Platform Workers: Employees, Or Not, And Why Does It Matter?

The Gig Economy

The gig economy. Maybe this term sounds strange and unfamiliar to you. In reality, you probably have been a frequent user of it, for the last couple of years at least. Uber would be the most obvious example. Uber is a digital platform that connects between drivers and customers. Drivers in Uber do not have to work according to standard working hours, 9:00 to 17:00 for example. The drivers get to choose their own schedule, they can decide to work only for 2 hours or only once a week, it is up to them.

So basically, the gig economy consists of platforms such as Uber, Airbnb, Just Eat, and many more. Those platforms have three things in common:

1) They are digital;
2) The platforms act like intermediaries that connect customers (e.g. passengers) and service providers/workers (e.g. drivers); and
3) Workers in those platforms, such as drivers, have great flexibility, they get to choose when they want to work.

So far the gig economy sounds great, it has many benefits. For example, the flexibility for workers that was mentioned. Also, the reduction of costs for customers, since many of those platforms don't cover insurance and other benefits for their workers. However, because of those unusual working arrangements, the legal status of digital platform workers is uncertain. Are they employees or contractors?

Employee vs Contractor

You might think to yourself: ‘What does it matter if one is defined as an employee or a contractor, aren’t they basically synonyms?’ Or at least that’s how I thought growing up. Then I took my first labour law class. There I learned the difference is huge and that it can have an impact on your life. People who are legally defined as employees are entitled to

rights and benefits that contractors are not entitled to. These include minimum wage, pension schemes, maternity/paternity leave, etc.

So who is legally defined as an employee? Well, that depends on the jurisdiction. However, as you will soon see, many countries adopt similar approaches and definitions. In this article, we will take a look at three jurisdictions. Namely, the US, the UK and the EU.

The U.S.

Two legal tests determine in the U.S. if someone is legally recognised as an employee. The first one is called ‘the common-law test’. According to it, if an employer exercises substantial control over the work process, and the worker is subordinate to the employer, then the worker is recognised as an employee. Secondly, there is the ‘economic realities test’. This test assesses whether a worker is economically dependent on a business for continued employment.

The last paragraph might have reminded you of your physics lessons from school - those legal tests sound way too abstract. So, let us try to make them a bit more approachable. Imagine that you employ a driver. This driver does not work the usual 40 hours per week, but only 3 times a week for about 4 hours. Additionally, you, as the employer, provide the driver with a uniform and a strict guideline to which they have to adhere. For example, making the driver wear a hat.

The driver does not necessarily resemble our normal understanding of an employee. Nevertheless, from this example, we can conclude that the driver is subordinate to the employer (because of the guideline) and the driver is economically dependent on the employer (due to the regular working schedule). Hence, according to both tests, the driver would legally be recognised in the US as an employee.

The UK

If a worker in the UK has signed an employment contract, then they will automatically be recognised as an employee. However, if a worker signed a different contract, for example, one that refers to them as a contractor, that does not necessarily strip the worker from the

possibility of being legally recognised as an employee. Courts in the UK adopt an approach that is called ‘primacy of facts’. This means that courts look into more than the mere words of a contract. They also assess the real-life relationship between the employer and worker. For example, like the common-law test of the US, courts in the UK would look into whether an employer exercises a substantial degree of control over their worker. Furthermore, they might examine whether a worker is required to perform their work personally, or they can delegate and subcontract it to someone else. The former - personal work - would make the worker resemble an employee. It should be noted that currently, courts in the UK do not have an exhaustive list of legal tests to determine if someone is an employee or a contractor.

Additionally, there is a third category in the UK - a *worker*. It falls somewhere between an employee and a contractor. It has more employment rights and benefits than a contractor but less than an employee. What makes a *worker* different from an employee is that the former has flexible and ‘irregular’ working arrangements. And unlike contractors, *workers* cannot delegate their tasks, they have to perform them personally.

<u>The EU</u>

The EU does not have a uniform legal definition for an employee or contractor. Each member state defines it individually. Nevertheless, the EU will become relevant in the next section where we will discuss the classification of platform workers.

Platform Workers - Employees or Contractors?

It is time for the climax of this article. Let’s see how the three mentioned jurisdictions classify workers of digital platforms. But before that, remember, the classification of a worker as an employee can be life-changing. Employees are entitled to rights and benefits that contractors are not entitled to.

