Gig economy Employment status

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Introduction

The gig economy is here to stay

We are living in a continuously changing society, which is not only reflected in the way we conduct business but also in people's mindsets and the way we work.

The concept of the standard employment agreement has come under increasing pressure. The reason is that workers attach more importance to flexibility and autonomy. Combined with technological developments, this has led to new ways of working such as the gig economy.

As discussed in our previous report, the gig economy has, however, been the subject of much controversy, especially in relation to the social status of the workers involved. Often, they will be hired as self-employed workers, which meets their needs in terms of freedom. On the other hand, they are longing for the social security benefits employees enjoy. Especially now,during the COVID-19 pandemic, when the gig workers and other service providers are the ones that kept the economy running during the lockdown.

The precarious position of the gig worker has also caught the eye of the European Commission, which will publish a report in September 2020, in which several potential future scenarios for platform work in the EU by 2030 are explored.

On a national level, we see that the discussion is still very much alive, which is translated to new case law in France and Germany, the report of the Borstlap Committee on the future of the labour market in the Netherlands and legislative actions in the Netherlands and the UK. In France promising legislative steps were taken at the end of 2019, but were unfortunately partially revoked by the French Constitutional Court due legal technicalities.

In our study, we again provide an overview of how workers in the gig economy are currently being treated in a number of prominent Member States of the European Union. We have investigated the respective national legislations and case law. In the below report, you can find a quick overview per country of the most important highlights up until 2019.

Belgium

Belgium (1/4)

Would the workers in the gig or sharing economy in Belgium be classified as either employees or self-employed, or perhaps as another category of workers?

The classification of workers in Belgium should be done on a case-by-case basis, depending on the elements mentioned in the answer to question 3. If the workers have sufficient freedom in organising their work and their working time and are not subject to a hierarchic authority, the employees will have to be considered as self-employed. Note that special rules exist for specific industries, such as the transport industry.

However, most companies that can be situated in the gig economy consider their workers as self-employed.

Are there different employment rights for employees and self-employed workers in Belgium and could some of these employment rights form a specific burden or hurdle for contingent workers working for a company in the gig economy?

The distinction between employees and self-employed workers should be made from both a social security and an employment law perspective. The social security rights and obligations for employees and self-employed workers differ hugely: e.g. pension accrual, disability allowances in the case of sickness/accidents, unemployment benefits, paid holiday, etc. In general we can conclude that the social security scheme for employees is far more extensive than the one for the self-employed. The uncapped social security contributions for employees amount to 13.07% of the gross salary (for the employee) and +/- 27.50% on top of the gross salary (for the employer). For self-employed workers, however, the contributions are capped and calculated on the basis of a maximum annual income of EUR 89,051.37 (amount for 2020).

From an employment law perspective, we can conclude that the employment of employees is heavily regulated, in contrast to the employment of self-employed workers.

The Belgian legislation has regulations in place on working time and resting periods, minimum (paid) holidays and public holidays, minimum salary, health and safety requirements, protection of pregnant workers, loan of manpower, etc. These types of provisions normally do not exist for self-employed workers.

Belgium (2/4)

What are the main tests for determining the employment status (employee, self-employed, other)?

In principle, the parties are free to give their contractual collaboration the classification they want (employment agreement or service agreement). The chosen classification is only to be set aside where it appears that there is an ensemble of facts (leaving socio-economic criteria out of consideration) that are incompatible with that classification. The nature of the relationship has to be assessed on the basis of:

- the intention of the parties,
- the freedom in organising the working time,
- the freedom in organising the work, and
- the ability to exercise hierarchic control.

Next to the above general principles to assess the self-employed nature of a contractual relationship, specific criteria exist for a limited number of industries (i.e. construction, security, transportation, cleaning, agriculture and horticulture):

- lack of any financial and/or economic risk on the part of the one performing the activities;
- lack of responsibility and decision-making powers with respect to the financial means of the company;
- lack of decision-making powers with respect to the purchasing policy within the company;
- lack of decision-making powers with respect to the pricing policy within the company;
- absence of obligation of results with respect to the agreed activities;
- guaranteed fixed remuneration, regardless of the company's results and/or the scope of the activities;
- not being an employer yourself or not having the option to have you replaced for the performance of the agreed activities;
- not presenting yourself as an independent company towards third parties, or working (almost) exclusively for one party;
- working in spaces of which you are not the owner nor the lessee, or working with supplies that have been provided, financed or guaranteed by the other party.

Belgium (3/4)

Whenever more than half of the above criteria are met, the contractual relationship is rebuttably presumed to be an employment relation. Where less than half of the criteria are met, it is rebuttably presumed to be a self-employed relationship. Both presumptions can be refuted by means of any remedies available under the law.

These nine specific criteria can be further complemented or replaced by criteria agreed on a sector level. At this time, industry-specific criteria exist for the following sectors: bus and/or coach companies, rental of vehicles with a chauffeur and of collective taxi services, road transportation and logistics for the account of a third party, security, construction, agriculture and horticulture.

Are the tests for employment status different for employment rights, personal income tax and/or social security tax purposes?

No.

Who can challenge an individual's employment status in your country?

The National Office for Social Security (RSZ/ONSS), the social inspectorate and the competent courts can, but also the individual worker can claim sham self-employment.

What are the penalties or civil consequences for wrongly classifying someone as a self-employed worker?

The contractual relationship may be reclassified into an employment relationship. In such case, employer and employee social security contributions (both to be borne by the employer) could be claimed, on top of which interest (7% on an annual basis) and surcharges (10%) would be due. The individuals themselves, who were formerly classified as self-employed, could additionally claim employment related benefits, such as (single, double and public) holiday pay and year-end premiums.

If an employment is reclassified into a self-employed worker status, the company may incur criminal sanctions (i.e. a fine and/or prohibition of activities). The self-employed worker will be able to reclaim social security contributions that he has paid in the past, without prejudice to the statute of limitations.

Is it possible to avoid tax and employment rights issues by hiring individuals from an employment agency or do agency workers have rights against the end user directly?

In the context of employment agencies, there exist only two agreements: one between the employee and the agency, and one between the agency and the end user. There is no contractual relationship between the employee and the end user. The end user will be responsible for compliance with all relevant labour conditions, and the agency will be responsible for the salary and the payment of social security contributions (the salary should be the same as for permanent employees). The employee will not be able to claim salary arrears from the end user.

Belgium (4/4)

Essential to this set-up is the temporary character of it all. Furthermore, the hiring of employees from an employment agency is strictly regulated. Temporary agency work is only possible in well-defined situations, described in the relevant legislation.

Is it common for independent contractors to have their own personal services companies through which they supply services? If such companies are used, does this mean that the end user has no employment responsibilities/obligations or tax responsibilities?

Yes, this is a very common practice in Belgium. The legal entity will not be able to enter into an employment agreement and so a service agreement will be concluded. As a result, the end user will pay periodic fees to the service company. These fees will be considered as revenue. After the deduction of business expenses, profit is what remains. This profit will then be subject to Belgian corporate income tax. The individual and thus director of his own service company will be considered as self-employed. The end user will thus not have to pay social security contributions or wage withholding taxes.

The veil created by the service company can still be pierced. The director and actual service provider can still be reclassified into an employee of the end user (for the implications, we refer to question 6 – page 8, last question).

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy?

In 2018, there was a non-binding ruling of the Administrative Commission for Employment Relationships whereby it was decided that the couriers of Deliveroo should be considered as employees, in contrast to what the company stated.

Even though the legal consequences of such a ruling are limited before a court of law, the relevance remains significant.

Moreover, the Judge Advocate for Labour in Brussels has started an investigation regarding the employment status of gig workers. In the framework of this investigation, he invited a large number of gig workers for an interview on their employment relationships. This investigation led to a citation of Deliveroo before the labour court in January 2020. Pleadings are expected to take place in October 2021.

As of 2016, legislation was in effect that allowed platform workers working for recognised platforms to earn up to EUR 6,000 per year free of social security charges and personal income taxes. On 23 April 2020, the Belgian Constitutional Court considered this legislation to be unconstitutional, as it was in breach with the principle of equality (Articles 10 and 11 of the Belgian Constitution). It is not yet clear what the impact of this ruling will be and how the Federal Government and Parliament will react to it.

Are there any other important remarks in relation to employment status, specifically within the context of the ‘platform or gig economy’?

A lot of discussion around the employment status is currently going on in Belgian legal literature. General consensus is, however, that the current Belgian legal framework is sufficient, although outdated, for the new phenomenon of the gig economy.

Denmark

Denmark (1/3)

Would the workers in the gig or sharing economy in Denmark be classified as either employees or self-employed, or perhaps as another category of workers?

The classification of workers in the gig economy depends on the factual circumstances of their collaboration.

See below for more details.

