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International Regulation of Platform Labor

A Proposal for Action

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ABSTRACT

Platform-mediated work is a source of livelihood for millions of workers worldwide. However, because platforms typically classify workers as ‘independent contractors’, those workers are generally excluded from the scope of labor rights. This has a corrosive effect on working standards of platform workers, creating the need for an international regulatory framework to prevent a race to the bottom. To address this situation, the article proposes an outline for an International Labor Organization (ILO) Convention for the regulation of platform work going beyond the employee/independent contractor dichotomy. It identifies five core issues in the platform economy – low pay, poor working conditions, inaccessible and unreasonable contracts, unfair management, and a lack of representation – and demonstrates how existing ILO standards could be adapted to address these issues. The proposals are informed by the evidence collected by the Fairwork project through its participatory and multidisciplinary research.

1 Introduction

Platform-mediated work is a source of livelihood for millions of workers, with countless more joining their ranks as a result of the Covid-19 pandemic. Digital labor platforms worldwide earned an estimated income of at least US\$50bn in 2019 and probably much more.¹ However, because platforms typically classify workers as ‘independent contractors’, those workers are excluded from the scope of labor rights in most countries. Instead, both the risks and the costs of providing labor are transferred to the worker. This has a corrosive effect on working standards, not just for platform workers but for workers in competing enterprises whose terms and conditions are likely to be undermined. There is therefore an urgent need to provide a regulatory framework which operates not just in specific countries but internationally to prevent a race to the bottom and support best practice across all platforms. At the same time, existing employment rights, which, in most jurisdictions, were designed for a standard employment relationship, need to be modified and adapted so that they can be usefully extended to *all* digitally mediated work.² Around the world, platform companies exert a spectrum of control over platform workers, ranging from disguised employment relationships to directories and marketplaces that place relatively few constraints over how workers and clients interact with one another.³ While recognizing that there are platforms whose models enable workers to operate with relative independence, and others which operate expressly through standard employment contracts, attempts to classify platform workers as employees (for example, based on criteria such as control or dependence) as a precondition of enjoying basic rights at work has not yielded a reliable framework for ensuring decent work standards in the context of digitally mediated work.

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- ¹ Richard Heeks, ‘How many platform workers are there in the Global South?’ (ICT4DBlog, 29 Jan 2019). <<https://ict4dblog.wordpress.com/2019/01/29/how-many-platform-workers-are-there-in-the-global-south/>> accessed 06 March 2021. According to one estimate, 8 percent of Americans have worked in the ‘ghost economy’ performing on-demand piecework: Mary L Gray and Siddharth Suri, *Ghost work: how to stop Silicon Valley from building a new global underclass* (Houghton Mifflin Harcourt 2019)
- ² According to ILO guidelines, workers have informal jobs if their employment relationship is, in law or practice, not subject to national labor legislation, income tax, social protection or rights to employment benefits such as notice, severance pay, paid leave etc. (ILO Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204)). It refers to non-standard employment as including (i) temporary employment; (ii) part-time work and on-call work; (iii) temporary agency work; and (iv) disguised employment relationships and dependent self-employment. Non-standard work can be in the formal or informal economy. This paper follows this classification.
- ³ See e.g.: Jeremias Prassl, *Humans as a Service* (OUP 2018); Alex Rosenblatt, *Uberland: How Algorithms are Rewriting the Rules of Work* (UC Press 2018); Jeremias Prassl and Martin Risak, ‘Uber, TaskRabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork’ (2015-16) 37 *Comp. Lab. L. & Pol’y J.* 619; Valerio de Stefano, ‘The rise of the “just-in-time workforce”: on-demand work, crowdwork, and labor protection in the “gig economy”’ (2016) 37(3) *Comp. Lab. L. & Pol’y J.* 471; Michael Doherty and Valentina Franca, ‘Solving the ‘Gig-Saw’? Collective Rights and Platform Work’ (2020) 49(3) *ILJ* 352; Alex Wood et al., ‘Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Gig Economy’ (2018) 33(1) *Work, Employment and Society* 56; Julia Tomasetti, ‘Rebalancing Worker Rights and Property Rights in Digitalised Work’, available at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3345808> accessed 13 September 2020; Alan Bogg, ‘Taken for a Ride: Workers in the Gig Economy’ (2019) 135 *LQR* 219.

Indeed, a survey of jurisprudence and legislation across jurisdictions reveals that policy-makers, legislators, and - especially - courts have struggled to articulate appropriate regulatory frameworks to address the reality of platform work. This is because traditional labor law regimes - premised on certain assumptions regarding the employment relationship in paradigmatic, physical-world settings such as the factory or the shop-floor - are ill-suited to specific features of platform work, such as the centrality of the app (as opposed to ownership of equipment), the use of ratings systems for surveillance, and the segmented or atomized nature of the workforce. An example of this is how courts in different jurisdictions have come to differing conclusions about whether drivers working for ride-hailing apps are employees or not; many of these judicial decisions have acknowledged the insufficiency of the existing regulatory framework, with one court memorably comparing it to trying to fit “two square pegs for a round hole.”⁴

This article aims to address these issues by proposing an outline for an International Labor Organization (ILO) Convention for the regulation of platform work going beyond the employee/independent contractor dichotomy. It does so because the ILO is the United Nations agency tasked with setting international labor standards, as well as promoting rights at work, encouraging decent employment opportunities, enhancing social protection, and strengthening dialogue on work-related issues. Its tripartite structure gives an equal voice to workers, employers and governments in all of these aspects of its work, and in particular, in standard-setting. Established in 1919, the ILO now has 187 member states. Conventions are legally binding international treaties setting out international labor standards which are drawn up by representatives of governments, employers and workers, and adopted at the annual International Labor Conference. Once a standard is adopted, member states must submit it to their parliaments or other competent authority to consider ratifying it. By ratifying a Convention, a member state undertakes to apply it in national law and practice and to report on its application periodically. There are also

⁴ Douglas O'Connor v Uber Technologies, No. C-13-3826 EMC, March 11, 2015 (Northern District of California); Dynamex v The Superior Court of Los Angeles County, Ct. App. 2/7 B249546 (Supreme Court of California); Uber v Bensalem, Case C-320/16 (10th April 2018) (Grand Chamber of the European Court of Justice); Michael Kaseris v Rasier Pacific, V.O.F., [2017] FWC 6610 (Australian Fair Work Commission); Pallage v Rasier, [2018] FWC 2579 (Australian Fair Work Commission); Razak v Uber, CA No. 16-573 (April 11, 2018) (District Court for the Eastern District of Pennsylvania); Lawson v Grubhub, Case No. 15-cv-05128-JSC (February 8, 2018) (District Court of the Northern District of California); Vega v Postmates, 2018 N.Y. Slip. Op. 4610 (June 21, 2018) (Appellate Division of the Supreme Court of New York); Inake v Deliveroo, 6622665 CV EXPL 18-2673 (July 23, 2018) (Court of First Instance, Amsterdam); Uber v Aslam & Farrar EWC (Civ) 2748 (2018) (UK Court of Appeal).

supervisory bodies and complaints procedures⁵ which can be initiated against countries for violating a ratified Convention.⁶ In a major step forward in 1998, the ILO identified a set of core principles which all ILO member states have a duty to respect and realize regardless of whether they have ratified the Conventions in question. These include freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced labor; the abolition of child labor; and the elimination of discrimination in employment and occupation⁷. An ILO Convention on platform work would therefore play an important role in creating binding labor standards which address the global nature of platform work as well as the particular vulnerability of platform workers. Once such a Convention were adopted, ratifying states would need to enact regulations which meet these standards while at the same time reflecting the specificities of their own domestic contexts. While the ILO has been subject to criticism on a number of fronts, it remains the foremost UN body tasked with setting labor standards, with the unique quality of tripartism, and therefore a key actor in providing a framework of decent work standards in this field. This article identifies five core issues in the platform economy – low pay, poor working conditions, inaccessible and unreasonable conditions, unfair management, and a lack of representation – and suggests that an international Convention ought to contain ten parts, each dealing with a specific aspect of platform work as set out below. The Convention ought to be based on two core principles: (a) ‘universality’ (i.e., a threshold set of rights and entitlements should be available to *all* platform workers, regardless of how platforms classify them), and (b) the recognition that platform work can take diverse forms, requiring calibrated legal standards. The article draws on existing labor standards that have been adopted by the ILO, and demonstrates how they could be adapted to be suitable for platform workers. It builds on the Universal Labor Guarantee proposed by ILO Global Commission on the Future of Work,⁸ stating that “All workers, regardless of their contractual arrangement or employment status, should enjoy fundamental workers’ rights”. It proposes that international regulation should provide all the fundamental

