



Policy responses to new forms of work: International governance of digital labour platforms

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Abstract

National level responses can address many of the issues arising from new forms of work. With respect to cross-border, web-based digital labour platforms, however, national responses, built for an earlier era, may confront challenges. States that seek to protect or strengthen the rights and benefits of workers on web-based, digital labour platforms may face compliance issues, or may place their workers at a competitive disadvantage vis-à-vis workers located in other jurisdictions, potentially promoting a race to the bottom in labour standards. Recognizing these difficulties, the ILO's Global Commission on the Future of Work called for an international governance system for digital labour platforms that could set, and require platforms and their clients to respect certain minimum rights and protections for all workers. In addition to setting minimum standards, an international governance system could establish the infrastructure needed to facilitate payments of social security across borders as well as establish a system of dispute resolution. The ILO's Maritime Labour Convention offers some guidance on how to move forward.

Introduction

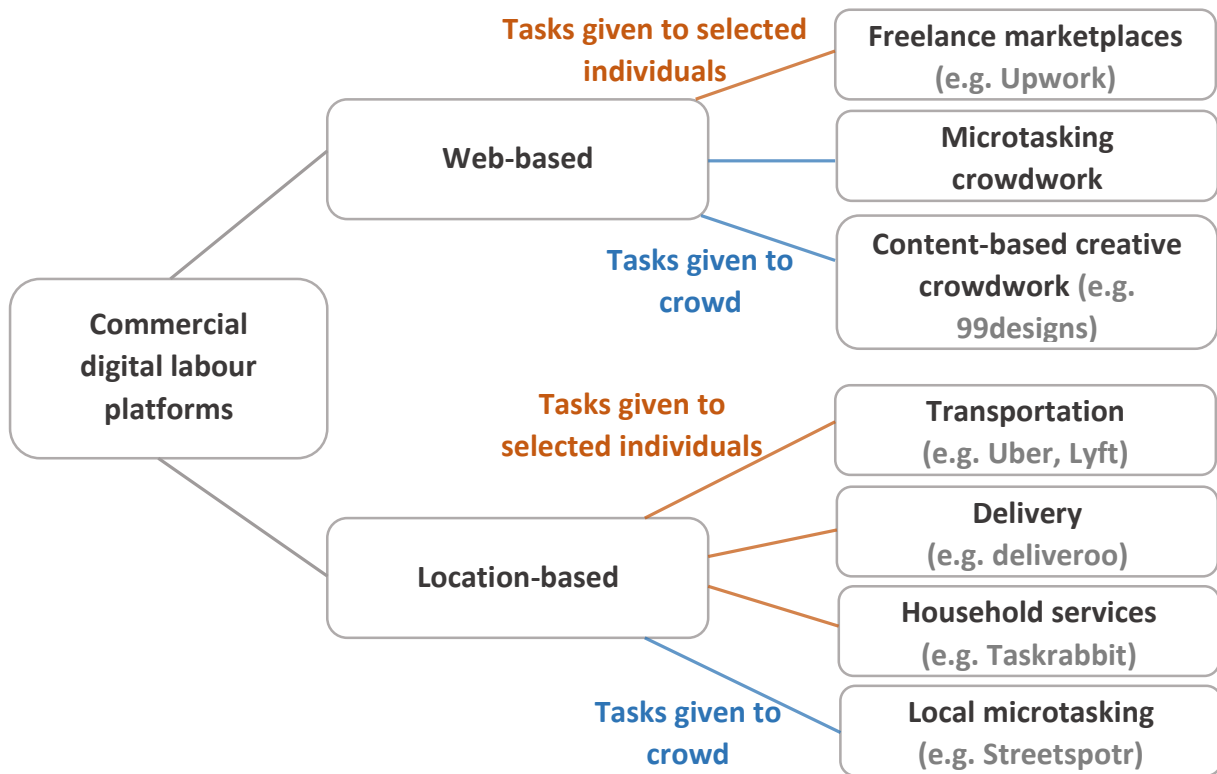
Debates on the gig economy have tended to focus on transportation network companies (TNCs) and other types of locally provided services, likely due to the greater visibility of this work. What is less discussed, but of nonetheless growing importance in the world of work, are the cross-border, web-based, digital labour platforms. These online activities pose important regulatory challenges for purely national responses.

Web-based, digital labour platforms permit the real-time hiring of labour for a myriad of tasks from IT programming, web development, graphic design, copywriting or routine clerical tasks. (See Figure 1 for a categorization of digital labour platforms). On these platforms, groups of workers (“the crowd”) living across multiple time zones offer businesses the possibility of completing projects at any time of day or night, and large numbers of workers mean that tasks can be accomplished quickly. Leveraging the power of “the crowd”, a business can have access to thousands of workers who can, for example, tag thousands of photos in a relatively short time period. These platforms also provide an avenue for innovation.

