

A person is riding a bicycle away from the camera on a city street. They are wearing a large yellow delivery bag with a blue question mark on the back. The street is lined with historic buildings and has a cobblestone path. Other people and vehicles are visible in the background.

TAKEN FOR A RIDE 2: ACCELERATING TOWARDS JUSTICE

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INTERNATIONAL
LAWYERS ASSISTING
WORKERS NETWORK

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Foreword

The ILAW Network is pleased to issue this update to its first issue brief on the protection of labour rights on digital platforms, *Taken for a Ride: Litigating the Digital Platform Model*. This report analyzes new caselaw and legislation from around the world since March 2021, with respect to digital platforms. This report is divided into three parts.

Part I is an in-depth essay prepared by Jason Moyer-Lee which surveys the major cases concerning the employment relationship on digital platforms - whether to contest unjust dismissal, to claim a certain wage or benefit or to join a union and benefit from a collective bargaining agreement. The essay also takes note of the legislative and regulatory changes, from Spain's Riders Law to the proposed EU Directive on platform work and more. The essay ends with six key principles as to how to tackle this growing industry and what 'pro-worker legislators' should do to better protect these workers.

Part II of this report is a digest of key judicial decisions concerning digital platforms, including case summaries from around the world.

Part III is brief summaries of legislation and regulation changes that have occurred or have been proposed since the last *Taken for a Ride* publication was released.

We want to thank ILAW Network members who have contributed many of these cases.¹ We acknowledge that this digest of cases and legislation is not exhaustive and that there are certainly additional relevant cases and laws concerning digital platforms. The ILAW Network will continue to monitor the developing case law and will issue updates of this digest to ensure it is as comprehensive as possible.

Please contact us at admin@ilawnetwork.com with any missing or new judgments, legislative or regulatory changes, as well as links to any academic analysis or commentary and we will be sure to include them in subsequent issues.

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Taken for a Ride 2: The Analysis

By Jason Moyer-Lee¹

“Determining worker status is not very difficult in the majority of cases, provided a structured approach is adopted, and robust common sense applied.”

-His Honour Judge James Tayler²

INTRODUCTION

“Sometimes we have problems because, well, we’re just fucking illegal.” The words of Nairi Hourdajian, Uber’s Head of Global Communication.³ One can understand why Uber appointed her to the role; she is undoubtedly the consummate communicator. What I will explain in 20,000 word below, she has summed up in just ten words above. Had she been in charge of writing Uber’s legal briefs, the company could have saved millions on litigation, judges around the world would have had a considerably easier time construing an employment relationship, and my analysis would be significantly shorter.

Hourdajian’s quote was revealed in the *Uber Files*, a trove of over 124,000 confidential documents leaked to *The Guardian* and shared with news organisations and

journalists around the world through the International Consortium of Investigative Journalists. The documents range from 2013 to 2017 and revealed, as *The Guardian* put it, “the inside story of how the tech giant Uber flouted laws, duped police, exploited violence against drivers and secretly lobbied governments during its aggressive global expansion.”⁴ And Hourdajian wasn’t the only Uber manager who was candid about Uber’s unlawful actions when they thought their words would remain confidential; some managers acknowledged that they were “not legal in many countries” and referred to themselves as “pirates.” Indeed, Uber’s combative CEO Travis Kalanick was so controversial that then-Mayor of London Boris Johnson, in refusing to meet the CEO, reportedly said “it would be less damaging politically to be photographed with the leader of ISIS than with Travis Kalanick.”⁵ Being rejected on these grounds by Boris alone speaks volumes.

As will be seen further below, it is the workers who most often bear the brunt of the company’s recklessness and illegality. What may be little more than “antiquated employment laws” for “gig economy” companies, can signify the difference between a wage which provides for basic needs and one which renders workers destitute. Entitlement to employment law protections can also make the difference between being able to afford time off to isolate when a worker has Covid-19, provide the security needed for a worker to speak out or refuse work in situations of imminent danger, provide workers redress when they are racially harassed or physically assaulted (as well as place an onus on the employer to take measures to avoid such incidents in the first place), allow workers the abil-

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² *Sejpal v. Rodericks Dental Limited* [2022] EAT 91 at 7.

³ Harry Davies et al., *Uber Broke Laws, Duped Police and Secretly Lobbied Governments, Leak Reveals*, *GUARDIAN* (July 11, 2022), <https://www.theguardian.com/news/2022/jul/10/uber-files-leak-reveals-global-lobbying-campaign>.

⁴ For a round-up of reactions to the Uber Files from trade unions and campaigners in Europe, see Gig Economy Project—*The #UberFiles: Reaction Round-Up*, *BRAVE NEW EUROPE* (July 10, 2022), <https://braveneweuropa.com/gig-economy-project-the-uberfiles-reaction-round-up>.

⁵ Rowena Mason, et al., *We needed Dave and George to lean on Boris: Uber’s battle for London*, *GUARDIAN* (July 11, 2022), <https://www.theguardian.com/news/2022/jul/11/we-needed-dave-george-lean-on-boris-uber-battle-for-london>.

ity to take time off to spend with their families, and provide the legal infrastructure to facilitate workers coming together as one and advocating for the improvement of their situation. While the cost of illegality for companies may be measured in dollars and cents, for their workers it is measured in human suffering.

Having broken the law around the world, Uber willfully evaded enforcement.⁶ As *The Guardian* reported:

Across the world, police, transport officials and regulatory agencies sought to clamp down on Uber. In some cities, officials downloaded the app and hailed rides so they could crack down on unlicensed taxi journeys, fining Uber drivers and impounding their cars. Uber offices in dozens of countries were repeatedly raided by authorities.

Against this backdrop, Uber developed sophisticated methods to thwart law enforcement. One was known internally at Uber as a “kill switch.” When an Uber office was raided, executives at the company frantically sent out instructions to IT staff to cut off access to the company’s main data systems, preventing authorities from gathering evidence.

The leaked files suggest the technique, signed off by Uber’s lawyers, was deployed at least 12 times during raids in France, the Netherlands, Belgium, India, Hungary and Romania.⁷

The objective was growth at all costs, even if—as one Uber exec put it—“fires start to burn.” According to this exec, burning fires were nothing to fear. “Embrace the chaos,” he instructed Uber managers. “It means you’re doing something meaningful.”⁸ Mark MacGann—the former senior Uber official who leaked the confidential documents—explained the corporate strategy:

The company approach in these places was essentially to break the law, show how amazing Uber’s service was, and then change the law. My job was to go above the heads of city officials, build relations with the top level of government, and negotiate. It was also to

deal with the fallout.⁹

Uber referred to this fallout—in another colourful characterisation—as “the pyramid of shit.”¹⁰ Throughout Uber’s illegal global rampage, the company treated its drivers as cheap and exploitable labour at best—referring to them as “supply” and “liquidity”¹¹—and cannon fodder to fire in the turf wars with taxi drivers and regulators at worst. As the Canadian Broadcasting Corporation (CBC) reported:

According to a 2015 leaked email from a legal director for Uber in western Europe, the company was particularly concerned that authorities could get access to their list of drivers, making it “much easier for the taxman, regulators and police to terrify our supply” and enforce against it. “If we hand over the driver list, our goose may be cooked,” he added.¹²

Uber denied its drivers employment rights, paid them enough to scale up operations, and then cut pay once driver supply was stable. A slide in a company presentation in Amsterdam succinctly summed up the approach to expansion, saying:

Young city: you are still subsidising your market. Get a real feel for the net fare/hour at which supply scales. Make sure drivers don’t end up making more than they need to stick around.¹³

⁹ Paul Lewis et al., *The Uber Whistleblower: I’m Exposing a System that Sold People a Lie*, *GUARDIAN* (July 11, 2022), <https://www.theguardian.com/news/2022/jul/11/uber-files-whistleblower-lobbyist-mark-macgann>.

¹⁰ Frédéric Zalac, Zach Dubinsky & Paul Émile d’Entremont, *Uber Deliberately Dodged Authorities, Ignored Rules in Early Years, Leaked Documents Show*, *CBC* (July 10, 2022), <https://www.cbc.ca/news/business/uber-ride-hailing-ijic-1.6514563>.

¹¹ Felicity Lawrence, *They Were Taking us for a Ride: How Uber Used Investor Cash to Seduce Drivers*, *GUARDIAN* (July 12, 2022), <https://www.theguardian.com/news/2022/jul/12/they-were-taking-us-for-a-ride-how-uber-used-investor-cash-to-seduce-drivers>.

¹² Frédéric Zalac, *supra* note 10.

¹³ Felicity Lawrence, *supra* note 11. Uber was not alone in this approach; for example, as *Novara Media* reported:

Foodpanda and its major rival, Deliveroo, have imposed fee cuts on delivery workers across Asia, who represent an easy target for economising measures amid rising global costs. But in several countries, workers have fought back. Strikers in Myanmar were inspired by the successes over the last year of their counterparts in Hong Kong and Dubai, who quickly won concessions from delivery companies, including on pay.

Ben Dunant, *In Myanmar, Workers and Activists Take on a Food Delivery Giant*, *NOVARA MEDIA* (Aug. 15, 2022) <https://novaramedia.com/2022/08/15/>

⁶ Davies, *supra* note 3.

⁷ *Id.*

⁸ Jamie Susskind, *Uber Stormed Through an Open Door—Now Politicians Must Change the Locks*, *GUARDIAN* (July 12, 2022), <https://www.theguardian.com/commentisfree/2022/jul/12/uber-politicians-tech-capitalism>.

When confrontations between Uber drivers and taxi drivers turned violent on the streets of Paris, Uber officials warned the then-CEO Travis Kalanick that continuing to encourage the company's drivers to protest would put them at risk. "I think it's worth it," Kalanick responded. "Violence guarantee[s] success."¹⁴

Underpinning Uber's illegal behaviour was a communications and lobbying strategy in which they sought to manipulate politicians, the press, and the public at large. Uber "sold" stock—the value of which was expected to increase dramatically when the company eventually went public—to media companies to buy influence¹⁵ and paid academic economists six figure fees to produce reports on driver earnings which were favourable to Uber.¹⁶

As the author and UK barrister Jamie Susskind wrote:

Of course, Uber is not the first company (and certainly not the first tech company) to seek to use its influence to change the law. More intriguing is the extent to which it was pushing an open door. Uber was welcomed, even feted, in the corridors of power. For a certain type of optimistic politician, Uber embodied the promise of tech-driven social progress. This gleaming platform was the future; boring old regulations were the past.¹⁷

[in-myanmar-workers-and-activists-take-on-a-food-delivery-giant/](#). Similarly, for a first-hand account of how app-based companies deployed such tactics in Bangladesh, and how this led to unionization. The union in Bangladesh is called App-Based Drivers Union of Bangladesh. See e.g., *Thousands of Drivers Unionizing Uber Tech Workers Coalition*, TWC NEWSLETTER (Apr. 12, 2022), <https://news.techworkerscoalition.org/2022/04/12/issue-6/>. In Kenya, drivers brought a legal challenge against Uber. Uber sought to have the case thrown out for being brought against the wrong subsidiary. When that tactic didn't work, it tried to remove the case to arbitration. See Zintie, *Uber Pushes for Arbitration in Fares Dispute with Drivers in Kenya*, ITNEWSAFRICA.COM (May 9, 2022), <https://www.it-newsafrica.com/2022/05/uber-pushes-for-arbitration-in-fares-dispute-with-drivers-in-kenya/>. For an account of how the companies—led by Gojek and Grab—deployed similar tactics in Indonesia, and importantly, how workers fought back, see Karen Hao & Nadine Freischlad, *The Gig Workers Fighting Back Against the Algorithms*, MIT TECH. REV. (Apr. 21, 2022), <https://www.technologyreview.com/2022/04/21/1050381/the-gig-workers-fighting-back-against-the-algorithms/>.

¹⁴ Paul Lewis et al., *The Uber Whistleblower: I'm Exposing a System That Sold People a Lie*, GUARDIAN (July 11, 2022), <https://www.theguardian.com/news/2022/jul/11/uber-files-whistleblower-lobbyist-mark-macgann>.

¹⁵ Felicity Lawrence, *Uber Offered Shares to Media Barons for Political Help, Leak Reveals*, GUARDIAN (July 22, 2022) <https://www.theguardian.com/news/2022/jul/11/uber-offered-shares-to-media-barons-for-political-help-leak-reveals>.

¹⁶ Felicity Lawrence, *Uber Paid Academics Six-Figure Sums for Research to Feed to the Media*, GUARDIAN (July 22, 2022), <https://www.theguardian.com/news/2022/jul/12/uber-paid-academics-six-figure-sums-for-research-to-feed-to-the-media>.

¹⁷ Susskind, *supra* note 8.

One such optimistic politician was Emmanuel Macron—then an economy minister in France's socialist government—who had a cozy text exchange with an Uber exec, telling him he would "personally" look into issues for him.¹⁸ Elements of the Australian Labour Party in New South Wales also appeared enamoured: "In Australia, the opposition always sees us as an opportunity," said Uber execs in one presentation. "We are literally writing a bill for them to look smart."¹⁹ Another optimistic—albeit former—politician fighting Uber's corner was David Plouffe, US President Barack Obama's campaign manager during the historic 2008 presidential campaign. Pesky ethical considerations aside—Plouffe was fined US\$ 90,000 for illegally lobbying Chicago's mayor²⁰—Plouffe was so inspired by Uber's promise that he compared it to the young volunteers who helped elect America's first Black president during the worst economic recession since the Great Depression:

When you walk thru Uber's HQ in San Francisco, the place is pulsating with young, brilliant, and dedicated employees who believe they are part of doing something historic and meaningful.... It's a feeling I've been fortunate to experience previously.²¹

Although the *Uber Files* made for some sensationalist headlines and shown a welcome spotlight on some politicians' backroom dealings with the company, the main thrust of the revelations would not have come as a big surprise to "gig economy" watchers and workers.²² As Jill Hazelbaker, Uber's senior vice-president of public affairs, stated in the company's response to the reporting:

There has been no shortage of reporting on Uber's mistakes prior to 2017. Thousands of stories have been published, multiple books have been written—there's even been a TV series. Five years ago, those mistakes culminated in one of the most infamous reck-

¹⁸ Paul Lewis, *supra* note 14.

¹⁹ Ben Butler, *The Uber Files: Firm Knew it Launched Illegally in Australia, Then Leaned on Governments to Change the Law*, GUARDIAN (July 15, 2022) <https://www.theguardian.com/news/2022/jul/15/the-uber-files-australia-launched-operated-illegally-document-leak>.

²⁰ Stephanie Kirchgaessner, Felicity Lawrence & Johana Bhuiyan, *The Uber Campaign: How Ex-Obama Aides Helped Sell Firm to World*, GUARDIAN (July 10, 2022) <https://www.theguardian.com/news/2022/jul/10/uber-campaign-how-ex-obama-aides-helped-sell-firm-to-world>.

²¹ *Id.*

²² On this point in the UK context, see Alex Marshall, *The world is Rightly Appalled by the Uber Files—the drivers Aren't So Surprised*, GUARDIAN (July 12, 2022), <https://www.theguardian.com/commentisfree/2022/jul/13/uber-files-drivers-rights-union-iwgb>.

onings in the history of corporate America. That reckoning led to an enormous amount of public scrutiny, a number of high-profile lawsuits, multiple government investigations, and the termination of several senior executives.²³



Photo © Solidarity Center / Dmitriy Tikhonov

But, protested Hazelbaker, the company had changed and there was a new sheriff in town. Dara Khosrowshahi replaced Kalanick as CEO and 90% of Uber's current employees joined after that. Khosrowshahi had revamped company values and governance and had moved the corporate strategy from confrontation to collaboration. "We have not and will not make excuses for past behaviour that is clearly not in line with our present values," stated Hazelbaker. "Instead, we ask the public to judge us by what we've done over the last five years and what we will do in the years to come."²⁴

In March 2021, Professor Nicola Kountouris and I wrote a first rough draft of judgment. And—so far as the treatment of workers was concerned—four years on from "one of the most infamous reckonings in the history of corporate America"—there was still plenty of infamy, but very little reckoning. In *The "Gig Economy": Litigating the Cause of Labour*²⁵—part of the International Lawyers As-

sisting Workers Network (ILAW) special report *Taken for a Ride*²⁶—we assessed the strategies "gig economy" companies such as Uber used to deprive their workers of rights. As we wrote:

The starting point for any analysis of employment relationships in the "gig economy" is to recognise that the companies are not neutral actors, simply operating technologically innovative modern businesses, the labourers of which may or may not be entitled to workers' rights. Rather, ...these companies go to extraordinary lengths to construct an impenetrable legal armoury around themselves, requiring workers, unions and/or the state to overcome innumerable hurdles should they wish to impose any employment obligations on the companies acting as "employers." An evaluation of court cases therefore needs to be conducted through this prism, thereby assessing how successful the laws, unions, workers, and states/public authorities have been in overcoming the formidable obstacles placed before them by Silicon Valley's best legal brains.²⁷

The "impenetrable legal armoury" included: treating workers as independent contractors from the get-go, including indemnity clauses in contracts with workers stating that if the worker asserted their rights they would have to pay the company's legal costs, designing complex contractual arrangements whereby the worker purportedly contracted directly with the passenger or client for the provision of transportation or delivery services, claiming that the companies were not transportation companies at all, but rather technology companies, engaging with workers through various subsidiaries and relying on the confusion in order to claim the worker had brought claims against the wrong party, compelling workers to agree to mandatory arbitration (with large upfront costs) as the only method of resolving legal disputes with the companies, including contractual provisions which purported to make the contracts subject to Dutch law, ignoring laws designed to target them, and seeking to change laws they did not like.²⁸

The essence of the "gig economy" employer strategy is that by using so many different tactics to defeat their

²³ Jill Hazelbaker, *We Will Not Make Excuses: Uber Responds to Uber Files Leak*, GUARDIAN (July 10, 2022), <https://www.theguardian.com/news/2022/jul/10/uber-response-uber-files-leak>.

²⁴ *Id.*

²⁵ Jason Moyer-Lee & Nicola Kountouris, *The "Gig Economy": Litigating the Cause of Labour* in ILAW: International Lawyers Assisting Workers Network, *TAKEN FOR A RIDE: LITIGATING THE DIGITAL PLATFORM MODEL* at 10 (2021) [hereinafter Moyer-Lee & Kountouris, *Litigating the Cause of Labor*],

<https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf>.

²⁶ *Id.* at 10.

²⁷ *Id.*

²⁸ *Id.* at 25.

workers' quest for rights, the companies enhanced their chances of prevailing. Underpinning these often unlawful tactics is an utter lack of integrity. For example, while routinely asserting in both contracts and public communications that Uber drivers and riders are categorically not employees, when threatened with the certification of a class action in Ontario, Canada, Uber instead argued that each individual driver/ride's situation had to be determined on its own facts. As the Ontario Superior Court of Justice summarized it:

Uber argues, however, that whatever may be the relationship between Uber users and Uber, there is no basis [in] fact for a finding that there is commonality across the putative Class Members. Uber argues that whatever relationship it has or had with the 366,359 putative Class Members is intrinsically, inherently, and fundamentally idiosyncratic. Uber submits that however the relationship might be classified, the classification would have to be determined on an individual case-by-case basis. Uber therefore submits that there are no common issues and that the common issues and the preferable procedure criteria for certification cannot be satisfied.²⁹

Although we reviewed plenty of cases in which the companies successfully deployed these tactics to defeat workers' claims—in particular, although not solely—in the United States, there appeared to be a general trend towards courts recognizing that “gig economy” workers were indeed workers, and as such, entitled to rights.

To be sure, Uber is not the sole perpetrator of the employer assault on “gig economy” workers' rights; the company merely leads the pack of avaricious wolves. If Uber may have a more sophisticated marketing machine, higher-priced lawyers, and more creative contracts, the denial of rights by a smaller competitor is no less serious for the worker whose rights are being denied. As a group of couriers working for Pedidos Ya argued before a Chilean Labour Court:

[W]hat the... company does not say, is that a large part of its activity is sustained by the work of thousands and thousands of workers, such as the plaintiffs, to whom the company denies their status as dependent and subordinate workers and as such drags them

into the most absolute precariousness.³⁰

And although the principal problem, the denial of workers' employment status is not the sole issue when it comes to the exploitation of these workers. The denial of decent wages³¹ and working hours,³² unfair dismiss-

³⁰ 1° Juzgado de Letras del Trabajo de Santiago, 17 mayo 2022, “Eduardo Jose Estrada y Otros v. Pedidos Ya Chile SPA,” Rit N° T-980-2020. Author's translation from Spanish.

³¹ For example, in Australia, where Menulog (a subsidiary of Just Eat) has trialed recognizing some of its couriers as employees, but has fought (thus far unsuccessfully) for the right to pay them a lower wage than would otherwise be required by the relevant Modern Award (i.e., the industry-specific minimum wage and employment conditions regime in Australia). See also *Menulog Pty Ltd* [2021] FWCFB 4053, *Menulog Pty Ltd* [2021] FWCFB 5227, *Menulog Pty Ltd* [2022] FWCFB 5, and *Transport Workers Union of Australia (TWU), Menulog Riders Win Minimum Rights and Protections for the First Time*, TRANS. WORKERS' UNION (Jan. 28, 2022), <https://www.twu.com.au/press/menulog-riders-win-minimum-rights-and-protections-for-the-first-time/>.

³² For example, and again in Australia, the *Sydney Morning Herald* reported on the findings of an audit from the New South Wales Point to Point Transport Commissioner:

Figures from the audit documents show some drivers are working extensive hours on the platform, including a small percentage who are on the road for 17 hours a day. A sample of more than 11,000 shifts found 26 per cent of drivers had completed shifts of 12 to 13 hours. That includes time off the Uber platform, but the audit documents note that “79 per cent of offline times are for less than 30 minutes and drivers are generally driving in their vehicle during the offline time”, suggesting they are driving for other apps or doing personal trips.

A separate sample of 31,828 drivers and their trip data showed 2189 were driving for Uber for at least 30 consecutive days while 458 of those drove 61 consecutive days — the entire tested period.

Nick Bonyhady, *Under Immense Pressure: Uber Allowed Drivers to Work 61 days in a Row*, SYDNEY MORNING HERALD (Feb. 16, 2022) <https://www.smh.com.au/technology/under-immense-pressure-uber-allowed-drivers-to-work-61-days-in-a-row-20220214-p59w9m.html>.

Similarly, National Public Radio (NPR) in the United States reported on a Chinese High Court ruling concerning “gig economy” working time:

One case highlighted in the high court's recent decision revolves around a man named Zhang. He was hired by a courier company last summer, working from 9 a.m. to 9 p.m. six days a week — the schedule that has become notorious under the shorthand “996” label.

Under Chinese law, monthly overtime totals are essentially limited to 36 hours. Zhang refused to work illegal amounts of overtime — as dictated by his schedule — and was fired. The courier company said Zhang failed to fulfill the requirements of his probation period. But he disagreed, and an arbitration panel ordered his former employer to pay him a month's salary of 8,000 yuan (about \$1,237).

The high court affirmed that decision last week, saying that Zhang had been fired illegally and that the company's work policies run afoul of the law.

²⁹ *Heller v. Uber Technologies Inc.*, 1999 CanLII ONSC 5518, para. 189 (Can. Ont.), <https://canlii.ca/t/jhj5q>.

als,³³ and some union busting to boot,³⁴ are all part and parcel of the *modus operandi*. Employment status is not the height of worker aspiration; it is rather the floor below which one falls into the depths of exploitative hell. Indeed, the exploitation of workers is systematic across the sector and inherent in the business models adopted by the companies. As the Indian Federation of App-Based Transport Workers (IFAT) urged on India's Supreme Court:

In fact, the status of App-based workers, today is that of forced/bonded labour. It is submitted, that a review of the contracts executed by App-based workers with [app-based employers], the never-ending debt cycles, and the conditions of work, the complete absence of a meaningful dispute redressal mechanism, and the abdication of the State from providing any semblance of a safety net, will make it more than evident that the gig economy is turning out to be a modern form of slavery.³⁵

The workers the companies exploit are predominantly people of colour and often immigrants—in the Global North, disproportionately so. For example, in London, England, the near entirety of private hire drivers (such as those who work for Uber) are people of colour.³⁶ In the

United States, as the Federal Trade Commission (FTC) has reported: “30% of Latino adults, 20% of Black adults, and 19% of Asian adults report having engaged in gig work, compared to only 12% of White adults.”³⁷ Similarly, in the US, about 50% of Uber's delivery personnel,³⁸ and 69% of Lyft's workforce,³⁹ are people of colour. In France, Uber Eats recently deactivated 2,500 workers' accounts, many of which because the workers were undocumented immigrants (from whose labour the company was previously seemingly happy to benefit).⁴⁰ As Lorena Gonzalez—the California Assemblywoman who sponsored AB 5, that state's landmark employment status law (more on which below)—told Professor Veena Dubal:

The gig companies strategically recruit drivers who are from working class, communities of color. They [seek] out vulnerable workers who would be caught in a continual cycle of desperation and need for immediate cash. [They try to] ensure that these drivers—who are overwhelmingly Black and brown—are relegated to a permanent underclass of workers who make less than minimum wage without any actual benefits.⁴¹

“Employment status is not the height of worker aspiration; it is rather the floor below which one falls into the depths of exploitative hell.”

Bill Chappell, *Employers Can't Require People To Work 72 Hours A Week, China's High Court Says*, NPR (Aug. 20, 2021), <https://www.npr.org/2021/08/30/1032458104/12-hour-6-day-996-work-schedule-illegal-china-deaths-tech-industry>.

³³ For example, the Philippine National Labor Relations Commission (NLRC) recently ruled that Foodpanda had illegally dismissed a group of couriers. Grace Cantal-Albasin, *NLRC Orders Foodpanda to Pay 7 Dismissed Delivery Riders in Davao*, RAPPLER (July 29, 2022), <https://www.rappler.com/nation/mindanao/national-labor-relations-commission-orders-foodpanda-pay-dismissed-delivery-riders-davao/>. Similarly, Uber drivers in British Columbia, Canada, filed a labor complaint with the province's Labour Relations Board, alleging they had been “fired after alleged conflicts with passengers refusing to follow COVID-19 safety rules.” See Jon Hernandez, *B.C. Uber Drivers Say They Were Fired for Refusing Unsafe Work, File Labour Complaint*, CBC (Oct. 8, 2021), <https://www.cbc.ca/news/canada/british-columbia/b-c-uber-drivers-say-they-were-fired-for-refusing-unsafe-work-file-labour-complaint-1.6203671>.

³⁴ For example, in the case of a Just Eat subsidiary in Israel, see Netherlands Nat'l Contact Point for the OECD Guidelines for Multinational Enterprises, INITIAL ASSESSMENT OF THE NOTIFICATION OF THE FNV VS JUST EAT TAKEAWAY.COM (2021). In another example, in Germany, delivery company Gorillas dismissed 350 drivers with no notice after workers went on strike. See Sophie Deistler, *Gorillas Allowed to Dismiss Striking Employees*, S MAGAZINE (Apr. 8, 2022), <https://www.startbase.com/news/gorillas-durfte-streikende-mitarbeitende-entlassen/>.

³⁵ Writ Petition at 50, *Indian Fed. of App-Based Workers (IFAT) v. Union of India*, No. 1068/2021 (Dec. 13, 2021 Sup. Ct.) (India).

³⁶ Jason Moyer-Lee, *It's Time for the UK government to Hear the Plight of Gig Workers*, AL JAZEERA (Nov. 26, 2020), <https://www.aljazeera.com/opinions/2020/11/26/gig-economy-uk>. Also, see the discrimination case

As the companies have spun so many other aspects of their exploitative practices, so they have spun the issue of race. Akin to gun manufacturers arguing that firearms are good for safety or cigarette companies arguing smoking is good for health, the “gig economy” companies have sought to portray their exploitation of brown and Black

brought by the Independent Workers Union of Great Britain (IWGB), which (unsuccessfully) argued that a congestion charge applied to the predominantly ethnic minority private hire sector, but not applied to the predominantly white taxi sector, constituted unlawful discrimination. *IWGB v. Mayor of London & Anor* [2020] EWCA Civ 1046.

³⁷ Federal Trade Comm., POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK (2022)[hereinafter FTC Policy Statement], <https://www.ftc.gov/legal-library/browse/policy-statement-enforcement-related-gig-work>.

³⁸ *Id.*

³⁹ Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL'Y REV. 511, 515 (2021)[hereinafter Dubal, *New Racial Wage Code*].

⁴⁰ *Le Gouvernement Interpellé pour Simplifier la Régularisation des Travailleurs Sans-Papiers des Plateformes*, LE FIGARO (Sept. 20, 2022), <https://www.lefigaro.fr/flash-eco/le-gouvernement-interpelle-pour-simplifier-la-regularisation-des-travailleurs-sans-papiers-des-plateformes-20220920>.

⁴¹ Dubal, *New Racial Wage Code*, *supra* note 39, at 529.

workers as examples of their antiracism; providing work opportunities for people who otherwise wouldn't have them.⁴² As Professor Dubal wrote of "gig economy" companies' efforts to deprive their workers of employment status through laws like Proposition 22 in California⁴³ (more on which below):

As platform companies and their funders attempt to spread this model of work to other sectors and the third category to other states, we must conceptualize these corporate efforts not only as broad attacks on economic security, but also as the insidious development of empires of capital upon the bodies of subordinated racial minorities.⁴⁴

Luckily, workers and their advocates are not keeping mum. As Professor Kountouris and I emphasised in *Litigating the Cause of Labour*, trade unions have been at the forefront of the pushback on the "gig economy" business model, through both campaigning and litigating. Indeed, just in the last year and a half since ILAW published *Taken for a Ride*, scores of employment status cases have been decided in different countries and—largely in reaction to the growing mass of litigation—workers and companies have pushed for legislation around the world to enhance or eliminate rights, respectively. If the analysis in *Taken for a Ride* focused on the detail of employer legal tactics and how courts grappled with these, the present analysis

⁴² As Professor Dubal put it:

The labour platform worker became identifiable as an economically struggling person of color, but the structures that created and sustained the economic struggle and racialized marginality disappeared in the process. Gig work, in this depiction, became a solution, rather than a source of the problem.

Id. at 537. The companies were supported in these endeavors by some racial justice organizations and activists who bought into the narrative, often after receiving financial support of some form from the companies. *Id.* See also *Episode 143: PR and Prop 22—How Silicon Valley Uses Hollow "Anti-Racist" Posturing to Sell Its Exploitative Business Model*, CITATIONS NEEDED (Sept 15, 2021) <https://citationsneeded.medium.com/episode-143-pr-and-prop-22-how-silicon-valley-uses-hollow-anti-racist-posturing-to-sell-its-d5b00f8b276c>. On the particular example of the California NAACP President—who publicly backed the Prop. 22 campaign—receiving over US\$ 1 million for her consulting firm from corporate interests looking for backing on different propositions. See Laurel Rosenhall, *California NAACP President Aids Corporate Prop Campaigns—Collects \$1.2 Million and Counting*, CAL MATTERS (Sept. 25, 2020), <https://calmatters.org/politics/2020/09/california-naacp-president-helps-corporate-ballot-measure-campaigns/>.

⁴³ Efforts which (re)produce and are made possible by racial subjugation. Dubal, *New Racial Wage Code*, *supra* note 39, at 518.

⁴⁴ *Id.* See also Laurel Rosenhall, *California NAACP President Aids Corporate Prop Campaigns—Collects \$1.2 Million and Counting*, CAL MATTERS (Sept. 25, 2020), <https://calmatters.org/politics/2020/09/california-naacp-president-helps-corporate-ballot-measure-campaigns/>.

takes as given that "gig economy" employers will pull every stop to defeat employment claims and that the reader is so aware. Our concern for present purposes is with the role of the judiciary and the legislator. In the next section we will discuss developments—both positive and negative—in how courts have construed employment relationships in the "gig economy." The following section will discuss legislative efforts, with a particular focus on employment definitions and sector-specific rights. We will then turn to the issue of enforcement and will follow with a conclusion.

CASE LAW DEVELOPMENTS: THE GOOD, THE BAD, AND THE UGLY

Prior to the publication of *Taken for a Ride*, the apex courts in several countries in western Europe had decided cases in favour of "gig economy" workers. For example, in Spain the Supreme Court (Social Chamber) held that a Glovo food delivery courier was an employee,⁴⁵ the UK Supreme Court held⁴⁶ Uber drivers were "limb b workers,"⁴⁷ the French Supreme Court of Cassation held that both a Take Eat Easy courier⁴⁸ and an Uber driver⁴⁹ were employees, and the Italian Court of Cassation held that Foodora couriers were entitled to employee-like protections.⁵⁰ Similarly, a number of cases in Latin America had been decided in favour of workers. The Court of Appeal of Concepción in Chile upheld a ruling⁵¹ that a Pedidos Ya courier was an employee, as did the Uruguayan Labour Court of Appeals in the case of an Uber driver.⁵² Underlying many of these decisions was the recognition of the

⁴⁵ STS, Sept. 25, 2020 (No. 2924/2020), ECLI: ES:TS:2020:2924 (Spain).

⁴⁶ *Uber B.V. & Ors v. Aslam & Ors* [2021] UKSC 5.

⁴⁷ An intermediate category in UK law between independent contractors and employees. For a discussion on limb b worker status, see Jason Moyer-Lee, *Taming the Beast: Making the "Gig Economy" Work for Workers* 86-107 (2021) (Australian Senate Select Committee on Job Security: Submission 229. Report commissioned by the International Transport Workers' Federation (ITF)), <https://www.aph.gov.au/DocumentStore.ashx?id=32cfc97b-7b83-4ef3-9b5c-77ff56a2d20c&subId=719560>.

⁴⁸ Cour de cassation (Cass.), soc., Nov. 28, 2018, n. 2018/1737, ECLI:FR:CCASS:2018:SO01737 (Fr.), <https://www.legifrance.gouv.fr/juri/id/JURITEXT000037787075/>.

⁴⁹ Cour de cassation (Cass.), soc., n. 2020/374, Mar. 4 2020, ECLI:FR:CCASS:2020:SO00374 (Fr.), <https://www.legifrance.gouv.fr/juri/id/JURITEXT000042025162?isSuggest=true>.

⁵⁰ Cass., sez. lavoro, 24 gennaio 2020, n. 1663/2020 (It.), https://www.lavorodirittieuropa.it/images/Cassazione_Foodora-.pdf.

⁵¹ Corte de Apelaciones de Concepción (C. Apel.), 15 enero 2022, "Arredondo Montoya v. Pedidos Ya Chile SPA," Rol N° 395-2020 (Chile), <https://www.diarioconstitucional.cl/wp-content/uploads/2021/01/6.1-ICA-DE-CONCEPCION-ROL-N%C2%B0395-2020.pdf>.

⁵² Recursos Tribunal Colegiado Montevideo, Queimada, Estaban c/Uber B.V. y otro, 3 junio 2020, IUE No: 0002-003894/2019, https://www.ilawnetwork.com/wp-content/uploads/2021/01/sent-2daInst_03-06-20_laboral_uber.pdf.

asymmetrical bargaining power between “gig economy” workers and their putative employers (more on which below), as well as the primacy of facts and substance over written contracts and form (more on which below).

This case law review does not purport to cover every single “gig economy”-related legal case from the past year and a half. Our main focus instead is on cases related to employment status;⁵³ but even within that category we must be selective.⁵⁴ We shall draw from these to illustrate examples of positive developments, setbacks, and dangerous jurisprudential approaches—i.e., the good, the bad, and the ugly.

The Good. The cases which post-date *Taken for a Ride*, and which were reviewed for this essay, suggest a general continuation of the positive trend in Western Europe and Latin America. For example, in two different cases Switzerland’s apex court considered the employment status of Uber drivers⁵⁵ and couriers⁵⁶ and held that both were employees. Similarly, the Court of Appeal of England and Wales upheld a decision that Stuart couriers were limb b workers,⁵⁷ and appellate courts in Uruguay have upheld

decisions that Uber drivers were employees.⁵⁸ The first subsection of our case law review will zoom in on some of these cases in which the judges adopted a novel or particularly helpful approach to determining “gig economy” workers’ employment status.

The Bad. Things have been much less rosy in Australia, where in a series of cases, the country’s apex court overhauled what many believed to be the judiciary’s approach to construing employment relationships. Notably, the court showed no interest whatsoever in the asymmetrical bargaining power, which characterises the employment relationship, preferring to limit its analysis to the written contract between the putative employee and putative employer, even if it was written by the latter and imposed on the former without any negotiation. The second subsection of the case law review will discuss the implications of these decisions. We will also briefly discuss the principal blemish on the UK courts otherwise good record in the field: substitution clauses.

⁵³ “Gig economy” cases which are excluded from the scope of this review include those which go more to licensing regimes and the ability of the companies to operate, rather than strictly to matters of workers’ rights. For example, in the case of *R (on the application of United Trade Action Group Limited) v. Transport for London* [2021] EWHC 3290 (Admin), the High Court of England and Wales held that Uber and other “private hire operators” (to adopt the regulatory terminology) had to amend their terms to make clear that when a passenger ordered an Uber, the person was entering into a contract with Uber—and not the driver—for the provision of such service. This was required by the Private Hire Vehicles (London) Act 1998. In a similar vein, the decision of the Court of Appeal of Brussels to ban Uber in the Belgian (and EU) capital. See Jean-Pierre Stroobants, *VTC: La Cour d’Appel Bannit Uber de Bruxelles*, LE MONDE (Nov. 25, 2021), https://www.lemonde.fr/economie/article/2021/11/25/vtc-la-cour-d-appel-bannit-uber-de-bruxelles_6103583_3234.html. related legal challenge by Uber. See Joy Belga Azar, *Uber Saisit le Conseil d’État pour les Chauffeurs sous Licences Flamandes et Wallonnes à Bruxelles*, VRT (Feb. 3, 2022), <https://www.vrt.be/vrtnws/fr/2022/02/03/uber-saisit-le-conseil-d-etat-pour-les-chauffeurs-sous-licences/> (related legal challenge by Uber).

⁵⁴ For example, Christina Hiessl in her 2021 report prepared for the European Commission, presents a review of 175 judgements and administrative decisions, and her analysis was restricted to just 15 European countries. Christina Hiessl, *Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions*, COMPAR. LAB. L & POL’Y J. (May 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839603.

⁵⁵ 2C_34/2021, du 30 mai 2022.

⁵⁶ 2C_575/2020, du 30 mai 2022.

