

THE BYWORD

THE GIG ECONOMY

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THE RISE OF THE GIG ECONOMY

An international perspective on employment in the gig economy

KEY FINDINGS

» The gig economy is a worldwide phenomenon, but its development is held back in some countries due to technological, cultural or regulatory factors.

» Most countries draw a clear distinction between those who are employed (i.e. treated as employees) and those who are not.

» There is a widespread commonality in the tests used to determine whether an individual is an employee. A central feature is usually the degree to which the individual is subordinated to – or under the control of – the ‘employer’.

» It can be difficult to fit gig-economy workers into the traditional categories for employment status, given the flexibility of their work and the autonomy that they seemingly enjoy. As a result, most countries report that gig economy workers do not enjoy the rights and protections granted to employees.

» The response of national governments to the rise of the gig economy is driven as much by concern over taxation as the rights of gig-economy workers.

» Nevertheless, an increasing number of countries are looking at creating an employment status somewhere between the traditional divide between employees and the self-employed.

» Government responses to the gig economy are, however, still in their early stages. No country as yet purports to have a ‘solution’ to the challenges posed.

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Should those working in the gig economy have the same rights as employees?

The term ‘gig economy’ was first coined as far back as 2009 to refer to people who, having lost traditional jobs in the financial crash, had turned to a variety of short-term, freelance roles to make a living.

More recently the term has become associated with the use of internet-based technology platforms that claim to act as an online market place where potential customers are put in touch with freelance service-providers.

An important question is whether such companies really are just putting customers in touch with independent service-providers, or whether they can be said to employ those who provide work through their online platforms. This has implications for labour market regulation across the world. Should those working in the gig economy have the same rights as employees, should they be treated as independent businesses like any other, or does the answer lie somewhere between the two?

To see how the challenge of the gig economy is being met around the world, we gathered data from 40 different countries. It is clear that in many countries it is felt that the traditional model of what constitutes employment needs to be revisited in the light of the growth in gig work – although no country has so far found the optimum way forward.

COUNTRIES TAKING PART IN OUR RESEARCH:

Austria, Belarus, Belgium, Bulgaria, Brazil, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, France, Finland, Germany, Greece, Hungary, India, Italy, Japan, Kazakhstan, Latvia, Luxembourg, Malta, Mexico, Netherlands, New Zealand, Panama, Peru, Poland, Romania, Russia, Slovakia, Slovenia, South Korea, Spain, Turkey, United Arab Emirates, United Kingdom, Ukraine, and United States.

THE GLOBAL IMPACT OF THE GIG ECONOMY

The gig economy was identified as an important and growing issue in a wide variety of countries

Not only the UK and the US, but also France, Germany, Austria, Belgium, China, Canada, Finland, Czech Republic, New Zealand, India, Poland, Netherlands, Spain, Ukraine, and Belarus all regarded the gig economy as an important or increasingly important issue.

The perception however, that the gig economy is a developing issue is not always reflected in patterns of employment. In Germany, a 2017 survey indicated that less than 1% of the German workforce performed work through internet-based technology platforms.

Often, the rise in importance of the gig economy was associated with a particular platform – particularly Uber. By way of example, Uber was highlighted as a significant factor in countries as disparate as Denmark, Finland, New Zealand, India and Panama. In Slovenia, the arrival of Uber in 2016 was seen as a major development prompting debate about how this new model of working related to existing labour and tax regulation.

The gig economy has not had a major impact in every country, however. It was not regarded as a significant issue in Bulgaria,

Croatia, Cyprus, Turkey, Greece, Japan, Romania, Latvia, Hungary, Slovakia and Slovenia.

It is also notable that where there are pockets of gig economy activity in countries that do not report a major impact, that activity is often generated by a handful of foreign companies - normally from the US, UK or EU. Such is the case in Russia, for example.

There are a number of reasons for the difference in impact. One factor is that the gig economy needs a high-tech environment in which to operate, with consumers using online platforms and apps to order goods and book services. It was reported that in Croatia, for example, the development of the gig economy is held back by the fact that less business is being conducted online.

On the other hand, advanced technology does not mean that the gig economy will necessarily thrive. Other cultural and regulatory factors have a part to

play. Japan, for example, does not yet regard the gig economy as a significant issue, save for concern that gig workers might enjoy less income and social security protection.

