue more thoroughly than an individual worker. Deliveroo appealed the assessment to the Social Court in Spain and lost.[592] The company appealed again – this time to the Social Chamber of the Superior Court of Justice of Madrid – and lost again.[593]

Understandably, according to Professor Baylos, the companies

[588] UGT. (2021). *Análisis de la Presión Política y Social de las Plataformas de Reparto,* p13. Author's translation from the Spanish.
[589] Baylos, A. (2021). Author interview. 12 October. Author's translation (interview was conducted in Spanish).
[590] *Sentencia número: 40/2020, Tribunal Superior de Justicia de Madrid – Sección n° 01 de lo Social*, at p14.
[591] Ibid., at p23.
[592] *Juzgado de lo Social n° 19 de Madrid, Procedimiento de Oficio 510/2018*.
[593] *Sentencia número: 40/2020, Tribunal Superior de Justicia de Madrid – Sección n° 01 de lo Social.*

> Are more fearful of…the Labour Inspectorate, which can force [them] to register and pay social security contributions…for those workers, than they are of any possible legal cases that some workers might bring against them.[594]

And it's understandable that the state wanted to get involved; 'we calculated that in the Spanish delivery sector, from just Glovo, Deliveroo, Uber Eats, and Stuart, the state…was losing more than 168 million euros per year,' says Ranz.[595] Indeed, according to a report by the UGT, the judges 'had never had to adjudicate on such a large number of falsely self-employed workers at the same time'; for example 3,200 in a case against Glovo and 2,200 in another against Amazon.[596] And the cases started going the other way.

At the same time as the jurisprudence started to accumulate against these companies, the legal rights to which the workers would be entitled once classed as employees also improved in an important way. In Spain, like in Switzerland – and indeed much of continental Europe – sectoral collective bargaining agreements form an important legal source of workers' rights. On 13 December 2018 the trade union confederations and employer bodies signed the latest version of the hospitality industry collective agreement which, for the first time, covered food delivery couriers.[597] As a result of the agreement, these workers would no longer lay in 'legal limbo', according to the Confederación Sindical de Comisiones Obreras (CCOO by its Spanish-language acronym),[598] one of the two main trade union confederations. By May 2020, the Government was announcing it intended to regulate the sector.[599]

However, even though the jurisprudential tide had started turning against the companies, it was not until September of 2020 that the employment status issue was settled in the case

[594] Baylos, A. (2021). Author interview. 12 October. Author's translation (interview was conducted in Spanish).
[595] Ranz, R. (2021). Author interview. 11 October. Author's translation (interview was conducted in Spanish).
[596] UGT. (2021). *Análisis de la Presión Política y Social de las Plataformas de Reparto,* p9. Author's translation from the Spanish.
[597] UGT. (2018). 'Incorporadas importantes novedades en la firma del nuevo Texto Refundido del V ALEH'. 14 December. https://www.fesmcugt.org/2018/12/14/incorporadas-importantes-novedades-en-la-firma-del-nuevo-texto-refundido-del-v-aleh-id-12917/. [Accessed 11 October 2021]; Cotizalia. (2019). 'Bomba para Deliveroo y Glovo: los 'riders' contratados son trabajadores de hostelería'. 1 April. https://www.elconfidencial.com/economia/2019-04-01/bomba-deliveroo-riders-contratados-convenio-hosteleria_1915458/. [Accessed 11 October 2021].
[598] LA INFORMACIÓN. (2019). 'Los 'riders' de comida a domicilio pasan a formar parte del convenio de hostelería'. 1 April. https://www.lainformacion.com/economia-negocios-y-finanzas/los-riders-de-comida-a-domicilio-pasan-a-formar-parte-del-convenio-de-hosteleria/6496584/. [Accessed 11 October 2021].
[599] UGT. (2021). *Análisis de la Presión Política y Social de las Plataformas de Reparto,* p42.

law with finality. Indeed, in the Summer of 2019, two regional appellate courts came down on different sides of the employment status line for Glovo riders. In Asturias, the Social Chamber of the Superior Court of Justice held that a Glovo courier was an employee,[600] while in Madrid the equivalent court held a different rider was not (agreeing with the company he was a TRADE).[601] When the Madrid courier, Don Desiderio, appealed that decision, the full panel of the Social Chamber of the Spanish Supreme Court agreed to hear the case for the sake of the 'unification of doctrine',[602] thereby resolving the jurisprudential discrepancy between the two appellate decisions.[603] The Court went on to unify doctrine in favour of the workers, unanimously holding that the Glovo rider was indeed an employee. Of particular note, the Court adapted the traditional indicia of the employment relationship in the Spanish jurisprudence to the digital age and the 'gig economy' model, for example, by holding that that the app – rather than the courier's vehicle - was the important tool of the trade and that the company's tracking of the worker via GPS was an example of control.[604]

Jurisprudentially, the Glovo Supreme Court case was highly significant. For 'then all of the appellate Courts of Justice [had] to apply it…that's the fundamental importance of that decision,' says Professor Baylos. 'From that moment on, no tribunal in Spain could [adjudge] that a bike courier was not in an employment relationship.'[605] Indeed, when Deliveroo attempted to appeal its case (referred to above) to the Supreme Court, the Court refused to grant them permission.[606] The case was also significant from a comms and lobbying perspective. 'One of the things the platforms used to say was that there was a legal gap,' says Ranz, in reference to company strategies to justify the exclusion of their workers from the protective scope of employment law. '[I]n the end, well, it was shown that there was no legal gap.'[607]

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[600] *Sala de lo Social del Tribunal Superior de Justicia de Asturias, 25 de julio de 2019, recurso 1143/2019.*
[601] *Sala de lo Social del Tribunal Superior de Justicia de Madrid, 19 de septiembre de 2019, recurso 195/2019*.
[602] Pursuant to Article 219, *Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social*.
[603] *Sentencia n° 805/2020.*
[604] *Sentencia n° 805/2020.* For an interesting analysis of the Supreme Court decision and the evolution of the Spanish jurisprudence on the employment relationship, see: Todolì Signes, A. (2020). 'Comentario a la Sentencia del Tribunal Supremo español que considera a los Riders empleados laborales'. In: *Labour & Law Issues*, vol. 6, no. 2.
[605] Baylos, A. (2021). Author interview. 12 October. Author's translation (interview was conducted in Spanish).
[606] Baylos Grau, A. (2021). 'Una breve nota sobre la ley española de la laboralidad de los riders'. In: *Labour & Law Issues*, vol. 7, no. 1, ISSN: 2421-2695, citation at C.4.
[607]Ranz, R. (2021). Author interview. 11 October. Author's translation (interview was conducted in Spanish).

Repeatedly losing legal cases didn't mean the companies were going to start obeying the law. As a report by the UGT noted – in terms which could be easily extrapolated to various other jurisdictions in which these companies operated: '[t]hey act unlawfully and accept the economic cost of this in order to, little by little, lay the groundwork for legitimising their model.' In other words, the strategy is to create facts on the ground; meanwhile 'at the same time as they confront judgment after judgment, they have worked conscientiously to…pressure different governments and influence regulation to their benefit.' As such, even though more than forty judgments have been handed down against these companies, 'declaring time and again that their business model is fraudulent, [the companies] have managed to make themselves part of daily life in our cities'.[608] And the Supreme Court decision was no different; indeed, in a video call with their riders, Glovo's senior management insisted nothing would change as the decision 'referred to conditions which no longer exist'.[609]

With the Government and courts turning increasingly against them, the companies opted for a new approach: promoting associations of riders to advocate against employment status. As a report by the UGT on this tactic stated:

> The creation of pro-platform associations is part of a pattern of actions undertaken by these companies, there are even documents that specify how to form them, finance them, and [setting out] the objectives they should pursue. It is clear that [the associations] are not the product of workers' independent action. Their appearance and development have been carefully supported by the companies. The problem is the means deployed to achieve this: fear campaigns among the workers, with threats of mass dismissals; disinformation; inducements of better conditions; trade union repression and persecution. Tactics which constitute a clear violation of freedom of association and the right to strike.[610]

For example, Deliveroo backed the formation of the Asociación Española de Riders-Mensajeros[611] (AsoRiders). Irony notwithstanding, Deliveroo's staff suddenly turned into

[608] UGT. (2021). *Análisis de la Presión Política y Social de las Plataformas de Reparto,* p7. Author's translation from the Spanish.
[609] Ibid.
[610] Ibid.
[611] The Spanish Association of Rider-Messengers (author's translation).

union organisers, calling riders to recruit them, offering them inducements to join. The company then signed a collective agreement[612] with the association to further legitimise the riders' pro-employer voice.[613] Joining the association was – superficially – an attractive proposition for riders; immediate benefit for low cost. Indeed – as one member was to admit in court proceedings – the membership fee was low as the association didn't have to pay rent for premises; they simply used Deliveroo's offices for meetings.[614] And the fee was easy to pay as Deliveroo helpfully deducted it directly from riders' earnings.[615] Similarly, Stuart supported the Asociación Profesional de Repartidores Autónomos[616] (APRA), an opportunity onto which Glovo quickly latched.[617] Other pro-employer riders' groups were also born; for example, the Asociación Autónoma de Riders[618] (AAR) and Repartidores Unidos[619] (RU), the latter supposedly a 'movement' rather than an association.[620] However, whilst the initial role of these associations was to supply pro-employer riders to court proceedings to give evidence in favour of the bogus self-employment model, as the threat of the *Rider Law* came into clearer focus, the associations turned their fire on the workers who were advocating for employment rights.[621] And it got nasty. According to the UGT report, the associations and their fanatical members, leaders and/or sympathisers:

> Followed members of the *Riders X Derechos*[622] group down the street, they took pictures of them, created chat groups to share private pictures, and they insulted them publicly. [The leader of AAR] was notable for his rude, sexist, and harassing behaviour. Some of these incidents are the subject of a complaint which resulted in a police investigation, so we prefer not to reveal them. We can say that his attitude reached such a point that he was capable of going to a funeral where there were members of [*Riders X Derechos*] saying goodbye to a loved one.[623]

Similarly, they went after UGT's trade union rep at Glovo;

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[612] Under the terms provided for in the law regulating TRADE.
[613] UGT. (2021). *Análisis de la Presión Política y Social de las Plataformas de Reparto,* p13.
[614] Ibid.*,* p15.
[615] Ibid., p22.
[616] Professional Association of Self-Employed Couriers (author's translation).
[617] UGT. (2021). *Análisis de la Presión Política y Social de las Plataformas de Reparto,* p18.
[618] Autonomous Association of Riders (author's translation).
[619] Couriers United (author's translation).
[620] UGT. (2021). *Análisis de la Presión Política y Social de las Plataformas de Reparto,* pp23-24.
[621] Ibid.*,* p21.
[622] [A pro riders' rights group].
[623] Ibid.*,* p33.

> They really persecuted him, where they also photographed him in the street, published intimate information and pictures, discriminated against him various times because of his sexual orientation, spoofed innumerable homophobic images and videos with a picture of his face, publicised his address and, once the Social Dialogue had been announced, made death threats against him and beat him up while he was working.[624]

Proving Glovo was behind the attack would be a tall order, although it is fair to say the company was less than helpful in response. As the UGT report pointed out:

> We must emphasise that Glovo does know who the aggressor was as the riders are constantly geolocalised – [Glovo] could even say at which speed [the aggressor] escaped -, but hasn't revealed it. In fact, a few minutes after [the attack], an employee from Glovo's office called our trade union rep to ask if he was OK. How did they know he had been attacked? Who told them? Or did they know it was going to happen?[625]

## From yellow unions to an alliance with the far right: the revolt against the *Rider Law*

On 28 October 2020 the Government convened the Social Dialogue partners to discuss the regulation of digital platforms.[626] The tripartite negotiations included the Government, the UGT and CCOO trade union confederations, and the employer bodies Confederación Española de Organizaciones Empresariales (CEOE) and Confederación Española de la Pequeña y Mediana Empresa (Cepyme).[627] As they were doing throughout much of the world, the 'gig economy' companies were advocating for their own status; something short of full workers' rights but which offered enough that they could make the case that their model was in the workers' interest. In Spain they proposed the *Digital TRADE*, i.e. a tweaking of the existing TRADE (given that the courts had found their riders not to be TRADEs already). But 'when this was proposed to the employer group, the other companies,' were having none of it, says Ranz.

[624] Ibid., p33.
[625] Ibid., p33.
[626] Ferrando García, F.M. (2021). 'Algunas reflexiones sobre la regulación del trabajo a través de plataformas digitales'. February. In: *NET21*.
[627] Pérez, G.R. (2021). 'El Consejo de Ministros aprueba la ley de 'riders': "El mundo nos está mirando"'. In: *El Pais*. 11 May. https://elpais.com/economia/2021-05-11/el-consejo-de-ministros-aprueba-la-ley-de-riders-el-mundo-nos-esta-mirando.html. [Accessed 7 October 2021].

'*You mean I have to pay social security contributions and you don't?!* That's why the employer group signed the agreement…[to avoid] unfair competition…'[628] Indeed, on the 10th of March 2021, the parties reached an agreement on the way forward,[629] but not without a split in the employer group and Glovo announcing its quitting of the CEOE.[630]

A couple months later, on 11 May, the Government introduced the agreement into law. 'Today is a day of enormous satisfaction,' said Minister of Labour Yolanda Díaz. 'Spain has become the international vanguard in this area,' she added. 'The world and Europe are watching us.'[631] The self-congratulatory language might have been a tad too grandiose given the lukewarm reaction with which the law was met in some quarters. 'The Government had the opportunity to move forward with this situation and extensively regulate the sector with the *Rider Law*,' the UGT asserted, 'but it caved to the platforms' pressure and lobbying and left the law with the bare minimum.'[632] The CCOO reacted similarly.[633]

The *Rider Law*[634] did two things. First, it amended Article 64 ET – concerning workers' information and consultation rights – by adding a new section (d) to para 4, providing for a right:

> To be informed by the company of the parameters, rules and instructions on which the algorithms or artificial intelligence systems are based that affect decision-making that may affect working conditions, access to and maintenance of employment, including preparation of profiles.[635]

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[628] Ranz, R. (2021). Author interview. 11 October. Author's translation (interview was conducted in Spanish).
[629] Baylos Grau, A. (2021). 'Una breve nota sobre la ley española de la laboralidad de los riders'. In: *Labour & Law Issues*, vol. 7, no. 1, ISSN: 2421-2695, citation at C.4.
[630] Baylos, A. (2021). 'El forum global "democratizing work 2021" y los trabajadores de plataformas'. 9 October. https://baylos.blogspot.com/2021/10/el-forum-global-democratizing-work-2021.html. [Accessed 12 October 2021].
[631] Quoted in: Pérez, G.R. (2021). 'El Consejo de Ministros aprueba la ley de 'riders': "El mundo nos está mirando"'. In: *El Pais*. 11 May. https://elpais.com/economia/2021-05-11/el-consejo-de-ministros-aprueba-la-ley-de-riders-el-mundo-nos-esta-mirando.html. [Accessed 7 October 2021]. Author's translation from the Spanish.
[632] UGT. (2021). *Análisis de la Presión Política y Social de las Plataformas de Reparto,* p35. Author's translation from the Spanish.
[633] Pérez, G.R. (2021). 'El Consejo de Ministros aprueba la ley de 'riders': "El mundo nos está mirando"'. In: *El Pais*. 11 May. https://elpais.com/economia/2021-05-11/el-consejo-de-ministros-aprueba-la-ley-de-riders-el-mundo-nos-esta-mirando.html. [Accessed 7 October 2021].
[634] *Ley 12/2021, de 28 de septiembre, por la que se modifica el texto refundido de la Ley del Estatuto de los Trabajadores, aprobado por el Real Decreto Legislativo 2/2105, de 23 de octubre, para garantizar los derechos laborales de las personas dedicadas al reparto en el ámbito de plataformas digitales.*
[635] Author's translation.

Importantly, however, the right corresponds to 'company committees', a form of collective representation of workers – regulated by Article 63 ET – in companies with more than 50 employees. So, the 'access to the algorithm' provision – as it has been colloquially denominated – is contingent upon i) the company treating the couriers as employees; and ii) there existing a company committee. Those two requirements make the practical viability of the provision – at least as things stand currently – extremely difficult for couriers. And yet, the scope of the clause is not limited to couriers or even the 'gig economy'; it extends to all employees. This clause 'was very polemical because the companies said that it was a violation of industrial secrets,' says Ranz. But 'we don't want to know the recipe for the Coca-cola,' he retorts. 'What I want to know is if, when you distribute work, you're giving more [work] to one person than to another.'[636]

Second, the law added 'Additional Provision 23'[637] to the ET, which built on the presumption of employment status required by Article 8(1) ET by providing that couriers are presumed to be employed by companies who exercise their control, organisational and managerial powers 'directly, indirectly or implicitly, through the algorithmic management of the service or the working conditions, through a digital platform'.[638] The intention was to codify the Glovo Supreme Court ruling into statute law. And not much else. As Ranz puts it: 'What the Supreme Court decision makes clear is that the judges don't need any modification of the law to interpret this.'[639] Although in theory, this sort of black-and-white sector-specific presumption should make it harder for employers to disprove employment status, given that - following the Supreme Court case - the law was already settled on the issue of courier employment status, it is unclear what – *in practical terms* – this provision adds.[640]

[636] Ranz, R. (2021). Author interview. 11 October. Author's translation (interview was conducted in Spanish).
[637] Author's translation.
[638] Author's translation.
[639]Ranz, R. (2021). Author interview. 11 October. Author's translation (interview was conducted in Spanish).
[640] The fact that this aspect of the law was even needed at all was 'very sad, juridically speaking,' noted law Professor Eduardo Rojo Torrecilla in his analysis of the Social Dialogue's agreement on the Riders law; see: Rojo Torrecilla, E. (2021). 'La laboralidad de los repartidores. Un buen acuerdo en el diálogo social'. In: *Net21*, no. 1, March.