⁵ Velibor Jakovleski, Scott Jerbi and Thomas Biersteker, ‘The ILO’s Role in Global Governance: Limits and Potential’, *International Development Policy | Revue internationale de politique de développement* [Online], 11 | 2019, Online since 11 February 2020, connection on 30 June 2021. URL: <http://journals.openedition.org/poldev/3026> accessed 13 September 2021; DOI: [10.4000/poldev.3026](https://doi.org/10.4000/poldev.3026); Thomas G. Weiss ‘Foreword’, in Steve Hughes and Nigel Haworth (eds.) *The International Labor Organization: Coming in from the Cold* (Oxon, UK: Routledge 2011); Guy Standing ‘The International Labor Organization’ (2010) 15(2) *New Political Economy* 307-18, DOI: [10.1080/13563460903290961](https://doi.org/10.1080/13563460903290961); Bernhard Boockmann ‘The Ratification of ILO Conventions: A Hazard Rate Analysis’ (2001) 13(3) *Economics and Politics*, 281-309, DOI: [10.1111/1468-0343.00094](https://doi.org/10.1111/1468-0343.00094); Philip Alston ‘Facing Up to the Complexities of the ILO’s Core Labor Standards Agenda’ (2005) 16(3) *EJIL*, 467–80, DOI: [10.1093/ejil/chi126](https://doi.org/10.1093/ejil/chi126).

⁶ ILO, ‘Conventions and Recommendations’ < <https://www.ilo.org/global/standards/introduction-to-international-labor-standards/conventions-and-recommendations/lang--en/index.htm> > accessed 12 March 2021.

⁷ ILO Declaration on Fundamental Principles and Rights at Work (adopted by the International Labor Conference, 18 June 1998) <<https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>> accessed 13 September 2021.

⁸ ILO, ‘Work For a Brighter Future: Global Commission on the Future of Work’ International Labor Office (Geneva, 2019) < https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf > accessed 6 March 2021 [ILO Work for a Brighter Future Report].

rights which all workers should be entitled to, while taking into account the specifics and varieties of this type of work. In this sense, it follows the model of the ILO's 2006 Maritime Labor Convention, which establishes minimum conditions of decent work for all seafarers working on ships flying the flags of ratifying countries. The Maritime Convention, like the proposed platform convention, aims both to provide decent work for workers in a global industry, and to secure fair competition and thereby the economic interests of both ship owners and workers.⁹ The proposal for an ILO Convention also complements and underpins measures proposed by the European Union for a minimum set of rights for platform workers regardless of their employment status.¹⁰ For reasons of space it is not possible to consider these measures more fully and, since ILO standards are of global application, these are used as the primary point of reference.

Throughout, the article recognizes that many platform workers value their relative freedom to determine their own working hours but rejects the contention that there is contradiction between such freedom and enjoyment of legal rights. Other than placing an upper limit on working hours, protection against exploitation will in no way diminish workers' existing rights.

The first part of this article reviews existing work undertaken by the ILO in the area of platform work. It shows that there is a general commitment to providing labor standards for platform workers but the detail of how a draft Convention might look is still absent. The second part draws on existing ILO standards and modifies them appropriately for platform workers in order to develop a proposal for a draft Convention, based on ILO principles but also informed by scholarly research, including the primary research of the Fair-work project (<https://fair.work/>) into the nature of labor standards appropriate for platform work. The ultimate aim is to enable the ILO to draw on this draft as a point of reference for a new Convention.

2 Background and context

A noticeable transformation in the world of work in the past decade has been the emergence of the digital labor platform economy (gig economy). While “gig work” is not entirely new, as the work on these platforms resembles many long-standing casual work arrangements, technological advances have led to a proliferation of types of work where digital tools are used as an

⁹ https://www.ilo.org/global/standards/maritime-labor-convention/what-it-does/WCMS_219665/lang--en/index.htm accessed 15 September 2021.

¹⁰ For a summary of EU initiatives in this area see <https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-improving-working-conditions-of-platform-workers> accessed 15 September 2021.

intermediary.¹¹ Digitally mediated labor marketplaces, or labor platforms, use digital technology to connect workers with consumers for one-off tasks or jobs that are completed either virtually or in person by an on-demand workforce. The technology utilizes smart-phone applications or websites for administering, requesting, providing, remunerating and evaluating work that delivers a range of consumer services and products. In this article, we use the term ‘digital labor platform’ to refer to a company that uses digital resources to mediate value-creating interactions between consumers and individual service-providing workers, i.e., that digitally mediates transactions of labor (Woodcock and Graham 2020). Digital platforms like Airbnb or eBay, where goods are exchanged, are not included within this definition.

2.1 Types of platform work

Among digital labor platforms, there are two broad types: ‘geographically-tethered’ or ‘location-based’ platforms, and ‘cloudwork’, ‘online work’ or ‘crowdwork’ platforms. In the first, the work is required to be done in a particular location. Examples include delivery driving (e.g. Deliveroo), transportation (e.g. Uber, Lyft), household services/home repair (e.g. Task Rabbit), and domestic work (e.g. care.com).¹² In the second, by contrast, the work can be performed from anywhere via the internet (e.g. data categorization or online freelancing). These platforms provide the ‘technical infrastructure for requesters to advertise tasks to large numbers of potential workers spanning different geographic and economic circumstances – “the crowd” – to retrieve and evaluate the results of completed tasks, and to pay individual workers for services rendered.’¹³ An example of a microtasking cloudwork platform is Clickworker, where clients can hire platform workers for ‘mobile crowdsourcing’ to ‘monitor brand campaigns and receive instant, up-to-date local market input by engaging our crowd on the ground via smartphones.’¹⁴ These platforms provide a centralized location for workers to identify tasks from different requesters, a method for submitting work products, and the financial and technical infrastructure to receive payment upon completion of work.¹⁵

¹¹ Janine Berg, Marianne Furrer, Ellie Harmon, Uma Rani and M. Six Silberman, ‘Digital labor platforms and the future of work: Towards decent work in the online world’ (International Labor Office, Geneva, 2018) <https://www.ilo.org/global/publications/books/WCMS_645337/lang--en/index.htm> accessed 6 March 2021; Mark Graham and Jamie Woodcock, ‘Towards a Fairer Platform Economy: Introducing the Fairwork Foundation’ (2018) 29 *Alternate Routes* 242.

¹² *ibid* 8.

¹³ Janine Berg et al. (n 11) 3.

¹⁴ *ibid*.

¹⁵ *ibid*.

2.2 Employment status and misclassification

Although there are a small number of sectors where platform workers are employed on employment contracts, they ‘are almost invariably classified as independent contractors, despite the fact that their work may be closely supervised and their pay is directed through a specific application or internet platform.’¹⁶ Classifying them as self-employed workers means that the workers are not entitled to the protections – relating to working hours, pay, occupational safety and health, voice and representation, and social protection – that are applicable to employees.¹⁷ A survey of 3500 microtask platform workers carried out by the ILO in 2015 and 2017 confirmed that, like most digital labor platforms, these platforms classified their workers as self-employed.¹⁸ A later study by the ILO revealed that almost all crowdwork terms of service contain clauses wherein workers attest that they are self-employed or “independent contractors”.¹⁹ This study observes that despite stipulating that workers have no employment relationship with the platform or client, many terms of service also impose constraints on workers’ autonomy that are not compatible with self-employment.²⁰ ILO surveys, and numerous studies,²¹ indicate several concerns that arise from platform work relating to the workers’ unclear employment status. These include misclassification of status to avoid employment law obligations, unfair treatment, low earnings, non-payment, lack of social protection, and lack of voice.²² Despite being classified as ‘independent’, platform workers may lack free agency, have little bargaining power, and may be subject to subordination and dependence.²³ Demand by workers for work outpaces supply of work, leading to competition among platform workers and a ‘race to the bottom’ in relation to terms and conditions of work. A number of studies show that platform workers receive low pay, at least in the case of

¹⁶ Corporate Legal Accountability Annual Briefing, ‘The Future of Work: Litigating Labor Relationships in the Gig Economy’ (Business and Human Rights Resource Centre, 25 March 2019) <<https://www.business-humanrights.org/en/from-us/briefings/the-future-of-work-litigating-labour-relationships-in-the-gig-economy/>> accessed 15 September 2021. See Glossary I.

¹⁷ *ibid* 43.

¹⁸ Joint ILO-Eurofound Report, ‘Working conditions in a global perspective’ (Office of the European Union and International Labor Organization, Luxembourg and Geneva, 2019) <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/--publ/documents/publication/wcms_696174.pdf> accessed 6 March 2021.

