EASTERN EUROPEAN JOURNAL OF TRANSNATIONAL RELATIONS

Social Protection of Digital Platform Workers under Norwegian Law

Tine Eidsvaag
Faculty of Law, University of Bergen, Norway
Eidsvaag@uib.no

Abstract. The main aim of this article is to investigate some encounters between the Norwegian system of economic risk-pooling for labour engaging individuals, and the emerging digital platform economy. The author argues that Norwegian labour and employment law, as well as social insurance law, may fall short in alleviating the economic strains of the typical digital platform worker in cases of loss of income. This is partly due to legal classification: Where Norwegian labour and employment law operates with two categories of labour engaging individuals: employees and non-employees, Norwegian social insurance law includes three categories: employees, freelancers, and self-employed persons. Employees are entitled to the most comprehensive and high-level coverage of income losses. The legal status of digital platform workers is basically unclear, and they may belong to each of the three categories, depending on contract terms. It is also argued that the Covid 19-pandemic has reinforced the differences between salaried, full-time, employees, and atypical workers such as digital platform workers. The compensation measures issued by the Norwegian state to cover income losses in relation to the pandemic did not meet the needs of the typical – freelance – digital platform worker to the same extent as those of undertakings and 'traditional' employees. The article suggests some measures to clarify the legal position and to give a better coverage for digital platform workers in cases of loss of income.

Keywords: digital platform work, concept of 'worker', employment law, social insurance law, Covid 19-pandemic.

JEL Classification: K31

Citation: Eidsvaag, T. (2021). Social Protection of Digital Platform Workers under Norwegian Law. *Eastern European Journal of Transnational Relations*, *5*(2), 35-48. https://doi.org/10.15290/eejtr.2021.05.02.03

Academic Editor(s): Charles Szymański

Publisher's Note:

1. INTRODUCTION

Norway and the Nordic countries are often considered as having a high level – and comprehensive – system of social protection for workers, both in terms of employment law and in terms of social insurance law. However, the evolving platform economy challenges the structures of the Norwegian and Nordic systems to alleviate economic risks for labour engaging individuals. A recent (2020) report on platform work ordered by the Nordic Council of Ministers states that "[t]riangular arrangements and algorithmic management of platform work blur employer responsibility and transfer risk onto the workers".[1] This development has been reinforced by the Covid-19 crisis.

The platform economy in Norway is currently not of a large scale.[2] In particular, Uber establishment in Norway has been hampered by taxi-legislation.[3] However, this legislation has recently (fall of 2020) been liberated, allowing Uber to (re-)establish.[4] Other actors operating in Norway include food delivery services such as Foodora and Wolt, and providers of care services such as Care.com. These actors operate under different business models.

The term 'platform workers' is used in this article according to the definition used by the EU Commission in its February 2021-initiative towards the social partners as "individuals providing services intermediated with a greater or lesser extent of control via a digital labour platform, regardless of these people's legal employment status (worker, self-employed or any third-category status)". 'Platform work' is defined as "the services provided on demand and for remuneration by people working through platforms, regardless of the type of digital labour platforms (on-location vs online) or the level of skills required".[5]

In this article I will focus mainly on Norwegian employment and social security law and the legal and policy responses to the challenges of the platform economy. I will put special emphasis on (lacunes in) the coverage of economic risks due to loss of income caused by circumstances at societal, employer, or employee, level: Obstacles to work performance at societal or employer level may result in lack of demand for the individual's labour, which in turn may lead to dismissals or furloughs due to long or short-term redundancies. Individual circumstances may also be hindering a person to offer his or her labour for shorter or longer periods. This includes the employee's own illness, children's illness, or the need for leave of absence in connection with childbirth and care of infants. During the covid-19 pandemic we have also witnessed obstacles to carrying out work tasks due to mixed causes and societal causes, such as school and kindergarten lockdowns and quarantine rules.

Where Norwegian employment law operates with two categories of statuses for labour engaging individuals: employees and non-employees, Norwegian social insurance law uses three categories: employees, freelancers, and self-employed persons. The status of digital platform workers is basically unclear. Depending on contract terms, those workers can be classified as belonging to each of the three categories.[6]

Below, I will first look at the international regulation and some approaches from other national legislators or courts to the legal position of platform workers (Chapter II). Then I will present some main rules on economic risk pooling and analyse the categorization of labour engaging individuals under Norwegian law, with a focus on digital platform workers: Chapter III will investigate Norwegian labour and employment law. Chapter IV will deal with Norwegian social security law. In Chapter V I will investigate some of the challenges caused by the covid-19

[1] Jesnes & Oppegaard (2020). 'Platform Work in the Nordic Models: Issues, cases and responses', Report from the project 'The Future of Work, Opportunities and Challenges for the Nordic Models', Nordic Council of Ministers [hereafter: 'Nordic report'], p. 80.
[2] Nordic report, 1.4, pp. 14-15.
[3] Cf. Nordic report Chapter 3, point 3.2.3, pp. 29-31.
[4] Cf. newspaper article in Dagens Næringsliv 27 October 2020 "Den omstridte drosjetjenesten Uber gjør comeback i Norge" (The controversial taxi service Uber is making a comeback in Norway.)
[5] Brussels, 24.2.2021 C (2021) 1127 final CONSULTATION DOCUMENT First phase consultation of social partners under Article 154 TFEU on possible action addressing the challenges related to working conditions in platform work, p. 5.
[6] See for instance: Hotvedt (2020, p. 5).

pandemic for this group of atypical workers and the economic measures taken by Norwegian authorities to meet these challenges. I will argue that those measures partly have fallen short in meeting the needs of the typical platform worker. Some conclusions will be drawn in Chapter VI, and in Chapter VII I will present some suggestions on what can be done to alleviate the vulnerability of platform workers, mainly inspired by a recent Official Norwegian Report on atypical work (NOU 2021: 9).[7]

2. SOME INTERNATIONAL AND NATIONAL APPROACHES TO PLATFORM WORK

The challenges of digital platform work have also been highlighted internationally, including at European level and in several European countries: How to ensure this group of labour engaging individuals social protection? Challenges for this group include low and insecure incomes, workers' low bargaining power and limited access to social insurance caused by status as non-workers.