⁵⁷ *Stuart Delivery Ltd v. Warren Augustine* [2021] EWCA Civ 1514. Although note that in the UK, there have been two cases since *Uber* which have raised an eyebrow or two. In *Johnson v. Transopco UK Ltd* [2022] EAT 6, the Employment Appeal Tribunal (EAT) held that a taxi driver who accepted jobs from the Mytaxi App was not a limb b worker. Although the app was in many ways similar to Uber, the regulatory regime to which the claimant was subject was distinct. The claimant was a taxi

driver, whereas those who work for Uber are private hire drivers. In the second case, *Commissioners for HMRC v. Atholl House Productions Limited* [2022] EWCA Civ 501, the Court of Appeal of England and Wales had to consider whether the terms of a contract between a client and a personal services company would be—for tax purposes—an employment contract had it been made between the client and the person (rather than the person’s company). Richards LJ—with whom the other two Lord Justices agreed—held that the approach of *Uber* and the earlier UK Supreme Court case of *Autoclenz Limited v. Belcher & Ors* [2011] UKSC 41 were inapplicable:

The Supreme Court’s decision in *Uber* raises as a threshold issue whether it is, in the very different context of the present case, permissible to apply the approach adopted in *Autoclenz* and *Uber*. It is common ground that whether the individual (Ms Adams in this case) would be “regarded for income tax purposes as an employee of the client” (the BBC in this case) under section 49 of ITEPA is to be determined by the application of the common law tests of employment. Both sides agreed that the statutory context gave no special meaning to the term “employee.” This is not therefore a case which raises any issue of statutory construction of a term such as “worker” which is to be understood in the context of the purpose of the legislation and the need to ensure that such purpose is not defeated by the way the relevant contract is drafted. The justification, as analysed and identified by the Supreme Court in *Uber*, for the application of the approach approved in *Autoclenz* is entirely absent in the present case. In those circumstances, it follows in my judgment that it is not legitimate to apply the *Autoclenz* approach.

Commissioners for HMRC v. Atholl House Productions Limited [2022] EWCA Civ 501, 156.

⁵⁸ See, e.g., ___ c/Uber Technologies Uruguay S.A. y otro – Proceso Laboral Ordinario (Ley 18.572), Sentencia: 131/2022 [Hereinafter Uruguay Uber Technologies Sentencia: 131/2022] and ___ c/Uber Technologies Uruguay S.A. y otro – Proceso Laboral Ordinario (Ley 18.572), Sentencia: 151/2022 [hereinafter Uruguay Uber Technologies Sentencia: 151/2022].



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The Ugly. In the United States, a shockingly high number of “gig economy” workers never get their day in court as this is the one country where courts have largely enforced the company’s mandatory arbitration clauses. This final subsection will discuss the US courts’ approach to these clauses and how it has deprived “gig economy” workers of justice.

THE GOOD...

Essential to the task of construing an employment relationship between a worker desirous of rights and a putative employer intent on denying them, is to focus on the reality of how the work was carried out, and not just on the picture painted by contracts the companies drafted. This approach is succinctly summed up in one of the Uruguayan Labour Appeals Court Uber decisions:

To determine in a specific case if those who provide their work have decided to exclude themselves from the protection of labor law, neither the labels nor the agreed form are enough. One must focus on the execution of the relationship, that is, on how the parties really behaved during the development of the relationship, to deduce if the verifying elements of dependent work occurred in fact, applying the principle of primacy of reality.⁵⁹

⁵⁹ *Id.* (author’s translation from Spanish). Similarly, the Swiss Federal Tribunal—that country’s apex court—stated in the Uber drivers’ case, summarizing its own jurisprudence:

The formal criteria, such as the title of the contract, the declarations of the parties or the deductions for social insurance, are not decisive. Rather, it is necessary to

Having established that these cases look to the reality of the relationship rather than to the fiction of the written contract, the next question is for what exactly the courts are looking. Much has been made in policy debates about the precise wording of definitions of the term “employee” and the criteria which the definitions take into account when judges construe them. As will be discussed below, definitions and criteria are of course relevant. As we pointed out in the analysis for *Taken for a Ride*, although “gig economy” employers had tended to fare better when confronted with the relatively narrow common law definitions of employee in the Anglo-Saxon tradition, they had a more difficult time evading the scope of broader statutory definitions. The UK provides an interesting example of this as employment law there provides for both the common-law derived notion of “employee” as well as the broader statutory construct of “limb b worker.” While both categories require that the worker provide personal service pursuant to a contract with the employer, when it comes to employees courts place heavy emphasis on the extent of employer control⁶⁰ whereas for limb b workers the inquiry is more concerned with whether or not the worker is in business on their own account.⁶¹ The mer-

take account of material criteria concerning the way in which work is actually carried out, such as the degree of freedom in the organization of work and time, the existence or not of an obligation to account for the activity and/or to follow instructions, or even the identification of the party which bears the economic risk[.]

2C_34/2021, ¶ 9.2, du 30 mai 2022. Author’s translation from French. Citations omitted. The Argentinean Labour Court stressed a similar point in *Bolzan Jose Luis c/ Minieri Saint Beat Guillermo Mariano y Otros s/ Despido*, Sentencia Definitiva No. 39351, saying the employment contract is a “reality contract.” And a Labour Tribunal in Mexico came to similar conclusions, appealing to article 17 of the Mexican Constitution, article 841 of the Federal Employment Law, and paragraph 9 of the International Labour Organization’s Recommendation 198 on the employment relationship. Sentencia Definitiva No. 637/2021 at [62]-[63].

⁶⁰ See, e.g., *Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance* [1968] 2 QB 497.

⁶¹ See, e.g., *Clyde & Co LLP & Anor v. Bates van Winkelhof* [2014] UKSC 32. Although note that in Ontario, Canada the employee-independent contractor divide also hinges to a large extent on whether or not the worker is in business on their own account. As the Supreme Court of Canada stated in the case of *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983 at [47]:

Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker’s activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the

its of broad statutory definitions is a matter to which we shall turn our attention below in the section on legislation. However, for present purposes, we are interested in instances of innovative construction of traditional indicia of employment, such as control, subordination, and the matter of who supplies the “tools of the trade.” Think of it as filling old bottles with new wine, or better yet, champagne.

“The ‘gig economy’ employer crowd commonly assert that their workers cannot be employees because they choose when to work, what jobs to accept, and suffer no consequences for cancelling jobs.”

Subordination and Control

The “gig economy” employer crowd commonly assert that their workers cannot be employees because they choose when to work, what jobs to accept, and suffer no consequences for cancelling jobs. While this is commonly an exaggeration and at times patently untrue, it is true that the control to which these companies subject their workers typically differs from that which we might associate with office or factory employees.⁶² The Court of

degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

(Internal citations omitted.)

⁶² An example of this control can be seen in how Uber uses incentives in Ontario, Canada to nudge drivers and riders into performing their jobs the way Uber wants them to. The Ontario Superior Court of Justice summarized this in the case of *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518 at [103(c)-(d)] (footnotes omitted):

The “Uber Pro” and the “Uber Eats Pro” programs offer perks to Drivers and Delivery People who drive more frequently, drive during Uber's preferred times, and maintain high ratings and low cancellation rates. Through Uber Pro, Drivers earn points for providing

services at certain times or in certain places determined by Uber. As they accumulate points, they can increase their “status” in the program and earn benefits, including: (a) “Airport Priority Rematch”, which gives Drivers a better chance for a quick pickup at an airport terminal after dropping off a Rider at the airport; (b) “Trip Duration and Direction”, which allows Drivers to view the estimated duration and direction of all Ride requests before accepting; (c) discounted car and bicycle maintenance; (d) discounted tax preparation; and (e) Monogram discounts.

Other examples of financial incentives that Uber offers

Amsterdam—in a case concerning whether Uber drivers were employees, so as to be covered by the relevant sectoral collective bargaining agreement—did a particularly good job of discussing this issue:

26. In today's technology-dominated age, the criterion of “authority” has taken on a more indirect (often digital) monitoring function that deviates from the classical model. Employees have become more independent and conduct their work at more variable (self-chosen) times. It is judged that the relationship between Uber and the drivers involves this “modern relationship of authority.” The following applies by way of explanation.

27. The drivers can only register with Uber through the Uber app. The conditions under which they can start using the Uber app are non-negotiable; they must first fully accept all conditions in order to be able to provide taxi rides by way of the app. Uber unilaterally determines the terms under which the drivers work, which Uber can also unilaterally change. This happens frequently. The drivers cannot reject these changes; if they are to continue driving through the Uber app, they must accept the changed conditions before they can log in again.

28. The algorithm of the Uber app then determines how the rides are allocated and prioritized. It does this on the basis of the priorities set by Uber. As explained by Uber at the hearing, when a ride is offered, Uber provides a limited amount of data, so that the driver cannot accept only those rides most advantageous for him. The Uber app determines which driver is to be offered a ride (first). A route is recommended on which the fare indicated to the customer is based. The drivers have no influence on that price, as Uber sets the fares. Although the customer and the drivers can mutually agree to adjust the fare by taking a route other than the one proposed, there is no question of free negotiation between passenger and driver. After

or has offered to Drivers and Delivery People are: (a) providing referral codes that give Drivers a financial incentive to recruit other Drivers; (b) providing additional compensation for completing a certain number of rides in a given week; and (c) promotions for completing trips overnight in rural areas.

all, it is very unlikely that a passenger will agree to a different route if this results in a higher fare.

29. The Uber app also has a disciplinary effect. After all, the drivers are given a rating via the Uber app and are therefore assessed, which may affect access to the Uber platform and the rides offered. A low average rating can result in removal from the platform, while a high average rating is an important criterion to qualify for the extra Platinum or Diamond status with Uber, which yields (financial) benefits for the driver. For example, a driver with a Platinum or Diamond status will be first to be offered the financially attractive rides from Schiphol Airport.

30. Furthermore, at the hearing it was stated on behalf of Uber that Uber—to put it simply—can “control the buttons of the app” and change the settings. This change affects the ranks to be achieved by the drivers and, in connection with this, the rides offered. As a result, the entrepreneurial freedom so argued by Uber is essentially absent.

31. Although Uber emphasises that a driver may cancel an *already accepted ride* at all times, the frequent cancellation of rides will lead to exclusion from the use of the Uber app. Rejecting an *offered ride* three times also means that the driver is logged out of the system and therefore no longer offered rides until he is logged in again. Uber has argued that its system will not function properly if rides are repeatedly declined. Nonetheless, it is Uber that determines through the algorithm whether and when a driver is logged out and allowed to log in again.

32. Finally, it is Uber that decides unilaterally about a possible solution in the event of customer complaints, including adjustment of the agreed fare. The driver can object to this, but the final decision rests with Uber.

33. In this way, the algorithm acts as a financial incentive and has a disciplining and instructing effect. The fact that the drivers—to a certain extent—are free to refuse a ride, determine their own hours, and use different apps or other booking systems at the

same time does not change this. Once they use the Uber app and are logged in for this purpose, they are subject to the operation of the algorithm designed by Uber and are therefore subject to Uber’s “modern employer authority.”^{63 64}

A similar assessment was upheld by the Swiss Federal Tribunal in two cases against Uber,⁶⁵ as well as by the ruling of an Uruguayan Labour Appeals Court against Uber.⁶⁶

⁶³ Rb. Ams. 13 september 2021, ECLI:NL:RBAMS:2021:5029 (Federatie Nederlandse Vakbeweging/Uber B.V at 26-33 (Neth.). Note that the Dutch courts have similarly found Deliveroo riders to be employees. The matter is—at the time of writing—pending before that country’s Supreme Court. Notably, the Advocate General De Bock submitted an advisory opinion saying the lower courts were correct to have found an employment relationship. Phr 17 juni 2022, ECLI:NL:PHR:2022:578 (Deliveroo/FNV). See also Stefan Sagel & Irina Timp, (2022). *Deliveroo Riders in Netherlands Are Employees, According to Advocate General*, DEBRAUW BLACKSTONE WESTBROEK (June 20, 2022), <https://www.debrauw.com/articles/deliveroo-riders-in-netherlands-are-employees-according-to-advocate-general>.

⁶⁴ This passage is reminiscent of the UK Supreme Court in *Uber BV & Ors v. Aslam & Ors* [2021] UKSC 5 at [101] (discussed in Moyer-Lee & Kountouris, *Litigating the Cause of Labor*, *supra* note 25, at 25). The exact opposite approach can be seen in the decision of a Chilean Labour Court in a case brought against courier firm Pedidos Ya: Eduardo Jose Estrada y Otros v. Pedidos Ya Chile SPA, Rit N° T-980-2020. The Seoul Administrative Court in South Korea also appears to have taken the opposite approach in a case concerning the employment status of private hire drivers working for Tada. See *Seoul Court Rules Ride-Hailing Drivers Are Not Workers*, ECONOTIMES.COM (July 12, 2022), <https://www.econotimes.com/Seoul-court-rules-ride-hailing-drivers-are-not-workers-1637342>.

⁶⁵ See 2C_34/2021, du 30 mai 2022 at [10.2], *supra* note 55 at 10.2 (drivers). 2C_575/2020, du 30 mai 2022 *supra*, note 56 (couriers). Notably, the latter case upheld the May 29, 2020 decision of the Court of Justice of Geneva, which held the following:

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...

Bundesgericht [BGer] May 30, 2022, 2C_575/2020, at ¶ 9(a) (Uber Switzerland GmbH/Office Cantonal de l’Emploi) (Switz.). Translation from French taken from *Taming the Beast*, *supra* note 47, at 118. For a detailed discussion of the Geneva Uber Eats case, see *Id.* at 107-123.

⁶⁶ Uruguay Uber Technologies Sentencia: 151/2022, *supra* note 58. In this case the Court stated that the liberty of the worker to turn on the app at will was “irrelevant because when distinguishing between independent and subordinate work, the focus must be on when the work is performed.” (Author’s translation.) Although this point did not prove decisive, the Full Bench of the Fair Work Commission in Australia took the exact opposite approach in *Deliveroo Australia Pty Ltd v. Diego Franco* [2022] FWCFB 156 at [45]:

...it is difficult to reconcile clause 2.3 with any conven-

The Paris Court of Appeals in France also stressed the extent to which Uber organized the activity into which the driver was inserted, as an example of subordination:

Without being able to freely decide how to organize his activity, to seek customers or to choose his suppliers, Mr. X Y has thus formed part of a transport service created and entirely organized by Uber, which only exists thanks to this platform; a transport service through which he does not constitute his own clientele, does not freely set his rates nor the conditions under which the transport service is provided, [all of] which are entirely governed by Uber.⁶⁷

As one Argentine Labour Court put it:

...it's logical that a company applies sanctions when the worker avoids work assignments; what's unreasonable is that [the company] exercises its disciplinary power and, at the same time, denies its status as an employer.⁶⁸

tionally-understood notion of casual employment. Clause 2.3 provides that it is up to Mr Franco as to whether, when and where he logs in or provides services, and that the Deliveroo Rider App enables him to log in and offer to provide services at any time and in any area where Deliveroo anticipates a need for riders. Casual employment usually operates on the basis that the putative employer, at its discretion, offers work at a particular time and place, and the worker may accept or reject this offer as they please. The employer thus has control over the parameters of the work that is offered. However, clause 2.3 goes somewhat further than this: Mr Franco has the right to elect not only when but *where* he chooses to work, and Deliveroo may offer work within the parameters thus determined by Mr Franco. This constitutes a reversal of an element of control, albeit limited, which is normally associated with casual employment. ...

⁶⁷ Cours d'appel de Paris (CA Paris), pole 6 – ch. 2, 16 sept. 2021, n 20/04929. Author's translation from French.

⁶⁸ Scornavache Victor Nicolas c/ Minieri Saint Beat Guillermo Mariano y Otro s/ Despido. Expte N° 34.176/2019, Sentencia Definitiva N° 7248. Author's translation from Spanish. Although, note that an employer's right to control does not always necessitate a correlative power to sanction. As Lady Justice Elisabeth Laing DBE put the point simply in the UK case of *The Commissioner for HMRC v. Professional Game Match Officials Limited* [2021] EWCA Civ 1370 (at [130]):

[The lower court's] formulation assumes, wrongly, in my judgment, that a contractual obligation is only enforceable if the employer has an effective sanction in relation to it. A contractual obligation is by its very nature enforceable, if necessary, by legal action, whether or not the contract enables the employer to apply a sanction for its breach.

Tools of the Trade

Surely these workers can't be employees, argue the "gig economy" employers, because they provide their own cars, mopeds, and bikes! What employee provides the tools of their trade? Well, are those vehicles the most important tools of the "gig economy" trade? Not really, some courts have said. The Uruguayan Labour Appeals Court pointed out that workers required the app—supplied by the company—to carry out their work, saying "the driver could never perform the service without the platform, even when using the remaining tools."⁶⁹ The Labor Court in Argentina put it more entertainingly:

...the vehicle owned by the plaintiff is not an indicator of his economic independence nor does it place him on an equal footing with CABIFY. His car is just an indispensable tool to get the job, similar to the bicycle that Antonio Ricci tried to steal in the legendary film "Bicycle Thieves" (1948).⁷⁰

If anything, the fact that these workers are compelled to supply their own vehicles is suggestive of the control to which they are subjected. Especially in the case of cars, where workers often must take out expensive leases which they would never do if it weren't to provide for-hire transportation services, this financial commitment makes them more vulnerable to the consequences of suspension or dismissal by the employer. Although the employment status was not in dispute in this case, the German Federal Labour Court recognized the imbalance between an employed courier and their employer who compelled them to provide their own tools with only a minimal subsidy, pointing out that:

The employment contract, which has only been expressly regulated by law in section 611a German Civil Code since April 1, 2017, is based on the basic assumption that the employee (only) owes the performance of the work and the employer provides the substrate on or with which the work is per-

⁶⁹ Uruguay Uber Technologies Sentencia: 151/2022, *supra* note 58. Author's translation from Spanish. A similar point was made by the Austrian Federal Administrative Court in a decision of August 2021 on mystery shoppers putatively employed by a crowdsourcing platform. As Christina Hiessl summarized the holding in her report *Case Law on the Classification of Platform Workers: Cross-European Comparative Analysis and Tentative Conclusions*: "The own operating resources used by mystery shoppers (car, mobile phone, computer) are insignificant compared to the platform as such as the core resource, notably as the other items are also used privately." Heissel, *supra* note 54, at 6.

⁷⁰ Scornavache Victor Nicolas, *supra* note 68. Author's translation from Spanish.

formed.⁷¹

The Court held that the arrangement whereby the employee had to provide their own bike and mobile phone was unreasonably disadvantageous to them.



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... THE BAD...

Set Back Down Under

One of the most notable setbacks in case law development since the publication of *Taken for a Ride* has taken place in Australia, where a series of High Court—the country's apex court—decisions has stymied the possibility of case law developing in a manner to protect “gig economy” workers. To be fair, the case law wasn't doing a fantastic job before these High Court cases, but the cases slammed closed a partially open door. In *Taming the Beast*, I summarized the state of play as of December 2021:

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 resulted in vindication for the companies. The Foodora case however held that the worker in question was an employee under the Fair Work Act 2009 (FWA). The Australian Tax Office (ATO) also held that the company had misclassified its workers as independent con-

tractors under tax law. In response, Foodora pulled out of the country, just as they had done after a similar ruling in Ontario, Canada. 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 and appellate level 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, Uber settled the claim for \$400,000. Paying that amount of money for a claim unlikely to be worth more than \$15,000 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*, 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 and Deliveroo, 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), Hungry Panda, 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.⁷²

The first of the High Court's hat-trick came in August 2021 in the form of *WorkPac Pty Ltd v Rossato*.⁷³ In that case a worker who was treated as a “casual employee”—a category in Australian law which provides for additional pay but fewer rights⁷⁴—contended that he was in fact a reg-

⁷² *Taming the Beast*, *supra* note 47, at 13-14 (footnotes omitted; all currency in Australian dollars).

⁷³ [2021] HCA 23.

⁷⁴ Section 15A(1) of the Fair Work Act 2009 currently defines “casual employee” thus:

- (1) A person is a **casual employee** of an employer if:
 - (a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and
 - (b) the person accepts the offer on that ba-

⁷¹ Bundesgerichtshof [BGH] Nov. 10, 2021, ECLI:DE:BAG:2021:101121.U.5AZR334.21.0 at 17, Nov. (Ger.).

ular employee. The Court held the worker had been correctly classified as a casual employee, noting that as the contractual documents were not argued to be a sham that there was no reason to disregard them “as true, reliable and realistic statements of the rights and obligations to which the parties agreed to bind themselves.”⁷⁵ In a precursor of what would later come, the Court also stated (at [63]):

It is no part of the judicial function in relation to the construction of contracts to strain language and legal concepts in order to moderate a perceived unfairness resulting from a disparity in bargaining power between the parties so as to adjust their bargain.

As *WorkPac* concerned the distinction between two types of employees, rather than between employees and independent contractors, there was still some hope that the ramifications for the “gig economy” would not be as severe as they seemed.⁷⁶ This hope was short lived, with the decisions in *Construction, Forestry, Maritime, Mining*

sis; and

(c) the person is an employee as a result of that acceptance.

Or as the full court of the Federal Court summed it up in the case of *Hamzy v. Tricon International Restaurants* (2001) 115 FCR 78 at 89 [38]: “The essence of casualness is the absence of a firm advance commitment as to the duration of the employee’s employment or the days (or hours) the employee will work.” In the UK, by contrast, one may be a standard employee even if only engaged on intermittent contracts. The Court of Appeal of England and Wales summarized the case law on this point in *Commissioner for HMRC v. Professional Game Match Officials Limited* [2021] EWCA Civ 1370 at 118:

- i. The question whether a single engagement gives rise to a contract of employment is not resolved by a decision that the overarching contract does not give rise to a contract of employment.
- ii. In particular, the fact that there is no obligation under the overarching contract to offer, or to do, work (if offered) (or that there are clauses expressly negating such obligations) does not decide that the single engagement cannot be a contract of employment. The nature of each contract is a distinct question.
- iii. A single engagement can give rise to a contract of employment if work which has in fact been offered is in fact done for payment.

However, in the UK certain employment rights require minimum lengths of service for entitlement, meaning one may be employed on intermittent contracts but cannot accrue sufficient service to qualify for certain rights.

⁷⁵ [2021] HCA 23 at 55.

⁷⁶ For example, at 101 the Court distinguished its decision from *Hollis v. Vabu Pty Ltd* (2001) 207 CLR 21, one of the leading High Court employment status cases concerning the distinction between independent contractors and employees.

and *Energy Union (CFMMEU) v Personnel Contracting Pty Ltd*⁷⁷ and *ZG Operations Australia Pty Ltd v Jamsek*.⁷⁸ These cases were the first time in two decades that the High Court had considered the approach to distinguishing between independent contractors and employees.⁷⁹ The approach, said a majority of the Court, was to be based on the written contracts between the parties. As the plurality decision in *CFMMEU* stated:

Where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under that contract. Where no party seeks to challenge the efficacy of the contract as the charter of the parties’ rights and duties, on the basis that it is either a sham or otherwise ineffective under the general law or statute, there is no occasion to seek to determine the character of the parties’ relationship by a wide-ranging review of the entire history of the parties’ dealings. Such a review is neither necessary nor appropriate because the task of the court is to enforce the parties’ rights and obligations, not to form a view as to what a fair adjustment of the parties’ rights might require.⁸⁰

In *CFMMEU*, the company decided that it wanted to convert a group of truck drivers it treated as employees into independent contractors. It told them: “If you don’t agree

⁷⁷ [2022] HCA 1.

⁷⁸ [2022] HCA 2.

⁷⁹ *CFMMEU v. Personnel Contracting Pty Ltd* [2022] HCA 1 at 99 [hereinafter *CFMMEU*].

⁸⁰ *Id.* at 59 (Opinion of Kiefel CJ, Keane J, and Edelman J.) (Footnotes omitted). Although but cold comfort, the justices were careful to state that it was the terms of the written contracts, rather than the *labels* adopted by the parties, that was determinative, for example at 66:

As a matter of principle, however, it is difficult to see how the expression by the parties of their opinion as to the character of their relationship can assist the court, whose task it is to characterise their relationship by reference to their rights and duties. Generally speaking, the opinion of the parties on a matter of law is irrelevant. Even if it be accepted that there may be cases where descriptive language chosen by the parties can shed light on the objective understanding of the operative provisions of their contract, the cases where the parties’ description of their status or relationship will be helpful to the court in ascertaining their rights and duties will be rare.

to become contractors, we can't guarantee you a job going forward."⁸¹ And yet, as the plurality opinion⁸² stated:

The circumstance that entry into the contract between the company and the partnerships may have been brought about by the exercise of superior bargaining power by the company did not alter the meaning and effect of the contract.

The origins of the reasoning in these decisions can be traced back to English common law, in the form *Narich Pty Ltd v Commissioner of Pay-roll Tax*,⁸³ a decision of the Privy Council of the United Kingdom, which until three years later still heard some appeals from Australian courts. This origin story is somewhat ironic as the English common law has since moved on considerably, with UK courts today showing very little interest in written agreements if they do not truly represent the working relationship in practice.⁸⁴

The reasoning of the High Court decisions was applied to the "gig economy" in the case of *Deliveroo Australia Pty Ltd v Diego Franco*,⁸⁵ an appeal by Deliveroo to the Full Bench of the Fair Work Commission of an earlier decision that Diego Franco was an employee and had been unlawfully dismissed.⁸⁶ The Full Bench pointed out that prior to the High Court decisions discussed above, it believed it was "necessary to look at the totality of a working relationship in order to determine whether it is one of employment or is an independent contracting relationship."⁸⁷ But now things had changed. Although the Full Bench made

clear that if the appeal had concerned only the dismissal, then nothing would have changed.⁸⁸ The appeal nevertheless succeeded in light of the new jurisprudence. In particular, and based on the written contract, four points proved decisive for the Full Bench: i) Deliveroo's lack of control over Franco; ii) the requirement that Franco provide his own vehicle; iii) the lack of a personal service requirement; and iv) Franco had to pay an administrative fee in order to use Deliveroo's software. The Full Bench also explained the factors that they could not take into account, but which would have been decisive in the other direction were they allowed to consider them.⁸⁹ These include, for example, the fact that "it was never commercially practical to delegate the work and Mr Franco never did so", that Deliveroo had practical operational control over riders, that Franco used his motorcycle for personal use, that Franco used Deliveroo-branded clothing and equipment, and that Franco had no input into a new contract which changed very little in practice but was designed to "remove any indication that Deliveroo could control the performance of the work." Tellingly, the Full Bench stated (at [54]):

Had we been permitted to take the above matters into account, as the Commissioner did, we would have reached a different conclusion in this appeal. As a matter of reality, Deliveroo exercised a degree of control over Mr Franco's performance of the work, Mr Franco presented himself to the world with Deliveroo's encouragement as part of Deliveroo's business, his provision of the means of delivery involved no substantial capital outlay, and the relationship was one of personal service. These matters, taken together, would tip the balance in favour of a conclusion that Mr Franco was an employee of Deliveroo. However, as a result of *Personnel Contracting*, we must close our eyes to these matters.

Franco had argued that he was an employee even under the written terms, and in the alternative, that the terms should be disregarded as they were a sham. However, the Full Bench rejected both arguments,⁹⁰ concluding

⁸¹ CFMMEU, *supra* note 79 at 11.

⁸² *Id.* at 8 (Opinion of Kiefel CJ, Keane J, and Edelman J.).

⁸³ [1983] 2 NSWLR 597.

⁸⁴ The two notable cases in this regard are: *Autoclenz Ltd v. Belcher & Ors* [2011] UKSC 41 and *Uber BV & Ors v. Aslam & Ors* [2021] UKSC 5. However, in both High Court decisions, Gageler J and Gleeson J argued in their opinion (concurring in judgment but dissenting in reasoning) that Australian cases both before and after *Narich* did not share the Privy Council's approach. For example, in *Cam and Sons Pty Ltd v. Sargent* (1940) 14 ALJ 162, Dixon J stated in oral reasons:

In a matter of this sort we are to look at the substance of the transaction and not to treat a written agreement, which is designed to disguise its real nature, as succeeding in doing so if it amounts merely to a cloud of words and, without really altering the substantial relations between the parties, describes them by elaborate provisions expressed in terms appropriate to some other relation.

⁸⁵ [2022] FWCFB 156.

⁸⁶ [2021] FWC 2818 and order PR729921. Notably, the Commissioner deciding the case at first instance characterized Deliveroo's dismissal of Franco as "callous and perfunctory" (at 165).

⁸⁷ [2022] FWCFB 156, *supra* note 85 at 8.

⁸⁸ *Id.* at 31.

⁸⁹ *Id.* at 53.

⁹⁰ In particular on the sham issue, the Full Bench stated:

That submission cannot be accepted because there is simply an insufficient evidentiary basis to conclude that the 2019 Agreement was in whole or part a "sham" according to the well-understood meaning of that expression. In *Equuscorp Pty Ltd v. Glengallan Investments*, the

that “[r]egrettably, this leaves Mr Franco with no remedy he can obtain from the Fair Work Commission for what was, plainly in our view, unfair treatment on the part of Deliveroo.” Even subject to the High Court imposed constraints, the Full Bench’s reasoning was particularly poor. Notably, their approach to “control” and “tools of the trade” contrast sharply with the decisions highlighted in the first subsection of this case law review, and the issue of the administrative fee being decisive borders on the farcical. Nevertheless, the fact that a generally sympathetic appellate division of Australia’s workplace tribunal came to the decision it did, is likely a strong indicator of where things are going for “gig economy” case law down under.⁹¹

Substitution in the UK

Another negative development in the case law since *Taken for a Ride* was published concerns the issue of sub-

stitution clauses in the UK jurisprudence. As the negative development is limited to one appeal of one case, the matter can be taken briefly. Before looking at the UK situation, however, it is important to note—as Christina Hießl does in her report on platform worker classification for the European Commission⁹²—that personal service of some sort is a common requirement of the employment relationship:

A duty of personal work performance, as opposed to an option of substitution and/or subcontracting, is a key indicator of employment status in all countries. Personal work performance is one among the four factors for employee status in Ireland, one of five criteria in Finland, one of four main criteria in Denmark, one of ten indicators in Sweden, and one of three requirements in the UK. It is also a necessary element for all “third categories” of relevance in the countries included in this analysis (one of three requirements each for determining employee-like status in Germany, *lavoro eteroorganizzato* in Italy, *TRADE* status in Spain, and worker status in the UK). In Belgium, personal work performance is one of nine criteria for the presumption of employee status to apply. The importance attached to personal performance varies, though, as does the weight given to a theoretical right of substitution vs. its actual use in practice and/or its meaningfulness considering the nature of the activity.⁹³

High Court said that “sham” refers to “steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences.” The important point is that the requisite intention must be that of both parties to the ostensible contract, usually if not always with the objective of deceiving a third party. Whatever might be said of Deliveroo’s intentions, there is no evidence that Mr Franco entered into the 2019 Agreement intending that it, or significant parts of it, would not have any legal consequences. To the contrary, Mr Franco’s evidence was that he signed the 2019 Agreement because it reduced the administrative fee from 5 per cent to 4 per cent, thus indicating that for his part he intended that it have legal effect.

Id. at 55 (citations omitted).

⁹¹ A couple months prior to the Full Bench decision, a first instance decision of the Fair Work Commission had also rejected a finding of employment in light of the High Court’s jurisprudence. In that case, *Asim Nawaz v. Rasier Pacific Pty Ltd T/A Uber B.V.*, Commissioner Hampton stated (at [6.4]): “Given my findings as to the veracity of the Services Agreement and absence of any variation, the post-contract conduct is not relevant” [2022] FWC 1189 at [6.4]. The Commissioner also alluded to the unfairness of the outcome:

I would observe that there are some elements of the relationship between Mr Nawaz and Uber that could operate unfairly. These include the approach evident in the Services Agreement to the establishment and variation of the fees and to other changes that may be made. These arise for the most part from the imbalance in the bargaining power of the parties. The role of the Commission in the present context is not to compensate for these factors or adjust the legal rights and obligations to provide a fairer outcome. I would also observe that in many situations within Australian workplaces and in our society these elements have led to some regulation to establish minimum standards and related dispute resolution rights and obligations. Any broad policy response remains a matter for the Parliaments of Australia.

Id. at 7.

⁹² Hießl, *supra* note 54. For another interesting and detailed review of European law on platform, see Antonio Aloisi, *Platform Work in Europe: Lessons Learned, Legal Developments and Challenges Ahead*, 13 EUR. LAB. L.J. 4 (2022). This article is based on a report for the European Centre of Expertise in the field of labor law, employment and labor market policies (ECE), commissioned for the 2020 ECE Annual Conference. For a highly comprehensive review of the background information taken into account for the proposed EU directive on platform work, as well as the law directly and indirectly relevant to such work, see Eur. Comm., Second-Phase Consultation of Social Partners Under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work, C(2021) 4230 final (June 15, 2021). For a comprehensive exploration of platform work issues in the Nordic countries, with a particular emphasis on the role of trade unions, see Cecilia West-erlund, *Nordic Transport Workers’ Federation*, PLATFORM WORK IN THE NORDIC COUNTRIES (2022), <https://www.nordictransport.org/en/platform-work-ers/>.

⁹³ Hießl, *supra* note 54, at 44. Although the above was written in the European context, the same can be said for the broader international context. For example, in Uruguay the Labour Appeals Court held that while the Uber driver in question had a theoretical right to register as associate drivers and hence not render a personal service, that in practice this never occurred. As such, said the court, the driver did render a personal service. Uruguay Uber Technologies Sentencia: 151/2022, *supra* note 58.

In UK law, to qualify for either employee or limb b worker status, one must provide personal service. The case law on what this means has developed in such a way as to allow a worker to use substitutes in a variety of circumstances.⁹⁴ Substitution clauses nevertheless remain the loophole of choice for “gig economy” employers in the UK.⁹⁵ The use of the loophole proved successful in the case of *Independent Workers Union of Great Britain v Roo-Foods Limited t/a Deliveroo*,⁹⁶ and when the first instance decision was challenged by way of judicial review.⁹⁷ More recently, the Court of Appeal of England and Wales upheld the judicial review decision. The holdings are notable, not least as the case was argued on the basis of article 11 of the European Convention on Human Rights (which provides for trade union rights).⁹⁸ Underhill LJ, giving the decision of the Court, discounted the effect of article 11 and the international labour law underpinning it,⁹⁹ stating (at [77], footnote 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.

Like the Fair Work Commission decisions above, Underhill LJ felt the need to acknowledge the inherent unfairness in the outcome (at [86]):

I am conscious that that conclusion may at

⁹⁴ See e.g., *Pimlico Plumbers Ltd & Anor v. Smith* [2018] UKSC 29.

⁹⁵ See, for example, Jason Moyer-Lee, *When Will “Gig Economy” Companies Admit that Their Workers Have Rights?*, *GUARDIAN* (June 14, 2018), <https://www.theguardian.com/commentisfree/2018/jun/14/gig-economy-workers-pimlico-plumbers-employment-rights>.

⁹⁶ Case Number: TUR1/985(2016).

⁹⁷ *R (on the application of the Independent Workers’ Union of Great Britain) v. Central Arbitration Committee & Anor* [2018] EWHC 3342 (Admin).

⁹⁸ Pursuant to s(3) Human Rights Act 1998, UK courts and tribunals are required to—so far as possible—construe domestic legislation so as to give effect to the European Convention on Human Rights, even if this means departing from standard canons of construction.

⁹⁹ The European Court of Human Rights in Strasbourg, France, which interprets the Convention, often construes convention provisions in line with international law. See *Demir and Baykara v. Turkey* [2008], Application no. 34503/97. In the case of the applicability of convention rights to employment relationships, this means construing the latter in line with ILO Recommendation 198.

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.”



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At the time of writing, the IWGB has been granted permission to appeal the judgment to the Supreme Court, where the union may yet find a more sympathetic audience. It is important to note, although stopping short of overturning this decision, the reasoning of a later Court of Appeal decision—*Stuart Delivery Ltd v Augustine*¹⁰⁰—on the same issue certainly seemed to depart from the *Deliveroo* case. A later Employment Appeal Tribunal (EAT)¹⁰¹ case appeared to make it even more difficult for companies to rely on the substitution loophole, saying that tribunals must simply consider whether a worker “was required to provide **some personal service**.”¹⁰² In dicta, the judge went further, opening the door to future arguments on the issue (at [32]):

It is arguable, post [*Uber B.V. & Ors v Aslam & Ors* [2021] UKSC 5], and the focus on statutory interpretation that is now expressly required, that there could be a situation in which despite there being a contractual term that provides an unfettered right of substitution, the reality is that the predominant purpose of the agreement is personal service,

¹⁰⁰ [2021] EWCA Civ 1514.

¹⁰¹ The EAT sits lower in the English judicial pecking order than the Court of Appeal.

¹⁰² Emphasis added.

so that the person is a worker. It might even be argued that personal service need not be the predominant purpose of the agreement, provided that the true agreement is for the provision of “any” personal service as required by the statute. It was not necessary to decide those points in this case.

Asymmetrical Bargaining Power

In an unsuccessful case which couriers brought against Pedidos Ya in Chile,¹⁰³ the Labour Court was dismissive of the difference in power between the couriers and the company, saying “the parties freely agreed to enter into and sign the contract for services,” and that “the principle of freedom of choice” was to reign supreme.¹⁰⁴ Similarly, in a case brought against courier company Wolt in Georgia, the Tbilisi City Court stated:

The court will also pay attention to the fact that Georgian Labor Code defines the essential conditions of the labour contract, such as: work and rest time; workplace; labour remuneration (salary, allowance); overtime pay; the leave and the procedure of granting it.