The *Rider Law* was approved as a Royal Decree Law, a form of law-making which allows the Executive – on the basis of an urgent necessity – to write and implement a law even before it is approved by Parliament.[641] 'When the laws are the result of the social agreements between employers, trade unions, and government, the classic Spanish formula is [that it's done] by Royal Decree Law,' explains Professor Baylos.'[642] When the law was approved by Parliament the following month, it passed by 195-151 votes in the Congress of Deputies (with two abstentions); in general, the left-leaning parties voted in favour and the right-leaning parties against.[643] The hard-right Vox party took particular umbrage at the law. The party's leader, Santiago Abascal – who likes motorcycles, describes himself as a 'strong patriot', and carries a gun with him at all times[644] – tweeted 'The riders need a law that protects their rights. Neither false self-employment nor victims of the trade union mafia.'[645] Indeed, Vox - and the main centre-right Partido Popular (PP) – challenged the *Rider Law* in the Constitutional Court on the grounds that it was not of an urgent necessity and as such was unlawfully issued as a Royal Decree Law.[646] At the time of writing the Constitutional Court had held the complaint to be admissible[647] but had not yet handed down a decision in the case.

[641] Pursuant to Article 86 of the Spanish Consitution.
[642] Baylos, A. (2021). Author interview. 12 October. Author's translation (interview was conducted in Spanish).
[643] Moreno, R. (2021). 'El Congreso avala la 'Ley rider' que obliga a contratar a los repartidores'. In: *Confilegal*. 11 June. https://confilegal.com/20210611-el-congreso-avala-la-ley-rider-que-obliga-a-contratar-a-los-repartidores/. [Accessed 12 October 2021].
[644] Sanchez Manzanaro, S. & Rodríguez, M. (2019). 'Vox: Who are Spain's far-right party and what do they stand for?' In: *Euronews*. 11 November. https://www.euronews.com/2019/11/10/vox-who-are-spain-s-far-right-party-and-what-do-they-stand-for. [Accessed 6 November 2021].
[645] Quoted in: Moreno, R. (2021). 'El Congreso avala la 'Ley rider' que obliga a contratar a los repartidores'. In: *Confilegal*. 11 June. https://confilegal.com/20210611-el-congreso-avala-la-ley-rider-que-obliga-a-contratar-a-los-repartidores/. [Accessed 12 October 2021]. Author's translation from the Spanish.
[646] Moreno, R. (2021). 'VOX recurre ante el Constitucional la Ley Rider y reclama un verdadero debate sobre el 'autónomo digital''. In: *Confilegal*. 1 July. https://confilegal.com/20210701-vox-recurre-ante-el-constitucional-la-ley-rider-y-reclama-un-verdadero-debate-sobre-el-autonomo-digital/. [Accessed 12 October 2021]; *infoLibre*. (2021). 'El PP recurre la 'ley rider' al Constitucional'. 19 July. https://www.infolibre.es/noticias/politica/2021/07/19/el_recurre_ley_rider_acusa_gobierno_abusar_poder_para_evadir_control_del_parlamento_122873_1012.html. [Accessed 15 October 2021].
[647] La Vanguardia. (2021). 'El Tribunal Constitucional admite a tramite los recursos de Vox y PP contra la 'ley rider''. 20 September. https://www.lavanguardia.com/economia/20210920/7733636/constitucional-admite-tramite-recursos-vox-pp-ley-rider.html. [Accessed 12 October 2021].

## Clearing out, casting aside, and bargaining collectively: aftermath of the *Rider Law*

The impact of the *Rider Law* in practice has had mixed results. Glovo, the food delivery industry leader in Spain, announced it would make a small minority of its couriers employees[648] and then made some adjustments to the model – which resulted in a significant deterioration of terms and conditions[649] - in order to claim that the rest were genuinely self-employed.[650] The CCOO has already responded by filing a complaint with the Labour Inspectorate.[651] Just Eat has reacted positively and – at the time of writing – was negotiating a collective agreement with the CCOO and the UGT[652] and was promising to bring its outsourced riders in-house and employ them directly.[653] Although, given that the model on which Just Eat is basing its proposals has reportedly already been implemented by the company in 160 cities in Europe,[654] the extent to which the company's proposals in Spain are the result of the *Rider Law* is debatable. Uber Eats – like in Geneva – responded by outsourcing its riders and then failing to abide by the relevant sectoral collective agreement. And - like in Geneva - there remains an open legal question as to whether the outsourcing was unlawful, pursuant to Article 43 of the ET. As Ignasi Beltran, Professor of Employment Law at the Universitat Oberta de Catalunya, put it: 'If the [subcontractor] doesn't add anything because the couriers are managed by the platform app, and only supplies the

[648] El País. (2021). 'Glovo contratará a cerca de 2.000 repartidores en España antes de 2022 para adaptarse a la ley de 'riders''. 28 July. https://elpais.com/economia/2021-07-28/glovo-contratara-a-cerca-de-2000-repartidores-en-espana-antes-de-2022-para-adaptarse-a-la-ley-de-riders.html. [Accessed 7 October 2021].
[649] Ranz, R. (2021). Author interview. 12 October.
[650] Brave New Europe. (2021). 'Gig Economy Project Analysis: Capital flight and legislative sabotage – Deliveroo and Glovo refuse to play ball with the Riders Act in Spain'. 30 July. https://braveneweurope.com/gig-economy-project-analysis-capital-flight-and-legislative-sabotage-deliveroo-and-glovo-refuse-to-play-ball-with-the-riders-act-in-spain. [Accessed 7 October 2021].
[651] Lara, D. (2021). 'La ley de repartidores echa a andar en medio de la negativa de las empresas a contratar a toda su flota'. In: *El País*. 11 August. https://elpais.com/economia/2021-08-12/la-ley-de-riders-echa-a-andar-en-medio-de-la-negativa-de-las-empresas-a-contratar-a-toda-su-flota.html/ [Accessed 7 October 2021].
[652] Europa Press. (2021). 'Just Eat negocia con UGT y CCOO el primer convenio colectivo para los repartidores de 'delivery''. 3 August. https://www.europapress.es/economia/noticia-just-eat-negocia-ugt-ccoo-primer-convenio-colectivo-repartidores-delivery-20210803125047.html. [Accessed 11 October 2021].
[653] Note however that the Just Eat model is somewhat unusual as the bulk of the couriers the company deploys are employed by the restaurants; Lara, D. (2021). 'La ley de repartidores echa a andar en medio de la negativa de las empresas a contratar a toda su flota'. In: *El País*. 11 August. https://elpais.com/economia/2021-08-12/la-ley-de-riders-echa-a-andar-en-medio-de-la-negativa-de-las-empresas-a-contratar-a-toda-su-flota.html/ [Accessed 7 October 2021].
[654] UGT. (2021). 'Just Eat, FeSMC-UGT y CCOO negocian el primer convenio colectivo de una Plataforma digital de reparto de comida a domicilio en España'. 3 August. https://www.ugt.es/just-eat-fesmc-ugt-y-ccoo-negocian-el-primer-convenio-colectivo-de-una-plataforma-digital-de-reparto. [Accessed 6 November 2021].

workforce, it will be an illegal transfer.'[655] But importantly, according to Ranz, they also dismissed at least 3,000 riders without offering them the opportunity to be (subcontracted) employees. However, the company did not follow any of the legal requirements regulating collective dismissals – something which the UGT is legally challenging at the time of writing. Deliveroo on the other announced its decision to pull out of Spain, however they denied that this was in response to the *Rider Law,*[656] a proposition with which Ranz agrees. 'I believe the main reason is…because [Deliveroo] has lost the race with the rest of the digital platform courier [companies].'[657] Deliveroo appeared to be following the legal requirements on collective dismissals of employees.[658]

On the other hand, new food delivery companies have announced their arrival in Spain. For example, the company Rocket plans on entering the country, hiring hundreds of couriers, expanding this number to over 2,000 in the short term, negotiating a collective agreement, and abiding by the *Rider Law*.[659]

## Fool Me Once, Shame on You. Fool Me Twice, Shame on Me. Shameless Principles for Effective Regulation

From the detailed studies of regulatory interventions above, one may learn lessons on how to regulate these companies effectively, resistant as they may be to rules. What follows is a

[655] Quoted in: Lara, D. (2021). 'La ley de repartidores echa a andar en medio de la negativa de las empresas a contratar a toda su flota'. In: *El País*. 11 August. https://elpais.com/economia/2021-08-12/la-ley-de-riders-echa-a-andar-en-medio-de-la-negativa-de-las-empresas-a-contratar-a-toda-su-flota.html/ [Accessed 7 October 2021]. Author's translation from the Spanish.
[656] Gutiérrez, H. & Lara, D. (2021). 'Deliveroo se propone cerrar su divsión española'. In: *El País*. 30 July. https://elpais.com/economia/2021-07-30/deliveroo-se-propone-cerrar-su-division-espanola.html. [Accessed 7 October 2021].
[657] Ranz, R. (2021). Author interview. 12 October. Author's translation (interview was conducted in Spanish).
[658] Lara, D. (2021). 'La ley de repartidores echa a andar en medio de la negativa de las empresas a contratar a toda su flota'. In: *El País*. 11 August. https://elpais.com/economia/2021-08-12/la-ley-de-riders-echa-a-andar-en-medio-de-la-negativa-de-las-empresas-a-contratar-a-toda-su-flota.html/ [Accessed 7 October 2021].
[659] CincoDías. (2021). 'Rocket lanza su servicio de 'delivery' en España con casi 600 repartidores en plantilla'. 11 October. https://cincodias.elpais.com/cincodias/2021/10/08/companias/1633717589_343946.html. [Accessed 12 October 2021].

series of principles, concerned more with the process than with the content of providing workers' rights to couriers and for-hire drivers.