Are there different employment rights for employees and self-employed workers in Denmark and could some of these employment rights form a specific burden or hurdle for contingent workers working for a company in the gig economy?

Yes, different rules exist. Self-employed workers are not salaried workers and are consequently not covered/protected by the Danish employment laws.

A self-employed worker only has the protection provided for in the employment contract and the Contract Act as no general protection is provided for such workers under Danish laws.

A self-employed worker is personally responsible for withholding and reporting taxes and social security contributions, whereas employers (with a few exceptions) are responsible for withholding and reporting income taxes and social security contributions of the employee.

What are the main tests for determining the employment status (employee, self-employed, other)?

The following criteria should be taken into account when assessing whether the individual is a self-employed worker or an employee:

- Does the individual bear the overall economic risk of his own business?
- Under which legal status does the individual operate? Personal services company, VAT registration, fee recipient etc.
- Is the person subject to the client's hierarchic authority? Does the client instruct the work and does the individual report to the client?
- Does the individual have more clients or does the individual in fact depend on one client?
- Does the client put working tools at the individual’s disposal? Laptop/mobile phone/office facilities/access to client's IT systems etc.
- Does the individual receive a fixed monthly fee or is there an hourly or daily fee?
- Which termination conditions have been agreed in the contract between the parties: e.g. same length as a notice period in an employment contract? Compensation in the event of termination? Is the person paid in case of illness? Is the individual entitled to paid leave or other similar, typical employee benefits?

Denmark (2/3)

Are the tests for employment status different for employment rights, personal income tax and/or social security tax purposes?

No.

Who can challenge an individual's employment status in your country?

The individuals themselves, the tax authorities, the trade unions, the labour market inspectorate and others with a legitimate legal interest in this issue.

What are the penalties or civil consequences for wrongly classifying someone as a self-employed worker?

For the "employee", there would be a liability to pay taxes.

Depending on the set-up, a real double taxation might occur if the person has organised the activity through a limited company or a similar entity.

In addition, fines for tax avoidance might be imposed on the "employee".

For the employer, there would be a risk for:

- secondary liability for unpaid/non-withheld taxes;
- fines for non-compliance in relation to salary reporting and tax withholding;
- fines (in theory also penal actions) for employer management for involvement in tax avoidance;
- loss of the right to participate in fast track immigration treatment of potential foreign employees;
- an obligation to pay holiday allowance, a notice period/severance pay in the event of termination, or other compensation rights for wage earners;
- a duty to pay compensation to trade unions.

Is it possible to avoid tax and employment rights issues by hiring individuals from an employment agency or do agency workers have rights against the end user directly?

Agency workers hired through a temporary workers agency are not to be considered as employees of the user. Employment rights cannot be enforced against the end user. For tax purposes, such employment relationships might nevertheless trigger a Danish tax liability, depending on the set-up and circumstances.

Denmark (3/3)

Is it common for independent contractors to have their own personal services companies through which they supply services? If such companies are used, does this mean that the end user has no employment responsibilities/obligations or tax responsibilities?

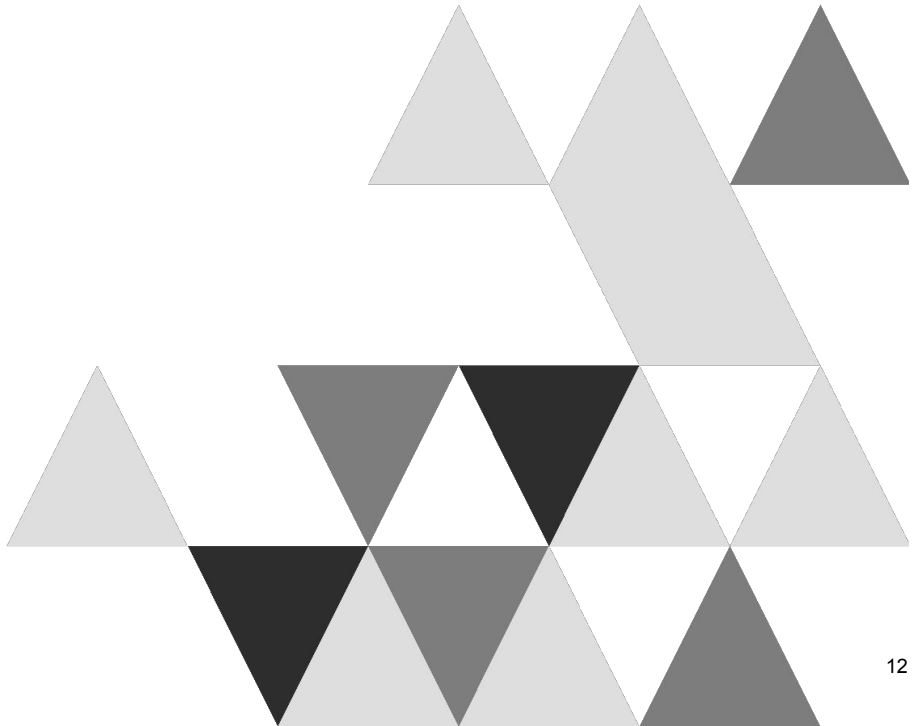
Independent contractors provide services either through their own personal services company or as a fee recipient. We cannot say which of the two options is more common. It does not have an impact on the liability for the end user under which set-up the services have been provided, but, as mentioned above, there is a risk that such a set-up could in the end entail a real double taxation (employee being directly taxed on salary + legal entity being taxed on cash flow into company + loss of expense deductions).

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy?

Court practice and legislation are strict as regards the self-employed status; self-employed workers have a high risk of being reclassified into employees/salaried workers. There is no tendency that this would change in favour of self-employed individuals. Similarly, current tax legislation and tax practice do not signal any changes towards a more flexible approach (especially since the consultancy/self-employed approach is often used to avoid or minimise tax payments, often by foreign service providers).

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

Currently, the focus of the legislators is to protect the tax base against the challenges from the sharing and gig economy. Thus, even though the legislation to a certain point appreciates the development of a sharing or gig economy, the main steps are not to facilitate this development but rather to impose reporting requirements and similar obligations in order to avoid the development of an untaxed economy.



France

France (1/4)

Would the workers in the gig or sharing economy in France be classified as either employees or self-employed, or perhaps as another category of workers?

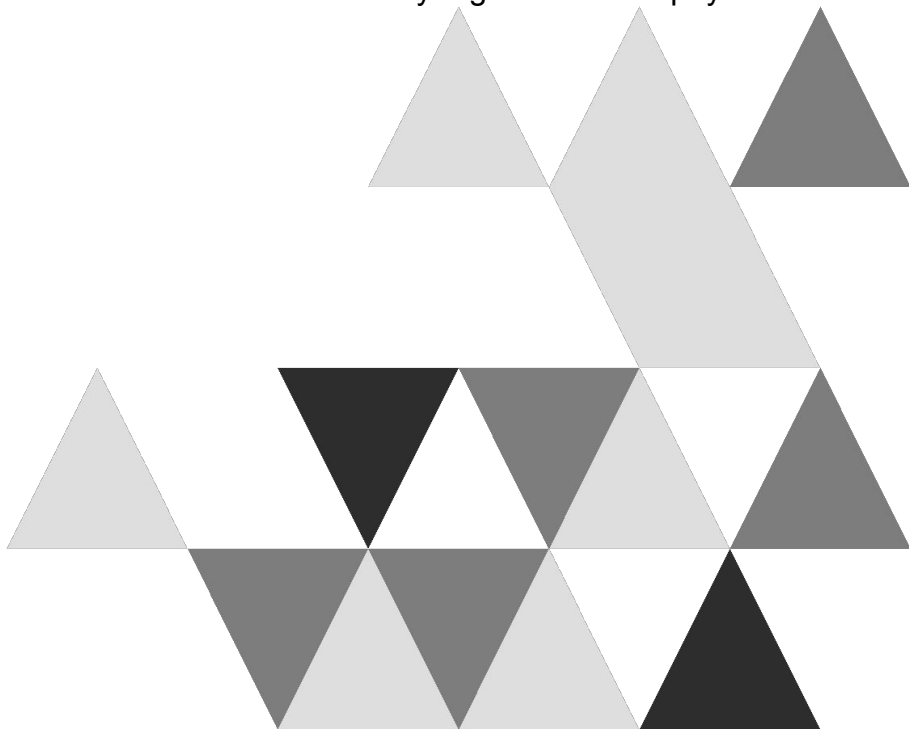
Whether the worker is classified as a self-employed worker or a salaried employee depends on the existence of a “hierarchical” link (as opposed to a merely “operational” link) between the platform and the individual.