In the contract concluded between the parties there was no agreement made on the above conditions, which is another confirmation of fact that the mentioned agreement does not fall under the nature of labour relationship.¹⁰⁵

In other words, the fact that the worker had not agreed to terms in a contract over which they had no influence, was used—in part—to justify a finding that they were not in an employment relationship. Underpinning the Chilean, Georgian, and Australian cases, and to some degree the UK Deliveroo case, is the grotesque fallacy that when it comes to construing an employment relationship, asymmetrical bargaining power should be a legal irrelevance. For the discrepancy in power between the lone worker and their employer is the *raison d'être* of trade unionism and the midwife which birthed the discipline of labour and employment law. When the jurisprudential approach

is blind to power relations, judges who interpret laws designed to protect the weak from the strong are meant to ignore how the strong use their strength to evade the scope of such laws, in order to exploit the weak. Even the US Chamber of Commerce—hardly a bastion of socialist values—has recognized the inherent power imbalance in the employment relationship:

Employees need to put food on the table every week. In many areas of the country, few employers exist, and it is difficult to move. An employee who wants to keep her family where it is has little choice but to accept the local employers' conditions of employment. Even in areas where there are many employers, many employees live paycheck-to-paycheck and are unwilling to quit their jobs based on the speculative possibility of obtaining higher pay elsewhere. The difficulty of finding a new job creates the risk that employees will accept work for substandard wages or working conditions. Wage and hour statutes were designed to protect workers from this type of exploitation.¹⁰⁶

To disregard such power imbalance is little more than to give the employer a license to lie, drafting contracts designed to create the appearance of something which is not. This path is particularly dangerous in the “gig economy.” For in this sector not only are the contracts normally unilaterally drawn up and presented to workers as take-it-or-leave-it propositions, but they are also routinely unilaterally changed with workers having no choice but to accept new terms or lose their jobs. For example, in Colombia, delivery company Rappi's terms and conditions stated that Rappi could “unilaterally change, at any time and in any way” such terms and conditions, and that by “unilateral decision” the company could remove a worker from the platform.¹⁰⁷

¹⁰⁶ The Chamber expressly disavows any application of the concept above to “gig economy” workers. Unopposed Application for Permission to file Amicus Curiae Brief and Proposed Brief of the Chamber of Commerce of the United States of America in Support of Appellants, Castellanos v. California, No. A163655, at 19 (Cal. Ct. App. June 1, 2022).

¹⁰⁷ See Álvaro Hernán Quina v. Rappi S.A.S. [2021], Rad. 11001 41 89 021 2021 00878. Similarly, Uber's terms in Uruguay stated that the company reserved the right to modify them at any time. See Uruguay Uber Technologies Sentencia: 151/2022, *supra* note 58. Glovo also imposed similar terms on their couriers in Kazakhstan, however the Kazakh Supreme Court used this against the company, counting it as an indicator of “hidden labour relations,” along the lines of ILO Recommendation 198. As Tamar Gabisonia (of ILAW) summarized the point in the case summary in this report (emphasis in original):

Failure to agree on changes in the contract on the part of the courier (lack of freedom of contract).

¹⁰³ This decision stands in contrast to earlier decisions against the same company in the same country, which were covered in *Taken for a Ride*, *supra* note 25. See, e.g., Arredondo Montoya v. Pedidos Ya Chile SPA, RIT M-724-2019 & Rol N° 395-2020.

¹⁰⁴ Eduardo Jose Estrada y Otros v. Pedidos Ya Chile SPA, Rit N° T-980-2020. Author's translation from Spanish.

¹⁰⁵ Judgment N 2/2777720 of 9 December 2021, § 6, at 20. Translation provided by Tamar Gabisonia of ILAW.

When courts ignore power imbalances and restrict their analysis to the written terms, this subjects the rights of workers to the effective veto power of company's contracts; documents which bear no resemblance to reality, into which workers had no input, over which they have no control, and changes to which are frequently made to better serve the needs of their adversaries. This is to tilt the scales of justice so profoundly as to make a mockery of the rule of law. It is akin to changing the rules of criminal evidence such that a person accused of murder has no right to call witnesses, cannot cross-examine the witnesses against them, and whose lawyer must make submissions using only the words "apples", "oranges" and "guilty." The definition of murder may not have changed, and the accused may be innocent until proven guilty, but you can be assured they're going to rot in jail.

... AND THE UGLY

Throughout several months in 2022, thousands of delivery riders struck against Foodpanda in Myanmar.¹⁰⁸ At one point the campaign led to a protest outside Foodpanda's office in Yangon. As *Novara Media* reported:

This immediately caught the attention of the military, which had brutally crushed anti-coup protests the previous year. We patiently explained that we aren't doing anything political but just asking for our labour rights," said ... a delivery worker who was at the demonstration. The soldiers ordered them not to protest, but to use the formal system for labour disputes instead. Knowing the military's record of murdering demonstrators, the strikers felt they had no choice but to disband and over the following weeks underwent five rounds of talks with the com-

pany mediated by the junta's labour officials. Strikers say the talks produced no agreements, while Foodpanda declined to comment or respond to any of Novara Media's questions.¹⁰⁹

Delivery Hero—the German multinational which owns Foodpanda—may have saved a few bucks thanks to the implicit threat of violence of a dictatorial regime, but such extreme measures are not always necessary to suppress "gig economy" workers' rights. In the United States, for example, the nearly hundred-year-old Federal Arbitration Act and some conservative judges have helped achieve the same aim.

"When courts ignore power imbalances and restrict their analysis to the written terms, this subjects the rights of workers to the effective veto power of company's contracts; documents which bear no resemblance to reality, into which workers had no input, over which they have no control, and changes to which are frequently made to better serve the needs of their adversaries. This is to tilt the scales of justice so profoundly as to make a mockery of the rule of law."

In the early 1920s the US Congress considered a bill designed to overcome the court's traditional hostility¹¹⁰ to arbitration provisions in commercial contracts.¹¹¹ Although the proponents of the bill at the time made clear that the bill was uninterested in employment contracts, trade unions were worried that it could be interpreted in such a way as to prevent workers from taking claims to court.¹¹² The President of the International Seamen's Union of America worried that due to the inequality of bargaining power, workers would be compelled to sign arbitration agreements. As he said at the time:

This bill provides for reintroduction of forced or involuntary labor, if the freeman through

Thus, clause 19 of the Agreement establishes that "The Conditions can be changed at GLOVO's sole discretion unilaterally. GLOVO will notify the Courier of all changes to the Terms of Service by sending a newsletter to the email address. If the Courier has not rejected the changed text of the terms of service within 72 hours from the date of publication of the changes, the Courier shall be deemed to have read the updated terms of service and accepted them. If the Courier does not accept the Terms, he / she cannot use the Application and the Platform.

Ospan A. v. Glovo Kazakhstan, No. 6001-21-00-6ap/19 (Jud. Bd. For Admin. Cases, Sup. Ct. Dec. 6, 2021) (Kaz).

¹⁰⁸ Ben Dunant, *In Myanmar, Workers and Activists Take on a Food Delivery Giant*, NOVARA MEDIA (Aug. 15, 2022) <https://novaramedia.com/2022/08/15/in-myanmar-workers-and-activists-take-on-a-food-delivery-giant/>.

¹⁰⁹ *Id.*

¹¹⁰ Inherited from English common law traditions.

¹¹¹ See *Circuit City Stores v. Adams*, 532 U.S. 105 (2000).

¹¹² *Id.* at 125 (Stevens J, dissenting) (discussing the legislative history of the Federal Arbitration Act).

his necessities shall be induced to sign. Will such contracts be signed? Esau agreed, because he was hungry. It was the desire to live that caused slavery to begin and continue. With the growing hunger in modern society, there will be but few that will be able to resist. The personal hunger of the *seaman*, and the hunger of the wife and children of the *railroad man* will surely tempt them to sign, and so with *sundry other workers in "Interstate and Foreign Commerce."*¹¹³

To allay such concerns, then Secretary of Commerce Herbert Hoover—a supporter of the bill—stated:

if objection appears to the inclusion of workers' contracts in the law's scheme, it might be well amended by stating "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce."¹¹⁴

Thus, the Federal Arbitration Act of 1947 reads, in relevant part:

[at §2] A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract...

[at §1] ...but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class

of workers engaged in foreign or interstate commerce.¹¹⁵

On the face of it therefore, arbitration agreements are to be upheld in commercial contracts involving interstate or international commerce, and the act does not apply to employment contracts. However, a series of Supreme Court decisions have effectively rewritten the act to this:

[at §2] A written provision in any ~~maritime transaction or a contract evidencing a transaction involving~~ **affecting** commerce¹¹⁶ to settle by **individual** arbitration¹¹⁷ a controversy thereafter arising...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract...

[at §1] ... but nothing herein contained shall apply to contracts of employment, **or for services**,¹¹⁸ of seamen, railroad employees, ~~or any other class of workers engaged in foreign or interstate commerce~~ **transportation workers actually involved in the flow of goods or people across state lines**.¹¹⁹

¹¹⁵ Federal Arbitration Act, ch. 392, 61 Stat. 670 (1947) (codified as amended at 9 U.S.C. § 1, et seq.). § 1 also defines "commerce," subject to the proviso exempting certain employment contracts, as: commerce

...among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation...

¹¹⁶ In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the Court held that the employment contract in issue before it did not evidence "a transaction involving commerce," saying (footnote omitted):

There is no showing that petitioner while performing his duties under the employment contract was working "in" commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions.

Id. at 200-201. However, in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995), the Court gave the words "involving commerce" an expansive reading, including within its scope the outer limits of the territory for which Congress was enabled to legislate pursuant to the Commerce Clause of the US Constitution.

¹¹⁷ *Epic Systems Corp v. Lewis*, 138 S. Ct. 1612 (2018). See also the discussion on this point in Moyer-Lee & Kountouris, *Litigating the Cause of Labor*, *supra* note 25, at 29-30.

¹¹⁸ *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019).

¹¹⁹ In *Circuit City Stores*, the Court—in a 5-4 decision—held that the words "any other class of workers" were to be construed pursuant to the maxim *ejusdem generis*, a canon of construction whereby if general words in a statute are preceded by specific words, the general words

¹¹³ *Id.* at 127, note 5. (Stevens J., dissenting) (quoting Proceedings of the 26th Annual Convention of the International Seamen's Union of America 203-204 (1923) (emphasis added)). Senator Walsh voiced a similar concern during a subcommittee hearing on the bill:

The trouble about the matter is that a great many of these contracts that are entered into are really not voluntary things at all.... It is the same with a good many contracts of employment. A man says, "There are our terms. All right, take it or leave it. Well, there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court and has to have it tried before a tribunal in which he has no confidence at all.

Id. at 139, note 3 (Stevens J., dissenting) (quoting Hearing on S. 4213 et al.) (internal quotations omitted).

¹¹⁴ *Circuit City Stores*, *supra* note 111 at 127 (Souter J., dissenting) (quoting Secretary of Commerce, Herbert Hoover).

The Supreme Court's interpretation is about as reliable as using Google Translate to master rocket science from a children's book in Ancient Greek. It has also presented a near absolute bar to workers seeking judicial enforcement of their rights. And there shall be no doubt that resolving a worker's claim through arbitration rather than the courts of law benefits the employer, not the worker. As Jackie Adelsberg of the Alliance for Justice has written, arbitration:

...creates one-sided arrangements that deny employees the typical safeguards afforded by court proceedings. In arbitration, there is no right to a jury, no discovery, no transparency, no legal precedents to follow, and no meaningful judicial review. Due to the absence of these checks and balances — and the fact that the private arbitrator is often hand-picked and paid for by the defending company — the deck is stacked against workers.¹²⁰

are read to include objects similar to the specific words. In the instant case, as "seamen" and "railroad employees" are types of transport workers, the Court held that the words "any other class of workers" were therefore qualified, such as to only encompass transport workers. The Court further held that the words "engaged in" (foreign or interstate commerce) had a narrower meaning than the words "involving commerce." As such, the only transport workers exempted from the FAA were those involved in the actual flow of transport across state or international borders. *Circuit City Stores*, *supra* note 117 at 127. As Justice Stevens noted in dissent:

Today, however, the Court fulfils the original -- and originally unfounded -- fears of organized labor by essentially rewriting the text of § 1 to exclude the employment contracts *solely* of "seamen, railroad employees, or any other class of transportation workers engaged in foreign or interstate commerce."

Id. at 129.

For a more recent discussion of this aspect of the FAA, see the Supreme Court case of *Southwest Airlines Co. v. Saxon*, 142 S.Ct. 638 (2021) (mem.), in which the Court held that a ramp supervisor, who was involved in loading and unloading airplane cargo, fell within the FAA exemption.

¹²⁰ Jackie Adelsberg, *This Labor Day, Let's Recommit to Ending Forced Arbitration*, ALLIANCE FOR JUSTICE (Sept. 1, 2022), <https://www.afj.org/article/this-labor-day-lets-recommit-to-ending-forced-arbitration/>. The Supreme Court, in its earlier 1956 composition, made similar points in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956):

The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment [to the US Constitution] and by Ch. 1, Art. 12th, of the Vermont Constitution. Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial....

To be added to this list is the fact that individual arbitration prevents class actions, often the only cost-effective method of low paid workers suing employers.¹²¹ It is thus understandable, given the asymmetrical bargaining power which allows employers to compel workers into arbitration agreements, the benefits to employers of arbitration, and the courts' pro-employer interpretation, that at least 60 million private sector workers in the US are believed to be subject to such arbitration clauses.¹²² The line of cases discussed above has been a bonanza for "gig economy" employers. So far as enforcing their unilateral arbitration clauses¹²³ was concerned, asymmetrical bargaining power did not matter, and fairness was irrelevant; all the companies had to do was fit their case into a loophole approximating the size of Saturn's outer ring. They have been largely successful in doing this,¹²⁴ by

Id. at 203.

¹²¹ See *Epic Systems Corp.*, *supra* note 117 at 1633 (2018) (Ginsburg J., dissenting).

¹²² Jackie Adelsberg, *This Labor Day, Let's Recommit to Ending Forced Arbitration*, ALLIANCE FOR JUSTICE (Sept. 1, 2022), <https://www.afj.org/article/this-labor-day-lets-recommit-to-ending-forced-arbitration/>.

¹²³ The "gig economy" companies often use these clauses as standard form, around the world, as part of their strategy to defeat employment status claims. The Ontario Superior Court of Justice summed this up succinctly in the case of *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518 at 125:

First, that Uber does not wish to have its relationship with Drivers and Delivery People to be an employer and employee relationship. Second, that Uber wishes any disputes with Drivers and Delivery People to be arbitrated not litigated. Third, Uber wishes to avoid class proceedings under the *Class Proceedings Act, 1992*.

In the US, a tiny minority of workers have been able to opt out of their application. For example, worker advocates have estimated that of the several hundred thousand drivers who work for Uber and Lyft in California, only around 1,300 have successfully opted out of the arbitration clauses. See *Class Action Complaint* at 147, *Gill v. Uber Technologies*, No. CGC-22-600284 (Cal. Super. Ct., S.F. Cnty. June 21, 2022). In a more extreme case, former Grubhub delivery worker Raef Lawson was denied class certification for a suit against the company as there was only one other worker besides him in the entire state of California who had opted out of the arbitration and class action waiver. *Tan v. Grubhub, Inc.*, No. 15-CV-05128-JSC, 2016 WL 4721439 (N.D. Cal. July 19, 2016), *aff'd sub nom.* *Lawson v. Grubhub, Inc.*, 13 F.4th 908 (9th Cir. 2021).

¹²⁴ For example, see the Ninth Circuit in *Capriole v. Uber Techs., Inc.*, 7 F.4th 854 (2021), stating "we join the growing majority of courts holding that Uber drivers as a class of workers do not fall within the "interstate commerce" exemption from the FAA." *Id.* at 861. And the District Court for the Southern District of New York in *Davarci v. Uber Techs., Inc.*, stating that, albeit with some exceptions, "[a] consensus has seemingly begun to develop that rideshare drivers are not exempt from the FAA[.]" No. 20-CV-9224, 2021 WL 3721374 (S.D.N.Y. Aug. 20, 2021), *appeal denied*, No. 20-CV-9224, 2021 WL 5326412 (S.D.N.Y. Nov. 15, 2021). In a notable exception to the trend, *Haider v. Lyft, Inc.*, held that a Lyft driver did fall within the FAA exemption. No. 20-CV-2997, 2021 WL 1226442 (S.D.N.Y. Mar. 31, 2021). However, it was a pyrrhic victory as the court later held that the arbitration clause was nevertheless enforceable under Delaware law. *Haider v. Lyft, Inc.*, No. 20-CV-2997, 2021

showing that their drivers and couriers were not directly involved in the flow of transportation of goods or people across state lines.¹²⁵ *Capriole v. Uber Techs., Inc.*,¹²⁶ a Ninth Circuit Court of Appeals decision, is instructive. There, the court considered an argument that Uber drivers fell within the FAA exemption, on the basis that they “sometimes cross state lines or pick up and drop off passengers at airports who are heading to (or returning from) interstate travel.” In considering the matter, the court pointed out that:

When deciding whether the exemption applies, “the critical factor [is] not the nature of the item transported in interstate commerce (person or good) or whether the plaintiffs themselves crossed state lines, but rather “[t]he nature of the business for which a class of workers perform[ed] their activities.”¹²⁷

Further, said the court, it needed to assess the relevant “class of workers” here, Uber drivers, at the nationwide level, rather than confine the assessment to any limited geographic region. The court rejected the driver’s contentions, holding:

WL 3475621 (S.D.N.Y. Aug. 6, 2021), *reh’g denied*, No. 20-CV-2997, 2022 WL 1500673 (S.D.N.Y. May 11, 2022). The same court came to the same conclusion—albeit that the arbitration clause was enforceable under New York state law *Islam v. Lyft, Inc.*, 524 F. Supp. 3d 338 (S.D.N.Y. 2021), *appeal withdrawn*, No. 21-1772, 2021 WL 6520224 (2d Cir. Nov. 8, 2021). Note, however, that last mile delivery drivers for Amazon have been held to fall within the exemption by both the Ninth and First Circuits. *Waithaka v. Amazon.com, Inc.*, 966 F.3d 10 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 2794 (2021), *reh’g denied*, 141 S. Ct. 2886 (2021), *Rittmann v. Amazon.com, Inc.*, 971 F.3d 904 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 1374 (2021). Similarly, the Court of Appeals of the state of Washington held that a delivery and service driver for a Domino’s Pizza supply chain centre fell under the FAA exemption, meaning the arbitration clause and its class action waiver were to be interpreted under the law of the state of Washington. And under that law, the court held the clause to be unconscionable as its class action waiver frustrated the “state’s public policy of protecting workers’ rights to undertake collective actions and ensure the proper payment of wages.” *Oakley v. Domino’s Pizza LLC*, 516 P.3d 1237, 1246 (Wash. Ct. App. 2022).

¹²⁵ The very arbitration clauses themselves were catered to the case law. For example, one such clause for an Uber driver in New York in 2020 stated (in part):

- (a) This Arbitration Provision is a contract governed by the [Federal Arbitration Act] and evidences a transaction involving commerce, and you agree that this is not a contract of employment involving any class of workers engaged in foreign or interstate commerce within the meaning of Section 1 of the Federal Arbitration Act.

Davarci v. Uber Techs., Inc., No. 20-CV-9224, 2021 WL 3721374, at *2 (S.D.N.Y. Aug. 20, 2021), *motion to certify appeal denied*, No. 20-CV-9224, 2021 WL 5326412 (S.D.N.Y. Nov. 15, 2021).

¹²⁶ 7 F.4th 854 (9th Cir. 2021).

¹²⁷ *Id.* at 861 (internal citations omitted).

...Uber’s service is primarily local and intra-state in nature. Only 2.5% of “all trips fulfilled using the Uber Rides marketplace in the United States between 2015 and 2019 . . . started and ended in different states.” Moreover, “only 10.1% of all trips taken in the United States in 2019 began or ended at an airport,” not all of which involved interstate travel. For example, some trips to and from the airport are taken by airport employees and passengers traveling solely on intrastate flights. Overall, interstate trips, even when combined with trips to the airport, represent a very small percentage of Uber rides, and only occasionally implicate interstate commerce. Furthermore, the record demonstrates that even Uber trips “that started and ended in different states” are inherently local in nature as “the average distance was approximately 13.5 miles and the average duration was approximately 30.0 minutes.” Even these statistics are likely influenced by the fact that many interstate trips are performed by drivers (or for riders) who live close to state borders, especially on the East Coast. For this reason, we agree with the district court in *Rogers v. Lyft Inc.*, that “[i]nterstate trips that occur by happenstance of geography do not alter the intrastate transportation function performed by the class of workers.”¹²⁸

The Ninth Circuit was dismissive of the “minority of district courts” that had come to an opposite conclusion, saying:

¹²⁸ *Id.* at 864 (internal citation omitted). The Southern District of New York District Court, in the case of *Davarci*, 2021 WL 3721374, similarly held that:

The raw number of cross-border trips conducted by Uber drivers is largely irrelevant to the ultimate inquiry, which asks not whether a class of workers happen to engage in a threshold number of interstate trips, but whether a central feature of class members’ jobs involves interstate commerce.

Id. at *12. The Court then separately denied plaintiffs’ application to certify the decision for appeal to the Second Circuit Court of Appeals. See *Davarci v. Uber Techs., Inc.*, No. 20-CV-9224, 2021 WL 5326412 (S.D.N.Y. Nov. 15, 2021).

Ironically, one of the justifications on which the European Commission relied for proposing the EU directive on platform work (rather than leaving it to Member States to legislate on the matter independently) was platform business models “intrinsically cross-border” nature. Eur. Comm., Commission Staff Working Document: Subsidiarity Grid, SWD(2021) 395 final, at 3 (Dec. 22, 2021).

They assign too much weight to the fact that rideshare drivers occasionally perform interstate trips or trips to transportation hubs. Moreover, they do *not* consider whether the trips form part of a single, unbroken stream of interstate commerce that renders interstate travel a “central part” of a rideshare driver’s job description.

In *Cunningham v. Lyft, Inc.*¹²⁹ the drivers argued their case, and the First Circuit Court of Appeals rejected it, on very similar grounds.¹³⁰



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Interestingly, much of the Ninth Circuit court’s reasoning in *Capriole* traced back to the antitrust Supreme Court case of *United States v. Yellow Cab Co.*,¹³¹ where it was “held that the transportation of interstate rail passengers and their luggage between rail stations in Chicago to facilitate their travel is part of “the stream of interstate commerce.” As the Ninth Circuit stated (internal citations omitted):

Important to the Supreme Court’s conclusion was that the passengers contracted directly with the railroad for this “between-station transportation in Chicago” that was exclu-

sively provided by a single company, itself contracting directly with the railroad. Thus, because the alleged restraint of trade sought to “eliminate competition . . . for supplying transportation for this transfer in the midst of interstate journeys,” the Supreme Court held that the plaintiffs had plausibly alleged an unlawful restraint of interstate commerce under the Sherman Act.

By contrast, addressing a related antitrust challenge against local taxicab operators in Chicago, the Supreme Court also held that “when local taxicabs merely convey interstate train passengers between their homes and the railroad station in the normal course of their independent local service, that service is not an integral part of interstate transportation.” The Supreme Court also noted that none of the cab companies “serve[d] only railroad passengers, all of them being required to serve “every person” within the limits of Chicago.” The companies had “no contractual or other arrangement with the interstate railroads.” “Nor [were] their fares paid or collected as part of the railroad fares,” and “in short, their relationship to interstate transit [was] only casual and incidental.” Because the plaintiffs in *Yellow Cab* failed to show how “local taxicab service” was “an integral part of interstate transportation,” the Supreme Court concluded that the plaintiffs failed to state a cause of action under the *Sherman Act*.¹³²

The First Circuit was also inspired—in part—by *Yellow Cabs* when it rejected Lyft driver’s attempt to get around

¹²⁹ 17 F.4th 244 (1st Cir. 2021).

¹³⁰ In February 2022, in the case of *Rogers v. Lyft*, the Ninth Circuit followed its own precedent (in *Capriole*), holding that the Lyft driver in question was not exempt from the FAA. No. 20-15689, 2022 WL 474166 (9th Cir. Feb. 16, 2022). Although the decision predates *TAKEN FOR A RIDE*, *supra* note 25, it is also worth pointing to another Circuit Court of Appeals decision holding that delivery riders were not exempt from the FAA: that of the Seventh Circuit in *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798.

¹³¹ 332 U.S. 218 (1947).

¹³² This reasoning is ironic, as the Ninth Circuit had previously sided with the Chamber of Commerce in a case challenging Seattle’s collective bargaining regime for Uber and Lyft drivers on the basis that the regime constituted a price-fixing cartel in violation of the Sherman Act. *Chamber of Com. of the United States of Am. v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018). Although the case did not expressly hold that the regime violated the Sherman Act, it did hold that the regime was not exempt from scrutiny under the Act. For a more detailed discussion of this case, see *Taming the Beast*, *supra* note 47, at 55-58. Given that the reasoning of the courts on the FAA traces back to analogous reasoning according to which the drivers should be exempt from the scope of the Sherman Act, this should be an absolute bar to any future challenges to “gig economy” collective bargaining regimes on the basis of federal antitrust law. Note though that in any case, the Chairperson of the Federal Trade Commission, Lina Khan, has previously suggested that “gig economy” workers should not be prosecuted under antitrust law for acting collectively. See Maeve Allsup et al., *Gig Economy Companies Brace for Crucial Year as Challenges Mount*, U.S. LAW WEEK (Jan. 4, 2022), <https://news.bloomberglaw.com/us-law-week/gig-economy-companies-brace-for-crucial-year-as-challenges-mount>.

the FAA in the case of *Cunningham v. Lyft, Inc.*,¹³³ saying they were

confident that a scenario not affecting “interstate commerce” under the *Sherman Act* would also not qualify as a scenario in which taxicabs would be “engaged in . . . interstate commerce” under *section 1 of the FAA*.”

But buried in the complexity of this reasoning lies an incessant intellectual incoherence. At its absolute simplest, this reasoning holds that: i) the scope of the FAA’s coverage is very wide and thus encompasses Uber and Lyft drivers; and ii) the exemption is exceedingly narrow and thus does not save Uber and Lyft drivers. Just how wide is the scope of coverage? According to *Circuit City*, as wide as the Commerce Clause of the US Constitution would allow Congress to make it. And how do we know that the exemption is so narrow that it does not save Uber and Lyft drivers? Because according to *Yellow Cab*, drivers doing analogous work did not even fall within the much broader scope of the Sherman Act. That’s where the analysis appears to end. But one must ask one more question: How wide is the scope of the Sherman Act? Well, according to a series of cases, it appears to be just as wide as the Commerce Clause of the US Constitution would allow Congress to make it.¹³⁴ In other words, as wide as the scope of the FAA. If the scope of the Sherman Act is as wide as the FAA and Uber and Lyft drivers do not fall within the scope of the Sherman Act, then they also do not fall within the scope of the FAA. Exemptions would be neither here nor there.¹³⁵ To the extent that comparing the scopes of coverage of the FAA and Sherman Act is to compare apples with oranges given their differing statutory purposes, the circuit courts have already indulged in that forbidden fruit by bringing in the comparison for the purposes of excluding drivers from the FAA’s exemption. Although “gig economy” arbitration clauses have for the most part proved a worthwhile investment, every once in a while, the companies get hit in the head from the clause’s boomerang effect. For example, at the end of

¹³³ 17 F.4th 244 (1st Cir. 2021).

¹³⁴ See, e.g., *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc.*, 710 F.2d 752 (11th Cir. 1983), *Tarleton v. Meharry Medical College*, 717 F.2d 1523 (6th Cir. 1983), *Schnapps Shop, Inc. v. H. W. Wright & Co.*, 377 F. Supp. 570 (D. Md. 1973), *Sheppard v. Blackstock Lumber Co.*, 540 P.2d 1373 (Wis. 1975), *Ballo v. James S. Black Co.*, 692 P.2d 182 (Wis. Ct. App. 1984).

¹³⁵ This argument has not been presented as such in any of the FAA “gig economy” cases reviewed for this essay. The closest is in the case of *Davarci*, 2021 WL 5326412. However, there the plaintiff appeared to argue that the scope of both the coverage of, and exemption to, the FAA were coterminous. In other words, if Uber drivers were not exempted, they also did not fall within the scope of the FAA in the first place. This, therefore, is quite a different argument indeed.

2020 in New York, a law firm managed to file over 31,000 individual consumer arbitration claims¹³⁶ against Uber over the same alleged violation. The American Arbitration Association—tasked with arbitrating the disputes—sent Uber a hefty bill; nearly US\$ 100 million in fees. Uber filed suit against the Association, alleging the fees were unlawful. When the company also tried to obtain a preliminary injunction to ensure the arbitration could proceed without Uber having to immediately foot the bill, the application was thrown out by the New York State Supreme Court.¹³⁷ As the appellate division of that court concluded:

While Uber is trying to avoid paying the arbitration fees associated with 31,000 nearly identical cases, it made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and AAA’s fees are directly attributable to that decision[.]

In other words, and to borrow from scripture, “whatsoever a man soweth, that shall he also reap.”¹³⁸

The extent to which courts in the US have sanctioned the “gig economy” arbitration ruse appears to be a uniquely American phenomenon.¹³⁹ Although the companies attempt to pull the trick elsewhere, it has almost always been thrown out. For example, on just the other side of North America’s Great Lakes, Uber has had a considerably harder time deploying its arbitration clauses to defeat class action litigation. First, Canada’s Supreme Court held the clause to be unlawful in the case of *Uber Technologies Inc. v. Heller*.¹⁴⁰ When that case returned to the Ontario Superior Court of Justice,¹⁴¹ Uber argued that changes it had made to the clause rendered it viable. As

¹³⁶ Uber’s customers are also subjected to arbitration clauses.

¹³⁷ *Uber Tech., Inc. v. American Arbitration Assn.*, 2021 N.Y. Misc. LEXIS 5250 (N.Y. Sup. Ct., Oct. 14, 2021) (in the first instance); *Uber Tech., Inc. v. American Arbitration Assn., Inc.*, 167 N.Y.S.3d 66 (N.Y. App. Div. 2022) (on appeal).

¹³⁸ Galatians 6:7.

¹³⁹ One should note that there are various legislative attempts in the US Congress to address the matter, although these attempts are unlikely to go anywhere. For example, the Protect the Right to Organize Act of 2021 (PRO Act) would amend the National Labor Relations Act to make it an unfair labor practice for employers to enter into or enforce any agreement with employees whereby the latter agree not to bring or participate in claims before a competent jurisdiction (court). S. 420, 117th Cong. § 104 (2021)

¹⁴⁰ 2020 SCC 16. “No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it.” *Moyer-Lee & Kountouris, Litigating the Cause of Labor*, *supra* note 25, at 30 (quoting *Uber Technologies Inc. v. Heller*, at 60).

¹⁴¹ *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518 (Can).

the court noted (at [131]):

Uber's new gambit is not to move for a stay for arbitration for the Riders and Delivery People who have not exercised their right to opt-out of arbitration; rather, the new gambit is to have the class definition exclude those Riders and Delivery People who did not exercise their right to opt-out of arbitration, which would be a right to opt-in (*i.e.* a right not to opt-out) to the current class proceedings, which was already underway in August 2020.

“This makes them look like they are helping workers, while still benefiting from a workforce of independent contractors. They take their cake, eat it, and leave drivers and riders with the crumbs.”

The Court also pointed out that plaintiffs had (at 128; footnotes omitted):

reasonably strong arguments that the Arbitration and Class Action Waiver Clause (like the original arbitration agreement contained in the Service Agreements) is unenforceable on the grounds that: (a) it offends the principles of contract formation; (b) it is unconscionable; or (c) it is contrary to public policy[.]

However, the court said, this was a matter to be determined later at trial. For the time being, the court proceeded to certify the class.¹⁴²

¹⁴² How the court saw the arguments on arbitration fitting into the procedure can be seen at 140, by way of the requirements on notifying putative class members:

In the immediate case, what the putative Class Members need to be told, among other information, is that if they did not opt out of the Arbitration and Class Action Waiver Clause, then should the court determine at the common issues trial that they are employees with rights and should they wish to pursue claims for compensation from Uber at individual issues trials, then they will be met with a defence that they have waived the right to do so in accordance with the Arbitration and Class Action Waiver Clause. The determination of the merits of that defence would be determined at the individual issues trials, unless the enforceability of the Arbitration and Class Action Waiver Clause is made an additional common issue.

See also Tara Deschamps, *Ontario Court Certifies Class Action Against*

The Uruguayan Labour Appeals Court went further, holding Uber's arbitration clause to be unenforceable as it was contained in a contract of adhesion, which the plaintiff could neither change nor resist.¹⁴³ And in some places, such as the European Union, the right to judicial resolution of a dispute is enshrined in law as a human right.¹⁴⁴

WRITING RIGHTS—OR EXPLOITATION—INTO THE BOOKS OF LAW

Given the mixed results of trying to resolve employment status by way of litigation, both workers and employers have gone to battle to write their own laws. In recognition of the fact that the company communications strategy on employment status—while incredibly effective—fell short of absolute victory, companies have tended to propose some form of independent contractor status with minimal employee-like rights. This makes them look like they are helping workers, while still benefiting from a workforce of independent contractors. They take their cake, eat it, and leave drivers and riders with the crumbs. Workers on the other hand have generally fought for employee status and/or additional rights specific to “gig economy” workers. In *Litigating the Cause of Labour* we said:

Bearing in mind that employment status is significant because it is the portal through which the worker accesses rights, both litigators and policy makers should focus on: i) how difficult it is to enter the portal; and ii) what rights entering the portal provides.¹⁴⁵

Adopting this framework, we now turn to the recent flur-

Uber that Could See Some Workers Recognized as Employees, CBC (Aug. 13, 2021), <https://www.cbc.ca/news/canada/toronto/uber-class-action-to-toronto-employees-david-heller-1.6139825>.

¹⁴³ Uruguay Uber Technologies Sentencia 151/2022, *supra* note 58.

¹⁴⁴ For example, article 47 of the Charter of Fundamental Rights, providing for the right to “an effective remedy before a tribunal” and to a “fair and public hearing” (at least for EU law-derived rights). Dec. 18, 2000, 2000 O.J. (C 364) 1, 20. Similarly, the European Convention on Human Rights provides at article 6(1) that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.” Nov. 4, 1950, 213 U.N.T.S. 221. In another example to be filed in the “hypocrisy” folder, in an attempt to invalidate California's landmark AB 5 employment classification law, Uber argued that the law was a “bill of attainder”, *i.e.*, “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.” The argument was rejected by federal district court without much hesitation. *Olson v. Bonta*, No. CV 19-10956, 2021 WL 3474015, at *9 (C.D. Cal. July 16, 2021).

¹⁴⁵ Moyer-Lee & Kountouris, *Litigating the Cause of Labor*, *supra* note 25, at 34.

ry of legislation.¹⁴⁶

THE DEFINITIONS

When it comes to defining “employee” in legislation, the ABC test commonly adopted in US states¹⁴⁷ appears to have performed better than most other definitions. According to this test, an individual providing services to a hiring entity is an employee unless the putative employer can demonstrate that:

(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.¹⁴⁸

Indeed, as discussed in *Litigating the Cause of Labour*, the Supreme Court of the state of California held in 2018 that the ABC test applied to wage orders under Californian employment law.¹⁴⁹ The following year, in September,

the state legislated to extend the ABC test to the rest of Californian employment law (as well as provide exemptions to it for certain industries) in the form of AB 5 (which came into effect on January 1, 2020). As expected, “gig economy” companies ignored the law so the state brought suits against them, and they in turn brought suits against the state arguing the law was unconstitutional. When none of that worked, they pumped over US\$ 200 million into a referendum campaign—Proposition 22, to be voted on in November 2020—in which they were able to deceive voters into thinking that voting to deprive workers of rights was the best way to provide them with rights. Prop. 22—which came into effect on 16 December 2020—classified app-based workers as independent contractors and provided a minimal set of rights.¹⁵⁰

However, there have been some important developments in the Californian story since ILAW published *Taken for a Ride*. First, workers have continued to bring suits against “gig economy” companies who misclassified them during the time in which the ABC test reigned (prior to Prop. 22). Indeed, Uber recently settled one such suit for US\$ 8.4 million.¹⁵¹ Next, although not squarely on point as far as rideshare and delivery riders are concerned, one of the main challenges to AB 5’s validity ended in failure. The California Trucking Association (CTA)—which represents motor carriers who engage owner-operator truck drivers classed as independent contractors—brought a case arguing that AB 5 was pre-empted by federal law. More specifically, they argued that the Federal Aviation Administration Authorization Act of 1994 (FAAAA)—which pre-empts state laws “related to a price, route or service of any motor carrier...with respect to the transportation of property”—pre-empted the application of the ABC test, as the test would compel truck drivers to become employees, which would in turn affect the price, route or service of motor carriers. Although they were able to obtain a preliminary injunction in federal district court, thus enjoining the state from enforcing AB 5 against mo-

¹⁴⁶ The analysis below does not constitute an exhaustive review of legislation and bills from the past year and a half, nor would such an all-inclusive survey be necessary for a fruitful discussion of key issues. For example, although not reviewed here, China has recently regulated to ensure platforms provide delivery drivers with minimum wage and insurance. See Rina Chandra, *Invaluable but Unprotected: Asian Gig Workers Fight for rights*, CHRISTIAN SCIENCE MONITOR (Oct. 4, 2021), <https://www.csmonitor.com/World/Asia-Pacific/2021/1004/Invaluable-but-unprotected-Asian-gig-workers-fight-for-rights>. For some of the background that led to Chinese regulation in the area. See Zoey Zhang, *996 Is Ruled Illegal: Understanding China’s Changing Labor System*, CHINA BRIEFING (SEPT. 9, 2021), <https://www.china-briefing.com/news/996-is-ruled-illegal-understanding-chinas-changing-labor-system/>. Similarly, regulation on “gig economy” workers’ rights appears imminent in some countries, yet there was not enough substance at the time of writing to include in the present assessment. For example, in the case of Australia, see Nick Bonyhady, *Gig Work ... Like a Cancer: Labor takes aim at Gig Economy*, SYDNEY MORNING HERALD (Aug. 25, 2022), <https://www.smh.com.au/technology/federal-government-takes-aim-at-gig-economy-cancer-20220825-p5bcph.html> and Nick Bonyhady, *Road Safety Pay Tribunal Back on Agenda After Unions, Industry, Uber Agreement*, SYDNEY MORNING HERALD (Aug. 29, 2022), <https://www.smh.com.au/politics/federal/road-safety-pay-tribunal-back-on-agenda-after-unions-industry-uber-agreement-20220829-p5bdk9.html>.

¹⁴⁷ At least 20 states use some version of it. See Lynn Rinehart et al., *Misclassification, the ABC Test, and Employee Status* (2021), <https://www.epi.org/publication/misclassification-the-abc-test-and-employee-status-the-california-experience-and-its-relevance-to-current-policy-debates/>.

¹⁴⁸ *Dynamex Operations W. v. Superior Ct.*, 416 P.3d 1 (Cal. 2018).