In addition, the ease, flexibility and low cost of outsourcing work to web-based digital labour platforms has resulted in their growth. According to the Oxford Internet Institute’s Online Labour Index, activity on the five largest English-language web-based labour platforms expanded by one-third between July 2016 and March 2019.¹ This number is likely to increase given the interest of Fortune 500 companies to scale up platform sourcing.² On the platforms that are tracked by the Online Labour Index, the most common occupations are software programming (with more than one-third of jobs), followed by the creative field (roughly one-quarter of jobs), clerical and writing (each just under 15 percent), sales (10 percent) and professional services (about 2 percent). An important subset of online labour platforms are the microtask platforms (for example, Amazon Mechanical Turk, Crowdfunder or Clickworker), where workers typically undertake shorter tasks that are paid at a piece-rate.

Web-based, online platforms, like most other types of digital labour platforms, often classify their workers as self-employed, resulting in a lack of labour protections and employer-provided social security benefits. The terms and conditions of working on the platforms are laid out in the platforms’ “terms of service” documents, which workers must click on in order to begin working. These terms are set unilaterally by the platforms and state how and when crowdworkers will be paid, how their work will be evaluated, and what recourse workers have (or do not have) when things go wrong. As workers are spread throughout the world, and may live in different countries from where the platform and/or the clients are located, it is not a simple matter for regulators to address working conditions. Moreover, as workers are classified as independent contractors in many instances, this deprives them of the right to organize collectively. Even if they could organize, the geographic dispersion of the workforce would make it difficult.

Figure 1.1 **Categorization of digital labour platforms**



Source: Adapted from Schmidt (2017).

Opportunities and risks for workers from web-based, digital labour platforms

One of the principal advantages to working on web-based, digital labour platforms is the flexibility that it can provide to workers, who can choose when, where, and how they would like to work.³ As a result, workers with disabilities or caring responsibilities – as well as residents of rural or economically depressed areas – are highly represented amongst crowdworkers.⁴ Work on digital labour platforms is an important source of income for many workers. In a comprehensive study of five English-speaking microtask platforms covering workers located in 75 countries in the world, it was found that it was the main source of income for one out of every three workers.⁵

However, there are also some important areas of concern with regard to pay and social security coverage, availability of work, and dispute settlement mechanisms. The 2017 ILO survey showed that average hourly earnings ranged between US\$2 and US\$6.5, with a high proportion of workers earning below the prevailing minimum wage in their jurisdiction, a finding also documented in other studies.⁶ The low earnings among these workers is also due in part to their inability to obtain tasks on a continuous basis and the time spent identifying suitable tasks. An overwhelming majority of workers (88%) mentioned that they would like to do more work, and on average they wished to do about 12 hours of more crowdwork per week.

The ILO survey showed that lack of social protection was also a real concern. Workers who did have health or pension coverage received those benefits through their main job, their spouses' employment, or the state. Among American workers on the Amazon Mechanical Turk platform, 91 percent of workers who were performing crowdwork as their main job were not contributing to social security.⁷ The Social Protection Floor Recommendation, 2012 (No. 202) calls for all workers to have a basic level of social security throughout their lives,⁸ and technology can be effectively used

and harnessed to ensure portability of social protection and in ensuring payment of social security for those working on digital platforms.

A major concern of the workers surveyed in the ILO study was the rejection of their work, which they deemed in many cases to be unfair. Almost nine out of ten workers had had work rejected, and in consequence not remunerated. Often, little or no justification for rejections was provided. While some rejections may have been justified, in that the worker did not follow the instructions properly or made mistakes, often the reason lay beyond the worker's responsibility, for instance if instructions were unclear, if there was a mistake in the task design, technical errors or simply dishonesty.⁹ The lack of transparency and recourse mechanisms for these rejections was an important source of concern.

In addition, currently the freelancing platforms charge workers a commission for working on the platform. At Upwork, fees are typically set on a sliding scale from 20% to 5% depending on the remuneration for the project and the worker's experience on the platform.¹⁰ An ILO survey of 1,000 platform workers in Ukraine found that the vast majority of online platform workers (85%) pays a commission to the platform on which they work. Almost two thirds (62%) always pay a commission, and a quarter (23%) pay it from time to time.

International labour standards, including the Protection of Wages Convention, 1949 (No. 95) and the Private Employment Agencies Convention, 1997 (No. 181) disfavor the practice of charging fees to workers. The Protection of Wages Convention, 1949 (No. 95) states that "Any deduction from wages with a view to ensuring a direct or indirect payment for the purpose of obtaining or retaining employment, made by a worker to an employer or his representative or to any intermediary (such as a labour contractor or recruiter), shall be prohibited" (Art. 9). Similarly, Article 7 of the Private Employment Agencies Convention, 1997 (No. 181) states that "Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers."