Although there are no obligatory criteria to characterise a hierarchical relationship, the main elements that have been retained by the courts as exemplifying such a relationship are that an employer evaluates an employee directly to determine remuneration and career advancement, and can take disciplinary measures, including dismissal. A self-employed person, on the other hand, tends to carry out his activity in an independent manner. An individual is generally considered to be independent when he is free to organise his time, activity and workload, bears financial responsibility for completing the work (i.e. payment is subject to completion of the work), and bears his own business expenses including the purchase of his own tools. The fact that a person receives “operational” instructions does not in itself create an employment relationship as both self-employed and salaried workers typically receive operational instructions on what is expected of them, for instance which wall to decorate or which paint colour and other materials to use. Therefore, in the case of a dispute, looking at a combination of factors, the courts will determine on a case-by-case basis. The factors taken into account are the same for social security purposes and for employment law purposes.

Are there different employment rights for employees and self-employed workers in France and could some of these employment rights form a specific burden or hurdle for contingent workers working for a company in the gig economy?

Self-employed individuals are not subject to French labour law rules but are rather governed by the commercial and Civil Code.

The rules relating to, for instance, notice period, dismissal, paid holidays, working time and payroll do not apply to self-employed contractors. A self-employed worker is responsible for his own social security registration and payments.



France (2/4)

What are the main tests for determining the employment status (employee, self-employed, other)?

An employment relationship is generally characterised by the following:

- Detailed instructions/orders are given to the individual concerned (keeping in mind that even self-employed workers will need to be told what is expected of them).
- The individual's activity, especially the time spent, is monitored.
- The individual is liable to sanctions if he fails to apply the instructions given by the employer.
- No risks are taken: the individual has a regular fixed remuneration; he does not bear any risk of non-payment or offsetting of payment due to poor performance.
- The number of clients: a full-time employee is generally subject to an obligation of loyalty and exclusivity, whereas a self-employed person is supposed to have more than one client.
- An employee cannot substitute himself whereas a self-employed individual is often free to engage another person to deliver the services and hence provide a substitute.
- An employee cannot refuse work, except under a limited number of conditions.
- An employee receives a monthly salary; a self-employed person will usually be paid for an individual assignment completed (i.e. generally at the end of the assignment, with possible payment of advances, not regular monthly payments).
- Being entitled to a fixed salary, an employee is not generally subject to variations in profit or loss: the self-employed person will suffer a loss if he underestimates the time it will take to complete the assignment or encounter unexpected difficulties that have not been provided for under the terms of the contract.
- An employee is generally provided equipment, or is reimbursed for its purchase.
- An employee is not responsible for his own professional liability insurance.

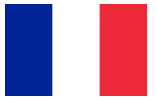
Are the tests for employment status different for employment rights, personal income tax and/or social security tax purposes?

In most cases, the tests are the same for employment rights and social security. In any case, if an individual is considered as an employee from a labour law perspective, he must also be considered as an employee for social security and income tax purposes.

Who can challenge an individual’s employment status in your country?

- The individual can.
- In some cases, the labour and social security authorities can in the case of an audit.

France (3/4)



What are the penalties or civil consequences for wrongly classifying someone as a self-employed worker?

- Regularisation of the social security contributions due in respect of the employment status, including penalties (5% of unpaid contributions, plus 0.2% per month or fraction of month of delay).
- Criminal offence of undeclared work (“travail dissimulé”) punishable by confinement of up to 3 years and a fine of €45,000 for the representative of the company (€225,000 for the company itself). Such an offence may lead to an additional social security penalty of 25% (of unpaid contributions).
- Payment of damages for unfair termination of the relationship.
- Payment of the dismissal indemnity and the compensation in lieu of notice.
- Payment of an indemnity for illegal work.

Is it possible to avoid tax and employment rights issues by hiring individuals from an employment agency or do agency workers have rights against the end user directly?

It is possible to hire individuals from an employment agency but only under specific conditions (e.g. it could be an issue if a company calls on an employment agency frequently to carry on the regular business of the company).

Is it common for independent contractors to have their own personal services companies through which they supply services? If such companies are used, does this mean that the end user has no employment responsibilities/obligations or tax responsibilities?

In our experience, such practice is not common in France.

If companies are used, the end user may still have employment responsibilities/obligations or tax responsibilities in the case of reclassification of the worker status.

It is important to keep in mind that the existence of a contractual employment relationship does not depend solely on the intention expressed by the parties concerned or the name given to the agreement reached between the parties but also on the actual conditions under which the activity is carried out.

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy?

On 28 November 2018, the French Supreme Court (i.e. Cour de Cassation) published an important decision regarding the gig economy and notably the reclassification of a self-employed worker status to an employment relationship in the courier industry.

France (4/4)

The French Supreme Court indicated (i) that the existence of an employment relationship does not depend on the intention expressed by the parties or on the denomination that they have given to their agreement (i.e. self-employment in the case at hand), but on the factual conditions under which the activity is carried out, and (ii) that the employment relationship is characterised by the performance of work under the authority of an employer who has the power to issue orders and directives, to supervise the performance of the work and to punish the failings of subordinates.

In the case in question, the French Supreme Court found that the platform had a system of geolocation allowing it to monitor the real time spent by the courier, the number of kilometres travelled as well as the (geographical) position, and had a sanctioning power with regard to the courier.

The French Supreme Court decision has since been confirmed by French case law. Indeed, on 10 January 2019, the Court of Appeal of Paris ruled that a platform worker was not to be considered as a self-employed worker but as an employee because the worker could not have his own clients and prices were contractually fixed by the platform, which was also in a position to sanction the worker for misconduct. On 4 February 2020, the Employment Tribunal of Paris condemned a platform for undeclared work. It judged that the obligation for the courier to conclude a service agreement was aimed at avoiding the application of the French labour code.

On 24 December 2019, the French Government attempted to restrain this reclassification trend by the French courts by legislating a presumption of self-employment for workers if the platform publishes a charter (which remains non-obligatory and is issued unilaterally) that determines the terms and conditions between the platform and individuals. However, this attempt has been censured by the French Constitutional Council and thus did not enter into effect.

Are there any other important remarks in relation to employment status, specifically within the context of the ‘platform or gig economy’?

The French Government wants to enhance the rights of workers while avoiding reclassification into an employment relationship. In the meantime, French Courts are increasingly ruling against platforms for not concluding employment contracts. On 4 March 2020, the French Supreme Court published a decision confirming that, even if the worker could choose his working days and hours, it did not exclude the fact that he could be in an employment relationship. Actually, the worker could not choose freely his clients or his fares, and Uber reserves the right to disconnect the driver.

In that case and on the basis of these elements, the French Supreme Court considered that the position of the individual concerned as a self-employed worker was legally unfounded.

Germany

Germany (1/2)

Would the workers in the gig or sharing economy in Germany be classified as either employees or self-employed, or perhaps as another category of workers?

The workers would rather be classified as self-employed, but it is often hard to distinguish them from employees. This is a major legal issue in Germany. There are no special regulations for the gig economy. The criteria for demarcation apply, which have been developed by law, case law and social security institutions.

Are there different employment rights for employees and self-employed workers in Germany and could some of these employment rights form a specific burden or hurdle for contingent workers working for a company in the gig economy?

The employment contract is regulated in §611a of the German Civil Code (the “BGB”). The services contract for freelancers is regulated in §611 BGB. Some regulations, such as the extraordinary termination according to §626 BGB, apply to both types of contract. Other provisions, such as the law on protection against dismissal, apply only to employees. There are no special regulations for the gig economy.

What are the main tests for determining the employment status (employee, self-employed, other)?

A lot of different criteria will be applied in the assessment of the classification, such as the right to issue directives on the content, implementation, place and time of the activity, personal dependence, nature of the activity, and integration into the employer's work organisation, as well as an overall assessment of all criteria.

Are the tests for employment status different for employment rights, personal income tax and/or social security tax purposes?

Yes, but the criteria often overlap. However, the Labour Court's decision as to whether the worker is an employee or a freelancer has no binding effect for, for instance, the Social Court or for taxation purposes. There are also cases in which the person concerned does not work under an employment relationship but still has to pay social security contributions.

Who can challenge an individual’s employment status in your country?

The employee can have his status clarified before the Labour Court. In addition, the employee or employer can have the German Pension Insurance Association (clearing house = "Clearing Stelle") check whether he has to pay social security contributions. The institutions of the German Pension Insurance Association can also examine this question as part of an audit. The health insurance companies also decide whether the employment relationship is one in which social security contributions must be paid.

Germany (2/2)

What are the penalties or civil consequences for wrongly classifying someone as a self-employed worker?

In particular criminal offences: section 266a of the German Criminal Code = withholding and defalcation of remuneration; section 370 of the German Tax Code = tax evasion.

Is it possible to avoid tax and employment rights issues by hiring individuals from an employment agency or do agency workers have rights against the end user directly?

The rights of temporary employees are governed by the German Temporary Employment Act (ANÜ).