¹⁴⁹ *Id.*

¹⁵⁰ See Moyer-Lee & Kountouris, *Litigating the Cause of Labor*, *supra* note 25, at 17 & 30-32. For a more detailed discussion of the Californian case, see *Taming the Beast*, *supra* note 47, at 65-78. For a comprehensive analysis of how the “gig economy” companies cynically used race and co-opted the language of racial justice to justify their exploitation of predominantly brown and Black workers. See Dubal, *New Racial Wage Code*, *supra* note 39. For the wage-reducing effect of Prop. 22. See Aarian Marshall, *California Voted for Cheaper Uber Rides. It May Have Hurt Drivers*, WIRED (Sept. 21, 2022), <https://www.wired.com/story/california-voted-for-cheaper-uber-rides-it-may-have-hurt-drivers/>.

¹⁵¹ Leah Shepherd, *Uber Signs \$8.4 Million Settlement Over Driver Misclassification*, SHRM (Sept. 1, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/uber-settlement-california.aspx>.

tor carriers,¹⁵² the Ninth Circuit Court of Appeals¹⁵³ overturned this decision, saying:

Because AB-5 is a generally applicable labor law that affects a motor carrier's relationship with its workforce and does not bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers, we conclude that it is not preempted by the F4A.

The trucking association tried to appeal to both the full court of Ninth Circuit judges,¹⁵⁴ as well as to the US Supreme Court¹⁵⁵ and was denied permission on both occasions. A similar challenge made its way through California's state courts and reached the same conclusion,¹⁵⁶ with both the California and US Supreme Courts rejecting permission to appeal to them.¹⁵⁷ The takeaway from this story is just how effective the ABC definition is, as Cal Cartage Transportation Express put it in their petition to the US Supreme Court:

Because truck drivers perform work that is within the usual course of a motor carrier's business, the "B prong" cannot be met by motor carriers that want to hire independent owner-operators, as they have historically done.¹⁵⁸

In related news, Uber had another go at trying to argue AB 5 was unconstitutional in federal court. Like last time, they failed.¹⁵⁹ Although an appeal appears to be pending before the Ninth Circuit Court of Appeals.¹⁶⁰

¹⁵² Cal. Trucking Ass'n v. Becerra, 433 F. Supp. 3d 1154 (S.D. Cal. 2020).

¹⁵³ California Trucking Ass'n v. Bonta, 996 F.3d 644 (9th Cir. 2021).

¹⁵⁴ California Trucking Ass'n, Inc. v. Bonta, No. 20-55106, 2021 U.S. App. LEXIS 18434 (9th Cir. June 21, 2021) (reh'g en banc denied).

¹⁵⁵ California Trucking Ass'n, Inc. v. Bonta, 142 S. Ct. 2903 (2022) (cert. denied).

¹⁵⁶ People v. Superior Ct. of Los Angeles Cnty., 271 Cal. Rptr. 3d 570 (Ct. App. 2d Dist. 4th Div. 2020).

¹⁵⁷ People v. Superior Court, No. S266217, 2021 Cal. LEXIS 1327 (Cal. Feb. 24, 2021) (rev. denied), Cal Cartage Transportation Express, LLC v. California, 142 S. Ct. 76 (2021) (sub. nom. cert. denied). Interestingly however, the First Circuit Court of Appeal decided essentially the same issue the other way. Schwann v. FedEx Ground Package Sys., Inc., 813 F.3d 429 (1st Cir. 2016).

¹⁵⁸ Petition for a Writ of Certiorari at 10, Cal. Cartage Transp. Express, LLC v. California, 142 S. Ct. 76 (2021) (No. 96-111) 2021 WL 1534379 at 10.

¹⁵⁹ Olson v. Bonta, No. CV 19-10956, 2021 WL 3474015 (C.D. Cal. July 16, 2021).

¹⁶⁰ See Docket, Olson v. California, No. 21-55757, (9th Cir. Jul 20, 2021). As of Nov. 20, 2022, the last entry on the the docket was for the filing of oral arguments on July 26, 2022. Those oral arguments are available at <https://www.ca9.uscourts.gov/media/video/220220713/21-55757/>.

To complete the hat-trick, a first-instance state court held Proposition 22 to be unconstitutional, leaving AB 5 as the law of the land (although nothing in practice has changed, as an appeal is currently pending before the state Court of Appeals).¹⁶¹ More specifically, the court held that Prop. 22 interfered with the California Legislature's "plenary power" to "create, and enforce a complete system of workers' compensation, by appropriate legislation"¹⁶² and violated the Separation of Powers clause¹⁶³ and the single-subject rule¹⁶⁴ of the state constitution.

On the other side of the country, in the state of Massachusetts, the "gig economy" boss club had to confront a similar setback. There—after the state Attorney General brought misclassification proceedings against Uber and Lyft¹⁶⁵—the companies pushed a Prop. 22-inspired initiative which they hoped would be on the ballot for a state-wide referendum in November 2022.¹⁶⁶ The Mas-

¹⁶¹ Castellanos v. California, No. RG21088725, 2021 WL 3730951 (Cal. Super. Aug. 20, 2021). Interestingly however, CalOSHA, the state's workplace health and safety regulator, issued citations against Uber and Lyft, holding them to be employers. See *Rideshare Drivers' Safety Complaint Against Lyft & Uber Results in CalOSHA Extending Workplace Protections to Gig Workers*, RIDESHARE DRIVERS UNITED (Aug. 1, 2021), <https://www.drivers-united.org/calosha-citation>.

¹⁶² CAL. CONST., art. XIV, § 4.

¹⁶³ Because Prop. 22 asserted that were the California legislature to create a collective bargaining regime for independent contractor app-based drivers, this law would constitute an amendment to Prop. 22 and, as such, require a seven eighths majority. The court held that this purported to limit the legislature's ability to legislate on matters which should not be considered amendments. Castellanos v. California, 2021 WL 3730951, at *4.

¹⁶⁴ Because the collective bargaining provision referred to above constituted a separate subject from the main subject of Prop. 22, namely the classification of app-based drivers as independent contractors. As the court stated:

A prohibition on legislation authorizing collective bargaining by app-based drivers does not promote the right to work as an independent contractor, nor does it protect work flexibility, nor does it provide minimum workplace safety and pay standards for those workers. It appears to protect the economic interests of the network companies in having a divided, ununionized workforce, which is not a stated goal of the legislation.

Id. at *5. See also Unopposed Application for Permission to file Amicus Curiae Brief and Proposed Brief of the Chamber of Commerce of the United States of America in Support of Appellants, Castellanos v. California, No. A163655, at 24 (Cal. Ct. App. June 1, 2022) (quoting contemporaneously Castellanos v. California).

¹⁶⁵ Healey v. Uber Techs., Inc., No. 2084-CV-01519, 2021 WL 1222199 (Mass. Super. Mar. 25, 2021). See also Kellen Browning, *Massachusetts Court Throws Out Gig Worker Ballot*, N.Y. TIMES (June 14, 2022), <https://www.nytimes.com/2022/06/14/technology/massachusetts-gig-workers.html>.

¹⁶⁶ Like Prop. 22, the measure would classify app-based drivers as independent contractors, while providing them with a limited set of rights. Some independent experts have suggested this would have left driv-

sachusetts Supreme Court held that the ballot initiative violated the single subject rule of article 48 of the Amendments to the Massachusetts Constitution,¹⁶⁷ holding relevantly that:

[I]n vaguely worded provisions placed in a separate section near the end of the laws they propose, the petitions move beyond defining the relationship between app-based drivers and network companies and the associated statutory wages and benefits. These provisions extend the classification of app-based drivers as independent contractors rather than employees or agents to potential lawsuits involving third parties, including apparently the victims of torts committed by app-based drivers, such as those assaulted by drivers or injured in traffic accidents. These provisions would thus have the apparent effect that in any actions seeking relief for torts committed by app-based drivers, the drivers are to be deemed independent contractors and not employees or agents, regardless of how they would have been classified under existing law. This would narrow the tort liability of network companies for drivers' misconduct or negligence, whether on a negligent hiring or retention theory or on a respondeat superior theory.

The petitions thus violate the related subjects requirement because they present voters with two substantively distinct policy decisions: one confined for the most part to the contract-based and voluntary relationship between app-based drivers and network companies; the other -- couched in confusingly vague and open-ended provisions—apparently seeking to limit the network company's liability to third parties injured by app-based drivers' tortious conduct.

And with that ended the company's US\$ 17.8 million campaign.¹⁶⁸

The companies have had better luck in some other US

states however. For example, they were able to ensure they would not become employers via new laws in Alabama, Florida, and Georgia.¹⁶⁹ Similarly, in the state of Washington, House Bill 2076—which Democratic Governor Jay Inslee signed into law on March 31, 2022¹⁷⁰—provides (at section 1(1)(i)) that:

Except as otherwise specified in this act, for purposes of this title and Titles 48, 50A, 50B, and 51 RCW, and any orders, regulations, administrative policies, or opinions of any state or local agency, board, division, or commission, pursuant to those titles, a driver is not an employee or agent of a transportation network company if the following factors are met:

- (i) The transportation network company does not unilaterally prescribe specific dates, times of day, or a minimum number of hours during which the driver must be logged into the transportation network company's online-enabled application or platform;
- (ii) The transportation network company may not terminate the contract of the driver for not accepting a specific transportation service request;
- (iii) The transportation network company does not contractually prohibit the driver from performing services through other transportation network companies except while performing services through the transportation network company's online-enabled application or platform during dispatch platform time and passenger platform time; and
- (iv) The transportation network company does not contractually prohibit the driver from working in any other lawful occupation or business.

Notwithstanding any state or local law to the contrary, any party seeking to estab-

ers with as little as US\$ 4.82 per hour. See Ken Jacobs & Michael Reich, MASSACHUSETTS UBER/LYFT BALLOT PROPOSITION WOULD CREATE SUBMINIMUM WAGE (2021), <https://laborcenter.berkeley.edu/mass-uber-lyft-ballot-proposition-would-create-subminimum-wage/>.

¹⁶⁷ Koussa v. Att'y Gen., 188 N.E.3d 510 (Mass. 2022).

¹⁶⁸ Kellen Browning, *Massachusetts Court Throws Out Gig Worker Ballot*, N.Y. TIMES (June 14, 2022), <https://www.nytimes.com/2022/06/14/technology/massachusetts-gig-workers.html>.

¹⁶⁹ Chris Marr & Rebecca Rainey, *Punching In: Gig Companies Score Small Wins on Worker Status*, DAILY LAB. REP. (July 5, 2022), <https://news.bloomberglaw.com/daily-labor-report/punching-in-gig-companies-score-small-wins-on-worker-status-28>.

¹⁷⁰ Chris Marr & Erin Mulvaney, *Washington Lyft, Uber Driver Deal Not Safe from Court Challenge*, DAILY LAB. REP. (Apr. 4, 2022), <https://news.bloomberglaw.com/daily-labor-report/washington-lyft-uber-driver-deal-not-safe-from-court-challenge>.

lish that the factors in this subsection (1) (i) are not met bears the burden of proof. A driver for purposes of this section shall not include any person ultimately and finally determined to be an “employee” within the meaning of section 2(3) of the national labor relations act, 29 U.S.C. Sec. 152(3).

The Washington law, similar to Prop. 22 and the companies’ ballot initiative in Massachusetts, also included a number of basic workers’ rights which fell short of employee status (more on which below). The passage of House Bill 2076 is notable though as it came out of the normal legislative process (rather than a referendum) of a politically progressive state and had the support of the Teamsters union local which had been active representing drivers there¹⁷¹ (even if the national head of the Teamsters was against it).¹⁷²

At the national level in the US, laws have been introduced on both sides of the debate, as well. For example, the Protecting the Right to Organize Act of 2021 (PRO Act)¹⁷³ would amend the definition of “employee” in the National Labor Relations Act (NLRA)—which covers trade union rights for private sector employees—by introducing the

ABC test (at Title I, s101(b)).¹⁷⁴ It would also enshrine in law a broad definition of “joint employer,” (at Title I, s101(a)) so as to facilitate workers obtaining collective bargaining agreements with more than one employer.¹⁷⁵ Having passed the House of Representatives in March of 2021, the bill is currently in the Senate where it will die a dignified death and join that institution’s graveyard of other progressive causes.¹⁷⁶ At the other end of the spectrum, the nauseatingly named Worker Flexibility and Choice Act¹⁷⁷ provides that if a worker enters into a “worker flexibility agreement” with a company that the company can avoid having to pay minimum wage and overtime under the Fair Labor Standards Act of 1938. “Worker flexibility agreements” must contain elements purporting to represent the worker’s freedom and flexibility at work, similar to the list in Washington state’s House Bill 2076, cited above. To sweeten the incentive structure, the Worker Flexibility and Choice Act also provides that workers who enter into such agreements will not be employees for federal tax purposes.¹⁷⁸ Incredibly, given that the Fair Labor Standards Act was designed to set minimum requirements on which states could build, rather than a ceiling limiting rights across the country,¹⁷⁹ this bill would pre-empt:

¹⁷¹ For a detailed account of Teamsters Local 117’s victories with app-based drivers in Seattle, see the discussion in *Taming the Beast*, *supra* note 47, at 53-64.

¹⁷² As the *Daily Labor Report* noted:

One of the Washington measure’s opponents is Sean O’Brien, the new head of the Teamsters International Union, who told Bloomberg News he was urging Inslee to veto the legislation hours before the governor signed it—even though a local affiliate of the union helped negotiate the legislation. O’Brien said the new law falls short of conferring the full rights and benefits of employment on drivers.

Marr & Mulvaney, *supra* note 170. In Canada, Uber has similarly sought to enlist trade union support—namely from the United Food and Commercial Workers’ Union (UFCW)—in advocating for laws which provide some rights but stop short of employment status. See Luiz Feliz Leon, *Uber Canada Offers Workers Toothless Union Support While Fighting to Keep Them Misclassified*, REAL NEWS (Feb. 23, 2022), <https://therealnews.com/uber-canada-offers-workers-toothless-union-support-while-fighting-to-keep-them-misclassified>. Although note that that union appears to have played a slightly more robust role in challenging Uber on behalf of Uber Black service drivers in Toronto. See *Uber Fends Off Unionization Attempt by Toronto Drivers for Premium Service*, CBC (May 6, 2022), <https://www.cbc.ca/news/canada/toronto/uber-union-toronto-1.6445058>. The challenges of big, traditional trade unions representing “gig economy” workers is an issue that has arisen all over the world. For a discussion on this in the context of Berlin, Germany. See Ben Wray, *Gig Economy Project—Inside Berlin’s food delivery workers movement*, BRAVE NEW EUROPE (June 9, 2022), <https://braveneweuropa.com/gig-economy-project-inside-berlins-food-delivery-workers-movement>.

¹⁷³ S. 420, 117 Cong.

¹⁷⁴ Note, however, that regardless of this bill, the proper construction of the term “employee” under the NLRA is currently under review by the National Labor Relations Board (NLRB), in the case of *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE*, Case 10-RC-276292. In that case the Board has invited the filing of briefs on the standard it should use. In particular, the Board is interested in whether it should adhere to its recent (narrow) Trump-era precedent on the matter (*SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019)), return to its broader Obama-era precedent (*FedEx Home Delivery*, 361 NLRB 610, 611 (2014)), or some other alternative. See *Order Granting Review and Notice and Invitation to File Briefs*, 27 December 2021.

¹⁷⁵ The joint employer standard appears to be based on the wide standard the National Labor Relations Board used in the case of *Browning-Ferris Industries of California*, Case 32-RC-109684 (approved by the D.C. Circuit Court of Appeals in *Browning-Ferris Indus. of Cal., Inc. v. NLRB*, 911 F.3d 1195, 1220 (D.C. Cir. 2018)), and which has been subject to a complicated saga of further cases and rulemaking. See *D.C. Circuit Again Sets Aside the NLRB’s Browning-Ferris Decision*, SULLIVAN & CROMWELL: LEGAL DEVELOPMENTS AFFECTING THE WORKPLACE (Aug. 3, 2022), <https://www.sullcrom.com/blog-dc-circuit-again-sets-aside-the-nlrbs-browning-ferris-decision>. Note that recently, the NLRB has also issued a notice of proposed rulemaking, proposing a broadened standard of joint employment. See Campbell, B. (2022). NLRB Proposes New Joint Employer Standard. 6 September. <https://www.law360.com/articles/1520787/nlrbs-proposes-new-joint-employer-standard>.

¹⁷⁶ Senate rules on the “filibuster” require a *de facto* super majority of 60 out of 100 votes for most bills. The Democrats currently only have 51 votes (including the tie-breaking Vice President) and it is unclear in any case that all of them would even support the PRO Act.

¹⁷⁷ H. R. 8442, 117 Cong.

¹⁷⁸ *Id.* at. § 2.

¹⁷⁹ See Pub. L. No. 75-718, § 18, 52 Stat. 1060 (codified as amended in scattered sections of 29 U.S.C.).

...all Federal, State, and local laws relating to wages and other monies paid, hours worked, documentation and recordkeeping, and applicable taxes, benefits, and contributions insofar as they may apply to the employment relationship between the individual and the entity covered under the worker flexibility agreement.¹⁸⁰

This bill was introduced into the House of Representatives on 20 July 2022 and has not yet been voted on.¹⁸¹



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Making it Easier to Meet Existing Definitions

As discussed above in the context of the United States, the battle over the definitions of employee is the main front in the war between those who aspire to have rights and those who wish to deny them. However, there have also been a variety of legislative interventions which do not purport to change the definition of the employment relationship, but rather seek to make procedural adjustments so that it is easier in practice for workers to fall within the relevant definition. One example of this type of law is Spain's *Riders Law*.¹⁸²

The law came off the back of an accumulation of jurisprudence from the Spanish courts on the employment status of couriers. These cases culminated with the

Supreme Court (Social Chamber) decision in the case against Glovo,¹⁸³ which was discussed in *Litigating the Cause of Labour*.¹⁸⁴ In *Taming the Beast*, I described how the law came about:

On 28 October 2020 the Government convened the Social Dialogue partners to discuss the regulation of digital platforms. 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). 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*,¹⁸⁵ 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 [Ruben] Ranz [a UGT trade union official working on “gig economy” issues]. “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...” Indeed, on the 10th of March 2021, the parties reached an agreement on the way forward, but not without a split in the employer group and Glovo announcing its quitting of the CEOE.¹⁸⁶

A couple months later the agreement became law. The law did two things. First, it provided additional rights on information and consultation, related to employers’ al-

¹⁸³ S.T.S., Sept. 25, 2020 (No. 805/2020, ECLI: ES:TS:2020:2924), <https://www.poderjudicial.es/search/openDocument/05986cd385feff03>.

¹⁸⁴ Moyer-Lee & Kountouris, *Litigating the Cause of Labor*, *supra* 25, at 23-24.

¹⁸⁵ “TRADE” is the Spanish-language acronym for “Economically Dependent Self-Employed Workers,” a third category in Spanish employment law which provides a limited set of rights to self-employed workers who are economically dependent on a principal client/customer. For a detailed discussion of TRADE, see *Taming the Beast*, *supra* note 47, at 123-32.

¹⁸⁶ S.T.S., Sept. 25, 2020 (No. 805/2020, p.132-33, ECLI: ES:TS:2020:2924) (Spain) (original footnotes omitted; new footnotes supplied), <https://www.poderjudicial.es/search/openDocument/05986cd385feff03>.

¹⁸⁰ Pro Act, H. R. 8442, 117 Cong § 3. This section would introduce a new subsection (c) to section 18 of the FLSA.

¹⁸¹ See also Rebecca Dixon, *Statement in Response to the Introduction to the Worker Flexibility and Choice Act*, NATIONAL EMPLOYMENT LAW PROJECT (July 22, 2022), <https://www.nelp.org/news-releases/statement-in-response-to-the-introduction-of-the-worker-flexibility-and-choice-act/>.

¹⁸² Royal Decree-Law 9/2021 of 11 May.

gorithms (more on which below). Second, as I wrote in *Taming the Beast*:

..the law added “Additional Provision 23” to the [Workers’ Statute]¹⁸⁷, which built on the presumption of employment status required by Article 8(1) [Workers’ Statute] 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.” 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.” 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.¹⁸⁸

In sum, before the *Riders Law*, Spanish statute already provided for a presumption of employment status and Spanish jurisprudence established that couriers were employees.¹⁸⁹ The *Riders Law* did not significantly add to or change either of these things.

The European Commission’s proposed directive on platform work¹⁹⁰ similarly purports to make it easier for individuals to be classed as employees without actually

changing the definition of the term. As such, those who would not currently be (correctly) classed as “workers” or “employees,” but who are nevertheless in a dependent work relationship, would not be reclassified as a result of the proposed directive. Indeed, the employment status definitions upon which the proposed directive relies are the definitions of the EU Member States,¹⁹¹ not those of EU law (even if the latter are meant to be taken into account).¹⁹² This means that “gig economy” workers for one company could be correctly classed as employees in one country and independent contractors in another, all in conformity with the proposed directive.

The presumption of employment status and the reversal of the burden of proof are the main mechanisms through which the proposed directive attempts to make it easier for workers to fall under the protective scope of employ-

¹⁹¹ Interestingly, this commanded support from both sides. According to the EU Commission, in consultations, both trade unions and employer groups wanted employment status to depend on national concepts rather than opening up a debate about EU law employment relationships. See Eur. Comm., Second-Phase Consultation of Social Partners Under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work, C(2021) 4230 final, at 21 (June 15, 2021). As a report of the Nordic Transport Workers’ Federation explained:

[N]ot everyone is in agreement that the EU Commission’s proposal should be adopted. Several unions have expressed concern over the extent to which such a regulation at an EU level would interfere with the Nordic model which is otherwise built on collective bargaining solutions between parties. There are trade unions and employers on the Nordic labour market who feel that the concept of the employee should not be defined in law since practice provides better conditions for greater flexibility, which is appropriate within the context of the rapid digital revolution. It does seem, however, that even if the burden of proof is to be altered and criteria for such a presumption introduced, it is still the key national concepts that will be applied. This will presumably be well received by those unions that consider it inappropriate to regulate working conditions at a detailed level through international regulations because the national concepts have been developed over decades at a national level.

Cecilia Westerlund, Nordic Transport Workers’ Federation, *Platform Work in the Nordic Countries*, 40 (2022), <https://www.nordictransport.org/en/platform-workers/>. Indeed, Sweden was the sole EU Member State to object to the proposed directive. See *Gig Economy Project—Sweden’s Election, the Nordic Model and the Gig Economy: Interview w/ GigWatch’s Felix Söderberg & Jacob Lundberg*, BRAVE NEW EUROPE (Aug. 17, 2022), <https://braveneweuropa.com/gig-economy-project-swedens-election-the-nordic-model-and-the-gig-economy-interview-w-gigwatches-felix-soderberg-jacob-lundberg>.

¹⁹² Many, but not all EU-law derived rights rely on an autonomous definition of the term “worker,” which applies to an individual who “performs services for and under the direction of another person in return for which he receives remuneration. See *Sindicatul Familia Constanta & Ors v. Direcția Generală de Asistență Socială și Protecția Copilului Constanta*, ECLI:EU:C:2018:926 (Case C-147/17) at [41].

¹⁸⁷ Ley del Estatuto de Trabajadores (2015) (Spain), <https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430>.

¹⁸⁸ *Taming the Beast*, *supra* note 47, at 134 (original footnotes omitted).

¹⁸⁹ Presumptions of employment status can be seen in other legal systems as well. For example, article 23 of the Law of Employment Contracts in Argentina presumes anyone who provides services to another to be in an employment relationship, unless the contrary is proven. See *Bolzan Jose Luis c/ Minieri Saint Beat Guillermo Mariano y Otros s/Despido*, Sentencia Definitiva No. 39351.

¹⁹⁰ Comm. on Emp. and Soc. Affs., Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work, 2021/0414(COD) (May 2, 2022) [hereinafter EU Proposed Directive on Platform Work]. For an account of the “gig economy” boss club’s lobbying efforts against the directive, see *Gig Economy Project – Piero Valmassoi: We Should Worry About What Uber Is Doing to Influence the EU Platform Work Directive*, BRAVE NEW EUROPE (July 12, 2022), <https://braveneweuropa.com/gig-economy-project-piero-valmassoi-we-should-worry-about-what-uber-is-doing-to-influence-the-eu-platform-work-directive>.

ment protections in their countries.¹⁹³ According to article 4, if two or more of five possible indicators of control are present, then the platform worker is presumed to be in an employment relationship. The indicators are (at article 4(2)):

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

Article 5 then provides for the possibility of the company to rebut the presumption, by proving that their labourers are not in an employment relationship.

These provisions amount to little more than window dressing. First, providing a checklist to “gig economy” companies is always a risky endeavour. They will simply modify arrangements on the app to create the appearance that at least four of the criteria are inapplicable. Second, the companies to whom the proposed directive is meant to apply have demonstrated repeatedly that they are prepared to openly flout the law and vigorously litigate any attempt to classify them as employers. There is nothing in the proposed directive to suggest the companies would not take the same approach here, namely, ignoring the presumption and then litigating any dispute over whether two or more criteria are applicable. Third, as we argued in *Litigating the Cause of Labour*:

¹⁹³ It is worth noting, however, that the proposed directive emphasises that employment status should be interpreted based on the facts of the relationship, rather than on a written contract which is often unilaterally imposed by the putative employer (art. 3(2)). Were the scope of the directive to include Australia, this would improve things. However, in most European countries this is unlikely to change the *status quo*.

For courts and tribunals which assess employment status on the basis of the reality of the working relationship rather than the written contract—as most of those courts and tribunals discussed in this paper appear to do—simply placing an onus on the putative employer to disprove employment status achieves next to nothing in practical terms. When the role of the court is to conduct a factual inquiry and then ascribe to the results of that inquiry the correct legal label, little turns on which party technically discharges the burden of proof.¹⁹⁴

Presumptions and reversed burdens of proof will certainly do no harm, but if employment status definitions do not change, it is increased state enforcement that will make a greater difference (more on which below). The proposed directive's mentions of enforcement are for the most part vague and not particularly rigorous.¹⁹⁵¹⁹⁶ Nevertheless, the companies fought the employment status presumption vigorously. When it was finally adopted, it would have been “unimaginable two years earlier,” Leila Chaibi—a member of the European Parliament (MEP) and prominent supporter of the proposed law—told me.¹⁹⁷ Indeed, it was not clear in the beginning, when it looked like the EU was going to legislate on the issue of platform work, if the legislation would even focus on workers' rights. The companies' lobbying machines were in full throttle. They saw potential legislation as an opportunity “to legalise that which the judges have said is illegal,” so that the employer can have the advantages of both an employment and self-employment model, whereas the

¹⁹⁴ Moyer-Lee & Kountouris, *Litigating the Cause of Labor*, *supra* note 35.

¹⁹⁵ For example, article 19(3) of the proposed directive states that “[t]he penalties provided for shall be effective, proportionate and dissuasive.” EU Proposed Directive on Platform Work, *supra* note 190. This is standard EU employment law directive language and has to date not prevented a wide variety of enforcement regimes in EU countries with many being substandard.

¹⁹⁶ Some provisions of the proposed directive would make it *harder* for workers to be classed as employees. For example, the recitals state that if a company voluntarily offers enhanced conditions these should not be determinative of an employment relationship. EU Proposed Directive on Platform Work, *supra* note 190, at recital 23. Similarly, they state that a company's compliance with regulatory measures or its initiatives to protect the health and safety of the recipients of the service should not be understood as the company controlling the worker. *Id.* at recital 25. These recitals are regressive. Whether or not Uber's compliance with private hire regulations should be taken into account in the assessment of drivers' employment status, was a big issue in the UK litigation. *Uber B.V. & Ors v. Aslam & Ors* [2021] UKSC 5. Uber argued it should not be taken into account and this was rejected. Whether employer control is mandated by law, or exercised of the employer's own volition, or—as is often the case—a mix of both, it should not matter: The worker is still subject to the control, whatever its origin.

¹⁹⁷ Author interview. 22 July 2022. Author's translation from French.

worker would have the disadvantages of both, said Chaibi.¹⁹⁸ And French President Emmanuel Macron's administration was a loyal supporter of the employer cause. Indeed, they were "the leading opponents of the employment presumption and the leading defenders of Uber's interests," Chaibi added. "The Uber files have confirmed what we've seen since the beginning."¹⁹⁹

Ironically, perhaps the proposed directive's greatest contribution to the quest for "gig economy" workers' rights is not the presumption and reversed burden of proof, but rather its article 15, which provides:

Member States shall take the necessary measures to ensure that digital labour platforms create the possibility for persons performing platform work to contact and communicate with each other, and to be contacted by representatives of persons performing platform work, through the digital labour platforms' digital infrastructure or similarly effective means, while complying with the obligations under Regulation (EU) 2016/679. Member States shall require digital labour platforms to refrain from accessing or monitoring those contacts and communications.

This article is an organiser's dream come true.

The content of the directive is far from settled, however. For example, the EU Parliament's Committee on Employment and Social Affairs has tabled several amendments to the proposed directive. Overall, the amendments are pro-worker and pro-union.²⁰⁰ Importantly for present purposes, the Committee would remove any threshold criteria for the application of the employment presumption in article 4. This means that whereas under the original proposal platform workers were only presumed to be employees if two of five criteria were met, under these amendments any and everyone who works for a platform is presumed to be an employee unless the platform can prove that they should be classed as self-employed.²⁰¹

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Many of them, such as amendments to the recitals, are largely symbolic but have the effect of being more critical of platform companies and being stronger on the defence of workers' rights and the role trade unions have to play.

²⁰¹ This does not change the fact that the effect of the proposed directive on employment status would still be procedural in nature. Although, in proposed amendments to recital 25, the Committee sets out a number of criteria that courts should take into account, inspired largely by ILO Recommendation 198 and pro-worker jurisprudence. EU Proposed Directive on Platform Work, *supra* note 190. It is unclear how much in-

The Council of the European Union,²⁰² under the current Presidency of the Czech Republic, has tried to push the directive in the opposite direction, proposing amendments which would water down the employment presumption even more than its current very-watery state. More specifically, these proposed amendments would in some circumstances require that three (rather than two) of five criteria be satisfied before the presumption applies²⁰³ and state that compliance with certain legal obligations (including to protect workers' health and safety) should not be taken into account when considering the criteria for the employment presumption.²⁰⁴ Further, the presumption would not apply at all in tax and criminal proceedings, and it would be up to Member States whether to apply it in social security proceedings.²⁰⁵ Finally, in certain proceedings enforcement bodies could disapply the presumption entirely "if it is manifest that the presumption would be successfully rebutted."²⁰⁶²⁰⁷

While the proposed directive stands a much better chance of becoming law than the PRO Act does in the US, it will be a long tedious slog before the EU legislative process is complete.²⁰⁸ After that, EU countries will have two years to implement the directive into domestic law. Unlike Regulations—another form of EU legislation—

fluence a recital like this would have on domestic courts, but if nothing else, it's a tricky way to try and broaden the domestic definitions of employee.

²⁰² This body represents European Union Member State governments and is co-responsible for legislation, alongside the European Parliament.

²⁰³ Council of the E.U., Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work, 2021/0414 (COD) (Oct. 10, 2022) [hereinafter Council's Amendments to the Proposed Directive], <https://data.consilium.europa.eu/doc/document/ST-13303-2022-INIT/en/pdf>. Proposed article 4(2a) derogates from article 4(1) by providing that the presumption will not apply if only the first two criteria in the list of five apply.

²⁰⁴ *Id.* at proposed art. 4(2b).

²⁰⁵ *Id.* at proposed art. 4a.

²⁰⁶ Although, not in proceedings in which a worker is the one seeking their correct employment status determination *Id.* at proposed art.4a(3).

²⁰⁷ The European Trade Union Confederation (ETUC) notably expressed concerns over these proposed amendments in a letter to Ministers and Ambassadors of the European Union Member States. See *Letter to the Ministers and Ambassadors Calling for an Ambitious Directive on Improving Working Conditions in Platform Work*, EUR. TRADE UNION CONFEDERATION (Sept. 23, 2022), <https://etuc.org/en/document/letter-ministers-and-ambassadors-calling-ambitious-directive-improving-working-conditions>.

²⁰⁸ The "ordinary legislative procedure," to which the proposed directive is subject, may involve various rounds of amendments by the European Parliament and the Council of the EU (the two bodies together effectively constituting the EU's legislative arm). See *The Ordinary Legislative Procedure*, COUNCIL OF THE E.U., <https://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure/> (last visited on Nov. 20, 2022).

directives leave a fair amount of discretion to Member States to achieve the directives' legislative aims through their own domestic implementing legislation. And, for the most part, individuals wishing to exercise the rights found in a directive against a private party must rely on the wording of the domestic (implementing) legislation.²⁰⁹ So, we are still some ways away from feeling any of the proposed directive's actual effects.

As a final example of interventions which go to facilitating workers' efforts to satisfy existing definitions rather than writing new ones, we turn again to the US. More specifically, the federal Department of Labor's efforts to issue a rule on how to interpret the employee definition in the Fair Labor Standards Act (FLSA).²¹⁰ In the final days of President Trump's administration, his Department of Labor issued the "Independent Contractor Status Under the Fair Labor Standards Act (FLSA)" rule. The rule sought to set out how one should distinguish between independent contractors and employees, as defined under the FLSA. As the Department would later explain:

The FLSA's minimum wage and overtime pay requirements apply only to employees. Section 3(e) generally defines "employee" to mean "any individual employed by an employer." Section 3(d) of the Act defines "employer" to "include[] any person acting directly or indirectly in the interest of an employer in relation to an employee." Section 3(g) defines "employ" to "include[] to suffer or permit to work."

²⁰⁹ Although domestic courts are meant to read such wording so as to give effect to the underlying directive as much as possible. See *Marleas-ing SA v. La Comercial Internacional de Alimentación SA* Case C-106/89. Under certain, very limited circumstances, one can invoke the provisions of a directive against a private party if relying on an article of the Charter of Fundamental Rights, which is sufficiently clear and precise. See *King v. The Sash Windows Workshop Ltd & Anor*, Case C-214/16.. It may be possible to invoke these circumstances in some cases with the proposed directive. Indeed, the EU Commission itself has invoked various articles of the Charter in relation to the proposed directive. See Eur. Comm, *Commission Staff Working Document*, SWD (2021) 143 final, at 91-92 (June 15, 2021).

²¹⁰ Although this example is the most pertinent to the instant discussion, various federal governmental bodies have, under President Biden, taken steps to try and address the misclassification issue. For example, the administration announced that the Equal Employment Opportunity Commission (EEOC), which enforces discrimination laws, would work to combat worker misclassification. See Paife Smith & Erin Mulvaney, *Gig Work, Contractor Status Land on EEOC's Anti-Bias Radar*, DAILY LAB. REP. (June 3, 2021), <https://news.bloomberglaw.com/daily-labor-report/gig-work-contractor-status-land-on-eEOCs-anti-bias-radar>. On the general issue. See Gregoru Hoff, *Whole-of-Government Approach to Labor, Employment Issues Set to Shift into High Gear*, HRP (Sept 1, 2022), <https://www.hrpolity.org/insight-and-research/resources/2022/hr-workforce-public/09/whole-of-government-approach-to-labor-employment-i/>.

The Supreme Court, in interpreting these definitions, has stated that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame," and that "the term "employee" had been given "the broadest definition that has ever been included in any one act." The Supreme Court has further stated that the "striking breadth" of the FLSA's definition of "employ"—"to suffer or permit to work"—"stretches the meaning of "employee" to cover some parties who might not qualify as such under a strict application of traditional agency law principles." Thus, the FLSA expressly rejects the common law standard for determining whether a worker is an employee.²¹¹

While courts traditionally took a broad and multifactorial approach to construing employment relationships under the FLSA, the Trump-era rule attempted to narrow the FLSA's scope of coverage by elevating the importance of certain factors over others. As a federal court later summarized it:

...the Independent Contractor Rule explained that to determine whether an employment relationship existed, the following non-exhaustive list of factors may be considered: (1) the nature and degree of control over the work; (2) the individual's opportunity for profit or loss; (3) the amount of skill required for the work; (4) the degree of permanence of the working relationship between the individual and the potential employer; and (5) whether the work is part of an integrated unit of production.

The Independent Contractor Rule further identified two core factors—(1) the nature and degree of control over the work and (2) the individual's opportunity for profit or loss—that would "typically (but not necessarily) carry greater weight" than the remaining factors.²¹²

²¹¹ Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 Fed. Reg. 24303 (May 6, 2021) (footnotes omitted), <https://www.govinfo.gov/content/pkg/FR-2021-05-06/pdf/2021-09518.pdf>.

²¹² *Coal. for Workforce Innovation v. Walsh*, No. 1:21-CV-130, 2022 WL 1073346, at *16 (E.D. Tex. Mar. 14, 2022) (footnotes and internal citations omitted).

President Biden's Department of Labor first delayed the implementation of the rule and then revoked it entirely before it came into effect. However, the Coalition for Workforce Innovation—a corporate lobby group in which Uber is involved²¹³—led a legal challenge to the Department's move. In March 2022, the federal district court for the Eastern District of Texas held that the Department of Labor's efforts to delay and then rescind the Trump-era rule violated the Administrative Procedure Act. As a result, the actions of the Department of Labor were nullified and the Trump-era rule stood.²¹⁴ The Department of Labor appealed, and the appeal is currently pending before the 5th Circuit Court of Appeals.²¹⁵

The Department has also announced its intention to issue its own, new rule on how to distinguish between independent contractors and employees under the FLSA.²¹⁶ The Department held consultations with stakeholders and in early July sent a proposed draft to the White House's Office of Information and Regulatory Affairs (OIRA), one of the final steps before making the proposed rule public.²¹⁷ The Department of Labor has made it clear though that the new rule will not propose the ABC test. As *Bloomberg Law* reported:

The agency's top lawyer, Solicitor Seema Nanda, suggested during a stakeholder meeting on the forthcoming contractor rule that adopting the ABC test wouldn't be possible via rulemaking, and could only be accomplished by Congress, according to multiple people who attended.²¹⁸

It is not clear why the Department has taken this restrictive view of its own powers. As highlighted above, the US Supreme Court has said “the term employee [in the

FLSA] had been given the broadest definition that has ever been included in any one act.” Further, when the California Supreme Court adopted the ABC test in *Dynamex Operations W. v. Superior Court*,²¹⁹ it was construing a definition of employment which was identical to that of the FLSA, i.e., the term “to suffer or permit to work.” By adopting the ABC test, the Department of Labor would merely be interpreting the same term in the same way as the California Supreme Court. Finally, in its opinion that the Department of Labor had unlawfully rescinded the Trump-era rule, the federal court said that the Department should have considered other alternatives to rescinding the rule in its entirety:

To name a few, the DOL could have considered implementing a version of the Independent Contractor Rule that did not elevate any factors as core factors. As another option, the Department could have promulgated a regulation that enumerated six factors instead of five, ranked the factors, or rephrased any of the factors' wording. The DOL could have also considered adopting the seven factors that the Department previously set forth in Fact Sheet #13 as the applicable economic realities test. Such alternatives were certainly within the ambit of the existing policy.²²⁰

Adopting the ABC test would seem consistent with this assessment.