There are three main approaches to these challenges: 1. combatting bogus self-employment via court cases or legislation, for instance by establishing legal presumptions that individuals should be assessed as employees when certain markers are present; 2. establishing special arrangements for 'grey-zone groups' which fall outside the traditional employee category, but still are economically dependent on one or a few clients. Some countries' legal systems operate with a third group of 'para-subordinati', (partly subordinated workers) with limited rights; 3: extending social protection in certain areas to all labour engaging individuals, including the self-employed.[8]

The ILO Recommendation on the employment relationship of 2006 (R198) urges states to *define* employment relationships and gives them some guidance on possible definitions.[9] Members should "formulate and apply a national policy for reviewing at appropriate intervals and, if necessary, clarifying and adapting the scope of relevant laws and regulations, in order to guarantee effective protection for workers who perform work in the context of an employment relationship", cf. point 1. The Recommendation points out that the national policy should at least include measures to "combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status", cf. point 4b. Point 9 highlights the 'primacy of facts' when assessing whether a contract forms an employment relationship. According to point 13 "[m]embers should consider the possibility of defining in their laws and regulations, or by other means, specific indicators of the existence of an employment relationship." While the 2006 Recommendation does not refer specifically to platform work, this is addressed in the 2019 report "Work for a brighter future" from the Global Commission on the Future of Work: The Commission inter alia highlights that "societies need to fill the gaps and adapt systems to the evolving world of work by extending adequate social protection coverage to workers in all forms of work, including self-employment". [10]

Status as a 'worker' is also decisive for the right to bargain collectively and to conclude collective agreements. In short: While collective agreements concluded by employers' and workers' unions are excluded from scrutiny by competition law, competition rules forbid cooperation between the self-employed on prize setting. However, in the ICTU complaint case from 2016 the European Committee on Social Rights (ECSR) held that the right to collective bargaining under the European Social Charter article 6 may under certain circumstances be extended also to

[7] NOU 2021: 9 Den norske modellen og fremtidens arbeidsliv. Utredning om tilknytningsformer og virksomhetsorganisering. (The Norwegian model and the working life of the future. Report on forms of affiliation and business organization.)
[8] An ILO working paper on platform work published recently, gives an overview of legislative initiatives and case law from different countries, aiming at ensuring social protection for digital platform workers, cf. ILO Working paper 27 Platform work and the employment relationship, 31 March 2021.
[9] Employment Relationship Recommendation, 2006 (No. 198).
[10] Work for a brighter future – Global Commission on the Future of Work – 2019, p. 36.

individuals who are genuinely self-employed: "[I]t is not sufficient to rely on distinctions between worker and self-employed, the decisive criterion is rather whether there is an *imbalance of power* between the providers and engagers of labour. Where providers of labour have no substantial influence on the content of contractual conditions, they must be given the possibility of improving the power imbalance through collective bargaining".[11]

Initiatives have also been taken at EU level to provide some social protection also to groups outside the traditional employment contract. The European Pillar of Social Rights point 12 extends the right of 'social protection' to self-employed, where they work under 'comparable conditions' to workers."[12] However, the Pillar is a non-binding instrument and the content of 'social protection' is unclear. Some more concrete measures are sketched in the 2019 Council Recommandation on access to social protection for workers and the self-employed, covering inter alia unemployment compensation and sickness benefit.[13] Another instrument, at EU Social partner level, is the Framework agreement on digitalization of June 2020. This agreement covers "all workers and employers in the public and private sectors and in all economic activities including in activities using online platforms", however referring to national definitions of employment."[14] In December 2021 the Commission put forward a proposal for a new Directive aimed at improving the working conditions for people working through digital platforms.[15]

EU law uses the term 'worker' in several legal instruments, but EU law is not based on at common notion of 'worker'.[16] It varies whether the term is defined by EU law or left to national definition.[17] Also, the scope of 'worker', as defined by EU law, may vary between different legal areas (Hotvedt, 2018b, p. 73). For instance, a wide definition has been applied under EU law on free movement of workers (Hotvedt, 2020, p. 74).

A 'maximum' approach on the EU notion of 'worker' has been applied on a directive on workers' minimum rights: In the Yodel case of 2020, C-692/19, regarding platform work, a neighbourhood parcel delivery courier claimed to be a worker in relation to the Working Time Directive of 2003.[18] This Directive does not define the notion of 'worker', nor does it explicitly leave the definition to national law. The ECJ held that the concept of 'worker' in the Directive has an autonomous meaning specific to EU law (pa. 26). The ECJ rules that "Directive 2003/88 must be interpreted as *precluding*[19] a person engaged by his putative employer under a services agreement which stipulates that he is a self-employed independent contractor from being classified as a 'worker' for the purposes of that directive" when certain factors, listed in the Order, are present. The ECJ emphasises the person's discretion to use subcontractors or substitutes; to accept or not accept tasks; to provide his services to any third party, and to fix his own hours of 'work'. However, the independence of the person must not appear to be fictitious, and it must not be possible to establish the existence of a relationship of subordination between the person and his putative employer (pa. 45).

