

Platform work and the employment relationship

平台工作与雇佣关系

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Origins of the regulation of the employment relationship 规制雇佣关系的起源

- ▶ In Europe, regulation of the employment relationship following the Industrial Revolution
在欧洲，工业革命后开始规制雇佣关系
- ▶ Spread of large-scale enterprises and bureaucratic forms of organization
大型企业的兴起和官僚化的组织形式
- ▶ Development of social insurance, employers were obliged to collect contributions and compensate certain losses of earnings
社会保险发展起来，雇主有义务收取缴费并补偿一定的收入损失
- ▶ Employees are subject to managerial control of employers in exchange for basic protections offered by employment law and collective agreements
雇员受雇主的管理控制，以换取劳动法和集体协议提供的基本保障
-> Employment relationship linked to subordination 雇佣关系与从属性相关联
- ▶ Employers' management power enables them to invest in workers' skills
雇主的管理能力使得他们能够投资于工人的技能

▶ Impact of new forms of work 新工作形式的影响

- ▶ Organizational changes, disintegration of the vertically-integrated firm : questioning the notion that the employment relationship is exclusively bilateral
组织变革，垂直一体化的公司瓦解：对于雇佣关系完全是双方关系的观念提出挑战
- ▶ Weakening of strict hierarchical controls 严格的等级控制削弱
- ▶ Legal responses: 法律回应
 - Multi-factor tests in common law countries 在普通法国家的多因素测试
 - Expansive notion of subordination in some civil law countries 在某些大陆法国家中，从属性的扩张概念
 - Regulation of a third, intermediate category in some countries 在一些国家则是作为第三种中间类别加以规制

ILO Recommendation No. 198 on the employment relationship: Preamble 国际劳工组织第198号《关于雇佣关系的建议书》：前言

- ▶ Labour law seeks, among other things, to address an **unequal bargaining position** between parties to an employment relationship
劳动法尤以解决雇佣关系各方之间可能存在的**不平等谈判地位**为目标
- ▶ Difficulties of establishing whether or not an employment relationship exists if (1) the respective rights and obligations of the parties are not clear, (2) there is an attempt to disguise the employment relationship, or (3) the legal framework, its interpretation or its application is not fully adequate
确定是否存在雇佣关系有困难，考虑到（1）当事人的各自权利和义务不清晰，（2）有人试图掩盖雇佣关系，或（3）法律框架及其解释或执行中存在不足或局限等
- ▶ Need to guarantee **fair competition** and **effective protection** of workers
保证**公平竞争**和对工人给予**有效保护**
- ▶ Protection should be accessible to all, particularly to vulnerable workers
保护应使所有人都能得到，特别是弱势工人

Recommendation No. 198 : key provisions 第198号建议书：关键条款

- ▶ ILO Member States should adopt and apply, in consultation with the most representative organizations of employers and workers, 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

成员国应当制定和实行旨在每隔适当时间对相关法律和规章的适用范围进行**审查**并在必要时进行**澄清和修改的国家政策**，并与最具代表性的雇主组织和工人组织协商，以便确保对在雇佣关系的框架下从事劳动的劳动者提供有效保护。

- ▶ Need to **combat disguised employment**, without interfering with true civil and commercial relationships
与隐蔽的雇佣关系做斗争，而又不妨碍真正的民事和商业关系
- ▶ Standards should **apply to all** forms of contractual arrangements, including those involving multiple parties
确保标准适用于**各种形式**的合同安排(包括涉及多方的合同安排)
- ▶ Particular attention to **workers especially affected** : women workers and the most vulnerable workers, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities
特别关注那些受到**特别影响的劳动者**：女工以及最脆弱的劳动者、青年工人、老年工人、非正规经济工人、移民工人和有残疾的工人

Recommendation No. 198 : how to determine the existence of an employment relationship? 第198号建议书：如何确定雇佣关系是否存在？

► Primacy of facts principle 事实至上原则

► ILO Member States should consider: 成员国应当考虑

- allowing a **broad range of means** for determining the existence of an employment relationship
允许采用**多种手段**确定雇佣关系的存在
- a **legal presumption** that an employment relationship exists where some indicators are present
当具备一项或多项相关指标时，为雇佣关系的存在做出**法律推定**
- determining, following prior consultations with the social partners, that workers with certain characteristics must be **deemed to be either employed or self-employed**
在与社会伙伴进行事先协商后，决定必须把具有某些特征的劳动者确认为**雇员或自雇者**。

► Possible indicators: work performed according to the instructions and under the **control** of another party; work to be **carried out personally** by the worker; **specific working hours** and/or workplace; worker's availability required; provision of tools or materials by the party requesting the work; periodic payment of remuneration to the worker; absence of financial risk for the worker.