Is it common for independent contractors to have their own personal services companies through which they supply services? If such companies are used, does this mean that the end user has no employment responsibilities/obligations or tax responsibilities?

That is possible. However, if the contractor is actually an employee, the client (employer) runs the risk of having to pay taxes and social security contributions (see above).

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

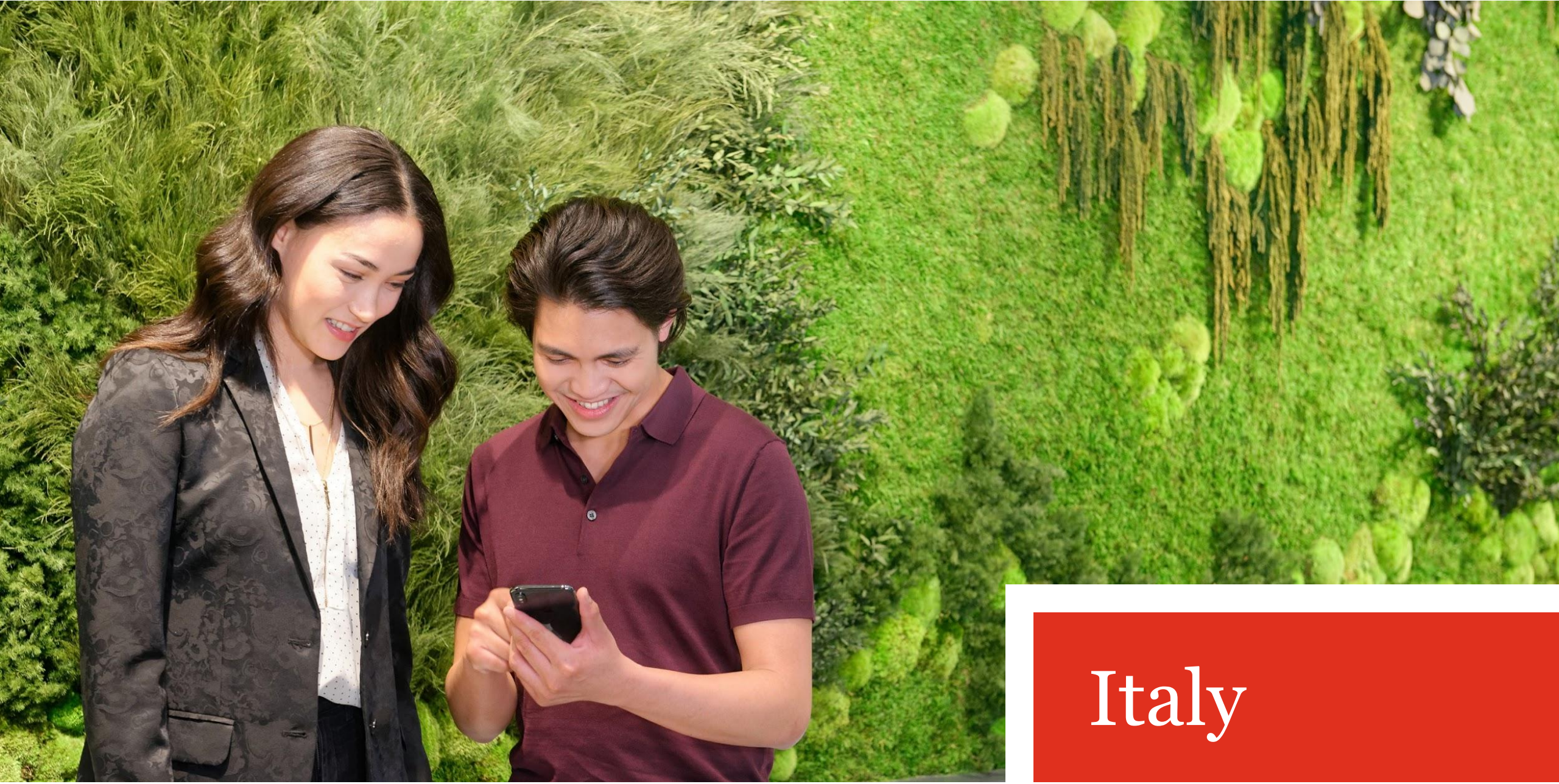
There is the Circular of the central associations (Deutsche Rentenversicherung Bund, Bundesagentur für Arbeit, GVK-Spitzenverband) of 13 April 2010, which contains, among other things, in Annex 5 a catalogue of certain professional groups to distinguish between dependent employment and self-employment.

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy?

According to the responsible authority, the Federal Ministry of Labour and Social Affairs (the "BMAS"), approximately 4.8 percent of employees worked as platform workers in 2018. This number has probably increased in the meantime. Since other or additional criteria may be decisive in assessing the status, the BMAS is currently working on proposals for the platform economy. Among other things, the question is whether so-called digital integration takes place through integration on a platform and the monitoring of the platform worker by a quality management system including price specifications, control mechanisms, evaluation of work results, and customer satisfaction assessment.

In the meantime, two judgments on the subject of platform work have also been handed down by the labour courts. On 4 December 2019, the Regional Labour Court in Munich decided that, in the case to be judged, the platform worker was self-employed. The platform worker photographed goods in petrol stations and supermarkets to check the presentation of the goods. On 14 February 2019, the Regional Labour Court of Hesse ruled that the bus driver involved (being the plaintiff) was not an employee because he was only employed on a selective basis.

The trade unions are now also discussing the issue of platform work. The trade union IG Metall has initiated the Crowdsourcing project. The trade union believes that so-called Work 4.0 requires reforms because the conditions have changed, such as the sending of orders via apps, which means that a permanent establishment (also to be assessed in the fiscal sense) is no longer necessary, or the display of orders via algorithms and the resulting reduction in order offers if the platform worker rejects orders (an essential criterion for self-employment is whether the platform worker himself can decide whether to accept or refuse orders). In our opinion, the current criteria will also apply to platform work, albeit in a modified form.



Italy

Italy (1/4)

Would the workers in the gig or sharing economy in Italy be classified as either employees or self-employed, or perhaps as another category of workers?

According to Italian law, workers in the gig or sharing economy can be classified as either (i) subordinate employees or (ii) self-employed workers, or perhaps (iii) as a third category, being "collaborative/para-subordinated/semi-subordinated" workers (in Italy referred to as "co.co.co."). The Italian Act no. 128/19 provides that gig economy workers whose co.co.co. relationships result in job performance being personal and continuous and whose job execution methods are organised by the client are subject to the rules set for subordinate employment. That said, gig or sharing economy workers in Italy are almost always hired through a self-employment contract: they perform their activity by using their own vehicles and tools and, above all, they are free to choose whether or not to carry out the order/activity for the client they work for (which is usually a web platform).

Are there different employment rights for employees and self-employed workers in Italy and could some of these employment rights form a specific burden or hurdle for contingent workers working for a company in the gig economy?

Italian law provides for a wide range of protection in favour of subordinate employees while not the same protection is in place for self-employed workers (or the co.co.co.). First of all, Italian subordinate employees are entitled to receive the minimum wage set forth by national collective bargaining agreements. Moreover, Italian law has rules that protect the employee's rights with regard to working time and holidays, sickness and injury, pregnancy and maternity/paternity, etc. In addition, with regard to the termination of the employment relationship, the employee's dismissal has to be grounded on objective or subjective reasons (otherwise, in general terms, the employee may be entitled to reinstatement and/or compensation for damages).

For all of these reasons, some of the employment rights can be seen as a burden for certain companies which avoid hiring subordinate employees for their activities and prefer to engage self-employed individuals. In relation to self-employed workers, where they are managed as subordinate employees, in certain cases, their relationship may require reclassification into a subordinate status.

Italy (2/4)

What are the main tests for determining the employment status (employee, self-employed, other)?

Under Italian law, the main and most important test for determining the employment status is the existence of subordination; that means that the employee is subject to the executive power, control and discipline of the employer with a consequent limitation of his autonomy. Other elements are merely subsidiary, meaning that they are useful to define with greater certainty the employment relationship as subordinated when it is not easy to recognize the existence of subordination. As an example: the worker is not responsible for the organisation of the business or its financial risks; the worker observes an agreed schedule; the remuneration is only based on worked hours; the relationship has continuity and duration; the worker has to notify the employer of his absence; the worker uses vehicles, equipment and/or tools provided by the employer only. Please note that, under Italian legislation, the economic dependence of the worker cannot be seen as a test for the employment status.

Are the tests for employment status different for employment rights, personal income tax and/or social security tax purposes?

No.

Who can challenge an individual's employment status in your country?

