Journal of Work Health and Safety Regulation

ISSN 2758-4755
Vol. 1
No. 1
January 2023

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This special issue was co-edited by Dr. Elizabeth Bluff and Emeritus Professor Michael Quinlan with the Editor-in-Chief (Law), Professor Richard Johnstone.

Journal of Work Health and Safety Regulation is published biannually by the Japan Association of Occupational Health Law (Office: Shin-Kagurazaka Building 2F, 43 Tansucho, Shinjuku-ku, Tokyo 162-0833, Japan, TEL: +81-3-5946-8844 FAX: +81-3-5229-6889 E-mail: jaohl@supportoffice.jp https://jaohl.jp/)
The editors wish to thank Ms. Momoe Kanada who kindly checkd the entire manuscript.
Printed by: Yamashiro Printing Co., Ltd., 588 Hokyoin Higashimachi, Teranouchi-dori Ogawa-nishi-iru, Kamigyo-ku, Kyoto 602-0062, Japan, TEL: +81-75-441-8177 FAX: +81-75-441-8179

Journal of Work Health and Safety Regulation

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Greetings from the *Editor-in-Chief (Law)* of the *Journal of Work Health and Safety Regulation*

I am honoured and grateful that the Japan Association of Occupational Health Law has appointed me to be the inaugural Editor-in-Chief (Law) of its new *Journal of Work Health and Safety Regulation*. During my nearly 40 years as a labour lawyer, the world of work has changed significantly, and with those changes have come new and emerging hazards threatening everyone involved in, and affected by, work. The name of journal reflects its focus on understanding how law and other modes of regulation do, and can best, address the wide array of hazards facing everyone who carries out work, or who is otherwise affected by work. The Journal's aim is to advance academic research and to inform policy debate and decision-making in all aspects of work health and safety regulation, including prevention, compensation and rehabilitation/return to work.

The Journal is interested in submissions that include analysis of work health and safety regulatory developments in a single country, particularly those that have transnational implications or that relate to potential international trends; doctrinal (legal analytical) comparisons addressing common work health and safety issues across two or more countries; empirical analyses; case studies; analysis of practical, theoretical, methodological and historical issues in comparative or transnational work health and safety regulation; and discussion of economic, social, or cultural aspects of work health and safety regulation and/or the 'transferability' of legal rules or policy approaches.

Multidisciplinary and interdisciplinary perspectives on work health and safety regulation – including from law, occupational health, medicine, sociology, regulatory studies, industrial relations, psychology, social policy, criminology, socio-legal studies and history – are welcome.

This first issue of the journal includes articles dedicated to one of the most pressing challenges in work health and safety regulatory policy: how to regulate to ensure the health and safety of workers undertaking work allocated through digital platforms across a range of industrial settings. I thank the guest editors of the special issue, my colleagues Dr Elizabeth Bluff and Emeritus Professor Michael Quinlan, for their careful and insightful editorial and scholarly contributions. I also thank each of the authors who has contributed to this special issue for their excellent papers and for their willingness to support this new journal.

The second issue of the Journal (to be published in the first half of 2023) will be a general issue, and the third issue (to be published in the second half of 2023) will be a special issue on work health and safety regulation and psychosocial hazards. Submissions to either or both of these issues are very welcome!

We hope that everyone with an interest in health and safety at work will support and publicise this new journal. We look forward to receiving submissions on work health and safety regulatory issues in the form of articles, notes on major reports, legislation notes, case notes and book reviews.

Editor-in-Chief (Law)

Richard JOHNSTONE, B Bus Sci (Hons) (Cape Town), LLB (Hons), PhD (Melbourne).

Honorary Professorial Fellow, Centre for Employment and Labour Relations Law, Melbourne Law School, The University of Melbourne, Australia

Greetings from the *Editor-in-Chief (Health)* of the *Journal of Work Health and Safety Regulation*

I am delighted to have the opportunity to express my appreciation to the Japan Association of Occupational Health Law for having appointed me as their Editor-in-Chief (Health) of its journal, with its primary focus on occupational medicine.

Over the 40 years of my professional life, I have been engaged in research in the fields of environmental toxicology and occupational medicine. The environment surrounding industrial areas in Japan was once heavily polluted in the 1950s but has since been remediated and considerably improved thanks to the judicial enforcement of the environmental protection laws and regulations during 1960-1980. Through this experience, we became deeply aware of the importance of establishing preventive measures at the forefront, as being the most effective method for environmental protection.

Currently, various occupational health problems, such as mental disorders and occupational cancers have surfaced among workers in various work environments. Finding a solution to these sensitive and complex issues takes collaborative effort among various disciplines including medical professionals, labor and social security specialists, human resource personnel, attorneys, and jurists.

I would like to encourage authors from various fields to report their experiences and findings of real-world disputed issues to which regulatory problems were identified and judicial judgments were given. In doing so, we will be able to share and compile this knowledge of former case law which address occupational health, as well as related occupational regulatory issues.

This new journal is designed to be a platform that facilitates multidisciplinary studies focusing on occupational health and knowledge exchange among those professionals in this field. I look forward to the vision of this journal offering new opportunities for researchers and professionals engaged or interested in occupational health law to network and initiate collaborative interactions.

Editor-in-Chief (Health)

Fujio KAYAMA, M.D., Ph.D.

Professor Emeritus, Jichi Medical University, Japan

Journal Guide

The Journal of Work Health and Safety Regulation (JWHSR) invites submissions in all fields related to the Work Health and Safety Regulation.
Please read the following guidelines and information before proceeding to the submission.

1. JOURNAL POLICY

1.1. Aims and Scope

The Journal of Work Health and Safety Regulation (JWHSR) is a peer-reviewed multidisciplinary journal of international scope in work health and safety regulation. It is published biannually in English and administered by the Japan Association of Occupational Health Law.

Before submitting your manuscript, please ensure you have read the aims and scope of the journal.

The aim of the journal is to advance academic research and to inform policy debate and decision-making in all aspects of work health and safety regulation, including prevention, compensation, and rehabilitation/return to work.

The Journal is interested in submissions that include analysis of legislative, administrative, or judicial developments in a single country that have transnational implications or that relate to potential international trends; doctrinal (legal analytical) comparisons addressing common work health and safety issues across two or more countries; empirical analyses; case studies; analysis of theoretical, methodological, or historical issues in work health and safety regulation; scholarship on mixed systems of law or of supranational legal regulation; and discussion of economic, social, or cultural aspects of work health and safety regulation and/or the 'transferability' of legal rules or policy approaches.

Multidisciplinary and interdisciplinary perspectives on work health and safety regulation – including from occupational health, medicine, sociology, regulatory studies, industrial relations, psychology, social policy, criminology, socio-legal studies, and history – are welcome.

The journal is also interested in submissions that analyze important court decisions (case notes), reports on work health and safety regulation issues (reports) and developments in work health and safety legislation (legislation notes), as well as reviews of books on work health and safety regulation (book reviews). The journal will also publish occasional editorials (including guest editorials) reporting on developments in work health and safety regulation from around the world.

1.2. Area of specialty

1) Basic framework of activities

The greatest characteristic of this association is the orientation towards problem-solving and prevention. Conventionally, laws have been oriented towards resolving disputes that have already occurred. By having its foundation based on the knowledge that is cultivated in such a manner, the Japan Association of Occupational Health Law (JAOHL) combines knowledge from various related fields and seeks to resolve and prevent legal issues concerning work health and safety. We welcome everything from the latest academic research to practical debates concerning the challenges in the field. In our educational activities, we emphasize the practical legal education of occupational health professionals, such as industrial physicians (Fig. 1).

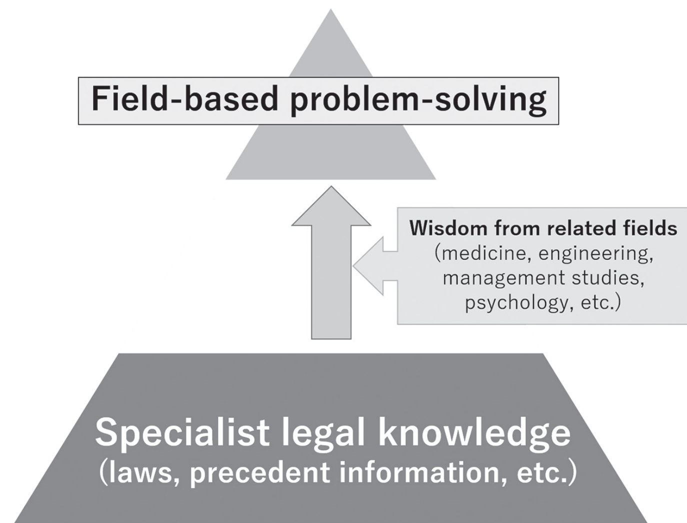

Fig. 1. Basic framework of JAOHL activities

2) Area of specialty aimed toward “field-based problem-solving”

Our area of specialty is aimed toward field-based problem-solving, which can be organized as shown in Fig. 2. While the horizontal axis represents time, the vertical axis represents perspective, creating the following four quadrants.

(1) Macro-level × prevention

How should legal systems be created to prevent work health and safety problems from occurring?

cf. proposals for work health and safety legislation, etc.

For example, how should the work health and safety of freelancers and teleworkers be regulated, and how should the handling of chemicals with unknown toxicity be regulated.

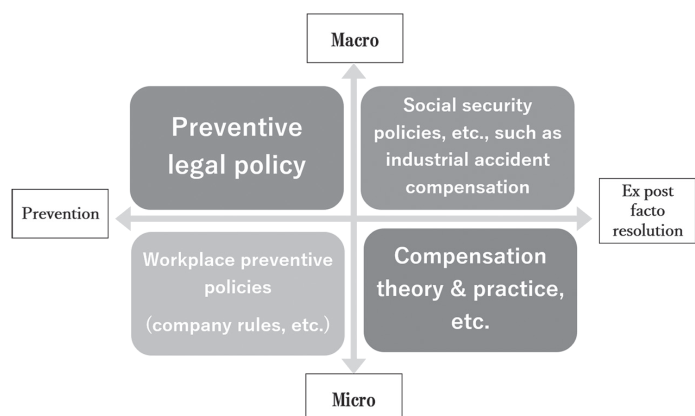

Fig. 2. Organization of field-based problem-solving

(2) Macro-level × ex post facto resolution

How should the legal systems and laws at the national level be created to resolve the work health and safety problem?

cf. how should the industrial accident compensation systems work, how should the industrial

accident compensation be wound up, etc.

For example, how should the findings of industrial accidents be made for chemical hypersensitivity or hepatitis when the effects of overconsumption of alcohol during work are suspected, and how should the decision to discontinue industrial accident compensation be made in the case of mental disorders, which can last over long terms.

(3) Micro-level × prevention

How should the company rules and systems be created to prevent work health and safety problems from occurring?

cf. the state of company rules and systems that are useful for prevention, etc.

For example, if there are useful examples of decreases in the number of unwell people or trouble through the preparation of new health management regulations, there must be an analysis of their factors and whether they can be expanded.

(4) Micro-level × ex post facto resolution

In order to resolve the work health and safety problems after the fact, how should individual methods and laws be created when the parties go to court?

cf. know-how about out-of-court dispute resolution, theories of appropriate compensation, etc.

For example, if there are strategies that have contributed towards the prevention of disputes at an early stage, when employees suffer unclear health disorders outside work, there must be an analysis of their factors and whether they can be expanded.

The issues that this Association will tackle for the time being

(1) Legal system that encourages collaborative work health and safety by various stakeholders
(2) Diverse and dense work destinations, possible health problems and legal regulations
(3) Measures to ensure health and safety in response to the increase in double-employed and self-employed
(4) Future chemical substance management and the law
(5) Criteria for certifying workers' injuries and healing of brain/heart diseases and mental disorders based on the evolution of diagnostics and pathology
(6) Scope of application of industrial accident compensation for health disorders other than brain heart disease and mental illness
(7) How to properly handle health information
(8) Appropriate return to work determination
(9) Appropriate way of dealing with employees who have problems with personality and development (including reasonable consideration) in the workplace
(10) Effective countermeasures against harassment

It applies an editorial policy that:

– is committed to a rigorous analysis;

- fosters diversity and equality of opportunity by strongly encouraging submissions in English or Japanese by authors of all generations and from all world regions;
- welcomes manuscripts related to the world of work health and safety regulation from all disciplines and encourages the submission of those with an inter-disciplinary approach;
- welcomes both theoretical and empirically-based studies, as well as comparative and international studies, and country-level studies that explore concepts, trends, and institutions that are of interest to an international audience;
- promotes a style of writing that is accessible to both academics, policy-makers, and a multidisciplinary readership.

2. SUBMISSION

2.1. Submission

Submissions to the JWHSR should be sent to:
JWHSR Editorial Office
E-mail: jwhsr-edit@bunken.co.jp

2.2. Languages

Articles must be submitted in English. Authors are invited to write in a style that is accessible to academics, policy-makers, and a multidisciplinary audience.

2.3. Manuscript Type

The journal publishes Articles, Legislation Notes (notes on new legislation in one or more countries), Reports (notes on significant reports on work health and safety law and policy issues), Case Notes, Book Reviews, and Editorials. Articles, Legislation Notes, notes on Reports, and Case Notes will be peer reviewed.

2.4. Submission declaration statement

All submissions should be accompanied by a statement indicating that they are not under consideration elsewhere or have not already been published, and that they will not be submitted for publication elsewhere without the agreement of the Administrator.

2.5. Conflict of interest statement

Authors must provide a conflict of interest statement on the title page.Authors should disclose any potential sources of conflict of interest. Any interest or relationship, financial or otherwise that might be perceived as influencing an author’s objectivity is considered a potential source of conflict of interest.

If there is a conflict of interest to be declared, it should be stated as in

・(1) Author X has received financial support from Y Corporation.
・(2) Author X is an employee of Y Corporation.

If the authors have no conflicts of interest to declare, they must state "The authors have no conflicts of interest to declare." on the title page at submission.

It is the responsibility of the corresponding author to review this policy with all co-authors. Submitting authors should ensure they liaise with all co-authors to confirm agreement with the final statement. Authors must complete the disclosure form and submit it with the manuscript.

2.6. Funding

Authors should list all funding sources in the acknowledgments section. Authors are responsible for the accuracy of their funder designation.

2.7. Research Ethics statement

Authors of manuscripts describing research involving the participation of humans must confirm that the work was carried out in accordance with the principles embodied in the Declaration of Helsinki, its revisions, and any guidelines approved by the authors' institutions. Informed consent obtained from research subjects and approval of an Ethics Review Committee must be clearly indicated on the title page. The author must submit the Ethical Consideration Confirmation Form with the manuscript to the editorial office. In the case that an ethical review is not required, the Ethical Consideration Confirmation Form must still be submitted.

2.8. Rights and permissions

Authors must observe the usual rules and practices regarding the reproduction of copyrighted material in their articles. If a manuscript includes previously published material, the authors must obtain permission from the copyright owners and the publisher of the original work to reproduce it. The authors must cite the original work in their manuscript.

2.9. Pre-print policy

This journal will consider for review articles previously available as preprints on noncommercial servers. Authors may also post the submitted version of a manuscript on noncommercial servers at any time. Authors must notify JWHSR of any preprint related to their manuscript upon submission. Authors are recommended to post a link to the JWHSR article on the preprint server after the manuscript is accepted.

2.10. Copyright

Authors transfer the copyright to the publisher as part of a journal publishing agreement. The manuscript accepted to be published will be published in a periodical journal and will be freely accessible on J-Stage. Upon acceptance for publication, authors will be required to sign a Copyright Transfer Agreement Form (CTA).

2.11. Fees and Charge

There are no submission fees or article processing charges.

3. PREPARING THE SUBMISSION

3.1. Formatting

Main text should be submitted as Word documents in "Times New Roman", font size 12, double-spaced.

Each new paragraph should be indented except for the first paragraph under a heading. The tables must submit as a separate Excel or MS Word File containing text data, not as images. Submit figures, photographs, graphs, or diagrams in MS Word, PowerPoint, JPEG, or TIFF. Figures should be of high enough resolution for direct reproduction for printing, and the resolution of the figure should be at least 300 dpi.

3.2. Arrangement and length of manuscript

Articles should be between approximately 3,000 and 10,000 words long, with an abstract of no more than 250 words. References, tables, and figures are excluded from the number of words.

The manuscript should be submitted in separate files for the following parts: (1) title page; (2) main text; (3) tables, figures, appendices, and supporting information. Legislation Notes, Reports, Case Notes and Book Reviews should be between approximately 1,500 and 7,000 words long.

Title page

The title page should contain:

i. A title containing no abbreviations;
ii. The full names of the author(s), specifying the name of the corresponding author, i.e. the person who will have the primary responsibility for communicating with the journal during the manuscript submission, peer review, and publication process.
iii. The institutional affiliation(s) where the work was conducted and e-mail address(es) of the author(s).
iv. Acknowledgments. Besides indicating any contributions from persons who do not meet the criteria for authorship, any financial support should be mentioned.
v. Submission declaration statement, see section 2.4. above.
vi. Funding, see section 2.6. above.
vii. Conflict of interest statement, see section 2.5. above.
viii. Information on rights and permissions obtained to reproduce material from other sources, see section 2.8. above.

Main text

As articles are peer-reviewed, the main text should not include any information that might identify the authors.

The main text should be presented in the following order:

i. Classification (Articles, Legislation Notes, Reports, Book Reviews, Editorials);
ii. Title;

iii. Abstract: describing the aims, methods, scope of analysis, results, and conclusions;
iv. Keywords (between 4 and 8);
v. Running title (60 characters or less);
vi. Main text (may be omitted depending on the type of manuscript);
vii. List of references.
viii. Legends

Tables, figures, appendices, and supporting information

Tables and figures should be included in the text and also supplied in a separate file. For submission, they should be supplied as separate files but referred to in the text. If data, scripts or other artifacts used to generate the analyses presented in the manuscript are available via a publicly available data repository, authors should include a reference to the location of the material within their manuscript.

4. HOUSE STYLE

4.1. References

JWHSR is a multidisciplinary journal, and authors can choose from the following two citation styles, which are familiar to the author's academic field. Authors are responsible for verifying all citations and quotations in the text, and the list of references before the submission of the manuscript. Incorrect surnames, journal/book titles, publication year, and pagination may decrease discoverability.

References in the law field

References follow the Chicago Manual of Style "author–date" system in the law field. All references should be listed in Reference list entries (in alphabetical order) and In-text citations. For more information on this citation style, please refer to the Chicago Manual of Style.

Reference examples follow:

– Journal article

Reference list entries

Malik, Radosław, Anna Visvizi and Małgorzata Skrzek-Lubasińska. 2021. "The Gig Economy: Current Issues, the Debate, and the New Avenues of Research." Sustainability 13, no. 9: 5023–5043.

In-text citations

...... and journalists (Malik, Visvizi, and Skrzek-Lubasińska 2021).

– Book

Reference list entries

Franklin, Paula, Pierre Bérastégui, Aude Cefaliello, Tony Musu, and Marian Schaapman. 2021. "Occupational Health and Safety Inequalities in the EU." In Benchmarking Working Europe 2021: Unequal Europe, edited by Nicola Countouris, Romuald Jagodzinski, and Sotiria Theodoropoulou,

133–155. Brussels: European Trade Union Institute.

In-text citations

...... to inequal protection of workers (Franklin et al. 2021, 143).

– Internet Document

Reference list entries

UFCW Canada (United Food and Commercial Workers Canada). 2022. “Benefits.” Accessed September 24, 2022. https://uber.ufcw.ca/en/driver-resources/benefits.

In-text citations

...... of platform work (UFCW Canada 2022).