¹⁹ Janine Berg et al. (n 11) 13.

²⁰ *ibid* 104.

²¹ See, e.g., Gray and Suri (n1).

²² Global Commission on the Future of Work, ‘Job quality in the platform economy’ *ILO Issue Brief prepared for the 2nd Meeting of the Global Commission on the Future of Work* (2018) <https://www.ilo.org/global/topics/future-of-work/WCMS_569528/lang--en/index.htm> accessed 6 March 2021 (The Global Commission Report).

²³ ILO Future of Work Research Series, ‘The architecture of digital labor platforms: Policy recommendations on platform design for worker well-being’ (International Labor Office, Geneva, 2018).

industrialized countries,²⁴ aggravated in some cases by failure to pay workers for the tasks they have completed.²⁵

2.3 Health and safety

A further concern is the occupational safety and health implications of workers' status as 'independent contractors.' Service providers in platform work who provide similar services to those in traditional enterprises (for example, a house painter hired through an app as opposed to those engaged through a house painting service business), are exposed to the same hazards in the workplace. The difference is the apparent absence of an employer who is responsible for the health and safety of the platform worker.²⁶ If they are classified as independent contractors, workers will also be solely responsible for the payment of social security contributions.²⁷ Given the low levels of pay, it is not surprising that only a small share of workers report that they contribute to social security or a pension.²⁸

To sum up: the platform economy is characterized by independent contractor status for most workers, as employers have sought to put legal distance between themselves and workers in a bid to avoid labor costs and legal obligations towards workers.²⁹ This is achieved through casualization, externalization, and framing the relationship as a 'commercial relationship' rather than an 'employment relationship'.³⁰ The OECD³¹ notes that the misclassification of platform workers is prevalent around the world, and it is estimated that platform companies' costs would be 20-30% higher if they were to classify workers as

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- ²⁴ Birgitta Bergvall-Kåreborn, Debra Howcroft, 'Amazon Mechanical Turk and the commodification of labor' (2014) 29(3) *New Technology, Work and Employment* 213. See also Alek Felstiner, 'Working the crowd: Employment and labor law in the crowdsourcing industry' (2011) 32(1) *Berkeley Journal of Employment and Labor Law* 143.
- ²⁵ M.K. Lee, Daniel Kusbit, Evan Metsky, Laura Dabbish, 'Working with machines: The impact of algorithmic and data-driven management on human workers, Proceedings of the Association for Computing Machinery (ACM)' (2015) *Conference on Human Factors in Computing Systems (CHI)*, Seoul, 18–23 April. See also The Global Commission Report (n 15).
- ²⁶ Yogindra Samant, 'The Promises and Perils of the Platform Economy: Occupational Health and Safety Challenges and Opportunities for Labor Inspections' <https://www.ilo.org/safework/events/safeday/33thinkpieces/WCMS_681619/lang--en/index.htm> accessed 17 September 2019.
- ²⁷ The Global Commission Report (n 22); Eurofound, 'Employment and working conditions of selected types of platform work' Employment and working conditions of selected types of platform work' (Publications Office of the European Union, Luxembourg, 2018) <<https://www.eurofound.europa.eu/publications/report/2018/employment-and-working-conditions-of-selected-types-of-platform-work>> accessed 1 March 2021 (Eurofound Report).
- ²⁸ *ibid.*
- ²⁹ Debbie Collier and Emma Fergus (eds), *Labor Law in South Africa: Context and Principles* (Oxford University Press Southern Africa (Pty) Limited 2018).
- ³⁰ Niels Van Doorn, 'Platform labor: on the gendered and racialized exploitation of low-income service work in the 'on-demand' economy' (2017) 20(6) *Information, Communication & Society* 898.
- ³¹ OECD, 'Policy Responses to New Forms of Work' (OECD Publishing, Paris, 2019) <<https://doi.org/10.1787/0763f1b7-en>> accessed 6 March 2021.

employees.³² Categorizing workers as ‘independent contractors’ permits platforms to avoid not only direct costs such as minimum wages, maximum hours, paid leave and paid sick leave, but also the indirect costs arising from employee rights such as the right not to be unfairly dismissed.³³ Further consequences of such a categorization are a general lack of government oversight, the atomization of the workforce and a lack of collective representation of workers, large information asymmetries, and labor demand–supply mismatches.³⁴

2.4 Gender discrimination

Of added concern is the replication of gender discrimination in the context of platform work. The ILO Culmination Report³⁵ shows that algorithms used in job matching may perpetuate gender biases, including unequal pay for equal work and segregation of women into lower paying tasks or sectors. Gendered wage gaps have been documented across platforms, with women earning less than men for performing the same tasks.³⁶ Despite the apparent anonymity that workers enjoy, the ILO found that women nevertheless earned less than men for selling the same product. Buyers were able to detect sellers’ gender by the information supplied in postings and were less willing to pay women what they would pay men.³⁷ Another study notes that there is no reason to expect the gig economy to close gender differences.³⁸ A study by the World Bank furthermore

³² Corporate Legal Accountability Briefing (n 10).

³³ The Fairwork country specific reports show that most of the workers interviewed were classified as self-employed or independent contractors. See Fairwork, ‘Fairwork. India Ratings 2020: Labor Standards in the Platform Economy’ (Bangalore, India; Oxford, United Kingdom, 2020) [Fairwork India Ratings Report 2020]; Fairwork, ‘Fairwork Germany Ratings 2020: Labor Standards in the Gig Economy’ (Berlin, Germany; Oxford, UK; Manchester, UK, 2020) [Fairwork Germany Ratings Report 2020]; Fairwork, ‘South Africa Ratings 2020: Labor Standards in the Gig Economy’ (Cape Town, South Africa; Oxford, UK; Manchester, UK, 2020) [Fairwork South Africa Ratings Report 2020]; Fairwork, ‘Fairwork. Chile Ratings 2021: Labor Standards in the Platform Economy’ (Santiago, Chile; Oxford, United Kingdom, 2021) [Fairwork Chile Ratings Report 2021]. Fairwork, ‘Fairwork. Ecuador Ratings 2021: Labor Standards in the Platform Economy’ (Quito, Ecuador; Oxford, United Kingdom, 2021) [Fairwork Ecuador Ratings Report 2021]; Fairwork, ‘Fairwork. UK Ratings 2021: Labor Standards in the Platform Economy’ (Oxford, United Kingdom, 2021) [Fairwork UK Ratings Report 2021].

³⁴ Mark Graham, Isis Hjorth, Vil Lehdonvirta, ‘Digital labor and development: impact of global digital labor platforms and the gig economy on worker livelihoods’ (2017) 23(2) *Transfer: European Review of Labor and Research* 135; Alex Wood, Mark Graham, Vil Lehdonvirta, and Isis Hjorth ‘Good Gig, Bad Big: Autonomy and Algorithmic Control in the Global Gig Economy’ (2018) 33(1) *Work, Employment and Society* 56.

³⁵ ILO, ‘A quantum leap for gender equality: for a better future of work for all’ (International Labor Office, Geneva, 2019) <https://www.ilo.org/global/publications/books/WCMS_674831/lang--en/index.htm> accessed 6 March 2021.

³⁶ *ibid.* See also Ambika Tandon and Aayush Rathi, ‘A Gendered Future of Work: Perspectives from the Indian Labor Force’ (2018) Centre for Internet and Society (Working Paper) <<https://cis-india.org/internet-governance/women-in-future-of-work.pdf>> accessed 12 March 2021.

³⁷ *ibid.*

³⁸ Cody Cook et al., ‘The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers’ (2018) Law and Economics NBER (Working Paper No. 24732).

shows that more women than men reject platform work due to the lack of benefits such as health coverage, maternity or sick leave, and retirement funding.³⁹

An ILO study in India⁴⁰ confirms the persistence of gender inequality in platform work, even while women may access new opportunities. A significant digital gender divide in terms of access to mobile technologies and the internet along with low levels of literacy, education, and skilling (combined with, and reinforced by, socio-cultural norms) are likely to restrict the capacity of women to leverage new technologies for their economic empowerment.⁴¹ Despite the huge increase in the number of ride-hailing passengers, India has seen negligible female participation as drivers, with only eight women drivers active on the Uber platform in 2018.⁴² Anthropologists have noted that while app-based food delivery has opened up this historically male-dominated line of work to women in India, that has not insulated it from patriarchal norms.⁴³ Moreover, platform work has led to the further marginalization of marginalized communities. Low levels of education and skilling (access to digital technology) constrains the capacity of marginalized communities to access technology gains.⁴⁴ As many medium-skill jobs become automated, economic mobility will be further restricted.⁴⁵

2.5 Collective bargaining and representation

Particularly glaring are the lack of collective bargaining and other representational rights. The Eurofound report on the employment and working conditions of selected types of platform work in EU member states indicates that the majority of platform workers are not represented, partly due to many being classified as self-employed, with this group traditionally less often represented than employees

³⁹ World Bank, 'Driving Toward Equality: Women, Ride-Hailing and the Sharing Economy' (International Finance Corporation and Uber Technologies Inc, United States, 2018) <https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/gender+at+ifc/drivingtowardequality> accessed 1 March 2021 (World Bank Report)

⁴⁰ Tandem Research, 'Emerging technologies and future of work in India' (ILO Asia-Pacific Working Paper Series, 2018) <https://www.ilo.org/newdelhi/whatwedo/publications/WCMS_631296/lang--en/index.htm> accessed 1 March 2021.