Under Italian law, the individual himself can always challenge his employment status: the self-employed worker is entitled to file a claim before a labour court for the reclassification of his relationship into subordinate employment. In any case, the labour inspectorate may exercise its inspection and supervision powers in order to detect "false" self-employment relationships and, therefore, impose sanctions on the employer for infringing labour laws. Also the Italian Institute for Social Security Contributions (INPS) has power of inspection and is entitled to claim payment of the social security contributions differences in the case of reclassification into subordinate employment of a self-employment relationship, and sanction the employer for not having paid contributions.

What are the penalties or civil consequences for wrongly classifying someone as a self-employed worker?

The main consequence for companies related to a wrong classification as self-employment is the risk that the worker claims the subordinate employment status, meaning that, since the beginning of the employment relationship, the relevant regulation would become applicable retroactively. Consequently, the employee is entitled to claim the salary differences - on the basis of the applicable NCLA provisions - as well as the payment of - the pro rata - social security contributions. Moreover, the application of employment regulations also entails the enforcement of the rules and the protection provided for the termination of the subordinate employment relationship (meaning that, as mentioned before, dismissal is subject to the obligation to state reasons).

Italy (3/4)

Is it possible to avoid tax and employment rights issues by hiring individuals from an employment agency or do agency workers have rights against the end user directly?

Aside from some exceptions provided for by Italian law, agency workers do have, in certain cases, rights directly enforceable against the end user. However, Italian law provides for an effective protection for agency workers who are entitled essentially to the same treatment as the one set forth for subordinate employees.

Moreover, agency work in Italy is subject to strict regulation whose violation determines the right for the worker to claim an employment relationship towards the agency or - in a few restricted cases - the end user. Please note that the legislation provides for the principle of joint and several liability among agency and end user for the payment of the worker remuneration and social security contributions.

Is it common for independent contractors to have their own personal services companies through which they supply services? If such companies are used, does this mean that the end user has no employment responsibilities/obligations or tax responsibilities?

In Italy, it is not that common for independent contractors to have their own personal services companies through which they supply services.

With respect to drivers working - as independent contractors - for digital platforms, it was proposed to look at the "umbrella company" model, under which an organisation provides its joiners only minimum protection standards (in terms of e.g. pension insurance scheme, accidents insurance, or financial support measures for long-term inactivity).

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy?

At the end of 2019, the Italian Government issued a new Act (no. 128/19) aimed at guaranteeing a minimum level of protection for gig economy workers and bringing their position closer to the one of subordinate employees.

In particular, Act no. 128/19 consists of a series of provisions including:

- mandatory written form for individual contracts, with penalties in the event of non-compliance;
- minimum remuneration to be determined by the NCLA; in the absence of such NCLA provisions, gig economy workers cannot be remunerated on a deliveries-made basis but must be guaranteed a minimum hourly fee based on the NCLA provision that would apply in similar or equivalent sectors;
- compulsory insurance coverage by INAIL (National institute for insurance against industrial injuries) for accidents at work and occupational diseases.

Such provisions will enter in force starting 2 November 2020.

Italy (4/4)

Are there any other important remarks in relation to employment status, specifically within the context of the ‘platform or gig economy’?

The Italian Supreme Court has recently ruled (decision no. 1663/2020) that gig economy workers (i.e. riders) can be classified as employees, overturning last Italian case law.

In particular, the Supreme Court ruled that even in case riders are classified as collaborators/semi-subordinate workers, if their job performance is personal, continuous and organised by the client (as to the execution methods), the employment status of subordinate worker has to be recognized.

The Court stated that the Italian most recent regulation (Act no. 128/19, see above) guarantees gig economy workers the same protection as the one enjoyed by subordinate workers, in line with the general approach of the reform, in order to protect workers considered being in conditions of economic "weakness", operating in a "gray area" between autonomy and subordination, but still considered being worthy of homogeneous protection.

Norway

Norway (1/2)

Would the workers in the gig or sharing economy in Norway be classified as either employees or self-employed, or perhaps as another category of workers?

Workers in the gig or sharing economy can be classified as either employees or self-employed workers, depending on an overall assessment of the factual realities of the case. According to case law and the text of the debates leading to the Working Environment Act ("WEA"), some of the decisive factors will be: 1) who is responsible/carries the risk for the final work result?; 2) how many job suppliers does the person who claims to be self-employed have? If there is only one, this is a factor that may indicate that there is in reality an employer and not a work supplier relationship; 3) how long has the work relationship lasted?; 4) who pays taxes and insurance premiums?; 5) who instructs how the work is to be carried out? If the person concerned is obliged to submit to the employer's management and control of the work, this may indicate that the relationship between the parties in reality is an employment relationship ; 6) who owns the equipment used to perform the work? 7) Can the relationship between the parties be terminated with a specific notice period? 8) Is it possible for the person concerned to use assistants/helpers at his own expense?

The conclusion in terms of whether or not the set-up should be considered as an employment relationship is made on the basis of an overall assessment of the concrete circumstances of the relationship between the parties. It is the legislator's intention that those in need of the protection provided by the WEA, the Holiday Act etc. should be protected by those acts, and the definition of employee/employment relationship must therefore be given a broad interpretation.

Are there different employment rights for employees and self-employed workers in Norway and could some of these employment rights form a specific burden or hurdle for contingent workers working for a company in the gig economy?

Employees are covered by the WEA and are guaranteed an agreed salary, holiday pay, pension benefits, industrial accidents insurance and social security benefits. Self-employed persons will themselves need to pay for pension, insurance coverage and social security insurance in case of sickness, provided that they have sufficient income, of course.

What are the main tests for determining the employment status (employee, self-employed, other)?

See the answer to question 1.

Are the tests for employment status different for employment rights, personal income tax and/or social security tax purposes?

No.

Who can challenge an individual's employment status in your country?

The individuals themselves may file a case with the court. Tax authorities may challenge a person's taxation as a self-employed person if the underlying facts indicate that the work relationship is a regular employment relationship. The Labour Inspection Authority will perform checks in various sectors and inspect (amongst other topics) what type of work relationship people are offered.

Norway (2/2)

What are the penalties or civil consequences for wrongly classifying someone as a self-employed worker?

If persons who have been classified as self-employed file a case and claim to be employees, and the courts accept that as the facts, the consequences are that the persons obtain the employee status from the time the relationship between the parties started. This means that the employees will be entitled to any pensions, holiday pay and possible wage differences or other relevant claims, e.g. overtime pay they should have received if they had been treated as regular employees from the beginning. Please note that the authorities may also order the employer to retroactively pay national insurance contributions arrears.

Is it possible to avoid tax and employment rights issues by hiring individuals from an employment agency or do agency workers have rights against the end user directly?

There are fairly strict rules in Norway as to for how long temporary workers may be hired in from work agencies. Hiring-in is only allowed as long as the regular conditions for temporary work are met. If the agency worker continues to work for the employer and the conditions for temporary work are not met, the risk is that the employee may demand to be employed permanently in the company where he is hired in. It is also important to be aware that if the employer has not adhered to the principle of equal treatment, user undertakings may be liable in the same way as an unconditional guarantor for payment of wages, holiday pay and any other remuneration pursuant to the principle of equal treatment.

Is it common for independent contractors to have their own personal services companies through which they supply services? If such companies are used, does this mean that the end user has no employment responsibilities/obligations or tax responsibilities?

Independent contractors will usually have their own companies registered as sole-proprietorships (ENK), and some will have their own private limited company (AS). Both company types are registered in the Brønnøysund Register Centre. As long as the independent contractor is regarded as a real independent contractor, the end user will as a main rule not have any employment responsibilities etc. other than possibly some HSE responsibilities.

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy?

We do not have any major developments to report so far. We have had a study group for the Ministry of Employment whose task was to examine whether the current legislation was sufficiently agile to respond to the gig challenges. The working group concluded that, as for now, there are no needs for legislative changes.

We have had some Uber cases, but these have only been handled by the police as issues of violation of the legislation on driving permits (no assessments under employment or tax laws).

Are there any other important remarks in relation to employment status, specifically within the context of the ‘platform or gig economy’?

Not applicable.

United Kingdom

United Kingdom (1/4)

Would the workers in the gig or sharing economy in the UK be classified as either employees or self-employed, or perhaps as another category of workers?

In the UK, there are three statuses for individuals: self-employed, employee and a middle category called "worker". Someone in the gig or sharing economy can fall into any of these three categories depending on the circumstances of their engagement. There are no special rules for the gig or sharing economy in determining employment status. Over the past 24 months, there have been a number of highly publicised employment tribunal cases in the UK where individuals who have been labelled by the parties as self-employed have been found to be workers in reality.

Are there different employment rights for employees and self-employed workers in the UK and could some of these employment rights form a specific burden or hurdle for contingent workers working for a company in the gig economy?

Yes, different rights apply depending on the status of the individual. These are broadly as follows:

- Self-employed: apart from limited discrimination rights, no entitlement.
- Workers: the main three rights (in addition to increased application of discrimination legislation) are to receive the National Minimum Wage; to benefit from protection under working time legislation including the right to a minimum of 5.6 weeks' paid holiday per annum; and to receive employer pension contributions under auto-enrolment legislation.