THE RIGHTS

The essay thus far has largely focused on attempts to insert the “gig economy” worker into, or alternatively extricate them from, the generally applicable protective scope of employment law. This subsection will instead look at instances of legislation which seek to provide rights specific to “gig economy” workers. These legislative endeavours may fall into one or more of the following categories: i) laws which provide rights to employees only; ii) those which provide rights dependent on the worker's employment status; iii) those which provide rights regardless of such status; and iv) those which provide rights to independent contractors at the cost of stipulating they cannot be classed as employees. Let's take these in turn.

Laws which Provide Rights to Employees Only

The Spanish *Riders Law* is an example of legislating for rights specific to employed “gig economy” workers. In ad-

²¹³ Maya Pinto, *How the Coalition for Workforce Innovation is Putting Workers' Rights at Risk* (2022), <https://s27147.pcdn.co/wp-content/uploads/The-Truth-About-CWI-Report.pdf>.

²¹⁴ Coal. for Workforce Innovation v. Walsh, 2022 WL 1073346.

²¹⁵ Coal. v. Walsh, No. 22-40316 (5th Circ. May 16, 2022).

²¹⁶ Press Release, Dept. of Lab., U.S. Department of Labor Announces Proposed Rule on Classifying Employees, Independent Contractors; Seeks to Return to Longstanding Interpretation (Oct. 11, 2022), <https://www.dol.gov/newsroom/releases/WHD/WHD20221011-0>.

²¹⁷ Allen Smith, *New Proposed Rule on Independent Contractors Sent to White House*, SHRM (July 7, 2022), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/proposed-rule-on-independent-contractors-sent-to-white-house.aspx>.

²¹⁸ Rebecca Rainey, *Workers Divide on Contractor Status, Complicating Biden Approach*, DAILY LAB. REP. (July 14, 2022), <https://news.bloomberglaw.com/daily-labor-report/workers-divide-on-contractor-status-complicating-biden-approach>.

²¹⁹ *Dynamex Operations W. v. Superior Ct.*, 416 P.3d 1 (Cal. 2018).

²²⁰ Coal. *supra* note 214 at 38.

dition to the provision on employment status discussed above, the law also provided for rights specific to workers whose employers use algorithms. More specifically, the law amended article 64 of the Workers' Statute, concerning information and consultation rights, by adding the following 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.²²¹

“These legislative endeavours may fall into one or more of the following categories: i) laws which provide rights to employees only; ii) those which provide rights dependent on the worker’s employment status; iii) those which provide rights regardless of such status; and iv) those which provide rights to independent contractors at the cost of stipulating they cannot be classed as employees.”

According to the European Commission, Spain was the first member state to adopt “labour legislation specifically addressing algorithmic-related challenges in platform work.”²²² As I wrote in *Taming the Beast*:

Importantly, however, the right corresponds to “company committees,” a form of collective representation of workers—regulated by Article 63 [Workers' Statute]—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.²²³

Laws which Provide Rights Dependent on Employment Status

The proposed EU directive on platform work, on the other hand, provides rights specific to workers in an employment relationship (as defined by national law) as well as to those who fall outside such definitions. For example, article 9 of the proposed directive provides rights to information and consultation for employed platform workers. The scope of the article is narrower than the Spanish *Riders Law* in that the EU only focuses on “automated monitoring and decision-making systems,” whereas the Spanish law concerns how a company uses the algorithm or artificial intelligence if it affects decision-making on working conditions or employment. However, the EU provision might be easier to implement in practice. Whereas in the Spanish law the rights accrue to company committees, in the proposed EU directive the obligation is to consult worker representatives, and if these do not exist, to consult the workers. Workers with larger companies are also allowed access (paid by the company) to support from an expert to assist with interpreting the information.

While article 9 applies only to employed workers, article 10 of the proposed directive stipulates that various other articles on algorithmic management concerning transparency and human review of automated decisions, among others²²⁴ apply equally to “persons performing platform work who do not have an employment contract or employment relationship.”²²⁵

Another of the EU Commission’s initiatives can be seen through a similar prism. Although decidedly not legislation, in December of 2021 the Commission issued a “communication” entitled, *Guidelines on the Application of EU Competition Law to Collective Agreements Regarding the*

²²³ *Taming the Beast*, *supra* note 47, at 134.

²²⁴ EU Proposed Directive on Platform Work, *supra* note 190. More specifically, article 6 (Transparency on and use of automated monitoring and decision-making systems). And paras. 1 and 3 of article 7 (Human monitoring of automated systems), and article 8 (Human review of significant decisions).

²²⁵ The amendments to the proposed directive which the EU Parliament’s Committee on Employment and Social Affairs proposed—*supra* note 203—would extend the provisions on data rights and algorithmic management to all companies that use automated and semi-automated monitoring and decision making in employment matters, not just platforms. In this sense it would make the Directive similar to Spain’s *Riders Law*. The amendments also propose extending the provisions on “automated” decision-making and monitoring to include “semi-automated” as well.

²²¹ Law 12/2021 ¶ 4(d) (B.O.E. 2021, 119341) [hereinafter Spain’s *Rider Law*], <https://www.boe.es/eli/es/l/2021/09/28/12>. Translation from *Taming the Beast*, *supra* note 47, at 133.

²²² Eur. Comm., Second-Phase Consultation of Social Partners Under Article 154 TFEU on Possible Action Addressing the Challenges Related to Working Conditions in Platform Work, C(2021) 4230 final, at 11 (June 15, 2021).

*Working Conditions of Solo Self-Employed Persons.*²²⁶ The communication concerned the applicability of the EU's antitrust law²²⁷ to collective agreements of self-employed people “who do not have an employment contract or who are not in an employment relationship and who rely primarily on their own personal labor.”²²⁸ The Commission stated that it considered various categories of the solo self-employed to be “in a situation comparable to that of workers’ and therefore collective agreements concluded by them.... fall outside the scope of” competition law. The Commission listed the exempted categories of solo self-employed as those who were economically dependent on a principal client, those who work “side-by-side” with workers, and those “working through digital labour platforms.” As the Commission stated:

The emergence of the online platform economy and the provision of labour through digital labour platforms has created a new reality for certain solo self-employed persons, who find themselves in a situation comparable to that of workers vis-à-vis the digital labour platforms through or to which they provide their labour. Solo self-employed persons may be dependent on digital platforms, especially in terms of their customer outreach, and may often face “take it or leave it” work offers, with little or no scope to negotiate their working conditions, including their remuneration. Digital labour platforms are usually able to unilaterally impose the terms and conditions of their relationship, without prior information or consultation of the solo self-employed persons.²²⁹

Agreements between these workers—in the Commission’s view—fall outside the scope of EU competition law, “even if the self-employed persons in question have not been reclassified as workers by national authori-

ties/courts.”²³⁰²³¹ Granted, this communication from the Commission does not put the solo self-employed on equal footing to employees when it comes to collective bargaining and action; but it does provide a form of attenuated protection for “gig economy” workers not considered to be in an employment relationship.²³²

²³⁰ *Id.* at ¶ 31.

²³¹ While in this communication the EU Commission has made clear its intent not to use antitrust law against platform workers, in a creative suit in California, “gig economy” workers have sought to use antitrust law against the platforms for whom they work. More specifically, they argue that Uber and Lyft constitute a duopoly that exploits their drivers by classifying them as independent contractors yet “deprive those drivers of economic independence by fixing the prices that drivers must charge to customers for rides.” Interestingly, given the discussion on modern forms of control above, plaintiffs also argue that:

In addition to vertical price-fixing, Uber and Lyft each adopt non-price restraints that are designed to limit competition between Uber and Lyft with respect to driver compensation and working conditions. One of these practices is to keep driver compensation so low when measured on a per-ride basis that drivers have no choice but to participate in game-like compensation packages that offer drivers a premium payment if, for example, they can complete a certain number of trips within a short period of time (such as a weekend). These practices are designed to make it harder for Uber and Lyft drivers, nominally independent contractors, to switch between ride-hailing platforms based on which would pay them more.

See Class Action Complaint at 2-3, 5, *Gill v. Uber Technologies*, No. CGC-22-600284 (Cal. Super. Ct., S.F. Cnty. June 21, 2022). See also Kellen Browning & Noam Scheiber, *Drivers’ Lawsuit Claims Uber and Lyft Violate Antitrust Laws*, N.Y. Times (July 21, 2022), <https://www.nytimes.com/2022/06/21/business/uber-lyft-antitrust-lawsuit.html>. For an analysis of antitrust issues in the “gig economy” by the economist advising the plaintiffs in this case. See Marshall Steinbaum, *The Antitrust Case Against the Gig Economy Labor Platforms*, LPE PROJECT (Apr. 7, 2022), <https://lpeproject.org/blog/the-antitrust-case-against-gig-economy-labor-platforms/>.

²³² France has also attempted to provide a scheme for collective representation for self-employed platform workers. In 2019, the country passed a law on transport mobility (which provided for—among other things—some basic rights for self-employed platform workers and the ability of platform companies to create voluntary codes providing for further rights for platform workers. Loi 2019-1428 du 24 décembre 2019 d’orientation des mobilités, Journal Officiel de la République Française, Dec. 26, 2019, no. 299, text no. 1, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000039666574/>. The law also laid the ground for a future ordinance which would provide for a mechanism of collective representation for platform workers. On April 21, 2021, the National Assembly of France passed Ordonnance n° 2021-484 du 21 avril 2021, Journal Officiel de la République Française, Apr. 22, 2021, no. 0095, text no. 21 [hereinafter Ordinance No. 2021-484] <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043403734>. Ordinance No. 2021-484 set out the terms for self-employed platform workers, specifically: i) those driving cars and transporting passengers; and ii) those delivering goods on 2 or 3-wheel vehicles) to elect representatives to negotiate on their behalf with platform companies.. Every platform worker—and there are only very loose requirements in order to be considered as such—gets one vote. They vote for the organizations, rather than the individuals. The organizations can be trade unions or non-union associations which meet certain criteria. These organisations then later designate the individuals who will negotiate. The organizations—at least

²²⁶ Guidelines on the Application of Union Competition Law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons 2022/C 374/02 of Sept. 30, 2022, 2022 O.J. (C 374) 2 [hereinafter Guidelines]. Although this analysis was based on a draft from the European Commission, the Commission’s approach appears to have been finalized in the last few hours preceding the submission of this essay. See Press Release, Eur. Comm. Antitrust: Commission Adopts Guidelines on Collective Agreements by Solo Self-Employed People (Sept 29, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5796.

²²⁷ Consolidated Version of the Treaty on the Functioning of the European Union art. 101, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

²²⁸ Guidelines, *supra* note 226, at ¶ 19.

²²⁹ *Id.* at ¶ 28.

In the United States, at least one federal circuit court of appeals has similarly interpreted antitrust law to exempt some independent contractors from its reach. In *Confederación Hípica de P.R., Inc. v. Confederación de Jinetes Puertorriqueños, Inc.*,²³³ the First Circuit held that it did not matter whether a group of workers was properly classified as employees or independent contractors for the purposes of applying the “labor-dispute exemption” to the Sherman Antitrust Act.²³⁴ What mattered was “whether what is at issue is compensation for their labor.”²³⁵ On this basis, the Federal Trade Commission (FTC), which is one of the bodies responsible for enforcing antitrust law, has recently announced—similar to the EU Commission—that its enforcement “will not focus on organizing efforts undertaken by gig workers.”²³⁶

A final example of legislation which provides rights dependent on employment status is Chilean Law Number 21.431 of March 11, 2022.²³⁷ This law sets out provisions applying to both employees and independent contractors, but does not seek to define the categories, saying instead that these are to be determined according to article 7 of the Work Code (pre-existing legislation). The law consists of four substantive paragraphs; the first

in the first elections held in 2022—need to get at least 5% of the vote to qualify as representatives. The elections normally will happen every four years, however, exceptionally, the next round of elections will take place in two years. The ordinance also creates ARPE (which in French stands for the *Autorité des relations sociales des plateformes d'emploi*), a tripartite body, financed by a tax on the platforms, which organises and oversees the elections, is responsible for training for reps, collecting data and issuing reports, and facilitating the social dialogue, among other things.

Similarly, in Greece Law no. 4808/2021 has recently provided for the rights of independent contractor platform workers to form unions, strike, and engage in collective bargaining (at article 70), among other things. See Greek Law No. 4808/2021, EUROFUND (MAR 4, 2022), <https://www.eurofound.europa.eu/data/platform-economy/initiatives/greek-law-no-48082021>.

²³³ 30 F.4th 306 (1st Cir. 2022).

²³⁴ The exemptions are rooted in the Clayton Act and the Norris-LaGuardia Act.

²³⁵ FTC Policy Statement, *supra* note 37. More specifically, for the labor-dispute exemption to apply, four criteria had to be satisfied, none of which depended on employment status. The court summarized the criteria thus:

...the statutory labor-dispute exemption applies to conduct arising (1) out of the actions of a labor organization and undertaken (2) during a labor dispute, (3) unilaterally, and (4) out of the self-interest of the labor organization.

²³⁶ Indeed, to the contrary, the policy statement announced a number of ways in which the body would seek to use its powers to crack down on exploitative practices by the companies. FTC Policy Statement, *supra* note 37.

²³⁷ Law No. 21431, March 8, 2022, <https://www.bcn.cl/leychile/navegar?i=1173544&t=0>.

contains definitions, the second—rights for employed platform workers, the third—rights for independent contractors who work on platforms, and the fourth—rights which apply to both categories.



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The second paragraph largely sets out information that the employer must provide the employee, which is specific to platform work, e.g. “The criteria used to establish contact and coordination between the worker and the users of the platform, which must be transparent and objective.”²³⁸ The paragraph also explains in some instances how generally applicable provisions from the Work Code apply to platform workers, e.g. saying that “workplace” in this context means “the geographic zone in which the worker must provide services.”²³⁹ Things get tricky however when it comes to minimum wage. The law helpfully counts as “working time” all time spent on the app and at the disposal of the platform,²⁴⁰ and counts as “passive time” those hours when the worker is logged on and at the disposal of the employer but—due to no fault of their own—does not have any jobs to do.²⁴¹ And yet, the law’s provision on minimum wage merely states that workers should be paid 120% of the normal minimum wage rate, but only for engaged (non-passive) time. The 20% uplift is meant to compensate for periods of passive working time.²⁴² In this sense the law is similar to Proposition 22 in California, and to what Uber has advocated

²³⁸ *Id.* at art. 152(S)(e). Author’s translation from Spanish.

²³⁹ *Id.* at art. 152(S).

²⁴⁰ In this sense the analysis is similar to the UK Supreme Court in *Uber B.V. & Ors v. Aslam & Ors* [2021] UKSC 5.

²⁴¹ Law No. 21431, *supra* note 237 at art. 152(U).

²⁴² *Id.* at art 152(V).

for in Canada.²⁴³ It falls short of more rigorous minimum wage regimes in which actual waiting time, and a tailored expenses regime, are taken into account in order to leave the worker with take home pay approximating the real minimum wage.²⁴⁴

Paragraph 3—on independent contractors—largely mirrors the employee rights in paragraph 2. For example, platforms must set out certain information in these workers' contracts,²⁴⁵ they must provide minimum wage entitlement on the same basis as employed platform workers,²⁴⁶ and the independent contractors have right of access to various social security provisions,²⁴⁷ among other things.²⁴⁸ Interestingly, and similar to some of the laws that "gig economy" companies have supported, this law places limits on the extent to which platforms can control the work of independent contractors, e.g.:

The digital service platform company ... may not temporarily disconnect or implement other sanctions based on facts such as the rejection of the independent worker of the service offered or the non-connection to the digital service platform during a certain period of time.²⁴⁹

The main difference of course is that the Chilean law does not force the worker to sacrifice their employment status in exchange for the provisions cited above. Paragraph 4, which applies to everyone who works for a platform, regardless of employment status, provides for a further set of employee-like rights, covering such things as data protection,²⁵⁰ discrimination,²⁵¹ payment on termination,²⁵² the ability to form trade unions and bargain

collectively,²⁵³ and health and safety.²⁵⁴ Unhelpfully, the article on health and safety states—like the proposed EU directive above—that complying with the article would not constitute indicia of subordination and dependence with respect to independent workers.

Laws which Provide Rights Regardless of Employment Status

In Ontario, Canada, the Digital Platform Workers' Rights Act, 2022 was given Royal Assent on April 11, 2022,²⁵⁵ and has the purpose of "establish[ing] certain worker rights for workers, regardless of whether those workers are employees."²⁵⁶ And the Act makes clear that the purpose is not to degrade pre-existing rights; section 5(2) states:

If one or more provisions in a contract or in another Act that directly relate to the same subject matter as a worker right provide a greater benefit to a worker than the worker right, the provision or provisions in the contract or Act apply and the worker right does not apply.

To be fair, the rights the Act provides are rather minimal. For example, the right to minimum wage (calculated on the basis of engaged time only),²⁵⁷ the right to "notice of removal" from the platform (although no general right to a fair process for such removal),²⁵⁸ and the right to certain information,²⁵⁹ among others. This law is more inter-

²⁵³ *Id.* at art. 152(H).

²⁵⁴ *Id.* at art. 152(F).

²⁵⁵ Digital Platform Workers' Rights Act, 2022, S.O. 2022, c. 7, Sched. 1, <https://www.ontario.ca/laws/statute/22d07>.

²⁵⁶ *Id.* at § 2. Interestingly, section 1 defines "digital platform" as (emphasis supplied): "an online platform that **allows workers to choose to accept or decline** digital platform work." Although note that section 66(c) provides the Lieutenant Governor in Council with the power to make regulations clarifying this and other definitions. Whether or not "gig economy" workers are employees in Ontario is the matter of current disputes. For example, in February 2022, the province's Ministry of Labour ruled—in response to a complaint—that an Uber Eats courier was an employee under the Employment Standards Act, 2000 (Uber stated its intention to appeal). See Vanessa Balintec, *Why this Uber Eats Bike Courier is at the Centre of a Dispute Over Gig Workers' Rights in Ontario*, CBC (Mar. 6, 2022), <https://www.cbc.ca/news/canada/toronto/uber-labour-ruling-gig-worker-legislation-1.6372810>. Meanwhile, as discussed above, there is currently pending before the Ontario courts a proposed misclassification class action of Uber couriers and drivers. *Heller v. Uber Technologies Inc.*, 2021 ONSC 5518.

²⁵⁷ *Id.* at Section 9.

²⁵⁸ *Id.* at Section 11.

²⁵⁹ *Id.* at Section 7. Interestingly, paragraph 4 of this section requires the platform to provide the worker with information on: "Any factors used to determine whether work assignments are offered to workers and a description of how those factors are applied." Depending on how

²⁴³ See e.g., D'Mello, C. *Uber is calling on Doug Ford to raise the minimum wage for gig workers to \$18 an hour*. 10 Feb. In: CTV News. (2022) <https://toronto.ctvnews.ca/uber-is-calling-on-doug-ford-to-raise-the-minimum-wage-for-gig-workers-to-18-an-hour-1.5777107>.

²⁴⁴ For example, the minimum wage regimes for app-based for-hire drivers in New York City and Seattle. For a detailed discussion on both. See *Taming the Beast*, *supra* note 47.

²⁴⁵ Law No. 21431, *supra* note 237 at art. 152(X).

²⁴⁶ *Id.* at art. 152(Y).

²⁴⁷ *Id.* at art. 152(Y).

²⁴⁸ In contrast to U.S. Worker Flexibility and Choice Act, *supra* note 177, the Chilean law also requires platforms to require workers to provide tax documentation unless the relevant tax authority resolves differently. Law No. 21431, *supra* note 237 at art. 152(Y).

²⁴⁹ *Id.* at art. 152(Z). The article does allow the platform to disconnect the worker for the purposes of limiting working time, in line with the law's stipulations.

²⁵⁰ *Id.* at art. 152(D).

²⁵¹ *Id.* at art. 152(E).

²⁵² *Id.* at art. 152(G).

esting for its provisions on enforcement (more on which below).

Two other laws which fall into this category, and which concern health and safety specifically, are Brazil's Law No. 14.297 of January 5, 2022²⁶⁰ and California's Assembly Bill No. 2716.²⁶¹ The Brazilian law applies to app-based couriers during the period of the Covid-19 public health emergency, and provides for rights to insurance²⁶² and Covid-relevant sick pay²⁶³ and personal protective equipment (PPE),²⁶⁴ among other things.²⁶⁵ The Californian law on the other hand would—among other things—require “transportation network companies” to require drivers to undertake safety training courses every two years.²⁶⁶ The companies would need to compensate drivers for attending such courses.

Laws which Provide Rights at the Expense of Employment Status

Finally, and as mentioned above, Washington state House Bill 2076²⁶⁷ establishes some employee-like

expansively this provision is interpreted, it may approximate rights of access to the algorithm contained in the Spanish *Riders Law* and the proposed EU directive on platform work, discussed above.

²⁶⁰ Lei No. 14.297, de 5 de Janeiro de 2022, Diário Oficial da União [D.O.U.] de 06.01.2022 (Braz.) [hereinafter Lei No. 14.297], <https://www.in.gov.br/en/web/dou/-/lei-n-14.297-de-5-de-janeiro-de-2022-372163123>.

²⁶¹ 2021-22 Leg. Sess. (Cal.) [hereinafter AB 2716], https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2716.

²⁶² Lei No. 14.297, *supra* note 260 at art. 3.

²⁶³ *Id.* at art. 4.

²⁶⁴ *Id.* at art. 5.

²⁶⁵ For an English-language summary of the key provisions, see Alina Fidelis & Vinicius Rodrigues de Castro, *Law to Protect App Delivery People During Covid-19 Comes into Effect*, LEXOLOGY (Jan. 11, 2022), <https://www.lexology.com/library/detail.aspx?g=0800f790-8629-4f36-8e80-b75e-fa4b4947>. Further, according to the Public Ministry of Labour, court cases were also brought against “gig economy” companies to achieve similar ends. See Press Release, *Ministério Público do Trabalho em São Paulo*, MPT Requer que 99, Uber, Rappi e Lalamove Reconheçam Vínculo Trabalhista (Nov 8, 2021), <https://www.prt2.mpt.mp.br/925-mpt-requer-que-99-uber-rappi-e-lalamove-reconhecem-vinculo-trabalhista>.

²⁶⁶ The content of the training courses must include not only standard matters of “road safety and defensive driving,” but also such things as “passenger interactions including de-escalation training, and protocols for managing intoxicated, unruly, or violent passengers, as well as unaccompanied minors.” AB 2716 § 1. Of course, this bill is not strictly aimed at workers. It is also designed to benefit consumers. Indeed, California Assemblymember Tim Grayson sponsored the bill after getting into an accident in an Uber. See Joyce E. Cutler, *Uber, Lyft Drivers Could Face New California Training Mandate*, DAILY LABOR REPORT (Aug. 25, 2022), <https://news.bloomberglaw.com/daily-labor-report/uber-lyft-drivers-could-face-new-california-training-mandate>.

²⁶⁷ H.B. 2076, 2022 Leg. Sess. (enacted Mar. 31, 2022, session law: c. 281, I. 2022), <https://app.leg.wa.gov/bills/summary?BillNumber=2076&Year=2021&Initiative=false>.

rights for app-based drivers who, by virtue of the bill, are deemed to not be employees. As far as rights for non-employees go, the law compares favourably with some of the other ones we have surveyed. For example, the law creates a membership-based Driver Resource Center to represent drivers,²⁶⁸ to be funded by a surcharge on rides²⁶⁹ and voluntary driver contributions,²⁷⁰ and expressly states that it “may not be funded, excessively influenced, or controlled by a transportation network company.”²⁷¹ The law also provides for a minimum wage regime which accounts for both time and expenses—although the rates for outside the city of Seattle are considerably worse than those for inside²⁷²—as well as a “just cause” standard and fair process for deactivations.²⁷³ The law further provides for entitlements to paid sick leave²⁷⁴ and a system of workers’ compensation,²⁷⁵ among other things. However, the fundamental problem with the law is that it comes at the cost of something better—employee status—and pre-empts “the field of regulating transportation network companies and drivers” so that individual cities, towns, counties, etc. could not provide better conditions to drivers.²⁷⁶ Rather than robbing Peter to pay Paul, the Act just robs Peter and repays him a pittance.

ENFORCEMENT

In its proposed amendments to the directive on platform work, the European Parliament’s Committee on Employment and Social Affairs forthrightly recognized the elephant in the room whenever “gig economy” cases and litigation are discussed: enforcement.²⁷⁷ This is seen, for

²⁶⁸ *Id.* at § 1(1)(k). The law is written in such a way that it is virtually guaranteed the Center will be the Drivers’ Union, a body set up by Teamsters Local 117.

²⁶⁹ *Id.* at § 1(12).

²⁷⁰ *Id.* at § 1(13).

²⁷¹ *Id.* at § 1(1)(k).

²⁷² *Id.* at § 1(4).

²⁷³ “Deactivations for certain categories of alleged reasons—such as sexual harassment—are exempted from the process. This subsection also provides for transportation network companies to come to a collective agreement with the Driver Resource Center on the “driver account deactivation appeals process” and includes language intending the section to qualify for immunity from federal antitrust law.” *Id.* at § 1(15).

²⁷⁴ “The entitlement—a driver earns one hour of paid sick leave for every forty hours of “passenger platform time worked”—is loosely based on comparable provisions for employees in the state of Washington. By European—or indeed by any human—standards, the entitlement is abysmal and would not cover a worker for any serious illness or injury from which it takes time to recover.” *Id.* at § 6.

²⁷⁵ *Id.* at § 11.

²⁷⁶ *Id.* at § 32(1).

²⁷⁷ State enforcement is something we emphasized as well in *Litigating*

example, in the Committee's proposed (new) Recital 22a, which states (in part):

Experience has shown that the existing Member States' sanctions have not been sufficient to achieve full compliance with prohibitions against the use of false self-employment employment. One of the reasons is that administrative sanctions alone are likely not to be enough to deter certain unscrupulous employers. Compliance can and should be strengthened by the application of effective and dissuasive sanctions, which could imply the suspension of the operating licence in cases of persistent infringements or particularly exploitative working conditions.²⁷⁸

Given the "gig economy" companies' track record on obeying the law—or better put, the lack thereof—any proposed law on "gig economy" workers' rights worth its salt must come with a comprehensive enforcement regime. The necessary ingredients of such a regime are: i) a government body with the financial resource and the political will to act; ii) criminal sanctions and stiff civil penalties; and iii) a procedural landscape which facilitates suits by workers, unions, and others.

The UK provides a fantastic case study of a country where the courts have done an increasingly good job of construing

the Cause of Labour, pointing out that:

Given that the overwhelming majority of low paid workers will not bring employment status litigation, and that trade unions and other labour organisations do not have limitless resource to bring the same, the state must proactively and rigorously enforce the law, applying penalties stiff enough to dissuade unlawful behaviour, if workers are to have any hope of enjoying the basic set of rights to which they should be entitled.

Moyer-Lee & Kountouris, *Litigating the Cause of Labor*, *supra* note 25, at 36.

²⁷⁸ Comm. on Emp. and Soc. Affs., Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work, 2021/0414(COD) (May 2, 2022). The amendments would also require other changes on enforcement. For example, they suggest Member States should be encouraged to set national targets for inspections each year (article 4(3)(d)), or Member States being required to do an automatic inspection every time a platform worker is newly recognized as an employee (article 4(3)(da)). The amendments grapple with the issue of undocumented migrant workers but only weakly float the possibility of a strict separation between migration and labor enforcement regimes (an absolute necessity if undocumented workers are expected to participate in enforcement actions). Similarly, the amendments allude to the problem of platforms outsourcing workers to evade any employer responsibilities, but stop short of proposing strict provisions whereby a platform would necessarily be liable for any violations of a subcontractor (see article 12(b)).

ing employment legislation to provide protections for "gig economy" workers, while the state has demonstrated zero political will, and enforcement bodies lack the financial resources, to effectively enforce the laws on which the courts rule. Instead, in June 2022, the government appointed the co-founder of Just Eat—a company against which workers at the time had staged the longest strike in UK "gig economy" history²⁷⁹—as the "cost of living business tsar."²⁸⁰ In a land where firms can face a minimum wage inspection once every five hundred years, and an infinitesimal chance of criminal prosecution,²⁸¹ employment law is effectively a voluntary proposition.²⁸²

"Given the 'gig economy' companies' track record on obeying the law—or better put, the lack thereof—any proposed law on 'gig economy' workers' rights worth its salt must come with a comprehensive enforcement regime."

In Spain on the other hand, there have been numerous enforcement actions, even before the *Riders Law* came into effect.²⁸³ Indeed, it is the well-resourced suits the

²⁷⁹ Jason Moyer-Lee, *Gauging the Impact of Gig Economy Judgments*, LABOUR RESEARCH at 9 (July 2022).

²⁸⁰ Rowena Mason, *Co-Founder of Just Eat Made UK's New Cost of Living Business Tsar*, GUARDIAN (June 13, 2022), <https://www.theguardian.com/business/2022/jun/13/co-founder-of-just-eat-made-uks-new-cost-of-living-business-tsar>.

²⁸¹ Between April 2015 and March 2021, employers stole more than £100 million from workers, in over 6,500 violations of minimum wage. Only six employers were criminally prosecuted. See Adam Bychawski Peter Geoghegan & Jenna Corderoy, *Only Six UK Employers Prosecuted for Paying Below Minimum Wage in Six Years*, OPEN DEMOCRACY (July 28, 2021), <https://www.opendemocracy.net/en/dark-money-investigations/only-six-uk-employers-prosecuted-paying-below-minimum-wage-six-years/>. More generally on UK enforcement. See *Taming the Beast*, *supra* note 47, at 102-7. See also *Gauging the Impact of Gig Economy Judgments*, *supra* note 279.

²⁸² See also Alan Bogg, *Taking the Rule of Law Seriously: The P&O Ferries Scandal and the Need for a Labour Enforcement Act* (2022), <https://www.tuc.org.uk/research-analysis/reports/building-worker-power?page=4>.

²⁸³ For example, *El País* reported in November 2021 that Glovo was fined over €8.5 million for misclassification in Sevilla. See Gorka R. Pérez, *La Inspección de Trabajo Multa a Glovo con Más de 8,5 Millones por no Regularizar los Contratos de sus Repartidores en Sevilla*, EL PAÍS (Nov. 18, 2021), <https://elpais.com/economia/2021-11-19/la-inspeccion-de-trabajo-multa-a-glovo-con-mas-de-ocho-millones-y-medio-de-euros-por-no-regularizar-los-contratos-de-sus-repartidores-en-sevilla.html>. More recently, Glovo was fined an additional €79 million, a sum roughly four times as large as any previous fine issued by the Labour Inspectorate. See *Gig Economy Project—Glovo Hit with Massive €79 Million Fine for False Self-Employment in Spain*, BRAVE NEW EUROPE (Sept. 21, 2022), <https://braveneweuropa.com/gig-economy-project-glovo-hit-with-massive-e79-million-fine-for-false-self-employment-in-spain>.

state brought which helped tipped the balance of jurisprudence towards employee status.²⁸⁴ However, these enforcement actions and/or the threat of further actions like them, have proved insufficient to render the *Riders Law* applicable in practice. Indeed, Just Eat was the only major food delivery company to fully comply with the law. Industry leader Glovo largely ignored it. Uber Eats dismissed 3,000 couriers and adopted an outsourcing model (which has been alleged to be unlawful),²⁸⁵ complained publicly that Glovo was flouting the law,²⁸⁶ and then went back to treating its own couriers as self-employed. Deliveroo on the other hand, pulled out of the country.²⁸⁷

Government bodies in other countries have also brought enforcement proceedings,²⁸⁸ and in some cases won substantial concessions or pay-outs. For example, the Department of Labor and Workforce Development in the US state of New Jersey was recently able to extract a whopping US\$ 100 million in back taxes from Uber due to the company's misclassification of drivers.²⁸⁹ In an even more powerful example, the Chinese government bent rideshare company Didi—which controls 90% of the Chinese market—to its will, effectively forcing the company to delist from the New York Stock Exchange.²⁹⁰ The

government also fined the company US\$ 1.2 billion for violation of data protection laws, including for storing 57 million driver ID numbers unencrypted.²⁹¹ The simple point is that for the most part, these proceedings have not been sufficient to engender an overhaul of the companies' employment model across the board.

In France, prosecutors recently deployed criminal law against Deliveroo; successfully winning a case against the company and some of its former directors over misclassification of riders. The company was fined €375,000 and two former directors were given one-year suspended prison sentences.²⁹² The Digital Platform Workers' Rights Act, 2022²⁹³ from Ontario, Canada, provides another interesting example of a criminal sanctions regime.²⁹⁴ For example, section 52 states:

A person who contravenes this Act or the regulations or fails to comply with an order, direction or other requirement under this Act or the regulations is guilty of an offence and on conviction is liable,

- (a) if the person is an individual, to a fine of not more than \$50,000 or to imprisonment for a term of not more than 12 months or to both;
- (b) subject to clause (c), if the person is a corporation, to a fine of not more than \$100,000; and
- (c) if the person is a corporation

²⁸⁴ See *Taming the Beast*, *supra* note 47, at 123-37.

²⁸⁵ The two trade union confederations—CCOO and UGT—are representing the workers in an unlawful collective dismissals case. The unions were at first denied the right to represent such workers. However, this denial was recently overturned by the Supreme Court (Social Chamber). 20 julio 2022, STS 3193/2022, ECLI:ES:TS:2022:3193. See also Laura Olías, *El Supremo Rectifica a la Audiencia Nacional y Reabre la Denuncia por ERE Encubierto de Uber Eats*, EL DIARIO (July 28, 2022), https://www.eldiario.es/economia/supremo-rectifica-audiencia-nacional-re-abre-denuncia-ere-encubierto-uber-eats_1_9207235.html.

²⁸⁶ Marimar Jiménez, *Uber Eats Exige al Gobierno que Glovo Cumpla la Ley Rider para Competir en Igualdad de Condiciones*, CINCO DÍAS (Mar. 8, 2022), https://cincodias.elpais.com/cincodias/2022/03/08/companias/1646726762_057560.html.

²⁸⁷ It is not clear, however, that Deliveroo pulled out because of the *Riders Law*. See *Taming the Beast*, *supra* note 47, at 123-137, *Gig Economy Project – Uber Eats Joins Glovo in Abandoning Spain's Rider's Law on It's 1 Year Anniversary*, BRAVE NEW EUROPE (Aug. 9, 2022), <https://braveneweuropa.com/gig-economy-project-uber-eats-joins-glovo-in-abandoning-spains-riders-law-on-its-1-year-anniversary>.

²⁸⁸ For example, in November 2021 the Brazilian Public Ministry of Labour announced it was bringing misclassification proceedings against "gig economy" companies 99, Uber, Rappi and Lalamove. See Press Release, *Ministério Público do Trabalho em São Paulo, MPT Requer que 99, Uber, Rappi e Lalamove Reconheçam Vínculo Trabalhista* (Nov 8, 2021), <https://www.prt2.mpt.mp.br/925-mpt-requer-que-99-uber-rappi-e-lalamove-reconhecem-vinculo-trabalhista>.

²⁸⁹ Cade Metz, *Uber Agrees to Pay N.J. \$100 Million in Dispute Over Drivers' Employment Status*, N.Y. TIMES (Sept. 12, 2022), <https://www.nytimes.com/2022/09/12/technology/uber-new-jersey-settlement.html>.

²⁹⁰ Cissy Zhou, *Didi to Exit NYSE on June 10 Amid Uncertainty About China Restart*, ASIA NIKKEI (Jun 9, 2022), <https://asia.nikkei.com/Business/Transportation/Didi-to-exit-NYSE-on-june-10-amid-uncertainty-about-china-restart>.

[restart](#).

²⁹¹ Paul Mozur & John Liu, *China Fines Didi \$1.2 Billion as Tech Sector Pressures Persist*, N.Y. TIMES (July 21, 2022), <https://www.nytimes.com/2022/07/21/business/china-fines-didi.html>.

²⁹² *Paris Court Finds Deliveroo Guilty of Abusing Riders' Rights*, LE MONDE (Apr. 19, 2022), https://www.lemonde.fr/en/france/article/2022/04/19/paris-court-finds-deliveroo-guilty-of-abusing-riders-rights_5980972_7.html. Although, note that not all cases in France have gone against Deliveroo. See Anne-Hélène Pommier, *Deliveroo Condamné en Appel pour Travail Dissimulé*, LE FIGARO (July 8, 2022), <https://www.lefigaro.fr/flash-eco/travail-dissimule-la-cour-d-appel-condamne-a-son-tour-deliveroo-20220708>. Courier companies Stuart and Resto In are currently being criminally pursued in France as well over the same issue. See Antoine Blanchet, *Paris: Peine Maximale Requête Contre Stuart et Resto In pour Travail Dissimulé*, ACTU.FR (Sept 23, 2022), https://actu.fr/ile-de-france/paris_75056/paris-peine-maximale-requete-contre-stuart-et-resto-in-pour-travail-dissimule_54023672.html.

²⁹³ 2022, S.O. 2022, c. 7, Sched. 1, <https://www.ontario.ca/laws/statute/22d07>.

²⁹⁴ This law is also interesting in that it provides for its own oversight. For example, section 17(1) provides for the appointment of a "Director of Digital Platform Work" to administer the Act and section 19(1) provides for the appointment of compliance officers to enforce the Act. Compliance officers "may, without a warrant, enter and inspect any place in order to investigate a possible contravention of this Act or to perform an inspection to ensure that this Act is being complied with." § 22(1).

that has previously been convicted of an offence under this Act,

- (i) if the person has one previous conviction, to a fine of not more than \$250,000, and
- (ii) if the person has more than one previous conviction, to a fine of not more than \$500,000.

