



European Union Proposal Presumes Platform Workers Are Employees

Insights

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Since the start of the coronavirus pandemic, platform workers have played an increasingly significant role in the global economy, which prompted the European Commission to propose a set of measures meant to improve their working conditions while also promoting the sustainable growth of the platform economy within the European Union (EU). People who work through these platforms have provided essential goods and services – such as ride-hailing, food delivery, and domestic work – to those in lockdown or quarantine. And although many COVID-19 restrictions have been lifted, the digital labor economy in the EU is expected to increase from 28 million workers to 43 million by 2025. While the European platform economy has increased flexibility and accessibility of the labor market due to lower entry barriers, it also highlighted the vulnerable working conditions of workers, who often lag behind other employees in the areas of labor and social rights protections. To combat these issues, the European Commission’s Platform Work Package, proposed in December 2021, introduces several instruments aimed at materially reshaping work through digital platforms. Notably, while many platform workers traditionally have been classified as self-employed independent contractors, the directive creates a rebuttable presumption that a digital labor platform is the worker’s employer, if certain criteria are met. Here’s what you need to know about the Platform Work Package and how it affects businesses in the EU.

Components of the Platform Work Package

The Platform Work Package consists of three instruments:

- A **communication** that sets out the EU approach and measures on platform work;
- A **proposed directive** designed to improve working conditions in platform work; and
- **Draft guidelines** on the application of EU competition law to collective agreements regarding the working conditions of “solo self-employed” persons. Note that the European Commission’s draft guidelines define “solo self-employed persons” as those who do not have an employment contract or are not in an employment relationship and rely primarily on their own personal labor for the provision of the services concerned.

The Communication

The communication provides an overview of the methods and tools needed to improve platform work at the EU level. The European Commission stresses that while it will support and monitor its proposed measures to improve platform working conditions, successful enforcement and proper application can only be achieved by implementing additional measures with the help of other key players.

The communication therefore calls on multiple actors – including EU member states, digital labor platforms, and social partners – to collectively work on enforcing the proposed directive and draft guidelines. The Commission also recognizes the importance of players outside the EU and affirms that it will work with its partners worldwide to promote ideal working conditions in platform work on a global scale.

The Proposed Directive

The proposed directive provides a set of requirements and reforms aimed at achieving the following specific objectives:

- Proper classification of the employment status of platform workers;
- Fairness, transparency, and accountability in algorithmic management; and
- Improving enforcement, transparency, traceability, and awareness of developments in platform work.

Presumption of Employment

Traditionally, many platform workers were classified as self-employed independent contractors, which denied such workers significant employment rights. Under the directive, there is a rebuttable legal presumption that a digital labor platform, which “controls the performance of work,” is the platform worker’s employer. The legal presumption will not have retroactive effect and will instead begin to apply two years after the adoption of the directive.

A platform will be presumed to be “controlling the performance of work” when at least two of the following criteria are met:

1. Effectively determining or setting upper limits for the level of remuneration;
2. Requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service, or performance of the work;
3. Supervising the performance of work or verifying the quality of the results of the work, including by electronic means;
4. Effectively restricting the freedom, including through sanctions, to organize one’s work, in particular the discretion to choose one’s working hours or periods of absence, to accept or to refuse tasks, or to use subcontractors or substitutes; and

5. Effectively restricting the possibility to build a client base or to perform work for any third party.

Qualifying platform workers will be entitled to the labor and social rights that accompany the status of a “worker,” which include the right to a minimum wage, collective bargaining, personal leave benefits, working time and health protection, and contributory old-age pensions. Platforms will have the right to rebut the legal presumption of an employment relationship, but the requirements for successful rebuttal have yet to be determined by the Commission. Once platform workers are treated as employees under the directive, there may be local tax and security implications imposed on the platforms.

Algorithmic Management

Digital labor platforms use automated algorithms to monitor, supervise, and evaluate the work performance of platform workers. Additionally, automated decision-making systems are used to make or support decisions, such as pay, ranking, and ability to receive additional work, which significantly affects the working conditions of platform workers.

The directive seeks to promote fairness, transparency, and accountability of such algorithmic management by necessitating that digital platforms meet the following requirements for both workers who are deemed to have an employment relationship with the platforms and those who are self-employed:

1. ***Increase Transparency in the Use of Algorithms***

- Inform platform workers of the use and key features of such automated systems, including how they are monitored, how they are evaluated by both the platforms and clients, and the main parameters that such systems take into account when making automated decisions.
- Inform and consult platform workers or their representatives on changes in algorithmic decisions, such as if the platforms intend to introduce new automated monitoring or decision-making systems.

2. ***Ensure Human Monitoring***

- Regularly utilize human monitoring to evaluate the impact of individual decisions taken by automated monitoring systems.
- Screen the human resources used for monitoring algorithmic systems to ensure that they have the necessary competence, training and authority to do so.

3. ***Provide the Right to Contest***

- Provide platform workers with the right to obtain an explanation for a decision taken or supported by automated systems that significantly affects their working conditions.
- Provide a written statement describing the reasons for any decision restricting, suspending, or terminating the platform worker’s account; refusing the remuneration for work performed by the platform worker; or affecting the platform worker’s contractual status

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Enforcement, Transparency, and Traceability

The national authorities of EU member states have struggled to gather data on platforms and persons that work through them, especially when platforms are operated in more than one member state. These difficulties have often made it unclear to the member states where, and by whom, the platform work is performed.

The directive seeks to promote transparency around platforms in two ways. First, the directive clarifies the existing obligations that platforms must declare work performed by workers to the labor and social authorities of the EU member state in which the work is performed and share relevant data with those authorities. Second, the directive requires that platforms provide national authorities with the number of persons performing work through the platform, such persons' contractual or employment status, and the general terms and conditions of those contractual relationships.

Draft Guidelines

The draft guidelines clarify the application of EU competition law to collective agreements of solo self-employed persons seeking to improve their working conditions.

Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between businesses that restrict competition within the internal market. However, the European Union Court of Justice has recognized that collective bargaining agreements between workers on the one hand and employers on the other fall outside the scope of the TFEU prohibition. Nevertheless, collective bargaining agreements concluded by solo self-employed persons risk infringing on the TFEU Article 101 prohibition because such persons are considered "undertakings" under EU competition law.

The draft guidelines confirm that the EU competition and antitrust laws do not infringe the right of solo self-employed persons to engage in collective agreements that improve their working conditions. The guidelines further explain that EU competition law applies to collective bargaining by certain solo self-employed persons, including:

- Economically dependent solo self-employed persons
- Solo self-employed persons working "side-by-side" with workers; and
- Solo self-employed persons working through digital labor platforms.

Conclusion

There will likely be changes and additions to the Platform Work Package, primarily within the proposed directive, which is still subject to discussion and review within the EU. However, once

adopted, the member states will have two years to conform their national laws to the package's measures.

We will monitor these developments and provide updates as warranted, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If your organization does business in the EU or employs any individuals through platforms, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our [International Practice Group](#) to learn more about the implications of the new law and to assess what changes, if any, are needed to bring your organization into compliance.

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