

ILO Research Externship

Lehigh University and University of San Francisco de Quito, Global Village

in collaboration with the

International Labour Organization

Protecting Workers' Rights in the Gig Economy:

AI and Digital Labour Platforms

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“The changing nature of work creates new opportunities for workers, but also new types of vulnerabilities”

- Katherine Stone

1. Executive Summary

It happens millions of times a day - the innocuous launching of an everyday application, and the commonplace phrase: “I’ll just order an Uber.” Behind this action, however, lies far more implications for labour than most consumers of the service will probably ever consider. A growing portion of the world is becoming more and more accustomed to this form of exchange of services on demand via digital intermediaries. These digital platforms, powered by the labour of millions of workers in addition to their digital interface, have been increasingly labelled as the “gig,” “on-demand,” or “sharing” economy. This nascent economic model seeks to provide an ecosystem in which workers can have the flexibility traditionally associated with self-employment with far less managerial oversight compared to traditional work via digital communication.

Despite these lofty ambitions for the model, the gig economy walks a thin, and wavering, line for where its backbone – the millions of its laborers – belongs. While the debate around whether gig economy workers belong as employees or as independent contractors rages on in legislatures across the United States, the debate misses the reality that gig workers do not neatly fit into either box. And much as how the gig economy has modernized the way consumers demand labour, so too should the systems that regulate this labour evolve. Rather than putting gig workers into either of these classifications, it becomes clear that a new category of worker needs to emerge to fill the gap created by the gig economy: the dependent contractor.

2. Description of Policy Challenge

Broadly speaking, the gig economy consists of freelance workers who are hired for a clear-cut task, work on demand, and are often recruited over digital labour platforms (Torpey and Hogan). Gig economy workers have been traditionally categorized as independent contractors who have control of the location, time, and the product of their work. Workers of the gig economy are not tied down to long-term contracts, and are consequently not entitled to many of the same benefits as full-time workers. Due to this lack of benefits, an increased amount of liability is placed upon these workers.

The gig economy has seen tremendous growth over the past decade and is no longer a small niche of economic activity for workers. As of 2019, there are an estimated 57 million individuals in the United States who work in the gig economy (Duffin 8). Gig economy workers often perform multiple jobs or projects; as of 2018, 56% of gig workers in the United States held two or more jobs (Duffin 12). Individuals within the gig economy consisted 25% full-time freelancers, 44% part-time freelancers, and 28% who freelance in addition to a full-time job to earn additional income (Duffin 9).

The gig economy has brought about a new way of doing business and has brought to light two important issues: the first is the meaning of what exactly an “employee” is and whether gig workers fit into this classification (Todolí-Signes 197). The second issue reflects on the need of protection for workers within the gig economy and their rights, regardless of how they end up being categorized (Todolí-Signes 197).

Almost all labour platforms require workers to accept being classified as self-employed or independent contractors in order to remove themselves from any legal and social responsibility (Berg et al.). From the perspective of the labour platforms, independent contractors

serve as an offloading of liability in both financial and legal requirements. The lack of recognition of a true employer-employee relationship has led to a series of violations in workers' rights, including the existence of a minimum wage, insurance coverage, vacation payment, social benefits, the right to establish and join trade unions, etc. (Berg et al.).

There is no better case study on this need for classification than the platform that brought the gig economy mainstream: Uber Technologies Inc. Since its founding in March 2009, Uber's expansion has reached up to 69 countries, and 14.1 billion U.S. dollars in net revenue in 2019 (Mazareanu). As a labour platform, Uber has not been exempt from the negative aspects related to the gig economy, rather Uber has often served as the face of these issues in the public eye. Uber has recently been involved in intense legal battles pertaining to a misclassification of workers inside its digital labour platform (Choudary).

Uber workers are classified as independent contractors and thus, risks are largely offloaded onto the worker instead of being managed by the company and the platform (Choudary). However, there are some arguments that prove that workers' status should in fact be as employees in terms of the control that Uber has and the existing dependency of the workers.

The first argument relates to the fact that in order to be an employee, it is necessary to be monitored and controlled by the employer, to ensure quality of work (Todolí-Signes 198). In a traditional firm, this takes the place of the manager or supervisor. In companies like Uber, however, the monitoring and controlling is delegated to the customers of Uber, through an evaluation system. The aggregation of these individual evaluations then gives Uber enough information to make decisions on work assignments, dismissals of workers, and other things a traditional manager would do (Todolí-Signes 198).

Contrary to popular belief, the absence of a defined schedule and working hours does not mean that employees immediately become self-employed. The fact that enterprises such as Uber decide not to exercise their power over a formalized schedule does not mean that they are not capable of doing so (Todolí-Signes 198). Uber still maintains a firm hand over drivers and can make meaningful changes to specifics drivers depend on. For example, this dependency can be observed in how the company fixes ride prices, handles the payment processing, and even imposes sanctions on poor performing drivers.