⁴¹ *ibid.* Tandon and Rathi (n 36) observe that gender (structural) inequality is fuelled by significant gender gaps in literacy, internet usage, mobile phone ownership, and bank account ownership, which are prerequisites for effective participation in the platform economy.

⁴² World Bank Report (n 39).

⁴³ Sumandro Chattapadhyay, 'Simiran Lalvani - Workers' fictive kinship relations in Mumbai app-based food delivery' (Centre for Internet and Society Blog, 16 August 2019) <<https://cis-india.org/raw/simiran-lalvani-worker-kinship-food-delivery-mumbai>> accessed 6 March 2021.

⁴⁴ Tandem Research (n 40).

⁴⁵ *ibid.*

or, in some countries, legally excluded from trade union membership.⁴⁶ However, on-location platform-determined workers in the ride-hail and delivery sectors are increasingly represented by trade unions or through their own initiatives (by contrast, cleaning and care workers and online freelancers, in most countries, remain relatively unorganized). So far, worker-organized initiatives have had limited success in securing better working conditions.

3 Towards an international regulatory framework

The inadequacy of traditional legal frameworks at national level, generally built around the requirement of a contract of employment, allows platforms in every country to circumvent existing regulations and undermine labor standards. Moreover, the international scope of larger platforms creates room for avoiding legal restrictions in any given country by locating the relevant parts of their operations elsewhere. This means that a regulatory framework at international level is crucial to prevent a race to the bottom. But, while the nature of employment in the platform sector bears many similarities to other precarious and informal work, platform work also has unique characteristics. The triangular relationship between platform, worker and customer bears some resemblance to agency work, which is itself the subject of a dedicated ILO Convention,⁴⁷ but is further complicated by the algorithmic medium of control utilized by platforms. In this respect it is different from any other form of work.

This means that existing ILO standards need to be shaped to address the specific challenges of platform work. For example, while dependent self-employed workers face many similar challenges to those facing platform workers, there are also specific challenges arising from the digitally-mediated nature of the work.

In this section, we draw on the empirical work of the Fairwork project⁴⁸ to establish a set of core issues which need to be addressed in a regulatory framework: low pay, poor working conditions, inaccessible and unreasonable contracts, unfair management, and a lack of representation. These principles are used to establish a proposal for a new ILO Convention on platform work, using existing ILO labor standards as a basis and modifying them appropriately for platform workers.

⁴⁶ Eurofound Report (n 27). The report adds: '[p]eople involved in worker-initiated and online contest work saw little need for representation': 2. See also Lionel Fulton, 'Trade unions protecting self-employed workers' (European Trade Union Confederation, Brussels, 2018) <https://www.etuc.org/sites/default/files/publication/file/2018-10/Trade%20unions%20protecting%20self-employed%20workers_EN.pdf> accessed 1 March 2021.

⁴⁷ Private Employment Agencies Convention, 1997 (No. 181).

⁴⁸ The Fairwork project is an international action-research project evaluating the working conditions offered by digital platforms. Available at: <https://fair.work/en/fw/homepage/>

3.1 Data and methods

It should be emphasized that the principles, while firmly grounded in ILO standards, are informed by detailed research on the ground, including desk research and interviews with a series of platforms and platform workers. They are therefore uniquely responsive to the actual conditions of platform workers, rather than operating as a ‘top-down’ exercise. When extrapolating to their situations, care is taken to determine how generalizable the standard might be. This interactive methodology was operationalized in 2018 when the project brought together platforms, workers, trade unions, regulators, and academics in meetings held at the International Labor Organization and the United Nations Conference on Trade and Development (UNCTAD), with a view to setting global principles for fair work in the platform economy. Those principles were revised after listening to the Fairwork partners and tripartite stakeholders in Bangalore, Johannesburg, Cape Town, and Berlin. On this basis we concluded that all good platform work should be characterized by five dimensions of fairness, namely: fair pay, fair conditions, fair contracts, fair management, and fair representation. These principles have been refined over the past two years, based on our⁴⁹ empirical work in South Africa, India and Germany,⁵⁰ and align closely with the ILO’s decent work agenda.

In applying these principles, the Fairwork project undertakes desk research, worker interviews and surveys, and interviews with platform management to measure the fairness of working conditions in digital labor platforms. Desk research aims to map the range of platforms to be scored (based on sector, size and relevance in the local context), identify points of contact with management as well as to gather any publicly available information about the platforms, including terms and conditions, digital interfaces, the provision of specific services and ongoing disputes with workers. Management interviews are meant to request direct evidence from the platforms for each of the Fairwork principles. These interviews also provide insights into the operations and working model of the platform.⁵¹ Finally, we interview 6-10 workers per platform to learn about platforms’ policies and practices pertaining to their working conditions. The interviewees are selected through purposive sampling and are not meant to be representative, but rather to verify or falsify evidence we gathered through the other two methods.⁵²

⁴⁹ All authors are members of Fairwork.

⁵⁰ The latest principles can be accessed at: <<https://fair.work/en/fw/principles/fairwork-principles-gig-work/#continue>> accessed 15 September 2021.

⁵¹ In case platform managers refuse to engage with us, we rely on evidence obtained through desk research and worker interviews.

⁵² For more detailed information about the Fairwork methodology, please see: <<https://fair.work/en/fw/methodology/>> accessed 15 September 2021.

Through these methods we seek evidence of the extent to which platforms act in accordance with the five Fairwork principles. This methodological approach allows us to cross-check the claims made by platform management, while also providing the opportunity to collect evidence from multiple sources. At the end of the process, we rate each platform according to a rigorous peer review process. We have thus far published the outcome of our research in reports on South Africa, India, Germany, Ecuador, the UK and Chile, with many other countries to follow. For more details about research in each country, see Table 1.

Table 1. Platforms scored and workers interviewed in each country

Country	# of platforms rated	Sectors	# of workers interviewed	Time of data collection
South Africa	11	ride-hail courier food delivery domestic services creative miscellaneous	75	2019-20
India	11	ride-hail courier food delivery domestic services	113	2019-20
Germany	9	ride-hail courier food delivery domestic services miscellaneous	64	2019-20
Ecuador	6	ride-hail courier food delivery domestic services	56	2020
UK	11	ride-hail courier food delivery domestic services	55	2020-21
Chile	7	ride-hail food delivery	37	2020

To sum up: existing ILO standards formed the starting point for our research, and the recommendations that follow are in line with these standards as well as with previous studies that are referred to. Our empirical work confirmed the appropriateness of these standards in the context of platform work, highlighting issues that are of most concern to platform workers and enabling us to refine the principles so as to ensure that they are responsive to actual working conditions.

Specifically, it led us to identify the five key principles set out below as a suitable framework for the proposed Convention.

3.2 The five principles

The five principles, and some of our recommendations in respect of each, can be summarized as follows.

Fair pay

As our research in several countries has shown,⁵³ the fact that workers tend to be (mis)-classified as independent contractors means they are usually excluded from the scope of minimum pay legislation. With the partial exception of Germany, the vast majority of platform workers we interviewed in all six countries were not guaranteed a minimum pay. The starting point for this principle is therefore to extend the statutory minimum wage to platform workers irrespective of their employment status. But this in itself is not sufficient. In addition, it should be recognized that many platforms – especially geographically-tethered platforms such as Uber – have business models that require surplus workers to be immediately available to meet demand by ‘hovering’ near potential passengers or clients. The number of working hours used for calculating earnings should therefore include time spent by workers waiting for a job with their app switched on.⁵⁴ Domestic workers working for a platform should be deemed to commence their working time when they leave their homes to set out for their first assigned job for the day and continue until they reach their homes at the end of the day.⁵⁵ The minimum wage calculation should therefore be adjusted to include both direct hours and indirect hours, such as travelling to a task or waiting between tasks.⁵⁶ Secondly, platform workers often have to absorb substantial work-related costs, such as transport between jobs, supplies, or fuel, insurance, and maintenance on a vehicle. These costs can make take-home earnings fall below the minimum wage.⁵⁷ For example, in both South Africa and India, we found that most platforms we rated could provide evidence that workers’ gross pay is at or above the minimum wage. However, gig workers were expected to provide a lot of their own equipment and pay work-related costs out of pocket. Among all six countries,

⁵³ See, for instance, Fairwork India Ratings Report 2020 (n 33); Fairwork South Africa Ratings Report 2020 (n 33); Fairwork Germany Ratings Report 2020 (n 33); Fairwork Chile Ratings Report 2021 (n 33); Fairwork Ecuador Ratings Report 2021 (n 33); Fairwork UK Ratings Report 2021 (n33).