If a company is convicted of victimizing a worker,²⁹⁵ the court will also order the company to “take specific action or refrain from taking specific action to remedy the contravention,”²⁹⁶ for example by ordering that the worker be reinstated.²⁹⁷ And if the company disobeys such an order, they can be fined up to C\$ 4,000 *per day* until the company complies.²⁹⁸

When it comes to creating a procedural landscape which facilitates the bringing of employment status suits against “gig economy” companies, the United States provides some interesting examples. In California, state law provides for a mechanism through which, under certain circumstances, “aggrieved employees” can bring enforcement actions on behalf of the state. As US Supreme Court Justice Alito summarized the law in the case of *Viking River Cruises, Inc. v. Moriana*:²⁹⁹

The California Legislature enacted the Labor Code Private Attorneys General Act (PAGA) to address a perceived deficit in the enforcement of the State’s Labor Code. California’s Labor and Workforce Development Agency (LWDA) had the authority to bring enforcement actions to impose civil penalties on employers for violations of many of the code’s provisions. But the legislature believed the LWDA did not have sufficient resources to reach the appropriate level of compliance, and budgetary constraints made it impossible to achieve an adequate level of financing. The legislature thus decided to enlist employees as private attorneys general to enforce California labor law, with the understanding that labor-law enforce-

ment agencies were to retain primacy over private enforcement efforts.

The law effectively delegated enforcement to employees. As the employees brought suits as if they were the state, they could allege violations of employment law in relation to multiple employees; they were not restricted to alleging violations solely in relation to their individual contract. Although “gig economy” companies tried to get around the far-reaching effects of the law by relying on their arbitration clauses, Californian state courts had severely limited their ambitions.³⁰⁰ However, in the *Viking River Cruises* case cited above, the US Supreme Court relied on the Federal Arbitration Act to effectively defenestrate PAGA, making it impossible for a worker subject to an arbitration clause to bring a PAGA suit in relation to violations against multiple employees.³⁰¹ Following this decision, and on the same basis, the US Supreme Court overturned a series of similar cases against Uber and Lyft, and remanded them back to the Californian courts.³⁰² An anti-abortion law from Texas provides a better example of creative enforcement mechanisms. There, S.B. 8 prohibited physicians from “knowingly perform[ing] or induc[ing] an abortion on a pregnant woman if the physician detected a foetal heartbeat for the unborn child,” unless compliance was thwarted by a medical emergency. At the time the law was passed, it stood in blatant violation of the US Supreme Court’s interpretation of the US Constitution, which provided for a right to abortion until much later in pregnancy.³⁰³ Largely in an effort to evade, or at least delay, a federal court ruling the state law unconstitutional, the state of Texas disavowed any role in directly enforcing the law, instead delegating that role to the world at large.³⁰⁴ Any person in Texas could

²⁹⁵ See, e.g., *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (2014).

³⁰¹ PAGA, reasoned the Court, did not invalidate the requirement for a dispute between a worker and an employer to be submitted to arbitration and, further, an employer could not be compelled to deal with claims of violations against multiple employees in the arbitral proceedings with the single “aggrieved employee” seeking to bring suit. And according to the Californian law, once the aggrieved employee’s own claim had been removed to arbitration, they no longer had standing in court to argue the suit in relation to violations against other employees. Accordingly, the collective aspect of the claim fell away. In sum, a law which sought to allow an individual employee to bring a claim in relation to multiple employment law violations, as if the employee were the state, was reduced into a claim by a single employee and subjected to arbitration.

³⁰² *Uber Techs., Inc. v. Rosales*, 142 S. Ct. 2860 (2022), *Uber Techs., Inc. v. Gregg*, 142 S. Ct. 2860 (2022), and *Lyft, Inc. v. Seifu*, 142 S. Ct. 2860 (2022).

³⁰³ As held in *Roe v. Wade*, 410 U.S. 113 and modified by *Planned Parenthood v. Casey*, 505 U.S. 833. These cases were later overturned by *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

³⁰⁴ State officials maintained an indirect role in enforcing the law via li-

²⁹⁵ *Id.* at § 13.

²⁹⁶ *Id.* at § 53(1).

²⁹⁷ *Id.* at § 53(2)(2). Reinstatement will not necessarily be ordered; the court is given broad powers to make orders in this regard.

²⁹⁸ *Id.* at § 54(b).

²⁹⁹ 142 S. Ct. 1906 (2022).

bring suit against an abortion provider, and if they won, get their lawyers' fees reimbursed and pocket a solid US\$ 10,000 for their trouble.³⁰⁵ But this wasn't all the law did; as US Supreme Court Justice Sotomayor summarized in her dissent in *Whole Women's Health v. Jackson*:³⁰⁶

Importantly, S. B. 8 also modifies state-court procedures to make litigation uniquely punitive for those sued. It allows defendants to be hauled into court in any county in which a plaintiff lives, even if that county has no relationship to the defendants or the abortion procedure at issue. It gives the plaintiff a veto over any venue transfer, regardless of the inconvenience to the defendants. It prohibits defendants from invoking nonmutual issue or claim preclusion, meaning that if they prevail, they remain vulnerable to suit by any other plaintiff anywhere in the State for the same conduct. It also bars defendants from relying on any nonbinding court decision, such as persuasive precedent from other trial courts. Although it guarantees attorney's fees and costs to prevailing plaintiffs, it categorically denies them to prevailing defendants, so they must finance their own defenses no matter how frivolous the suits. These provisions are considerable departures from the norm in Texas courts and in most courts across the Nation.

S. B. 8 further purports to limit the substantive defenses that defendants may raise. ...³⁰⁷

To be sure, S. B. 8 was a vile attempt to invalidate a human—and at the time, constitutional—right. Its ends were reprehensible. There is also a serious question about whether its procedural innovations will ultimately survive the scrutiny of the federal judiciary in the US—or for that matter, whether they would survive judicial scrutiny elsewhere. However, the lesson to be learned from S. B. 8 is that a root and branch overhaul of procedures

dramatically affects the extent to which a substantive law can be enforced. For non-state enforcement to be effective, the overhaul must be as radical as law will permit.

CONCLUSION IN 6 PRINCIPLES

As interesting as comparative law analysis can be for the mere sake of satiating intellectual curiosity, it is important that such analysis serve the aims of making “gig economy” workers' rights real in practice. So, for the pro-worker legislator who wishes to do this, where should they start? Well, from the morass of cases and laws discussed in detail above, it is possible to distil the rather simple propositions below.

1 First, independent, democratic trade unions and worker organizations which represent “gig economy” workers must be provided a seat at the table. These organizations and the workers they represent have been the driving force in pushing back on the Silicon Valley spin machine, in winning better pay and conditions, in pressuring regulators and legislators to act, and in bringing legal cases and filing complaints in order to enforce the law. They also hold more expertise than legislators, lawyers and academics about what “gig economy” workers need from the law.

2 Second, one must identify the rights to which any proposed law would entitle “gig economy” workers. One may legislate to simply insert such workers into a pre-existing regime of employment protections (such as AB 5 sought to do in California), create a new regime (which should be comparable or superior in coverage), or some combination of the two (such as the proposed EU directive and the Spanish *Riders Law*).

3 Third, one must identify the definitions upon which any new law will rely. The most effective definitions are those that clearly delineate the category of worker who is to fall under a certain classification. For example, Proposition 22-style laws leave no room for doubt about which workers are to be classed as independent contractors. Pro-worker laws could do the same in reverse, stating in black and white which “gig economy” workers are to be classed as employees (or such other category which provides them with a comparable or superior set of rights). Failing this, the ABC test has provided the broadest and most dependable net with which to catch the slippery employment status fish.

4 Fourth, one must ensure—in the legislation if need be—that the jurisprudential approach to construing the law will be purposive and broad. Asymmetrical bargaining power must be taken into account, that the rights-enhancing purpose of the law must be clear, and interpretation is to be based on the reality of the working relationship and not merely written contracts.

censing decisions. See *Whole Women's Health v. Jackson*, 142 S. Ct. 522 (2021).

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ Footnotes and internal citations omitted.

5 Fifth, the procedural landscape must be cognizant of the power relations at play and conducive to the realisation of rights. Arbitration clauses should be prohibited, and no other mechanism should be allowed to oust the jurisdiction of courts of law or to impede class/collective actions. Similarly, workers and unions should have their costs reimbursed if they win, but not be condemned to pay the employer's costs if they lose. If financial support is needed in order for a worker to afford to bring a claim, the law should stipulate how it will be provided.

6 Sixth, and arguably one of the most important points, the enforcement regime must be serious. In addition to facilitating workers and others to take out claims, the state must have the resources and political will to relentlessly pursue lawbreakers, and the penalties must be so severe that the mere threat of enforcement is incentive enough to fall into line. This is an industry in which employers have demonstrated over and over again that irrespective of what judges say, or the extent to which they are lambasted in the press, that they are willing to flout laws unfavourable to them. Because the price of doing so has not been high enough.

Digest of Key Judicial Decisions

Argentina

[Cáceres, Itatí Laura Lucía c/ Repartos Ya S.A. – Medida cautelar](#) (decision in Spanish)

Date: September 24, 2021
 Tribunal: National Chamber of Labor Appeals - Courtroom III
 Issue: Unfair Dismissal
 Finding: Employee

Decision:

The Chamber of Labor Appeals affirmed the decision of the court of first instance, upholding the injunction demanded by the worker to recover access to her account. The company has blocked access to the app because of trade union activity. The de-platforming, the plaintiff argued, violated the [Argentine Law of Trade Unions, No. 23,551](#), which protects union leaders from dismissal, and the [Necessity and Urgency Decree No. 329/2020](#) (issued during the COVID-19 pandemic), which prohibited dismissals without just cause on the grounds of lack or reduction of work or force majeure.

The ruling stated that:

the plaintiff condemned what she named as a system of labor precariousness, which was implemented by the defendant, and stated that she and other colleagues organized a group known as “La Red de Trabajadores Precarizados” (The Network of Precarious Workers). With this group, she promoted... a campaign for the recognition that distribution workers are employees in a dependent relationship....

Thus, [the plaintiff] said that on August 10, 2020, her group called for a National Meeting of Delivery Workers of the Network. According to her, she acted as one of its main referents. She added that from there the National Assembly of Delivery Workers was promoted and organized, ...via “Zoom” on September 4 of that year... [This group] resolv[ed] on that occasion to make a call to mobilize at the doors of the Ministry of Labor for labor recognition on September 17, 2020.

According to the plaintiff, days after these events, she was allegedly “fired” by the defendant.

The ruling stated that there would be no judgment on the merits of the case, that is, whether or not there is an employment relationship:

An injunction does not require full and conclusive proof of the right that is invoked; whoever requests it must only prove that the right is plausible and the Judge may grant it without prejudging the merits of the case, because all that is required is the possibility that the right exists, and not an undisputable reality that will only be achieved by exhausting all the steps of the procedure, which is why, as pertains to this requirement, the broadness of criteria must be accepted.

The decision was not unanimous, as one of the chamber judges dissented.

Argentina

[Scornavache, Víctor Nicolás v. Cabify S.A. y otros – Despido](#) (decision in Spanish)

Date: September 2, 2021
 Tribunal: First Instance National Labor Court No. 77 (Buenos Aires) (No. 7248)
 Issue: Right to vacation, overtime, and bonuses
 Finding: Employee

Decision:

A driver for Cabify repeatedly requested that Cabify register their contractual relationship as required by law so she would be able to access and receive overtime pay, bonuses, vacation time etc. Despite repeated attempts by the driver, Cabify continued to ignore and reject the driver's requests. It further argued that the driver and Cabify were not in an employment relationship that required registration and the driver was an independent contractor. The ruling confirmed the existence of the constituent elements of an employment relationship. It stated that

[i]t is well known that, in the globalized world, new technologies have altered the way in which the subjects of an employment relationship relate to each other. But even in these new scenarios, the substance remains despite the changes. An in-depth analysis of the new relationships reveals the existence of that which characterizes (and defines) an employment relationship: personal work for others.

In so doing, it applied the principle of the primacy of reality:

A diachronic study of Labor Law shows that the genesis of many of its rules was aimed at reacting to situations of labor fraud. Among these, we should note the recourse of those who provide employment which seek to use contracts chosen from other branches of law to hide the existence of a labor contract.... This is the "principle of reality" that informs the labor discipline and compels the magistrate to pay attention to the real situation created, rather than to the forms that are chosen.

Furthermore, the ruling stated that the formalities (i.e., acceptance of the terms and conditions, invoicing by the driver, etc.) were the platform's requirements. The judgment then identified the following elements which are applicable to the case, and also are both classic and current elements on the subject:

On the existence of instructions:

The fact that the assignment of trips, as well as the control of compliance with the contractual parameters, is carried out algorithmically, even automatically, does not mean that managerial powers are not being exercised.

On the presence of the power of direction and control:

[T]he control of objectives through GPS is not different from the personal and face-to-face... supervision of the classic factory.... The owner (or foreman) watching the work from a window located above the production line, has the same panoptic position as the one who controls the movement of each of his vehicles through a satellite tracking system such as GPS.

On the power to direct or organize the work:

The fact that the assignment of trips, as well as the control of compliance with the parameters of the contract is carried out algorithmically, even automatically, does not mean that managerial powers are

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not being exercised....

With the emergence of new technologies, not only the sharpness and effectiveness of control, but also its foundations, are identical to those designed since the birth of human labor. It is true that the instruments of control are increasingly sophisticated and invisible and, therefore, more effective.

In this case, it was established that the application required 72 hours of work per week for which it paid a fixed price.

On employer sanctioning power: The witnesses were clear that the refusal of trips caused unfavorable consequences for the drivers. The ruling stated that,

...it is logical for a company to apply sanctions when the employee evades the work assignment...[W]hat is unreasonable is that it exercises its disciplinary power and, at the same time, ignores its status as an employer.

On workers "integration in the company" and the "absence of risk":

It has been conclusively demonstrated that the plaintiff joined a company which was owned by someone else and that directed and channeled his personal work towards its own ends.... [T]he fact that the vehicle is owned by the plaintiff is not an indication of his economic autonomy nor does it place him on equal footing with Cabify.... The relationship is not at all associative like the defendant argues. Strictly speaking, suspicion must be raised when a few persons who own a means of production claim to have a corporate relationship with many others, who only have their working capacity (internal quotations omitted).

Furthermore, the Court observed that

[t]he reduction of agency costs by the implementation of a work platform whose algorithm is owned by the company cannot be considered as a disruptive element for the identification of the employer-employee relationship. Although it seems that a third party exercises the power of control which is part of the power of management, this outsourcing of employer powers is the result of an employer plan, as occurs with the well-known delegation of employer powers to a hierarchical employee.

On periodic remuneration:

The continuous and regular payment of sums of money in exchange for personal work is indicative of the existence of a subordinate relationship, which does not appear to be contradicted by the forms used by the parties.

Furthermore, it is economic dependence in its pure state. The subjects of an employment relationship consent to it and enter with dissimilar elements. The employer enters the market with their own means of production and therefore benefits from the profits generated by the dynamics of the market. The means of production that the worker commits in the contract is their own body or, to be more generic, their working capacity. This capacity enters the production process which is instrumentalized by the employer, which can generate profits or losses.

Therefore, the employer—in their capacity as the owner of the means of production—benefits from the profits generated by the process.... [F]or their part, the employee, who contributed to this profit with their personal work, is only entitled to the agreed upon remuneration.

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The employee has no influence on the decisions made by the employer. These essential elements, which form the socio-economic basis of the employment contract, do not disappear because the work is provided by a person who owns a car.

On brand alienation:

With the emergence of apps, there is a phenomenon of brands associated with an increasingly diffuse business venture, which can only be accessed with a cell phone. The truth is that the brand generates clients, and the employees provide services to the clients of the brand owner, and not to their own clients.

When an individual worker provides services on a personal basis under the umbrella of a brand that is not their own and following an “instruction manual” imposed by the main company, there are serious indications that they could be considered a labor worker.

On the activity of the applications, the integration of its drivers and the lack of professional development to qualify them as entrepreneurs or partners:

From the user’s point of view, the defendant is a company whose activity is the transportation of passengers. The users are customers of CABIFY; they are not customers of the various drivers. CABIFY’s only assets are its customers.... This is reinforced by the fact that no evidence has been submitted in the case to prove that the plaintiff is the owner of a business organization of his own. It cannot be inferred from the record that the plaintiff has acted as an independent business owner and that, as such, he has agreed to his obligations based on a rational calculation of needs and interests.

The ruling ended by noting that,

[t]he defendant company hired [the plaintiff], trained him, required him to have a certain car, special clothing, required that he be available for a predetermined period of time, told him every day the trips he had to take, controlled his compliance with the work and sanctioned him when it considered [his failure] to comply with the required guidelines. In the opinion of the court, these facts necessitated the conclusion that this relationship is “labor subordination in its purest form.” Thus, drivers for Cabify are employees.

This decision was appealed by the platform and is under review by a National Chamber of Labor Appeals (2nd instance).

[José Luis Bolzan v. Cabify S.A. y otros – Despido](#) (decision in Spanish)

Date:	August 31, 2021
Tribunal:	First Instance National Labor Court No. 21 (Buenos Aires)
Issue:	Right to vacation, overtime, and bonuses
Finding:	Employee

Argentina

Decision:

This ruling was based on the presumption that there is automatically an employment relationship when one person is rendering services for the benefit of another person, unless proven otherwise, as established by article 23 of [Law No. 20.744](#), which governs labor contracts in Argentina.

The Court defined “dependance” as the “legal status” where the worker is incorporated into a company, which is in whole or in part not their own, and the worker contributes their work to achieve the purposes of the company. Further, access to the final product is relinquished by the worker in advance, so that they are not party to the risks or rewards because they are instead receiving remuneration and following orders or instructions given to them by the employer.

In response to the argument that platforms, such as Cabify, are software companies and not transportation companies, as well as the element of “integration into the company,” the ruling pointed out that passenger transportation “is precisely the business purpose of the defendant company and therein lies the object of its commercial exploitation.” The ruling is based on, among other things, the principle of the primacy of reality, stating that they must look “beyond the forms, denomination and legal appearance that the contracting parties may give to the relationship.”

It held that the company failed to rebut the presumption of employment. The description of the service provided by the platform does not offer sufficient evidence to legally define the relationship as something other than what the driver states and that “the fact that the plaintiff issued invoices, that the vehicle with which he worked was his property, that they signed a commercial contract that the defendant is trying to uphold and other formal issues that were implemented are not decisive for the purpose of qualifying the relationship with the company.” It should be noted that the court ordered severance pay because the driver was dismissed after demanding the payment of labor obligations from the company.

Lastly, the decision is enforceable against the president of the company per Argentine law based on the theory of unenforceability of a legal status when used to violate the law.

This decision was appealed by the application and is under review by a National Court of Labor Appeals (2nd instance).

Australia

[Deliveroo Australia Pty Ltd. v. Franco](#)

Date: August 17, 2022
 Tribunal: Fair Work Commission (FWC) (Full Bench)
 Issue: Unjust Dismissal
 Finding: Independent Contractor; overturned finding of employee

Decision:

The Full Bench determining Deliveroo's appeal considered that the commissioner at first instance (see summary and analysis below) had approached the issues, of whether Diego Franco had been unfairly dismissed and the appropriate remedies, in an "orthodox" manner. However, the Full Bench was required by the High Court decisions in *ZG Operations v Jamsek* and *Construction and Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty. Ltd.*¹ to analyze the jurisdictional question—whether Franco was an employee—by reference only to the terms of the written agreement entered into between him and Deliveroo.

In that analysis, the Full Bench found that there were four aspects of the written agreement weighing decisively in favor of the conclusion that Franco was in an independent contracting relationship with Deliveroo. First, the agreement terms conveyed "a lack of control by Deliveroo over the manner of performance of any work which Mr. Franco agree[d] to undertake" (e.g., he would determine the route taken to ensure safe and efficient delivery of a food order, and the type of vehicle he would use). Secondly, Franco was obliged to provide the vehicle for making deliveries, at his expense. Third, the agreement did not require the personal service of Franco – he could arrange for someone else to perform delivery services, without approval from Deliveroo. Fourth, in addition to payment by results rather than for time worked, Franco was required to pay a 4% administrative fee to Deliveroo.

The Full Bench went on to outline certain "realities we are obliged to ignore," in respect of the way that the working relationship between Franco and Deliveroo operated in practice. These included: the booking system the platform used to allocate work to riders "provided Deliveroo with a significant degree of operational control over its delivery workers, including Mr. Franco;" the two motorcycles used by Franco for his work were also used personally, and did not amount to a substantial capital outlay on his part; "it was never commercially practical to delegate the work and Mr. Franco never did so;" and finally, the:

various iterations of the contract were drawn up unilaterally by Deliveroo without any negotiation or consultation, and it might be inferred that this was done with an eye to maintaining Deliveroo's position that the delivery workers were contractors and not employees.

The Full Bench concluded as follows:

Had we been permitted to take the above matters into account, as the Commissioner did, we would have reached a different conclusion in this appeal. As a matter of reality, Deliveroo exercised a degree of control over Mr. Franco's performance of the work, Mr. Franco presented himself to the world with Deliveroo's encouragement as part of Deliveroo's business, his provision of the means of delivery involved no substantial capital outlay, and the relationship was one of personal service. These matters, taken together, would tip the balance in favour of a conclusion that Mr. Franco was an employee of Deliveroo. However, as a result of *Personnel Contracting*, we must close our eyes to these matters.

¹ [2022] HCA 1 and [2022] HCA 2, both handed down on February 9, 2022.

Australia

The Full Bench therefore decided that the Commissioner had erred (in a formal sense) in finding that Franco had been an employee of Deliveroo. Therefore, Franco was not protected from unfair dismissal under the Fair Work Act, and the Fair Work Commission had no jurisdiction to deal with his unfair dismissal claim or grant any remedies: “Regrettably, this leaves Mr. Franco with no remedy he can obtain from the Fair Work Commission for what was, plainly in our view, unfair treatment on the part of Deliveroo.”

News:

David Marin-Guzman, [Deliveroo Overturns Ruling Rider an Employee](#), FINANCIAL REVIEW, August 17, 2022.

Nawaz v. Rasier Pacific Pty Ltd T/A Uber B.V.

Date: June 17, 2022
 Tribunal: Fair Work Commission (FWC)
 Issue: Unfair Dismissal
 Finding: Independent contractor (not Employee)

Decision:

Asim Nawaz brought a complaint against Rasier Pacific Property, Ltd. for unfair dismissal, which he alleged had been effected through the termination of the services agreement under which he undertook rideshare services for Uber. His access to the Uber platform had been removed, apparently in response to a passenger complaint. Applying the approach to determination of work status established by the High Court in *ZG Operations v. Jamsek* and *Construction, Forestry, Maritime, Mining and Energy Union v. Personnel Contracting Pty Ltd*² (see above), the FWC determined that Nawaz was not an employee and, therefore, was jurisdictionally barred from pursuing an unfair dismissal claim.

The FWC found that as the parties’ relationship was regulated by a written, comprehensive agreement, which was not a sham, the characterization of the relationship was to be determined by reference to the rights and obligations set out in that agreement. The written agreement exhibited some aspects of a right to control on the part of Uber, including the various obligations it imposed upon Nawaz along with Uber’s Guidelines and its ratings system.

The FWC went on to find that:

There are aspects of control associated with how the fees are set and varied and variations to the Services Agreement more generally operate. However, whilst these are capable of operating unfairly and are a reflection of the imbalance in the bargaining power of the parties, in light of the judgements in *Personnel Contracting* and *Jamsek* ..., they are not relevant indicators of the nature of the relationship. The absence of a more workable dispute resolution procedure also falls into that category.

In addition, Nawaz was able to accept work through other rideshare and delivery apps, even when logged on and performing work for Uber. The FWC also considered that:

² *Id.*

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Mr. Nawaz's role under the terms of the Services Agreement was not so subordinate to Uber's business in the sense contemplated in *Jamsek and Personnel Contracting* that it can be seen to have been performed as an employee of the business.

The FWC ultimately concluded as follows:

[T]here are some elements of the relationship between Mr. Nawaz and Uber that could operate unfairly. These include the approach evident in the Services Agreement to the establishment and variation of the fees and to other changes that may be made. These arise for the most part from the imbalance in the bargaining power of the parties. The role of the Commission in the present context is not to compensate for these factors or adjust the legal rights and obligations to provide a fairer outcome. ... [I]n many situations within Australian workplaces and in our society these elements have led to some regulation to establish minimum standards and related dispute resolution rights and obligations. Any broad policy response remains a matter for the Parliaments of Australia.

News:

David Marin-Guzman, [Uber Uses High Court precedent to Dash Employment Claims in Key Win](#), FINANCIAL REVIEW, June 20, 2022.

[Franco v. Deliveroo Australia Pty Ltd.](#)

Date: May 19, 2021
 Tribunal: Fair Work Commission (FWC)
 Issue: Unfair Dismissal
 Finding: Employee

Decision:

Diego Franco, a food delivery rider for Deliveroo, had his services terminated by the platform (via email) for allegedly failing to deliver orders on time as required by his 'supplier agreement'. The Fair Work Commission (FWC) ruled against Deliveroo's jurisdictional objection that Franco was not an employee and therefore could not pursue an unfair dismissal claim under the [Fair Work Act 2009](#).³

The FWC found that Franco was not carrying on a trade or business of his own. Rather, he was working in and as part of Deliveroo's business. While it appeared that he had some freedom about when and where to work, in practice Deliveroo's technological systems directed him to make himself available and perform work at particular times and not cancel booked deliveries.

³This outcome contrasts with that in *Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd T/A Uber Eats* (2020) 296 IR 246, where a full bench of the FWC found that a driver for Uber Eats was an independent contractor (even though they acknowledged she did not have the practical means to develop her own independent delivery business). The Transport Workers Union supported Amita Gupta in an appeal against that decision to the full court of the Federal Court of Australia. The case was settled in late 2020, after a hearing in which judges questioned whether the contracts imposed by Uber Eats reflected the reality of its drivers' working arrangements. The settlement involved a substantial payout to Gupta, later revealed to have been in the amount of A\$400,000 (many times higher than the maximum compensation she could have received for unfair dismissal). See David Marin-Guzman, [Uber Paid "Incredible" Amount to Avoid Landmark Judgment](#), FINANCIAL REVIEW, June 10, 2021.

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The FWC noted that:

[W]hat might have, superficially, appeared to be an absence of control over when, where, or how long Mr. Franco performed work for Deliveroo, actually camouflaged the significant capacity for control that Deliveroo, (like other digital platform companies) possesses. The capacity for this control is inherently available from any utilisation of the significant volume of data that provides the metrics upon which control of engagement and performance of the work may be exercised.

The supplier agreement and other relevant documents indicated the existence of a principal-independent contractor relationship. However, in the FWC's view, these were terms and conditions imposed on Franco without any capacity to negotiate: "The practical reality of the circumstances was that Deliveroo presented the contractual arrangements to Mr. Franco and other riders, as a fait accompli."

The FWC was not troubled by the fact that Franco had also performed food delivery work for Uber Eats and Door Dash, while working for Deliveroo. "Multi-Apping" of this kind has been a factor precluding gig workers in many countries from establishing employment rights. On this point, the FWC considered that,

traditional notions regarding the exclusivity necessary for the establishment of an employment relationship require reconsideration.... [T]he fact that Mr. Franco could and did work for competitors of Deliveroo, must be assessed in the context of a modern, changing workplace impacted by our new digital world.

Having determined that (as an employee) Franco could claim for unfair dismissal, the FWC then had to consider whether his termination by Deliveroo was harsh, unjust or unreasonable. The tribunal found that Deliveroo had not clearly identified the required delivery time standards that had formed the basis for its decision to terminate Franco's services. Therefore, there was no valid reason for the dismissal relating to his performance or conduct. Further, by effecting the termination by email, Deliveroo had acted in a "perfunctory, callous" manner which gave Franco no opportunity to respond:

[T]he access that digital platform businesses have to extensive quantities of data and which provide the capacity for detailed examination of performance metrics, should not translate into a license to treat individuals, whether they be employees or contractors, without a level of fundamental, human compassion.

The tribunal ordered Deliveroo to pay compensation to Franco for his lost wages, and that he be reinstated to his former position. Reinstatement is rarely awarded in Australian unfair dismissal claims. In this case, the FWC rebutted Deliveroo's contention that Franco's involvement (post-dismissal) in a public campaign by the Transport Workers Union for gig workers' rights had irretrievably damaged the relationship between the parties. Reinstatement was therefore "an appropriate and just rectification" for Franco's unfair

News:

Lydia Feng, [Deliveroo Driver's Dismissal 'Harsh, Unjust and Unreasonable', Fair Work Commission Rules](#), ABC News, May 18, 2021.

Aftermath of the Decision:

Deliveroo swiftly lodged an appeal against the decision. In August 2021, a full bench of the FWC (having heard the appeal) decided to put the proceedings on hold. This followed a decision of the High Court of Australia in

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a case involving the rights of casual employees under Australian labor laws⁴—and two further pending High Court cases examining the legal tests for distinguishing between employees and independent contractors (although not in the context of gig work). The FWC full bench considered that final determination of the appeal in *Deliveroo v. Franco* should await the authoritative guidance of the High Court on the principles to be applied on the employee-independent contractor distinction. Therefore, the FWC order of reinstatement was stayed during this interim period, and Deliveroo was ordered to pay A\$300.00 per week to Franco until the determination of the appeal.⁵

In February 2022, the High Court delivered its judgments in the other two relevant cases: *ZG Operations v. Jamsek* and *Construction, Forestry, Maritime, Mining and Energy Union v. Personnel Contracting Pty Ltd.*⁶ In essence, the Court elucidated an approach to determining work status that focuses predominantly on the relationship between the parties, by reference to the right and duties set out in any written agreement, which comprehensively regulates that relationship.⁷ The Court eschewed prior approaches that had considered the substance and reality of the work relationship as it has evolved or any inequality of bargaining power that may exist between the parties. The traditionally-applied multi-factor test for distinguishing between employees and independent contractors would still have relevance, but in the High Court's view, through the prism of the written contractual terms.

The parties in *Deliveroo v. Franco* were then invited by the FWC full bench to make further submissions on the implications of the High Court's shift in approach to deciding on employment status. Predictably, Deliveroo argued that the High Court had overridden the kind of analysis of the parties' working relationship adopted by the FWC at first instance, which led to its finding that Franco was an employee. Rather, according to the platform, when the focus is centered on the rights and obligations of the parties under the terms of the services agreement, the conclusion must be reached that it amounted to a contracting relationship.⁸

The appeal decision of the Full Bench is summarized above.

The new High Court precedents on contract interpretation⁹ significantly narrow the prospects of other gig workers being able to successfully challenge their putative engagement by platforms as independent contractors. However, the election of a federal Labor Government on May 21, 2022 offers the potential for long-awaited legislative reform. The Labor Government's policy states that it will extend the powers of the FWC to set minimum standards for those in employee-like forms of work, including gig workers.¹⁰ Some unions and academics will also be pressing the new government to broaden the statutory definition of "employment" in the Fair Work Act, to bring gig workers within the legislation's framework of minimum wages, employment conditions, unfair dismissal protection, and collective bargaining.

⁴ *Workpac Pty Ltd v. Rossato and Others* (2021) 95 ALJR 681.

⁵ *Deliveroo Australia Pty Ltd v. Franco* [2021] FWCFB 5015 (August 13, 2021), <https://www.fwc.gov.au/documents/decisionssigned/html/2021fwcfb5015.htm>. See also the FWC Bench's earlier Statement in the *Deliveroo v. Franco* appeal: [2021] FWCFB 4840 (August 6, 2021), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FWCFB/2021/4840.html>.

⁶ [2022] HCA 1 and [2022] HCA 2, both handed down on February 9, 2022.

⁷ This approach is based on the reasoning developed by the High Court (in the context of casual employment) in *Workpac v. Rossato*, (2021) 95 ALJR 681.

⁸ David Marin-Guzman, *Deliveroo Wilds High Court ruling to Argue Riders are Not Employees*, FINANCIAL REVIEW (Mar. 11, 2022), <https://www.afr.com/work-and-careers/workplace/deliveroo-wilds-high-court-ruling-to-argue-riders-are-not-employees-20220311-p5a3ri>.

⁹ See e.g., "Big win" for Deliveroo ahead of reactivated case, WORKPLACE EXPRESS (Feb. 9, 2022).

¹⁰ Ontario Class Proceedings Act, 1992, S.O. 1992, § 5 (Can.).

Canada

[Heller v. Uber Technologies Inc, et. al](#)

Date: August 12, 2021
 Tribunal: Ontario Superior Court of Justice
 Issue: Certification of Class for Class Action
 Finding: Class Certified

Decision:

The plaintiffs brought a class action lawsuit against Uber in Ontario. Instituting this suit is the first step in class action litigation, which requires the court to assess and “certify” the class for it to continue. The litigation is focused on the classification of Uber drivers, which under Ontario law can be one of the following: (1) employer-employee; (2) contractor-independent contractor; and (3) contractor-dependent contractor, which is an intermediate classification. The court does not make a judgment on the merits of this case, but is solely focused on whether the class can be certified. In order to determine whether the class can be certified, “there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behavior of wrongdoers.”¹¹

These factors dictate that the plaintiffs show some “basis in fact” to have the class certified. The Court reviewed the evidence and found that this class can be certified for breach of the Employment Standards Act¹² and breach of contract, but not the other two causes of action that were pled (i.e., unjust enrichment and negligence). Given the legal and factual question regarding the employment status of these drivers, the Court found that the plaintiffs have “plainly and obviously” disclosed a cause of action. With regards to unjust enrichment, the Court found that a breach of contract claim precludes an unjust enrichment claim because unjust enrichment is a remedy in exceptional circumstances, where other remedies are unavailable. Additionally, the Court did not find that plaintiffs qualified under the standard set in *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*,¹³ to show pure economic loss in negligence.

The Court found there to be an identifiable class, by evaluating whether the complaint: “(a) ...identifies the persons who have a potential claim against the defendant; (b) ...defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (d) ...describes who is entitled to notice.”

The Court was willing to certify the class with a slightly amended definition to take into account the complexity of the employment relationship at issue. In determining a common issue within a class, the court looks to see whether resolution would avoid duplication and facilitate judicial economy and access to justice. In this instance, there are many drivers who can point to the same set of facts or a substantially similar set of facts, that allowing class action suits to proceed would promote the Court’s efficiency concerns. All of the drivers used the Uber app and have had to agree to the same terms and conditions. Thus, there are common issues. Finally, the Court found that the representative plaintiffs would adequately represent the interests of the entire class without conflict of interest, and that there is a preference to this form of litigation. For these reasons, the Court certified this class of Uber drivers to proceed with litigation.

It should be noted that there was a discussion regarding the arbitration clause and waiver by the plaintiffs in this case. The Court referred to a Supreme Court of Canada’s decision that found that arbitration provisions in service agreements to be unenforceable on the grounds of the contractual doctrine of unconscionability. Al-

¹¹ Ontario Class Proceedings Act, 1992, S.O. 1992, § 5 (Can.).

¹² Ontario Employment Standards Act, 2000 S.O. (Can.).

¹³ Canadian National Railway Co. v. Norsk Pacific Steamship Co., 1992 CanLII 105 (SCC), [1992] 1 SCR 1021.

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though Uber updated its service agreement, in light of that decision, and the Court expressed doubt that those changes would survive further scrutiny. However, the Court did not rule on this issue due the case's procedural posture.

News:

- Laura Fric et al., [The Ride Isn't Over: Uber v Heller Certified as a Class Action](#), OSLER, Aug. 31 2021.
- Tara Descha, [Ontario Court Certifies Class Action Against Uber that Could See Some Workers Recognized as Employees](#), CBC, Aug. 13, 2021.

Commentary:

Luis Felix Leon, [How Gig Workers in Canada are Fighting for Employee Rights](#), REAL NEWS NETWORK, Mar. 8, 2022.

Chile

[Eduardo José Estrada, et al. v. Pedidos Ya Chile Spa](#) (Decision in Spanish)

Year: May 17, 2021
Tribunal: First Labor Court of Santiago (RIT: T-980-2020)
Issue: Dismissal for trade union activities
Finding: Independent Contractor (not Employee)

During the time the plaintiffs worked at Pedidos Ya (Chile), the company changed its remuneration structure for delivery workers, eliminating the guaranteed income and the incentives associated with the number of orders delivered. This situation caused the workers to organize themselves through the *Whatsapp* messaging platform, creating a kind of de facto collective organization, which demanded changes in remuneration. Remuneration conditions continued to change, which lead the workers to mobilize and express their dissatisfaction with the company's policies. These workers went to the company's office to demand a change in the remuneration structure. The company did not acquiesce to these demands, but rather fired 35 of the delivery drivers. The workers also led protests and strikes against Pedidos Ya. The plaintiffs argued that Pedidos Ya engaged in anti-union dismissals and violated their fundamental right to be free from unlawful discrimination.

The workers brought suit to request the recognition of their employment relationship; that the workers who were dismissed for their trade union activities be reinstated; and that they be paid full compensation for their services. The plaintiffs argued that the delivery service was carried out under the control and instructions of the company: they wore company uniforms; the service was provided at times and in areas determined unilaterally by the company; and the delivery workers provided their services under the organization and direction of the company.

Pedidos Ya declared the there was no employment relationship because of the absence of proof that the services were rendered in conditions of subordination and dependence. The company argued that the relationship was that of an independent contractor and a company, and that the workers were paid professional fees for their services. It further argued that the absence of an employment relationship precludes the existence of a trade union, since trade unions definitionally can only be established by employees, not independent contractors.

The Court concluded that the plaintiff had not proven the existence of an employment relationship and, therefore, rejected the remainder of the claims because they were all based on the existence of an employment relationship between the delivery workers and Pedidos Ya.

Colombia

[Alvaro Hernán Quina v. Rappi Sas](#) (Decision in Spanish)

Date: September 6, 2021
 Tribunal: Twenty-first Municipal Civil Court of Small Claims and Multiple Jurisdictions of Bogotá (Tutela, Radicación n.º11001-41-89-021-2021-00878-00)
 Issue: Access to due process and the right to the minimum wage
 Finding: Employee

Decision:

The plaintiff worked as a delivery person for the *Rappi* app. On March 17, 2020, the plaintiff's account was permanently deactivated for alleged non-compliance with the terms and conditions of the "Soy Rappi" community. Rappi did not specify the nature of the non-compliance.

The Court was called on to determine whether *Rappi's* unilateral decision violated the right to due process. In making that determination, the Court scrutinized the contract (i.e., the "terms and conditions") between the plaintiff and the defendant. Per the contract, Rappi claimed the app is an intermediary between *Rappi* delivery persons and the consumers. Also, per the contract, Rappi possessed the unilateral power to allow or block delivery driver's access to its platform and also terminate the contract. The Court determined that Rappi's unilateral power to terminate the contract did not give the delivery person the opportunity to provide a real and material defense as to why he should not be blocked from the platform. Moreover, the plaintiff stated that his work with Rappi was his only source of income and that he and his family depended on this income. Therefore, the Court considered it appropriate to intervene to the extent that the plaintiff's minimum and vital income and due process was compromised by *Rappi's* unilateral decision.