可能的指标：该工作是根据另一方的指令并在其**控制**下进行的；该工作由该劳动者**亲自完成**；在**特定工作时间内**及/或工作场所内；要求劳动者随叫随到；下达工作的一方提供工具或物料；定期向劳动者支付报酬；劳动者没有财务风险。

New ILO research



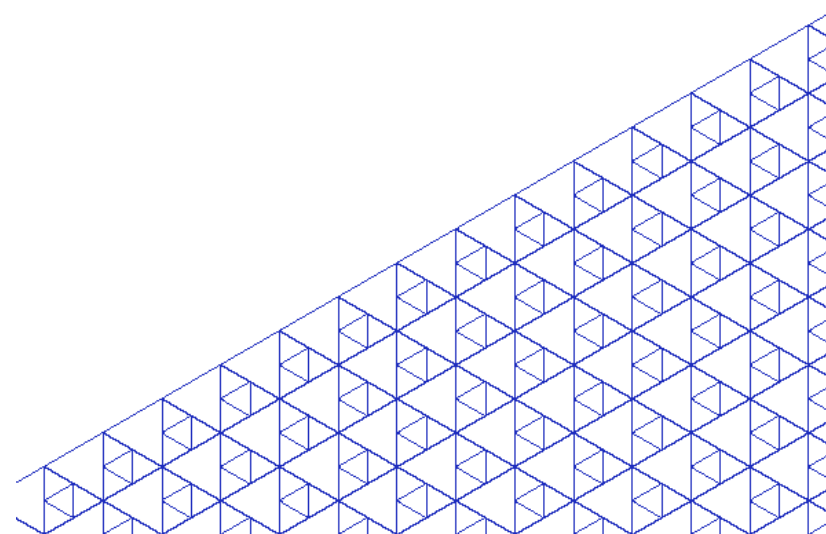
国际劳工组织一项新的研究

**Focus of this presentation: location-based
platforms**

关注基于位置的平台

► **Platform work and the employment
relationship**

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Terms and conditions of platforms 平台的服务条款

- ▶ **Unilateral determination** of the terms and conditions of their engagement with clients and workers
单方确定与客户和劳动者发生关联的条款和条件
- ▶ Workers generally classified as « **self-employed** » or « independent contractors »
劳动者通常被归为**自雇者**或独立承包商
 - May also provide that the relationship between the worker and the client is one of self-employment
可能还规定劳动者与客户之间的关系是自雇关系
 - Platforms sometimes specify that they are not employment agencies 平台有时明确表明自己不是雇佣机构
 - Exclusion of responsibility: « you will indemnify and hold [the platform] entirely harmless from any claims from [the national authorities] »
排除责任：您将予以赔偿，并使（平台）免受（国家当局的）任何索赔
- ▶ Workers are sometimes allowed to be hired as **employees** of the platform or a third party: Hilfr in Denmark, YouGenio in Italy, Helping in Switzerland
有时劳动者可以成为平台雇员或第三方的**雇员**：如丹麦的Hilfr，意大利的YouGenio，瑞士的Helping
- ▶ Some adopt the status of **temporary work agencies**: Ploy, belonging to Randstad
有些采用了**临时介绍所**的身份：Ploy，属于Randstad的一部分

Legislations on digital labour platforms 关于数字劳工平台的立法

- ▶ Platform workers as independent contractors: **Iowa** (United States), with guarantees on the absence of prescribed availability periods and the prohibition of exclusivity clauses
平台工人作为独立承包商：**爱荷华州**（美国），保证没有强制的提供服务的时间并禁止排他性条款
- ▶ **France** : legal rights for some self-employed platform workers. **法国**：某些自雇平台劳动者的法律权利
 - 2016: platforms that set the services characteristics and the task price must assume their social responsibility, including payment for occupational accidents insurance, right to vocational training, right to organize and to « engage in concerted refusals to provide their services ». Retaliation prohibited.
2016年：设定服务特征和任务价格的平台必须承担其社会责任，包括支付职业事故保险，职业培训权，组织权和“共同拒绝提供服务”的权利。禁止报复。
 - 2019: possible adoption of social charters by ride-hailing and delivery platforms.
2019年：网约车和送货平台可能会适用社会宪章。
- ▶ **Portugal**, 2018 (ride-hailing) and **Spain**, 2021 bill (delivery): presumption of employment relationship
葡萄牙，2018年（网约车）和**西班牙**，2021年法律（送货）：雇佣关系推定
- ▶ **Colombia**, 2020 bill: intermediary status for economically dependent platform workers, including social security coverage **哥伦比亚**2021年法案：经济依附性平台劳动者的中间类别地位，包括社会保障

