

# Gig economy Employment status

May 2019



PwC Legal  
A multidisciplinary law firm





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# Introduction

## The gig economy: an emerging phenomenon

The gig economy goes by many names and has many variants, such as 'platform economy' and 'peer-to-peer economy', and has been the subject of much controversy in European media over the last few years.

The gig economy, however, has a lot of potential and is still at a very early stage of development.

The allure of the gig economy shouldn't come as a surprise; for individuals, the gig economy can be a way to explore a new business that they want to set up and provide a healthy work life balance, whereas, for the unemployed, it can be a short-term or long-term work opportunity. Its success rate has forced national and supranational authorities to examine the legal framework in which the gig economy has to operate.

National authorities are coming up with a patchwork of different regulatory actions, some supportive, some restraining the gig economy. This results in legal uncertainty for all. Specifically the ambiguity on whether the platform workers are to be classified as either self-employed or as employees remains – and subsequently the uncertainty of their social rights. This is a considerable issue seeing that the employer cost for a company is significantly higher for employees. This has resulted in companies such as Uber and Deliveroo being praised by some and demonised by others.

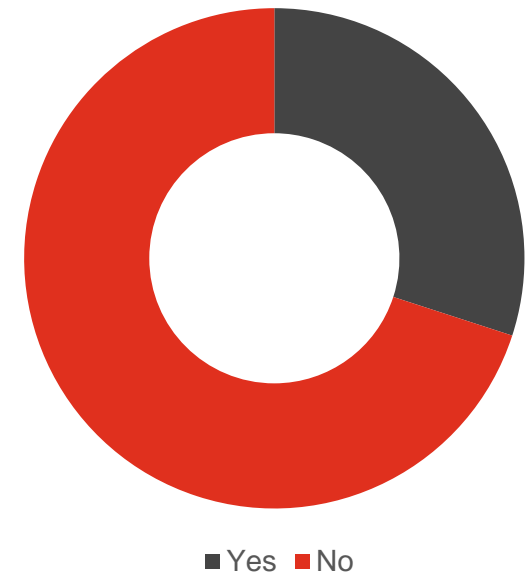
The precarious position of the gig worker was also the European Commission's main concern. As an answer to this issue, the European Commission has made several proposals and recommendations to ensure a minimum social protection for all workers, regardless of their status in the member state.

On a national level, member states have been busy as well. In our study, we 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 2018.

# At a glance: a summary

- As we look into the different legal schemes, we see that most countries only provide the possibility of a self-employed status or an employment contract for workers in the gig economy. Only three of the countries involved have a third possibility upfront, an intermediate status if you will, of economically dependent self-employed, which provides basic social protection with more flexibility (UK, Spain and Italy). However, this third option was not created for the workers in the gig economy in any of those countries.
- To distinguish an employee from a self-employed worker, we found that the exercise of employer authority in the relationship is a common criterion across all countries, in some more decisive than in others.
- In all countries, we found that it is of great importance to provide a correct classification as otherwise the consequences could be severe, ranging from tax adjustments (regularisation) to penal sanctions. Depending on the country involved, different parties can challenge the employment status. In all countries involved, both the 'employee' concerned and the tax authorities can demand reclassification. It is, however, striking that Denmark was the only country in which any party with a legitimate interest can challenge the employment status, next to the trade unions, the employee, tax authorities and social inspection authorities.
- It is noticeable that Scandinavian countries seem to have less case law with respect to the reclassification of the working relationship for workers in the gig economy. However, almost all countries are confronted with case law in this respect.
- Nonetheless, only three out of ten surveyed countries have taken a legislative initiative to provide a fitting legal framework for the gig economy workers.

Legislative initiative(s)  
for the gig economy





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 or sharing 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 should be made from both a social security point of view, and an employment law perspective. The social security rights and obligations for employees and self-employed 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 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 a maximum annual income of EUR88,119.80 (amount 2019).

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 based on:

- the intention of the parties,
- the freedom in the organisation of 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 relation, 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 relation is refutably presumed to be an employment relation. When less than half of the criteria are met, it is refutably presumed to be a self-employed relation. 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 the 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. 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?**

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 services 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?**

There has been a recent 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 his investigation he has invited a large number of gig workers for an interview on their employment relationships. The investigation is still ongoing.

**Are there any other important remarks in relation to employment status, specifically within the context of the 'sharing 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 are not salaried workers and are consequently not covered/protected by the Danish employment laws.

A self-employed 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 is himself responsible for the withholding and reporting of taxes and social security contributions, whereas employers (with a few exceptions) are responsible for the withholding and reporting of 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?