It is also clear that the development of the gig economy faces more barriers in some countries than in others. In the UAE, where 80% of the workforce are expatriates, the need for workers to have a work permit and be sponsored by a licenced and registered body means that the potential for growth in the gig economy is small. Indeed, although Uber operates in the UAE, it must do so on a significantly different basis from elsewhere in the world. It is forbidden from competing directly with regular taxi companies and drivers are employed directly by a registered limousine company. Uber then acts purely as a booking platform and contracts with the limousine company itself rather than with individual drivers.

In Malta, those registered as self-employed are themselves subject to a restrictive legislative regime which, some argue, has limited the growth of the gig economy. In other countries, the concern is that regulations are being bypassed, with gig-economy workers operating within the 'grey' or 'informal' economy. In Kazakhstan, those operating their own business must register as entrepreneurs, but there is a concern that many using online platforms are failing to do so. In Peru, it is also believed that the gig economy is operating outside of the regulations that are in place.

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EMPLOYMENT STATUS

Most countries for whom the gig economy was an issue saw it as posing a challenge to existing models of employment relationships

Across the countries responding, the most common model in place is a straightforward divide between those who are regarded as 'employees' and those who are 'self-employed'.

Moreover, there is a significant degree of commonality in the way in which different countries define employment. The central idea that an employee is someone who agrees to work under the direction and control of another is almost universally recognised – though different countries may emphasise different aspects of the relationship in distinguishing between employees and independent contractors.

Many countries focus in particular on the idea of subordination in determining whether or not an individual is an employee – that is, the performance of work under the authority of an employer who has the power to issue orders and directives, to supervise their execution and to exert discipline over the subordinate. Subordination is the key distinction between a salaried employee and an independent contractor in France, Cyprus, Mexico and Panama, among others.

In many ways, subordination is part and parcel of the control that is almost universally regarded as crucial in establishing an employment relationship. Greece and Romania, for example, both place emphasis on the extent to which the employer exercises control over how when and where the individual performs work and the requirement for him or her

to comply with the employer's instructions. Unusually, Greece also distinguishes between hourly paid and salaried employees when it comes to the minimum notice that must be given on termination of employment.

An interesting factor identified recently by the California Supreme Court is whether the contractor is performing work that is generally outside the usual course of the hiring entity's business. The case in question was brought by package delivery drivers working for a package delivery company (Dynamex) and the Court's conclusion that they were employees is regarded as having potentially wide ramifications for businesses in California. This is particularly so as the Court also ruled that contractors should be assumed to be employees unless the employer can demonstrate otherwise.

Most of the countries responding to the research emphasised that whatever the contract may say on paper, the courts or other authorities will look carefully at the reality of the relationship in order to determine its true status. Normally, the consequence will simply be that the workers will then be in a position to claim their rights as employees. In the Czech Republic, however, the misclassification of a worker brings significant sanctions with it. An organisation engaging a worker as an independent contractor when he or she should in reality have been engaged as an employee can be fined up to CZK 10,000,000 (approx EUR 400,000).

SOME KEY CRITERIA COMMONLY USED IN MOST COUNTRIES TO DECIDE WHETHER SOMEONE IS AN EMPLOYEE:

- ▶ The degree of control or supervision by the employer
- ▶ The obligation to provide a personal service (that cannot be subcontracted)
- ▶ That performance of the work is at the employer's risk

This contrasts with the position in Latvia where the courts have taken the view that the most important factor is the existence of a will of the parties to enter in a specific type of relationship. If parties have clearly and intentionally chosen a 'gig' type of relationship, then employment law protections are not applicable. Bulgaria operates at the other end of the scale, with its Labour Code expressly stipulating that all relations between parties in connection with the provision of the individual's labour are to be regulated solely as employment relationships.

Such a clear-cut approach is unusual. It is far more common for various factors to be weighed up by the courts, with the label attached to the contract by the parties being just one factor taken into account in an overall analysis.

In Turkey, the label that the parties choose to attach to the contract can be overridden if the level of dependence is such that in reality the relationship is one of employment. Slovenia emphasises the extent to which the contractor is integrated with the employer's



business - a factor also recognised as important in China.

China indeed provides a neat example of how universal the test of employment status is. According to press reports, the 'Good Chef' app allowed customers to book chefs to come to their home to cook a meal. The chefs operated under strict rules set by the app operator which also provided work clothes, training, and paid the chefs a fixed monthly fee for their service. The court held that, although the cooperation agreement specified that both parties did not have employment relationship, in reality the relationship was one of employer and employee. As a result, the chefs were entitled to severance payments when their employment came to an end.

A similar result would almost certainly have been arrived at in most of the countries responding to our research.