[11] Emphasis added. Irish Congress of Trade Unions (ICTU) Irish Congress of Trade Unions (ICTU) v. Ireland, Complaint No.123/2016 pa. 38 i.f. *See also*: Hotvedt, 2020, p. 1-44.
[12] Interinstitutional Proclamation on the European Pillar of Social Rights (2017/C 428/09).
[13] Council Recommendation of 8 November 2019 on access to social protection for workers and the self-employed (2019/C 387/01.) point 3.2.
[14] European Social Partners Framework Agreement on Digitalization of June 2020, p. 4. The framework agreement highlights i.a. working time issues and the possibility to disconnect.
[15] Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, COM/2021/762 final.
[16] Cf. e.g., Case C-85/96 Martinez Sala, EU:C:1998:217 (pa. 31).
[17] Cf. e.g., Hotvedt, 2018b, ch. 3.
[18] Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organization of working time; Order No. C-692/19, B/Yodel, ECLI:EU:C:2020:288, ECJ 22 April 2020.
[19] Emphasis added.

Also, EU competition rules and rules on free movement of services may set limits to how widely states can define 'worker' (*See e.g.*: Hjelmeng, 2016, p. 316-326).[20] This was demonstrated in the FNV-case from 2014: A Dutch collective agreement concluded by a trade union had set minimum fees covering also self-employed members of the union. The ECJ held that it was only when the self-employed members «are 'false self-employed', in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement […] does not fall within the scope of Article 101(1) TFEU."[21] An European Commission initiative of 2020, however, recognizes that not only bogus self-employed, but also "genuine solo self-employed might be in a situation of unbalanced negotiation power and competition law can be an obstacle for them to collectively bargain to improve their precarious situation". The initiative seeks to ensure that working conditions can be improved through collective agreements not only for employees, but also for those self-employed who need protection.[22] In December 2021, the Commission launched a public consultation on draft guidelines on collective bargaining of self-employed.[23]

Several European national court cases have decided on platform workers' status. Results vary, according to national law and specific factors of the cases. Nevertheless, the trend appears to be towards a more thorough scrutinizing of formal self-employment. In February 2021, the UK Supreme Court found that the UK Uber London drivers in question were "workers" in relation to the UK Employment Rights Act of 1996. [24] The UKSC inter alia assessed factors such as standardization of contract terms; autonomy in relation to when and how much to work (formal and in practice); discretion to deliver services to other clients (including whether the platform hindered direct communication between drivers and clients); and the duration and stability of contract. This was then compared to other digital labour platforms where the contract conditions (including the content of the service and prices) are not standardized, where consumer ratings are published, and where the platform do not hinder direct communication between service provider and customer. Also Spanish and Dutch courts have decided on the employment status of platform workers, according to national law. In the Glovo cases, the Spanish court found that delivery couriers were workers, emphasizing standardized processes, dependence between worker and company, that formal working time 'freedom' practice resulted in a competition for the most profitable working times, the platform's control of performance and the disciplinary regime.[25] In the Netherlands, a group of Deliverioo couriers were assessed to be employees. The court emphasized that the freedom in performing work had strong limitations, and there was little freedom to negotiate terms. [26]

3. NORWEGIAN LABOUR AND EMPLOYMENT LAW. ECONOMIC RISK ALLOCATION AND THE CATEGORIZATION OF LABOUR ENGAGING INDIVIDUALS. 'EMPLOYEES' OR 'NON-EMPLOYEES'

As mentioned in the introduction, Norwegian employment and labour law is basically operating with two categories: employees and non-employees. Employee status is often a determining factor for economic risk allocation, both in situations concerning lack of demand for the person's labour and in situations of individual obstacles for the person to offer his or her services.

---

[20] In Commission vs. Austria, C-161/07, ECLI:EU:C:2008:759, the Austrian method of distinguishing between self-employed persons and employees deriving from Austrian legislation was held to be a restriction on the freedom of establishment.
[21] C-413/13 pa. 42, ECLI:EU:C:2014:2411.
[22] Press release 30 June 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1237 (visited 12 July 2021).
[23] https://ec.europa.eu/competition-policy/public-consultations/2021-collective-bargaining-2_en (visited 13 January 2022).
[24] [2021] UKSC 5, Uber BV and others (Appellants) v Aslam and others (Respondents), Judgment given on 19 February 2021. *See also*: ILO Working paper 27 Platform work and the employment relationship, 31 March 2021.
[25] SENTÈNCIA NÚM. 1034/2020, La Sala Social del Tribunal Superior de Justícia de Catalunya, Barcelona, 21 February 2020.
[26] ECLI:NL:GHAMS:2021:392, Gerechtshof Amsterdam, 16 February 2021.

The most important Norwegian act regulating the rights of employees is the Working Environment Act (WEA).[27] Section 1-2 (1) states that the act applies to all "undertakings that engage employees …". The WEA is also regulating employment protection and minimum periods of notice, cf. Chapter 15. If a worker is dismissed due to lack of need for his or her services, the employer must pay him or her during a minimum notice period, regardless of whether there are tasks to be performed. The employer's economic risk in case of lack of demand for the employee's labour is also demonstrated by the Mandatory Wages Act.[28] During temporary furloughs, the employer must pay the laid-off employee's wages for a notice period, and after that for an employer's pay period without using the employee's labour, cf. Section 3.