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:

- a 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;
- 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. However, 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 either provide services through their own personal services

company or as a fee recipient. We cannot say which is more common of the two options. 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 the self-employed individuals. Similarly, the current tax legislation and tax practice does not signal any changes towards a more flexible approach (especially since the consultancy/self-employed approach is often used to avoid or minimize tax payments, often by foreign service providers).

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

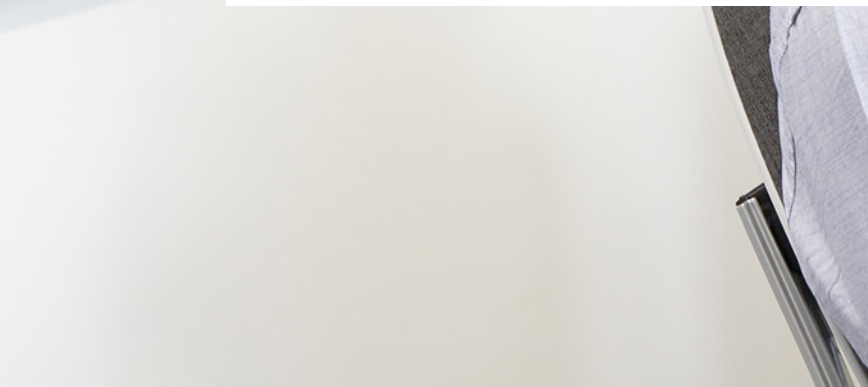
Currently, the focus of the legislators is to protect the tax base against the challenges from the sharing and gig economy. Thus, even though the legislation to a certain point appreciates the development of a sharing or gig economy, the main steps are not to facilitate this development but rather to 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?

The worker could be classified either as a self-employed or an employee depending on the existence or not of a hierarchical link between the platform and the individual.

The main difference between an agreement entered into with a self-employed individual and a contract of employment is that, under the former, the individual carries on his activity in a totally independent manner whereas, under a contract of employment, the individual is in a relationship of dependence. An individual is considered to be independent when he is free to organize his business, and works under his own responsibility and at his own expense. However, he is considered to be in a relationship of dependence when the work is performed under the authority of an employer who has the power to give orders and instructions, supervise the performance of the work and take disciplinary measures.

Various factors would be considered by the Courts to form a judgment as to whether the individual is an employee or a self-employed person. 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.

The rules related for instance to the notice period, the dismissal, the paid holiday and the working hours arrangement are not applicable to this kind of individuals. They are acting in a quite free manner.



# France (2/4)



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

- Instructions/Orders given to the individual concerned.
- Control over the individual's activity.
- Sanctioning of the individual in the case of failure to apply the instructions given by the employer.
- Not taking economic risks: he/she has a regular fixed remuneration; he/she does not bear any risk of non-payment or offsetting of payment due to poor performance.
- The number of clients: for instance a self-employed individual is supposed to have more than 1 client.
- Total independence in the organisation and performance of the work (no control, no performance review, no reporting) – A self-employed individual would be free to engage other employees in the delivery of the service and provide a substitute.
- Possibility for the individual to refuse work (although this criterion is not an obstacle to reclassification to a relationship of dependence).

- 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).
- Ability to make a profit or loss: the self-employed person will suffer a loss if he/she underestimates the time that it will take to complete the assignment or encounter unexpected difficulties that have not been provided for under the terms of the contract;
- Performance of work using own equipment and having taken out own professional indemnity insurance.

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 individual (the most common scenario).
- In some cases, the labour law and social security authorities.



# France (3/4)



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

- Regularisation of the social 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 a confinement up to 3 years and a fine by € 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).
- Damages for unfair termination of the relationship.
- Payment of the dismissal indemnity and the compensation in lieu of notice.
- 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 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 really common in France.

If companies are used, that does not mean that the end user has no employment responsibilities/obligations or tax responsibilities.

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 on the factual 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 to an employment relationship.

# France (4/4)



The French Supreme Court indicated (i) that the existence of an employment relationship does not depend on the will 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 his/her subordinate.

In the case at hand, 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 his/her (geographical) position and had a power of sanction with regard to the courier.

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

Based on our experience, the gig economy is not very common yet in France. Legal practitioners encounter the phenomenon very rarely in their day-to-day practice.





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 services contract for freelancers is regulated in §611 BGB. Some regulations, such as the extraordinary termination according to §626 German Civil Code, 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, e.g. the right to issue directives on the content, implementation, place and time of the activity, personal dependence, nature of the activity, 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, e.g. for the Social Court or for taxation. 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?

In particular criminal offences: section 266a German Criminal Code = withholding and defalcation of remuneration; section 370 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 major developments ongoing or expected in relation to employment status in the context of the gig economy?