⁵⁴ *Uber BV v Aslam* [2018] EWCA Civ 2748; see Sandra Fredman, and Darcy du Toit, ‘One Small Step Towards Decent Work: *Uber v Aslam* in the Court of Appeal’ (2019) 48 ILJ 260.

⁵⁵ *Federacion de Servicios Privados del sindicato Comisiones obreras (CC OO) v Tyco Integrated Security SL (C-266/14)* [2016] CMLR 22 c-266/14 (CJEU).

⁵⁶ *Uber BV v Aslam* [2018] EWCA Civ 2748; Sandra Fredman and Darcy du Toit (n 54).

⁵⁷ See Fairwork South Africa Ratings Report 2020 (n 33).

less than half of the 55 platforms could provide evidence that workers are paid above minimum wage after costs are taken into account, and it was observed that workers often worked very long hours to cover expenses.⁵⁸

We would recommend that workers, irrespective of their employment classification, should earn at least the local minimum wage, or the wage set by collective sectoral agreement (whichever is higher) *after* work-related costs. In cases where the minimum wage is less than a living wage (i.e., enough to afford a basic but decent standard of living), workers, irrespective of their employment classification, should earn at least a living wage after work-related costs. This is supported by the principles of international law that ‘[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family’.⁵⁹ States are furthermore bound to take ‘appropriate steps’ to ensure the realization of ‘the right of everyone to an adequate standard of living for himself and his family’.⁶⁰

Fair conditions

Platform workers may encounter significant risks in the course of their work, including accidents and injuries, exposure to harmful materials, and crime and violence, with few if any measures taken to protect them. Workers may also have to work long and unreasonable hours. During the COVID-19 pandemic, for example, contactless delivery was a widespread policy of delivery platforms, but contactless collection was less available. Moreover, health and safety measures have been increasingly connected to surveillance measures in the form of temperature scans, selfies, and photos taken at distribution centers or restaurants, without the consent or immediate knowledge of workers.⁶¹ Platforms should have policies to protect workers from risks arising from their work and should take proactive measures to protect and promote workers’ health and safety – for example, by showing that they seek to improve working conditions or address basic risks faced by workers.⁶² As with the ILO Violence and Harassment Convention, such policies should extend to ‘work-related trips’ undertaken ‘through work-related communications, including those enabled by information and communication technologies’ or ‘when commuting to and from work’.⁶³

⁵⁸ See Fairwork India Ratings Report 2020 (n 33).

⁵⁹ United Nations’ Universal Declaration of Human Rights of 1948, art 25(1).

⁶⁰ International Covenant on Economic, Social and Cultural Rights 1966, art 11(1).

⁶¹ See Fairwork, ‘The Gig Economy and Covid-19 :Looking Ahead’ (Oxford, United Kingdom, 2020) [‘Fairwork Covid-19 Looking Ahead Report’], available at: <<https://fair.work/wp-content/uploads/sites/97/2020/09/COVID-19-Report-September-2020.pdf>> accessed 2 October 2021..

⁶² For a practical illustration, see M Six Silberman and Lilly Irani ‘Operating an employer reputation system: Lessons from Turkoption, 2008-2015’, (2016) 37(3) *Comp. Labor Law Policy J.* 505 available at SSRN: <<https://ssrn.com/abstract=2729498>> accessed 15 September 2021.

⁶³ ILO Violence and Harassment Convention, art 3.

Where work is done on the premises of a third party – for example, in the case of a domestic worker who may suffer injury because of unsafe conditions in the user’s home – the platform and the user should be jointly liable. Given that the obligation for compensation is generally limited to injuries or accidents that occur in the course of employment, it is important to accord a broad and purposive interpretation to terms such as “in the course of employment”, taking into account the realities of platform work and including all activities undertaken by a worker in performing services on behalf of a platform.

A further problem, noted above and intensified by the pandemic, is the absence of social safety nets for many platform workers. For instance, we could find evidence in only half of the 191 platforms we surveyed in 2020 that the platform was providing a form of financial support in case workers fell ill because of coronavirus.⁶⁴ Most countries provide social security systems to protect workers against loss of income due to circumstances outside their control, such as unemployment. However, platform workers may not qualify for such protections because of their independent contractor status. Given that most workers are dependent on income from the platform for their livelihood, all dependent workers, regardless of their employment status, should be covered by social security measures. Platforms should therefore be made responsible for paying social security contributions on behalf of all such workers and, where state benefits are not available, should be encouraged to provide benefits, such as medical and disability insurance, in line with local best practice.

Platforms should furthermore be required to take adequate measures for the protection and management of workers’ personal data, laid out in a documented policy in line with the ILO code of practice on Protection of Workers’ Personal Data⁶⁵ and national legislation.

Fair contracts

Many workers agree to contracts without understanding or being able to read them, and the terms and conditions governing their work are not always accessible to workers. While in South Africa, Germany, Chile and Ecuador, the vast majority of platforms could evidence of having accessible and comprehensible terms and conditions, in India, only two of the eleven platforms we analyzed in 2020 could do so, and in the UK only five out of eleven.⁶⁶ Furthermore, contracts often misclassify workers as independent contractors or freelancers and deny them access to statutory employment rights, and contain other terms and conditions which may be onerous. Overall, only 13 out of 55 platforms we analyzed in six countries could show not to impose unfair contract

⁶⁴ See Fairwork Covid-19 Looking Ahead Report (n 61).

⁶⁵ ILO (1997) Protection of Workers’ Personal Data International Labor Office: Geneva.

⁶⁶ See Fairwork India Ratings Report 2020 (n 33); Fairwork UK Ratings Report 2021 (n 33).

terms, Employment laws frequently include a provision requiring workers to be provided with details as to their employment conditions, but these are not available to platform workers who are classified as self-employed. The right to information on their terms and conditions of work should therefore be extended to all workers, and contracts should be communicated in clear language that workers could be expected to understand. There are also some special features which apply to platform work. Firstly, platforms can unilaterally change terms and require the worker to consent before being able to sign in to the app. Secondly, because platforms often operate across different jurisdictions, they may frustrate workers' claims for legal redress by making their contracts subject to the law of a different jurisdiction from that in which the worker is based, or by locating the legal entity contracting with the worker in a different jurisdiction. For instance, in both Chile and Ecuador, we found a number of platforms making contracts subject to the jurisdiction of the country where the headquarters of the company are located, rather than to local law.⁶⁷ Thirdly, workers are often made to carry a disproportionate amount of risk for engaging in the contract; for example, making them liable for any damage arising in the course of their work.

To avoid abuses of this nature, there should be regulations prohibiting contractual clauses which (i) unreasonably exempt the platform from liability for working conditions, negligence or the like; (ii) prevent workers from effectively seeking redress for grievances which arise from the working relationship. Platforms should be required to notify workers of proposed changes in a reasonable time-frame before they can take effect and prohibited from reversing accrued benefits or reasonable expectations on which workers have relied. In the case of geographically tethered work, it should further be required that the party contracting with the worker should be identified in the contract and subject to the law of the country in which the worker works. For cloudworkers, the contract should not require workers to waive rights to reasonable legal recourse against the platform. Consumer protection legislation may also be scrutinized to establish whether its provisions could extend to platform workers in cases where platforms claim to be providing a service (the app) to workers as their 'clients'.

Fair management

Algorithms are at the heart of the relationship between the platform and the worker throughout its duration, being involved in wage-setting or surveillance of work. Algorithmic management also means that platform workers can experience arbitrary deactivation; that is, being barred from accessing the platform, and losing their income, without any explanation. Workers may be subject to other penalties or disciplinary decisions without the ability to challenge them if they believe they are unfair. Only 23 of the 55 platforms evaluated could show to provide due process for decisions affecting workers.