In relation to the allocation of financial risks, it is also important to note that according to the WEA Section 14-9 (1) "[a]n employee shall be appointed permanently" unless there is a specific legal basis for fixed-term employment. Although zero-hour contract workers can be considered employees under Norwegian law (see below in this Chapter), the WEA does not accept zero-hour contracts as 'permanent' employment contracts, mainly due to the lack of income security for the employee. The WEA Section 14-9 (1) defines 'permanent employment' as "appointment [that] is continuous and not time-limited, [where] the provisions of the Act concerning termination of employment apply and [where] the employee is ensured predictability of employment in the form of a clearly specified amount of paid working hours." This means that for contracts of employment for platform work to be legitimate, they must either be construed as a permanent part-time contract with the possibility to accept extra shifts, or as a series of subsequent fixed-term appointments.[29] Valid reasons for fixed-term appointments are specified in WEA Section 14-9(2), including "work … of a temporary nature" (a), and "work as a temporary replacement for another person or persons" (b).[30]

The employer also carries some economic risks for periods where the employee is absent from work due to individual circumstances, such as holiday pay under the Holidays Act, and mandatory employer period sick pay under the National Insurance Act [NIA].[31] Finally, employers are required to provide their employees with mandatory supplementary pension insurance and mandatory additional occupational injury insurance. [32]

In addition to legislation, a relatively large part of the labour market in Norway is covered by collective agreements, defined in the Labour Disputes Act of 2012 as "an agreement between a trade union and an employer or employers' association regarding employment and wage terms or other working conditions", cf. Section 1(e).[33] The Norwegian Competition Act Section 3(1) states that the Act does not apply to working and employment conditions, meaning that wages and working conditions in collective agreements are not subject to scrutiny by the competition authorities. The Act implements EU/EEA competition law and should be interpreted in accordance with this.

Collective agreements are not common for platform work, but in 2019 some Foodora couriers were able to conclude a collective agreement after a five-week strike.[34] This collective agreement includes minimum wage rates,

[27] Act 17 June 2005 No. 62 relating to working environment, working hours and employment protection, etc. (Working Environment Act) (arbeidsmiljøloven).

[28] Act 6 May 1988 No. 22 relating to the duty to pay wages during a temporary lay-off (the Mandatory Wages Act) (permitteringslønnsloven)

[29] Foodora uses the first model for its employees, see newspaper Klassekampen 30 April 2021 and Nordic report p. 60.

[30] And in some other situations defined in the Sections 14-9 and 14-10.

[31] Act 29 April 1988 No. 21 relating to Holidays (Holidays Act) (ferieloven). Act 28 February 1997 No. 19 on National Insurance (National Insurance Act) (folketrygdloven). See further below (Chapter IV) on the benefits of the NIA.

[32] Compulsory Occupational Pension Act of 21 December 2005 No. 124 (lov om obligatorisk tjenestepensjon); Act relating to industrial injury insurance of 16 June 1989 No. 65 (yrkesskadeforsikringsloven).

[33] Labour Disputes Act of 19 June 2012 No. 9. A trade union is defined in Section 1 (c) as "any federation of employees or employees' unions with the purpose of safeguarding the employees' interests vis-à-vis their employers".

[34] Nordic report Chapter 5. *See also*: Nordic Labour Journal news Sep 19, 2019, 'Oslo Foodora riders on strike'.

reimbursement for equipment, extra pay in wintertime and a collectively agreed early retirement pension.[35] At present, Foodora couriers may choose whether they want to conclude employment contracts or contracts to work as self-employed.[36] Foodora couriers choosing to be employees are hired on marginal part-time contracts (10 hours per week), with the possibility to take up extra shifts. The competing food delivery service Wolt is not accepting employer responsibility and is engaging couriers as self-employed or employed for a partner company. The same – basically – applies to the re-established Uber.[37]

To what extent are platform workers included under Norwegian employment law?

Norwegian employment law does not distinguish between "employees" and "workers". According to the WEA Section 1-8 (1), "employee" (arbeidstaker) shall mean "anyone who performs work in the service of another". The definition of the Holidays Act is similar and the concepts of employee under the WEA and the Holidays Act are to be interpreted similarly.[38] The same applies to the employee concepts of the Mandatory Wages Act and the Labour Disputes Act.[39]

The concept of 'employee' has been interpreted in several recent Norwegian Supreme Court (NSC) judgments, however none directly addressing workers in the platform economy. These judgments have frequently referred to a non-exhaustive seven-point list of factors, given in preparatory papers to the WEA. In short:

1. an employee has an obligation to perform personal work, and cannot use substitutes,
2. an employee is under instruction and control from the employer,
3. the employer supplies the work equipment,
4. the employee does not carry the economic risk for the service,
5. pay is given in the form of remuneration,
6. the contract has a certain stability and duration,
7. an employee works mainly from one client – the employer.[40]

The factual circumstances of the contract arrangement are decisive, not formalities.[41] The concept of "employee" should be interpreted broadly.[42] In assessing whether a person is an employee, the need for protection should be considered.[43] The development under recent NSC jurisprudence has been towards a stronger aim orientation (*See e.g.*: Hotvedt, 2018a; Hotvedt 2018b).