From this perspective, it is necessary to consider that as Lobel has affirmed:

The larger issue is how to modernize employment and labor protections to fit with the realities of work today. In employment and labor law, we should strive to get regulation just right: not so little as to leave workers unprotected, but not so much as to distort the market and create employment disincentives. (“The Debate Over How to Classify”)

3. Policy Options to Address the Challenge

Todolí-Signes suggests turning towards the examples of Spain and Italy. Both countries have implemented special labour laws that differentiate among professions and adapt employment regulations to the necessities of specific professions (201). Such an approach could be used to design special labour laws for gig economy workers, so as to not hinder the innovation of the gig economy as a whole while still maintaining legal protections for workers.

Following this reasoning, Todolí-Signes continues to suggest a draft for specific proposed regulation of gig economy platforms, with the following special considerations: the flexibility of schedule and working hours should be kept by the workers but the employer should be allowed to set a maximum number of working hours per worker and per week; there should not exist any exclusivity agreements that prevents workers from taking other employment simultaneously; the

employee's liability for damages should be eliminated; and employers should be obligated to pay minimum wage, including for waiting times (Todolí-Signes 202).

Only Lobel adds another fact that should not be ignored: "modern employment law is based on the assumption of two worlds of work: you are either an employee or you are not, and if not, you have none of the protections afforded to employees" ("The Gig Economy" 9). From that affirmation arises the proposal of an extension of protections to all workers, irrespective of employment status.

As shown by the author, there are some states in the United States that have already expanded protections to all workers. For example, the Washington Law Against Discrimination (WLAD) establishes prohibitions against discrimination by expanding the definition of employee (Lobel, "The Gig Economy" 10).

Given the difficulties that arise when trying to classify gig economy workers into one of the two traditional categories, new legal groupings have been proposed to accommodate the special nature of gig workers/platforms. Chief among them are the categories "independent workers" and "dependent contractors." For the former, Seth Harris and Alan Krueger have proposed a structure of benefits that could make the independent worker status neutral, by expanding protections and benefits that exist in employment. The category finds itself as "a middle ground between traditional employees and independent contractors" (Harris and Krueger 2-3).

The main objective of this new category is to clarify protections and benefits that should be provided in relationships such as those in the gig economy (Harris and Krueger 5). For this, the authors propose reforms like the inclusion of freedom to organize and collective bargaining,

ability to pool, compensation insurance, tax withholding, wage and hour protection, unemployment insurance and affordable health insurance (Williams and Lapeyre 15).

In the case of a potential dependent contractor category, it is essential to consider whether Uber drivers ought to be categorized inside a “dependent self-employment” status. The International Labour Organization (ILO) defines this as a category in which “workers provide a service for a company with a contract that differs from a work contract, but depend on its clients for their income or received detailed instructions regarding how the work is to be done” (*Non-standard Employment Around the World* 15).

The ILO highlights this definition as a way to clarify the "gray area" that exists between employees and self-employed workers due to a binary classification of work. This allows for the new third category that could be consistent with its definition: the category of "dependent contractors.” Therefore, Uber drivers would no longer be considered as independent contractors, rather dependent contractors, which are defined by the ILO as “worker[s] employed for profit, usually by way of a commercial transaction, who are dependent on another entity that directly benefits from the work performed by them and exercises explicit or implicit control over their activities” (“Resolution Concerning Statistics on Work Relationships” 9). Hereby, Uber drivers no longer benefit from labor protections, such as collective rights, as they continue to be considered independent contractors by the Uber platform.

What the dependent contractor category would look like is still being debated, as there exists extensive literature proposing different scopes of it. From the previous case study analysis on the working conditions of Uber drivers, it can be inferred that the dependent contractor category needs to ensure collective rights for Uber drivers. Currently, they are discouraged from the platform of collective action and thus disempowered. For instance, Uber does not encourage

drivers to gather at central dispatch locations, nor create social relationships among themselves, nor organize themselves to respond collectively to changing platform policies. This is a result of workers being classified as independent contractors which possess an impediment to the exercise of collective rights and could be regarded as illegal actioning (Choudary). If collective action is extended to Uber drivers, they may be then enabled to deconstruct the platform's information asymmetry, which occurs when Uber platform has sole exclusive access to data on its workers, and gain greater agency.

Implementing this third category ought to be a progressive change inside Uber's platform in order to avoid possible implications of a sudden change into its business model design. To accomplish it would require a "safe harbour period" for Uber to be able to adapt to the new reality, specially on "experimenting with granting their workers some benefits and to financially prepare for the eventual addition of the dependent contractor" (Fendrick). This implementation process may enable all parties involved to regard this policy recommendation as enforceable.

4. Conclusions and Recommendations

Though the classification of gig economy workers may present itself as a new problem, it is really an old problem which has been given a digital paint job. As the modern economy has matured since the Industrial Revolution, so too has the need to evolve the regulatory systems that protect labourers. With this regulatory evolution should come a middle ground that helps to fill the gap that exists for the gig economy.

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