There are currently no concrete changes to the law. The general criteria apply (see above).

Are there any other important remarks in relation to employment status, specifically within the context of the 'sharing 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.





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 the so-called "collaborators/para-subordinated/semi-subordinated" workers (in Italy, "co.co.co."). However, most of the rules applicable to co.co.co. are those relative to self-employment, thus they can be essentially considered as self-employed. Furthermore, 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 laws provide for a wide range of protections in favour of subordinate employees and not in favour of self-employed workers (or the above-mentioned co.co.co.). First of all, Italian employees are entitled to receive the minimum wage set forth by national collective bargaining agreements. Moreover, Italian law provides for rules protecting 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, they may require reclassification of their relationship into a subordinate one.



# 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 is entitled to file a claim before a 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 punish infringements on the part of the employer. 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?

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 protections 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 treatments set forth for subordinate employees.

Moreover, agency work in Italy is subject to strict regulation whose violation determinates 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, 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?

There are several ongoing proposals aiming to regulate the employment status in the context of the gig economy.

First, the Region of Lazio made a draft law on this topic. The proposal - which is still in the process of approval - is referred to the platform's drivers and provides them a minimum hourly rate of pay. Moreover, it is said that the cost of maintenance of vehicles will be charged to the platform itself, which will also have to provide the workers with safety training and insurance against accidents.

Moreover, a draft of Act of fundamental rights for platform workers (Carta dei diritti fondamentali per i lavoratori digitali nel contesto urbano) was signed in Bologna.

The new Italian Government is now discussing how to regulate this phenomenon and whether to involve the trade unions in this process. Furthermore, please note that, recently, the national collective agreement for the logistics sector has introduced regulations providing social and wage protection for the category of "drivers".



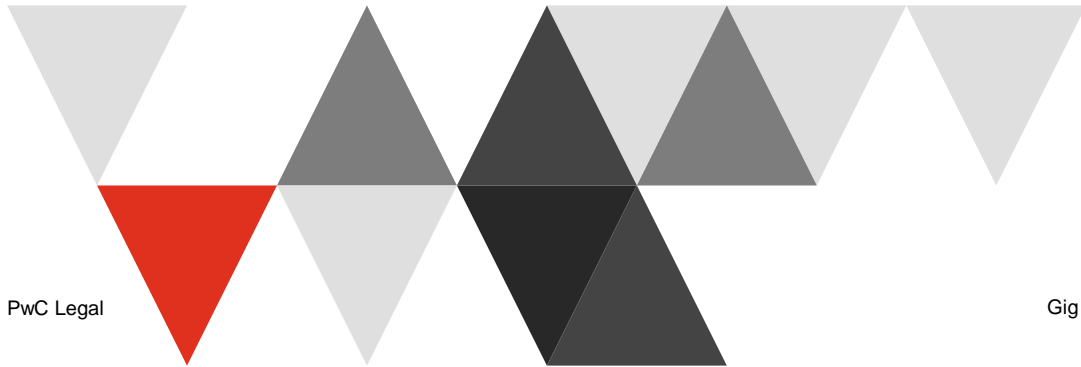
# Italy (4/4)



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

Latest Italian case law stated that gig economy workers - almost - cannot be classified as employees. Particularly, they have the choice to accept or not to carry out the order and thus they cannot be seen as employees. Actually, there is no special measure set forth by Italian legislation. Nevertheless, we assume that the gig economy phenomenon has essentially economic grounds: workers are in a precarious situation because of their economic dependence either from the market or from the platform they work for.

The current legislation lacks sufficient protection for this (new) matter. It would be desirable that the legislator provides for the necessary arrangements in this respect and involves the trade unions, perhaps even looking at a new form of cooperativism.





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 depending on an overall assessment of the factual realities of the case. According to case law, 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?; 6) who owns the equipment used to perform the work? The courts do not make one factor more decisive than the other, the conclusion whether or not there is an employment relationship is made after an overall evaluation assessment of the factors.

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 Working Environment Act (WEA 2005) and the employees are secured an agreed salary, holiday pay, pension benefits and social security benefits. Self-employed persons will themselves need to pay for pension, insurance cover and social security insurance in the 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 Inspector Authority will perform checks in various sectors and inspect (amongst other topics) what type of work relationship people are offered.

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

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 they should have received, had they been treated as regular employees from the beginning.



# Norway (2/2)



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.

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 "enkeltperson-foretak", and some will have their own "aksjeselskap"(AS). Both types of companies are registered in the Brønnøysund Registre Centre. The end user will then have no employment responsibilities etc.