Some factors appear to have lost importance since the list was provided. Whether the putative employer provides the tools or work equipment (factor 3) was considered a prominent factor in earlier times.[44] This factor appears to have been given less weight in recent jurisprudence (*See:* Hotvedt, 2018b, p. 71). The person's right to perform services to other clients (factor 7) have been addressed, but not been given much weight.[45]

The factor most problematic in relation to platform workers is the freedom to choose when and how much to work, and the lack of control by the platform of the content of the service provided (factors 6 and 2). Platform

[35] Nordic report, p. 58-59.
[36] Newspaper Klassekampen 30 April and 4 May 2021.
[37] According to the Uber Norwegian Website, drivers may choose to set up their own business and apply for a taxi license or to drive under an Uber Fleet Partner, cf. https://www.uber.com/no/en/drive/requirements/. (visited 14 July 2021).
[38] *See* NSC Judgment Rt. 2013, p. 354, *Avlaster I* (pa. 38). Cf. also NOU 2004: 5, point 10.5.2.
[39] Ot.prp. nr. 11 (1987–1988), p. 36 and Prop. 134 L (2010–2011), point 9.1.
[40] Ot.prp.nr. 49 (2004–2005), p. 73. NSC Rt. 2013, p. 342 *Beredskapshjem* (pa. 46 ff.).
[41] *Avlaster I* (pa. 37).
[42] *Avlaster I* (pa. 39).
[43] *Avlaster I* (pa. 38).
[44] *See e.g.* judgment by the Norwegian Labour Court, ARD 1996, p. 91.
[45] *Tupperware,* p. 1049. Under Norwegian law, the general rule is that also employees have the right to offer their labour to another employer in their resting time, *see e.g.* Rt. 1959, p. 900 *Sveiser.*

workers often experience a combination of formal autonomy and factual subordination, making them formally free and at the same time economically dependent (Hotvedt, 2016).

Factor 2, control by the putative employer, have been assessed as an important factor in NSC jurisprudence when deciding whether a person is an employee or an independent contractor.[46] *Legal competence* to control the employee is sufficient. The actual control may be exercised by other persons than the employer, for instance clients.[47] This factor will also include possibility to control workers via technology, which is a prominent feature in platform work. Autonomy in relation to work performance has been considered as a strong argument against status as an employee.[48]

Autonomy in relation to freedom to choose when and how much to work, is also an important factor in the assessment.[49] An earlier NSC judgment from the 1980-ies, Rt. 1984 p. 1044 *Tupperware*, found that a provider of "home-parties" selling "Tupperware" was not an employee. The freedom to decide when, where and how much to work was emphasized, elements transferrable to the situation of platform workers. Duration and stability of contract (factor 6) have been assessed as factors in assessing whether a person is an employee or an independent contractor.[50] However, this does not exclude zero-hour contract workers to be considered as employees.[51] Nor is duration and stability necessarily decisive in a positive sense for a person to be assessed as an employee.[52]

Another factor is remuneration, see factor 5.[53] This may relate to whether the individual is paid by task or by the hour, see also factor 4. Still, also individuals paid according to tasks completed, may be employees, such as taxi-drivers. Whether the remuneration from the putative employer is the person's main source of income may influence the assessment.[54]

The possibility to use a substitute of one's own choice (factor 1) is considered a very weighty argument against a person being classified as an employee.[55]

At present, it seems unclear to which extent digital platform workers will be considered employees under Norwegian employment law, and the decision would probably depend on the conditions of the contract.[56] A recent proposal to specify the employee definition and introduce a legal presumption for employee status when certain markers are present, will – if adopted – probably make it easier for a platform worker to obtain employee status, see below under Chapter VII.

Still, not all platform workers can and want to become employees, with an employer. As mentioned, couriers in Foodora may choose whether to be engaged as employees or as independent contractors. More than half of the couriers have chosen the last option.[57] Other platforms may not entail the same control mechanisms and standardizing of terms as those present in e.g., the UKSC Uber London judgment. A digital platform like Care.com does not standardize prizes and services, and this may be a weighty argument against the service providers being recognized as employees.

---

[46] NSC HR-2016-1366-A *Avlaster II* (pa. 63). *See also* NSC Rt. 1984 p. 1044 Tupperware (1049).
[47] *Avlaster II* (pa. 64–65).
[48] Cf. inter alia Rt. 1984, p. 1044 *Tupperware*.
[49] Ibid.
[50] *See e.g.*: *Avlaster II* (pa. 58).
[51] See (for illustration) Rt. 2005 p. 826 Braaten and Prop.73 L (2017-2018) (preparatory papers to the WEA) Chapter 6.
[52] In *Tupperware*, the person was not found to be an employee despite having worked approximately full time over a period of 6 years.
[53] This i.a. relates to whether the person carries the economic risks for the result of the provided service, see Rt. 1994, p. 1064 vs. Rt. 2002, p. 996 (both on tax law).
[54] *See, e.g.* Rt. 1992, p. 534.
[55] *Avlaster II* pa. 70. Ot.prp.nr.49 (2004–2005) (preparatory papers to the WEA), p. 73. ARD-1955-117.
[56] For a thorough analysis *see* Hotvedt (2016).
[57] Klassekampen newpaper article 30 April 2021.

4. NORWEGIAN SOCIAL INSURANCE LAW: ECONOMIC RISK POOLING FOR DIFFERENT GROUPS, EMPLOYEES, FREELANCERS, AND SELF-EMPLOYED PERSONS

The most important Norwegian legal instrument on social insurance is the National Insurance Act, NIA. Benefits include compensation for loss of income due to unemployment, sickness, children's sickness, parental leave as well as basic and additional disability and old age pension and additional coverage for occupational injuries. The NIA divides labour engaging individuals into three categories: employees, freelancers, and the self-employed. The rights of the categories are different, with employees given the best coverage. This also reflects the amount of tax contributions paid by the different groups – or their employer.[58]

4.1. The Norwegian social insurance system in short

The Norwegian social insurance system is partly insurance based, partly redistributive. The NIA covers all persons with a legal residence in Norway, Section 2-1. All labour engaging individuals; employees, freelancers, and self-employed persons, earn 'pensionable income', as defined in NIA Section 3-15. This forms the basis for compensation for short-term loss of income and decides the size of long-term benefits such as national insurance pensions.