References in the health field

References follow the AMA Manual of Style for authors in the health field. All references should be consecutively numbered in order of appearance and listed as completely as possible. All in-text citations should be given in consecutive order using Arabic superscript numerals. For more information on this citation style, please refer to the AMA Manual of Style.

Reference examples follow:

– Journal article

Hosohata K, Mise N, Kayama F, Iwanaga K. Augmentation of cadmium-induced oxidative cytotoxicity by pioglitazone in renal tubular epithelial cells. Toxicol Ind Health. 2019; 35: 530–536.

– Book

Mishiba T. Workplace Mental Health Law-Comparative Perspectives, London, Routledge, Taylor and Francis, 2021.

– Internet Document

Guidelines for Determining Probability of Causation Under the Energy Employees Occupational Illness Compensation Program Act of 2000.
https://www.ecfr.gov/current/title-42/chapter-I/subchapter-G/part-81 Published May 2002. [Accessed March 19, 2022]

4.2. Legends

The list of legends for figures, illustrations, appendices, and supporting information should be after the References section in the text document. Each legend should have a brief description and sufficient information for interpretation of the corresponding figure or other material.

4.3. Tables and figures

Tables and figures should be numbered consecutively, in order of appearance in the text. Authors should indicate a source under figures and tables, in particular indicating the source of any data used for calculations, regardless of whether this has already been explained in the text.

4.4. Lay-out and general style points

– Headings and subheadings

Titles, headings, and sub-headings should be numbered (following the format Ñ, 1.A, 1.A.(i),) to indicate the level of importance.

– Abbreviations, acronyms, and contractions

In general, terms and names should not be abbreviated unless they are used repeatedly (more than three times) and the abbreviation is helpful to the reader. Where abbreviations are used, each one should be expanded on its first use, followed by the abbreviation or acronym in parentheses. Thereafter, the abbreviation or acronym should be used rather than the full term.

– Latin phrases and foreign expressions

Where these are used, they should be italicized unless so common that they have become wholly absorbed into the everyday language (e.g. bona fide). Examples of the normal rule: res ipsa loquitur amicus curiae.

– Capitalization

In articles, only the first letter of the title, subtitle, and headings should be capitalized, as well as any other words that would ordinarily be capitalized. Following colons and en dashes, the first letter of subtitles is also capitalized. E.g.: Welfare and labor market regimes: A review of earlier work

In source citations, however, regardless of the capitalization of the original, English language titles of works are capitalized except for articles, conjunctions, and prepositions ("regarding", "concerning" and "respecting" are treated as prepositions), unless they are the first or last word of a title. Initial capitals should be used for the short titles of legislative texts and international instruments.

– Page references

Page references should be set out in full, e.g. pp. 123–124 (not 123–4). It is preferable to cite a precise range of pages rather than using expressions such as "p. 218 ff."

5. EDITORIAL POLICIES AND ETHICAL CONSIDERATIONS

5.1. Peer-review and acceptance

All manuscripts undergo screening by the JWHSR Editor-in-Chief, Managing Editor, and the Editorial Board based on the JWHSR's editorial policy. Those manuscripts which pass this screening stage are submitted to a double-blind peer-review process and, if accepted, to editing and translation.

5.2. Publication ethics

Authors should observe high standards with regard to publication ethics as outlined by the Committee on Publication Ethics (COPE). Any cases of ethical misconduct will be dealt with in accordance with the COPE guidelines (https://publicationethics.org/).

6. EDITORIAL BOARD AND COMMITTEE OF THE JOURNAL

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A Special Focus on Work Health and Safety Law and Policy and Work for Digital Labor Platforms

Richard JOHNSTONE, Elizabeth BLUFF and Michael QUINLAN

1. INTRODUCTION

This inaugural issue of the English version of the *Journal of Work Health and Safety Regulation* focuses on one of the most pressing challenges in work health and safety (WHS) regulatory policy: how to regulate to ensure the health and safety of workers undertaking work allocated through digital platforms across a range of industrial settings. In addressing this challenge, this special issue recognizes that platform mediated gig work (hereafter "platform work") is one type of "gig work" within the broader range of precarious work, which is strongly linked with exploitative practices and poor health and safety outcomes (as elaborated later in this Editors' Introduction).

2. THE THREE KEY THEMES EXPLORED IN THIS SPECIAL ISSUE

The five papers in this special issue explore three key themes in the regulation of WHS in platform work.

One theme is, what are the work hazards arising from platform work? As authors in this special issue note, platform workers are exposed to layers of risks: traditional risks and risks due to the use of artificial intelligence at the workplace. One key question is: How are risks found in traditional work settings exacerbated by the platform environment? For example, what impact has work had on the length of time that platform workers spend at work? And, are there particular kinds of risks that arise from the use of algorithms to allocate and to monitor work?

Another broad theme is the challenges posed by platform work to effective WHS regulation, and the related question of whether existing WHS regulatory systems, most of which have been built upon the "employment paradigm," are "fit for purpose" to regulate the health and safety risks arising from platform work. For example, are WHS regulatory regimes able to effectively regulate hazards that are exacerbated by the nature of platform work? How are attempts to regulate "working time" affected by the way in which platform work is organized? Digital platforms present themselves as technology companies, and one of the reasons for the development of platform work has been to avoid protective labor laws and to return to a market-centered approach to labor regulation. Thus, it is not surprising that in most countries, WHS regulation, traditionally focused on employers having health and safety duties to employees, is having difficulty protecting the health and safety of platform workers. Within this theme there are questions about how courts determine whether platform workers are "employees" covered by labor regulation, or self-employed, "independent contractors" or persons running their own business. For example, in 2020, the Spanish Supreme Court ruled that platform delivery workers are employees and not self-employed

workers, on the basis that they perform their jobs strictly subject to the platform's instructions and lack the essential infrastructure to perform their duties—the computer program developed by the platform, not their vehicle or mobile phone (Rodríguez 2022). In addition, delivery workers do not enjoy real autonomy in determining work schedules and are subject to the management power of platform businesses. Subsequently, the Spanish Congress approved the riders' law (*Ley rider*), which presumes an employment contract between the delivery worker and the platform, because the worker is subject to decisions stemming from the platform's algorithm. One possible solution concerns efforts to have platform workers classified as, or deemed to be, "employees," in order to extend the application of labor standards to these workers.

A third theme involves the normative question of how platform work should be regulated in order to ensure that platform workers are not exposed to risks to their health and safety. Can the health and safety of platform workers be effectively protected by a patchwork of labor laws that together cover most kinds of platform work? Would platform workers be adequately protected by WHS legislation if all platform workers were deemed to be "employees"? Are there examples of WHS regulatory regimes that ensure that digital platforms owe duties to ensure the health and safety of all kinds of platform workers? Can WHS laws facilitating worker representation, consultation, and participation in WHS accommodate all kinds of platform workers? And, can WHS regulation ensure the health and safety of platform workers if it doesn't address issues to do with the payment of workers and the scheduling of their work (see further discussion of these issues later in this Editors' Introduction)? Finally, how can WHS inspectorates effectively inspect and enforce compliance by digital platforms with their obligations under WHS legislation?

Each of the papers in this special issue aims to address at least one of these questions.

3. WHAT IS PLATFORM WORK?

The triangulated work arrangement in which digital platform businesses utilize online platforms, websites, or mobile apps to put workers in touch with clients or end users of services, is a significant and growing trend in the labor market in many countries. A survey conducted in 14 member states of the European Union (EU) in 2021 found that 4.3 percent of the working age population had done platform work in the past year and 1.1 percent could be classified as "main platform workers"; that is, working 20 hours or more per week or earning more than 50 percent of their income through platforms (Piasna, Zwysen, and Drahokoupil 2022, 14). The amount of platform work is higher in some countries: for example, 6.5 percent of the working age population in Ireland (Piasna, Zwysen, and Drahokoupil 2022, 17) and 7.1 percent in Australia (McDonald et al. 2019, 3).

Digital labor platforms differ considerably in their operating models but, in broad terms, there are two main types. "Crowdwork" platforms act as an intermediary or matching service to provide technology services that enable workers, who are running their own businesses, to locate and receive payment from clients. Such platforms tend to exert only incidental control over how the work is defined or performed, similar to a newspaper or website publishing job advertisements, and

in certain circumstances the end user may employ the worker (De Stefano 2016, 473–474; Stewart and McCrystal 2019, 9–11). In contrast, "work on demand" platforms operate as vertically-integrated firms, offering their clients a service, supplying the labor to achieve that, and stipulating and enforcing standards of performance (De Stefano 2016, 473–474; Stewart and McCrystal 2019, 9–11). The workers provide the labor through which the platform conducts its business. In their articles in this issue, Eric Tucker and Aude Cefaliello, using the location of labor provision as a key criterion, also distinguish between work performed in the physical world and location based ("ground work" or "location-based platform work") and work performed online ("cloud work" or "online work").

As all platform work arrangements are triangulated, there is ambiguity about responsibility for WHS among the platform businesses that organize work as intermediaries, aggregators, or mediators; the clients or end-users of services; and the platform workers. Although digital labor platforms match workers with demand for services, provide systems enabling the conduct of work in exchange for payment, and set rules governing or rating behavior of participants (as workers or clients), the relationship between platform businesses and workers is not a conventional bilateral employer-employee relationship (Choudary 2018, 25, 32–33; Stewart and McCrystal 2019, 10). As several articles in this issue show, contracts that workers sign with labor platforms typically cast them as self-employed persons or independent contractors, although the arrangement is more one of subordinate, dependent contracting due to the structural power imbalances perpetuated by platforms, and the management, monitoring, and surveillance of worker performance enabled by digitalization and artificial intelligence. These central features of platform work, along with job insecurity, irregular and sometimes extended working hours, unpredictable income, and lack of workplace support are significant contributors to psychosocial and physical risks, illness, and injuries (Bérastégui 2021, 26, 45, 85–93; Lenaerts et al. 2021; Moore 2019, 2, 6; Stacey et al. 2018, 6–7), and platform workers have also been especially vulnerable during the COVID-19 pandemic (Matilla-Santander et al. 2021).

Platform work is part of the wider rubric of precarious work including casual, temporary, labor hire and agency work, self-employment, and dependent subcontracting. Although the term "gig work" is commonly applied to platform work, many precarious work arrangements co-existing with and pre-dating the digital economy could be construed as gigs, such as short-term freelance work done by many musicians, other performers, and journalists (Malik, Visvizi, and Skrzek-Lubasińska 2021). In the current era, precarious work is pervasive and a 2016 McKinsey report estimated that 20–30 percent of the working-age US population and perhaps 162 million individuals in the EU are engaged in some form of independent work characterized by autonomy, task/piece payment, specific assignment, and a short-term relationship between workers and clients (Manyika et al. 2016, viii, 1). If anything, the growth of precarious work accelerated during the COVID-19 pandemic, with the flood of new entrants into the food delivery sector to meet the increase in demand for home delivery of food, pharmaceuticals, and other products

during the pandemic, and the lack of more secure work options for those workers (Matilla-Santander et al. 2021; Piasna, Zwysen, and Drahokoupil 2022, 5, 20; Rawling and Riley Munton 2021, 7−8).

4. PLATFORM WORK IN HISTORICAL AND COMPARATIVE CONTEXT

In order to understand platform work and the health and safety problems it poses, and to assess regulatory remedies and sanctions, it is important to place it in a wider historical and comparative context. In this regard, precarious work is a term used widely since the early nineteenth century, and such work has been a long-term feature of capitalism (Quinlan 2012). It declined in extent, but never disappeared, in the three decades after World War II in old rich countries. From this period, notions of standard full-time employment developed, although less so for women. The post-war decline in precarious work was due to a combination of factors including Keynesian economic policies and the greater influences of organized labor, both industrially and politically (Quinlan 2012). From the mid-1970s there was a renewed phase of growth in precarious work globally, accompanying changes to business practices and neoliberal policies. In many respects there was little to differentiate the "new" phase of precarious work from earlier periods. For example, on-call employment and dependent subcontracting were centuries old work arrangements. Further, the growth of precarious work also seems to have been associated with parallel increases in the informal sector or black economy in rich and especially poor countries, like those in Africa, South America, and Eastern Europe. Triangular work arrangements involving middle-men and labor contractors also date back to at least the early nineteenth century but have become far more extensive, organized, and global over the past 20 years (for examples in clothing manufacturing, seafaring, and dock work, see Gregson and Quinlan 2020; Quinlan 2013a, 2013b).

As is the case today, in the nineteenth and early twentieth centuries some domains of precarious work (like clothing manufacturing and dock work) were dominated by foreign or immigrant labor. A significant difference now is the far greater reliance on temporary immigrant or foreign workers facilitated by cheaper and fast travel and a raft of temporary visas, the movement of undocumented immigrations and refugees, and specialist migration agencies (Toh and Quinlan 2009). Digitalization, including smartphones and computers, has enabled tweaking of some pre-existing precarious work arrangements (like long haul truck-driving and parcel delivery services) while opening up new precarious work arrangements such as food delivery. In essence, digitalization provides new avenues of communication, worker surveillance, and discipline, thereby counteracting one of the technical drivers for the shift away from subcontracting in the nineteenth century[1)]—the Taylorist/Fordist control and discipline advantages of waged labor in factories, offices, and other large workplaces including large fast-food operations such as McDonalds (Mayhew and Quinlan 2002).

1) Digital platforms and artificial intelligence together with a permissive regulatory environment enable corporations to amass large amounts of personal data on their employees/workers, clients/customers and others with wider social implications still unfolding. See, for example, Waldman (2021).

Platform work is effectively website- or app-enabled subcontracting and this work arrangement—subcontracting of tasks via a third-party provider—is centuries old, not new. What is new is the capacity of digital technology to extend this type of work to a wider array of arenas. As with conventional agency labor (or labor leasing) firms, the website- or app-providers have a vested interest in growing these arrangements because they are profitable. This profitability is in no small part the result of bypassing or weakening the effectiveness of regulatory controls (like licensing of taxi services) and reducing conditions and protections relating to wages and hours, workers' compensation and the like, which were historically built on the legal concept of employee rather than the broader concept of worker (De Stefano 2016; James 2020, chap. 5).

The institutional protections that might be afforded by collective negotiation and industrial relations processes have also been weakened by two significant factors. The first is a long-term decline in union density in almost all countries, itself in no small part due to the rise of precarious work. The second is the difficulty for unions to recruit workers given the fluid, irregular, and low pay for much precarious work, even where unions are not formally precluded from recruiting certain workers—as they are when workers are deemed self-employed rather than employees or, as in some jurisdictions, prevented from associating (Hartmann-Cortés 2021). There is also a dichotomy between the desire of some workers for flexibility, and a desire for collective protection to offset their subordination by platform businesses. Recent research identifying this dichotomy mirrors studies of subcontracted workers in industries like construction going back many decades (Wood and Lehdonvirta 2021). As noted in the article by Bluff, Johnstone, and Quinlan in this special issue, the age-profile and temporary visa and/or foreign status of many platform workers, especially in areas like food delivery, exacerbates unionization and worker representation challenges.

The point that much platform work is structured to bypass regulation, and weaken conditions and protections, is relevant to our final contextual observation. Since the 1980s, a growing and now extensive body of research has linked the expansion of precarious work arrangements and neoliberal changes to regulatory regimes, to the weakening of labor standards in many countries. This has resulted in lower wages, wage theft, unpaid training and internships, and other exploitative practices. Most pertinent to this special issue, there is now extensive global evidence that precarious work and job insecurity from repeated waves of downsizing are associated with significantly worse health and safety outcomes, as measured by work-related injuries and fatalities (including disasters), physical and mental health indices, and lower compliance with regulatory requirements (for reviews of this evidence, see Quinlan 2015; Quinlan, Mayhew, and Bohle 2001). Research into causal pathways have repeatedly identified three aspects of work organization that are connected to poorer OHS outcomes. These are: low and irregular income returns, financial vulnerability and incentive pay regimes (economic and reward pressures); less training and induction, fragmented management regimes and limited union presence (disorganization); and legislative gaps, under-resourced inspectorates

and poor enforcement (regulatory failure) (see, for example, Underhill and Quinlan 2011; Strauss-Raats 2021). With regard to economic and reward pressures, it is important to note in passing that a considerable number of precarious workers are paid on a task or piece basis and there is an extensive body of research linking this to poor OHS outcomes (see, for example, Johansson, Rask, and Stenberg 2010; Mooren, Williamson, and Grzebieta 2015; Premji, Lippel, and Messing 2008).

In the nineteenth and early twentieth centuries, evidence of the link between poor OHS outcomes and precarious work, together with associated campaigning by organized labor, anti-sweating leagues, first-wave feminists and others, drove the introduction of regulation that sought to better protect workers (Gregson and Quinlan 2020). Moreover, one specific driver of reform was the recognition that precarious work arrangements facilitated the spread of communicable disease, a connection identified in the 1870s. In the present day, the COVID-19 pandemic has highlighted again the greater vulnerability of societies that were heavily dependent on precarious work and elaborate supply chains, as well as exposing many low paid, precarious workers to additional risks because their jobs were deemed essential even during lockdowns (Quinlan 2021). This led to specific regulatory interventions such as severely limiting subcontracting and the use of agency workers in meatworks in Germany in response to evidence linking these arrangements to spreading the disease. More broadly, changes to work associated with the pandemic strengthened a push to better regulate digital forms of work (like telework) as well as precarious work, the latter mirroring anti-sweating debates over a century earlier (Sanz de Miguel, Caprile, and Arasanz 2021; Lenaerts et al. 2021).

Understanding this wider historical and comparative context is essential to progressing current debates about regulating health and safety in work for digital labor platforms. It illuminates the significant challenges and approaches to regulating platform work explored in the five papers in this special issue.

5. INTRODUCING THE PAPERS IN THIS SPECIAL ISSUE

As the previous section has explained, a threshold issue in many labor law systems is whether workers are to be categorized as "employees," and covered by the labor law system, or as independent contractors, to be regulated by the general commercial law.

Across the globe, countries have been struggling to address health and safety challenges posed by platform work within the context of their national or provincial/state labor law systems. This special issue reports on three examples.

Eric Tucker provides a preliminary assessment of the problems platform work presents for the WHS regulatory regime in Ontario, Canada. After a brief discussion of the structure and typologies of platform work, the article reviews the limited available data on the incidence of platform work in Canada and the sparse literature on the WHS challenges related to, and arising from, platform work. Tucker notes that work performed in the platform environment is not usually different from work carried out in more traditional settings, but that the platform environment often exacerbates those risks, for example by increasing stress and providing incentives for long hours and the

intensification of work. He also reminds us that much platform work is lower skilled and highly controlled, which is of great significance for debates about regulatory protection. He makes the important point that, to properly understand the hazards arising from platform work, researchers need to disaggregate the WHS hazard created or exacerbated by platform work from hazards generally associated with the type of tasks performed. Amongst the additional risks arising from platform work are "epistemic risks" resulting from the lack of transparency in algorithmic controls, leaving workers uncertain about the rules governing their work, and thus increasing their anxiety and undermining "their sense of agency." Tucker also observes that the legal environment exacerbates WHS hazards experienced by platform workers to the extent that it disrupts and leads to uncertainty about the protection afforded by WHS regulation. Focusing on the application of Ontario's WHS law to platform work, he highlights many "ambiguities" in legal concepts and their application to platform work, such as the meaning of a "workplace," and "absences" which are gaps in regulations, such as inadequate provisions for mobile work or for psychosocial hazards. Tucker illustrates the concerns by drawing on two scenarios: the platform business as rentier that merely sells a technology—an intermediation service—to enable independent contractor platform workers to connect with platform clients who seek their services; and the platform owner or operator as an employer who hires workers. He shows that in the platform business as rentier scenario, apart from platform work performed on a client's or employer's premises, platform workers have an obligation to ensure their own health and safety and might have the law enforced against them if they fail to do so, and even then, the WHS regulations generally don't address the kinds of work that they perform. While treating the platform business as employer would reduce ambiguities in application of WHS law, much more is needed to address the gaps in regulating the WHS risks faced by platform workers. Tucker canvasses possible reforms, including legislation introduced in Ontario at the time of writing to provide platform workers with some basic rights, but concludes that more fundamental reforms are needed to address the ambiguities and absences.