## Who to regulate?

As a general principle, the provision of workers' rights should not be limited to those couriers and for-hire drivers who use an app. Whilst the app-based companies may deserve particular attention in terms of enforcement regimes given their behaviour, the fact that a courier is given orders via an app does not make that courier in any more need of a living wage than if they were given orders via a 2-way radio or phone. The same goes for for-hire drivers. Indeed, one of the drawbacks of the New York City minimum pay standard, for example, is that it left thousands of for-hire drivers outside of its scope.

## There's Power in a Union

If the aim is to provide an effective regime of workers' rights for the 'gig economy', the first thing regulators should do is look to support and work with the trade unions and worker organisations representing these workers (at least those ones which are not supported by the companies and do not deploy homophobic violence, as in Spain). Collective organising is not only an effective means of articulating the needs of the workers – which should be a starting point for anyone looking to change their conditions – but is also a way of garnering political and public support for any regulatory intervention. Given the amount of money, effort, and spin that the companies throw at resisting regulating, it is not cliché to suggest that 'hearts and minds' are key to successful intervention. For example, '[o]nce the drivers started organizing, all the reports started to come out about what the drivers were facing,' Bhairavi Desai, Executive Director of the NYTWA said. 'That's when consumers and the public at large really started to take a second look.'[660] Similarly in the UK, after years of high profile legal cases and media reports, a recent Oxford University survey indicated that 57% of Britons believed 'gig economy' companies should be obliged to negotiate with trade unions; 49%

[660] Quoted in: Rosenberg, E. (2019). 'N.Y. ride-hailing drivers file suit against Uber, allege they are owed millions in undercut wages'. In: *Washington Post*. 7 November. https://www.washingtonpost.com/business/2019/11/07/uber-drivers-say-they-are-owed-millions-dollars-wage-theft-case-against-company/. [Accessed 19 October 2021].

even believed that the companies should be nationalised if they continued to deny workers fair pay and conditions![661] Indeed, every instance of regulatory intervention discussed in this report followed at least some level of worker mobilisation and action. 'This victory would not have been possible without drivers working with the Drivers Union to speak out, testify at online City Council meetings, and share their stories with the media,' as the Seattle Drivers Union recognised in the wake of the City Council passing the emergency sick pay ordinance.[662] We have seen as well how Unia lobbied the cantonal government to pursue Uber, how the SEIU organised drivers to testify at committee hearings in the California Assembly, how the UGT and CCOO negotiated the content of the *Rider Law* in Spain, and how the IWGB and GMB brought and/or supported employment status suits in the UK, among many other examples.

So, trade unions should be engaged from the outset in conversations about the content and scope of regulation, as they were, for example, in Seattle, and should indeed have a seat at the table in agreeing the regulation, as they did in Spain.

## Get the data

Access to data on trips, waiting time, pay, number of workers, etc., as well as on how the algorithms work to influence working conditions is key not only for effective regulatory intervention, but also to combat repeated and unverifiable assertions by 'gig economy' companies about how much their workers earn. Having comprehensive data also undercuts employer attempts to dismiss a regulator's costings on the basis that the regulator has relied on results of an unrepresentative survey. The importance of data was seen in particular in the case of New York City and its calculation of the minimum pay standard. The data – at both the macro as well as the individual worker level – should also be accessible by workers (in line with ITF P7) so that workers and their organisations also have the means to better advocate for themselves.

[661] Stone, J. (2021). 'Public supports nationalising 'gig economy' apps such as Deliveroo and Uber to improve working conditions'. In: *The Independent*. 28 October. https://www.independent.co.uk/news/uk/politics/nationalisation-deliveroo-uber-working-conditions-b1946987.html. [Accessed 19 November 2021].

[662] Welter, J. (2020). 'Victory! Uber/Lyft Drivers Win Sick Pay'. 2 June. https://www.driversunionwa.org/victory_for_driver_sick_pay. [Accessed 15 October 2021].

## Cap the numbers & increase utilisation

Capping the number of workers these companies are allowed to take on is essential. As was seen repeatedly throughout the cases above, if they can get away with it, their model is to saturate the market with as many low-paid workers as possible, with the result of lowering customer wait times as well as workers' wages. This is not sustainable and makes ultimate regulatory intervention more challenging when the companies then have to deal with the cost of keeping all these workers on the books. So, like engaging trade unions and getting data, introducing a cap should be one of the very first orders of business. And, as we have seen in the case of New York City, the sky has very much *not* fallen in.

Similarly, the companies must be incentivised as much as possible to increase utilisation rates, as was done in Seattle and New York. Increased utilisation means more pay per hour for workers, more efficiency, and less congestion and pollution. This must be incorporated into requirements on minimum pay.

## The rights

Whether the regulatory intervention seeks to make clear that the 'gig economy' workers fall into the same category as standard employees (as was the case for example with the *Rider Law* and couriers in Spain and AB 5 in California), or provides a tailor-made set of rights (as was the case with New York City and Seattle), the aim should be to provide these workers with a broadly comparable package of rights as others in an employment relationship have. At a bare minimum, this must include protection against detriment for blowing the whistle, minimum pay (ITF P4) – which *must* properly account for waiting time and expenses, access to social protections (ITF P9), protection of their health and safety (ITF P1), right to claim unfair dismissal (ITF P6), trade union rights, and protection from discrimination (ITF P3, P8). As discussed above, what matters is not the names or numbers of employment status categories; what matters is the rights they provide for workers. The problem with the 'third category' as conceived of by the 'gig economy' companies is that the package of rights falls drastically short of those of employees. Tailor-made rights may in some circumstances be preferable; for example, in the discussion on the NYC pay standard above, it was seen that

Lyft actually preferred a time-based minimum wage rate (more akin to minimum wage for employees) than the job-based rate NYC required (designed to incentivise pay *above* the minimum). Similarly, those countries where sectoral collective bargaining is still the norm effectively provide for tailor-made rights by industry. But the test must always be: if the 'gig economy' workers are not classed as standard employees, are the rights they have broadly comparable to those of employees?

One step that should be taken is ensuring that international workers' rights law is effectively transposed in the domestic legal order. So, for example, the trade union rights and protection from discrimination contained in the ILO's FPRW, which are binding on all ILO member states, must be made operative. The best way to do that will depend on the nature of the legal system in a given jurisdiction; options may include implementation of the rights into, or incorporation by, domestic statute. Importantly though, provision should be made to incorporate not only the text of these fundamental rights, but also their interpretation by the ILO supervisory bodies – the 'ILO jurisprudence' to use a term loosely – even if this means conflict with other domestic law, such as antitrust law. This could be done by providing that in case of conflict, the FPRW reign supreme.

Similarly, ILO R198 should constitute at least one of the tests for determining the employment relationship in national law. This does not need to replace any statutory or common law-derived definitions of the employment relationship in national law; it should simply provide that even if a worker falls outwith the standard definition of an employment relationship in national law they should nevertheless be considered to be in an employment relationship if they meet the criteria of ILO R198.

## Racism and xenophobia

As has been seen in the various case studies above, migrant workers and people of colour tend to be disproportionately represented among 'gig economy' workers, at least in the Global North. First, it is important to note that racial and economic justice are inextricably linked and the 'gig economy' cannot eschew responsibility for this by way of some creative thinking and glossy spin. As the co-chair of the Poor People's Campaign in the US put it: 'It

has taken African-Americans 400 years to get from $0 to $7.25. We know we cannot wait any longer for a $15 an hour federal minimum wage.'[663] And this also means that the workforce is disproportionately subjected to xenophobia and racism, at both the interpersonal and structural levels. For example, in an open letter to 'gig economy' companies organised in response to companies' comments on the Black Lives Matter movement, the campaign group Gig Workers Rising wrote (emphasis in the original):

> The Black gig workers who have been on the frontlines of this pandemic have been the hardest hit economically and the most likely to die from the virus, yet your companies have done nothing to ensure their welfare. There are stories of drivers who have lost their lives, yet your companies once again, were nowhere to be found. There are stories of drivers who have been exposed to COVID-19 yet too afraid to stop working for fear of financial ruin. **Where were you then?**
>
> Before the COVID-19 pandemic, Black gig workers *already* faced discrimination and abuse on the job. Black gig workers *already* had no protection from racist consumers who file false complaints and do not tip. Black gig workers *already* found less support and more discrimination from staff meant to "support" us. Black gig workers *already* were subject to more policing and harassment from law enforcement on the job everyday. **Where were you then?**[664]

So, rectifying the labour exploitation discussed in this report will also go some way towards achieving racial justice for the workforce, a point economists Parrot and Reich make in relation to the Seattle pay standard. Providing for living wages, decent working conditions, health and safety protections, sick pay, protection from discrimination, access to information on how the algorithms work, prohibiting companies from using tips to satisfy pay requirements, and providing protections from unfair dismissal, would all go some way to mitigate the issues outlined above. Crucially, the onus must be on the companies to

[663] Barber II, W.J. (2021). 'The Fight for a $15 Minimum Wage is Our Selma'. In: *Time*. 17 February. https://time.com/5940311/minimum-wage-biden/. [Accessed 7 November 2021].