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 'sharing 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 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 to claim a statutory redundancy payment and claim 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, namely:

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. There is ongoing government consultation, which may result in HMRC also becoming the enforcement body for holiday and sick pay purposes.
- The Government Pension Regulator: for pension auto-enrolment (see above - this right applies to workers as well as to employees).

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

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, then it is obliged to make withholdings of tax and National Insurance in specified 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.

This rule is expected under current government consultations to be extended across the private sector in 2019 or 2020.

# 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. It is expected that, as from 2019 or 2020, 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 is consulting 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. There are also another three gig/sharing economy related consultation papers that have been issued dealing with such questions as to whether HMRC should be made the enforcing authority for holiday pay as well as National Minimum Wage.

Are there any other important remarks in relation to employment status, specifically within the context of the 'sharing 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 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 that rules employment relationships and Act 20/2007 on self-employed work) and case law on the matter. That is to say, in view of 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).

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:

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?

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 CBA.
- Recognition of seniority of the self-employed worker since 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 externalize 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 a 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 RETA; and
2. Royal Decree 8/2018 of 3 August 2018, regulating a programme aimed at reactivating employment.

Are there any other important remarks in relation to employment status, specifically within the context of the 'sharing 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 (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, inter alia, 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, e.g. 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?

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 case, 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 case, 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 'sharing 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 (1/3)



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 at hand. 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 (2/3)



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

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?

On 10 November 2017, the Coalition Agreement of the new Dutch Government was announced including new legislation for independent contractors (expected to be implemented as of 2020). A distinction is made between 3 situations, based on the hourly rate and the duration of the agreement:

1. An employment agreement is (always) in place if work is performed at a low hourly rate (expected between €15 and €18 per hour) in combination with (a) a long duration of the contract (>3 months) or (b) the performance of regular business activities.



# The Netherlands (3/3)



2. An “opt-out” of payroll taxes will be introduced if work is performed at a high hourly rate (expected >€75 per hour) in combination with (a) a short duration of the agreement (<1 year) or (b) the performance of non-regular business activities.
3. For independent contractors earning above the low hourly rate, an “Employer Statement” is introduced, which employers can obtain by completing a web module. This Statement provides the employer upfront certainty regarding withholding payroll taxes, unless the web module is found not filled in correctly. The relationship of authority will be tested based on the actual facts and circumstances, less on the formal circumstances.

The current system of model contracts will be gradually phased out once the new legislation has come into force. The new legislation will be enforced reluctantly in the first year (e.g. no fines after a first audit) during which the Dutch tax authorities have a coaching role and would assist parties in implementing.

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

The Netherlands are currently figuring out how to respond to the gig/sharing economy. Depending on the circumstances, a worker can be classified as an employee or as a self-employed worker. It is expected that the new legislation as mentioned in the previous question will have major consequences for sharing and/or gig economy platforms as these platforms mostly work with workers being paid at a low hourly rate. These workers may be classified as employees, which means that Dutch labour law will be applicable to those workers.



# Conclusion

It is clear that workers all of the world are looking for a new way of working that aligns with their needs and which guarantees a better work-life balance. This is a trend that is not likely to disappear any time soon. By providing a fitting legal framework, the European – and local – economy can attract companies that are willing and able to provide jobs that match these needs.

The gig economy is – from a labour law perspective – particularly challenging because of its high need for flexibility. As a result, we find that all surveyed countries are challenged with providing the workers a fitting legal framework. Proof that the existing legislation cannot meet all the needs of the gig economy is the overflow in case law worldwide, reclassifying the working relationship between the worker and the company (usually from self-employed to employee).

In some countries, however, a third category of worker exists, an intermediate status if you will, i.e. neither employee nor self-employed. The intermediate status was not something developed specifically for the gig economy, but it may serve a great purpose. Most gig workers could be placed under such a third ‘in-between’ category.

In the UK, the category of ‘*worker*’ refers to an individual who contracts to perform for a third party, without this party being a formal client or customer, as it would be the case if the individual was a self-employed worker.

Workers do not have the same rights and levels of protection as normal employees, but they do have a certain level of rights and protection that normal self-employed individuals do not have (e.g. minimum wage, holiday pay, and employer pension contributions under auto-enrolment legislation).

There have been court cases in the UK, in which the courts have ruled that a number of platform workers are to be classified as ‘workers’.

Most countries that are taking legislative action, such as the Netherlands, are developing a framework based on current legislation but adding some tweaks in order to fit the gig economy framework.

As our overview shows, it is gradually becoming clear which place the gig economy will get within the European and national legal systems. The gig economy, as well as the corresponding legislation, is becoming more advanced as we speak. We believe that is vital to develop a legal framework that is able to capture the opportunities that the gig economy has to offer.

We for one are looking forward to see how this will further take shape in the future.

# Thank you

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