Takenori Mishiba, Kotaro Kurashige and Shoko Nakazawa analyze the way in which Japanese law has sought to regulate the health and safety of platform workers. Japanese labor laws are generally "soft laws," and the legal system surrounding platform work is diverse, flexible, and ultimately complex, and, in the view of the authors, deficient. They show that in the Japanese system a patchwork of laws, each with its own rationale, seeks to regulate the issues and supervise the behaviors of business operators, mediated by factors, such as the confidence in business operators by the workers and consumers, the public reputation of the organization, the conscience of the business operator, tax exemptions on profit distribution, and the market, which are very specific to Japan. They conclude that the combined scope and interaction of the major individual labor laws do not adequately address the health and safety issues arising from platform work, even though there is scope for flexible interpretation of the coverage of these laws. For example, the *Industrial Safety and Health Act* includes provisions imposing liability on organizations creating

health and safety risks for workers, but these provisions do not protect all kinds of platform work. The *Home Work Act* imposes various health and safety duties on work providers to protect household-based handcraft industry workers, but it is old-fashioned and not applicable to modern gig workers who often process data and build systems. The principle of risk creator management liability in the *Civil Safety Consideration Obligations* also applies to platform work, as long as there is a special social relationship, such as a command and order relationship, between the platform business and the platform workers. Separately, in economic law, the *Small and Medium-Sized Enterprise Cooperative Act* offers the legal basis for sole proprietors to engage in business in a cooperative manner based on the spirit of mutual support, and a legal basis for negotiation with client companies, but it is hardly utilized. Mishiba, Kurashige and Nakazawa show that while direct regulation is sparse, when faced with a serious circumvention of the law, the courts will grasp the intent of the existing laws and aim to provide relief by flexible interpretation, such as imposing the obligation to ensure health and safety. These judicial initiatives might motivate legislative intervention. They suggest that fundamental measures to be imposed on platform businesses in future lawmaking will be risk assessment and the provision of assessment results to the platform workers, as well as good-faith response to collective bargaining. They also suggest that there should be national surveys of the general risks associated with platform work, and measures to provide health and safety information to platform businesses and platform workers. Also, they suggest that there is a need for a scheme where if a cooperative that is protected by the *Small and Medium-Sized Enterprises Cooperative Act* appoints an industrial physician to interview a member (gig worker), the consignor/business operator can make efforts to improve the working conditions if such a physician deems it necessary.

Elizabeth Bluff, Richard Johnstone and Michael Quinlan examine how the health and safety of platform workers is protected through legal regulation in Australia. They analyze the contemporary approach of the Australian *Work Health and Safety (WHS) Acts*, arguing that they are potentially able to protect platform workers because they impose legal duties on all persons who conduct a business or undertaking (including platform businesses), and the duties protect all persons who carry out work. They also enable WHS inspectorates to enforce WHS issues in work for labor platforms and envisage a role for worker health and safety representatives which could help strengthen the potential protections for platform workers. However, using the case of food delivery work, Bluff, Johnstone and Quinlan demonstrate critical deficiencies in the application of Australian WHS laws—protracted negotiations to elect worker health and safety representatives, and weak regulator enforcement and guidance focusing on safe worker practices and equipment, rather than platform businesses' systems and algorithms that drive risky behavior in response to time and economic pressures. They argue that there is a strong case to be made for optimal application and strategic enforcement of WHS regulation in relation to digital labor platforms, making greater use of general deterrence and focusing inspection and enforcement on the platform businesses that control work arrangements and the allocation of work. They

further argue that effective regulation of health and safety in platform work will also require a broader refashioning of labor regulation, which would entail the closer integration of WHS laws with those for workers' compensation and industrial relations matters (including minimum wages, maximum hours, and worker representation), to ensure attention to the fundamental drivers of risk in platform work (as with supply chain regulation and "safe rates" regimes). They conclude with recent Australian developments aimed at enhancing platform workers' rights and entitlements (including health and safety), and variously addressing transparency in relation to how platform work is monitored, controlled, and remunerated, platform workers' opportunity to contribute to a collective voice, and access to dispute resolution before an independent government body.

Other initiatives to address health and safety challenges posed by platform work are cross-national in their scope. This special issue reports on two such examples.

Aude Cefaliello examines recent EU initiatives to regulate platform work: a draft Directive on improving working conditions in platform work and an Artificial Intelligence Act. She argues that rather than being new, platform work extends pre-existing trends: greater control and surveillance, greater job precarity, and greater worker isolation and workplace fragmentation. What is distinctive about platform work, she argues, is its unique usage of algorithmic management software to constantly monitor, organize and evaluate workers. This has a major impact on both the physical and mental health of workers. Cefaliello shows that the risks that platform workers are exposed to are layered: there are traditional risks and the risks due to the use of artificial intelligence at work. Even if these risks are preventable, she argues that the widespread misclassification of platform workers as independent contractors means that workers assume the legal responsibility to prevent the risks even though they do not have the organizational means and power to do so. She also argues that even if platform workers were protected by WHS legislation, the difficulties they face in electing health and safety representatives, and the problems that government inspectors face in locating them because of the disparate and temporary locations at which they work, mean that it would be difficult for their protections to be enforced. Cefaliello notes that research suggests that about half of EU platform workers are employees (either in open-ended or fixed-term contracts) in their "offline" jobs. She shows that the level of protection that platform workers performing two jobs receive depends on whether they are classified as "employees" in one or both jobs and whether the work they do in these jobs is the same (in which case in their platform work they will benefit from their WHS knowledge as a non-platform employee) or completely different. Cefaliello then carefully examines whether the recent EU draft Directive to improve working conditions of platform work adequately address *a minima* the challenges raised by the various forms of platform work, or if it includes provisions which will effectively empower and protect platform workers. The key features of the draft Directive are that: (i) it proposes a presumption that platform workers are "employees" if two indicators of employment status are satisfied; (ii) it requires platforms to assess the health and safety risks in algorithmic management

systems and introduce preventive measures to address identified risks; and (iii) its approach to transparency, remedies, and enforcement. The draft Directive does not, however, address the inadequate protection of workers against psychosocial risks in the existing EU Directives, and there are also concerns that the prevention measures it requires might be limited to controlling the performance of work, rather than reforming the algorithm. Cefaliello explains that the draft Directive on platform work intends to complement the Artificial Intelligence Act provisions. This Act is product safety legislation which bans AI systems creating unacceptable risks and introduces a process of risk assessment and the introduction of safeguards before AI systems are placed on the market, put into service, and used.

As we noted earlier in this Editors' Introduction, a major challenge for labor regulators is to address the complex issues relating to working time in the platform economy. Cristina Inversi considers the regulation of working time as an essential element of protecting platform workers' health and safety, examining developments in the EU and in the UK. She establishes the inadequacy of standard setting on this issue, especially for work organized through algorithmic management, and characterized by precarity, schedule unpredictability, "time famine" and "time squeeze," coupled with surveillance and performance monitoring. She also illustrates health, safety, and work life balance concerns inherent in platform work, drawing on her qualitative research with food delivery workers. Inversi then critically analyzes current and proposed legal frameworks in the EU and UK for protecting platform workers' health, safety, and working time. She argues (as have others in this special issue) that the application of WHS regulation to platform work is less clear or precluded completely, but she cites specific legal judgements counterbalancing legislative inaction (a UK case protecting platform workers during the COVID-19 pandemic and an Italian case condemning severe exploitation in platform food delivery services). She concludes that the EU Commission's proposed directive to extend protections to some platform workers is a positive development, but it is a missed opportunity to universalize health and safety protections to all platform workers.

6. CONCLUSION

We have argued in this Editors' Introduction that, to a significant extent, the work arrangements arising in platform work are fundamentally not much different from those found in work arrangements in the nineteenth and early twentieth centuries, many of which have been revived in the past 30 years or so. In particular, much platform work essentially amounts to app-enabled subcontracting and thereby includes exploitive mechanisms associated with these arrangements. The key difference is the work allocation, monitoring, control, and surveillance enabled by digital labor platforms and algorithms embedded in them, thereby facilitating a historical shift in work. In the late nineteenth and early twentieth century subcontracting arrangements became less favored because Taylorist and Fordist ideas of closely supervised employees were more suited to the mass-production technologies then being developed, rather than more fragmented and less easily supervised work arrangements like subcontracting. Egregious exploitation associated with subcontracting also made it a

target of union, community campaigns, and regulation. What digital labor platforms have enabled is the capacity to subcontract work in a highly controlled and monitored way, both overcoming some of the "limitations" of subcontracting, and also evading a web of protective regulation built on the employer-employee relationship. The result has been the re-emergence of what in the nineteenth century has been labelled "sweated labor," that is, people employed at very low or highly irregular rates of remuneration for long hours.

Some of the authors in this special issue have argued that many of the hazards that arise in platform work are hazards that are found in the traditional forms of that work, though in many instances the hazards are exacerbated by platform arrangements. We have also argued that other factors exacerbate traditional hazards that also arise from platform work, not least the precariousness of platform work, and the pre-existing vulnerabilities of the workers who find themselves engaging in it. The articles in this special issue provide examples of how existing WHS regulatory systems are struggling to accommodate themselves to the work arrangements and dynamics of platform work; and examples of new approaches to regulation that have the potential to protect workers. They all suggest, however, that issues that still have to be addressed are payment and scheduling systems that pressure workers into working too quickly or taking short cuts, and which ultimately exacerbate the health and safety risks that they face at work. They also suggest that WHS regulators will need to provide more suitable and detailed guidance to digital labor platforms, and to workers, to enable them to address the full array of hazards found in platform work, as well as the factors that underpin these hazards. Regulators will also need to develop new inspection and enforcement strategies to ensure that platforms rethink the way in which they organize platform work to better ensure that it is safe and without risk to the health of those who carry out the work. Further, as several contributors observe, as with precarious work more generally, effective protection of platform workers' health, safety, and well-being cannot be achieved through expanding the coverage of conventional WHS legislation. Rather, these workers require access to workers' compensation, rights to unionize and bargain collectively, and minimum labor standards. Very low pay can of itself be incompatible with healthy and safe work, especially when associated with incentive-based payment regimes that encourage long hours, rushing, and other forms of risk-taking. In this regard, it is worth noting the centrality of supply chain regulation and the "safe rates" concept of setting effective minimum wage rates to protect platform workers and others doing precarious work that has recently secured recognition within the International Labour Organization (ILO). The ILO has also made WHS a core labor standard. These moves reflect a wider recognition of the need to refashion regulation to more accurately address the "new" world of work.

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J Work Health Saf Regul 2023; 1; 30–53 **Original Article**

Ambiguities and Absences: Occupational Health and Safety Regulation of Platform-Mediated Work in Ontario, Canada

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Abstract: Platform-mediated work, whether location-based, as in the case of Uber, or cloud-based, as in the case of Amazon Mechanical Turk, poses severe challenges to effective occupational health and safety (OHS) regulation. While the work performed in the platform environment is not usually very different from work performed in more traditional employment settings, the platform environment often exacerbates those risks by, for example, increasing stress and incentivizing long hours and work intensification. Regulating these hazards is impeded by ambiguities surrounding the legal relationship between platform operators and platform workers that make it uncertain whether the OHS regime even applies. As well the regime itself was not designed to address the conditions of platform work or many of the risks and exacerbating factors it produces. Drawing on existing studies, this article explores the structure of platform-mediated work, examines its incidence in Ontario, Canada, summarizes its associated OHS risks, and provides a detailed analysis of the obstacles to effective regulation under Ontario's OHS regime.

Key words: Occupational Health and Safety, Regulation, Canada, Ontario, Gig Work, Platform-mediated Work, Cloud Work, Uber

1. INTRODUCTION

Platform-mediated work (PMW), meaning work that is provided through or mediated by online platforms, creates challenges for protective labor and employment laws built on the foundation of a contract of employment. Platform owners construct themselves as technology companies which sell or rent a product or service to other risk-bearing entrepreneurs who operate their own businesses from their own locations. According to this construction, platform owners do not hire platform workers either as employees or even as independent contractors, and thus are relieved of any responsibility that the law imposes on employers to have regard for these workers' economic well-being or health and safety. Responsibility for these matters is shifted entirely onto the shoulders of those performing the work.

While avoiding protective labor and employment laws is not the only reason why businesses adopt the platform model, undoubtedly it is one of its attractions. Indeed, put in historical context, the rise of PMW can be understood in part as an effort to return to a market-centered approach to labor regulation that began to be overladen with protective laws over two centuries ago in response to the horrific conditions and worker discontent it produced. The early English factory acts required factory owners to take some measures

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to protect the health and safety of women and children otherwise subject to the tender mercies of the labor market. The subject of this article might be summarized as the extent to which platform owners in Ontario have succeeded in avoiding responsibility for the health and safety of platform workers, leaving them to those tender mercies.

While platform owners present themselves as technology companies whose relations with platform workers are outside the ambit of protective labor and employment law, including occupational health and safety, their assertions about the legal character of this relationship are being challenged. However, as long as the legal status of platform workers is unresolved, the resulting ambiguity itself undermines the efficacy of the law (Johnstone and Quinlan 2006). But that is not all. Even if platform workers are successful in claiming coverage by occupational health and safety (OHS) acts, there remain many ambiguities and absences in the law that would undermine its efficacy in the platform environment. These ambiguities and absences will be discussed in more detail in the body of the article, but by way of example much of Ontario's *Occupational Health and Safety Act* (OHSA)[1] is written on the assumption that workers perform their work on premises under their employers' direct control. What is the meaning of a "workplace" in the context of the platform environment and how does its interpretation affect the legal obligations of platform owners even if they are covered by the act?

In addition to ambiguities in the law, there are also absences. For example, OHS law in Ontario often poorly regulates the kinds of work most commonly performed in the platform environment even when it is performed outside that environment. For example, the OHSA does not have regulations designed to protect mobile workers, like taxi drivers and food delivery workers, and does little to address psychosocial hazards, whether the work is platform mediated or not (Lippel and Walters 2019; Popple et al. 2021). Put simply, the combination of ambiguities and absences creates formidable challenges to making OHS regulation effective for PMW. Moreover, there is a paucity of research on OHS in the context of PMW, which adds to the difficulty of devising strategies to identify and address regulatory gaps (European Agency for Safety & Health at Work [EASHW] 2021).

This article makes a modest contribution to filling this gap by providing a preliminary assessment of the problems PMW presents for the OHS regime in Ontario, Canada.[2] It begins with a brief discussion of the structure and typologies of PMW, followed by a review of the limited data available on the incidence of PMW in Canada and of the sparse literature on the OHS challenges related to and arising from PMW. The main part of the article provides an exploratory legal analysis of the application of Ontario's OHS law in the platform context under two scenarios: 1) the platform owner/operator as rentier (Christophers 2020) who merely provides an intermediation service used by buyers and sellers of labor service and 2) the platform owner/operator as employer who hires workers. As I argue, while treating platform owners/operators as employers for the

1) *Occupational Health and Safety Act*, R.S.O 1990, c. O.1.

2) Under the Canadian constitution, OHS regulation is primarily a matter of provincial and territorial jurisdiction. Ontario is Canada's most populous province and its OHS laws are generally representative of those in Canada.

purposes of OHS regulation would improve its efficacy by reducing some ambiguities, much more would need to be done to address remaining ambiguities and absences. In the final part, I consider possible reforms, including legislation enacted in Ontario at the time of writing (but not declared in force) to provide digital platform workers with some basic rights, but argue that more fundamental reforms are needed.

2. PLATFORM-MEDIATED WORK: STRUCTURE AND TYPOLOGY

On its surface, PMW is constructed as if the platform owner provides an intermediation service that enables the platform worker to connect with platform clients seeking to purchase their services. Understood in this way, the platform owner merely rents an asset to the platform worker, who then enters into contracts for service with clients. While there are a variety of structures (Howcroft and Bergvall-Kåreborn 2019; Tucker 2020), the Uber model, illustrated in Figure 1 is arguably the most common.

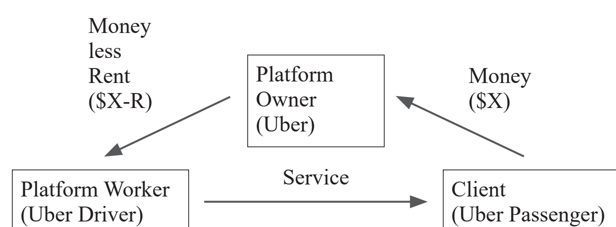

Figure 1 Formal Structure of Platform-Mediated Work

If we accept the platform's legal construction of the relations between the parties, the worker is not the platform owner's employee, nor has the platform owner contracted for the service of the worker. Rather, it is the client who has contracted for the labor service (and typically pays the worker through the platform). Of course, this characterization is often sharply contested by platform workers, unions, and worker advocacy groups who claim that the platform owner is the legal employer of the worker. For now, however, we can put that issue aside and turn to typologies of PMW.

There are many varieties of PMW that can be mapped along the dimensions of the format or location of labor provision, skill level, and level of control, among others. The location of labor provision differentiates between work that is location based, or what I previously labelled "groundwork," and work that is performed online, which I previously labelled "cloud work" but which is now more commonly called "online work" (Tucker 2020). Skill level and control are fairly self-explanatory, and while we do not have empirical data on the most common types of PMW, it is generally accepted that a significant proportion of PMW is lower skilled and highly controlled,[3] which of course is extremely important for the purposes of protective labor and employment law generally and for OHS regulation in particular. Elsewhere I have emphasized the importance of location of labor provision in thinking about worker resistance but as we shall see it is also important in the context of OHS regulation (Tucker 2020; Wood and Lehdonvirta 2021).

3. THE INCIDENCE OF PMW IN CANADA

There is remarkably little research on the incidence of PMW in Canada. Indeed, it is fair to conclude that there are no studies designed

3) Research on the distribution of PMW by skill level is surprisingly thin. For work that provides some evidence, see Pesole et al. (2018, 36–44) and De Groen et al. (2018).

to specifically capture the extent or intensity of Canadian workers in PMW. What we have instead are a few studies that look more broadly at gig work or the “sharing” economy, or more narrowly at online work.

Gig work is defined as short-term work for multiple entities. As such, it includes PMW but also a much broader range of informal and temporary work arrangements. A recent study found that the share of gig workers in Canada rose from 5.5 percent in 2005 to 8.2 percent in 2016 (Jeon, Liu, and Ostovsky 2022). However, the share of gig work that is platform mediated is unknown, although the authors suggest that the growth of gig work after 2012/2013 may be related to the proliferation of online platforms. Another study of participation in “informal” work, broadly defined to include everything from babysitting to selling goods online to PMW, found that 30 percent of respondents to a 2018 survey had engaged in one or more forms of it, but again there was no separate measurement of PMW (Kostyshyna and Luu 2019). Finally, a 2016 study of the so-called “sharing economy” found that 9 percent of respondents in the Greater Toronto Area had participated in it. However, the survey did not differentiate between providing labor service and home sharing online (Block and Hennessy 2017).

While the above studies are overly broad for our purposes, in the sense that they include both platform-mediated sales of labor and non-labor assets, there is one study that is too narrow. The Online Labour Observatory[4] publishes the Online Labour Index 2020 (Stephany et al. 2020) that measures online gig work only. Using a measure of projects and tasks posted by employers on five major English-language platforms starting in May 2016, it shows that Canadian employers increased their use of online labor by 11.1 percent as of February 21, 2022. However, the index does not show the country in which the online work was performed, and it does not capture platform mediated location-based or groundwork.