The Court granted temporary relief because it also found that there was an employment relationship between the parties. Thus, the rights and obligations arising from that relationship must be decided by a labor judge within the framework of the ordinary labor process, in which the interpretation of the contract is made. However, given that the response time of such special jurisdiction may be considerable, the Court ruled that this *tutela*¹⁴ should proceed as a protective mechanism to avoid irremediable damage to a fundamental right.

NOTE: [Carlos Andrés Pérez Ruiz v. Internet Services Latam S.A.S.](#), issued in 2020, was one of the first cases on the employment status of delivery workers to be decided in Colombia. In it, the Sixth Labor Court of Small Claims of Bogotá declared that an employment relationship existed between the plaintiff (a grocery shopper and delivery person) and the defendant (a grocery store delivery application) under the principle of the primacy of reality. In the court's opinion, the provision of the service constituted an indefinite employment contract, thus requiring the company to provide severance pay, a service bonus, vacation, and payments into social security.

Commentary:

Natalia Ramírez-Bustamante, [¿Mandatarios o trabajadores? Análisis jurídico de la vinculación entre Rappi y los rappideros](#), AMBITO JURIDCO, Oct. 25, 2021.

¹⁴ A *tutela* is a mechanism by which, "[a]ny individual may claim immediate legal protection of fundamental rights before a judge at any time or place, through a preferential and summary proceeding, on his/her own behalf or through someone else acting in his/her name, whenever the individual fears these rights may be jeopardized or threatened by the action or omission of any public authority." [Constitución Política de Colombia](#) [C.P.] art. 86.

Georgia

[Shakro Metreveli v. Wolt Georgia LLC \(Case No. 2B/1082\)](#) (decision in Georgian)

Date: July 8, 2022
 Tribunal: Tbilisi Appellate Court
 Issue: Unjust dismissal; de-platforming
 Finding: Independent contractor (not employee)

This judgment is an appeal from the lower court judgment discussed below. The Appellate Court affirmed the judgment of the lower court, finding that because the courier was able to determine his own working time and decline orders, and that the written contract was one of service and not employment, the parties were not in an employment relationship. The Appellate Court found that Wolt is an intermediary that has created a platform to connect couriers, customers, and restaurants and does not have effective control over the couriers. It also noted that the payment received by the courier was considered a “service fee” and not remuneration as required in an employment relationship. Furthermore, the Court reiterated the lower court’s observation about the contract at issue, noting that it had been set out as a service agreement without the regular terms of an employment contract, such as working time, overtime, holidays, sick leave, all of which suggest the absence of an employment relationship. The Appellate Court found that the independent contractor relationship between Wolt and its couriers was not fictitious because a courier was not required to work particular days or hours, but could determine his own schedule, determine his own route for delivery, use his own transportation for deliveries, and had a written service agreement. There was not effective control by Wolt, and thus the courier was found to be an independent contractor.

This judgment is on appeal to the Supreme Court of Georgia.

[Shakro Metreveli v. Wolt Georgia, LLC \(Case No. 2/27777-20\)](#) (decision in Georgian)

Date: December 9, 2021
 Tribunal: Tbilisi City Court
 Issue: Unjust Dismissal; de-platforming
 Finding: Independent Contractor (not Employee)

Plaintiff Shakro Metreveli had a service agreement signed with the delivery platform Wolt-Georgia. He was ultimately deactivated from the Wolt app because he refused to deliver orders and had disagreements with other drivers. The plaintiff claimed that to earn at least a minimum amount of money to cover living costs, he was obliged to work longer than permitted by law and he could have been subject to administrative liability for refusing orders. Additionally, he argued that the obligation to wear the company’s branded clothing and hygiene requirements established a labor relationship between the parties.

The company claimed that the plaintiff had control over his working time and that they did not monitor his work. Accordingly, the company stated that they did monitor the timely and efficient delivery of products to its customers, and even further, they could impose administrative liability if his work was considered inefficient or he received negative ratings from customers. Plaintiff was performing the job routinely, with the perspective of a long-term relationship and was receiving payment from the company, which was transferred to his bank account monthly.

The Tbilisi City Court refused to recognize the existence of a labor relationship between the plaintiff and the company, based on the following reasoning:

Georgia

- Principle of subordination – The court found that there were no concrete tasks assigned to the delivery worker/courier. The amount of work depended on the orders coming from the customers. The delivery worker decides whether to accept or decline the order, but once it is accepted, the courier is responsible for its efficient and timely delivery. The court found that the courier could control and manage his working time, decide whether to accept orders, and is not obliged to work on a regular schedule or negotiate his working time with the company. According to the court, this autonomy did not establish an employer-employee relationship under the labor relations act, whereby employees are obliged to follow employers' instructions efficiently and in a timely manner and they remain under the control of the employer, even if there is no task to fulfill.
- Vertical nature of the labor relationship, the employer as a strong party in the labor relationship – An employee under a labor contract is “hired” by the employer and remains under their subordination, whereas contractors under a service contract are independent of the company and are not under their dominion. Contractors perform work individually and at their own risk, since the service contract is based on the principle of autonomy. Thus, this type of relationship is considered a horizontal one.

According to the ruling, under the Labor Code, work is carried out by employees who are provided with technical equipment and other tools. Under an employment contract, the employer hires employees as a workforce, and work inventory and equipment are supplied by the employer. In this case, according to the service contract, a courier is required to have their own work equipment, except for a warmer bag, which the company provides. The courier must have their own car, scooter, or bicycle delivery for the service. The courier himself is responsible for the transport costs. The company generally bears no costs, unless there is a delivery service refund. The only real duties imposed under the service agreement are that while delivering the order, the courier must wear the branded T-shirt provided by the company cap and/or jacket.

The Court found that a labor relationship did not exist between the courier and the platform. According to the Court, based on the presented documents, the courier has a right to transfer his duties to a third party, which contradicts the Labor Code requirement that an employee to perform duties and obligations personally and prohibits transforming working activities to others. In addition, the judge found that the internal organizational structure of Wolt-Georgia had no such position as a “courier.” And lastly, the court referred to the service agreement signed between Wolt Georgia and the courier. It found that there were no essential terms of a contract negotiated between the parties, and concluded that there was a service contract, not a labor contract, because the latter requires negotiation on the essential terms of the contract.

The Court found because the food ordered by the recipient must reach the destination in good condition, the conditions on the courier to ensure hygiene are necessary to avoid sickness and were not seen by the Court as subordination..

Based on the abovementioned justification, the Tbilisi City Court did not find that a labor relationship existed between the plaintiff and Wolt Georgia.

Germany

Case No. 5 AZR 334/21

Date: November 11, 2021
Tribunal: German Federal Labour Court
Issue: Provision of essential work equipment
Finding: Work equipment must be provided by employer

The Roamler case sets an important precedent for crowd-workers in the digital platform economy. This is vitally important because the platform economy is expanding rapidly, and a growing number of people are being forced to turn to it to support their livelihoods.

Decision:

The Federal Labour Court found that bicycle delivery workers who deliver food and receive their orders via a smartphone app are entitled to have their employer provide them with essential work equipment to perform their job. In this case, essential work equipment includes a road-worthy bicycle and an internet enabled smartphone. The Court acknowledged that there could be deviations that are contractually agreed to, only if the employee is promised appropriate financial compensation for the use of their own equipment (i.e., their bicycle and mobile phone). It is not enough that the delivery person already has a bicycle and phone that they could use, with just a reimbursement by the company for any damage, particularly when the company dictates where such damage can be repaired. The Court found that it disadvantaged the delivery worker to have to use their own bicycle and mobile device and that the employer is required to provide such essential equipment and ensure that it is in good working order.

News:

Tom Bateman, [Delivery Apps in Germany Must Give Couriers Bikes and Phones or Pay Up, Court Rules](#), EURONEWS.NEXT, Nov. 15, 2021.

Israel

[Khazanovitch v. Wolt Enterprises Israel Ltd. \(Wolt\)](#) (Decision in Hebrew)

Date: August 3, 2022
 Tribunal: Tel Aviv Regional Labor Court
 Issue: Entitlement to social protection
 Finding: Class action certification; employee

The Tel Aviv Regional Labor Court approved a motion to file a class action against an app-based food delivery service company, Wolt-Israel, to require the company to contribute to its couriers' retirement savings, travel expenses, and paid leave, and to recognize their eligibility for paid sick leave and severance pay. Wolt is a digital platform company that enables restaurants to sign up for delivery for customers on the Wolt platform. When an order is received, Wolt charges the customer's credit card, transmits the order to the restaurant, and simultaneously use its algorithm to locate a courier to complete the delivery. The courier picks up the food, confirms the order on the app and then receives the customer's address and requested time of delivery via Wolt's app. Wolt charges the restaurant a 25% commission of the total order and the customer a delivery fee related to the distance. Wolt couriers received training, uniforms, and temperature-insulated containers with Wolt's logo. They were informed of their status as an "independent contractor" via a written contract. Couriers are paid a fixed amount for each delivery, plus possible compensation related to distance, long wait time, or bad weather.

The National Labor Court developed criteria for determining an employment relationship in [Gavriel Kota v. Ministry of Justice](#):

The test for determining the employee-employer relationship has evolved over the years in a way that has allowed more and more discretion in its implementation. It has been [previously] clarified in case law that the test must be dynamic, one that varies according to changes in the different employment patterns. ... [Because of the changes, courts have] changed the determining test to a "mixed test," which includes at its center the integration test as well as other subtests.... In difficult cases the tests set out in case law have turned from tests of absolute weight to relative tests, when in answering the question of whether an employee-employer relationship exists, the court learns from the cumulative weight of the totality of the tests.

Thus, in applying the integration test, the court will examine:

whether there is an enterprise in which the service provider has integrated, whether the work performed is a necessary action for the normal activities of the same enterprise, whether the person performing the work is part of the organizational system of the enterprise and not an external factor to it, and whether the work of the service provider is at the core of the client's occupation.

In *Kota*, the Court specifically examined the following conditions in determining the labor relationship:

the degree of supervision of the employer on the hours worked, the place where the work was performed, the division of tasks between employees, the composition of work teams, and the hierarchy between different employees; the centrality and vitality of activities of the performer of labor to the employer's overall activities; the engagement procedures with the employed person; the continuity of contact between the parties; the power of the employer to assign changing tasks to the performer of the work; the employer's control of the manner in which the work is performed; the subordination of the performer of the work to the employer; the exclusivity of the work performer and the performer's linkage to the enterprise; the need for the person performing the work for assistance from other employees to perform the work; the place where the work is performed; the method of payment; the supply of materials to carry out the work, and more.

Israel

In the review conducted by the court in this case, it rejected Wolt's claim that it was just an intermediary between the restaurant and the couriers. It found that although Wolt operated a gig economy platform, as long as a courier was connected to the app, Wolt had control and supervisory authority over the courier. Wolt's core business is delivery, which cannot happen without couriers delivering food. Just because the app gave the couriers' instructions rather than a human being, does not discount that instructions were given by Wolt. Furthermore, Wolt was able to supervise and monitor couriers through the app. The Court found that the app is a working tool rather than a 'virtual space.'

The court found that this case could be adjudicated as a class action. Wolt has expressed its intention to appeal this decision.

Kazakhstan

[Ospan A. v. Glovo Kazakhstan & Ors.](#) (decision in Kazakh)

Date: December 6, 2021
 Tribunal: Judicial Board for Administrative Cases of the Supreme Court of the Republic of Kazakhstan
 Issue: Whether a lien can be placed on courier's bank account
 Finding: Employee

Decision:

At the beginning of 2021, Ospan A., a courier with Glovo Kazakhstan, had his bank account suspended pursuant to a debt collection case. The courier used this account to deposit the earnings from his work with Glovo. He made several attempts to declare this decision unlawful and to reverse the court's decision to suspend his bank account.

In the course of litigation on the debt collection issue, the Court made findings about the existence of labor relations between the platform and the courier. Even though no employment contract had been established between Ospan A. and Glovo Kazakhstan per Article 21 of the Labor Code, and that the couriers were regarded as individual entrepreneurs under a civil agreement with the platform, the court nevertheless found that there was a labor relationship between the platform and the courier.

On August 27, 2021, the court of first instance satisfied Ospan's claim against a private bailiff and ordered that his account be reinstated. The court of first instance concluded that payment for courier services was being paid to the plaintiff's account and that the specified work was the plaintiff's only source of income. However, on September 22, 2021, the Judicial Collegium for Administrative Cases rejected the decision of the court of first instance to remove the suspension of Ospan's Kaspi bank account. The court found that Ospan A. did not have an employment relationship with Glovo Kazakhstan (according to Article 21 of the Labor Code), since he only works with the company based on a civil agreement for the provision of services. Disagreeing with the court's decision, Ospan's filed a cassation appeal on September 22, 2021, with a request to cancel the decision and remove the suspension from his account.

On December 6, 2021, the Judicial Board for Administrative Cases of the Supreme Court decided against Glovo Kazakhstan, recognizing that the relationship between Ospan A. and the limited liability partnership Glovo Kazakhstan was a labor agreement, finding that "the nature and species of the relationship between the plaintiff Ospan A. and 'Glovo Kazakhstan' is predetermined by the presence of one or more signs indicating the presence of hidden labor relations".

In applying this approach, the court referred to article 7 of the Regulatory Decree of the Supreme Court of the Republic of Kazakhstan, *On Certain Issues of the Application of Legislation by Courts in the Resolution of Labor Disputes*, dated October 6, 2017 (hereinafter NPVS), which states that the characteristic features of labor relations are those circumstances where an employee personally performs work (labor function) for a certain qualification, specialty, profession, or position; obeys the directions working in the agreement; and the employer pays the employee wages for labor.

Further, the Court referred to the recommendations of the International Labor Organization's [Employment Relationship Recommendation, 2006 \(No. 198\)](#), pointing to part I, which indicates the need to combat hidden forms of labor relations in the context of other forms of relationships, which may include the use of other forms of contractual arrangements to hide the real nature of the legal status. A hidden labor relationship arises when an employer treats a particular person not as an employee, and in such a way as to conceal his or her true legal status as an employee.

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Glovo Kazakhstan argued that “couriers are a network of self-employed professionals” and “the concepts of “working time” and “work schedule” are not applicable.” However, the Court considered the following factors in finding that the [Kazakh Labor Code](#) should serve as the basis for establishing a labor contract:

- The remuneration is determined by the organization, and its amount can be unilaterally influenced by the platform. According to clauses 7.1 and 7.2 of the tariffs section of Glovo’s agreement: “[The] [r]ates of Courier’s remuneration are available for viewing and familiarization in the Courier’s Personal Account in the Application.... The Courier is aware and agrees that the Courier’s remuneration rates may be changed by GLOVO unilaterally by changing the relevant data in the Application.”
- There is a lack of freedom of contract. The courier has no power to agree to changes in the contract. Clause 19 of Glovo’s agreement establishes that:

The Conditions can be changed at GLOVO’s sole discretion unilaterally. GLOVO will notify the Courier of all changes to the Terms of Service by sending a newsletter to the Courier’s email address. If the Courier has not rejected the changed text of the terms of service within 72 hours from the date of publication of the changes, the Courier shall be deemed to have read the updated terms of service and accepted them. If the Courier does not accept the terms of service, they cannot use the GLOVO application or platform.

- Glovo Kazakhstan acts as an intermediary for the immediate delivery of ordered products. The Court found that the personal participation of the couriers was prominently integrated into the logistics chain of the organization, indicating that the company could not function without the couriers. The critical function of couriers is established by clause 1.2 of section 1, “Services provided by the courier” of the agreement.
- Couriers are required to perform deliveries within a certain amount of time. GLOVO establishes certain standards of business conduct for Couriers who work with them. Under section 2.2(f) of the agreement, “the Courier has the right to organize his time independently, provided that an Accepted Order is executed within 60 minutes from the moment of appointment. Execution of the Order without going beyond the maximum delivery time is a prerequisite for the Courier. Failure to comply with this condition in accordance with Section 11 of the Agreement entails its termination. Moreover, a series of refusals from the Courier to fulfill orders can cause a courier to have limited access to the Platform.”
- Couriers perform work (work function) in a certain specialty and (or) position, thereby realizing the logistics function as the main component (part), for which customers are charged.
- Couriers do not know the destination of the order or how much they will earn until they accept the information on the app. The organization also monitors the quality and speed of couriers’ work by having an appropriate warning and reward system for this.
- In fact, the entire portfolio of work is formed based on information from the organization: a specific time and place, volume and continuity of work.

After studying the legal relationship between the platform and its users, as well as having examined similar cases in other countries, the Kazakh Court concluded that in the relationship between these platforms and their users, there are a number of grounds for determining the existence of a labor relationship. The Court found that as an employee, if this income earned through that employment, it cannot be seized. Thus, this example can serve as a precedent for considering similar situations in the country and serve as a protective mechanism for laborers’ rights. For representatives of the platform economy and government bodies, this

Kazakhstan

situation may become an impetus for a revision of legal relations with platform users and for the platforms' obligation to establish an employment contract under article 21 of the Labor Code of Kazakhstan.

South Korea

[SOCAR v. National Labor Relations Commission](#) (decision in Korean)

Date: July 8, 2022
Tribunal: Seoul Administration Court
Issue: Employment Relationship
Finding: Independent Contractor (not Employee)

Decision:

On July 8th, 2022, the Seoul Administration Court overruled that the National Labor Relations Commission's decisions to recognize the drivers of the ride-hailing service "Tada" as employees. The court's decision was based on the fact that the defendants (formerly Tada drivers) had no contractual relationship with the plaintiff ("SOCAR", the parent company of "Tada" platform operator VCNC). The court said although it is hard to deny the fact that the specific details of the defendants' work have been assigned by the "Tada Driver Application," and that the defendants have been practically forced to comply with the orders made by the application. However, those aspects are nothing but inevitable consequences of the Tada business model. The court also stressed that the content of the defendants' work, including pickup place, drop-off destination and the route taken, was determined by the orders placed by customers.

The Commission has appealed the decision.

Mexico

[Case No. 637/2021](#)

Date: May 5, 2022
 Tribunal: First Labor Court of the Judicial Region of Toluca (parties protected)
 Issue: Entitlement to social protection
 Finding: Employee

Decision:

The delivery driver for a digital platform company argued that they were an employee of that company and thus entitled to social protection and vacation. The main issue for the court was to determine whether the delivery driver is an employee of the digital platform company, even when the driver agreed to the terms and conditions set forth by the company. The Court presumes an employment relationship, and the burden to prove a different relationship lies with the employer, when it argues that there is not an employment relationship.

The employer claimed that because the driver had flexibility on when to start and end their services, and the income generated was derived from services provided to a third party, there is no employment relationship, and the driver should be considered an independent contractor.

The Court held that the company did not rebut the presumption of an employment relationship, since the existence of driver flexibility alone is not enough prove that the driver was an independent contractor rather than an employee. Further, the lack of a written contract did not preclude a finding of an employment relationship, "since this lack of formality is not exclusive of the rights of the employee derived from the labor regulations and the services rendered; on the contrary, this omission is imputable to the defendant, as established in article 26 of the Federal Labor Law." The Court found an employment relationship based on two main elements: i) the legal power of command attributable to the employer and ii) the duty of obedience by the person rendering the service:

The labor schemes based on digital applications, as is the case here, attend to a novel regime of business organization, based on digital technology and the creation of "algorithmic management" of work, which uses this technology as a tool of organization, control and discipline of workers, which reinforces the technical control that employers have over workers. Therefore, the legal power of command is attributable to the employer. And on the other hand it is possible to conclude that the digital platform, by establishing guidelines to provide a service, is equated with the supervision and control of standard work; therefore, the work provided by the plaintiff in the platform *****, is considered subordinated to the duty of obedience with respect to the moral defendant and, consequently, the inherent elements of subordination are present. (translated from Spanish)

Regarding the length of the workday and salary, the court argued that "the discontinuous nature of the work or at the employee's choice does not contravene the provisions of the law," since the law does not establish a minimum workday but a maximum, and that, given the discontinuous nature of the workday and the difficulty of establishing a salary, the legal minimum will be set.

In summary, applying the constitutional and legal principle of actual practice over what is stated in documents, the Court found the existence of an employment relationship. The digital platform was ordered to back pay social security, bonuses and vacation time.

Netherlands

[Deliveroo Netherlands BV v. FNV / Deliveroo Netherlands BV v. Industry Pension Fund Foundation for Professional Road Transport](#)

Date: December 21, 2021
 Tribunal: Amsterdam Court of Appeal
 Issue: Application of collective labor agreement and pension fund
 Finding: Collective agreement applies/ right to pension due to employment relationship

Decision:

The Amsterdam Court of Appeals ruled in two judgments that Deliveroo failed to abide by the collective labor agreement (as decided in the February 16th judgment summarized below) and is required to pay into the pension fund. Deliveroo challenged whether its delivery drivers fall within the collective labor agreement. The Court of Appeals found that Deliveroo's core activity is the delivery of meals. The mode of transportation for the delivery does not change the evaluation that Deliveroo's core business activity is the transport of food and thus falls within the collective labor agreement for professional freight transport. Furthermore, Deliveroo is required to pay into the industry pension fund for its deliverers. Since this is a collective case, individual riders cannot derive rights from this decision and have to file individual claims. Deliveroo has appealed this decision to the Supreme Court. That decision is expected in 2023.

NOTE: On October 3, 2022 an interlocutory [decision](#) regarding the case of 12 former riders was issued applying the terms of the collective labor agreement for these former Deliveroo riders. A final decision is pending.

[FNV v. Private Limited Co. Uber B.V.](#)

Date: September 13, 2021
 Tribunal: Employment relationship; collective bargaining rights
 Issue: Unjust dismissal
 Finding: Employee entitled to collective bargaining

Decision:

The Dutch Trade Union Confederation (FNV) brought this case against Uber arguing that drivers for Uber are covered under the Collective Labor Agreement (CLA) for Taxi Transport that has been declared universally binding and thus applies to employers not affiliated with the employers' organization under the CLA. Uber argued that its drivers are not employees and, therefore, should not be covered under the CLA. The Court first undertook an assessment of the employment relationship between Uber and its direct drivers and then an assessment of whether the CLA applied.

In reviewing the employment relationship between Uber and its direct drivers, the Court evaluated the actual relationship, rather than what is stated in the contract. It did so by evaluating the following factors: performing work (in person) (personal performance), pay, and relationship of authority (control). The Court found that Uber's core services are transporting individuals. As a result of safety and driving regulations in The Netherlands, Uber explicitly verifies via photograph the driver who is logged onto the app and accepting fares. Thus, there is no ability for that driver to substitute another individual to perform the service of transporting people, and thus personal performance is required.

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Regarding wages (payment for services), Uber receives the request for a ride, determines via algorithm the driver, the route and expected fare. Drivers are unable to negotiate a different rate directly with the passenger. Upon completion of the ride, the passenger pays Uber, who then pays the driver for the work of transporting that passenger to a specific location. Uber pays the wages of its direct drivers for their work of transporting individuals to a specific location as requested.

Finally, the Court looked at the relationship of authority (control) between Uber and its direct drivers. The Court found that in the technology-driven world we now live in, control is often via digital monitoring rather than the classical mode of control, which the Court terms a “modern relationship of authority.” The Court found that Uber and its drivers have a modern relationship of authority since: the drivers are required to accept all terms and conditions; Uber can and does unilaterally change terms and drivers cannot reject modified terms; Uber purposely provides limited data to drivers to ensure they do not reject disadvantageous rides; and drivers have no ability to control or negotiate fares. Furthermore, Uber via the algorithm and its digital control is able to discipline drivers by de-platforming them and evaluating them via the ratings they receive. Uber determines which drivers should receive a platinum rating, which should be de-platformed, and how to resolve any customer complaints, even if it results in lower fares for the driver. The algorithm, managed wholly by Uber, acts as the instructor, discipliner, and financial incentive.

Thus, based on these factors, the Court found that Uber is in an employment relationship with its direct drivers. Furthermore, it found that Uber must comply with the CLA, since it covers employees who carry out the transport of persons against payment via a passenger car. Uber will be required to adhere to the terms of the CLA and pay wages in arrears to drivers who qualify.

Commentary:

- [Press release from the Court of Amsterdam](#), Sept. 13, 2021.
- [Press release from Dutch Trade Union Confederation \(FNV\)](#), Sept. 13, 2021.

Update: Uber appealed the decision. The Court of the Hague in [Uber BV v. The State of the Netherlands](#), issued a preliminary judgment dismissing the challenge.

[FNV v. Helpling Netherlands BV](#)

Date: September 21, 2021
 Tribunal: Amsterdam Court of Appeals
 Issue: Employment relationship
 Finding: Temporary employment contract

Decision:

The Amsterdam Court of Appeal overturned the lower court’s decision and found that cleaners and Helpling BV have a temporary employment contract relationship. Helpling operates an online platform where cleaners and households can make agreements about work to be performed. The cleaner creates their own profile, determines their hourly rate, with Helpling setting maximum and minimum hourly rates. If a cleaner wants to charge more than the maximum hourly rate, they have to call Helpling and have it pre-approved.

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The household decides which cleaner, from the list they are given, they want to offer the job to, and the cleaner can accept or reject. Once a cleaner has accepted a job, they generally cannot cancel it. They are able to change the date of the job with acceptance of that change by the household. Helpling and the cleaner have a user agreement that is not in writing, and there are general terms and conditions that apply between Helpling and the cleaner and Helpling and the household. The instructions for cleaning are provided by the household directly to the cleaner. Helpling does not know the type of work performed or how the work is performed. It only collects a commission from the household, and if requested by the cleaner, will generate an invoice for the work. Households were required to pay all cleaners hired via Helpling through the “Stripe” payment system; they are not allowed to directly pay the cleaner in most circumstances.

The Amsterdam Court of Appeal found that the cleaner is not a “self-employed person” and thus the cleaner is entitled to payment of wages in the event of illness, vacation days, and protections against unfair dismissal. The Court found that, although the work is directed by the household, the payment is made via a Helpling specified payment platform and then transferred to the cleaner. The Court found that since the method of payment is determined by a third party, there could not be a direct employment relationship between the cleaner and the household. Furthermore, the Court concluded that Helpling did not determine or know the work performed, how it was performed, and what specific cleaning activities were done; the household exercised that part of control/authority. A temporary employment contract “is characterized by the fact that the employee performs work under the supervision and direction of the hirer.” The Court determined that this relationship between Helpling and cleaners falls within a temporary employment contract. Thus, Helpling is required to pay sick pay, vacation and protection from unfair dismissal.

Commentary:

- [Press release from the Amsterdam Court of Appeal](#), Sept. 2021.
- [Press release from Dutch Trade Union Confederation \(FNV\)](#), Sept. 21, 2021.

[Deliveroo Netherlands BV v. FNV \(judgment in Dutch\)](#)

Date: February 16, 2021
 Tribunal: Amsterdam Court of Appeal
 Issue: Employment Relationship
 Finding: Employee

Decision:

This case was on appeal from the judgment of the lower Court of Amsterdam issued in January 2019. The lower court determined that an employment relationship existed between Deliveroo and the individuals making food deliveries. Deliveroo appealed the judgment, and the Court of Appeals affirmed the lower court’s judgment. Specifically, the Court held that deliverers for Deliveroo are in an employment relationship and are employees under Dutch law.

The Court of Appeal reviewed the facts and judgment from the lower court. It noted that since the judgment, Deliveroo has made changes to how it operates the business, and those changes should be analyzed in determining whether an employment relationship exists. Most of the changes involve the type

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of contract used, the way deliverers are able to get deliveries, and changes in pay per delivery. The Court found that Deliveroo is in an employment relationship with its deliverers despite, and in some cases because of, its operational changes.

The Court of Appeal looked at several factors, including labor, wages, and control. When evaluating the relationship, the Court determined the extent to which deliverers had the freedom to accept or reject orders and the extent to which replacement deliverers were used. Under the changes instituted by Deliveroo, deliverers who reject or do not accept three times will be logged out or told to “take a break.” However, no other negative consequences occur.

Deliverers are allowed to be replaced, and the replacement’s work permit is verified by Deliveroo. Deliveroo wants to know who is delivering for them, because should a problem arise, they are able to identify the individual involved. The Court found that the replacement option available is not inconsistent with an employment relationship, even where Deliveroo gives its deliverers freedom to accept or reject orders.

With respect to wages, the court looked at the method of payment to determine what type of relationship existed. The Court found that the fact that Deliveroo paid per delivery, but sent payments out every two weeks to its deliverers, suggested more of an employment relationship rather than that of an independent contractor.

The Court also looked at the relationship of authority (control) between Deliveroo and its deliverers. It found that since deliverers are likely to pick the fastest route, the freedom to choose one’s route is relative, and not determinative in whether an employment relationship exists. It did find that the fact that Deliveroo unilaterally changes wages, the content of contracts, and how the work is organized is determinative in indicating an employment relationship.

Finally, the court referred to a judgment from the European Court of Justice in [FNV Kunsten Informatie en Media v. Netherlands](#), to discuss the distinctions of an entrepreneur and an employee. Specifically, the Court found the fact that Deliveroo has insurance for its deliverers and provides them a stipend if injured on the job is an indication that its drivers are employees rather than entrepreneurs. Furthermore, given that a large percentage of these drivers do not pay certain taxes and do not hold themselves out to be entrepreneurs economically, because they only deliver as a “hobby,” is a further indication they are employees, not entrepreneurs.

Commentary:

- [Press release from the Amsterdam Court of Appeal](#), Feb. 16, 2021.
- [Press release from Dutch Trade Union Confederation \(FNV\)](#), Feb. 16, 2021.

New Zealand

[E Tu Inc. v. Raisier Operations BV and Uber BV et. al.](#)

Date: October 25, 2022
 Tribunal: Employment Court of New Zealand, Wellington
 Issue: Employment relationship
 Finding: Employee

Decision:

The Court declared that Uber and Uber Eats drivers had an employment relationship with Uber. In this landmark case, the Court looked at the definition of employment within the law, reviewed the real nature of the relationship, and focused on the social purpose of such laws. In particular, the law was designed in recognition of the inherent power imbalance between the parties in protecting themselves from exploitation. The judgment also referenced the importance of reviewing judgments of other jurisdictions in informing its own analysis.

In determining whether drivers for Uber are employees or independent contractors, the Court looked at the following factors: (1) exercise of control; (2) extent of integration; (3) whose business was worked for; (4) written and oral terms of the contract; (5) divergences from the written contract; and (6) industry practice.

The Court found that because of the fare setting, review process for complaints, community guidelines, reward schemes, and disciplinary action including de-platforming, Uber exercised a significant amount of control over its drivers. Alternatively, if drivers were independent contractors, they would be able to run their services as they see fit, by setting their own fares, standards, and process for handling complaints. It is part of Uber's own business model, not that of the drivers, that it creates, dictates and manages the circumstances of transporting individuals or food. In looking at the flexibility offered to drivers, the Court found that in modern employment, often employees have flexible working hours or arrangements. Furthermore, it found that although drivers could decline rides, that choice came with financial consequences, as their ratings would be lowered and thus get less lucrative fares. Drivers for Uber are known by passengers and households as 'Uber drivers,' without a uniform or logo, because they are only able to connect with them via the Uber platform. For most people, they associate these drivers with Uber, and Uber has community guidelines to ensure that its reputation is not harmed by the behavior of the drivers. The Court found that the drivers and Uber have a relationship of economic co-dependency. Finally, with regards to the agreement, it was solely prepared by Uber, amended at will by Uber, and was presented in a "take it or leave it" fashion, with no ability of the drivers to negotiate. The Court found that based on all of these factual considerations, drivers for Uber and Uber Eats are employees under the law. It further found joint-employer status in cases where a driver worked for multiple entities at once.

It should be noted the judge expressed that although this specific decision applied to the drivers involved in the case, an argument could be made to expand the reach of this decision. Uber has stated it will appeal the decision.

News:

Tess McClure, [New Zealand Uber Drivers Win Landmark Case Declaring Them Employees](#), GUARDIAN, Oct. 24, 2022.

Switzerland

[2C 34/2021 – Arrêt du 30 mai 2022](#)

Date: May 30, 2022
 Tribunal: Federal Court
 Issue: Employment Relationship
 Finding: Employee

Decision:

The Federal Court confirmed the findings of the [Court of Justice of the Canton of Geneva](#) that Uber drivers operating in the Canton of Geneva had entered into an employment contract with Uber B.V., a Dutch enterprise. The drivers in question had performed paid work for Uber, for a length of time, and at a price set by Uber. Uber decided in detail how this work was to be performed, gave instructions as to the vehicles used, the expected behavior of drivers, and the itinerary that they should take. Drivers were not free to organize their work once they were connected to the platform. Furthermore, repeated refusal to do journeys were sanctioned by a fixed-time deactivation. The geo-localization allowed Uber to have control over the activities of drivers. In particular, a non-efficient itinerary could be sanctioned with a reduced price for the journey. Drivers were controlled and monitored via a system of grades and complaints, and an account could be deactivated at the full discretion of Uber. The Court found that all these elements show a control on activities and monitoring that are characteristics of subordination.

The Federal Court noted that the findings of the Court of Justice correspond to those of other Swiss and foreign jurisdictions, and those a part of the Swiss doctrine.

[2C 575/2020 – Arrêt du 30 mai 2022](#)

Date: May 30, 2022
 Tribunal: Federal Court
 Issue: Application of Law on Leasing of Services
 Finding: Employee

Decision:

The Federal Court examined the relevance of the federal law on employment service and leasing of services (LSE). This implied, inter alia, examining whether there was an employment relationship between Uber Eats and delivery drivers. In this regard, it noted the following: it is recommended by Uber Eats that delivery drivers follow the instructions of the restaurant and wait at least 10 minutes at the customers' address; delivery drivers must accept that their geolocation information is provided to Uber services; delivery drivers are assessed by both the restaurants and the customers; to continue using the app, delivery drivers must maintain an average rating above the minimum average rating set by Uber; and an insufficient average rating can lead to a warning, or even exclusion from the platform if the rating does not improve within a set time.

The Court noted that delivery drivers can refuse a delivery, but are warned that repeated refusals give rise to a "negative experience" for users. The contract contains other instructions, and delivery drivers expose themselves to access restrictions or even to the deactivation of their account, if they do not comply with

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those conditions. The Court notes that the fact that delivery costs can be reduced in the event of an inefficient route or if the delivery person has “failed to correctly complete” a delivery mission, also demonstrates that Uber strictly controls the way in which the service is performed. The Court concludes that these elements are characteristic of a relationship of subordination. The possibility to restrict access to the account of delivery drivers or to deactivate them demonstrate a power of control and surveillance of the activity of drivers that are specific to an employment contract.

Turkey

[DECISION NO: 2022/701](#)

Date: April 20, 2022
 Tribunal: Istanbul Court of Appeal, 50th Circuit
 Issue: Employment Relationship
 Finding: Independent Contractor (Not employee)

Decision:

FIRST INSTANCE COURT DECISION (Istanbul 23rd Labour Tribunal)

In cases where the relationship between the parties is that of an employee and employer, it is clear that the employee works for the wage determined depending on the employer's orders and instructions. As stated in the decree numbered 2021/8368 E. 2021/13080 K:

Real legal dependency includes the obligation of the worker to comply with the execution of the work and the instructions in the workplace. The worker fulfils his performance within the framework of the employer's decisions and instructions. The personal dependence of the worker on the employer comes to the fore. The content of the dependency element in the contract consists of the worker acting in accordance with the employer's instructions and the supervision of the work process and its results by the employer. Control, the employee's operating without capital and without an organization of his own, and the way the wage are paid are auxiliary facts to be taken into account in the determination of personal dependence.

According to the defendant, the plaintiff does not work for the wage determined in accordance with the orders and instructions of the defendant employer and under the supervision of the employer. The working hours are determined by the worker. The insurance premiums are paid by the worker. The annual leave is at his own initiative. The defendant does not have any risk in the event that the plaintiff cannot earn income due to his inability to work. The daily ordinary expenses of the vehicle used and the traffic fines are borne by the plaintiff. In this respect, the risk is on the plaintiff. Thus the plaintiff is not dependent on the employer in terms of wages, working hours, working style. because the conditions sought for the employee-employer relationship are not met by the plaintiff.

The court rejected this case out of procedural irregularities, as the court found this case should have been brought to the Istanbul Civil Courts of First Instance.

ISTANBUL COURT OF APPEAL 50TH Circuit 2022/934 E. 2022/701 K. 20.04.2022 DECISION

As it is understood that the decision of the Court of First Instance is based on the material evidence and legal grounds adopted by the Court of Appeal, the Labor Court is not responsible for the settlement of the dispute, according to the reasons written in the decision of the First Instance Court, which is examined with the mutual claims and defences of the parties, the documents on which they are based, the characterization of the legal relationship, and the rules of law applicable to the dispute. It has been concluded that the appeal application should be rejected on the merits.

United Kingdom

Stuart Delivery Ltd. v. Warren Augustine

Date: October 19, 2021
 Tribunal: Court of Appeal (Civil Division)
 Issue: Employment status of courier delivering goods via moped
 Finding: Employment relationship

The Court of Appeal upheld the decisions of both the Employment Tribunal and the Employment Appeal Tribunal that couriers for Stuart Delivery Limited are workers under section 230(3)(b) of the Employment Rights Act 1996 ("the Act"). It further confirmed that decisions as to whether an individual is an employee, a worker, or an independent contractor is a question of fact to be determined by the first level tribunal, and which should not be overturned by an appellate court absent misapplication of law, that would show that the tribunal could not have reasonably reached that conclusion.

When determining whether a worker falls within the definition of section 230(3)(b), the Court found that the main factor is whether the individual "undertakes to do or perform personally any work or service for another," that is, "personal performance." The Court based its findings on the lower court decisions and the dicta from Pimlico Plumbers Ltd. It clarified that the summary provided in Pimlico Plumbers was not meant to establish a rigid classification of what did or did not amount to personal performance or when a right of substitution would or would not negate the personal performance obligation, despite Stuart Delivery's arguments. In the lower courts, both parties had made arguments related to Pimlico Plumbers. Specifically, whether a courier did or did not fit within the standard set in that decision. In those arguments, the parties mainly focusing on the right to substitution.