Finally, unionisation of workers on web-based platforms and their participation in collective bargaining is largely absent. The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, establishes that freedom of association and effective recognition of the right of collective bargaining are universal to all workers.

Potential difficulties in regulating digital labour platforms across multiple jurisdictions¹¹

As a result of the problematic working conditions and low pay of much platform work, platform workers and trade unions around the world have turned to the courts in an attempt to invoke the protections of labour law. Currently, cases are being heard around the world on the question of the employment status of platform workers. Most of these cases pertain to work being performed locally within a particular jurisdiction (particularly in the sector of transportation), though the case *Otey v. Crowdfunder*, filed in in a U.S. district court in California, involved the web-based digital labour platform, Crowdfunder.¹²

Given differences in labour regulation by jurisdiction, it is not surprising that the conclusions reached across jurisdictions have varied.¹³ Yet for web-based digital labour platforms whose work involves cross-border transactions – with the platform located in one country, the client in a different country, and workers spread throughout the world – the different legal decisions reached across jurisdictions set the stage for inconsistent rulings and conflicts of law.¹⁴ It can also lead to problems in legal compliance. As countries begin to address the current absence of regulation, lack of

uniformity will likely occur. Under these circumstances, the need to calculate minimum pay rates across multiple jurisdictions or to comply with various procedural and administrative rules will likely result in time-consuming and potentially costly compliance issues for platforms.

The geographical dispersion of transactions across the platform work creates the potential for bringing legal action against a platform in any of the jurisdictions in which the platform's clients and workers are based. As such, the potential for "conflicts of law" disputes -- in which courts must first determine which jurisdiction's laws apply before resolving the underlying dispute -- is considerable.¹⁵ In a wider meaning, this term also designates the rules applied to determine which courts are competent to hear a case.

The regulation of digital platform work on a national level may encourage all relevant parties to select the jurisdiction in which to file a legal action where the laws are most favourable to them (e.g. the country where the worker resides or works, the country where the platform has its headquarters, or the country where the client is located). Platforms may seek to exert influence in this regard by choice of law clauses in their online terms of service. Such 'forum shopping' leads to inconsistent and sometimes conflicting frameworks that create additional problems.

National-level regulation that aims to strengthen the rights and benefits of workers on web- based, digital labour platforms, for example by requiring platforms to contribute to social security systems or by applying local minimum wages, could also face compliance issues. As noted earlier, implementing national regulations risks creating a competitive disadvantage.

[An international governance system for digital labour platforms](#)

Recognizing these difficulties, the ILO's Global Commission on the Future of Work called for the "development of an international governance system for digital labour platforms that sets and requires platforms (and their clients) to respect certain minimum rights and protections."¹⁶ The Commission further noted that the Maritime Labour Convention, 2006 (MLC, 2006) is an interesting precedent, as it too concerns an industry with multiple parties operating in different jurisdictions. Despite this regulatory challenge, governments and social partners through the MLC have managed to establish and apply a global labour code for seafarers (See Box 1).

Although seafaring is distinct from providing on-line services through digital platforms, there are some parallels, including the temporary, task or project-based nature of the work, the potential for wage theft or other forms of fraud, and most importantly the different jurisdictions implicated as a result of the international nature of the work. As such there may be a need for an international sectoral regulation of crowdwork or other form of international governance mechanism.

The ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), 2017 could constitute a useful starting point for this purpose. It provides guidance to multinational enterprises on social policy and inclusive, responsible and sustainable workplace practices. It defines multinationals as including enterprises which control services outside the country in which they are based. Platforms could use the guidance provided in the MNE Declaration to develop clear codes of conduct for members, including published procedures for workers to raise their concerns.

One interesting development in this respect is the "Ombuds office for the Crowdsourcing Code of Conduct" established in 2017 by the German trade union, IG Metall, the German Crowdsourcing Association, and eight digital labour platforms. These eight platforms, headquartered in Germany

and the United Kingdom, but with legal presence in other European countries and operations that span the globe, had signed a voluntary Code of Conduct.¹⁷ The code of conduct sets out a basic set of guidelines with a view to promoting trust and fair cooperation between service providers, clients and crowdworkers. The mandate of the Ombuds office is to enforce the Code of Conduct and resolve disputes between workers and signatory platforms, regardless of the location of the worker. The Ombuds office is composed of a board of five people – one worker, one trade union representative, a platform representative, one Crowdsourcing Association representative, and a neutral chair – and resolves disputes by consensus, with IG Metall handling the administration. As of January 2019, the Ombuds office of the Code of Conduct had resolved 22 cases submitted by workers via its online form.¹⁸