In sum, not only do we lack data on the percentage of the Canadian workforce participating in PMW, but we also know little about the intensity of their work, meaning the extent to which workers are performing PMW as their main job or as a supplement to other income earning activities; nor do we have data on the distribution of PMW between online and location-based work generally or on the kinds of work performed in each category. The lack of data makes it very difficult to assess the impact of the presumed growth of PMW on the health and safety of Canadian workers generally or whether this growth of PMW is occurring in sectors historically more hazardous, such as transportation. In the next part, we turn to the existing literature on the OHS hazards of PMW before returning to the question of the problems this structure creates for the effective regulation of occupational hazards under Ontario OHS law.

4. THE OHS HAZARDS OF PMW

Given the variety of work performed through platforms and the absence of data about the kinds of platform work being performed by Canadian workers, it is difficult to know where to focus, especially when work that is performed through platforms is or was historically done through other contract

4) Online Labour Observatory: http://onlinelabourobservatory.org/.

arrangements, such as employment or "independent" contracting. Transportation services such as Uber are a prime example.[5] As such, it is fair to say that the work performed through platforms is similar to work performed in employment or in contracting arrangements outside of platforms and shares many of the same OHS risks (Samant 2019). We therefore need to disaggregate the OHS hazards created or exacerbated by the platform-mediated context from the hazards generally associated with the type of work being performed.[6] This is a challenging task, especially given the limited research on safety and health in PMW in general (EASHW 2021, 1).

One feature of PMW that exacerbates OHS hazards is that it is less well-regulated than work performed in the context of employment or even, arguably, through direct independent contracting. We will return to this issue in the next part of this article. Here the focus is on features of the platform environment that exacerbate the physical and psychosocial hazards that exist for workers performing equivalent tasks in employment or outside the platform environment. It is also important to remember that the line between physical and psychosocial hazards often cannot be sharply drawn because the most common exacerbating factors identified in the literature relate to work intensification and social isolation, which have both physical and psychosocial dimensions (Bérastégui 2021; Bérastégui and Garben 2021).

Transportation and delivery work are perhaps the two most studied forms of platform-mediated groundwork, both characterized by high levels of algorithmic control and isolation (De Stefano 2019). While these are not unique to PMW, the totality of control and isolation, in conjunction with the pervasiveness of customer ratings, exacerbate the incentives to violate traffic laws, use phones while driving or riding, or otherwise behave in ways that increase the risk of injury (Bluff, Johnstone, and Quinlan this special issue; Christie and Ward 2018; Government of New South Wales 2020; Lachapelle et al. 2021; MacEachen et al. 2019). In addition to increasing work intensity, workers also have an incentive to make themselves available when demand is high, which may result in long hours stretched over the course of a day resulting in fatigue, which has negative physical and psychosocial consequences (Bartel et al. 2019; Christie and Ward 2019; EASHW 2022a). An additional feature of platform-mediated delivery work is that algorithmic controls lack transparency, leaving workers uncertain about the rules governing their work, which itself produces anxiety and undermines their sense of agency. Gregory (2021) has characterized these as "epistemic risks" that should be recognized for their negative impact on worker's health and safety.

Studies of the OHS hazards of platform-mediated groundwork outside the delivery context are rare, but a study of platform mediated-handiwork performed in people's homes reaches similar conclusions about the ways in which the platform environment aggravates hazards experienced in a non-platform environment (EASHW 2022b).

Online platform-mediated work can

5) For a discussion of the history of the evolving structure of taxi work in Toronto, see Tucker (2018).

6) For an overview of these hazards, see EASHW (2021, ch. 3.1). For Canadian studies, see Bartel et al. (2019) and Reid-Musson et al. (2020).

be varied but a significant component of it consists of low-skill microtasks or crowdwork performed by a globalized workforce (Berg et al. 2018). This work largely involves desk-based tasks using a computer and presents hazards similar to those experienced by workers performing similar tasks outside the platform context. These include poor ergonomic arrangements that can lead to musculoskeletal disorders, visual strain, and adverse health consequences associated with sedentary work, including cardiovascular disease and diabetes.[7] However, the platform environment exacerbates these risks and introduces new one. As in groundwork, algorithmic controls, including platform-based rating and ranking systems, as well as an oversupply of globalized labor, create a highly stressful environment resulting from work intensification, long, irregular, and unsocial hours, a lack of job and income security, epistemic risks arising from the black box of algorithmic controls, and the risk of non-payment if the client rejects the work. Additionally, the work is commonly performed in workers' homes, without ergonomic workspaces and with equipment, and where there is likely to be significant work-life conflict, particularly for women who are disproportionately responsible for caregiving. To cope, women online workers often work during the night, putting them at greater risk for physical and psychosocial injuries. Moreover, the work is performed in isolation, limiting access to co-worker and social support (EASHW 2022c; Gray and Suri 2019, 67–93; Moore 2018; Wood et al. 2019).

5. REGULATORY CHALLENGES

The very brief discussion above highlights some of the principal ways the platform context exacerbates the physical and psychosocial hazards of work that are also present outside of it. The legal environment is another way in which the platform context exacerbates the OHS hazards experienced by platform workers by disrupting or making uncertain the operation of OHS regulation. In addition, we also consider ways in which the OHS regime, even if it applies, inadequately regulates the kinds of work most commonly performed in a platform environment.

In thinking about the regulatory challenges, it is helpful to consider two scenarios. The first is the platform-as-rentier based on the legal structure of PMW asserted by the platform owner described earlier in part 2, according to which the platform is a technology purchased by independent contractors as a tool for their business. The second is the platform as employer of the workers who secure work through it. This approach is necessary because the status of platform workers in Ontario for the purposes of OHS regulation is unresolved.

A. The Platform Owner as Rentier

Most Canadian protective labor and employment law is built on the platform of the contract of employment. That is, the law imposes duties on employers that are owed exclusively to employees. Workers who are not in an employment relation are outside the protective ambit of the law.[8] Ontario's OHSA is different in two significant ways. First, duties

7) For a pioneering study of these hazards, see Stellman and Henifin (1984).

8) For example, see the *Employment Standards Act* (ESA), S.O. 2000, c. 41. It should be noted that this Act, like many protective employment laws, imposes personal liability on the directors of the corporate employer in certain situations.

are owed to *workers*, not just employees and second, the Act applies to *multiple duty holders* who are responsible in different ways for the protection of workers. The implications of these differences are fleshed out below.

Under the OHSA a worker is defined as a person "who performs work or supplies services for monetary compensation" (section 1(1)). This section makes it clear that the Act applies both to employees and to independent contractors.[9)] As a result, the coverage of the OHSA is broader than other protective employment laws and so the significance of being classified as an employee is much reduced. Correspondingly, an employer is defined as a person "who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, or contractor or subcontractor to perform work or supply services" (section 1(1)). Leaving aside the nuances of this definition for the moment, it is clear that a person who hires employees or who hires persons to perform services for monetary compensation is an employer for the purposes of the OHSA.

Second, unlike most Canadian protective employment law, which only imposes legal obligations on employers, the OHSA imposes legal duties to protect the health and safety of workers on a number of actors, including employers (sections 25 & 26), supervisors (section 27), owners (section 29), constructors (section 23), licensees (section 24), and suppliers (section 31). The OHSA also imposes duties on workers (section 28) and some sections apply to self-employed persons (section 4).

If we accept platform owners' characterization of the platform's legal architecture, the platform owner is not an "employer" of platform workers as the workers are neither the platform's employees, nor are they hired to perform services for the platform. Rather, the platform owner is a rentier who sells an intermediation service for a fee. Platform owners are unlikely to have obligations as "owners" under the OHSA since an owner is defined as a person who owns, leases, occupies, etc. lands or premises to be used as a workplace and a "workplace" is defined as "land, premises, location or thing at, upon, in or near which a worker works" (section 1(1)). Thus, while platform owners may have physical premises where employees directly hired by them perform work, platform workers do not work at a workplace owned by platform. They may never step foot onto or work near lands or premises owned by the platform owner in order to perform work. Moreover, it seems quite unlikely that an app would be considered a "location" or "thing" on which a worker works. It is also unlikely that platform owners have duties as "suppliers." First, it would be difficult to characterize the platform owner as a supplier, which is defined in the OHSA as a person who "supplies any machine, device, tool or equipment … for use in or about a workplace" (section 31(1)). But even if it could be argued that a platform is a device

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Platform owners, like Uber, have fought extended battles to resist the classification of platform workers as employees. The extent of Uber's global efforts was recently revealed in a leaked trove of confidential documents (Davies et al. 2022).

9) *R. v Wyssen*, 1992 CanLII 7598 (ONCA).

used in a workplace, the supplier's obligations are to ensure that the tool, equipment, etc. is in good condition and complies with the Act and regulations (section 31(1)(a)(b)). The likelihood of successfully arguing that the platform itself is not in good condition and fails to comply with the OHSA and its regulations seems remote.

What, then, about the clients? Do they have duties under OHSA to the platform workers who, under the platform-as-rentier scenario, they hire to provide services? The answer to that question is, "it depends." If the services are to be provided at the client's premises, then the client who hires a platform worker could owe duties under the OHSA both as an "owner" of a premises used as a workplace and as an "employer" of a platform worker. First, considering the client as owner, there is an important exception in the case of homeowners. Section 3 of the Act provides that the Act does not apply to work performed by "a servant" of the owner in or about a private residence or the lands used in connection with that residence. There is no definition of the term "servant" in the Act, but servant is usually considered by courts to mean employee.[10] That being the case, it is arguable that the work-in-the-home exception only applies to employees, not to workers under a contract for services, but there is no case law so holding and the Ontario OHSA Policy Manual (Government of Ontario 2021) does not draw that distinction. However, if work is being performed at the client's business premises, then the client clearly has duties as the employer of a worker (sections 25 & 26), including a general duty to take every precaution reasonable in the circumstances for the protection of the worker. The client would also have duties as an owner (section 29), which require the owner to ensure that the workplace complies with applicable regulations and that prescribed facilities are provided and maintained (section 29). As well, if the workplace is a construction site, then the client would have the obligations of a constructor (section 23), which include a duty to comply with the OHSA and applicable construction regulations, to ensure that every worker performing work on the project complies with the Act and regulations, and to protect the health and safety of workers on the project.

On the other hand, a person who hires a driver to take them from point A to point B or to deliver food to their home would certainly not fit within the category of an owner under the OHSA, since the work is not being performed on their premises. Could they be an employer and, if so, what obligations would they have? There is no case law that clarifies this question. It is exceedingly unlikely that the platform worker is an *employee* of the client in this scenario. The most common test for determining employee status in Canada is the multi-factor test established by the Supreme Court of Canada in *Sagaz Industries*:[11]

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her

10) *Kearney v Oakes*, (1890) 18 SCR 148, 173.
11) *671122 Ontario Ltd. v Sagaz Industries Canada Inc*. [2001] 2 S.C.R. 983, paras. 47–48.

> own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

Under this test, a person who drives a taxi does not become the passenger's employee for the duration of the trip, nor does the person delivering food become the employee of the client who ordered the food during the time of delivery. The platform context does not change this arrangement.

However, it is quite possible that the client could be the employer of the driver or delivery worker *qua* independent contractor, but it is doubtful this would result in any meaningful OHS duties. What duties could arise from such a transient relationship? None of the prescribed duties in sections 25 and 26 of the OHSA are likely to impose a significant obligation on the client. For example, the general duty of the employer to take every precaution reasonable in the circumstances likely imposes no duties because there are unlikely to be any reasonable precautions that the passenger or person ordering food should take in the circumstances, other than perhaps not to physically interfere with the driver or to pressure them to drive unsafely. The client does not provide any equipment and is not responsible for providing information, instruction, or supervision to a worker to protect the worker's health and safety.

Finally, if we turn to online services, it is even clearer that the online worker is not the employee of the client requesting services. However, the client could potentially be found to be the employer of the online platform worker *qua* independent contractor, but no OHSA duties may flow from this characterization. There are three reasons for this. First, there is the question of the location of the platform worker and the client. If the client is located inside Ontario, but the worker outside, and the worker has no other connection to the province, then it is unlikely the OHSA applies to that relationship.[12] Alternatively, if the worker is located in the province but the client is located outside, even if in theory Ontario law applied, there is no practical way it can be enforced. Second, most online PMW is performed in the worker's home where the Act does not apply. Finally, even assuming provincial law applied and could be enforced, few legislated employer duties would be applicable. The client provides no equipment or materials, and no protective devices are required for online work. What remains is the duty to take all precautions reasonable in the circumstances for the health and safety of the worker, but, as we shall see below, OHS regulation in Ontario, and most of Canada, imposes few if any specific duties on employers to protect workers against the hazards associated with online work.

Finally, there is almost no possibility that the client or requester of an online worker

12) The OHSA does not refer to the location where work is performed, but it can be safely assumed that it only applies to work performed in the province or which is a continuation of that work outside the province. This is made explicit in the recently enacted Digital Platform Workers' Right Act, 2022, S.O. 2022, c. 7, as it is in the Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A, s. 13(3).

would be found to be an "owner" under the OHSA, since the work is not being performed on the client's premises.

Another way that the OHSA can apply to platform workers, again accepting the platform owner-as-rentier scenario, is through section 4, which provides that specified sections of the Act "apply with necessary modifications to a self-employed person." In other words, self-employed persons are obliged to comply with provisions of the Act that apply to them, but no meaningful obligations arise in the platform environment. A platform worker, for example, must comply with section 25(1), which requires the worker to use prescribed equipment, materials, and protective devices and maintain them in good condition and to use them as prescribed. Other applicable provisions relate to matters such as the use and handling of hazardous materials, notification obligations, and being subject to inspection and enforcement actions.

Basically, then, apart from that slice of platform work that is performed on a client's or employer's premises, platform workers have a duty to look after their own health and safety and are subject to inspection and enforcement actions if they fail to do so in accordance with the applicable sections of the OHSA and its regulations (unless they are working from home where the Act does not apply). Apart from the obvious point that an OHS regulatory regime should not be built on the foundation of making workers chiefly responsible for their own safety without meaningful OHS obligations on other duty holders, the responsibilization approach is unlikely to provide much protection: prescriptive regulations for the most part do not address the kinds of work performed by platform workers and there is little risk that platform workers will be inspected. The exception is where platform work is performed on a client's or employer's premises, where there is a risk of inspection and enforcement action being taken. For example, a platform worker working on a client's construction site without a hard hat or safety shoes might be subject to a small on-the-spot fine, as would the immediate supervisor for failing to ensure that workers were wearing prescribed protective equipment (section 27(1)) (Gray 2009).

B. *The Platform Owner as Employer*

The above discussion assumed the validity of platform owners' claim that they are rentiers, not employers, but whether they are employers is a question of law or mixed law and fact and the legal structure of PMW has been the subject of multiple challenges. This is not the place to review this litigation (De Stefano et al. 2021) but numerous courts and tribunals have found that platform owners are the employers of platform workers, whether categorized as workers, employees, dependent contractors, or even contractors. For example, in Ontario, Foodora delivery workers were held to be dependent contractors for the purposes of the province's collective bargaining statute and, therefore, were employees entitled to bargain collectively under the Act.[13)] Here we want to examine the implications of treating platform owners as employers of platform workers for the purposes of OHS regulation, whether they be employees, dependent contractors, or independent contractors.

13) *Canadian Union of Postal Workers v Foodora Inc. d.b.a. Foodora*, 2020 CanLII 16750 (ON LRB), https://canlii.ca/t/j5nj1, retrieved on March 18, 2022.

(i) The External Responsibility System (ERS)

First, with regard to the so-called external responsibility system that imposes and enforces duties on employers to protect the health and safety of their workers, platform owners as employers would owe a general duty to take every precaution reasonable in the circumstances for the protection of the worker (section 25(2)(h)). However, it is unclear what that duty might entail. In the context of groundwork, such as ridesharing or food delivery, traditional dispatchers have escaped scrutiny from OHS regulators, despite the fact that they have sometimes been found to be the drivers' employers for some purposes (Reid-Musson et al. 2020; Tucker 2018). In part, this is because there are no OHS regulations specific to these industries that specify the employers' obligations, despite the fact that in 2010 an expert report prepared for the Ontario Ministry of Labour identified taxi driving as the most dangerous job in Canada and called upon the Ministry to explore options for improved OHS protection (Dean et al. 2010, 50). Rather, taxi regulations, including requirements for driver training and vehicle safety, are primarily established by municipal bylaws, which platform owners, acting as regulatory entrepreneurs, have weakened in recent years (Coiquaud and Morissette 2020; Reid-Musson et al. 2020). As well, because groundworkers provide their own equipment, platform owners are relieved of any duty to provide or maintain equipment in a safe condition. At best, platform owners may have a duty to require their workers to use and maintain roadworthy vehicles and other equipment, an obligation that platform owners may already meet.

There is also the question of whether platforms, as employers, have obligations that are "workplace" based. As discussed above, OHSA defines a workplace as a physical location or thing upon, in, or near which a worker works. Platform workers arguably never work on or near their employers' workplace, unless a digital platform is a "thing." If it is found that platform operators do not have workplaces, their obligations under the OHSA would be severely limited, for both the ERS (discussed here) and the internal responsibility system (IRS) (discussed below).

With regard to the ERS, several of the obligations in section 25 impose *workplace*-related duties, such as the duty to post in the workplace a copy of the OHSA and any explanatory materials prepared by the ministry (section 25(2)(i)). As well, while the Act requires employers to prepare and review at least annually a written OHS policy and develop a plan to implement it, the section does not apply to a *workplace* at which five or fewer workers are regularly employed (sections 25(2)(j) & 25(4)). If platform employers do not have a workplace, are they exempt from the obligation to prepare a written OHS policy or to post it "at a conspicuous location in the workplace" (section 25(2)(k))?

The issue of workplace-relatedness also arises in relation to the more recently imposed duties regarding violence and harassment (OHSA, Part III.O.1), hazards that are well-documented in taxi and delivery work (Burgel, Gillen, and White 2014; Ma et al. 2022; Moore 2018). The law requires employers to prepare policies with respect to *workplace* violence and *workplace* harassment and to post those policies at a conspicuous place in the *workplace* (OHSA, section 32.0.1(1)). As well, the mandatory content of these policies is framed in relation to *workplace* violence and

harassment, as is the duty to assess the risk of *workplace* violence (OHSA, sections 32.0.2, 32.03 & 32.0.6).

Of course, not all employer duties are framed in relation to workplaces. The general duty to take every precaution reasonable in the circumstances, for example, applies to all work performed for the employer, not just work performed in the employer's workplace. However, the fact that the work is not performed in the employer's workplace may limit the scope of what is held to be reasonable in the circumstances. That said, if the workplace-based duties do not apply, it might be possible to argue that at least some of these obligations arise under the general duty clause.

The general duty clause might also require platform owners as employers to monitor the performance of platform workers to ensure they are performing it safely, which may include monitoring workers' driving, requiring them to take necessary breaks, and limiting their time on the app, although these are not matters OHS regulators generally address. However, if employers were required to manage these matters as OHS concerns, algorithmic controls would provide the necessary technology, potentially increasing the already high level of surveillance and control platforms currently exercise (Aloisi and De Stefano 2022; Wood and Monahan 2019).