⁶⁷ See Fairwork Chile Ratings Report 2021 (n 33); Fairwork Ecuador Ratings Report 2021 (n 33).

Regardless of their employment status, platform workers should be provided with due process in relation to discipline or termination. Platforms should be required to provide a channel for workers to communicate with a human representative of the platform, to respond within a reasonable timeframe, and to put in place a documented process for workers to meaningfully appeal low ratings, payment issues, deactivations, and other disciplinary actions. In the case of deactivations, the appeals process must be available to workers who no longer have access to the platform. Workers should be protected against adverse treatment for voicing concerns or appealing disciplinary actions.

Discrimination based on gender, race, religion, and other attributes is also prevalent in the platform economy. The COVID-19 pandemic has deepened existing lines of inequality: not just between gig workers and others who are better served by government support schemes, but also by placing additional pressures on women, immigrants, and minority-ethnic groups who form a core part of the gig workforce.⁶⁸ In addition, algorithms are not neutral. Biases may be built in at the stage of inputting data and design, resulting in indirect discrimination against particular groups. Only eight of the 55 platforms we evaluated could evidence equity in the management process, protecting workers against discrimination and promoting equality of opportunity. All workers should have effective protection against direct and indirect discrimination, regardless of their employment status. Given the lack of transparency of algorithms and other aspects of platform design, under-representation or unequal pay for disadvantaged groups should be regarded as *prima facie* discrimination, shifting the burden to the platform to justify it or to take measures to identify and remove those barriers to equal treatment. Platforms should be required to promote equality of opportunity for workers from disadvantaged groups, including reasonable accommodation for pregnancy, disability, and religion or belief. They should also be required to take measures to reduce the risk of discrimination by users against disadvantaged groups (for example, in accessing work) and provide clear information as to the criteria that algorithms are programmed to apply.

Fair representation

Platforms often have mechanisms to listen to worker concerns. However, they tend to do so in ways that individualize those concerns. For example, among the 55 platforms we analyzed in 6 countries, 44 platform companies fared poorly when it came to acknowledging a collective voice for workers—and only five platforms were agreeable to negotiating with worker associations and unions.⁶⁹ This left most platform workers without institutionalized channels for worker representation, and meant that they had little influence over the decisions that impact their jobs. Some platforms refuse to negotiate with

⁶⁸ See Fairwork Covid-19 Looking Ahead Report (n 61).

⁶⁹ See Fairwork India Ratings Report 2020 (n 33).

workers' representatives, forcing workers to do so individually even though individual workers have little or no bargaining power.

Freedom of association is a fundamental right for all workers, and is enshrined in the constitution of the ILO and the Universal Declaration of Human Rights. The right of workers to organize, to collectively express their wishes and be listened to is an essential prerequisite for fair working conditions. Platforms should be required to set up mechanisms for the expression of collective worker voice, including recognizing or bargaining with an appropriate collective body of workers or a trade union representing workers. Workers should be protected against detrimental treatment for organizing or expressing their concerns.

Trade unions and platform workers internationally have adopted varied and innovative strategies to promote organization and address the challenges of collective action in the platform environment.⁷⁰ Within the context of national law, possibilities should be examined supporting such efforts or creating opportunities for workers to engage collectively with platforms. Where trade union rights are limited to employees, this will include possibilities for other forms of organization – for example, voluntary associations or cooperatives – to represent workers in negotiations.

Even where platform workers are able to join trade unions or exercise equivalent collective rights, it needs to be considered whether existing collective labor rights are adequately aligned to the conditions of platform work. Where necessary, adaptations should be considered for recasting traditional rights – for example, a trade union's right of access to the employer's workplace – in the context of digitally mediated work.

3.3 Overcoming the employee/independent contractor binary

Labor legislation in most jurisdictions has traditionally assumed a binary division between independent contractors, who are assumed to be in a position to take on the risks of their own enterprises and are excluded from employment protection legislation, and employees who, by contrast, are considered to warrant employment protection for a variety of reasons, including the employer's control over their work, the worker's subordination to and dependency on the employer, and the worker's integration into the employer's enterprise. These factors are often used as indicia to delineate the boundary between employees and independent contractors. Platform work, like many other forms of work in the modern workforce, does not conform to this binary division. The blurring

⁷⁰ See Hannah Johnston and Christopher Land-Kazlauskas 'On Demand and Organized: Developing Collective Agency, Representation and Bargaining in the Gig Economy' paper presented to the 5th conference of the Regulating for Decent Work Network, ILO, 3-5 July 2017; Michael Doherty and Valentina Franca, 'Solving the 'Gig-saw'? Collective Rights and Platform Work' (2019) 49 ILJ (UK) 363.

of boundaries is exacerbated by the fragmentation of the relationship among different entities, mediated by a platform. The result is twofold. The first is that, even if the workers should be classified as employed workers and become eligible for employment rights, platforms are in a position to rearrange relations so as to present workers as no longer conforming to the indicia of employment (above). The second is that, even where workers are technically self-employed, they may nevertheless be in a highly precarious position. Leaving them to shoulder the full risks of their activities exacerbates this precarity, which has deepened further during the COVID-19 pandemic.⁷¹

Building on the Universal Labor Guarantee proposed by the ILO Global Commission on the Future of Work (2019)⁷² (i.e., that “All workers, regardless of their contractual arrangement or employment status, should enjoy fundamental workers’ rights”), there is a need to break free of the binary classification, and regard all workers as rights-bearers regardless of their classification. Although this applies to all ‘informal’ workers, platform work raises specific challenges due to its digitally mediated nature. For example, the process of termination or deactivation can be automatically triggered by means of a set formula, such as a certain number of poor customer reviews, while the platform is typically portrayed as a mere medium for connecting work-seekers and work-suppliers, thus disguising the control it exerts. International regulation should provide platform workers with all the fundamental rights which all workers are entitled to, while taking into account the specifics of this type of work. Precedents for doing so are provided by the ILO’s Domestic Work Convention (No 189), the Private Employment Agencies Convention (No. 181), the Violence and Harassment Convention (No 190) and the Maritime Labor Convention 2006. The fact that platform workers, employers, platforms and clients might operate in different jurisdictions should not deter action, as has been shown by the Maritime Labor Convention (2006) in providing a global code for seafarers.

It should be stressed that the obligations contained in ILO Conventions are, in the first instance, directed at states. It is up to states, through enacting appropriate legislative or other regulations, to create legally binding obligations on platforms as appropriate.

4 Outline of a convention on platform work

It has been shown so far that, because of the specific characteristics of platform work, current ILO Conventions need to be adapted to provide appropriate standards of decent work for platform workers. Drawing on the evidence collected

⁷¹ Fairwork Covid-19 Looking Ahead Report (n 61).

⁷² ILO Work for a Brighter Future Report (n 8).

by the Fairwork project demonstrating what is required for decent work for platform workers, we examined all existing ILO Conventions and adapted relevant parts to create a proposed outline of a Convention on platform work. We set out the proposal below, indicating which provisions we have drawn on.

4.1 Definitions

- \ The Convention should provide an inclusive definition of platform work or labor. Reference could be made to a definition developed by Eurofound,⁷³ which characterizes platform work as a form of work ‘that uses a digital platform to enable organizations or individuals to access other organizations or individuals to solve specific problems, or to provide specific services, in exchange for payment.’ A crucial feature is that the services are designed, offered, mediated and/or controlled by the platform, which derives its revenue, at least in part, from the labor performed by the worker.
- \ A corresponding definition of ‘worker’ should be included, stipulating that the term includes everyone who provides personal services mediated by a platform, regardless of contractual status.
- \ Further definitions of key terms are proposed below.

4.2 Coverage

The proposed Convention should cover all platforms and all workers in all sectors who fall within the above definitions, in line with the ILO Universal Labor Guarantee (above). A model can be found in the ILO’s Violence and Harassment Convention (No 190) which applies to all workers and employees, including ‘persons in training, workers whose employment has been terminated, volunteers and job seekers’, and applies to ‘all sectors, whether private or public, both in the formal and informal economy, and whether in urban or rural areas’.⁷⁴ This is crucial for the creation of a floor of rights for all workers, thereby preventing the use of boundaries between ‘employees’ and ‘self-employed’ to exclude some workers and undercut conditions for all. In triangular relationships there should be an appropriate distribution of liability between the platform and the end-user, which may not be to the detriment of fulfilment of the worker’s rights under the Convention. Responsibility should fall on the platform to establish that it has taken all reasonable and appropriate steps to fulfil its obligations to workers under the Convention.

⁷³ EurWork, ‘Platform Work’ (Eurofound, 29 June 2018) <<https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/platform-work>> accessed 12 March 2021.