Case law on the employment relationship and platform work

关于雇佣关系和平台工作的判例法

Platform control 平台控制

- ▶ **CJEU:** Uber services are, in fact, transport services, instead of mere “digital” information society services, because of the control exercised on the drivers (maximum fare, rewards...) -> EU Member States can regulate them.
欧盟法院: Uber服务实际上是运输服务, 而不是单纯的“数字”信息社会服务, 因为其对司机实行了控制 (最高票价, 奖励.....)
-> 欧盟成员国可以对其进行监管。
- ▶ **Republic of Korea:** drivers are employees due to the degree of control and direction imposed on them.
韩国: 由于受控制和指导的程度, 司机是雇员
- ▶ **South Africa:** even though there is no direct or physical supervision, control is exercised through technology. Drivers are employees.
南非: 即使没有直接或物理的监督, 控制是通过技术来实现的。司机是雇员。
- ▶ **France:** control by the platform via its algorithms by setting the fares, overseeing the acceptance of rides and imposing a certain route to be followed. Drivers are employees.
法国: 通过设置票价、监督接单并确定特定路线, 平台通过算法进行控制。司机是雇员。
- ▶ **United Kingdom:** clients’ ratings are used by the platform purely as an internal tool for managing performance. Recognition of intermediary status for the drivers. **英国:** 平台纯粹将客户的评分用作管理绩效的内部工具。认定司机的中间类别地位。
- ▶ **Florida, United States:** evaluation and supervision carried out by passengers, not the platform, therefore drivers are not employees. **美国佛罗里达:** 评估和监督是由乘客而不是平台进行的, 因此司机不是雇员。

Technological control will likely become more and more relevant

Case law on the employment relationship and platform work 关于雇佣关系和平台工作的判例法

Work performed personally 亲自完成工作

- ▶ **Brazil:** drivers are not employees if they do not necessarily perform the work personally and can have others do the driving for them.

巴西：如果司机不一定要亲自完成工作而是可以让其他人为他们开车，那么他们就不是雇员。

- ▶ **United Kingdom:** Central Arbitration Committee, intermediary status denied to delivery couriers having a substitution right. Employment Tribunal: status recognized to couriers who do not have a substitution right « in practice ».

英国：中央仲裁委员会，对于有替代权的快递员，否认其中间类别地位。就业法庭：对“实践中”没有替代权的快递员，认可其地位。

- ▶ **Spain:** the substitution clause seems intended to distort the true labour nature of the contract. Couriers are employees.

西班牙：替代性条款似乎旨在扭曲合同的真实劳动性质。快递员是雇员。

Case law on the employment relationship and platform work 关于雇佣关系和平台工作的判例法

Working hours 工作时间

- ▶ **Brazil** (drivers), Turin, **Italy** (food-delivery riders): flexible work schedules do not allow for workers being reclassified as employees.

巴西（司机），意大利都灵（送餐员）：劳动者有灵活的工作时间，不能归为雇员

- ▶ **France** (drivers): Choosing one's work schedule by logging on and off the app does not exclude the existence of an employment relationship, if the driver becomes an integrated part of the platform's services once logged on.

法国（司机）：如果司机一旦登录就成为平台服务的组成部分，则通过登录和退出应用程序选择工作时间并不排除雇佣关系的存在。

- ▶ **Spain** (couriers): distinguishes between theoretical and actual freedom, scoring system based notably on performance during peak hours

西班牙（快递员）：区分理论自由度和实际自由度，评分系统主要基于高峰时段的绩效

Concentrating only on this element may lead to the exclusion from protection of the most precarious and unstable workforce. 只关注这一要素可能会导致无法保护工作条件最危险和最不稳定的劳动力。

Conclusion 结论

- ▶ The 2019 **ILO Centenary Declaration** calls on ILO Member States to implement policies and measures that “respond to challenges and opportunities in the world of work relating to the digital transformation of work, including platform work”. 2019年《**国际劳工组织百年宣言**》呼吁成员国采取“应对与工作数字化转型（包括平台工作）相关的劳动世界中的挑战和机遇”的政策和措施。
- ▶ The **European Commission** recently launched a consultation with the social partners concerning the regulation of platform work at the EU level, including on ways to address misclassification of employment status. 欧盟委员会最近与社会伙伴就欧盟层面平台工作的监管展开了磋商，包括解决就业状况错误分类的方法。
- ▶ The employment relationship remains the **most important gateway** to protection for many workers around the world, including in newly emerged forms of work, such as platform work. 雇佣关系仍然是保护世界各地工人的**最重要途径**，包括新兴的工作形式，例如平台工作。
- ▶ The **ILO Employment Relationship Recommendation, 2006 (No. 198)**, in particular the primacy of facts principle, remains a most valuable guide. Role of technological control, risks associated with excessive reliance on working time flexibility, discussion on the genuine nature of substitution clauses. 国际劳工组织**第198号《关于雇佣关系的建议书》**，尤其是事实至上的首要原则，仍然是最有价值的指南。技术控制的作用，与过度依赖工作时间灵活性相关的风险，关于替代性条款的真正性质的讨论。
- ▶ Beyond the employment relationship: **how can we ensure more universal access to labour and social protection?**
超越雇佣关系：**我们如何能够确保更普遍的劳动和社会保障？**