In reviewing the lower courts decisions, the Court of Appeal reviewed the system in place for a courier to be replaced and found that it did not qualify as a true right of substitution. Thus, the courier had a personal performance obligation and was a worker under section 230(3)(b). Specifically, the Court found no right to substitution because:

- no reference to a right of substitution was made in the written contract (the general conditions of use)
- the courier could notify via the company's app that they needed a substitute, but they could not choose a specific substitution themselves
- if the courier could not find a substitute, they would have to work that shift or face adverse consequences
- the substitute could only be someone who was already approved and vetted by the company and already had access to the app

The system that was set up by the company was intended to ensure that the courier did carry out the work and did turn up for the slots designated and make deliveries during that period. The main feature is that the obligation of personal performance with limited substitution rights does not negate the obligation and thus, the individual is found to be a worker under section 230(3)(b) of the Act.

News:

George Nott, [Stuart Loses Court Appeal on Worker Rights](#), GRO CER Oct. 20, 2021.

United Kingdom

[Independent Workers Union of Great Britain v. Central Arbitration Committee & Rooffoods Ltd. t/a Deliveroo \(interested party\)](#)

Date: June 24, 2021
 Tribunal: Court of Appeal (Civil Division)
 Issue: Collective Bargaining and Trade Union Rights under the ECHR Art. 11
 Finding: No employment relationship and thus no rights under Art. 11

Decision:

This appeal is from the decision of the Central Arbitration Committee (CAC) concerning the collective bargaining rights of Deliveroo riders. The Independent Workers Union of Great Britain (IWGB) applied to the CAC to be recognized by Deliveroo as collective bargaining agent for a group of riders for Deliveroo. The CAC declined the application because it found that the riders were not “workers” as required under the Trade Union and Labour Relations (Consolidation) Act 1992 (Act).¹⁵ It reached this conclusion finding that the terms of their work did not require them to provide services personally and were permitted wide use of substitutes.

The IWGB appealed, arguing that the CAC did not evaluate their application under Article 11 of the European Convention of Human Rights (ECHR).¹⁶ The CAC evaluated the relationship between Deliveroo and its riders based on the “Supplier Agreement” that was amended a few weeks before the CAC hearing. Under this new “supplier agreement,” Deliveroo allows substitution without Deliveroo’s prior approval, as long as the other courier has not been de-platformed for serious material breach. The rider is responsible to ensure the substitute courier has the necessary skills and knowledge and is responsible for their remuneration; Deliveroo will only pay the original rider. Throughout the new agreement, Deliveroo refers to the rider (or any substitute), whether it be in relation to health and safety provisions, insurance, etc. Furthermore, the new contract had specific provisions that created no obligation (or consequence) for a rider to log on to accept deliveries or face consequences for rejections. Also, there were no restrictions on working for competitors. The new contract was designed to give as much autonomy to the riders as possible.

The CAC looked at the contract and practice to determine that these riders did not fit within the definition of “worker” because they did not have an obligation to personally perform any service. The CAC looked at both the contract and the practice to determine the “true agreement or the actual legal obligations of the parties,” and found that despite the substitution option not being used often by riders, the lack of personal

¹⁵ Worker is defined under this Act as:

[A]n individual who works, or normally works or seeks to work –

(a) under a contract of employment, or

(b) under any other contract whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his, or

(c) in employment under or for the purposes of a government department (otherwise than as a member of the naval, military or air forces of the Crown) in so far as such employment does not fall within paragraph (a) or (b) above.

¹⁶ Article 11 of the Convention reads:

Freedom of assembly and association

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.

United Kingdom

performance was determinative in finding that they were not workers as defined in the Act.

The Court took up the appeal to determine whether the CAC erred in not explicitly ruling on whether article 11 of the ECHR applied and whether it would allow these riders the right to form a trade union. This Court focused on two main issues: (1) Do the riders fall within the scope of article 11 and (2) If yes, does article 11 give IWGB the right to seek compulsory recognition.

The Court found that the riders do not fall within the scope of “worker” as defined by article 11. It looked at the jurisprudence of the European Court of Human Rights (ECtHR) as set out in *Good Shepard*,¹⁷ International Labour Organization (ILO) Recommendation 198 (ILO R. 198),¹⁸ and the decision of the Court of Justice of the European Union in *B v. Yodel Delivery*.¹⁹ It found that the ECtHR determines an employment relationship by evaluating the criteria identified in ILO R. 198. According to the Court, ILO R. 198 requires that the determination of an employment relationship be based on (1) the facts relating to the performance of work and (2) remuneration of the worker. It stated numerous factors to help guide states in determining performance of work,²⁰ including that work “must be carried out personally by the worker.” *Yodel* looked at whether the EU Working Time regulation should apply based on a determination of “worker” status. In *Yodel*, the Court found that the riders should not be classified as workers because of the use of subcontractors or substitutes; the ability to not accept tasks; the ability to work for competitors; and to fix their own hours. In comparison, the riders for Deliveroo, in this case, had the ability to have almost anyone substitute; could accept or reject any rides; work for competitors; and choose to not log on the app at all without consequence. In drawing these similarities, the Court found that the Riders were not workers as defined by article 11 and thus did not have their fundamental right violated. It did make note of that fact that these riders could still exercise their right to association, but just not to form a trade union or collectively bargain.

Commentary:

Jamie Woodcock & Callum Cant, [Platform Worker Organising at Deliveroo in the UK: From Wildcat Strikes to Building Power](#), 25 J. LAB. & SOC'Y 220 (2022).

¹⁷ *Sindicatul “Patorul Cel Bun” v. Romania*, app. No. 330/99, (2014) IRLR 49.

¹⁸ International Labour Organization, R198 - Employment Relationship Recommendation, 2006 (No. 198) [hereinafter ILO R.198], https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312535.

¹⁹ *B v. Yodel Delivery Network Ltd.* Case C-692/19 (2020) IRLR 550.

²⁰ ILO R. 198, *supra* note 18, at art. 13(a).

United States of America

California Trucking Association, Inc. v. Bonta

Date: June 30, 2022
 Tribunal: United States Supreme Court
 Issue: Whether a California law which would likely result in truck drivers being classified as employees is preempted by federal law that preempts state laws related to price, route, or service of motor carriers
 Finding: Employee (although a secondary issue in the case)

Decision:

The United States Supreme Court declined to consider an appeal of a [decision](#) by the Ninth Circuit Court of Appeals, effectively upholding the ruling allowing a California law that would likely classify truck drivers and other workers as employees, rather than independent contractors, to go into effect. The trucking industry attempted to strike down the law by arguing that the 2019 California law was in conflict with the Federal Aviation Administration Authorization Act, a federal law adopted in the early 1990s, with the intention of de-regulating the shipping industry. This act expressly preempts state laws “related to a price, route, or service, of any motor carrier.”

The California legislature enacted AB-5, codifying the “ABC” test for determining whether a worker is an employee or an independent contractor, in September 2019. Under the ABC test, a worker is deemed to be an employee except in cases where all three of the following conditions are met: (1) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (2) the worker performs work that is outside the usual course of the hiring entity’s business; and (3) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

The California Trucking Association, a trade association representing motor carriers that classify their workers as independent contractors, and two independent owner-operators filed suit, seeking to enjoin enforcement of AB-5, by arguing that it was in conflict with a federal law that expressly preempted state laws related to “related to a price, route, or service, of any motor carrier.” The California Trucking Association argued that reclassifying workers would raise costs and thus affect prices, route and services.

The Ninth Circuit determined AB-5 to be a generally applicable law because “it applies to employers generally; it does not single out motor carriers but instead affects them solely in their capacity as employers.” The Court found that AB-5 and other “laws of general applicability that affect a motor carrier’s relationship with its workforce and compel a certain wage or preclude discrimination in hiring or firing decisions, are not significantly related to rates, routes or services.” Generally applicable laws, “even if they raise the overall cost of doing business or shift incentives and make it more costly for motor carriers to choose some routes or services relative to others, leading the carriers to reallocate resources or make different business decisions,” do not directly fix prices, routes or services. AB-5 did not bind motor carriers to specific rates or services; meaningfully interfere with the ability of motor carriers to set routes; or compel a certain result at the level of the motor carriers’ consumers.

United States of America

Vega v. Commissioner of Labor

Date: March 26, 2020
 Tribunal: New York State Court of Appeals
 Issue: Contribution to State Unemployment Benefit System
 Finding: Employee

Decision:

The New York State Court of Appeals, the highest court in the state, found that Postmates couriers are employees and that Postmates must therefore make contributions to the state unemployment insurance fund.

Plaintiff Luis Vega worked as a Postmates courier in June 2015 and was fired as a result of poor customer ratings. He filed for unemployment benefits, and the Department of Labor of New York State ordered that Postmates pay unemployment contributions based on the earnings of Mr. Vega and “all other persons similarly employed.” Postmates appealed that decision before an administrative law judge, who found Postmates couriers were independent contractors because Postmates did not exercise sufficient supervision, direction and control over their workforce. The New York Labor Commissioner appealed to the New York Unemployment Insurance Appeals Board, which held that Postmates couriers were employees because Postmates exercised, or reserved the right to exercise, control over their services. Postmates in turn appealed to the Appellate Division of New York State. The Appellate Division reversed the Board’s decision in favor of the Postmate’s couriers. The Commissioner then appealed to the New York Court of Appeals.

The Court of Appeals found “substantial evidence” to demonstrate that Postmates exercised sufficient control over its couriers, noting in particular that “Postmates dominates the significant aspects of its couriers’ work by dictating to which customers they can deliver, where to deliver the requested items, effectively limiting the time frame for delivery and controlling all aspects of pricing and payment.” The Court noted that: “Postmates informs couriers where requested goods are to be delivered only after a courier has accepted the assignment.” Customers cannot request that the job be performed by a particular worker. In the event a courier becomes unavailable after accepting a job, Postmates—not the courier—finds a replacement. Although Postmates does not dictate the exact routes couriers must take between the pick-up and delivery locations, the company tracks courier location during deliveries in real time on the omnipresent app, providing customers an estimated time of arrival for their deliveries.

The couriers’ compensation, which the company unilaterally fixes without negotiation, is paid to the couriers by Postmates. Postmates, not its couriers, bears the loss when customers do not pay. Because the total fee charged by Postmates is based solely on the distance of the delivery, and couriers are not given that information in advance, they are unable to determine their share until after accepting a job. Further, Postmates unilaterally sets the delivery fees, for which it bills the customers directly through the app. Couriers receive a company sponsored “PEX” card which they may use to purchase the customers’ requested items, when necessary. Postmates handles all customer complaints and, in some circumstances, retains liability to the customer for incorrect or damaged deliveries.

The Court acknowledged that while “the couriers retain some independence to choose their work schedule and delivery route does not mean that they have actual control over their work or the service Postmates provides its customer.”

United States of America

Impact of compulsory arbitration under the Federal Arbitration Act

The application of the Federal Arbitration Act (FAA) to app-based drivers, and thus whether drivers can be compelled to arbitrate their claims rather than taking them to court, is an unsettled legal issue. As a result many employers' motions to send such claims to individual arbitration is depriving Uber/Lyft drivers and others of pursuing their claims.²¹ Presently, with the issue of appropriate forum for resolving the issue still in limbo, tens of thousands of individual app-based drivers have filed misclassification arbitration claims or have been compelled by their employers to arbitrate their claims.²²

The most recent case on the scope of the FAA is *Southwest v. Saxon*.²³ The Supreme Court unanimously decided that cargo loaders for Southwest Airlines are exempt from the FAA under section 1 because they are sufficiently engaged in interstate commerce. The Supreme Court has yet to rule to what extent, if any, that Uber/Lyft drivers or other platform-app drivers and couriers dealing with people or goods engaged in interstate commerce would be similarly exempt, and thus free to pursue class action misclassification claims in court.

'ABC' Platform Cases

In *James v. Uber Technologies*,²⁴ a drivers' class action case which Uber ultimately settled for \$8.4 million, a federal district court in California rejected company's claim that plaintiffs fail to satisfy the ABC test. Uber argued that under Prong B of the test, it is a software company such that its drivers are not in the same line of business. "This Court has repeatedly held that Uber and Uber's drivers are both in the business of transportation."

In *Lawson v. Grubhub, Inc.*,²⁵ the Ninth Circuit remanded the case to district court to apply the ABC test to determine whether a food delivery driver was employee. The driver argued that the right of control test no longer applies, and that the company cannot satisfy prong b of ABC test because food delivery work is obviously not "outside the usual course of [Grubhub's] business."

In *East Bay Drywall LLC v. Department of Labor and Workforce Development*,²⁶ the New Jersey Supreme Court (the highest court in the State) affirmed the 'ABC Test' as the main evaluation to use in determining whether a worker is an employee or an independent contractor. This case did not involve workers in the platform economy, but is instructive because it solidifies the ABC test and shifts the burden to the employer to prove that a worker is not misclassified.

²¹ See e.g., *Capriole v. Uber Techs*, 7 F.4th 854 (9th Cir. 2021) (finding drivers not exempt from the FAA as being engaged in interstate commerce; *Cunningham v. Lyft*, 17 F.4th (244 1st Cir. 2021); but see *Haider v. Lyft*, No 20-CV-2997, 2021 WL 1226442, (S.D.N.Y. Mar., 2021); *Islam v. Lyft*, 524 F. Supp 3d 338 (S.D. N.Y. 2021) (finding drivers engaged in interstate commerce and exempt were from FAA, though the arbitration provision was nonetheless enforceable under New York state law).

²² See, e.g., *Postmates v. 10,356 Individuals*, No. CV 20-2783, 2020 WL 1908302 (C.D. Cal, 2020).

²³ 142 S.Ct. 1783 (2022).

²⁴ 338 F.R.D. 123 (N.D. Cal. 2021).

²⁵ 13 F.4th 908, 916-17 (9th Cir. 2021).

²⁶ 278 A.3d 783 (2022).

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Eduardo Díaz v. Uber BV y Uber Technologies Uruguay S.A. (Eduardo Diaz v. Uber BV and Uber Technologies Uruguay S.A.)

Date: February 9, 2022
 Tribunal: 20th Circuit Labor Court of the Capital (Montevideo) (Ficha 2-5251/2021)
 Issue: Right to vacation, overtime, and bonuses
 Finding: Employee

Decision:

An Uber driver filed a claim for the collection of labor benefits (leave of absence, vacation salary and Christmas bonus, etc.) to the Uruguayan Labor Court based on his relationship with Uber BV, which he argued was a subordinate work relationship and not a commercial one. The Court ruled in favor of the plaintiff, holding:

[Through] weighing and evaluating the evidence gathered, we conclude [that the relationship between the plaintiff and Uber was a dependent one], a labor relationship by means of which Mr. Diaz was inserted, without any possibility of discussion or negotiation of the terms, in the organization of the enterprise carried out by Uber. He [drove for Uber] according to the [unilateral] conditions... imposed by Uber, including the remuneration that he would receive for his performance.

The ruling is based almost exclusively on the application of [ILO Recommendation No. 198](#), relying on each of the components mentioned in this instrument, namely that:

- The work is carried out according to the instructions and under the control of another party;
- Uber established in the service contract the way in which the work would be carried out;
- Uber directs multiple aspects of the provision of the transportation service, either through clauses contained in the contract that binds them, or through communications that are generated in the course of the relationship, by which it gives instructions or even suggestions about how the service should be provided.
- Uber articulates behavioral guidelines to be followed during the relationship (e.g., that the driver must wait for the passenger for at least ten minutes; that they must transport them directly to their destination without interruptions, etc.);
- Uber reserves the right to block the driver's account in general, and specifically for low ratings resulting from the rejection of trips;
- The users' ratings constitute an indirect control mechanism by the application; and
- The company has, at all times, information on the location of the driver through the application.

The ruling concluded that the facts in reality showed that Uber is a provider of transportation services and that the plaintiff and other drivers using the application are cogs in the company's organization, used to reach its objective ("without the execution of the trip the company does not obtain income"). Uber's business is the provision of transportation to the point that it unilaterally fixes the fare and can modify it at any time and at its own discretion: "The role of the driver is therefore limited to providing the material component (the vehicle) and the personal activity necessary for Uber to fulfill its mission. The driver follows the

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conditions of performance, including the price, set by Uber.”

This ruling recognized that the very personal nature of the service may be missing in this business model. However, in this specific case, the driver was not replaced by someone else, nor did he share the vehicle with another person.

With regard to the issue of flexible working hours, the court held:

Undoubtedly, this flexible way of performing work is peculiar, but the emphasis should be placed... on the amount of time that the driver is connected, the driver’s choice in the matter, the fact that during the time the driver is connected the integration in Uber’s organization is absolute, and the dependence on what the algorithm determines for the performance is total, since the driver only sees the trip requests that Uber communicates to them, only engages in direct contact with the “client” when they are in the vehicle and, above all, Uber determines the monetary income that the driver will receive for each of the trips they perform.

The Court noted that the evidence shows that the driver has been working without interruption since 2017, and without any other employment. The driver made trips almost every day for 10 to 12 hours a day, which was “necessary to generate an income that allows him to cover the costs he is forced to pay to remain active on the platform.”

The ruling recognized that the driver provides components that are indispensable to the service, such as the vehicle, its associated costs and the phone. However, the Uber application is just as important or may be even more important. The ruling also stated that

this [provision] is the basis of Uber’s business model: to dissociate itself from the costs and responsibilities associated with the tools necessary to carry out the work, the vehicle, and to make the activity be seen as an opportunity to develop an independent enterprise. However, the driver is not an entrepreneur beyond the fact that they are registered with DGI and BPS.²⁷ [T]hey have no customers of their own, they do not set the price of the service they provide, they do not develop marketing strategies, and [they] can be barred from carrying out the activity if Uber, for whatever reason, decides to not allow them to connect to the application.

The ruling outlined that Uber periodically pays its drivers (i.e., on a weekly basis) and that this was the only source of income for the drivers. This relationship constitutes “economic dependence on Uber.” At this point, the ruling also referred to the lack of exclusivity (i.e., the possibility for the driver to work simultaneously with other applications that provide transportation services), thus recognizing that holding multiple jobs is a reality and that Uber did not demand exclusivity.

As a secondary issue, it should be noted that the ruling rejected the arbitration clause because it goes against Uruguayan law and because the contract between Uber and the driver is a contract of adhesion. The arbitration clause in the terms and conditions requires any dispute to be settled through arbitration in the Netherlands. It also stated that an economic relationship was established between Uber and the local company that supports it, making it jointly and severally liable. The Court ordered the payment of labor obligations for the duration of the relationship, since the driver was still performing the work.

Note: This decision is under review by a Court of Appeals (2nd instance).

²⁷ Authorities responsible for taxation and social security.

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News:

[*Uber está "preocupada" por dos fallos en su contra en cinco días: qué deberá pagar a los conductores*](#), EL PAÍS
URUGUAY, Feb. 19, 2022.

[Carlos Herrera v. Uber BV y Uber Technologies Uruguay S.A. \(Carlos Herrera v. Uber BV and Uber Technologies Uruguay S.A.\)](#)

Date: [February 14, 2022](#) and [June 1, 2022](#)
 Tribunal: 9th Circuit Labor Court of the Capital and 3rd Circuit Labor Court of Appeals (Montevideo - Uruguay)
 Issue: Qualification as a dependent employee and payment of labor benefits (leave of absence, vacation salary and Christmas bonus).
 Finding: Employee

Decision:

This case involved an Uber driver who, after voluntarily resigning, claimed that a subordinate employment relationship was established during the course of his work. He sued for the labor obligations that Uruguayan law confers to dependent workers (i.e., leaves of absence, paid days off, and end-of-year bonuses).

The ruling analyzed all the factual elements. In doing so, it stated that

there is proof that could determine that the relationship is independent, namely: [t]hat the driver defines the amount of time they will spend providing the service; [t]hat the partner must provide the vehicle and bear the expenses; that [there is an] absence of direct orders on how the service should be provided beyond the suggestions made by the company; [and] [t]he impossibility of direct control over the way in which the service is provided, notwithstanding aspects that can be controlled in real time, such as the route followed by the vehicle, the duration of travel, and the users' rating of the service, as well as the non-existence of exclusivity, and the possibility of having a driver other than the plaintiff driving the vehicle. The ruling is made considering this proof and bearing in mind that in our country there is no presumption of an employment relationship like in other countries.

The ruling identified the following elements which favor the opposite view:

- The price of the service is fixed by the company without any possibility of negotiation on the part of the partner.
- The type of conditions or suggestions included in the service guidelines, which the member must observe, imply an interference on the part of the company that is closer to an employment contract than to a lease of services.
- The unilateral power to cancel access to the service for a partner who does not comply with the suggestions or guidelines of the service or who receives negative reviews from users.
- The platform's potential power of control over the way the service is provided (i.e., route, travel time, and user rating) and the possibility of Uber assuming the solution of some of the problems that the

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partner may have in the execution of the transportation service.

- The service provider does not have the freedom to choose its customers because the platform centralizes the requests and assigns them to its “collaborators” through algorithms.
- The price is set by algorithms through a predictive mechanism, which imposes on the driver (i.e., the worker) a particular route regardless of their preferences. At the same time, the company reserves the option to adjust prices, if the worker has chosen an inefficient route. Therefore, there is personal activity, and the service is onerous.

Starting with the classic theory of the employment relationship, the Court emphasized the powers of the employer, of direction, and of control. Regarding the power direction, the court stated, “[w]hile most of the conditions that Uber poses are ‘suggestions,’ the driver’s activity is being directed.” Regarding the power of control, the Court noted the following:

There is direct control because the contract allows Uber to block access to the platform, for example when the driver gives a client a business card, when there is mistreatment of the client and the client reports it, or when several requests for rides are rejected because the application demands a minimum acceptance rate. Uber also receives and uses the ratings given by users to determine the continuation or not of the relationship. In addition to the fact that the application is equipped with a geo-tracking system that allows them to monitor the location of the driver in real time and record the total number of kilometers traveled.

The ruling referred to [ILO Recommendation No. 198](#) as an argument that complements the classic theory. Thus, the Court understands that there is an integration of the driver into the enterprise. It expresses that “the driver could never provide this service on their own without the platform that they are a part of.” The Court also observed that the work is performed according to instructions and under the control of Uber; that it is performed solely or mainly for the benefit of another party; and that the work has a particular duration and a certain continuity. In addition, the ruling referred to the economic dependence of the drivers because Uber usually represents their main source of income.

The ruling rejected arbitration as a valid dispute resolution mechanism between the driver and Uber because it goes against Uruguayan law and was imposed by Uber through a contract of adhesion. It also found that there was an economic joint venture between Uber and the local company, making both parties liable.

The 3rd Circuit Labor Court of Appeals confirmed on June 2, 2022, which definitively resolved the case. First, it verified that in Uruguay, arbitration is not a valid mechanism for the resolution of labor disputes. It also concluded that, despite Uber’s arguments, the support function of the local company constitutes—together with the parent company in the Netherlands that runs the algorithm, assigns rides, makes payments, etc.—an economic whole and, therefore, they are jointly and severally liable. With respect to the fundamental issue, the nature of the relationship, the Court shares “the evaluation of the facts and evidence made by the judge of first instance, as well as the conclusion reached and its grounds.”

The Court of Appeals focused on the following aspects of the lower court’s decision:

- The discussion of Uber’s activity:

Without the transportation of individual passengers, the company does not make a profit and has no reason to exist. The transportation of passengers on an individual basis is the reason the company exists and the reason there is a relationship with the drivers. Without the work of the drivers, the company cannot function. While the organization of the company starts from the premise of

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the freedom of the drivers as to the time and place in which they connect to the application and are therefore at the disposal of the company, as expressed in TAT Ruling 1 No. 89/2020. What matters is how the task is performed and when they are connected. During the connection, the drivers are subject to the defendant's power of direction, which is delegated to the users who must review the driver, which has an impact on the driver's relationship with the defendant. The defendant is not indifferent to how the driver provides the service but controls it through the users.

- The personal nature of the relationship. On this issue, the Court stated that

it should be established that the drivers were associated to the owner of the car. [I]n this case, the plaintiff was the owner of the car and two other drivers were connected to it. [This fact does] not mean that the plaintiff's work could be performed indistinctly by one or the other, since all three were registered in Uber as driver partners. [While the money] generated by the three drivers was deposited in the plaintiff's account, there was a record of trips for each of them, and, therefore, each of the drivers associated with the plaintiff's vehicle knew what they had [earned]. Their relationships were with Uber through the plaintiff's vehicle. It was not with the plaintiff. [T]hey were not dependent on the plaintiff. [I]t was not the plaintiff who paid them, nor did he give them instructions, and Uber controlled what each driver was paid. The proof of this is that the defendant does not dispute the liquidation of the items claimed by the plaintiff, which considers exclusively what was generated by the trips made personally by him.

- The exclusivity of the service:

Regarding the significance assigned by the defendant that [the plaintiff could work for other companies], the Court considers that because the other application – Cabify – had little impact on... daily work... and that exclusivity is not a requirement that precludes the existence of an employment relationship, this claim fails to disprove that [the] plaintiff was integrated into Uber's organization and was working under its direction.

For the Court, [this analysis] is sui generis if we consider the traditional model of dependent work.... [T]herefore, a greater effort is required to interpret how in fact the relationship between the parties was carried out. But the elements in favor of the existence of the labor relationship that can be verified are conclusive as to the fact that we are dealing with an employment relationship.

- The fixing of rates, the assumption of risks and the integration of the drivers in the company:

The remuneration mechanism is also special, but the defendant has the information and the mechanisms to determine the profit it intends to make and, on that basis, fixes the drivers' remuneration, considering that they assume the vehicle's expenses. Although this implies taking on part of the risks, it does not contradict the fact that in the end the drivers perform a crucial task that allows the company to function and that when they are connected, the company organizes and controls how the task is performed.

On the other hand, the percentage of acceptance of trips is also controlled by the company. [S]o, the consequences that this may have on the drivers depends on the policy of the company. [I]n fact, it has had consequences according to the testimony of some witnesses. Notwithstanding, the special mechanism of operation of the company must be considered in the analysis, and that does not change what was referred to above regarding the integration of the plaintiff in the operations of the company and the submission of the plaintiff to the power of direction of the company.

ADDITIONAL COMMENTARY AND ANALYSIS OF THE DIGITAL PLATFORM ECONOMY – GLOBALLY:

1. Felix Hadwiger, International Labour Organization, [Realizing the Opportunities of the Platform Economy Through Freedom of Association and Collective Bargaining](#) (2022).
2. Alan Bogg & Michael Ford, [Employment Status and Trade Union Rights: Applying Occam's Razor](#), INDUST. L.J., Sept. 2022.
3. Conditions of Work and Equality Dept., International Labor Organization, [Decent Work in the Platform Economy](#), ILO Doc. MEDWPE/2022 (2022).
4. Niels van Doorn, Fabian Ferrari, & Mark Graham, [Migration and Migrant Labour in the Gig Economy: An Intervention](#), BRIT. SOCIO. ASS'N, July 2022.
5. Inga Sabanova & Delia Badoi, Friedrich Ebert Stiftung, [Policy Report: Online Platforms and Platform Work](#), (2022).
6. Karen Hao & Nadine Freischlad, [The Gig Workers Fighting Back Against the Algorithms](#), MIT TECH. REV., Apr. 2022) (Indonesia).
7. Antonio Aloisi, [Platform Work in Europe: Lessons Learned, Legal Developments and Challenges Ahead](#), 13 EUR. LAB. L.J. 4 (2022).
8. Cansu Safak & James Farrar, Worker Info Exchange, [Managed by Bots: Data-Driven Exploitation in the Gig Economy](#) (2021).
9. Adrian Todoli-Signes, [Making Algorithms Safe for Workers: Occupational Risks Associated with Work Managed by Artificial Intelligence](#), 27 TRANSFER: EUROPEAN REV. LAB. & RES. 433 (2021).
10. Valerio De Stefano et al., [Platform Work and the Employment Relationship](#) (ILO, Working Paper No. 27, 2021).
11. Jan Drakokoupil & Kurt Vandaele, [A Modern Guide to Labour and the Platform Economy](#) (2021).

Legislation & Regulation

CHILE - No. 21.431

This law went into force in March 2022. This law sets out provisions applying to both employees and independent contractors, but does not seek to define the categories, saying instead that these are to be determined according to article 7 of the Work Code (pre-existing legislation according to which the Individual Employment Contract is given with the existence of i) personal provision of the service, ii) dependency and subordination and iii) remuneration, as determining elements of the employment relationship). The law consists of four substantive paragraphs: the first contains definitions; the second rights for employed platform workers; the third rights for independent contractors who work on platforms; and the fourth rights which apply to both categories.

On October 19, 2022, the Labor Directorate (whose mission is to promote and ensure efficient compliance with labor legislation) issued [Dictum No. 1831/39](#) on Digital Platform Workers, establishing the meaning and scope of the law, addressed to the Regional Labor Directors. The opinion maintains, among other things, that by virtue of this law, the Labor Directorate would be empowered to determine if there are indications of employment that translate into a relationship under subordination and dependency, in accordance with the requirements established in article 7 of the Labor Code. Accordingly, it would not be necessary for the courts of justice to determine the legal nature of the relationship between workers and technological platforms. This has generated a strong reaction from the platform companies that have demanded the aforementioned administrative act in courts, considering that the Labor Directorate would be exceeding its competence. There has been no judicial decision on this issue as of the writing of this report.

Commentary and News:

- Jorge Leyton García et al., Fairwork, [New Regulation of Platform Work in Chile: a Missed Opportunity?](#) (2022)
- Jorge Leyton García et al., [Chile: Nueva Ley Laboral “asegura” derechos muy difíciles de exigir](#), DOSIS ACADÉMIA, Mar. 2022.

EUROPEAN UNION

In Part I of this report, there is a robust discussion of the [proposed directive](#) by the European Commission on platform work. The proposed directive is still being debated and amended.

Below is additional commentary on the proposed directive:

- [Regulating algorithmic management: An assessment of the EC's draft Directive on improving working conditions in platform work](#) (September 2022)
- [The EU Commission's proposal for a Directive on Platform Work: an overview](#) (July 2022)
- [De-gigging the labour market? An analysis of the 'algorithmic management' provisions in the proposed Platform Work Directive](#) (July 2022)
- [DISPATCH NO. 40 – EUROPEAN UNION THE EU PROPOSAL FOR A DIRECTIVE ON IMPROVING WORKING CONDITIONS IN PLATFORM WORK](#) (January 2022)

On September 2022, the European Commission formally approved the [Guidelines on the Application of EU Competition law to Collective Agreements Regarding the Working Conditions of Solo Self-Employed Persons](#). These guidelines state that in situations where solo self-employed persons are “considered to be in a situation comparable to that of workers,” their collective agreements fall outside the scope of competition law. Furthermore, the European Commission will not enforce EU competition law against collective agree-

ments in cases of a clear imbalance of bargaining power between workers and their counterparty. The guidelines do not define solo self-employed persons in situations comparable to workers, but do provide examples including: those who provide their services predominantly to one undertaking; those who work side-by-side for the same counterparty but remain “solo”; and those who provide services through a digital labor platform. The guidelines define imbalance of power to include where the counterparty is of “a certain economic strength” or where the collective agreement is concluded pursuant to national or EU legislation.

Commentary:

Despoina Georgiou, [An Assessment of the EU's Draft Guidelines on the Application of EU Competition Law to Collective Agreements of the Solo Self-Employed](#), COMP. POL'Y INT'L, July 2022.

PORTUGAL – LEI NO. 45/2018

This law went into force in November 2018. This law establishes a legal framework for paid passenger transport in ordinary vehicles via an electronic platform (TVDE). This law creates a presumption of employment between drivers and the digital platform companies and provides maximum driving limits at 10 hours per day, as well as a complaint mechanism. The law requires a written contract between the driver and the platform company and requires the drivers to complete a training course before receiving the necessary license.

Commentary:

Emanuele Leonardi & Giorgio Pirina, [Uber in the Portuguese Gig Economy: A Laboratory for Platform Capitalism](#), 14 WORK ORG., LAB. & GLOBALISATION 46 (2020)

SPAIN – ‘RIDERS LAW’

The Spain Riders Law came into force in August 2021. The law applies to food delivery platforms and creates a rebuttable presumption of an employment relationship for delivery riders. The rebuttable presumption exists when the following four conditions are met: (1) the provision of services by one person; (2) the delivery of goods to a final consumer; (3) the direct or implicit exercise of the employer’s management via a digital platform; and (4) the use of an algorithm to manage the service and determine working conditions. The law also requires that such businesses inform food delivery riders about how algorithms and artificial intelligence affect their working conditions, hirings, and firings. This law exclusively applies to food delivery riders working for digital platform companies and does not apply to other workers in the digital platform economy.

Commentary and News:

- [Gig Economy Project – Uber Eats Joins Glovo in Abandoning Spain's Rider's Law on Its 1 Year Anniversary](#), BRAVE NEW EUROPE, Aug. 2022.
- European Agency for Safety and Health at Work, [Spain: The ‘Riders’ Law’, New Regulation on Digital Platform Work](#) (2022).
- [Gig Economy Project – Spain's Riders Law Comes into Force: Here's What You Need to Know](#), BRAVE NEW EUROPE, Aug. 2021.
- EuroFound, [Riders' Law](#) (Aug. 20, 2021).

UNITED STATES

In the United States, there have been state level legislative reforms with regards to workers in the digital platform economy.

In Washington state, [HB 2076](#), took effect in June 2022, which effectively created a third category of employment status for transportation companies' ride-share drivers, continuing to treat them as independent contractors yet also requiring companies to provide minimum per-trip payments, paid sick leave, and workers' compensation benefits for the drivers. The law has been broadly criticized by many unions and other worker advocates, and employer representatives. However, there is interest this model by other jurisdictions. The City of Seattle, in Washington state, enacted similar legislation applicable to its municipal app-based drivers at about the same time.²⁸

In Massachusetts, in June 2022, the Supreme Judicial Court found that a proposed Massachusetts ballot initiative to redefine the employment classification of drivers for ride share companies like Uber and Lyft, rendering them independent contractors, was ineligible for placement on the statewide ballot because it improperly lumped together distinct policy questions.²⁹ Hoping to take their success in financing a similar referendum, Proposition 22, that was approved by the voters in an extremely misleading 2020 ballot campaign in California, Uber and Lyft had spent millions of dollars in their unsuccessful Massachusetts project.

In New Jersey in both 2020 and 2021, laws were enacted to stop misclassification of workers. These laws include administrative penalties of \$250 per misclassification the first time and up to \$1000 per misclassified employee for each subsequent violation.³⁰ Additionally the employee is entitled to up to 5% of the worker's gross earnings over the past year. Under another [law](#) that went into effect in January 2022, "Employers who 'purposely' or 'knowingly' misclassify employees under the New Jersey Insurance Fraud Prevention Act (NJIF-PA) may be subject to penalties for fraud that include fines starting at \$5,000 for the first violation, \$10,000 for the second violation, and \$15,000 for each subsequent violation." New Jersey has enshrined the ABC Test in [NJ Rev Stat §43:21-19 \(6\)\(i\)](#) to determine employment status and refers to this standard in the new laws to combat misclassification.

News:

Cade Metz, [Uber Agrees to Pay N.J. \\$100 Million in Dispute Over Drivers' Employment Status](#), N.Y. TIMES, Sept. 12, 2022.

In California, more than a year after a state trial court declared unconstitutional the Proposition 22 ballot initiative, which carved out certain app-based workers from the AB-5 classification test, the Court of Appeals has yet to decide the case (*Castellanos v. California*).³¹ Meanwhile, the Ninth Circuit Court of Appeals and various federal district courts have held that even if ultimately found to be constitutional, Proposition 22 would not apply retroactively to abate workers' wage claims governed by the *Dynamex* decision's ABC misclassification test or its codified version in AB-5 (although damages would presumably then cease as of Proposition 22's passage in November 2020).³² If the courts ultimately affirm the unconstitutionality of Proposition 22, workers in cases alleging independent contractor misclassification, whether in court or in arbitration, should be able to seek damages through the present.³³

²⁸ Seattle Council Bill 120294 (June 2022).

²⁹ *Koussa v. Attorney General*, 188 N.E.3d 510 (Mass. 2022).

³⁰ N.J. Stat. § 34:1A-1.18.

³¹ No. A163655 (Cal. Ct. of Appeal, 1st App. Dist.).

³² See *Vazquez v. Jan-Pro Fran. Int'l, Inc.*, 986 F.3d 1106, 1122 (9th Cir. 2021); *James v. Uber Techs Inc.*, 338 F.R.D. 123 (N.D.Cal. 2021).

³³ See, e.g., *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904 (2020), *aff'd* *Rogers v. Lyft*, No. 20-15689, 2022 WL 2866364 (9th Cir. July 21, 2022).

Commentary:

- Veena Dubal, [The False Promise of “Third-Category” Worker Laws](#), REGUL. REV., Apr. 19, 2022.
- Veena Dubal, [Economic Security & the Regulation of Gig Work in California: From AB5 to Proposition 22](#), 13 EUR. LAB. L.J. 51 (2022).
- Lynn Rhinehart et al., Economic Policy Institute, [Misclassification, the ABC test, and Employee Status](#) (2021).

United States Department of Labor – Proposal for a New Rule

On October 11, 2022, the U.S. Department of Labor (DOL) filed a new proposed rule which, if finalized, would update and improve the test used to determine whether a worker is an independent contractor or an employee under the U.S. federal labor law pertaining to minimum wage and overtime pay, the Fair Labor Standards Act. The public will now have 45 days to submit comments, and following DOL’s publication of a final rule, there will almost surely be judicial challenge by employer groups.

Once in effect, however, the rule would apply to most all occupational sectors, including those working in rideshare, food delivery, and other common platform economy services. The rule would put in place a six factor, totality-of-the-circumstances economic realities test for determining worker status, and replace a Trump-era rule that provided a narrow analysis that focused on only two factors and facilitated those employers seeking to avoid basic employment responsibilities, by falsely categorizing their employees as independent contractors.

Under the new rule, DOL would be applying an economic realities test that does not rely on isolated factors, but rather on the circumstances of the whole activity, to answer the question of whether the worker is economically dependent on the employer. The six factors to be considered include: 1) worker’s opportunity for profit or loss based on managerial skills; 2) investments by the worker and the employer; 3) degree of permanence of the work relationship; 4) nature and degree of employer control; 5) extent to which the work performed is an integral part of the employer’s business; and 6) use of specialized skills and initiative to perform the work. A catch-all seventh item entitled “additional factors” is also included.

**READ TAKEN FOR A RIDE I:
LITIGATING THE DIGITAL
PLATFORM MODEL**



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