Employees: as for workers, plus the full range of employment rights such as maternity and family leave, and the right to claim a statutory redundancy payment as well as unfair dismissal upon termination of employment. There are withholding obligations of the employer for tax and National Insurance.

There are no specific rules on the employment rights to which individuals in the gig or sharing economies are entitled, as opposed to traditional models of employment. However, there is more publicity and developing case law concerning the gig economy.

What are the main tests for determining the employment status (employee, self-employed, other)?

In determining the status of an individual, it is necessary to look at a whole range of factors and not merely at any written contract that may be in place between the parties. There are three main factors:

1. Mutuality of obligation: is the engaging entity obliged to offer, and is the individual obliged to accept, any work?
2. Personal service: is the individual obliged to perform services personally, or do they have an unlimited right to provide a substitute?
3. Control: what level of control is exercised by the engaging entity over the performance of the services?

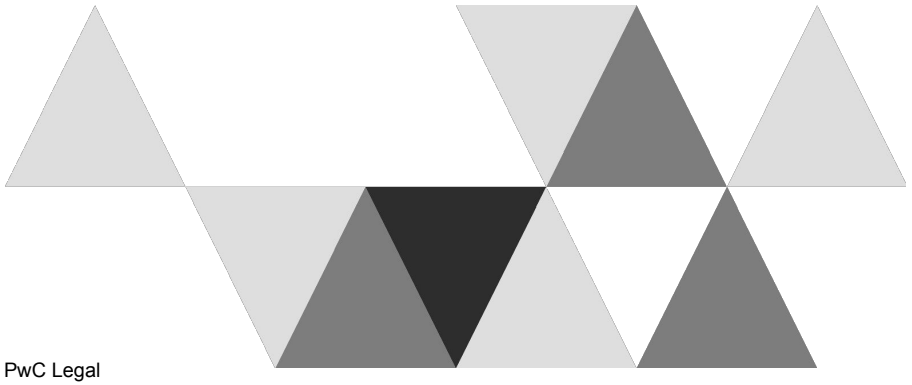
United Kingdom (2/4)

In addition to the above, other relevant factors that will be taken into account include the level of financial risk taken on by the individual in providing the services; the degree to which the individual is integrated into the engaging entity's organisation; and whether the individual provides their own equipment.

The same tests apply to determine whether someone is self-employed, a worker or an employee, but it is harder for an individual to demonstrate that they are an employee than a worker.

Are the tests for employment status different for employment rights, personal income tax and/or social security tax purposes?

The answer is basically that the tests are the same, although, for tax and social security purposes, the "worker" category does not exist. So tax etc. withholding obligations only apply if the individual has employment status. Please note that it is possible for employment tribunals and courts to reach a conclusion on an individual's status that differs from the view taken by UK tax authorities (HMRC).



Who can challenge an individual's employment status in your country?

Apart from individuals themselves, the main enforcement authorities are as follows:

- HMRC: for tax/social security withholding obligations. HMRC is also the enforcement authority for National Minimum Wage and has been very proactive in the enforcement of NMW for individuals with worker status.
- The Government Pension Regulator: for pension auto-enrolment (see above - this right applies to workers as well as to employees).
- A new single enforcement body has been proposed by government to strengthen workers' ability to seek redress for poor treatment. Details of the proposal and the corresponding draft legislation have not yet been published.

What are the penalties or civil consequences for wrongly classifying someone as a self-employed worker?

If someone who is a worker is wrongly classified as self-employed, the engaging entity can be liable to make payments of National Minimum Wage and statutory holiday pay, and arrears can be ordered for up to six years. The engaging entity can also face penalties for failing to comply with pension auto-enrolment legislation.

United Kingdom (3/4)

The same penalties can apply in respect of an employee who is classified wrongly as being self-employed. In addition, here, the engaging entity will be liable for unpaid tax and National Insurance contributions, again for a period of typically up to six years, plus interest and penalties. An employee can also bring claims for unfair dismissal and a statutory redundancy payment on termination of employment.

Is it possible to avoid tax and employment rights issues by hiring individuals from an employment agency or do agency workers have rights against the end user directly?

Many of the issues surrounding employment status can be avoided by the end user through the use of carefully drafted arrangements with reputable employment agencies and businesses, but there are a number of caveats to this, including:

- The Agency Workers Regulations: after an agency worker (whether a worker or employee as defined above) has been assigned to an end user for 12 weeks or more, that individual will be entitled to the same basic conditions (pay, commission, hours of work, holiday etc.) as a comparable employee of the end user. This liability falls on the employment agency, which will normally pass on the associated costs to the end user.

- Tax and National Insurance: although they may not be employees, an employment agency or business is obliged to make withholdings of tax and pay employers' National Insurance contributions on agency workers' fees. This obligation falls on the employment agency/business, which will again pass on the obligation to the end user.

See also the response to the question below.

Is it common for independent contractors to have their own personal services companies through which they supply services? If such companies are used, does this mean that the end user has no employment responsibilities/obligations or tax responsibilities?

It is fairly common in the UK for contractors to have their own personal service companies (PSCs). This can avoid application of the Agency Workers Regulations mentioned above. However, under rules introduced in 2017, if the engaging entity of a PSC is in the public sector or from April 2020 is a medium or large sized business in the private sector, then it is obliged to make withholdings of tax and National Insurance in specific situations. If the PSC is supplied to the end user through an intermediary such as an employment agency, then the agency must make the withholdings but the end user entity must make the determination on whether these withholdings rules operate in the first place.

United Kingdom (4/4)

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy?

Yes, there are a number of ongoing and expected changes:

- Case law: a number of cases are currently going through the courts on the employee/worker status of individuals in the gig economy and these could result in organisations having to change their operating models significantly if they want to retain a self-employed workforce.
- Changes to tax rules for the engagement of PSCs: see the above question. A recent change in the law means that now all entities that engage PSCs other than small private sector businesses have an obligation to withhold tax and National Insurance in many situations. There is also a possibility that employment rights could be extended to situations where tax becomes payable.
- All entities that engage PSCs will have an obligation to withhold tax and National Insurance in many situations. There is also a possibility that employment rights could be extended to situations where tax becomes payable.
- Consultation of employment status and other gig economy related issues: the government has consulted on whether the tests for employee and worker status developed by case law and mentioned at the third question above should be codified into statute and what (if any) changes should be made to these tests, but there is no news on government plans for these reforms. New legislation is proposed (as mentioned above but has not yet been published), which will strengthen workers' protection and create a new single enforcement body for certain rights such as holiday pay and National Minimum Wage.

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

The question of employment status in the gig economy is a genuinely hot topic in the UK because of case law developments and recent and proposed changes in both tax and employment rights law. There is a very significant degree of media interest in this fast-moving area.

Spain

Spain (1/3)

Would the workers in the gig or sharing economy in Spain be classified as either employees or self-employed, or perhaps as another category of workers?

In Spain, there is no law, either business (mercantile) or labour (subordinate) in character, that particularly governs the type of work performed in the gig economy by any collaborator, and therefore, currently, there is legal uncertainty regarding this topic. For the time being, our labour courts have to decide on the nature of the relationship by considering the historical laws (Workers' Statute regulating employment relationships and Act 20/2007 on self-employed work) and case law on the matter. That is to say, looking at the circumstances and the presence of the characteristics of an employment relationship (dependence and alienation), the courts will have to determine, depending on the circumstances in each case, whether the relationship with the worker is a labour relationship or a business relationship, and in the latter case, whether the employee is a common self-employee or a TRADE (self-employed economically dependent).

However, recent labour court decisions against major companies operating in the Delivery sector whose activity is based on riders' services have confirmed that the relationship between riders and companies is an employment relationship, as riders' conduct meets the characteristics of subordination and dependence, typical of the employee status (STJM 40/2020, of January 17). That said, each individual case needs to be considered to determine whether or not an employment relationship exists.

Are there different employment rights for employees and self-employed workers in Spain and could some of these employment rights form a specific burden or hurdle for contingent workers working for a company in the gig economy?

Yes. In Spain, there are different employment rights for employees and self-employed workers. The most relevant difference is that self-employed workers are not subjected to the Spanish Workers' Statute and thus are not covered by its benefits (i.e. they have no right to severance compensation) and they do not contribute to the general social security system and so they are not entitled to the benefits offered under this regime.

The above facts could indeed become a burden for contingent workers working for a company in the gig economy.

What are the main tests for determining the employment status (employee, self-employed, other)?