This leads to the question of whether OHS regulation could require platforms to address the epistemic risks created by the platform environment. In general, OHS regulation in Ontario does not deal with psychosocial hazards. First, apart from harassment, Ontario does not impose any specific duties on employers to protect workers from psychosocial risks. Of course, the general duty clause should apply to psychosocial hazards, but in Ontario this has not translated into any attempt to regulate them. No Ontario employer has ever been prosecuted for failing to take reasonable measures to protect the psychosocial health of a worker.[14] OHS regulation has also largely ignored the adverse health effects of work intensification outside the platform environment, whether through assembly line speed-ups or managerial supervision. Indeed, even when it comes to harassment, the Act is careful to exclude "a reasonable action taken by an employer or supervisor relating to the management and direction of workers of the workplace" (section 1(4)) from the definition, making it very unclear where to draw the line between what is a "reasonable action" aimed at work intensification or discipline. Moreover, the OHSA merely provides that the employer must have a harassment policy but does not impose a duty to provide a harassment-free workplace (Sobat 2022).

Long hours are also related to poor OHS outcomes, a fact that was recognized and central to the first factory acts, especially as they related to women and children (Fudge and Tucker 2020; Tucker 1990). More recently, these issues have migrated from OHS regulation to employment standards laws, which only apply to employees, not all workers, so that platform workers would

14) The situation in Quebec is different and specifically requires employers to "take the necessary measures to protect the health and ensure the safety and physical and mental well-being of his worker": *Act respecting occupational health and safety*, CQLR c S-2.1, s. 51. For a critical discussion of the situation in Quebec prior to the more recent amendments to the law, see Lippel, Vezina, and Cox (2011).

have to overcome their (mis)classification as self-employed in order to secure the benefit of hours of work laws. As discussed earlier, platform operators have invested heavily in resisting these claims, often asserting that employee status would interfere with the freedom of workers to select their own hours. However, claims about scope of choice exercised by online workers have been heavily criticized and as discussed below the struggle for employment status in Ontario is ongoing, so it is possible that some platform workers may qualify for employment standards protections (Athreya 2021; Katsabian and Davidov 2022; Stanford 2022).

The OHS regulation of *online* platform work is also problematic. In addition to the difficulties noted above, the likelihood of platform owner being found to be the online platform worker's employer is lower than in the case of groundworkers (Howcroft and Bergvall-Kårebron 2019). As well, there is a question of whether the OHSA applies when either the worker or the platform owner is located outside the province. Finally, assuming Ontario law applies, there is the question of what duties would be imposed on platform owners in this context.

A helpful analogy might be telework, which involves employees working remotely. While teleworkers often reported benefitting from this arrangement, they also reported OHS concerns about work-station design, long hours, and isolation. A study by Montreuil and Lippel (2003) found that while most Canadian OHS legislation theoretically applied to teleworkers, it was doubtful that it effectively addressed their OHS concerns both because of legal ambiguities regarding employer obligations to teleworkers and because of the absence of inspections and enforcement. In 2021, Quebec amended its health and safety legislation to better cover teleworkers by providing that the Act applies, "[s]ubject to any incompatible provision, in particular with respect to the workplace." With regard to enforcement, the amendment barred inspectors from entering teleworkers' homes without their consent unless they obtained a court order, which is available if there are reasonable grounds to believe that the worker or another person at the home is exposed to a danger threatening life, health, safety, or physical or mental well-being.[15] Oddly, the Act does not define telework and so it remains to be seen whether it applies to PMW. If it does, the scope of workplace-based obligations will need to be determined. For example, do employers have any OHS obligations in relation to the design of home workspaces and worker-owned equipment? In Ontario, the OHSA does not apply to work performed by the owner or occupant in or about their private residence, effectively excluding online work performed at home from its ambit (OHSA, section 3(1)), so the question does not even arise.

There is also the issue of long and unsocial hours of work, which as mentioned, have fallen outside of OHS regulation and are now addressed by employment standards law. Ontario recently enacted "right to disconnect" legislation that requires employers with 25 or more employees to prepare a written policy with respect to disconnecting from work. However, the law fails to stipulate any mandatory elements that must be contained

15) *Act respecting …*, sd. 5.1, 179.1.

in such a policy. Moreover, because the right is located in the ESA, it only applies to employees, and so can only benefit online workers who can establish that they are employees.[16)]

Finally, there is the issue of enforcement. This is not the place to engage in an extended discussion of the efficacy of OHS enforcement in Ontario, but research has shown that while Ontario prosecutes employers more frequently than other Canadian jurisdictions, it still relies primarily on the IRS to secure compliance, resulting in significant enforcement gaps, particularly for non-unionized and precarious workers (Tucker 2013). More recently, the Ontario Auditor General expressed concern that the Ministry of Labour, Training and Skills Development, which is responsible for enforcing the OHSA, only has about one-quarter of all Ontario employers registered in its system and does not effectively target high-hazard workplaces or workplaces in which vulnerable workers are employed (Auditor General of Ontario 2019, ch. 3.07). We turn to the IRS in the platform context below, but there is little doubt that enforcement challenges would abound in the platform environment where workers often do not have a fixed workplace and, if working from home, are not covered by the OHSA, even if the worker was prepared to allow the inspector to enter the home (OHSA, section 54(2)).

(ii) The Internal Responsibility System (IRS)

So far, we have considered the substantive duties of an employer, but there is also the question of whether employer status would require platform employers to create occupational health and safety management systems that comply with OHSA requirements. Presumably, the answer to that question must be yes, but that leaves open the question of what the law would require in the platform environment. There are two elements to the mandated IRS. One is the management responsibilities of employers and the other is the rights of workers to participate in the employer's management system. This article cannot provide a complete review of all the required elements of management systems in Ontario, but it will highlight a few that seem to have the greatest potential and likelihood of being found to apply.

Perhaps the most important mandated elements are the employer's duty to provide information, instruction, and supervision to protect the health and safety of workers, to appoint competent supervisors, and to acquaint a worker or supervisor with any hazard in the work (OHSA, section 25(2)(a)(c)(d)). In the platform environment, the imposition of these duties could be significant insofar as it would require platform employers to more actively manage the OHS hazards associated with platform work. For groundworkers, this might involve a duty to provide warnings about the use of cell phones while driving or biking as well as reminders to obey traffic rules or to comply with applicable OHS laws such as wearing prescribed protective equipment. For online platform workers, it might require training in regard to ergonomic hazards. However, these management duties are unlikely to require better management of psychosocial and epistemic risks as long as they are not recognized as occupational hazards.

16) ESA, s. 21.1.

While the imposition of a duty to manage occupational hazards in the platform environment can have a positive effect, there is also a risk that platform employers will respond by imposing more intense surveillance and by adopting punitive behavior-based management systems that ignore the systemic pressures workers face that often promote unsafe actions.[17] For example, platform employers can use GPS to monitor the speed of drivers and suspend them from the app for driving above the speed limit while ignoring the features of algorithmic management that promote unsafe behaviors. In general, it is easier to impose management duties than to ensure that they are exercised fairly and in ways that best address the root causes of workplace hazards.

Ontario workers enjoy three major rights in the employer's IRS: the right to know, the right to participate, and the right to refuse unsafe work. The right to know closely intersects with the employer's duty to provide information and instruction but gives workers more agency by allowing worker health and safety representatives (HSRs) to obtain information from the employer regarding conditions that *they* identify as potentially hazardous. As well, HSRs are required to periodically inspect the physical condition of the workplace so that they have the opportunity to identify hazards (OHSA, sections 8 & 9). However, because this dimension of the right to know is assigned to HSRs, its existence is contingent on the requirement to have them in the first place, which leads us to the second right, the right to participate.

The right to participate has a number of dimensions but it is most strongly institutionalized through the obligation to appoint individual HSRs in smaller workplaces or to establish a joint health and safety committee (JHSC) in larger (20+ employees) ones. HSRs and worker representatives on JHSCs (who we will also call HSRs) collectively represent workers and are involved in the identification of hazardous work condition, making recommendations for their improvement, securing information, and representing workers' OHS concerns generally (sections 8 & 9).

The first hurdle to securing this form of collective representation is to determine whether the OHSA requires an HSR or a JHSC in the platform environment. Section 9 of the OHSA provides that a JHSC is required "at a workplace at which twenty or more workers are regularly employed" (section 9(2)(a)). In *Ontario (Ministry of Labour) v United Independent Operators Ltd*. (UIOL), the Ontario Court of Appeal considered whether independent contractors should be counted when determining whether there were 20 or more workers regularly employed. The court rejected an earlier decision of the Labour Relations Board and held that on a purposive interpretation independent operators should be counted as workers "regularly employed."[18] Therefore, even if platform workers were found to be independent contractors employed by platform owners rather than employees, this would not exclude them from the possibility of claiming a right to have a JHSC. However, they would still have to establish that they were "regularly" employed "at a workplace."

17) The literature on behavior-based systems is vast. For a somewhat dated, but insightful assessments of the limits of this approach and the broader context of employee responsibilization strategies, see Hopkins (2006) and Gray (2009).

18) *Ontario (Ministry of Labour) v United Independent Operators Ltd*. 2011 ONCA 33.

In the UIOL case, the employer conceded that its office was a workplace, but disputed that it was a place the drivers regularly attended. In a previous case, involving delivery workers, a tribunal held that dispersed workers should be counted as being regularly employed at the workplace, but that was in the context where the drivers had a home base to which they regularly returned.[19)]

In the context of PMW, it may be difficult to establish that there is a "workplace," defined in the Act as "any land, premises, location or thing at, upon, in or near a worker works" (section 1(1)), which seems to presuppose a physical space. It is possible that the ambiguity surrounding the meaning of a workplace in the platform environment could be resolved in favor of finding that the platform is a workplace, but that is uncertain given the definition that seems grounded in an understanding of a workplace as a physical, not a virtual space. The linking of collective representation to the existence of a physical workplace at which a specified number of workers are employed thus may deprive platform workers of this right.[20)]

Even assuming platform workers enjoyed a right to collective representation, there is the question of how or whether HSRs could conduct workplace inspections. The issue of the scope of the duty to inspect arose in a recent Supreme Court of Canada judgment addressing the question of whether it applied to remote locations not under the control of the employer. In *Canada Post Corp. v Canadian Union of Postal Workers*, the majority of the court upheld a determination that workplace inspections only had to be conducted over work areas that the employer controls. Therefore, postal worker HSRs did not have the authority to inspect delivery routes to identify hazardous conditions.[21)] While the case was interpreting federal OHS regulation, it is quite possible that a similar interpretation would be applied to the OHSA.

There is clearly a lot of ambiguity about whether collective worker representation is required in the platform environment, whether for ground or online work, and if required whether HSRs are empowered to fulfill one of their key responsibilities. However, even if these ambiguities were resolved favorably to require collective worker participation, there would still be the obstacle of making these arrangements effective in the platform environment. Again, this is not the place to delve deeply into the literature on the effectiveness of collective representation, but Walters (2021) recently summarized the factors associated with its efficacy: strong legislative steering for worker representation; employer commitment to participatory approaches to OHS management; supportive worker and union organization inside and

19) *Brewers Retail (Re)*, [1995] O.O.H.S.A.D. No 20 (QL).

20) If the platform is held to be a workplace, there still may be problems determining whether the number of workers regularly present exceeds the threshold, particularly in the online environment where some workers may not be in Ontario. I have not found case law on whether workers outside of Ontario are counted for the purposes of determining whether the threshold has been met, but it is notable that recently the Ontario government advised that when determining whether an employer meets the twenty-five-employee threshold for being required to post a right to disconnect policy only employees in Ontario were to be counted. See: https://www.ontario.ca/document/your-guide-employment-standards-act-0/written-policy-disconnecting-from-work#section-1.

21) 2019 SCC 67 (CanLII).

outside establishments; and well-trained and well-informed worker representatives using autonomous worker-centered approaches to OHS. In an environment in which the preconditions for effective worker participation are generally eroding (Walters 2021, 129–138), the obstacles to establishing effective collective worker representation in the platform environment are formidable, but perhaps not insurmountable as demonstrated by the 2022 agreement between the United Food and Commercial Workers (UFCW) and Uber to provide some representational services to Uber drivers that includes periodic meetings between UFCW and Uber to discuss driver concerns and to discuss health, safety, and other issues related to the quality of platform work (UFCW Canada 2022). The agreement, however, is quite controversial given its limits and potential to impede efforts by other unions to secure collective bargaining rights for Uber drivers and other platform workers (Doorey 2022a; Mojtehedzadeh 2022). In any event, it remains to be seen whether this form of non-statutory collective representation on OHS matters yields positive improvements.

The right to refuse unsafe work is the third worker right in the IRS. Under the OHSA, workers have a right to refuse work when they have reason to believe:

> (a) any equipment, machine, device or thing the worker is to use or operate is likely to endanger himself, herself or another worker;
>
> (b) the physical condition of the workplace or the part thereof in which he or she works or is to work is likely to endanger himself or herself;
>
> (b.1) workplace violence is likely to endanger himself or herself; or
>
> (c) any equipment, machine, device or thing he or she is to use or operate or the physical condition of the workplace or the part thereof in which he or she works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself, herself or another worker (OHSA, section 43(3)).

Workers who exercise their right to refuse are protected against employer reprisals (section 50).

Again, assuming that platform owners are employers of platform workers, would a right to refuse unsafe work be meaningful in this environment? First, we have the problem that the right to refuse is typically exercised by workers concerned about hazards arising from employer-provided equipment on employer premises. This is not the situation in which platform workers find themselves and so most of the enumerated circumstances in the Act for when workers can refuse do not apply. The only one that clearly does is paragraph b.1 regarding violence. This circumstance is faced by many location-based platform workers such as drivers and delivery workers and it does occur within a physical workplace, albeit one outside of the platform employer's immediate control. Nevertheless, such a work refusal should trigger an employer investigation in the presence of an HSR or another worker and, if after the inspection the worker continues to have reasonable grounds to believe the risk of workplace violence continues, then an inspector would be called to investigate the refusal and if they uphold it, they may issue an order to address the hazard.

Having said all this, given the structures of platform work and the sources of the risk of

violence (presumably from clients or from the times and places of rides and deliveries), it is unclear that many platform workers would be willing to invoke their statutory right to refuse and trigger its process for dispute resolution. We know that even in the best of circumstances workers are extremely reluctant to exercise the right to refuse, notwithstanding that the OHSA protects them against retaliation for exercising their rights under the Act (Foster, Barnetson, and Matsunaga-Turnbull 2018; Lewchuk 2013). However, the extension of a protected statutory right to refuse unsafe work might provide some encouragement to platform workers to informally exercise their right to refuse by not accepting jobs offered on the app and potentially challenging adverse actions taken by the platform, such as suspensions from the app.

In sum, even if we deem platform owners and operators to be employers and thereby remove or reduce legal status ambiguities in PMW, existing OHS regulation is not well designed for the platform environment. There are many ambiguities related to matters such as the meaning of a workplace, absences such as the lack of regulation of psychosocial hazards and epistemic risks, enforcement challenges when workers are widely dispersed, and the general problem of making rights real for vulnerable workers.

6. WHAT IS TO BE DONE?

A recent survey by the EASHW of measures to address OHS concerns in platform work found that the issue has been largely overlooked by policy makers and by platform owners and that "few regulations, policies, strategies, programmes, initiatives and actions are directly related to OSH" in the platform work environment (EASHW 2022d, 4).

On the other hand, there have been more indirect measures that could lead to some amelioration. One of the more common proposals is to overcome the legal ambiguity regarding the relationship between platform owners and platform workers by either declaring platform workers to be employees or adopting a test that would make it easier for them to secure this status. However, in the Ontario context, it is important to remember that an employment relationship is not necessary for the OHSA to apply. It is sufficient to show that the platform operator hires workers, who may either be employees or contractors. So, the more salient ambiguity in Ontario is with respect to whether platform owners hire workers at all or, as they claim, are merely rentiers selling intermediation services that permit clients and entrepreneurs to find and contract with each other.

There is no case law in Ontario on the status of platform workers for the purposes of the OHSA, but there is case law that platform owners hire workers for the purposes of Ontario's *Labour Relations Act* (LRA).[22] As discussed earlier, the Labour Relations Board found that Foodora delivery workers were dependent contractors and thus Foodora's employees for the purposes of collective bargaining. More recently, an Employment Standards Officer held that Uber Eats delivery workers are employees for the purposes of employment standards legislation.[23] While

22) *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A.

23) Uber Portier B.V., Claim ID# 0014666-CL000, Order ID# 0014666-COOO2 (February 22, 2022). For a summary of the decision, see Doorey (2022b).

these decisions are helpful, they are fact-specific and leave other platform workers, especially those outside the food delivery sector, without clarity as to their status for the purposes of these laws, let alone the OHSA. Thus, legislation clarifying the legal status of platform owners as employers of "workers" for the purposes of OHSA would remove any ambiguity about whether the Act applies. The government could go even further and deem platform workers to be the "employees" of platform owners in order to give them protection under Ontario's collective bargaining and minimum standards laws that require employment status.

Currently, the Government of Ontario is seemingly unwilling to enact such sweeping legislation. Earlier this year, it enacted the *Digital Platform Workers' Rights Act, 2022* (DPWRA), which defines worker as "an individual who performs digital platform work."[24] However, the Act does not define the legal relation between platform operators and platform workers for the purposes of this Act or for other statutes, although it does specify that the DPWRA applies regardless of whether the platform worker is an employee or not (section 2). As a result, legal ambiguity about whether platform operators are employers of digital platform workers, either as employees or independent contractors, remains.

A second indirect measure to improve health and safety outside the OHSA is to address some of the underlying conditions of platform work that contribute to the creation of hazardous conditions. Here, the DPWRA is much more successful. It provides covered digital workers with a right to information, including how pay for digital work is calculated, factors used in allocating work assignments, and the operation of performance rating systems. It also guarantees a minimum wage for work assignments performed (not including time seeking work on the app), a right to retain tips, a right not to be denied access to the platform in the absence of written reasons and, for longer denial of access, notice, and a right to dispute resolution in Ontario, among others (sections 7–14). These provisions go some way to address the epistemic risks arising from the uncertainty that often surrounds the algorithm's operations and that have been identified as an OHS hazard (EASHW 2022d; Gregory 2021).

A third indirect means of improving OHS outcomes is to provide platform workers with meaningful access to collective bargaining or representation. If platform workers remain outside the OHSA, they lose access to collective representation in the IRS, which currently is the only area of law where collective representation is mandated. Conceivably, the DPWRA might be amended to provide that all digital workers or, better yet, all platform workers, are entitled to collective representation with regard to OHS matters and provide platform workers with an opportunity to select their representatives. An even stronger measure would be to give platform workers meaningful access to collective bargaining,

24) *Digital Platform Workers' Rights Act*, 2022, S.O. 2022, c. 7, Sched. 1, s. 1(1). At the time of writing, the Act was not yet in force. The Act does not apply to all digital platform work, but only to ride share, delivery, and courier services performed in the province of Ontario (s. 1(1)). Ontario is not unique in limiting the regulation of digital platform work to transportation and delivery. The Spanish Rider Law (Royal Decree Law 9/2021 of May 11, 2021, ratified by Law 12/21 of September 28, 2021) is similarly limited.

whether through the LRA or an alternative arrangement. With respect to the former, while some platform workers have unionized under the LRA, they had to be recognized as dependent contractors in order to do so, but it will be a fact driven exercise in each case and many may not qualify under the existing law. Hence the need to amend the Act to bring them in. But, the LRA's enterprise bargaining model has become less effective in providing private sector workers with meaningful access to collective bargaining and is even less well-suited to the challenging conditions that face platform workers (Doherty and Valentina 2020; Gebert 2021; Johnston and Land-Kazlauskas 2018). Hence a sectoral bargaining model is especially apposite for this group of workers.