[664] Gig Workers Rising. (2020). Sign On: Open Letter to Gig Companies regarding Black Lives Matter. In: *Medium*. 18 June. https://medium.com/@catalina.brennan.gatica/sign-on-open-letter-to-gig-companies-regarding-black-lives-matter-4b48420e238d. [Accessed 7 November 2021]. A similar point was made by Black Lives Matter (BLM) UK regarding a case against Uber it was backing together with the IWGB union. The case concerned Uber's use of facial recognition software to verify driver ID. Such software has been found to work less effectively on people with darker skin than people with lighter skin. 'The gig economy, which already creates immense precarity for Black key workers, is now further exacerbated by this software,' said BLM. See: Booth, R. (2021). 'Ex-Uber driver takes legal action over 'racist' face-recognition software'. In: *The Guardian*. 5 October. https://www.theguardian.com/technology/2021/oct/05/ex-uber-driver-...1319346&email_subject=newsletter-taking-the-fight-to-the-bosses- . [Accessed 12 October 2021].

demonstrate they are proactively rectifying policies which directly or indirectly discriminate against people.

When it comes to migrant workers, some innovative policies have been seen above, for example, Seattle's requirement to provide certain information in the worker's primary language. This approach should be replicated throughout the obligations on 'gig economy' companies towards their workers. If a native-English speaking qualified lawyer struggles to understand Uber's contract with its drivers, then the proposition that the contract is accessible to a non-legally qualified worker who is not fluent in English, is farcical. To the extent that fear of immigration authorities – which may be legitimate for both documented and undocumented migrant workers – inhibits a worker from proactively enforcing their rights, regulatory interventions should make clear that they apply to all workers, regardless of immigration status, and enforcement mechanisms – both by administrative bodies and in the courts – should have a strict and well-publicised firewall with immigration enforcement. Similarly, barriers to accessing social safety nets – which increase dependence on a single job, no matter how exploitative – should be removed for migrant workers, regardless of documentation status. Further, in jurisdictions where this is relevant, 'gig work' should count towards permanent residency applications, as called for by Gig Workers United, Uber Drivers United, and the Ontario Federation of Labour, in Canada.[665]

## Outsourcing

Once the companies are cornered out of classifying their workers as independent contractors, sometimes they respond by outsourcing them. In particular, this appears to be the favoured approach of Uber, as seen in Geneva and Spain. This should not be allowed to occur, and the regulatory intervention should make this clear. Outsourcing tends to drive down wages and terms and conditions as well as remove accountability from the ultimate decision-makers. The companies should be prohibited, full stop, from outsourcing their core workforce in response to the requirement that they provide them with workers' rights.

[665] *Gig Workers' Bill of Rights*. https://ofl.ca/action/gig-workers/. [Accessed 20 November 2021].

## Cutting hours and jobs

As we have seen in the case studies of this report, job losses after the imposition of workers' rights have been a rare - but not insignificant – occurrence, as seen in the Uber Eats example in Spain. As Ranz, the UGT official puts it: 'the problem is if you create a very large fraudulent [labour] bubble, when [it] pops, is the issue.'[666] It is true that Deliveroo announced its intention to leave Spain after the *Rider Law* came into effect – although the company has stated, and the trade union official interviewed for this report believes, that this was caused by market forces rather than the duties imposed by the law. And the supposed job losses in the Uber Eats Geneva case are hotly disputed by the union. But regardless of the cause, companies may pull out of a location because of – or simply after – the imposition of workers' rights. Therefore, whatever the regulatory regime into which 'gig economy' workers are slotted, it is imperative that the basic provisions on dismissal are included; right to a legally enforceable fair process, consultation with the trade union or workers' reps in situations of redundancy, as well as redundancy payments. If a company pulls out within a certain period of time after the workers' rights related regulatory intervention, it is proposed as well that they be heavily fined. If the company cannot operate without providing a minimum standard of pay and terms and conditions for its workers, then it should not be operating, and it is not right that the worker be made to bear the price for the company's reckless behaviour.

Similarly, and more likely than the response of pulling out of a jurisdiction completely, is the possibility of a company responding by imposing certain shifts, or preventing workers from working the shifts they previously worked, e.g. as we saw with Lyft in NYC. It is also therefore necessary that any regulatory intervention be accompanied by strict provisions disincentivising this. For example, the regulation should stipulate that – regardless of any contractual documentation that may exist between worker and company – the worker is entitled to the same working hours as before the regulatory intervention (or before the companies became aware of the proposed intervention, as the case may be). For workers who don't work shifts, working hours can be measured by taking an average over the previous six months, or year, or some other tailored measure. If a company proposes to reduce a worker's hours, or impose unfavourable shifts regardless, it should be treated as a dismissal

[666] Ranz, R. (2021). Author interview. 12 October. Author's translation (interview was conducted in Spanish).

and reengagement (without loss of length of service, as applicable), thereby engaging the unfair dismissal and/or redundancy procedures referred to above. However, each instance of this behaviour should be fined heavily, with a fair proportion going to the worker. These companies – like most companies in the economy – must manage their pool of labour to better match customer demand so as not to flood the circuit, driving down wages for all workers. But if a company has gone down the flooding route, it must rectify it by natural attrition (which tends to be quite high anyway) and by freezing new recruitment. If a company has irresponsibly taken on more workers than it needs, simply because the marginal cost of each new recruit was close to zero, then the company must be made to reap that which it has sown. The existing workers, whose livelihoods depend on the jobs they do, must not be made to suffer the consequences. The rules governing the reaction of companies to new regulation are in the gift of the regulator; they must be used to mitigate possible negative consequences for workers.

## Enforcement

Although as a general principle, a law is only as good as its enforcement, in the case of the 'gig economy' a law is only as good as the regulator's will relentlessly to pursue these companies, repeatedly litigate, and impose sanctions so severe that their flirtation – or better put, love affair - with avoidance is rendered a non-starter. There are two key elements to this: i) the arm of the state tasked with enforcement must have adequate resources and the political will to proactively enforce the law; and ii) the sanctions must be severe. Simply put, if Uber's CEO were sitting in Alcatraz Federal Penitentiary rather than across the bay in a US$ 16.5 million mansion[667] while these regulatory debates were happening, then the proposition of depriving workers of rights to save a bit of money would be rather lass attractive. Putting aside the sensationalism – and the fact that Alcatraz closed down several decades ago – the state must make penalties stiff enough to be dissuasive. Providing for criminal sanctions and extremely high fines are necessary ingredients.

[667] ValueWalk. (2020). 'Drivers Protest Outside Uber CEO's Pacific Heights Mansion'. 24 June. https://www.valuewalk.com/2020/06/protest-uber-ceos-pacific-heights-mansion/. [Accessed 7 November 2021].

In addition to the State, workers and unions should also be empowered to effectively enforce the law. This means more than simply providing for their ability to file suit. One way to do this is to provide delegated authority to workers to step into the state's shoes and enforce the law as if they were the state. This has been seen, for example, in the Private Attorneys General Act (PAGA) in California,[668] the history and purpose of which was summarised by the state's Court of Appeal (internal citations omitted)[669]:

> Before *PAGA* was enacted, only the state could sue employers for civil penalties under the Labor Code… "Government enforcement proved problematic," for reasons including inadequate funding and staffing constraints. … "To facilitate broader enforcement, the Legislature enacted *PAGA*, authorizing 'aggrieved employee[s]' to pursue civil penalties on the state's behalf. … 'Of the civil penalties recovered, 75% goes to the Labor and Workforce Development Agency, leaving the remaining 25% for the "aggrieved employees"".[670]

State enforcement bodies also must work collaboratively with unions, the latter being an excellent source of intelligence on employer violations. The UK, for example has a notably abysmal record in this regard. Despite the IWGB – which represents predominantly low-paid workers – being frequently reported on by mainstream press, I cannot recall a single instance of the minimum wage enforcement division of Her Majesty's Revenue and Customs (HMRC – the tax office) approaching the union regarding minimum wage violations. Similarly, the only time the union was approached by the Health and Safety Executive (HSE) – tasked with enforcing health and safety at work laws – was after we brought a legal challenge arguing that the government had acted unlawfully. The purpose of the HSE asking for a meeting was effectively to persuade us that the litigation was unnecessary. The meeting – perhaps to the surprise of no one in attendance – was an utter waste of time. The proceedings continued and the government was indeed found to be in violation of the law.[671]

But above and beyond collaboration from enforcement bodies, the law must purposively facilitate the representation of, and if need be, litigation by workers. One positive example

[668] Lab. Code, § 2698 et seq..
[669] Second Appellate District, Division Eight.
[670] *Rosales v Uber Technologies, Inc., 63 Cal. App. 5th 937*, at p5.
[671] *R (on the application of the Independent Workers' Union of Great Britain) v the Secretary of State for Work and Pensions & Ors* [2020] EWHC 3050.

in this regard is the arrangement between the Drivers Union and the City of Seattle, where the latter effectively funds the former to represent drivers who may have been unfairly deactivated. This should be replicated. Similarly, funding should be provided to workers who chose to litigate purported violations on their own. Other interventions should include one-way cost shifting in proceedings, i.e. if the worker wins, the company pays their legal costs; if the company wins, each side pays their own costs. Similarly, the compensation to which a worker should be entitled in the case of a violation should include not only the monetary value of the entitlements which they were denied, but also the amount necessary to compensate for the gruelling, tedious, and time-consuming nature of litigation. Put bluntly, the company strategy of depriving workers of rights safe in the knowledge that most will find it too costly and time-consuming to do anything about it, must be rendered ineffective. If the enforcement and sanction provisions of the regulatory intervention do not make violation costlier than adherence, then the balance is not right.