Box 1. A brief history of the Maritime Labour Convention

In the nineteenth century, a seafarer's life was a difficult one, with few, if any safeguards against wage theft, safety hazards, or poor working conditions. At that time, the dominant international law regulating the seas was the centuries-old concept of freedom of the seas – *mare liberum*. Yet as the volume of goods shipped at sea increased, so too did concern over potentially exploitative or poor working conditions for seafarers.¹⁹ In extreme situations, workers could find themselves abandoned at foreign ports with no money and no passage to return home.²⁰

Beginning in 1897, the International Maritime Committee (IMC) began advocating for greater unification of maritime law, and adopted regulations and protocols to further harmonization.²¹ In the ensuing years, the IMC began to fashion the standards and organization necessary to provide cooperation between seafaring states and the ILO passed numerous conventions regulating various employment and working conditions for seafarers.²² In 2006, under the auspices of the ILO, the International Labour Conference took up the project of consolidating and modernizing the sixty-plus instruments that concerned various aspects of maritime employment in the Maritime Labour Convention (MLC).²³ Every seafarer under the MLC has a right to a safe workspace that complies with international standards, fair terms of employment, medical care, and decent living conditions. These rights are set out in five titles.²⁴ Title I sets forth minimum and basic requirements, such as age requirements, adequate training, and employment notification standards. Title II covers the conditions of employment, including notice of termination periods, regular wage payment and calculation, hours, leave, repatriation, and compensation. Title III concerns decency of accommodation and recreation, including quality of food served aboard. Title IV ensures adequate healthcare provisions, places liability for workers' health on the owner of the ship, requires safety standards to be followed, and provides for social insurance for seafarers. Finally, Title V discusses the enforcement of the other titles, including the responsibilities of flag and port states.

Since its promulgation in 2006 and entry into force in 2013, the MLC can by all accounts be considered a success. As of February 2019, 82 member states have ratified the convention, covering over 90 percent of the tonnage shipped. As such, the MLC ensures that there is a level playing field that affords protection to seafarers around the world.

Source: Cherry, 2019.

Given important concerns about lack of dispute settlement mechanisms available for workers on digital labour platforms, the bipartite Ombuds office is an important initiative. It is also a good

example of ‘virtual’ labour market governance, as all activities, including discussions and decisions of the board, are conducted online.

An international governance system, as called for by the Global Commission on the Future of Work, could set minimum standards as well as develop the infrastructure necessary for facilitating payments to social security systems. It could also establish a representative board to adjudicate disputes between platforms, clients and workers.

Legal systems developed for an analogue era may not have the capacity to address web-based digital labour platforms, where transactions are virtual and extra-territorial. If we are to ensure decent work for all, including those working on digital labour platforms, then we must devise mechanisms that respond to this new form of work.

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¹ According to the index creators, the five platforms that make up the online labour index, Freelancer.com; Guru.com; Mturk.com; Peopleperhour.com and Upwork.com, account for 70% of traffic on online labour platforms. See Kässi and Lehdonvirta, 2018.

² Corporaal and Lehdonvirta, 2017.

³ Felstiner, 2011; Ipeirotis and Horton, 2011; Barnes et al., 2015.

⁴ Zyskowski et al., 2015; Berg et al., 2018 ; Aleksynska, Bastrakova and Kharchenko, 2018.

⁵ Berg et al., 2018.

⁶ Berg, et al., 2018, Hara, et al., 2018; Huws, et al., 2017, European Parliament, 2017.

⁷ Berg, 2016.

⁸ Social protection floors should be part of national strategies to progressively ensure higher levels of social security to as many people as possible, guided by ILO social security standards.

⁹ McInnis et al. 2016.

¹⁰ <https://www.upwork.com/blog/2016/05/upwork-pricing/>

¹¹ This section draws from an ILO working paper prepared by M. Cherry, 2019.

¹² Workers sued the company for failure to pay minimum wage under the FLSA and Oregon's minimum wage law. The case was settled before a judgement could be made.

¹³ See <https://ignasibeltran.com/2018/12/09/employment-status-of-platform-workers-national-courts-decisions-overview-australia-brazil-chile-france-italy-united-kingdom-united-states-spain/#%C3%ADndice> for an overview of national court decisions.

¹⁴ For a detailed discussion of conflict of law issues in the platform economy, see Cherry, 2019 and Pretelli, 2018

¹⁵ Cherry, p. 21. Cherry reviews conflict of law cases that have emerged in US, EU and India.

¹⁶ ILO, 2019, p. 44.

¹⁷ <http://crowdsourcing-code.com/>

¹⁸ See <http://ombudsstelle.crowdwork-igmetall.de>.

¹⁹ Mangone, 1997.

²⁰ Link, 2015.

²¹ Wiswall, n.d.

²² Frawley, 2011.

²³ Maritime Labour Convention, Preamble, Feb. 23, 2006, 2952 U.N.T.S. 5. *See also* Chirstodoulo-Varotsi, 2012.

²⁴ Maritime Labour Convention, at Art. IV.