EU proposes new legislation to protect “digital labour platform” workers from status misclassification

Ben Smith

17th December 2021

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Over 28 million people in the EU currently work through digital labour platforms. By 2025, this number is expected to reach 43 million. The rise of digital labour platforms (i.e., what is often referred to as the “gig” or “platform” economy) has led to many court cases in recent years across the EU in relation to the classification of the working relationship between the worker and the digital labour platform.

The European Commission on December 9, 2021, published proposed legislation that, if passed, would mark a fundamental change in the way digital labour platforms operating in the EU approach their employment law compliance.

Although the changes have gained a lot of media attention, their immediate practical impact is minimal due to the lengthy period for deliberation, voting and implementation before the new rules could take effect. Even once in force, the changes will not necessarily

mean the end of self-employment in the sector as we know it: platforms can still rebut the presumption of employment that the new rules seek to impose.

Key Points

- The new law would substantially diminish the ability of digital labour platforms to define individuals working through the platform as self-employed contractors;
- Individuals would be presumed to be in an employment relationship if the platform exercised control over their work and pay. While platforms would be able to rebut that presumption, this would be a significant change to the power dynamic between individuals and platforms;
- It is likely that the new law would significantly increase the costs of operating in the EU for digital labour platforms as large numbers of those currently classified as non-employed contractors would have an easier path to gaining entitlements and protections reserved for employees; and
- While this new legislation is only a proposal and any practical impact is several years in the future, digital labour platforms with operations in the EU will be following developments with keen interest.

What is the current position?

The vast majority of individuals working through digital labour platforms are classified by the platforms as self-employed contractors. In recent years, courts across the EU (and globally) have become more willing to find that these workers have been misclassified by the platform and are in fact employees. These challenges generally rely on individual workers bringing claims in court, tribunals, or other national bodies.

What would change?

The key change is the creation of a legal presumption that there is an employment relationship between the platform and the individual, and therefore that the individual would be a "worker" for the purposes of EU law and an employee for the purposes of national law. This presumption would apply if the platform exercised a certain level of control over the worker.

If any two of the following five factors apply, the individual would be presumed to be in an employment relationship with the platform:

- the platform controls pay;
- the platform sets binding work rules governing how work is done, conduct towards the end-user of the services, or the worker's appearance;
- the platform supervises the work done or verifies the quality of work (including by electronic means);
- the platform exercises control, including through sanctions, over working hours (including the ability to sub-contract work or use a substitute, the ability to accept or refuse particular tasks); or
- the platform restricts or controls the individual's ability to build their own client base or work for another person (such as another digital labour platform).

The platform (or the individual – though this is likely to be rarer in practice) would then be able to rebut that presumption by proving that the relationship was not actually an "employment relationship," as defined in relevant national law.

The implications of being in an "employment relationship" will continue to be subject to national law, however.

It is likely that the mechanism for individuals to challenge their status would remain the same as it is currently – court challenges or disputes before national labour authorities – but the impact of the new legislation is likely to embolden claims as it presents an easier route to success for individuals.

The proposed legislation would also impose a transparency obligation on digital labour platforms. The platforms would be required to provide workers with specific information on the monitoring and decision-making systems used and the impact these systems have on the workers' working conditions, such as their access to work assignments, earnings, working time, occupational safety and health, and so on.

Who would be affected?

This proposed legislation, if passed, would directly impact business operations in EU member states only. However, non-EU legislatures will be watching with interest, so there is potential for legislation inspired by the EU in the UK and beyond in years to come.

When will this change?

At the moment there is no clear timeline for this to become binding law. For now, it is just a proposal –it will need to be picked up and discussed by the EU's legislative bodies, likely with amendments, and passed before it becomes binding law.

The European Commission has indicated it wants this to become law by 2024, when the current legislative session ends. If it does pass, the practical impact would still take years to be felt in full as EU member states would have a two-year period to implement the legislation into national law. This is because the proposed legislation is a directive, not a regulation (such as the GDPR, which would be directly applicable in member state law), and therefore must be effectuated into national law by each member state.

Eric van Dam and Edward Carlier also contributed to this article.