On the other hand, classifying platform workers as employees might be disadvantageous to digital platforms and customers. If workers of digital platforms are classified as employees the platforms will have to cover for their employees’ benefits. This means higher prices for customers. Consequently, it can make customers less willing to use the platforms, which will cause the latter to lose profit. This is indeed a tricky situation.

The U.S.

Currently, there is no singular Federal approach as to how to classify platform workers. It seems like the general attitude of states is to classify platform workers as contractors. The first state to make it clear was California. After long campaigns and exhausting court battles, Uber, and other ride-hailing platforms, managed to convince the Californian legislature and judiciary that their workers should be classified as contractors. Nevertheless, the State of New York seems to have taken a different approach. New York's Supreme Court concluded that workers of Uber should be classified as employees. The Court based its decision on the common-law test that was mentioned above. It argued that Uber exerts substantial control over its workers, which is typical for employees.

Similar cases are being lodged in other states, as well as appeals in the states that were mentioned. Many even argue that because of the issue's relevance and its wide scale, the Federal government should be the one to legislate over this matter. Only time will tell what would be the approach of the U.S.

The UK

A black-and-white division between employees and contractors can be outdated and not pragmatic, especially with the advent of the Internet and the gig economy. That's why the UK opted for a third category, the abovementioned *worker*. The Supreme Court of the UK ruled that Uber exerts substantial control over their workers. However, given that drivers' working arrangements in Uber are very flexible, the Court did not classify them as employees but as *workers*. This means that Uber drivers are now entitled to benefits, such as minimum wage and holiday pay, but not to rights like protection from unfair dismissal, which are reserved solely for employees. While the mentioned case concerns Uber, the judgement made by the Court applies to other similar platforms and their workers.

The EU

As was mentioned above, the EU does not legally define who is an employee, member states do it individually. Nevertheless, there is a pending EU legislation whose aim is to define

when a platform worker can be defined as an employee. This legislation is called the Platform Workers Directive (PWD). The European Parliament just has to submit its approval before the PWD is adopted. Many experts believe that in most likelihood the PWD will be approved.

According to the PWD, digital platforms will be considered to have an employment relationship with their workers based on 7 criteria. If a platform acts according to 3, or more, out of the 7 criteria, then a platform would be presumed to be an employer and its workers would be regarded as employees. The 7 criteria are the following:

1) Supervising the performance of workers through electronic means;
2) Restricting their ability to choose their working hours;
3) Restricting their tasks;
4) Preventing them from working for third parties;
5) Setting an upper limit on pay;
6) Setting rules on their appearance or conduct; and
7) Restricting their ability to use subcontractors or substitutes.

Conclusion

All three jurisdictions seem to have taken different approaches to the classification of platform workers. Each has its own benefits and disadvantages. For example, courts in the U.S. keep on relying on the two legal tests that define an employment relationship. The favourable part of this approach is that it leaves flexibility to determine for each platform individually if it should be classified as an employer. Digital platforms vary in the way they operate. For instance, some have strict guidelines for their workers and some do not. Therefore, instead of being classified automatically as employers just for being a platform, the legal tests help to determine that. The downside is that those legal tests can be vague and broadly interpreted, which explains how different states managed to classify platform workers differently.

The UK chose to create a third category which includes platform workers. This is an innovative idea that attempts to adapt to our rapidly changing society. The UK provides a sort of middle ground. Owing to that, platform workers can work knowing that they will receive a fair wage for their service, for example, and platforms do not have to pay for the full range

of benefits that are provided to employees. Nevertheless, by being classified, as *workers* platform workers will not be able to be classified as an employee no matter how much their working conditions might make them resemble one, making them unable to benefit like employees.

The EU decided to stick with the orthodox distinction of employee vs contractor. However, unlike the U.S., it provides 7 very specific criteria to determine an employment relationship. The criteria are very straightforward and not vague, making the classification of platform workers easier to determine. Notwithstanding, some scholars have argued that those criteria are way too inclusive. They assert that under these criteria and EU legislation, besides platform workers, people who normally would have been regarded as contractors will become employees.

The growth of the gig economy is almost certain to continue. Also, platforms that are part of the gig economy operate all across the globe, and their (digital) services are not restricted territorially, they are found in the borderless world of the Internet. Will countries come to adopt a single approach to classify platform workers, or not? If yes, whose approach will prevail?