In short, the discrepancies between the three groups are larger in terms of societal risks, (such as lack of demand for the individual's labour), and less accentuated for individual risks (such as individual incapacity for work). The area where the differences are smallest, is parental benefit, a result of gender equality policy. The following overview of the social insurance system in Norway is over-simplified.

Employees who have been dismissed or temporarily laid-off because of lack of demand for their labour, may be entitled to *unemployment benefit* after the notice period of dismissal (normally 1-6 months), and after the mandatory employer pay period in case of furloughs (normally 14 days of notice + 10 days of pay without work).[59] Freelancers who are involuntarily unemployed are also entitled to unemployment benefit, if they can document loss of income.[60] The compensation rate of national insurance unemployment benefit (for both groups) is approximately 62 % of former income.[61] Self-employed persons are not covered by unemployment benefit unless they conclude a voluntary unemployment insurance or form a limited responsibility company and engage themselves as employees.

Employees with an incapacity to work due to the person's own sickness are entitled to statutory *sick pay*, at a rate of 100 %[62] of former income from day 1; first 16 days from employer, from day 17 from national insurance. Free-lancers with an incapacity to work due to their own sickness also receive 100 % sickness pay, but only from day 17 (from national insurance). Self-employed individuals receive sickness benefit from national insurance at a rate of 80 % of former income, from day 17. (The compensation rate for sickness benefit for self-employed persons was previously set at 65 % but has been lifted in recent years due to the former Centre-Right Government's policy to stimulate entrepreneurship).[63]

---

[58] Cf. inter alia Act 26 March 1999 No. 14 on tax on wealth and income [Tax Act] (skatteloven) Section 12-2, and NIA Section 23-2 on Employer's National Insurance contributions.
[59] NIA Chapter 4.
[60] The Mandatory Wages Act (on furloughs) covers only employees.
[61] Up to a certain wage maximum.
[62] Up to a certain wage maximum. Some employers pay full wages and seek redress from National Insurance.
[63] Granavolden agreed policy platform, p. 35, available from https://www.regjeringen.no/no/dokumenter/politisk-plattform/id2626036/ (visited 14 July 2021).

Employees are also entitled to sick pay to take *care of sick children*, with a 100 % coverage rate, first 10 days from employer. Freelancers and the self-employed are also entitled to sick pay at a rate of 100 % to take care of sick children, but not in the 'employer period'.[64] Parental benefits in case of childbirth are paid to all groups with a coverage rate of 100 %[65] from three weeks before presumed date of birth, entirely from national insurance.[66]

All categories of economically active individuals are covered by *disability and old age pension*.[67] The level of the pension benefit is depending on former "pensionable income". In addition to NIA benefits, employers are obliged to take out an occupational extra pension insurance for their employees and are also obliged to conclude an insurance for occupational injuries.[68] As shown under Chapter III, freelancers and self-employed persons are not included in the mandatory extra occupational pension insurance, nor is there a duty to insure them against work related injuries.[69]

4.2. Definitions of 'employee', 'freelancer' and 'self-employed' under social insurance law

The legal definition of 'employee' in the NIA is similar to the definition in WEA, but not identical:[70] An employee is defined as "anyone who performs work in the service of another for remuneration", cf. NIA Section 1-8.[71] A self-employed person is "anyone who runs a continuing operation or undertaking at own account, suited to provide a net income", cf. NIA Section 1-10. A list of criteria to assess whether a person is self-employed is included in Section 1-10. For instance, the scale of the operation is to be assessed, and whether the self-employed person has engaged employees or freelancers. A freelancer is defined as "anyone who performs work or service for remuneration, while not being in the service of another and not being a self-employed", cf. NIA Section 1-9. As can be seen, freelancer is a residual category for economically active persons who are neither in another person's service, nor do they run their own business.[72] There are no NSC Judgments on the status of platform workers in relation to the NIA.

It appears that persons delivering services in the form of personal labour via digital platforms can belong to all three NIA categories: They may be running their own business and take up assignments via one or more digital platforms. A person may also be categorized as a platform employee, under mainly the same circumstances as under employment law, for instance the bicycle couriers of Foodora. Typically, however, it appears that platform workers will be placed in the 'freelancer' category.[73] As such, at least formally they have a fairly good coverage of medium and long-term loss of pensionable income due to lack of demand or due to individual circumstances. However, they may fall short of the short-term income losses ('employer pay periods'), and of extra occupational pension and extra occupational injury benefit.

---

[64] NIA Section 9-9.
[65] Up to a certain wage maximum.
[66] NIA Section 14-7. Some employers pay full wages and seek redress from National Insurance.
[67] NIA Chapters 12, 19 and 20. Persons who have not been economically active are entitled to a minimum level pension.
[68] Act 21 December 2005 No. 124 on mandatory additional pension for workers, (Lov om obligatorisk tjenestepensjon [OTP-loven]) and Act 16 June 1989 No. 65 on insurance for occupational injuries (lov om yrkesskadeforsikring).
[69] Some additional benefits in case of occupational injuries are included in the NIA (Chapter 13).
[70] See preparatory paper to the NIA, NOU 1990: 20 Forenklet folketrygdlov p. 173, where it is stated that one cannot deduct from the employment law assessment of employee to the social insurance and tax law notion. NOU 1990: 20, p. 172 is listing six factors to be assessed to decide whether a person is an employee, (similar to the WEA preparatory papers definition, but excluding the factor of offering one's services mainly to one client). However, the list is non-exhaustive.
[71] Translations of the NIA draw heavily on the Norway report by Marianne Jenum Hotvedt (2020).
[72] Cf. HR-2016-589-A *Ordfører*. A mayor was assessed as a freelancer in relation to NIA sickness benefit. (Rt. 2013, p. 342 *Beredskapshjem* on mandatory employer period of sickness benefit appears to have been decided under the notion of 'employee' in the WEA.)
[73] *See also* Norway report, p. 25.