## License to act

If there is a discernible pattern in the effectiveness of the regulatory interventions discussed in this report, it is this: the companies appear to be more responsive to those regulations introduced by licensing authorities than they are to general employment law measures. As we have seen, the companies appear to be broadly adhering to the rules imposed by Seattle and New York. Their violations appear to be more of the spirit – rather than the letter – of the laws. In California, the UK, and Spain, on the other hand, they have generally ignored all or aspects of the laws in question. This behaviour is understandable if looked at through the lens of cost-benefit analysis from the companies' perspective. If the costs of any enforcement actions – both financially and in terms of reputation – are less than the costs of obeying the law, the companies will simply opt for the former. Paying fines and getting bad press is simply a cost of doing business. It is the *doing business* that they are really interested in; hence, they pay slightly more attention to those who give them license to operate, such as New York City's TLC and the City of Seattle.

Therefore, and given the extraordinary lengths to which these companies go to subvert regulation, I propose that any regulatory intervention on the matter of workers' rights be

enshrined in a 'gig economy' employer licensing regime. In other words, the companies must demonstrate that they satisfy the workers' rights requirements in order to be given a license to operate; operating without such a license would be subject to the strictest of criminal penalties. As already seen, licensing – in particular of for-hire vehicles and companies – is already commonplace, and so could easily accommodate the addition of workers' rights provisions. However, I propose that a licensing regime of this sort also be extended to courier companies. Although not related to the courier or for-hire industries, there is precedent for this sort of regime in the UK in the form of the Gangmasters and Labour Abuse Authority (GLAA) which requires 'businesses who provide workers to the fresh produce supply chain and horticulture industry' to obtain a license to operate, in order 'to make sure they meet the employment standards required by law'.[672] An effective licensing regime would ensure regular supervision of the companies (who could be required to renew their license every year or even more frequently in particularly egregious cases), as well as definitively linking the issue of workers' rights to their ability to do business.

## Much Ado About Nothing: The Conservative Dissent

As part of the Australian Senate Select Committee on Job Security's *First interim report: on-demand platform work in Australia*, the two conservative senators – Ben Small of the Liberal Party of Australia (LP) and the Hon Matthew Canavan of the National Party of Australia (NATS) – provided a scathing, dissenting report. This section shall address some of the issues raised in the dissent, in light of the case studies and analysis presented thus far. Given how little substance the dissent actually contains, the matter can be taken quite briefly.

Roughly half of the dissent is used to decry the interim report as little more than 'partisan politicking',[673] for example by stating that 'The blatant cherry-picking in the selection of

[672] GLAA. (n.d.). 'What we do'. https://www.gla.gov.uk/who-we-are/what-we-do/. [Accessed 7 November 2021].
[673] At [1.2].

evidence to present in the report totally discredits its contents as partisan stunt.'[674] Putting aside for the moment that an eyebrow must be raised whenever a politician uses a political process to call out an opposing politician for being 'political' – queue the blond neo-fascist narcissist who said 'I'm not a politician. My only special interest is you, the American people.'[675] – it is worth pointing out that the conservative Select Committee members had access to all of the same testimony and evidence as the interim report authors. So what case do the dissenters make?

First, they say that 'gig economy' workers can multi-app and criticise the report for downplaying this.[676] But who cares? As seen in the case studies throughout this report, it is common in the 'gig economy' for some workers to multi-app and others not to. They all need workers' rights and the presence of multi-apping is no barrier to providing for such rights.[677] Next, the conservatives criticise the report for ignoring evidence of the extent to which 'gig economy' workers use the work to supplement pay rather than 'to put food on the table'. Again, and as seen throughout this report, some 'gig economy' workers will do the work to put all their food on the table, others will do it to put some food on the table, and yet others may do it just to buy a snack or two. To the extent that figures show a large majority of 'gig economy' workers do not depend on the work as their main source of income, this is often misleading in the sense that a disproportionate amount of 'gig work' is done by those workers who do depend on it for their main source of income. Either way, both full time and part-time workers are deserving of basic protections.

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[674] At [1.5].

[675] Quoted in: PTI. (2016). 'I'm not a politician. My only special interest is Americans: Donald Trump'. In: *Financial Express*. 2 November. https://www.financialexpress.com/world-news/im-not-a-politician-my-only-special-interest-is-americans-donald-trump-2/436678/. [Accessed 7 November 2021].

[676] At [1.5].

[677] Commissioner Cambridge addressed the significance of multi-apping for employment status head on in the case of *Diego Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818 at [118]:

> Although the traditional arrangements for the performance of work would not have envisaged simultaneous employment for two or more employers, and in many instances the physical performance of work would continue to prevent simultaneous employment occurring, traditional notions regarding the exclusivity necessary for the establishment of an employment relationship require reconsideration. The expressed permission provided by Deliveroo for riders to work for its competitors and to engage in the multi-apping as Mr Franco did, is a factor which points against the existence of an employment relationship. However, in the context of the modern, rapidly changing workplace, it could not represent a factor that should be construed as preventing the existence of an employment relationship.

After criticising the use of 'baseless rhetoric' to 'distract from the legitimacy of argument against an enforced minimum income',[678] the dissenters – without the slightest hint of irony – baldly state that 'the exponential growth of the on-demand economy is clear evidence of favour among hundreds of thousands of Australians' who choose to work in it.[679] The dissenters then dispute the TWU's evidence on food delivery couriers,[680] instead preferring the evidence of Uber, 'who are best placed to provide data on earnings'.[681] It is peculiar, to put it generously, that given their purported concern with 'bias' they are willing to blindly accept the data provided by Uber as if the latter had no self-interest in convincing the Australian Senate that its couriers earned decent wages. If anything, this bolsters the need for regulators to acquire detailed data from on earnings. However, and again, even if Uber did pay more than a survey of drivers appeared to indicate; so what? If 'gig economy' companies already, of their own volition, pay higher than the prevailing minimum wage or any tailor-made minimum pay standard that a regulator might introduce, then the companies should have absolutely no quarrel with minimum pay standards being applicable to them, and nor should their conservative supporters. The fact that the companies and their political hacks so fiercely resist any legal obligation to pay decent wages is a rather strong indication that such obligations entail paying their workers *more* than they currently do.

The dissenters then try even to undermine the idea that 'gig economy' work is even work; after emphasising the flexibility inherent in the business model, they even go so far as to state: 'Most Australians would think that it hardly sounded like a job at all – and that's because it isn't.'[682] The assertion does not appear to be based either on any survey of what Australians actually think, nor on any legal standard of what constitutes 'a job' (or employment relationship, which is what they probably mean). Indeed, and as has been seen above, not only have various courts around the world repeatedly held such workers to be in an employment relationship, but also in Australia roughly half of the litigated cases have resulted in recognition of the workers as employees.

[678] At [1.9].
[679] At [1.10].
[680] At [1.11].
[681] At [1.12].
[682] At [1.13].