Malta takes an interesting approach to defining employees. In common with most countries it has a multi-factorial test, but this is applied in an unusually rigid way. Ostensibly self-employed persons will be deemed to be employees if at least five of the following criteria are satisfied:

»They depend on one single person for whom the service is

provided for at least 75% of their income over a period of one year

»They depend on the person for whom the service is provided to determine what work is to be done and where and how the assigned work is to be carried out

»They perform the work using equipment, tools or materials provided by the person for whom the service is provided

»They are subject to a working time schedule or minimum work periods established by the person for whom the service is provided

»They cannot sub-contract their work to other individuals to substitute themselves when carrying out work

»They are integrated in the structure of the production process, the work organisation or the company's or other organisation's hierarchy

»Their activity is a core element in the organisation and pursuit of the objectives of the person for whom the service is provided

»They carry out similar tasks to existing employees or, in a case where work is outsourced, they perform tasks similar to those formerly undertaken by employees.

Many of these criteria would be familiar in countries around the world – including the US and the UK. Usually, however, these or similar factors are taken together to form a general impression of the overall position. In Canada, this approach was set out by the Supreme Court in the case of *Sagaz Industries Canada Inc*:

"The central question is whether the person who has been engaged to perform the services is performing them as a person in business of his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks."

In some countries we looked at the fact that a nominally self-employed contractor may in fact be judged to be an employee was suggested as a factor which in itself holds back the terms and conditions of gig-economy workers. In particular, the high level of social protection afforded to employees in France means that gig-economy platforms have an incentive not to provide workers with greater security or benefits that might tip the balance in favour of them being classed as employees.

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the most common model in place is a straightforward divide between those who are regarded as 'employees' and those who are 'self-employed'

There was widespread acknowledgement that failing to regard them as employed under the standard model of employment left many gig-economy workers without the protections enjoyed by those doing similar work as employees, although it was also acknowledged that gig work provided more flexibility and autonomy for the workers concerned.

In the US in particular, the ambiguous position of people engaged in the gig economy has led to a wave of litigation from such workers seeking to bring themselves within the scope of employment law.

While there are few judicial decisions in the US on this issue, there have been some high-profile settlements, or attempts at settlement. In March 2017, Lyft agreed to pay USD 27 million to approximately 95,000 Californian drivers who claimed they were misclassified as independent contractors. This settlement does not, however, change the status of Lyft drivers under California law or restructure the relationship between the drivers and the company.

A US court has also rejected a proposed USD 100 million settlement agreement between Uber and its drivers. This would have altered some of Uber's business practices so that drivers would be treated more like employees in some ways, but expressly ensured drivers remained classified as independent contractors. However, the court rejected the proposed settlement as "not fair, adequate, and reasonable."

Two other cases suggest, however that Uber drivers will struggle to be classified as employees in the US:

» In *Saleem v. Corporate Transportation Group* (2nd Cir. April 12, 2017), the US Second Circuit Court of Appeals ruled that a group of black car drivers in New York were independent contractors and not the employees of the company that provided them with despatch base services. Central to the case was the lack of control exercised over the drivers and their ability to generate income by driving for private clients or accepting work from other platforms.

» In *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 227 (Fla. Dist. Ct. App. 3d Dist. Feb. 1, 2017), Uber drivers were held not to be employees with the result that they did not qualify for State re-employment assistance. The fact that Uber did not control what work they accepted or rejected was a central consideration.

Gig economy workers in France have similarly not had much success in challenging their self-employed status in the courts. The Labour Court of Paris and the Paris Court of Appeal refused to recognise the existence of an employment contract in cases involving three gig-economy platforms: Chauffeur Privé, Deliveroo and Take Eat Easy. This was despite the existence of factors that ordinarily would have been indicators of employment status. The companies in

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question provided training and equipment and there was a degree of exclusivity of service when the workers in question were engaged in shifts. The view taken by the courts, however, was that in the specific context of the gig economy, these factors were insufficient to establish employment status.

An Employment Tribunal in Italy recently ruled that six riders for the food delivery service Foodora were self-employed contractors, while legal challenges from Uber drivers in Brazil have had mixed success leading to little appetite for further litigation.

Looking at our respondents overall, it is striking how few legal challenges there seem to have been to the status of workers in the gig economy. This may well reflect a differing propensity in legal systems for employment disputes to reach the courts at all, but it is clear that - despite widespread concerns about the status and regulation of gig economy workers - these have not in the main led to legal action.