The basic principles to define whether the nature of a relationship is a labour relationship or a business relationship are as follows:

1. there is a presumption 'iuris tantum' that the relationship is a labour relationship if the worker receives remuneration under the organisation and direction of the company;

2. according to case law, there is a labour relationship if: the individual renders services regularly on behalf of the company; earns a steady income; has to follow the instructions of staff of the company; has to comply with certain standards set by the company; does not reject services and can be identified as related to the company (e.g. through logos or publicity); and

3. no matter the name that the parties have given to the contract as, in the event of a dispute, the relationship will be considered a labour relationship if there is evidence of dependence and alienation.

Spain (2/3)

Are the tests for employment status different for employment rights, personal income tax and/or social security tax purposes?

Not really, but the determination of the employment status of a worker as a labour relationship and not a business relationship will have an impact on his social security status.

Who can challenge an individual's employment status in your country?

The controversy can be raised by a self-employed contractor who asks to be recognized as an employee before the labour courts, or by the Inspectorate of Work, which may start a procedure to have the contractors of a company recognized as employees (which may also lead to a procedure before the labour court).

What are the penalties or civil consequences for wrongly classifying someone as a self-employed worker?

The main consequences are the following:

- The company could be sanctioned for serious infringement for failure to register the employees with the social security authority, with a fine ranging between €3,126 and €10,000 per employee. Alternatively, the company could be sanctioned for serious infringement for failure to pay contributions, with a fine ranging between 50% and 100% of the amounts not contributed, plus a 20% surcharge.
- The company could lose social security bonuses and would not be able to benefit from them during a term of 1 year.
- The company could have to pay the social security contributions for the last four years, plus a 20% late payment surcharge.
- The company could be held liable for the future benefits the employees would have to receive if the social security contributions had been properly made (such as unemployment benefit or retirement pension). In the event of an accident at work, additional liabilities could apply (such as damages and surcharge over social security benefits).
- The employees' working conditions would have to be improved so as to comply with the minimum levels set by the Collective Bargaining Agreement.
- Recognition of seniority of the self-employed worker would be required since the time he started performing services for the company.
- In the event of unfair dismissal, self-employees would be entitled to receive the same severance compensation as ordinary employees: 33 days of salary per year of service.

Spain (3/3)

Is it possible to avoid tax and employment rights issues by hiring individuals from an employment agency or do agency workers have rights against the end user directly?

In Spain, it is only possible to hire individuals through a temporary employment agency if temporary legal grounds are available (a specific work or service, a particular peak of work in production, or the need to cover the position of an employee under a leave with reservation of his job position). However, it is possible to externalise some services with third-party contractors to avoid tax and employment rights. In such cases, it is very important that the company hiring those third-party contractors does not act as the real employer of the employees coming from the third-party contractor as, in such a case, again there could be a risk of regarding those employees as real employees of the company to all effects. This phenomenon is known as "illegal lending of employees".

Is it common for independent contractors to have their own personal services companies through which they supply services? If such companies are used, does this mean that the end user has no employment responsibilities/obligations or tax responsibilities?

In Spain, this type of situations can be commonly found. However, in this case, if the company through which the employee provides services to the end user (a third company) is just a cover to avoid the application of the labour legislation, then a court could rule that a labour relationship exists between the employee and the end user and could order the end user (third company) to bear the same consequences as the ones described under question 6.

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy?

The fight against labour fraud has become one of the main lines of action of the new Government. In this sense, the Government has approved a "Master Plan for Decent Work", which includes two lines of action:

1. Royal Decree 997/2018 of 3 August 2018, aimed at amending the Social Security Contribution Regulation, to guarantee the affiliation of false self-employed workers under the General Scheme for those cases that the Labour Inspectorate detects as having been irregularly framed under the Régimen Especial de Trabajadores Autónomos (RETA); and

2. Royal Decree 8/2018 of 3 August 2018, regulating a programme aimed at re-activating employment.

Are there any other important remarks in relation to employment status, specifically within the context of the ‘platform or gig economy’?

We must emphasize that the trade union CCOO has asked the Government to develop a state regulation that regulates the digital economy and which establishes a consensus among communities, business associations and consumers.

Sweden

Sweden (1/3)

Would the workers in the gig or sharing economy in Sweden be classified as either employees or self-employed, or perhaps as another category of workers?

If an employee is employed part-time pursuant to the Employment Protection Act and applicable Swedish legislation, the employer is obliged to ensure the employee a minimum amount of working hours. Further, if the employment contract stipulates a certain amount of hours per month and it cannot be offered by the employer, the employer is still obliged to pay the employee a salary as if the employee had worked the minimum number of hours. If the worker is regarded as a part-time employee, the employer will be obliged to pay social taxes etc.

A common set-up is that of self-employment companies that hire workers who do not have a corporate tax card but who wish to freelance. The worker is responsible for performing the work whilst the company does the billing. However, the company will still have to pay social taxes as well as grant the worker the above minimum rights.

The most common set-up to avoid any social taxes etc. is a consultancy agreement. If the part-time worker is regarded as a consultant, the company will not be obliged to pay any social taxes or observe the notice periods set down in the Employment Protection Act. In such case, the parties can freely agree on working hours etc.

Are there different employment rights for employees and self-employed workers in Sweden and could some of these employment rights form a specific burden or hurdle for contingent workers working for a company in the gig economy?

Yes, in the case of employment, Swedish employment law will be applicable. Swedish employment law ensures that workers are granted minimum rights as regards, among other things, holiday benefits, payment in the case of sick-leave, working hours and termination of employment. If the worker is regarded as a consultant, the minimum right will not apply and the consultant will have to secure these rights through the consultancy agreement.

It should be noted that a worker may be regarded as an employee as defined in the Swedish Employment Protection Act despite the presence of a consultancy agreement. If the contractual consultancy relationship resembles an employment, the employer will have to comply with the obligations set out in the Swedish Employment Protection Act. If the worker in question is regarded as an employee, the provisions on termination of employment set forth in the Swedish Employment Protection Act will apply, for instance provisions on redeployment and order of priority in the event of redundancy with the employer.

Please see question 3 below for the criteria that must be met for a worker to be considered an employee or, *a contrario*, a consultant.

Sweden (2/3)

What are the main tests for determining the employment status (employee, self-employed, other)?

Generally, an employment relationship is typically deemed to exist if:

- The worker is expected to personally perform the work.
- The contractual relationship is of a lasting nature.
- The worker is prevented from performing work for another company.
- The worker is under the company's control and is bound by the company's continuous instructions.
- The worker uses the company's property (e.g. computers and other equipment) in order to perform the work.
- The worker performs the work within the company's premises or at another place assigned by the company.
- The worker's compensation is predetermined and guaranteed.
- The worker is compensated for any expenses incurred in performing his duties.

Are the tests for employment status different for employment rights, personal income tax and/or social security tax purposes?

Yes.

Who can challenge an individual's employment status in your country?

The individuals themselves, tax authorities and labour unions can challenge an individual's employment status in Sweden.

What are the penalties or civil consequences for wrongly classifying someone as a self-employed worker?

If a company wrongly classifies someone as self-employed rather than as an employee, the company will have to pay all social taxes associated with the employment as well as an administrative penalty. The company may also have to compensate the employee for any loss of mandatory benefits pursuant to Swedish employment law such as holiday benefits and sick pay. The company may also have to pay damages due to any other breach of Swedish employment law such as a wrongful termination of the employment.

Sweden (3/3)

Is it possible to avoid tax and employment rights issues by hiring individuals from an employment agency or do agency workers have rights against the end user directly?

In such cases, the employment agency will be responsible for the individuals. Generally, the agency workers will have no employment related rights towards the end user directly. Instead, any such claims will have to go through the employment agency. In some cases as regards matters that are not of mere employment nature, such as discrimination, the worker may enforce his rights against the end user.

Is it common for independent contractors to have their own personal services companies through which they supply services? If such companies are used, does this mean that the end user has no employment responsibilities/obligations or tax responsibilities?

Yes, please see question 1 above. In such cases, the end user will not have any employment responsibilities if the relationship between the end user and the independent contractor's company is regarded as a consultancy relationship. If the relationship resembles an employment relationship, the end user will have employment responsibilities (please see question 3 above).

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy?

In 2012, Sweden implemented the Agency Work Act, which strengthened the rights of agency workers. Self-employment companies mentioned under question 1 above are currently under pressure from trade unions since the trade unions wish to strengthen the employees' rights in respect of notice periods and minimum wages. However, there are no upcoming major legislative changes in the context of the gig economy.

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

When determining the set-up as regards the gig economy, it is crucial that the difference between the notion of employee and that of consultant is kept in mind (see question 3 above) in order to avoid any tax related consequences and damages.

The Netherlands

The Netherlands (1/4)

Would the workers in the gig or sharing economy in The Netherlands be classified as either employees or self-employed, or perhaps as another category of workers?