The other way to gain collective representation (or bargaining) is through voluntary recognition. As noted earlier, Uber and the UFCW in Canada reached an agreement early in 2022 that gives the UFCW limited representation rights, including consultations with Uber over OHS issues, but it remains to be seen how well this model will work in practice. Uber has also entered into a more extensive agreement in Australia (Goods, Veen, and Barratt 2022). While, these non-state actions could potentially produce some amelioration, experience with voluntary recognition for collective bargaining purposes suggests that it is unlikely to become widespread.

These indirect measures may be helpful, but ultimately legislative changes are needed that directly address OHS in the platform environment. As the recent EASHW policy brief (2022d) indicated, we are just beginning to come to grips with the issue and much work remains to be done. However, it seems clear that priority must be given to rethinking how we regulate OHS risks in the kinds of work commonly performed through platforms, including taxi services, food delivery, and office ergonomics. Imposing a general duty on platform workers to take every precaution reasonable in the circumstances for the protection of platform workers is a starting point but given the paucity of measures taken to date by platform operators (EASHW 2022d, 11–12), there is also a need to identify the hazards faced by platform workers and require platform employers to address them or face penalties if they fail to do so.

In conclusion, while most platform work is not dissimilar from work performed in other environments, the conditions under which it is performed introduce new epistemic risks and exacerbate existing ones while creating ambiguities about the application of health and safety regulation and revealing absences that leave certain risks poorly regulated. There are some incipient developments that are beginning to address these deficiencies, but many hurdles remain.

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ACKNOWLEDGMENTS

Professor Tucker would like to thank Professors Richard Johnstone and Valerio de Stefano for their comments on an early draft and the anonymous reviewers for their many helpful suggestions.

CONFLICT OF INTEREST STATEMENT

The author has no conflict of interest to declare.

Legal Protection of the Health and Safety for Gig Workers: The Present Status and Future Prospects in Japan

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Abstract: Labor laws in Japan are generally soft laws, and the Japanese legal system has not recognized platform mediated gig work sufficiently; however, different laws with different principles exist in order to combat labor issues and regulate behaviors of business owners with the help of group dynamics (such as worker and customer trust in business owners). One reason to value an agreement with management in setting work rules is to ensure that management strictly follows these rules once they have been established. In terms of versatility and flexibility, labor laws in Japan may, to some extent, serve as a useful reference in a global context.

In Japan, the scope of significant labor protection laws for individuals (*Labor Standards Act*, *Industrial Safety and Health Act*, *Labor Contracts Act*, and *Industrial Accident Compensation Insurance Act*) is not broad enough to appropriately cover all kinds of platform mediated gig work. The laws permit several interpretations, but they have limited flexibility. Laws that govern labor-management relations, including the *Labor Union Act*, may apply to gig work. In cases where they do, employers cannot refuse to bargain collectively with the representatives of the workers, which would allow the representatives to discuss safety and health matters with the employer. The *Industrial Safety and Health Act* includes provisions reflecting the principle that a person who generates risk is responsible for risk management. The scope of the Act has been gradually extended through legal interpretation and amendments. Still, it may not apply to all kinds of gig jobs. The *Home Work Act* for homeworkers or home handicraft workers requires both clients and contractors to implement diverse health and safety controls. Although the Act has been applied to limited types of work, given its similarity in terms of formative background to laws (including the prohibition of evasion of responsibility by employers), some amendments could make the Act applicable to gig work. The civil responsibility of employers to provide a safe workplace may bolster the principle that a person generating risk is responsible for risk management, and this part of the law has the highest potential to be applied to gig work. This would require, however, a relationship between the platform and the gig worker such that the platform can establish, control, and manage work conditions or command authority over the worker, which would allow the risks of work-related accidents (damages) to be easier to predict and control. Regarding economic laws, the *Small and Medium-Sized Enterprise Cooperatives Act* provides a legal basis for the solidarity of sole proprietors and for negotiations with their clients. Still, it has been utilized very rarely to date.

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Note: Mishiba and Kurashige contributed equally to this work. As for considerations from a legal perspective, Kurashige prepared a draft, and Mishiba reconstructed and finalized it. The article therefore reflects the views of both authors. Mishiba also constructed a theory about the characteristics of Japanese laws and regulations and about ensuring the health and safety of the gig economy. Nakazawa conducted a data investigation about gig workers as well as literature review regarding occupational health. Mishiba reviewed the JILPT's 2019 study and ILO/WHO technical brief.

As described above, there are almost no direct restrictions on health and safety in the gig economy or its users; if serious cases of law evasion occur, however, courts will, based on the intent of applicable laws, attempt to offer remedies for workers with flexible judicial discretion with regard to the employer's duty of care, and this initial step may lead to the formulation of concrete laws in the future. In the future, essential duties to be imposed on platforms after new legislation is formulated are risk investigation, provision of investigation results to gig workers, and sincere response to collective bargaining, while measures to be taken by the Government include investigations of general risks associated with gig work and of ideal countermeasures and the provision of relevant information. In addition, a scheme is necessary to make it possible that in cases where cooperatives that are protected under the *Small and Medium-Sized Enterprise Cooperatives Act* assign industrial physicians to conduct interviews with cooperative members, when the physicians deem it necessary to do so, cooperatives can approach clients, etc. (including platforms) to improve the working conditions of the members in question. Furthermore, as experts in occupational health or other fields have pointed out a number of gig work-related risks, their findings need to be utilized in formulating new legislation, flexibly applying the employers' duty of care, and conducting mandatory negotiations between platforms and gig workers.

Key words: Gig worker, Platform, Industrial Safety and Health Act, Employers' duty of care, Risk assessment, Risk-creator's liability, Small and Medium-Sized Enterprise Cooperatives Act, Home Work Act

1. INTRODUCTION

This article indicates the possibility and limitations of the application of labor and economic laws of Japan, which are mainly soft laws and unique in the global context, to the gig economy. It also examines legal initiatives to overcome these limitations based on suggestions from occupational health studies. First, we describe the features of the legal system of labor-related laws in Japan in comparison to international standards.

A. *Features of the Legal System of Labor-Related Laws in Japan*

People in Western culture often find it challenging to comprehend many features of the legal system of Japanese labor laws. The advantages of the Japanese legal system lie in its versatility and flexibility in approaching issues, while its disadvantages lie in its ambiguity and slow response. In general, the difference between labor and management is a relative concept, and the attributes of "labor" and "management" have almost no relation to social and economic class differences. If an employee is regular and a candidate for an executive position, the person is likely to be promoted to manager. Labor and management often attach importance to their connection (sense of belonging) with the organization or community they belong to (such as a business and department). Even some non-regular employees[1)] also value their connection with the organization they belong to. Employers,

1) This could be interpreted almost the same as contingent workers. In Japan, they usually work under a fixed term contract or with a condition that a dispatching company and a client company that receives the dispatching service

therefore, tend to consider a trust-based relationship with their employees and parties concerned (such as clients) important. Employers often voluntarily consider the interest of employees without engaging in the labor-management dialogue. Although laws strictly regulate the dismissal of employees, the rules of employment that set out primary working conditions of employees are at times decided at the sole discretion of employers without an agreement between labor and management, and these conditions are binding for employees. Until recently, there was almost no limit on long working hours as long as employers carried out specific procedures. If an employee becomes ill due to his or her job, the employer assumes only the responsibility to make compensation for such illness.

Laws are, at best, inducements to sensible action by employers, and the behavior of employers is influenced by diverse factors, including trust from employees, public reputation, the manager's conscience, tax exemption for profit sharing, and the market. If requirements by laws and other factors are inconsistent with each other, laws are often disregarded or evaded. The courts and administrative bodies apply laws considering the context of each case, social background, and other conditions comprehensively. In responding to a new arising issue, a single law is rarely enacted within a short period with mandatory provisions that are specific, clear, and dogmatic. Multiple laws with different intentions and courses of the enactment process have direct and indirect influences on behaviors of employers.[2] Issues are to be addressed with mild restrictions (including those that might not be applied directly), and if cases of law evasion occur, courts will, based on the intent of the applicable regulations, attempt to offer remedies for workers with flexible judicial discretion. This initial step may lead to the formulation of concrete laws in the future. It is, of course, possible that even if there is no judicial precedent, social movements may result in the enactment of a law.

In the case of standard terms of a contract, for example, by which consumers in a weaker position in dealings enter a contract semi-compulsorily under unfavorable conditions, the Japanese authorities have not adopted a way to establish an independent adhesive contract regulation law to directly render any of these contracts illegal and invalid. The courts have attempted to offer remedies for consumers in accordance with the general provisions of the Civil Code and separate laws and regulations by industry (which regulate behavior in business by granting the authority of supervising business operators to an administrative body). In reality, however, the behaviors of business operators depend on the supervision and direction authorized by the administrative bodies, voluntary regulations by industrial organizations, customer reputation, and other factors that correlate with each other. For this reason, companies focus on brand

are different, which often causes unstable employment. Non-regular employees in Japan frequently suffer lower wages and other inferior working conditions compared with regular workers.

2) This article will refer to laws about compensation and rehabilitation as long as they relate to prevention. This is because the laws are a part of prevention in a broad sense and, in fact, have a strong impact on prevention measures by employers in Japan.

image strategies. An Act to directly regulate consumer contracts was enacted in the Diet only recently (in 2000), and its content is vague and its illegality criteria are unclear. Therefore, consumers not suffering from great injustice have not been helped by this act. Conversely, in the event of great injustice, affected people have been helped by means of legal interpretation, even without direct conflict of laws. The above mechanism of behavior control is not much different from that in the labor law field.

The industrial safety and health laws and regulations in Japan attempt to improve working hours, placement, and other general working conditions, considering past suicides and deaths due to overwork. In other words, the scope of regulations has extended to social protection, from technical protection for workers such as machinists and builders. These laws also aim to improve business communication with a view to reducing stress. Recently, they have actively supported the employment of patients with cancer or severe illness. They are trying to provide a sense of safety and security comprehensively. Hence, legal fields to be applied in cooperation with each other to realize the health and safety of employees are widening (for example, the Labor Standards Act, economic laws, company management laws, the Social Welfare Act, and the Medical Care Act). The advantages mentioned above of the legal system of Japanese labor-related laws (i.e., versatility and flexibility) may be effective in addressing these complex, different, and multi-layered problems.

The *Industrial Safety and Health Act* has made a model specific to Japan, while the laws of the UK have influenced it in terms of its establishment and amendments. The incidence of work-related accidents in Japan has been and still is very low compared to other countries.[3)] However, like other countries, Japan has not yet succeeded in controlling excessive occupational stress (Mishiba 2022, 69–75).

B. Purpose and Structure of this Article

Based on these features of the Japanese legal system, in the following sections, this article aims to describe the current status and issues regarding legal measures for the health and safety of workers in the gig economy in Japan, recommend the development of a collective bargaining framework between risk generators and workers as well as the utilization of industry health professionals through the legal system, and present reference material applicable to the world at large.

Section 3, Gig Workers and Issues about Their Health and Safety in Japan, argues that Japan is also wrestling with the challenge of what measures are to be taken to ensure the health and safety of gig workers while the status of gig workers as "employees" has not been clearly defined because there are incompatible theories. First and foremost, we should make an effort to flexibly interpret the status of gig workers as employees and protect them under existing labor laws; concerning health and safety, without regard to a discussion on the workers' status as employees, both legal interpretation and the legislative process should be based on the principle that

3) Japan Industrial Safety and Health Association, various data listed on "Safety and Health Statistics (by nation)." https://www.jisha.or.jp/international/field/disaster.html, last visited March 12, 2022.

a person generating risk is responsible for risk management (risk generators include those who have risk information and/or the authority to control and manage risk), and; since there are various risks depending on the type of industry and employment, we should enhance the bargaining power of gig workers with risk generators such as clients and platforms.

Section 4, The Current Circumstances of Gig Workers, clarifies that, according to the results of a social survey about freelancers, including gig workers, such workers feel motivated at work but are not satisfied with their pay, and potential risks might vary as gig workers are distributed among various types of industry and job.

Section 5, The Possibility and Limitations of Application of the Status as Employees/Workers, indicates the definition of employee under the pertinent labor laws in Japan, namely, the *Labor Standards Act*, *Labor Contracts Act*, and *Labor Union Act*. The applicability of the definition of the employee/worker is broader under the Labor Union Act. If a person falls under the definition of "proprietorship to a significant degree" (for example, a person to whom business profit is attributable), the category of the "employee/worker" is unlikely to be recognized. Even though a person does not fall under the definition of "employee/worker," he or she should be protected if their contracts with the clients include accessoriness, adhesiveness, or economic dependency (vertical relationship because one person's livelihood depends on the other). In gig jobs, however, there are a number of issues, including that it is unclear who should be treated as the employer (or equivalent).

Section 6, The Possibility and Limitations of Expanding the Scope of the *Industrial Safety and Health Act*, include the following: the *Industrial Safety and Health Act* of Japan has provisions to embody the principle that a person generating risk is responsible for risk management, but its scope of application and restrictions are limited; however, a recent judgment from the Supreme Court of Japan stated that, because the *Industrial Safety and Health Act* aims to improve the workplace environment, the subjects of requirements about the provision of information on chemical substance risks include non-workers, and from this standpoint, may include gig workers.

Section 7, The Possibility and Limitation of Application of the Civil Law Concepts of Employers' Duty of Care, presents the following: the civil responsibility of employers to provide a safe and healthful workplace is applicable in a relatively wide range. In both academic papers and judicial precedents in Japan, this responsibility is commonly called the "duty of 'safety' consideration," but this term also covers health issues such as the handling of toxic substances. Whether the duty of safety consideration covers well-being issues such as measures against fatigue and stress has been a controversial topic in academia, but judicial precedents have included them in the past. In this article, the term "duty of 'safety' consideration" is deemed to cover employees' safety, health and well-being, and is called "duty of care" hereinafter. Platforms may have this responsibility to their gig workers; in this case, however, the gig workers should be working under the direction and order of the platforms, or the platforms should govern and manage gig workers' working conditions.

Section 8, A Labor-Related Law: The *Home Work Act*, includes the following: the *Home Work Act* in Japan has been

established against a backdrop of the evasion of labor regulations by business owners by consigning tasks to industrial home workers and the exposure of home workers to toxic chemicals; this act requires both clients and industrial home workers to take specific risk prevention measures; and, although this act is not applicable to the emerging gig economy, it would be worth revising the act to make it applicable.

Under these circumstances, it is difficult to protect the health and safety of gig workers only with the current labor laws and labor-related regulations in Japan (even though the civil responsibility for the employer's duty of care is applicable in a relatively wide range). We should, therefore, explore the possibilities of applying economic laws.

Section 9, Economic Laws and the Health and Safety of Platform Mediated Gig Work, presents the following: as economic laws in Japan, there are laws to ensure the payment of subcontracting fees from principal contractors (the *Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors*) and to regulate the exclusion of, or control on, new entrants and cartel formation (the *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade*) but they do not secure transactions (such as obligatory conclusion of a contract); there is also a law for small- and medium-sized businesses, which are economically weak, to organize trade associations or guilds, enhance bargaining power with clients, and promote mutual assistance (the *Small and Medium-Sized Enterprise Cooperatives Act*); this act has the potential to cover gig workers and would make it easier for them to solve the various health and safety issues they are facing through negotiation with clients; however, it is difficult to force clients to enter into negotiations.

Section 10, Suggestions from Occupational Health, presents the results of a review of articles from the area of occupational health concerning risks inherent to gig work and control measures, as information to be considered for theories of legal interpretation such as for the duty of care and bargaining between relevant parties, as well as legislative processes in the future. The results indicate a) hazards inherent to the work, such as traffic accidents (occupational vulnerabilities), b) poor protection (precarity), and c) hazards arising from the use of platforms, such as loneliness (platform-based vulnerabilities). In addition, the increase in the risk of infection from COVID-19 is associated with algorithmic management.

Section 11, Conclusion: The Necessary Legal Response, includes the following: health and safety are essentially managed by the assessment of different risk factors at work, and risk generators should be legally responsible for implementing the duty of care regardless of the labor-management relationship; nevertheless, there are cultural differences around the world, and in Japan, it is not always desirable to force the above policy in all cases; the risk factors in the gig economy are diverse and should be addressed according to the level of risk through collective bargaining between the parties concerned; in addition, a scheme should be planned to allow gig workers to receive occupational health services including occupational medicine, and; concerning general risks inherent to the work, the government should conduct an investigation and publish the results.

2. RELATED STIPULATIONS UNDER STATUTORY LABOR LAWS

The following are key provisions of statutory labor laws in Japan related to health and safety in the gig economy:

A. Provisions Applicable in Case the Person Falls under the Definition of Being an "Employee"

The *Labor Standards Act* (Act No. 49 of 1947): This law aims to specify the minimum standards for working conditions to be complied with by employers with regard to their employees and to ensure inspection and guidance by labor standard inspection bodies, criminal penalties for flagrant violations, and governance on labor contracts (causing contracts under statutory standards to become void and providing direct discipline). It sets out the limitation on working hours, a guarantee of the minimum wage, and the obligation to create rules of employment, etc.

In this Act, the term "employee" is defined as "a person who is employed at a business or office and to whom wages are paid, regardless of the occupation" (Article 9). The term "employer" is defined as "a person acting on behalf of the person in control of the business in matters concerning the employees of the business" (Article 10). The term "wage" is defined as "anything that the employer pays to the worker as remuneration for labor" (Article 11).

The *Labor Contracts Act* (Act No. 128 of 2007): This law stipulates the critical points for interpreting rules of employment to be created by employers or labor contracts presented by judicial precedents. Most of its provisions have been deemed enforceable. Not all indications from precedents, however, are expressly stipulated. Later, innovative concepts exceeding precedent indications were incorporated in a revised edition of this act. It prescribes that the appropriate content of the rules of employment constitutes a labor contract. A repeatedly renewed fixed-term labor contract should be changed into a contract without a fixed term, in addition to balanced and equal treatment between fixed-term and non-fixed-term contract workers.

In Article 2, Paragraph 1, the term "employee" is defined in the same way as in the *Labor Standards Act*. In Paragraph 2, the term "employer" is defined in the same way as in Labor Standards Act.

The *Industrial Safety and Health Act* (Act No. 57 of 1972): This law separates fourteen provisions concerning health and safety from those initially prescribed in Chapter 5 of the *Labor Standards Act* and improves its contents. To ensure health and safety (effectiveness), this act provides regulations concerning the speedy development of elaborate standards for hazard prevention, the establishment of a safety and health management system, various administrative actions by administrative officers with expertise, and the education and utilization of health and safety experts. Thoroughness, flexibility, and a high degree of specialization are features of this act. Many provisions target a person other than the employer. This act aims to "facilitate the creation of comfortable work environments" and ensure employees' health and safety.

Article 2: In Item 1, the term "industrial injury" is defined as "an employee being injured, contracting a disease, or dying due to a construction, equipment, raw material, gas, vapor, dust, or the like that is connected with the employee's employment, or as a result of an employee's work activities or other duties."

In Item 2, the term "employee" is defined as "an employee" as prescribed in Article 9 of the *Labor Standards Act* for the most part, and in Item 3, the term "employer" is defined as "a person that is engaged in an undertaking, and that employs an employee(s)."[4)]

The *Labor Union Act* (Act No. 174 of 1949) includes provisions about the formation of a labor union by workers, standards to protect justifiable acts by workers, including collective bargaining and strikes through a labor union, and administrative remedies.

Article 1: Paragraph 1 describes the purpose of this act: to elevate the status of workers; to defend the exercise of collective action by workers; and to promote the practice of collective bargaining and procedures to conclude collective agreements between employers and workers. Paragraph 2 specifies immunity from criminal liability to labor unions for performing justifiable acts (Article 8 includes the exemption from civil liability for workers' justifiable strikes).

Article 3 provides that in this Act, the term "worker" is defined as "a person who lives on their wages, salary, or other equivalent income, regardless of the kind of occupation."