This may also reflect the fact that gig workers are generally highly individualised with little collective organisation. In a country like Denmark, for example, much of the employment regulation of employment is contained in collective agreements, leaving little room for the consideration of gig-economy workers. Other countries have relatively little protection for employees in any event, so the determination of the status of individual workers is less of a concern.

Nonetheless, in India the Delhi High Court is presently adjudicating a writ petition filed by Delhi Commercial Driver Union. In this matter, the cab drivers of Ola and Uber are seeking to be reclassified as employees (currently they are classified as 'independent contractors'). The union has alleged that cab aggregators are denying the drivers' basic rights by treating them as self-employed. The drivers had even gone on strike, protesting against low fares and the lack of basic amenities from the cab aggregator companies.

EMPLOYMENT STATUS IN THE GIG ECONOMY

Most countries reported that those engaged in the gig economy would not be likely to be regarded as employed under the standard model of employment

INTERMEDIATE STATUS

While the most common model among countries responding to our research is a straight divide between employees and the self-employed, a number of countries do recognise an intermediate status between the two

Generally, intermediate status has not been something developed in response to the gig economy, but arguably an intermediate status of this type is where gig economy workers would most naturally sit. It is not surprising therefore that some countries are actively considering adopting similar approaches as a direct response to the growth of the gig economy.

In the UK, the category of ‘worker’ refers to an individual who contracts to perform work for another person. However, an individual is not a ‘worker’ if the other party to the contract is a client or customer of that individual’s profession or business. Workers have a narrower range of rights and protections than ‘employees’, but these include the UK’s minimum wage, holiday pay, whistle-blower protection and rights not to be discriminated against on grounds of sex, race, age, disability etc.

There have been a series of gig-economy cases in the UK in which the ‘employer’ has argued that it is not an employer at all, and that those who use the platform to find work are not ‘workers’ because they perform work for the individual client rather than for the gig-economy platform itself. Generally, the courts have so far been unwilling to accept this argument and have found that a range of gig workers are in fact workers. The most prominent case – involving Uber – is being appealed to the Court of Appeal, so the legal position may well change.

Other countries have an intermediate status based on the

contractor being economically dependent on the employer. Spain has this distinction, having an intermediate category of self-employed whilst economically dependent on a particular client (known as ‘TRADE’). This category is routinely used in the context of the gig economy in Spain.

Similarly, Canada distinguishes between independent and dependent contractors. While independent contractors fall outside of the scope of employment protection, a dependent contractor – one who is dependent on a long-term and stable relationship with a

particular client – does have some minimum rights to notice.

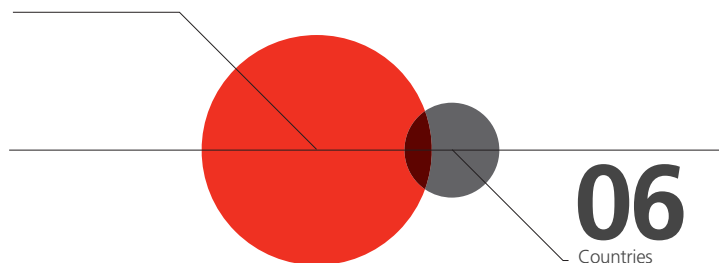
Slovenia also has a category of an ‘economically dependent person’ who relies on one particular client for at least 80% of his or her annual income. Such a person does not qualify for full employment rights but does enjoy a more limited set of protections, including against discrimination. Similarly, in Austria, ‘quasi-employed’ contractors – who lack the economic independence of the fully self-employed- enjoy certain limited protections including in relation to equal treatment.

In South Korea, independent contractors who work almost exclusively for one client may be classed as ‘tuk-su go-yong’ workers, with the consequence that they qualify for workers’ compensation on the same basis as employees with their ‘employer’ being required to pay the appropriate contributions. There are currently proposals similarly to expand unemployment insurance eligibility to tuk-su go-yong workers as if they were employees, but it remains unclear what the ultimate details of any legislation will be.

EMPLOYMENT STATUS OF WORKERS IN DIFFERENT COUNTRIES

32

Countries



06

Countries

- Employees / Self employed
- Hybrid status

Austria	●	Brazil	●	India	●	Panama	●
Canada	●	China	●	Italy	●	Peru	●
Slovenia	●	Croatia	●	Japan	●	Russia	●
Spain	●	Cyprus	●	Kazakhstan	●	Slovakia	●
South Korea	●	Czech Republic	●	Latvia	●	Turkey	●
UK	●	Finland	●	Mexico	●	UAE	●
Belarus	●	Germany	●	Netherlands	●	US	●
Belgium	●	Greece	●	New Zealand	●	Ukraine	●

PROPOSALS FOR REFORM

A wide range of countries are considering a specific legislative response to the gig economy, although in most cases proposals are at a formative stage

We have yet to see any comprehensive reform that takes account of the specific policy challenges that the gig economy poses.