Workers in the gig or sharing economy in the Netherlands can be classified as employees or as self-employed workers - depending on the facts of the situation in question. Employees are generally defined as individuals working under an employment contract. Self-employed workers are individuals who work under a contract for services. The primary difference between self-employed workers and employees is that self-employed workers are not subject to any relationship of authority. Self-employed workers do not have the same level of rights and protection as employees.

Are there different employment rights for employees and self-employed workers in The Netherlands and could some of these employment rights form a specific burden or hurdle for contingent workers working for a company in the gig economy?

In the Netherlands, there is a difference between the rights of self-employed workers and those of employees. Dutch labour law is applicable to employees. This entails for example strict dismissal law, payment during sickness for a maximum of 2 years, statutory severance payment and applicability of collective labour agreements and/or participation in mandatory industry-wide pension funds. A self-employed worker works for his own account and risk and may work for different contractors. A self-employed worker cannot invoke Dutch labour law.

What are the main tests for determining the employment status (employee, self-employed, other)?

In the Netherlands, an employment relationship needs to have three elements: labour (services provided), pay, and a relationship of authority (between the employee and the employer). If these criteria are met, the contract of services between an entity and the self-employed worker qualifies as an employment agreement.

Whether this will be the case will be determined based on the intention of both parties as well as considering all facts and circumstances. The risk depends on what happens in practice, i.e. it is important that the work is performed in conformity with what is agreed in the (model) contract and that no relationship of authority exists.

Are the tests for employment status different for employment rights, personal income tax and/or social security tax purposes?

Yes, see the answer to the sixth question.

Who can challenge an individual's employment status in your country?

The individuals can state that their situation resembles that of an employee rather than that of a self-employed worker and as such claim payment of wages. The Dutch tax authorities can claim payment of (wage) tax, social security contributions and possibly fines.

The Netherlands (2/4)

What are the penalties or civil consequences for wrongly classifying someone as a self-employed worker?

The civil consequences for organisations that wrongly classify someone as self-employed instead of employee are (among others) applicability of Dutch labour law to the contract (with retroactive effect). This leads to a liability regarding payment of wages and (wage) tax, possibly fines and application of Dutch dismissal law (including a statutory severance payment).

Is it possible to avoid tax and employment rights issues by hiring individuals from an employment agency or do agency workers have rights against the end user directly?

Temporary employment agencies are responsible for the terms of employment of the posted workers. If the agencies do not pay their workers the correct wages (e.g. the hirer's reward), the hiring company can be held jointly liable for providing the correct wages (if certain conditions are met, this liability can be mitigated).

However, as the agency workers are employed by the temporary employment agency, the agency workers cannot in principle claim to have an employment agreement with the hiring company. The hiring company does have certain obligations towards the agency workers such as liability with respect to work related accidents.

There is an obligation for temporary employment agencies (domestic and foreign) to be registered at the trade register held by the Dutch Chamber of Commerce ("CoC") if they post workers in the Netherlands. Agencies that are not registered can be fined. Companies that hire staff from such agencies can be fined.

Is it common for independent contractors to have their own personal services companies through which they supply services? If such companies are used, does this mean that the end user has no employment responsibilities/obligations or tax responsibilities?

It is common for independent contractors to be assigned/posted to a client via their own management companies. Despite using such management companies, it is nonetheless important that the (model) contract between the management company and the client states that no relationship of authority towards the independent contractor is exercised and that the contract should not be considered as an employment contract. Again, the risk (for the client) depends on what happens in practice (the risks are similar to those described above).

Are there any major developments ongoing or expected in relation to employment status in the context of the gig economy?

The Dutch Government aims to introduce new legislation regarding self-employed workers in 2021. The proposed legislation aims to (1) offer protection for the lower levels of the labour market, (2) create space for self-employed persons at the top end of the labour market and (3) offer more clarity to clients and independent contractors. In this new legislation, a distinction is made between 2 situations on the basis of the hourly rate:

1. All self-employed workers must be paid a minimum hourly rate of €16. The responsibility for checking and paying the minimum rate is transferred to the client. The contractor must make an estimate and overview of the direct costs and hours prior to and after each assignment. If it turns out that more direct costs and/or hours have been incurred, as a result of which the rate falls below the minimum rate, the client is obliged to make additional payments.

The Netherlands (3/4)

2. For self-employed persons at the top end of the labour market, a self-employed persons' declaration is introduced. This declaration can be used if (1) work is performed at a high hourly rate (>€75 per hour), (2) the contract is entered into for a maximum duration of 1 year (3), the self-employed person is registered at the Dutch Chamber of Office, (4) the contract states that parties do not intend to enter into an employment agreement, and (5) the contract is signed by both parties. If these conditions are met, the client will be indemnified against payroll taxes, even if it turns out afterwards that the relationship was an employment relationship.

Clients can obtain certainty in advance by means of a Client Statement that states that the work is done outside of employment through an online web module. The Client Statement provides the employer upfront certainty regarding withholding payroll taxes and social security premiums. The Client Statement is valid as long as the web module is filled in truthfully and work is carried out accordingly in practice.

The intention is for the legislation to enter into force in 2021.

It is expected that this new legislation will have consequences for sharing and/or gig economy platforms, as these platforms mostly work with workers who are paid at a low hourly rate. These workers will then be entitled to a minimum rate of €16 per hour.

Furthermore, in 2019, three interesting judgments were issued regarding the employment status of Deliveroo workers and the classification of Deliveroo's business activities. The first two cases were initiated by the Dutch trade union FNV and the third case by the sectoral pension fund for road transport. In the first judgment, the court ruled that self-employed Deliveroo riders should be classified as employees. This was an interesting case as, six months earlier, the same court ruled in a case initiated by an individual Deliveroo rider that he in fact was a self-employed worker and not an employee. In the other judgments, the court ruled that Deliveroo must be classified as a meal delivery company instead of a technology company. As a result, the court ruled that Deliveroo falls within the scope of the collective labour agreement for road transport and haulage by road and the sectoral pension fund for road transport.

Deliveroo is currently appealing these judgments and has not yet changed its working method. On the basis of the first judgment, self-employed Deliveroo riders could in principle claim an employment agreement.

The Netherlands (4/4)

Are there any other important remarks in relation to employment status, specifically within the context of the 'platform or gig economy'?

On 23 January 2020, the Borstlap committee published its report on the future Dutch labour market. The committee made, amongst other things, the following recommendations to the Dutch government:

- The factual circumstances should be decisive in determining whether there is an employment or self-employed worker relationship. The intention of the parties should be less relevant.
- Employees and self-employed workers should pay the same taxes.
- Whether or not a relationship of authority exists should no longer be determined by whether there is guidance and supervision but by whether the worker is embedded in the employer's organisation and by whether the worker's activities are part of the employer's regular activities.
- The minimum hourly rate for self-employed workers and the self-employed persons' declaration (see previous question) should not be introduced, as these schemes are practically unenforceable and unverifiable.
- Employment platforms (such as meal delivery services) should be treated as employers and should be responsible for taxes and premiums, if the platform worker is paid through this platform.

If the Dutch government were to adopt the recommendations of the Borstlap committee, this could have a far-reaching impact on the status of self-employed workers in the Dutch sharing or gig economy.

Conclusion

As discussed in our previous report, the gig economy has been the subject of much controversy, especially in relation to the social status of the workers involved. Our report last year made it clear that various countries are struggling with this phenomenon but only few of them have taken action in this respect.

Also the COVID-19 pandemic showed us the added value of the gig economy as a valid economic model that is here to stay. While many of us are staying at home, gig workers and other service providers are keeping the economy running. However, due to a lack of social protection, in these times, such workers are more vulnerable than ever before. This situation has made the lack of fitting legislation painfully clear.

A year after our last report we come to the conclusion that almost no legislative progress has been made. The countries that did act almost all invested in upgrading the social rights of gig workers in order to offer them a social status similar to that of employees.

In Italy, a law was introduced to provide social protection to gig workers. More specifically, starting 2 November 2020, gig workers must all have written contracts and a minimum hourly wage (no payment per job), and be covered by industrial accidents insurance.

In the UK, new legislation is proposed (not yet published) that will strengthen gig workers' social protection. Also a new single enforcement body was created for certain rights such as holiday pay and minimum wages.

Also in the Netherlands, the goal is to introduce new legislation by 2021, which would include minimum hourly wages for gig workers. A special committee even made recommendations to the government to make all platform providers employers.

In other words, most countries that are taking legislative action are developing a framework based on current legislation while adding some tweaks in order to fit the gig economy framework, instead of investing in a modernised format. However, if we further develop down this road of employment, workers might have to give in on flexibility and autonomy.

Let this pandemic crisis be a call for action to all national and European legislators to provide an employment law and social security framework that is adjusted to the needs and preferences of both companies and workers. We believe this to be necessary in order to pull the gig stakeholders out of the legal vacuum they are forced to conduct business in, and welcome them in the 21st century.

Thank you

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