The conservatives even suggest that it is the flexibility of 'gig economy' work that has made it 'Public Enemy Number One for the Union movement.'[683] First of all, the amount of flexibility with which these workers tend to work is often greatly exaggerated. That being said, it is true that they often have more flexibility than what one might think of as a standard employee. Flexibility which works for the worker is a grand thing. There is no reason for workers' rights to pose a threat to that, either legally - a point made repeatedly in the jurisprudence from different countries[684] - or practically (as discussed above). Indeed, the *Victoria Inquiry* addressed this issue for the Australian context (at [980] and [998]):

> The Inquiry notes that while this feature is part of the 'work status' test, it is not incongruous to awards and workplace laws that work is carried out as, and when, workers choose. Many workers are not 'rostered' for particular hours. Employees may work flexibly and often with minimal supervision. Many employees are able to choose to carry out work from home, in the evening or early in the morning, to fit around their lives and family. Employers' flexible work policies facilitate this and such policies are encouraged. The challenges required in working under the COVID-19 shut-down have demonstrated that many businesses can operate more flexibly and this is likely to have fundamental and long term implications for the arrangement of work into the future.[685]
>
> …
>
> The Inquiry notes that while minimum shifts commonly feature in awards, they are not required by the FW Act and the FWC. They may be less relevant in the case where a worker is not being 'rostered' by the employer and therefore choosing when to work. These requirements could be modified in existing, or new, awards taking into account the distinct features of platform work.[686]

Pro-'gig economy' company propaganda is not worthy of the moniker without a healthy dose of fear-mongering. And the conservative dissenters are loyal servants to the cause, stating 'Frighteningly, some of the changes that Labor and Greens Senators seek to impose have [] already been implemented in other countries to devastating effect.'[687] The only example they

[683] At [1.13].
[684] Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 26 October 2021].
[685] James, N. (2020). *Report of the Inquiry into the Victorian On-Demand Workforce*. Victorian Government. June, p139.
[686] Ibid., p141.
[687] At [1.15].

provide is that of Uber Eats in Geneva, and the only evidence on which the example rests is the regurgitation of Uber's claims, which – as seen above – are hotly disputed by people on the ground.

It is worth pausing here to make some broader points about job security in the 'gig economy'. First, without regulatory intervention, the 'gig economy' business model – and as such the jobs of those who work within it – is extremely unstable. For example, Uber alone has pulled out of Russia, China, and South East Asia due to its inability to compete (and not because of worker's rights legislation).[688] Also, just a few months into the pandemic, Uber's rideshare trips had gone down by roughly 80% globally, signifying a drastic reduction in work for drivers.[689] The app-based rideshare industry in Seattle fell by a similar amount,[690] and the Select Committee's Interim Report noted an initial decline of roughly 70% in the Australian 'gig economy'.[691] Second, even when the instability of the sector does not lead to a job loss in the sense that the worker still has some work to do, we have repeatedly seen how company policies drive down pay and terms and conditions, thereby converting better paying jobs into poorer ones. This is often done – as has been seen throughout this report – by flooding the streets with riders and drivers. It is also done by unilaterally withdrawing perks or incentives once companies realise they are not needed to keep workers on the books. For example, Ola withdrawing accident insurance from drivers in Australia.[692] As Jen - a 54 year-old Instacart worker in the US state of Massachusetts – stated on the verge of a national strike against the company organised by the Gig Workers Collective: 'I haven't shopped in more than four weeks now because there's not one batch that comes on my screen that would put me making over minimum wage.'[693] Third, and again as has been seen throughout this report, 'gig economy'

[688] Moyer-Lee, J. & Kontouris, N. (2021). 'The "Gig Economy": Litigating the Cause of Labour'. In: *Taken for a Ride: Litigating the Digital Platform Model*. International Lawyers Assisting Workers Network Issue Brief: March. https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf. [Accessed 26 October 2021], p7.
[689] Etienne, R. (2020). 'En Suisse, Uber mise sur la reprise'. In: *Le Temps*. 4 June. https://www.letemps.ch/economie/suisse-uber-mise-reprise. [Accessed 17 October 2021].
[690] Parrot, J.A. & Reich, M. (2020). *A Minimum Compensation Standard for Seattle TNC Drivers*. Report for the City of Seattle. July, p68.
[691] Select Committee on Job Security. (2021). *First interim report: on-demand platform work in Australia*. June, p21.
[692] Ibid., p36.
[693] Quoted in: Oladipo, G. (2021). ''It's a sweat factory': Instacart workers ready to strike for pay and conditions'. In: *The Guardian*. 15 October. https://www.theguardian.com/business/2021/oct/15/instacart-workers-strike-pay. [Accessed 17 October 2021].

workers are losing their jobs on a daily basis due to deactivations (dismissals), often done without any recourse to process, fair procedure, or trade union representation for the worker. As it happens, virtually all of the litigated 'gig economy' cases in Australia concerned dismissals. Fourth, the unregulated rampage of these companies causes job losses and worsens terms and conditions for other workers. Indeed, at the time of writing the NYTWA had just completed an awe-inspiring two-week hunger strike over debt levels of traditional taxicab drivers,[694] an issue exacerbated by 'gig economy' companies flooding the streets with cars. Similarly, these companies' evasion of workers' rights creates pressure on other employers to drive down wages and conditions in order to compete. So, when the conservatives suggest that regulating these companies necessarily causes job losses – putting aside the lack of evidentiary basis for such a categorical assertion – one must make the point that a job is only 'lost' because of a regulation if it would have existed but for the regulatory intervention. And, as seen above, far from being some haven of stable work, jobs are being lost in the 'gig economy' right, left, and centre, *without* regulatory intervention. The only thing worse than losing your job, is losing it without any input, due to an unfair process, with no right to representation, legal recourse, or indeed any form of compensation or unemployment benefits after the loss. That is how 'gig economy' workers are currently losing their jobs.

Finally, if one steps back to look at the import of what the conservatives are actually saying, it is this: do not provide 'gig economy' workers with a minimum wage (or for that matter, other workers' rights) or the impact will be devastating. This is reminiscent of some of the opposition to the FLSA in the US - which introduced a minimum wage and contained provisions on child labour - in the 1930s. For example, one opponent, Congressman Edward Cox, said in 1938:

> [The Fair Labor Standards Act] will destroy small industry ... [these ideas are] the product of those whose thinking is rooted in an alien philosophy and who are bent upon the destruction of our whole constitutional system and the setting up

[694] Rosenthal, B.M. (2021). 'N.Y.C. Cabbies Win Millions More in Aid After Hunger Strike'. In: *New York Times*. 3 November. https://www.nytimes.com/2021/11/03/nyregion/nyc-taxi-drivers-hunger-strike.html. [Accessed 7 November 2021].

> of a red-labor communistic despotism upon the ruins of our Christian civilization.[695]

Or when the Labour Government in the UK proposed the National Minimum Wage Act 1998 and it was opposed by the Tories. 'This is an absolutely disastrous policy, it's utterly misconceived and the sooner the Labour Party withdraw it the better,' Conservative MP Michael Howard said at the time.[696] Cox was wrong in the 30s, Howard was wrong in the '90's, and Small and Canavan are wrong now.

If one threads together the constituent parts of the conservatives' dreary duet, the narrative looks something like this:

> *We know the 'gig economy' is a great thing because so many people chose to do their non-jobs in it. The income from these non-jobs is decent, but doesn't really matter to them. But you can never require any minimum amount of pay, because even though companies are already paying above the minimum, loads of people will lose their non-jobs, upon which they do not depend, and the results will be devastating.*

In sum, despite having access to a wealth of evidence and testimony, and despite their passionate critique of the Interim Report as being a political hack job, the conservative dissent is little more than incoherent, ideological puff; hot air metamorphosed into ink on paper. It is, Much Ado about Nothing.

[695] Quoted in: Baum, E. (2015). '5 Noteworthy Quotes About Fair Labor Standards Act of 1938'. In: *Newsmax*. 2 June. https://www.newsmax.com/FastFeatures/fair-labor-standards-act-quotes/2015/06/02/id/648222/. [Accessed 7 November 2021].

[696] Michael Howard, quoted in: GMB. (2021). 1 April. https://twitter.com/GMB_union/status/1377574677976076294?s=20. [Accessed 6 April 2021].

## Conclusion

Many of the features of Australia's' employment and labour law regime are similar to the countries reviewed in this report. For example, Australia is a common law country, like the UK and US. Although employment and labour law are predominantly national in scope – due to a combination of relying on the Corporations Power of the Constitution[697] to regulate constitutional corporations and states willingly referring industrial relations powers to the federal government[698] - and the Fair Work Act 2009 enshrines minimum standards, the system of modern awards provides for more specific and tailor-made standards for different industries and categories of employees, sort of like sectoral collective bargaining without the bargaining. Further, and importantly, Australia is bound by the international law discussed above; for example, it is required to promote collective bargaining and freedom of association for *all workers*, something it currently does not do.[699] Although further work may be required on the adaptation of the proposals in this report to the Australian legal context, there is no reason *prima facie* to suggest that any of the proposals are inapt for Australia.