In many cases, the concerns driving proposals for reform are more to do with the taxation of gig-economy platforms and their workers rather than questions of employment rights. For instance, Belarus has sought to take specific steps to ensure that independent contractors are placed on an equal footing with employed workers in terms of the social payments that are paid by the company.

Similarly, in Poland, social security laws were amended to give the Social Security Office power to determine which entity should pay social security contributions by issuing an administrative decision. The result is that the gig-economy company may be held responsible for payment of outstanding social security premiums for the gig worker. In Denmark, it has been proposed that extra tax advantages should be incurred by the users of online booking platforms that automatically report to the tax authority.

Apart from the issue of taxation, there is a clear concern - in countries such as the Netherlands - that current models of employment protection are potentially bypassed by gig work.

In the US, there have been discussions among regulators and lawmakers about the possibility of creating a third category of workers that would more accurately reflect the status of workers in the gig

economy. No specific legislation or regulatory action has, however, yet been proposed. In Belgium, the Minister for Work recently considered whether there was a need for a new hybrid employment status and research is now being conducted into this to see whether it is feasible or would create too much legal uncertainty.

Even in France, where employment law protection has always been built firmly around the concept of the salaried worker, consideration is being given to the need for reform. In August 2016, a law was adopted which recognised the validity of the gig-economy model of engaging services and creating a specific status for those working within it. One concern expressed in France, however, has been that an intermediate or lesser employment status might operate in practice to drive down standards.

In the UK, the independent Taylor Review of modern working practices was set up to specifically address these issues and the Government has subsequently launched a series of consultations (albeit with very few concrete proposals having yet been made).

In due course, it is expected that there will be a fresh look at the definitions used in determining 'employee' and 'worker' status and enhanced protection for workers engaged on zero-hours contracts.

The growth of zero-hours contracts has gone hand in hand with the increase in gig work. Although strictly speaking the two are not the same, there is a clear overlap between the case of an individual relying on work being allocated through an online platform and someone forced to wait for work to be offered by the employer without the security of any guaranteed hours.

It is therefore instructive to consider the case of New Zealand where, in 2016, the parliament amended the Employment Relations Act by making it unlawful for an employer to require an employee to be available for work without appropriate payment. Potentially, a similar rule could be applied to gig workers who make themselves available for work by logging on to the appropriate platform, but who are not currently entitled to be paid until they are offered (and accept) a particular assignment.



CONCLUSIONS

The gig economy can be an effective and flexible way of delivering important services and also allows individuals who might otherwise be excluded from traditional employment to become economically active. But flexibility comes at a price. Those who participate in the gig economy do not generally enjoy similar rights and protections to those in more standard forms of employment.

Across the world, there is a clear consensus that the gig economy presents a challenge to the employment law framework. Despite the widely varying legal systems and cultural and economic circumstances of the countries covered by our research, the issues faced are essentially the same. How do we provide appropriate protection for gig-economy workers without losing the benefits that the gig economy is providing for consumers?

Traditionally, employment protection has been based on a concept of employment that involves an individual working under the direction and control of an employer. In the gig economy that subordination or control is usually missing. As a result, gig economy workers tend to fall into a self-employed or entrepreneurial category, even though in many cases it seems highly artificial to regard them as running their own business rather than working for someone else.

It may be that control and subordination are outdated concepts that will become increasingly less relevant as employment relationships evolve. Perhaps one way forward would be to focus on economic dependence instead. Where workers are dependent on one particular platform to make a living, does it really matter how much control the operator of that platform exercises over when and how they work?

As we have seen that in Canada, Slovenia and South Korea, economic dependence can at least result in the worker enjoying a basic floor of rights – even though this may fall some distance short of full employee protection. Other countries are actively considering similar approaches.

Despite the widespread pressure for reform, it is clear that we are still some way from any sort of paradigm shift in what constitutes ‘employment’, and what sort of labour needs to be legislatively protected. While employment law has so far generally failed to keep pace with the development of the gig economy, our research shows that pressure is building on governments. If the gig economy continues to grow, they will have to find new ways to think about how to provide security and stability for those who work within it.

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