5. THE COVID-19 PANDEMIC AND MEASURES TO SECURE SOCIAL PROTECTION TO LABOUR ENGAGING INDIVIDUALS

On March 12th, 2020, Norway introduced several lockdown measures, affecting large parts of society life, and including the closure of schools and kindergartens. Those institutions opened by the end of April 2020, but infection control measures have been switched on and off – or tuned up and down – depending on variations in infection rates, causing economic crises in several branches of business. The Norwegian state has issued a wide range of measures to compensate for the economic losses due to Covid-19 and the lockdown measures. However, in Norway, like in many other countries, the crisis caused by the pandemic has demonstrated and reinforced differences between employees with fixed salaries and permanent positions and people with a more marginal position in the labour market, including platform workers. It can also be argued that measures aimed to compensate for loss of income due to Covid-19 have not met the needs of digital platform workers, typically freelancers, to the same extent as regular employees and the self-employed.

One important practical problem for platform workers has been the instability and insecurity of income: They may face difficulties in documenting loss of income. Many platform workers also have combined incomes, including income as employee, freelancer and self-employed, meaning that their loss of income may not meet the eligibility requirement thresholds to receive compensation in each of the categories.

Some government measures were made to alleviate the risk of income losses caused by lack of demand for the individual's labour (societal risks): In relation to unemployment benefit, entry conditions (requirement of earlier income, minimum percentage of loss of income) were softened, and the rate of compensation was set higher and with a longer duration.[74] The state took over much of the economic risk from the employer in case of furloughs, aiming to make furloughs easier and to avoid dismissals and lasting unemployment. This served as an economic relief especially for employees in traditional employment relationships. Partially, the softened entry conditions and the higher compensation rates also benefitted the typical – freelance – platform worker. Still, freelancers do not receive pay during the employer mandatory pay period. And the instability of former income made it more difficult for freelancers to fulfil those requirements. Platform workers who are self-employed are – as mentioned above – not entitled to unemployment compensation from national insurance.

For the self-employed, the state issued several compensation measures for loss of income due to lockdown and the effects of covid-19 on the demand for the individual's services. Partly because of the concerns mentioned above, these compensation arrangements have also been made available to freelancers.[75] Freelancers have been able to choose between this compensation arrangement and other benefits covering the same loss, such as unemployment benefit.

The *sickness benefit* has been left generally unchanged for all groups. However, it has been made available also to those quarantined. Because a quarantine normally last for less than 16 days, mostly employees with an employer have benefitted from these amendments. The same applies for sickness benefit to care for sick children, which was made applicable also during school and kindergarten lockdowns and to care for quarantined children. Again, the benefit is for all, but employees are the ones mostly benefitting from it. However, some reliefs were made also for non-employees: National insurance paid sickness benefits from day 4 to freelancers and the self-employed, where

[74] The benefit was also given a more redistributive shape, giving higher compensation for the first NOK 300 000 of yearly income. Cf. Midlertidig forskrift om unntak fra folketrygdloven og arbeidsmiljøloven i forbindelse med covid-19-pandemien FOR-2020-03-20-368 (Temporary regulation on exemptions from the National Insurance Act and the Working Environment Act in connection with the covid-19 pandemic).

[75] Midlertidig lov om kompensasjonsytelse for selvstendig næringsdrivende og frilansere som har mistet inntekt som følge av utbrudd av covid-19, LOV-2020-06-12-62. (Temporary Act on compensation benefit for self-employed persons and freelancers who have lost income as a result of an outbreak of covid-19). Cf. also Nav (Norwegian Labour and Welfare Administration) webpages: https://www.nav.no/person/selvstendig-naeringsdrivende/ (visited 14 July 2021).

the sickness were related to the pandemic.[76] And the benefit to care sick children were expanded to twice the regular number of days, paid by national insurance.

6. SOME CONCLUSIONS

The legal position of platform workers in Norway is basically unclear, both in terms of labour and employment law and in terms of social insurance law. They may be placed in all three categories of labour engaging individuals: employee, freelancer or self-employed, and they may have combined incomes from all three categories.

Platform workers are covered by several general social security benefits or compensation measures under Norwegian law, as the NIA income compensation benefits are based on the loss of "pensionable income". All groups have access to medium and long-term benefits like work assessment allowance, disability pension and old age pension, and to short-term benefits like sickness benefit and benefit to take care of sick children. One major lacuna appears to be that most self-employed persons are not covered by unemployment benefit.

However, platform workers assessed as non-employees face certain risks of non-compensation particularly for short term loss of income due to lack of demand for their services or due to individual incapacity to work. These risks may stem from differences in legal status, but also from factual differences.

Differences in legal status are seen in a lack of compensation for short-term obstacles to work performance. Non-employees do not profit from employer pay periods, including notice periods in case of dismissals, mandatory employer pay periods in case of furloughs and mandatory employer pay periods in case of the employee's own or his or her children's sickness.

Platform workers may also be less protected due to *factual circumstances*. Variable income makes it difficult to document loss of income for a certain period. Low income, variable income and income from different sources make it difficult to reach the thresholds of former income to qualify for unemployment compensation or compensation related to sickness and family situation. Voluntary extra social insurance coverage for the self-employed may not be fitting low-income platform workers.

These inequalities have been perpetuated and partially reinforced during the Covid19-pandemic. While most employees have been able to get a wage advance from their employer, free-lancers have been forced to wait several months for National Insurance to pay their benefits. Also, infection control measures have been reported to hamper the income possibilities of freelancers and solo self-employed persons.