B. Provisions for Imposing General Obligations Concerning the Health and Safety of Employers and for Setting Relevant Ministerial Ordinances

The *Industrial Safety and Health Act*

Articles 20 through to 25-2 impose general obligations on business operators to take the necessary measures to prevent industrial injuries or diseases caused by various hazards, including: machinery, inflammable and other dangerous substances; work methods involved in excavation and cargo handling; places with a potential for landslides; raw materials, exhaust fumes, waste fluids, and other harmful materials, and; the work environment in an office, including the ventilation, temperature, floor, and stairs.

Article 26 requires workers to respond (cooperate and collaborate) to the measures taken by business operators under the provisions of Articles 20 through 25-2.

Under Article 27, the measures required to be taken by business operators pursuant to the provisions of Articles 20 through 25-2 are prescribed by the Order of the Ministry of Health, Labour and Welfare.

C. Provisions Related to Worker's Compensation

The *Labor Standards Act* requires employers to pay at their expense compensation for their workers who sustain an injury or suffer illness in the course of employment. In addition, the *Industrial Accident Compensation Insurance Act* (Act No. 50 of 1947) specifies that an industrial accident compensation insurance administered by the government takes over employers' responsibilities for worker's compensation and provides more support (pension and other measures to support the worker's livelihood) and medical rehabilitation for affected workers. There are seven types of

4) In Japan, therefore, the employer defined under the *Industrial Safety and Health Act* is different from that under the *Labor Standards Act* and refers to an employer of employees and a legal entity or sole proprietor to whom business profit is attributable.

insurance proceeds under this act, including medical treatment compensation benefits.

D. Provisions Related to the Civil Law Concepts of Employer's Duty of Care

The *Labor Contracts Act*

Article 5: This article prescribes that "the employer is to give the necessary consideration to enable his/her employees to work while ensuring their life and safety."

This act only specifies the obligations of employers to their employees and does not cover the entire framework of the duty of care that has been formed judicially. An administrative interpretation (Notice No. 0810 Article 2 of the Labour Standards Bureau of the Ministry of Health, Labour and Welfare, August 10, 2012) clarifies that the concept of "life and safety" includes "mental and physical health."

In the first place, the *Labor Contracts Act* was established by stipulating the essence of significant precedents from the Supreme Court decisions, mainly concerning labor disputes as civil affairs. Article 5 of this act also reflects the above context.

3. GIG WORKERS AND ISSUES ABOUT THEIR HEALTH AND SAFETY IN JAPAN

Technological development is driving the global expansion of new forms of work, such as gig jobs, where gig workers work using Uber[5] and other digital platforms. Japan is also seeing an upward trend in the number of gig workers.[6] Since they can be classified as "employees" in a sense, how to secure their health and safety is a problem. Prevention and compensation measures are required for, for example, traffic accidents during delivery, fatigue due to long working hours or poor mental health caused by work, and labor accidents such as occupational diseases (in this article, "labor accident" means any occupational accident resulting in injury, illness, death, and health impairment), and commuting accidents.

Of course, there are various gig jobs, and some gig workers have been determined as "employees."[7] For these workers, existing labor laws and regulations may provide adequate protection. In addition, even if a gig worker is a party to a contract/service agreement under the Civil Code in Japan, the worker is protected by provisions of the *Industrial Safety and Health Act* (mainly about machinery and equipment safety, provision of

5) Because Japan has regulations on general passenger vehicle transportation businesses under the *Road Transportation Act*, Uber (Uber Technologies, Inc.; a technology company in the US) is not well known in Japan and Uber Eats (an online food ordering and delivery service) is more popular as a platform for gig workers.

6) In this article, following Murata's view (Murata 2020), the term "gig economy" is defined as a way of working where workers undertake a one-time job mediated by the Internet without an employment relationship and "gig worker" is defined as a person who works in the gig economy.

7) The "employee" in this context is a comprehensive, superordinate concept that indicates a person protected under main labor laws. A definition of the employee in each law differs by the purpose of each law. Refer to Section 5 and 7 for details. The classification of the "employee" under the *Labor Standards Act* in Japan is determined primarily by the presence or absence of command and control as well as wages (consideration of labor), which is similar to the concept of "salarié" under French labor codes. The concept of a "worker" under the *Labor Union Act* in Japan is a person who works dependently to earn a living (like a person in the working class in Europe), which is similar to that of a "worker" under the *Trade Union Act 2016* of the UK in that it covers self-employed workers.

information on hazardous chemical substances, and the improving the work environment). In some cases, the civil law duty of care arises by consulting the Supreme Court judgments as described later.

In Japan, however, there are few studies available concerning how to protect gig workers and what protection is required for the health and safety of gig workers. Furthermore, the government has not clearly articulated its policy on whether gig workers should be treated as "employees" or "independent self-employed workers (hereinafter referred to as "self-employed workers").[8)]

A paper titled "Essay on Safety and Health Law Policy for Side Job Workers and Freelancers" (Mishiba 2020, 7) is one of few studies on this subject. In this paper, Mishiba proposed the principle of the risk generator being responsible for risk management, that is, a concept that a person who generates risk or can control and manage risk based on risk-related information he/she has obtained is responsible for risk management.[9)] Mishiba then indicated that the scope of health and safety laws should be extended to cover workers with employment-like working styles[10)] among freelancers, gig workers, and the like and that it is necessary to strengthen solidarity and enhance the bargaining power of these employee-like workers to the same level as workers in a labor union as much as possible. Based on this theory in general, our article aims to clarify what protection is required for gig workers in Japan and how to enhance their bargaining power in reality, in order to present reference material for the world.

Regarding health management for teleworking employees (the opposite concept to self-employed teleworkers), Ishizaki (2021) pointed out that, even for off-site employees, employers should establish a health and safety management system, provide health and safety education (Article 59 of the *Industrial Safety and Health Act*), develop a health consultation system (Article 13-3 of the same), and implement occupational hygiene measures (working environment control, administrative control, and health control) necessary against foreseeable health hazards causing such as mental instability.[11)] This opinion is applicable to gig jobs if gig workers do their jobs using computers and other digital devices at any

8) In California in the US, for example, the judge ruled that a California law backed by Uber and other gig economy companies, which ensures gig workers are considered independent contractors while granting them limited benefits, is unconstitutional under California's Constitution (https://www.nytimes.com/2021/08/20/technology/prop-22-california-ruling.html, last accessed February 16, 2022).

9) As mentioned above, the laws of the UK have had a significant impact on the legal system in Japan. The *Health and Safety at Work etc. Act 1974* (HSWA) of the UK requires every employer to conduct his/her undertaking in such a way as to ensure that "persons not in his/her employment" are not thereby exposed to risks to their health or safety (s.3(1)). "Persons not in his/her employment" include self-employed persons and visitors (Selwyn and Moore 2015, 117–118). The act also requires every self-employed person to act in such a way as to ensure that he/she and other persons who may be affected thereby are not thereby exposed to risks to their health or safety (s.3(2)).

10) In Japan, those who have not concluded a formal employment contract (but have concluded a contract or service agreement) and been working under the conditions similar to those for employed workers are called employment-like workers or dependent self-employed workers. If illegality is suspected, such a contract may be called a fraudulent contract.

11) Mishiba (2020) agrees with Ishizaki (2021) and examines relevant conditions, methods, and contents more closely.

place outside facilities operated by clients.

In general, ways of protection for dependent self-employed workers are as follows: (i) expanding the concept of a worker; (ii) defining the third category (a concept of "semi-worker" or "quasi-worker") in addition to the concepts of a worker and self-employed workers and partially expanding protection under labor laws to those under this category; and (iii) not adopting both (i) and (ii) but granting special protection by enacting independent legislation. Concerning occupational health and safety, another approach, similar to (ii) and (iii), requires a person conducting a business or undertaking to take measures to protect people engaged by and working for the person while defining them as a worker.[12)]

In the case of (i), instead of the conventional concepts and criteria of "employees" such as employment subordination or personal subordination (i.e., the state of being under the control of another), economic, and organizational concepts of subordination can be actively considered by establishing uniform criteria across various labor laws and regulations[13)] or by relatively applying relevant individual laws and regulations[14)] to recognize people as "employees."

In the case of (ii), self-employed workers such as gig workers are not uniformly recognized as "employees," but for parts where protections are needed as employees, partial protections should be provided (i.e., partial application of the "employee" status should be given).[15)] A similar stance is seen in, for example, a judgment by the UK Supreme Court (*Uber BV and others v Aslam and others* [2021] UKSC 5), which ruled Uber

12) In Australia, s.19 of the harmonized *Work Health and Safety Acts* target a person who conducts a business or undertaking (PCBU), not an employer, and requires them to ensure, so far as is reasonably practicable, the health and safety of workers engaged, or caused to be engaged by the person. The scope of these Acts has been set very broadly to cover all kinds of work arrangements and in order to avoid frequent revisions considering the speedy changes of modern business models. In these statutes, PCBUs include franchisers, principal contractors, and upstream vendors in the supply chain. A subcontracted self-employed person could be a PCBU and worker. The term "worker" broadly includes a person who carries out work in any capacity for a PCBU, such as a contractor and an employee of a contractor. A worker is not required to be a person who carries out work for a specific PCBU; it is enough to be a person who carries out work for an unspecified PCBU(s). Those who work in a downstream supply chain, therefore, fall under workers (see Bluff et al's article in this issue; also see Johnstone (2019) and Johnstone and Tooma (2022, ch 2). It is difficult to determine whether such a definition is applicable for a case where, for example, the digital platform only plays an intermediary role between an end user and a worker, like crowd work. According to Prof. Johnstone (2019), each case will depend on the exact nature of the relationship between the intermediary and the worker.

13) An example is described by Hashimoto (2021), who argues that, in Japan, judicial precedents so far (especially those relating to definition of "employee" under the *Labor Standards Act* and the *Labor Contracts Act*) are too focused on the concept of personal subordination to accept the broader concept of being the "employee." The author then argued that we should consider actively the concept of economic subordination by comparing with German laws and EU rules, and when a worker does not voluntarily bear any management risk and is under "de facto constraints," a definition of the "employee" should be applied consistently across different labor laws and regulations. This theory may aim to avoid the generation of a gray zone, which causes a gradual weakening of the protection for workers. Kawaguchi (2012) is on the same side. In a part, however, this perspective lacks the protection for those who are not (deemed to be) workers.

14) See, for example, Kezuka (2017).

15) See, for example, Kamata (2019); and its English version, Kamata (2020).

rideshare drivers must be treated as workers[16)] because of the Uber's level of control over working conditions.[17)] A white paper, Work 4.0, published by the Federal Ministry of Labour and Social Affairs in Germany[18)] also takes the similar position. This white paper denied the status of "employee" for gig workers but concluded that "one-size-fits-all solutions will not meet the needs of all self-employed individuals. Legislators should therefore determine the appropriate level of protection which different types of worker's need, and include them in labour- and social-policy legislation accordingly." In addition, this white paper suggested the enactment of the *Crowdworking Act* (*Crowdwork-Gesetz*) and the application of conventional provisions of the *Home Work Act*.[19)]

In the case of (iii), the legal status of employment-like workers and gig workers is put aside, and efforts are made to provide necessary protections by expanding the scope of existing laws and establishing new ones.[20)] Work 4.0 in Germany is close to this position in terms of the legislative approach. France has taken this position as it has established a special law for crowd workers who meet specified requirements to make platforms share the costs for worker's compensation insurance, job training, and business career certification (Suzuki 2017; Kasagi 2019).

As a way of protection for dependent self-employed persons such as gig workers, this article first attempts to flexibly apply the concept of being an "employee" (without expanding it; without changing the concept itself) and adopt (iii) to deal with the portion not covered by such flexible interpretation. Specifically, it is necessary to set out the concept of the "worker" separately from the "employee" that is currently covered by the labor laws and "self-employed," by the economic law, to support the activities and protection of the workers, and to strengthen their solidarity.[21)] Their health and safety should be ensured under this process. We will

16) In the UK, in addition to two categories of employment, employee and self-employed, there is an intermediate third category of a "worker." It is a term used in the *Employment Rights Act 1996* and the *Equality Act 2010*, and does not necessarily mean a party concerned to a labor contract. Prof. Diana Kloss MBE, one of the country's leading authorities on occupational health, stated as follows (via an email to Mishiba):
"The UK common law has maintained the master/servant viewpoint for several hundred years, but for protecting a "worker," we are under pressure to get rid of the viewpoint. Now, the courts are required to contemplate the reality of the situation and not what the employment contract says."
"But interestingly, the Supreme Court takes a different approach to vicarious liability. According to a judgment delivered immediately before this judgment, the Supreme Court ruled that employers could be liable for wrongful acts committed only by their employees but not by independent self-employed workers (*Barclays Bank v Various Claimants* [2020] UKSC 13)."

17) A judgment rendered by the Court of Appeal, the original decision of the case (*Uber BV and others v Aslam and others* [2019] IRLR 257) stated that the mechanism of the algorithmic management by Uber was coercive (if drivers maintain a low acceptance rate, the system offers less opportunities to them).

18) Federal Ministry of Labour and Social Affairs, *White Paper Work 4.0*, March 2017. https://www.bmas.de/EN/Services/Publications/a883-white-paper.html.

19) See Kamata et al. (2021, 23-52) and Yamamoto (2021, 72–93).

20) For example, Toki (2020, 372–373).

21) Ouchi (2021, 11) argues that the sole application of the economic law will not provide an adequate protection, and that the problem is how to include workers who are in the intermediate state not covered by the labor laws into the protection framework.

discuss the details of purposes and methods in the following.

Moreover, based on the idea of Prof. Hamamura, who recommends the expansion of the definition of the "worker" under the *Labor Union Act* and the utilization of the *Small and Medium-Sized Enterprise Cooperatives Act* for people working in the platform economy (Hamamura 2018), we also examine whether the Small and *Medium-Sized Enterprise Cooperatives Act* is applicable to protect gig workers.

4. THE CURRENT CIRCUMSTANCES OF GIG WORKERS

There are various types of gig workers, including crowd workers on crowd sourcing platforms and ridesharing drivers, but they have points in common. As shown in Figure 1 below, digital platforms on the Internet provide job opportunities for workers; thus, a tripartite structure exists. A recent example is Uber Eats, which is well known in Japan, which has a system where workers register on the platform and deliver food from restaurants to destinations during whatever time slot they prefer.

Although there are no official statistics that would make it possible to know the exact number of gig workers, in research on freelancers (independent self-employed workers) conducted by the Japan Institute for Labour Policy and Training (JILPT 2019), the investigation results about crowd workers are informative. This is because most gig workers are those who work via digital platforms without entering a labor contract, and most crowd workers[22)] are more or less gig workers. According to JILPT (2019), crowd workers represented 12.9% (1,068 people) of the total

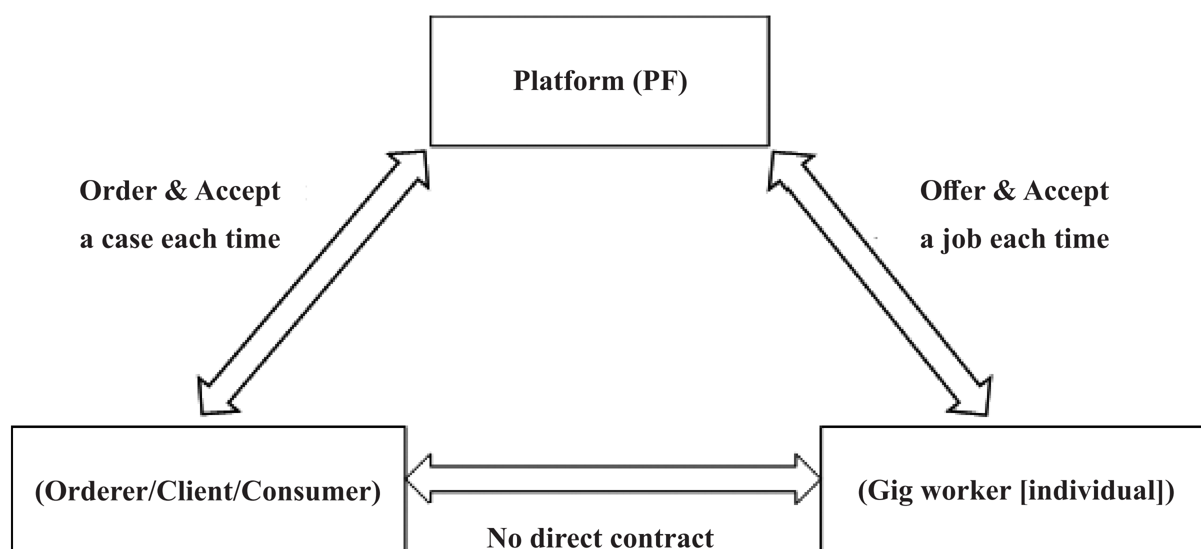

Figure 1 Basic Structure of the Gig Economy

22) People who receive work orders via crowd sourcing platforms that outsource tasks online to an unspecified number of people (JILPT 2019). Some of them are considered to be gig workers.

samples (8,256 freelancers).[23] The research provided the following breakdowns by industry type in descending order: clerical support (54.9%), professional and technical (20.3%), field construction work (8.9%), IT (6.8%), design/video production (6.0%), and life service and barber/beautician (3.1%).

This research shows a tendency that crowd workers (i) are young, female, university graduates, and/or married, (ii) have multiple freelance jobs, (iii) provide labor to multiple clients, (iv) have difficulty receiving orders due to the substitutability of their work, (v) are under the directions of their clients concerning contents of and ways to perform tasks without specified work place and time, and (vi) receive low wages (less than 500,000 yen annually in many cases). The cases of ending the relationship before the contract termination were unexpectedly few (10-15%). It also shows that an agent usually determines the working condition under a contract with a client and responds to any problems. Moreover, crowd workers demand to ensure the properness of their working conditions and develop conditions to avoid problems with their clients (caused by payment delays, pay reduction at clients' own discretion, etc.) more keenly than freelancers.

Of all 8,256 freelancers, this research shows a comparatively higher satisfaction with their working time, sense of accomplishment, and motivation. Many of them, however, are not satisfied with their income.

These data do not directly show the state of health and safety of freelancers and gig workers but are worth referring to because, as mentioned before, the *Industrial Safety and Health Act* in Japan covers stresses (psychosocial risks) related to general working conditions such as workers' placement and working hours. The result suggests that workers overwork themselves to make a living and cannot avoid risks of falling or traffic accidents. However, it also shows that there should not be comprehensive restrictions on their jobs.

5. THE POSSIBILITY AND LIMITATIONS OF APPLICATION OF THE STATUS AS EMPLOYEES/ WORKERS

In some cases, even gig workers might be recognized as "employees or workers" under Japanese labor laws. Suppose the status of being an "employee" under the *Labor Standards Act* and the *Labor Contracts Act* is recognized—in this case, gig workers will be protected as general employees under these laws and the *Industrial Safety and Health Act*. In addition, if the status of being a "worker" under the *Labor Union Act* is recognized, they can join an organized group with specific bargaining powers to conduct collective bargaining concerning safety and health issues, which could lead to the establishment of the safety and health measures appropriate for the occupational type and other conditions. In this context, we will first examine to what extent the concept of "employee/worker" can be controlled (i.e., interpreted flexibly).

23) This research defines freelancers as "people running a business without employees and physical stores, whose occupation is not agriculture or fishery" and estimates there are about 3.67 million people who perform freelance work, either as their principal or side source of income. Freelancers and gig workers have a point in common; they are usually not treated as employees and work as an individual.