Indeed, the one thing the members of the Senate Select Committee appear to be in agreement on is the need for more data. Australia has also, in the past, relied on the External Affairs power of the Constitution to legislate for the implementation of international workers' rights law, an approach which was largely upheld by the High Court.[700] There are also

[697] Section 51(20).
[698] Pursuant to s51(37) of the Constitution.
[699] The importance of these fundamental rights was reiterated by the ILO's Centenary Declaration for the Future of Work (at [II(A)(vi)]):

> In discharging its constitutional mandate, taking into account the profound transformations in the world of work, and further developing its human-centred approach to the future of work, the ILO must direct its efforts to:
>
> ..
>
> (vi) promoting workers' rights as a key element for the attainment of inclusive and sustainable growth, with a focus on freedom of association and the effective recognition of the right to collective bargaining as enabling rights;
>
> …

[700] Stewart, A., Forsyth, A., Irving, M., Johnstone, R. & McCrystal, S. (2016). *Creighton and Stewart's Labour Law*. 6th Edition. The Federation Press, at p91; *Victoria v Commonwealth* (1996) 187 CLR 416.

examples in Australia of the licensing of certain business which are particularly prone to unlawful behaviour – partly inspired by the GLAA model in the UK[701] - in the form of the state-level labour hire licensing regimes in Queensland, Victoria, and South Australia. Similarly – although perhaps with theoretically less teeth - the Migrant Workers' Taskforce – established by the Federal Government – recommended a national labour hire registration scheme to cover certain sectors; a proposal the Government accepted in March 2019.[702]

The real question is whether or not there exists in Australia the political will to intervene, for the sake of protecting livelihoods – and indeed - lives. Compelling these companies to provide workers' rights is no easy feat, as has been seen in detail above. They will kick, scream, lobby, obfuscate, resist, and – if allowed to – ignore. And no policy or regulatory approach will be perfect; inevitably, there will be unintended consequences of any intervention. But none of this is any reason not to act. For Tame the Beast, one must. To cite an English judge of two and a half centuries gone by:

***Let justice be done though the heavens may fall.***

[701] Forsyth, A. (2019). 'Regulating Australia's 'Gangmasters' through Labour Hire Licensing'. In: *Federal Law Review*, Vol 47(3), 469-493, at p471.
[702] Australian Government, *Report of the Migrant Workers' Taskforce* (Report, March 2019), cited in: Forsyth, A. (2019). 'Regulating Australia's 'Gangmasters' through Labour Hire Licensing'. In: *Federal Law Review*, Vol 47(3), 469-493, at pp482-483.

## Appendix A: Abbreviations

**AAR:** Asociación Autónoma de Riders (Autonomous Association of Riders, Spain)

**AB:** Assembly Bill (California, United States)

**APRA:** Asociación Profesional de Repartidores Autónomos (Professional Association of Self-Employed Couriers, Spain)

**AsoRiders:** Asociación Española de Riders-Mensajeros (Spanish Association of Messenger-Riders, Spain)

**ATO:** Australian Tax Office

**BLM UK:** Black Lives Matter UK

**BLS:** Bureau of Labor Statistics (United States)

**CAC:** Central Arbitration Committee (United Kingdom)

**CARES:** Coronavirus Aid, Relief and Economic Security Act (United States)

**CCOO:** Confederación Sindical de Comisiones Obreras (Spain)

**CEACR:** International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations

**CEOE:** Confederación Española de Organizaciones Empresariales (Spain)

**Cepyme:** Confederación Española de la Pequeña y Mediana Empresa (Spain)

**CFA:** International Labour Organization's Committee on Freedom of Association

**CJEU:** Court of Justice of the European Union

**DPSC:** Deputy President of the Supreme Court (United Kingdom)

**EAT:** Employment Appeal Tribunal (United Kingdom)

**EC:** European Commission

**ECHR:** European Convention on Human Rights

**ECtHR:** European Court of Human Rights

**EEA:** European Economic Area

**EFTA:** European Free Trade Association

**EJ:** Employment Judge (United Kingdom)

**ESC:** European Social Charter

**ET:** *Estatuto de los Trabajadores* (Workers' Statute, Spain)

**EU:** European Union

**EU-KFTA:** European Union – Korea Free Trade Agreement

**FAA:** Federal Arbitration Act (United States)

**FHV:** For-Hire Vehicle (United States)

**FLEX:** Focus on Labour Exploitation (United Kingdom)

**FLSA:** Fair Labor Standards Act (United States)

**FPRW:** International Labour Organization Fundamental Principles and Rights at Work

**FWA**: Fair Work Act 2009 (Australia)

**FWC:** Fair Work Commission (Australia)

**FWO:** Fair Work Ombudsman (Australia)

**GLAA:** Gangmasters and Labour Abuse Authority (United Kingdom)

**GMB:** GMB trade union (United Kingdom)

**GUF:** Global Union Federation

**HMRC:** Her Majesty's Revenue and Customs (United Kingdom)

**HSE:** Health and Safety Executive (United Kingdom)

**HVFHS:** High-Volume For-Hire Service Provider (New York City, United States)

**ICJ:** International Court of Justice

**ILAW**: International Lawyers Assisting Workers Network

**ILC:** International Labour Conference of the International Labour Organization

**ILO:** International Labour Organization

**IOE:** International Organisation of Employers

**ITF:** International Transport Workers' Federation

**ITUC:** International Trade Union Confederation

**IWC:** Industrial Welfare Commission (California, United States)

**IWGB:** Independent Workers' Union of Great Britain (United Kingdom)

**J:** Justice (United Kingdom)

**JSC:** Justice of the Supreme Court (United Kingdom)

**LA:** Los Angeles

**LAX:** Los Angeles International Airport (California, United States)

**LJ:** Lord Justice (United Kingdom)

**LL:** Local Law (New York City, United States)

**LP:** Liberal Party of Australia

**LSE:** *Loi fédérale sur le service de l'emploi et la location de services* (labour hire law, Switzerland)

**MCG:** Mouvement citoyens genevois (Geneva Citizens Movement) (Switzerland)

**mph**: miles per hour (United States)

**MR:** Master of the Rolls (United Kingdom)

**NATS:** National Party of Australia

**NELP:** National Employment Law Project (United States)

**NJ:** New Jersey (United States)

**NLRA:** National Labor Relations Act (United States)

**NYC:** New York City (United States)

**NYC DoT:** New York City Department of Transportation (United States)

**NYTWA**: New York Taxi Workers Alliance

**OCE:** Office cantonal de l'emploi of Geneva (Cantonal Office of Employment; Switzerland)

**OLS:** Office of Labor Standards (Seattle, United States)

**PA:** Pennsylvania (United States)

**PAGA:** Private Attorneys General Act (California, United States)

**PCBU**: person conducting a business or undertaking (terminology from the Worker Health and Safety laws in Australia)

**PHV:** Private Hire Vehicle (United Kingdom)

**PP:** Partido Popular (Spain)

**PPE:** personal protective equipment

**PSC:** President of the Supreme Court (United Kingdom)

**QC:** Queen's Counsel (United Kingdom)

**R198:** International Labour Organization's Employment Relationship Recommendation, 2006 (No. 198)

**RC**: Registre de commerce de Genève (Trade Register of Geneva) (Switzerland)

**RDU:** Rideshare Drivers United (California, United States)

**RTD Award:** Road Transport and Distribution Award 2020 (Australia)

**RTS:** Radio Télévision Suisse (Switzerland)

**RU:** Repartidores Unidos (Couriers United, Spain)

**RWDSU:** Retail, Wholesale & Department Store Union (United States)

**SEA:** Self-Employed Australia

**SEIU:** Service Employees International Union (United States)

**SG Act:** Commonwealth Superannuation Guarantee (Administration) Act 1992 (Cth) (Australia)

**SHRR:** Seattle Human Rights Rules (United States)

**SMC:** Seattle Municipal Code (United States)

**TDL:** The Doctors Laboratory (United Kingdom)

**TFEU:** Treaty on the Functioning of the European Union

**TfL:** Transport for London (United Kingdom)

**TLC:** Taxi and Limousine Commission (New York City, United States)

**TNC:** Transportation Network Company (United States)

**TRADE:** *Trabajador autónomo económicamente dependiente* (economically dependent self-employed worker, Spain)

**TWU**: Transport Workers' Union of Australia

**UGT:** Unión General de Trabajadores (Spain)

**WAV:** wheelchair-accessible vehicle

**WHS**: Worker Health and Safety laws (Australia)

## Appendix B: ITF 'Gig Economy' Principles

1. Health, safety and PPE for all workers with adequate and appropriate provision of personal protection equipment and sanitation facilities, and specific protections against violence and harassment in the workplace;
2. Correct employment status classification and an end to disguised employment relationships;
3. A labour protection floor that enforces ILO Fundamental Principles and Rights at Work, including gender rights, freedom of association and collective bargaining. These rights should be embodied in the algorithms themselves.
4. Living wages, regardless of employment status, with negotiated cost recovery formulas for fairly classified self-employed workers. Workers must be paid on time, and should receive tips in full at the moment they are paid.
5. Human and humane control where workers in the gig economy have their work conditioned and controlled by software and data. Named individuals should be responsible for the software and its impacts on workers.
6. Fair digital contracts – flexibility should not come at the cost of decent working conditions. Deactivations from the app should follow a fair process in which appeals are heard. Contracts should specify rights to data, and changes to working conditions should be consulted and negotiated. Workers ratings should be portable across apps.
7. Workers' data rights – workers produce data that is then used to control their work, so they have the right to know what data is collected, what it is used for, where it is stored, and how the software built on it works. They should enjoy free access to all the data collected on them during working time, in recognition that it is their data since they created it.
8. Gender neutral software – platforms must ensure that their algorithms and digital processes are tested so that gender biases against women in relation to pay, safety and other issues can be eliminated.
9. Access to social protections including healthcare, pensions and other forms of social security and insurance protection; and,
10. Paying taxes – social protections are paid by the state, but can only be paid for if companies adopt responsible business practices, such as paying their share of taxes.