⁷⁴ Art 2. See also the ILO’s Private Employment Agencies Convention, (No 181), which states: ‘This Convention applies to all categories of workers and all branches of economic activity [except seafarers]’: art 2(2).

4.3 Pay

The provisions on pay below are adaptations of the Regulations promulgated by the ILO pursuant to the ILO Maritime Labor Convention 2006 (timeous payments, regularly and in full; procedures for establishing minimum wages); the ILO Private Employment Agencies Convention 1997 (minimum wages); the ILO Wage-fixing Convention 1970 (factors to take into account in setting wages; effective implementation; deductions); the ILO Domestic Work Convention, 2011 (calculation of remuneration); and ILO Guidance on how to define a minimum wage (piece rate).

- \ Member States should take measures to ensure that all platform workers are paid for their work regularly, in full and in accordance with their agreements, whether the agreement is with the end-user or with the platform or both. Platforms should be required to take appropriate steps to ensure that such payments are made timeously.⁷⁵ The term “remuneration” below includes all payments made to workers in return for the services they perform (for example, ‘fees’).
- \ Member states should take the necessary measures to ensure all workers receive just and equitable remuneration allowing them and families to lead an existence worthy of human dignity, supplemented, if necessary, by other means of social protection.⁷⁶
- \ After consulting with representative platform owners and platform workers’ representatives, Member States should establish procedures for determining minimum remuneration for platform workers, or include platform workers in existing procedures for determining remuneration for workers.⁷⁷
- \ The level of remuneration should take into account the nature of platform work,⁷⁸ active hours (direct and indirect), the needs of platform workers and their families, the general level of wages in the country, the cost of living, social security benefits and the relative living standards of other social groups,⁷⁹ as well as economic factors such as the desirability of attaining and maintaining a high level of employment.⁸⁰ Expenses or work-related costs⁸¹ incurred by platform workers in providing their services should always be included.

⁷⁵ Regulations pursuant to the ILO Maritime Labour Convention 2006 (MLC 2006), reg 2.2.

⁷⁶ ILO Private Employment Agencies Convention 1997 (No. 181), art 11(c).

⁷⁷ ILO Maritime Labour Convention 2006, guideline B2.2.3.

⁷⁸ ILO Maritime Labour Convention 2006, guideline B2.2.3.

⁷⁹ ILO Wage Fixing Convention (No.131. 1970), art 3(a).

⁸⁰ ILO Wage Fixing Convention 1970, art 3(b).

⁸¹ Work-related costs include direct costs the worker may incur in performing the job. This may include, for instance, transport in between jobs, supplies, vehicle repair and maintenance, fuel, road tolls and vehicle insurance. However, it does not include transport to and from the job (unless in-between tasks), nor taxes, social security contributions or health insurance.

- \ Appropriate measures should be put into place to ensure the effective implementation of the provisions relating to minimum remuneration.⁸²
- \ Minimum remuneration must not be subject to deductions by individual agreement, nor, except with general or particular authorization of the competent authority, by collective agreement.⁸³
- \ Workers should be given regular statements which set out, in an appropriate, verifiable and easily understandable manner, the remuneration, method of calculation and periodicity of payments.⁸⁴ Where appropriate, statements should include the costs paid by the worker and how the minimum is calculated for piece rate pay.⁸⁵

4.4 Health and safety

These provisions are adaptations of the ILO Health and Safety Convention (definition of workplace; requirement for inspection; information to representatives; protection for removing oneself from unsafe workplace; protective clothing; no expenditure from workers for safety measures); ILO Violence and Harassment Convention (work); ILO Homework Convention (working from home); ILO Private Agencies Convention (compensation for occupational accidents or diseases)

- \ ‘Workplace’ should include all places where workers need to be or go by reason of their work and over which the platform has direct or indirect control or is in a position to influence by contract or otherwise.⁸⁶ ‘Work’ should be defined comprehensively as encompassing all activities by a worker arising from platform work (as defined). As with the ILO Violence and Harassment Convention, it should extend to ‘work-related trips’ undertaken ‘through work-related communications, including those enabled by information and communication technologies’ or ‘when commuting to and from work’.⁸⁷

⁸² ILO Wage Fixing Convention 1970, art 5.

⁸³ ILO Wage fixing convention (1970), art 2; C026 - Minimum Wage-Fixing Machinery Convention 1928 (No. 26), art 3(2) (3). “Competent authority” means “the minister(s), government department(s) or other authority having power to issue and enforce regulations, orders or other instructions having force of law in respect of the subject matter dealt with in those instruments”: ILO International labor standards – A glossary at <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_712708/lang--en/index.htm> accessed 12 March 2021.

⁸⁴ Cf ILO Domestic workers Convention 2011 (C189), art 7(e).

⁸⁵ Cf ILO guidance on how to define a minimum wage < <https://www.ilo.org/global/topics/wages/minimum-wages/definition/lang--en/index.htm>> accessed 12 March 2021.

⁸⁶ See mutatis mutandis Health and Safety Convention c155, art 3(c). (For example, the car driven by Uber drivers; or the home cleaned by domestic workers).

⁸⁷ ILO Violence and Harassment Convention (C190 of 2019), art 3.

- \ Where the worker works at home, national laws and regulations on health and safety must apply, taking account of the nature of the work.⁸⁸
- \ The enforcement of laws concerning occupational safety and health and the working environment for platform workers must be secured by an adequate system of inspection, with any necessary adaptation required by the nature of the work.⁸⁹
- \ Workers and their representatives must be given adequate information by platforms on health and safety, as well as appropriate training in relevant areas of occupational health and safety, and should be consulted to determine their health and safety concerns.⁹⁰
- \ Adequate compensation should be provided in the case of occupational accidents or diseases,⁹¹ either by the State or by compulsory insurance taken out by platforms.
- \ Workers who remove themselves from a work situation because they have reason to believe that it presents an imminent and serious danger to their life or health must not be penalized.⁹²
- \ Workers must be provided with adequate protective clothing and protective equipment to prevent the risk of accidents or adverse effects on health as far as reasonably practicable.⁹³
- \ Occupational health and safety measures must not involve any expenditure for workers.⁹⁴

4.5 Hours of work

These provisions are adaptations of ILO Hours of Work (Industry) Convention, 1919 (No. 1); and Hours of Work (Commerce and Offices) Convention, 1930 (No. 30) (hours of work); ILO Forty Hour Week Convention (maximum hours).

- \ Platforms should not be permitted to require or allow workers to work more than 48 hours a week, with a maximum of 8 hours a day, in order to

⁸⁸ ILO Home Work Convention 1996 (C177), article 7.

⁸⁹ ILO Occupational Health and Safety Convention 1981 (C155), art 9.

⁹⁰ ILO Occupational Health and Safety Convention (C155) 1981, art 19.

⁹¹ ILO Private Employment Agencies Convention 1997 (C181), art 11(h).

⁹² ILO Occupational Health and Safety Convention (C155) 1981, art 13.

⁹³ *ibid*, art 15(c).

⁹⁴ *ibid*, art 21.

achieve the level of wages referred to in paragraph 3(b).⁹⁵ Hourly earnings should be sufficient to make this possible.

- \ Workers may only be permitted to work a limited number of additional hours above the maximum, on conditions no more onerous and subject to additional rates of remuneration no less favorable than those applicable to employees performing comparable work.

4.6 Contract

These provisions incorporate elements of the ILO Domestic Work Convention, 2011 (No. 189) (statement of terms and conditions) and Recommendation concerning the Employment Relationship (R198) (referred to below).

- \ Given the risk of attempts to disguise the employment relationship,⁹⁶ there should be a legal presumption that an employment relationship exists where one or more of the relevant indicia is present.⁹⁷
- \ Such indicia should include the fact that, expressly or in effect, the work: is carried out according to the instructions and under the control of the platform; involves the integration of the worker in the activity or the business of the platform; constitutes a service offered by the platform; is performed solely or substantially for the benefit of the platform;⁹⁸ accounts for the worker's income to a significant extent; must be carried out personally by the worker; is of a particular duration or has a certain continuity; requires the worker's availability; OR involves the provision of tools, materials and machinery by the platform.⁹⁹
- \ Regardless of whether the worker is employed under a contract of employment, the minimum conditions required by the Convention cannot be waived or contracted out of.
- \ Workers, regardless of whether they are employed under an employment contract, should be supplied with a written statement setting out all the terms of the contract¹⁰⁰ in an appropriate, verifiable and reasonably understandable manner. The contract itself should be accessible to workers at all times. It should include the names and addresses of all parties, who must be subject to the local jurisdiction. It should further specify the

⁹⁵ ILO Hours of Work (Industry) Convention 1919 (No. 1); Hours of Work (Commerce and Offices) Convention 1930 (No. 30). The aspiration should be to achieve a 40-hour working week (Forty-Hour Week Convention, 1935 c47).