7. THE FUTURE OF LABOUR REGULATION FOR PLATFORM WORKERS IN NORWAY

As demonstrated above, the challenges arising from digitalisation and platform work has led to several political initiatives. In 2019, the Norwegian government appointed an official commission to explore the challenges of non-standard work, including platform work.[77] The social partners were represented in the commission. The commission submitted its report on June 23rd, 2021, in the form of an Official Norwegian Report (NOU).[78] The majority of the commission, (including the representatives from trade unions and the independent expert members), has proposed a new and more specified definition of 'employee' in the WEA, combined with a legal presumption of employment status when certain markers are present.

---

[76] Midlertidig forskrift om unntak fra folketrygdloven og arbeidsmiljøloven i forbindelse med covid-19-pandemien FOR-2020-03-20-368 §§ 3-4 and 3-5.

[77] https://www.regjeringen.no/no/aktuelt/utvalg-skal-se-pa-fremtidens-arbeidsliv/id2666279/ (visited 14 July 2021).

[78] NOU 2021: 9 Den norske modellen og fremtidens arbeidsliv — Utredning om tilknytningsformer og virksomhetsorganisering. (The Norwegian model and the working life of the future - Report on forms of affiliation and business organization.)

The following definition is to be applied: "For the purposes of this Act, employee shall mean anyone who performs work for, and subordinated, another. In the decision, emphasis shall be placed on, among other things, whether the person in question puts her or his labour at the disposal of another, whether there is a personal duty to work, and whether the person in question is subordinated through management, direction, and control. Where there is reasonable doubt as to the classification, the relationship shall be classified as employment unless the client proves that the person is an independent contractor."[79]

Should this proposal be followed, the putative employer of a platform worker will have to demonstrate that a contractual arrangement is not a contract of employment.

It is also interesting to note that the proposal entails a general anti-circumvention clause, cf. WEA proposed new Section 1-10:

> "(1) Provisions and agreements which entail a circumvention of this Act may be set aside by the courts as invalid. In such cases, the employee's legal position is determined by court decision.
>
> (2) In assessing whether there is circumvention, emphasis shall be placed on whether the disposition or agreement is wholly or partly motivated by, or has the effect that, the employee is deprived of rights. Emphasis can also be placed on, among other things, imbalance of power between the parties and the economic and welfare impact of the disposition or agreement."[80]

These are promising proposals to clarify the status of platform workers and provide them with the social protection awarded by employment law.

The commission also investigates the notion of 'employee' in the Labour Disputes Act, covering collective labour law. At present, this notion is to be interpreted in the same way as 'employee' in the WEA. Awaiting the EU clarification on the borders between collective labour law and competition law, the commission however makes no proposals to amend the Labour Disputes Act.[81]

The commission has only to a limited extent been able to investigate the notion of 'employee', 'freelancer' and 'self-employed' in the NIA, and the difference in benefits awarded to the different groups. However, it states that the corona pandemic has highlighted the need for a social safety net for freelancers and the self-employed. The majority of the commission members recommends that this issue should be investigated in more detail.[82]

The proposals made by the commission appears to be useful. As demonstrated by this article we need social benefits better tuned to the ways of earning that platform workers have. Another idea in this respect could be to offer unemployment benefit based on former economic activity, not contractual status, like it is done in Denmark.[83]

REFERENCES

Hjelmeng, E. (2016). The Concept of an «Undertaking» – On the Borderline between Labour Law and Competition Law. In B.J. Mulder, M.J. Hotvedt, M. Nesvik & T.L. Sundet (Eds), *Sui Generis: Festskrift til Stein Evju*. Oslo: Universitetsforlaget, s. 316-326.

Hotvedt, M.J. (2016). Arbeidsgiveransvar i formidlingsøkonomien? *Tilfellet Uber. Lov og rett, 55*(8), 484–503. https://doi.org/10.18261/issn.1504-3061-2016-08-03

Hotvedt, M.J. (2018a).The contract-of-employment test renewed, A Scandinavian approach to platform work. *Spanish Labour Law and Employment Relations Journal, 7*(1-2):56. http://dx.doi.org/10.20318/sllerj.2018.4436

[79] Cf. proposal for an amended Section 1-8(1) of the WEA. Translation by the author.
[80] Translation by the author.
[81] NOU 2021: 9, p. 255.
[82] NOU 2021: 9, p. 256.
[83] Cf. Nordic Report, p. 20.

Hotvedt, M.J. (2018b). ARBEIDSTAKER – QUO VADIS? Den nyere utviklingen av arbeidstakerbegrepet [Employee – quo vadis? The newer development of the concept of employee], Tidsskrift for Rettsvitenskap (1), 42-103. http://dx.doi.org/10.18261/issn.1504-3096-2018-01-02

Hotvedt, M.J. (2020a). Kollektive forhandlinger for oppdragstakere? Rekkevidden av adgangen til å forhandle tariffavtaler i lys av internasjonal rettsutvikling [Collective bargaining for contractors? The scope of the right to conclude collective agreements in the light of development in international law]. *Arbeidsrett, 17*(1), 1-44.

Hotvedt, M.J. (2020b). Protection of platform workers in Norway Part 2 Country report. Nordic future of work project 2017–2020: Working paper 09. Pillar VI. Fafo 2020. https://www.fafo.no/images/pub/2020/Nfow-wp9.pdf

Jesnes, K. & Oppegaard S.M.N. (Eds) (2020). Platform Work in the Nordic Models: Issues, cases and responses', Report from the project 'The Future of Work, Opportunities and Challenges for the Nordic Models', Nordic Council of Ministers. http://dx.doi.org/10.6027/temanord2020-513