⁹⁶ ILO Employment Recommendation Relationship 2006 (R198), preamble.

⁹⁷ *ibid*, para 11(b).

⁹⁸ 'Benefit' in this context should be construed in the context of the platform's business; e.g., whether the service is branded by the platform and to what extent the platform depends, directly or indirectly, on that service for its revenue.

⁹⁹ ILO Employment Recommendation Relationship 2006 (R198), para 13(a).

¹⁰⁰ ILO Maritime Labour Convention 2006, reg 2.1 para 1.

remuneration, method of calculation and periodicity of payments, terms and conditions relating to termination, including deactivation or penalties, and whether the contract is temporary or indefinite.¹⁰¹

- \ There should be adequate procedures for investigating complaints by workers.¹⁰² Arbitration clauses which place unreasonable burdens on workers or have the effect of nullifying the enforcement of workers' rights, for example by specifying a foreign jurisdiction, should be null and void.¹⁰³
- \ Workers must be given sufficient opportunity to review and seek advice on the terms and conditions of the contract before accepting.¹⁰⁴ Workers should be notified of proposed changes to the contract in a reasonable timeframe and freely consent thereto before such changes can come into effect. Changes that reverse existing accrued benefits and reasonable expectations on which workers have relied should be prohibited.
- \ The contract should not impose unfair contract terms. In particular, it should not include clauses which exclude liability for negligence or unreasonably exempt the platform from any liability, nor clauses which prevent workers from effectively seeking redress for grievances which arise from the working relationship.

4.7 Non-discrimination and equality

These provisions are in accordance with the following ILO Conventions: Equal Remuneration Convention 1951 (No. 100), article 1(b); Discrimination (Employment and Occupation) Convention 1958 (No. 111), articles 1 and 5; Older Workers Recommendation 1980 (No. 162), articles 3-5; Workers with Family Responsibilities Convention 1981 (No. 156), article 3; Vocational Rehabilitation and Employment (Disabled Persons) Convention 1983 (No. 159), article 4; Maternity Protection Convention 2000 (No. 183), articles 8 and 9; HIV and AIDS Recommendation 2010 (No. 200), articles 1(e), 3(c), 9-14; Domestic Workers Convention 2011 (No. 189), articles 3(2) and 11.

- \ Platforms should be responsible for ensuring that no worker is subjected to discrimination or harassment, directly or indirectly, on the basis of race, colour, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law or practice, such as gender identity, sexual orientation, age or disability,¹⁰⁵ caste, ethnicity, or any other status.

¹⁰¹ ILO Domestic workers Convention 2011 (C189), art 15

¹⁰² *ibid*, art 7.

¹⁰³ *Uber Technologies Inc. v. Heller* 2020 SCC 16.

¹⁰⁴ ILO Maritime Labour Convention 2006, reg2.1 para 2.

¹⁰⁵ ILO Private Employment Agencies Convention 1997 (C181), para 5(1).

- \ Platforms should protect workers against discrimination by customers or users by disallowing requirements by customers or users which would have the effect of discriminating directly or indirectly against workers on any of the grounds mentioned in a. Where persons from a disadvantaged group (such as women) are significantly under-represented among its workers, it should seek to identify and remove barriers to access by persons from that group.
- \ Equality of treatment should be implemented in relation to remuneration, statutory or private social security protection, minimum age for admission to employment, maternity and parental protection¹⁰⁶ and all other terms and conditions of work. This includes a right to equal remuneration for work of equal value.¹⁰⁷
- \ Workers should have access to information explaining all decisions affecting their access to work through the platform or the terms and conditions for the performance of work, including the criteria for automated decisions.

4.8 Data

Processing of data by platforms should protect workers' personal data, ensure respect for workers' privacy, and be limited to directly relevant matters such as the worker's qualifications and relevant experience.¹⁰⁸ Data should only be collected with express and informed consent of the worker and should not be shared with third parties under any circumstances without the worker's express and informed consent.

4.9 Representation

These provisions are adaptations of, in particular, Convention 87 (Freedom of Association) art 2; Homeworkers Convention, 177, art 4(a)); and Collective Bargaining Convention, 1981 (No. 154), arts 1, 2 and 5. However, the same principles are elaborated in various other Conventions and Recommendations.

- \ Platforms should recognize and respect the right of workers to establish or join organizations of their own choosing and to participate in the activities of such organizations.

¹⁰⁶ ILO Home Work Convention 1996 (C177), art 4(2).

¹⁰⁷ ILO Equal Remuneration Convention 1951 (C100), art 2(1).

¹⁰⁸ ILO Private Employment Agencies Convention 1997 (C181), art 6.

- \ Platforms should recognize and respect the right of workers to collectively negotiate any terms and conditions affecting their work through organizations of their own choosing.¹⁰⁹
- \ Workers should be adequately protected against any detrimental treatment due to their exercise of the right to freedom of association or collective representation.¹¹⁰

4.10 Social protection

These provisions are in accordance with ILO Social Protection Floors Recommendation 2012 (R202).

- \ Basic social security guarantees (‘the social protection floor’) should extend to all workers (whether classified as employed or self-employed) on a basis of non-discrimination and gender equality and respecting the principle of adequacy and predictability of benefits.¹¹¹
- \ The social protection floor should comprise at least access to essential health care, including maternity care and basic income security for platform workers who are unable to earn sufficient income due to sickness, unemployment, maternity or other circumstances beyond their control.¹¹² Platforms should be required to contribute to social security and pension schemes on behalf of their workers on the same basis as comparable employers. Member States may determine that platforms which simply act as a ‘marketplace’ or ‘directory’ should not be deemed comparable to employers for the purposes of making such contributions. This caveat should strictly apply only to the responsibility to make social security contributions and not to any other sections of the Convention, and the State should ensure that the social protection floor applies to all workers regardless of whether platforms are required to make contributions on their behalf.

5 Conclusion

We have argued in this article that legally binding international labor standards for platform workers are necessary to prevent a race to the bottom, support best practice across all platforms, and protect the terms and conditions of

¹⁰⁹ Cf Convention 87 Freedom of Association; Convention 98 Right to Organize and Collective Bargaining; Convention 2006, Maritime Workers; Convention 181, Private Agencies etc.

¹¹⁰ Cf Convention 87 Freedom of association Convention, art 2; C177 Home Work Convention, art 4(a) etc – this is covered in all relevant conventions.

¹¹¹ ILO Social Protection Floors Recommendation 2012 (R202), art I.3(c).

¹¹² ILO Social Protection Floors Recommendation 2012 (R202), art II.5.

non-standard workers in similar fields. Because of the distinctive characteristics of platform work, existing ILO Conventions do not fully address all the regulatory challenges it raises. We have therefore set out a proposed outline for an international ILO Convention for the regulation of platform work. All its proposals are distilled and adapted from standards set out in existing ILO Conventions, drawing on the rich evidence-base collected by the Fairwork project. The research may be described as participatory and multidisciplinary, involving cooperation between social science and legal scholars and, critically, drawing on the insights of stakeholders in the platform economy in finding ways of addressing the challenges of legal regulation.¹¹³ While the ILO standard setting process is slow and complex, the Covid pandemic, with its huge toll on both lives and jobs, has hastened the flow of work onto platforms, highlighting the urgency of the issue. Space does not permit a discussion of mechanisms and structures responsible for implementing the proposed measures. Again, however, it is proposed to follow the established ILO approach; i.e., that responsibility for implementation will devolve on member states upon ratification of the proposed Convention and that its provisions shall, “in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or in such other manner as may be consistent with national practice, be given effect by national laws or regulations”.¹¹⁴ This article provides an evidence-based set of proposals which, we hope, can constitute a first step towards such an outcome.

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¹¹³ On the challenges and importance of research that combines empirical analysis and normative intervention, see e.g. Alain Supiot, ‘The transformation of work and the future of labor law in Europe: A multidisciplinary perspective’ (2008) 138(1) *Int Labor Rev.* 31; Emily M. Houh & Kristin Kalsen, ‘It’s Critical: Legal Participatory Action Research’ (2014) 19 *MICH. J. RACE & L.* 287 available at: <https://repository.law.umich.edu/mjrl/vol19/iss2/3> accessed 15 September 2021.

¹¹⁴ ILO Collective Bargaining Convention 1981 (No. 154), art 4. However, this does not preclude platforms from implementing its provisions voluntarily and trade union from campaigning for implementation.