A. The Status of an "Employee" under the Labor Standards Act and the Labor Contracts Act

Based on judicial precedents[24] and the government's views,[25] the concept of an "employee" is the same under the *Industrial Accident Compensation Insurance Act* and the *Labor Standards Act*. The concept of an "employee" under the *Industrial Safety and Health Act* and that under the *Labor Standards Act* is also the same. Moreover, the concept of an "employee" under the *Labor Standards Act* and that under the *Labor Contracts Act* (Article 2) is almost the same. Essential elements commonly seen in the "employee" concept under these laws are (i) employment subordination (the state of being under the command and control of an employer) and (ii) the receipt of reward as remuneration for labor.[26] Element (i) is satisfied when a person is under the direction of an employer and works for the employer in a broad sense even without performing tasks following the employer's direction to the letter, and (ii) is satisfied when the reward is paid as remuneration not for the completion of a task but for the provision of labor. As specific decision factors, the courts have comprehensively considered the following (they are not requirements and it is not always necessary to meet all of them): (i) the presence or absence of freedom to accept or reject a work order, task direction, etc., (ii) the presence or absence of command and control on the content of and how to perform a task, (iii) the presence or absence of a designation or control of the workplace and working hours, (iv) the presence or absence of alternative labor sources, (v) the presence or absence of a reward as remuneration for labor, (vi) the presence or absence of proprietorship (ownership or the share of responsibility for machinery and equipment, and the amount of remuneration), (vii) the degree of exclusivity, and (vii) responsibility for taxes and public dues (with or without a deduction for withholding tax and social insurance premiums). There are various forms of gig work, but a common form is that in which a worker receives an order from a client via a platform and completes the order. In many cases, the order has a service agreement or contract, the worker maintains a certain independence, and remuneration is paid not for labor but for a product. Hence, it would be difficult to recognize the "employee" status under the *Labor Standards Act* as this requires employment subordination as a precondition.

Appropriate worker's compensation is a part of occupational health and safety in a broad sense and is highly called for by workers working in a situation similar to that of employed workers. As mentioned earlier, the concept of an "employee" under the *Industrial*

24) *Chief of Fujisawa Labor Standards Office Case* (Supreme Court of Japan First Petty Bench decision, June 28, 2007), Labor Case, No. 940, 11; *Chief of Yokohama Minami Labor Standards Case* (*Asahi Paper Industry*) (Supreme Court of Japan First Petty Bench decision, January 18, 1996), Labor Case, No. 714, 14; *Asahi Shimbun Case* (*International Editorial Department journalist*) (Tokyo High Court decision, September 11, 2007), Labor Case, No. 951, 31; *Japan Broadcasting Corporation Case* (Osaka High Court decision, September 11, 2015), Labor and Economic Case Newsletter, No. 2264, 2; *Chief of Shinjuku Labor Standards Office Case* (*movie shooting engineer*) (Tokyo High Court decision, July11, 2002), Labor Case, No. 832, 13; etc.

25) See Labor Management Relations Law Study Group (2011).

26) See Labor Standards Law Study Group (1985).

Accident Compensation Insurance Act is the same as that under the *Labor Standards Act*. The former has, however, established a unique scheme to allow self-employed carpenters (independent craftsmen who undertake construction jobs) to obtain coverage. The subjects of this special insurance coverage scheme were limited to the automobile driving service industry, construction industry, fishery, forestry, and the like. Following a revision in September 2021, the scheme started to cover those who perform delivery services using a bicycle, such as Uber Eats. However, many industries where gig workers and freelancers exist have not been covered yet. The worker's compensation insurance under this unique scheme is deemed to cover cases almost the same[27)] as those under the insurance for general employees, such as commuting accidents occurring on the way to or from the workplace. Still, the availability of protection could be different in some cases. For cases such as an accident occurring when a worker takes his or her child between home and nursery school or back pain caused by work at home, the compensation insurance might not apply to general employees,[28)] but we should consider the possibility of offering compensation to gig workers. For other cases, such as long working hours and mental health conditions, general employees would be covered, but there should be higher requirements to give compensation to gig workers according to the level of their independence during work.

B. The Status of a "Worker" under the Labor Union Act

According to judicial precedents in Japan, the status of being a "worker" defined under the *Labor Union Act* is often considered a concept covering a more comprehensive range of people than the definition of "employee" under the *Labor Standards Act* and the *Labor Contracts Act*. Therefore, even though the conditions for the latter are not met, those for the former may be met in some cases. When only the worker criteria under the *Labor Union Act* is deemed to be applicable to an individual, he or she would not be protected directly by the *Labor Standards Act* and the *Industrial Safety and Health Act* but would become able to join a labor union or form a new one, and thereby become able to negotiate with the employer through collective bargaining (which the employer must participate in), regarding specific health and safety conditions.[29)] This is effective in developing health and safety measures by job type.

In Japan, the "worker" defined under the *Labor Union Act* has been interpreted to "include those who should be defended by organizing a labor union and practicing collective bargaining."[30)]

In addition, relevant precedents[31)] have

27) Ministry of Health, Labour and Welfare: https://www.mhlw.go.jp/new-info/kobetu/roudou/gyousei/rousai/dl/040324-5-08.pdf, accessed February 9, 2020.

28) Because the former case is not considered as having occurred during commuting, and the latter is not a task performed in the workplace.

29) In Japan, unreasonable refusal by an employer to engage in collective bargaining with a labor union would be deemed to be an unfair labor practice, and a labor relations commission would give a relief order or a court would order payment of damages, which is practically compulsory.

30) Labor Management Relations Law Study Group (2011).

31) *CBC Orchestra Labor Union Case* (Supreme Court of Japan First Petty Bench decision, May 6, 1976), Supreme

decided that, in determining whether a person falls under the definition of a "worker" under the *Labor Union Act*, basic decision factors are as follows (they are not requirements, and it is not always necessary to meet all of them): (i) inclusion in a business organization, (ii) one-sided/adhesion contract provisions, and (iii) receipt of reward as remuneration for labor; the following are considered as supplementary positive decision factors (the presence of these factors may lead to recognition of the person as a "worker"): (iv) a relationship in which a person must accept a work order and (v) labor provision under control and supervision in a broad sense as well as a certain restriction by place or time; the following are negative decision factors (the presence of these factors may lead to less recognition): (vi) the presence of significant proprietorship. In this context, the "worker" under the *Labor Union Act* is deemed applicable not only to employees with a labor contract but to some independent self-employed workers and artists (maintenance service contractors of electrical equipment manufacturers,[32] opera singers,[33] etc.). Gig workers, therefore, could be protected by the *Labor Union Act* as "workers" under this act if the above positive factors are met.

There is a limitation, however, in controlling (i.e., interpreting flexibly) the concept of a "worker" under the Labor Union Act. A representative case is the order of the Central Labour Relations Commission[34] (CLRC Order March 15, 2019, Labor and Economic Case Newsletter, No. 2377, p.3) issued on March 15, 2019, regarding a franchise contract for a convenience store (a small supermarket[35] that sells mainly groceries with consumer-friendly characteristics such as multi-store operation and 24/7/365 opening hours). One of the common factors, in this case, is that both a franchisee and a gig worker are formally proprietors but they are bound under contract and working conditions that are specified solely by the other party. In this case, the owner of the convenience store, one party of the franchise contract, was argued against by the other party, a franchiser of the convenience store (hereinafter referred to as "franchise headquarters"), regarding whether the owner is a "worker" or not. The order denied such status and concluded as follows. There are "de facto constraints" and "one-sided contract provisions" in the relationship of the owners

Court Reports, Vol. 30, No. 4, 437; *New National Theatre Tokyo Incident Case* (Supreme Court of Japan Third Petty Bench decision, April 12, 2011), Supreme Court Case, Vol. 65, No. 3, 943; *INAX Maintenance Case* (Supreme Court of Japan Third Petty Bench decision, April 12, 2011), Supreme Court Case, No. 236, 327; *Victor Service & Engineering Incident Case* (Supreme Court of Japan Third Petty Bench decision, February 21, 2012), Supreme Court Case, Vol. 66, No. 3, 955; etc.

32) The aforementioned *INAX Maintenance Case* Supreme Court decision.

33) The aforementioned *New National Theatre Tokyo Incident Case* Supreme Court decision.

34) An independent administrative agency (quasi-judicial body) established to deliver settlements of collective labor-management disputes under the Labor Union Act. The agency promotes more technical and flexible settlements than the courts. It also treats individual labor-management disputes. It has the formal powers of conciliation, mediation, and arbitration. Its arbitration decisions are binding on the parties concerned. The first instance is to be determined by a prefectural labor relations commission, but if a party has an objection, it can appeal the decision to the Central Labour Relations Commission. If a party has an objection to the decision of the Central Labour Relations Commission, it can apply to the court for cancellation of the decision.

35) There are nearly 60,000 stores in Japan as of December 2021 (Japan Franchise Association website: https://www.jfa-fc.or.jp/particle/320.html, accessed February 20, 2022.

of each convenience store with the franchise headquarters, such as the requirement of 24-hour operation, no closing day, and payment of a specified loyalty; however, these binding conditions are rooted in the nature of the franchise contract. On the other hand, because the convenience store owner is an employer and a person who conducts a business or undertaking, the significant proprietorship is recognized. Therefore, the "worker" status under the *Labor Union Act* does not apply.

The Central Labour Relations Commission indicates the necessity of the development of a scheme to ensure social protection and dispute settlements because "concerning the issues arising from [...] a disparity of bargaining power between a person and a business, even if the person does not have a legal right to bargain collectively under the *Labor Union Act*, the development of an appropriate problem-solution mechanism, efforts of both parties toward it, and especially the company's consideration are desirable."

Given the broadness and flexibility of the concept of a "worker" under the *Labor Union Act* on the one hand, and conditions such as constraints on and economic dependency (a vertical relationship due to livelihood dependency) of gig workers caused by accessoriness and adhesiveness of contracts, the labor relations commission or courts might recognize that they fall under the category of a "worker" under the *Labor Union Act*.[36)] There should be a certain level of protection for them, such as ensuring the right of solidarity and bargaining.[37)] When the status of "worker" is recognized for gig workers, however, a complex problem about who should be deemed the "employer" may arise.

It is, therefore, necessary to examine how to protect gig workers who cannot be covered by controlling (interpreting flexibly) the concept of a "worker" under the *Labor Union Act* and other labor laws.

36) There is a case that an organization called Uber Eats Union formed by 30 Uber Eats delivery staff applied the Tokyo Metropolitan Government Labor Relations Commission to examine a platform, the Uber Eats Japan Co., Ltd., and give a relief order to begin collective bargaining concerning a way to determine pay, compensation for injuries due to work, and other matters. On November 25, 2022, the Commission ordered the platform to engage in collective bargaining. The platform argued against the validity of the organization as a labor union but the Commission decided the delivery staff are workers under the *Labor Union Act* based on a general judgment as follows (Bengo4.com News, November 25, 2022, https://www.bengo4.com/c_5/n_15309/):
(i) Although the delivery staff worked without the restriction of place or time and have freedom to accept or reject a work order, their behaviors were controlled in reality by algorithmic management, performance evaluation, and other schemes so that they cannot refuse the requests from clients easily.
(ii) Significant proprietorship is not recognized for the delivery staff, and they were included in the business organization as the essential labor force of the platform by offering incentives to secure delivery staff working exclusively the company. The delivery wage is in fact a consideration for performed work.
(iii) The Uber Eats determines at its sole discretion the terms and conditions of an adhesion contract with its delivery staff.

37) Based on the guarantee of basic labor rights, Mishiba (2020, 7–8) stated as follows: "the development of a system to promote the solidarity should be considered" also for employment-like workers. The author continues, "it would be necessary to at least establish support measures such as imposing restrictions on contracts that interfere with collective bargaining or class action taken by employment-like workers, and requiring the orderer (and the like) to intermediate between an employment-like worker to other employment-like workers who work for the same orderer (and the like) to allow them to communicate each other, if so requested by the worker."

6. THE POSSIBILITY AND LIMITATION OF EXPANDING THE SCOPE OF THE INDUSTRIAL SAFETY AND HEALTH ACT

In principle, the *Industrial Safety and Health Act* in Japan specifies provisions that require the business operator (a person who employs a worker or workers and to whom business profit is attributable, including a sole proprietor or legal entity) to protect his or her employees from various occupational health and safety risks related to industrial activities, including physical risks caused by machinery operation, dangerous substances, construction work, etc., as well as psychosocial risks such as fatigue and stress. This law also has many provisions that require those other than business operators to protect people other than those employed by them. For example, a person who places an order (original orderer) contracting out a job categorized as the construction industry, etc. and also carries out some portion of the job him- or herself (called "principal business operator") is required to engage in the overall control and management of the safety of workers including subcontractors, lower-tier subcontractors, etc. working at the same construction site (including risk information sharing and safety patrol) (Article 30). Article 31 of this law specifies that orderers contracting out a job categorized as construction etc. who carry out a part of the job themselves and meet specified requirements must take similar necessary measures to prevent industrial injuries for subcontractors and the like as they would do for workers they employ, when they make the workers use structures and other dangerous materials (including scaffolding, formwork supports, and alternating-current arc welders) for which the orderers have the risk information and management right. Article 30 has provisions about site management, and Article 31, material management. In addition, there are provisions to require manufacturers and importers of specified dangerous and hazardous chemical substances to provide potential users of them risk information about these substances by labeling or other means (e.g., Article 57). The *Worker Dispatch Act* (the *Act on Securing the Proper Operation of Worker Dispatching Businesses and Protecting Dispatched Workers*) imposes obligations to impose more strict health and safety regulations on the person acting as the undertaking business operator who directly command and control workers than on the dispatching business operator (Article 45).[38)]

These regulations assume that, to effectively ensure health and safety, it is not sufficient to make business operators protect the workers they employ. Hence, these regulations require those who have the right to manage information about and control the sites and materials with potential hazards and risks to provide such information and perform necessary protection measures (Toki 2020, 368).[39)] It may be said that these provisions reflect the principles such as

38) For the features of the *Industrial Safety and Health Act* in Japan, refer to Mishiba et al. (2022, 1-180).

39) Toki (2020) says that the targets of these provisions are given a duty to observe the labor regulations (in this case, the *Industrial Safety and Health Act*) because they are exercising the authority of the employer under a labor contract. That is certainly true for some undertaking business operators, but principal business operators, for example, are prohibited to directly give instructions to assigned workers such as subcontractors (which would be deemed as an

Equivalenzprinzip (the idea that a person who benefits from an activity must be responsible for the prevention of and compensation for any accident caused by such activity) and foreseeability and controllability (the idea that a person who can foresee and control an accident must be responsible for the prevention of and compensation for such an accident). Essentially, however, these provisions are based on the nature of occupational health and safety which primarily pursues the prevention of industrial accidents. Because many of these regulations target constructors, shipbuilders, chemical substance manufacturers, etc., it is difficult to generally apply them to industries that commonly provide gig jobs.[40)] In addition, the *Industrial Safety and Health Act* in Japan and relevant ministerial ordinances do not always clarify the subjects of the protection (according to Article 1 and Paragraph 1 of Article 3 of this act, it aims to the protection of employees in general, but there are not many individual provisions that designate employees as the subject to be protected). In this context, the protection subjects may be interpreted naturally as employees or interpreted to include a wider range of people.

Recently, a precedent was decided that interpreted the scope of the protection under some provisions of the *Industrial Safety and Health Act* to be broader. That was a case of *construction asbestos lawsuit* (*Kanagawa first party*) (Supreme Court of Japan First Petty Bench decision, May 17, 2021; Supreme Court Reports, Vol. 75, No. 5, 1359). Employees of construction companies and self-employed carpenters who had been suffering from asbestos lung, lung cancer, or other diseases caused by exposure to asbestos claimed compensation for damages against both the Japanese Government and construction materials manufacturers. The reasons were that nonuse of restriction power by the Japanese Government regarding the direction and supervision for the use of protective equipment, labeling and posting as to the danger of asbestos, and other measures was illegal under the *State Redress Act*, and the failure of duty of care by construction companies such as the failure of warning about risks of the products was an unlawful act. Japan banned the manufacturing of asbestos in September 2006 under the Order for Enforcement of *Industrial Safety and Health Act*,[41)] but some people engaged in construction work who had performed building construction or demolition up to then (both employees and non-employees such as self-employed carpenters) had

evasion of the law because they should be treated as workers under a dispatch arrangement. Refer, for example, to "Standards regarding the Division between Businesses Performed by Worker Dispatching Businesses and Businesses Performed under Contract" (Notification of the Ministry of Labor No. 37 of 1986)). Historically, the *Industrial Safety and Health Act* was derived from the *Labor Standards Act* to play a technical and flexible role to pursue the prevention of industrial accidents. It is, therefore, not appropriate to identify who is responsible for hazard prevention measures because of the similarity to employers in their status.

40) The workers' home falls under neither the category of "workplace" that is mostly covered by the *Industrial Safety and Health Act*, nor the "office" that is subject to the relevant Office Hygiene Standards Regulations (Ordinance of the Ministry of Labor No. 43 of 1972).

41) The Supreme Court confirmed the details that the Government had required business operators to "prepare (not confirm the use of equipment)" the protective equipment and raised the level of controls to be taken depending on the assessed level of asbestos hazards by providing notification and other means (not legally binding).

developed mesothelioma, lung cancer, or other asbestos-related diseases. Victims filed a class action against the government and construction materials manufacturers to eight district courts across the country. The case mentioned above is one of these lawsuits.

A point of issue, in this case, was whether the *Industrial Safety and Health Act* that aims to secure the health and safety of the "employee" in principle also covers self-employed carpenters under a contract/service agreement or not, and in the event of failure of restrictions (including establishment or revision of legally binding rules or issuance of notifications not legally binding) for protecting them, whether nonuse of restriction power by the Japanese Government could be illegal or not.

At that time, Article 57 of the *Industrial Safety and Health Act* required a person who puts specified chemical substances into a container, or packages or transfers them to others, to inform the parties concerned of related risks or other information by putting a label identifying this information on a container. In addition, Article 38-3 of the Ordinance on Prevention of Hazards Due to Specified Chemical Substances required business operators to indicate hazards and precautions for handling carcinogenic substances and other specified substances in the workplaces where these substances are handled. The Ordinance on Industrial Safety and Health at that time had required business operators to prepare respiratory protective equipment but had not required them to ensure that people engaging in work use the equipment.

The point of contention, in this case, was whether the Government had committed an illegal act under the *State Redress Act* by failing to specify restrictions with the issuance of notifications (not legally binding) and to make adequate rules (legally binding). Concerning the latter issue, the question was whether self-employed carpenters were included in the subjects of protection under these rules.

The Supreme Court decided that the government is liable under the *State Redress Act* for not providing sufficient information or guidance regarding asbestos risks and the importance of wearing protective equipment by means of labeling, posting, or notification, and for not making it mandatory for those engaging in work to use protective equipment. In short, the Supreme Court affirmed the Government's compensation responsibility under the *State Redress Act* for self-employed carpenters, based on the following grounds. The Court said:

1) The main purpose of the *Industrial Safety and Health Act* is to protect employees but this act also specifies provisions to ensure the improvement of the workplace environment. In addition, because Article 57 of this act focuses on material hazards, the subjects of the protection under this article include non-employees who access the workplace.

2) The labeling requirement provided for by the Ordinance on Prevention of Hazards Due to Specified Chemical Substances also aims to protect people engaging in work including non-employees at the workplace where dangerous substances are handled.

Based on this ruling, it is considered that the regulations regarding communication about risks of dangerous and hazardous substances and the improvement of the workplace environment under the *Industrial Safety and Health Act* are applicable to gig workers as

long as they work at construction/work sites that are managed and administered by business operators.[42] There is a limitation, however, in the flexible interpretation by the courts. In fact, the current *Industrial Safety and Health Act* has contributed to the realization of only a part of the principle that a person generating risk is responsible for risk management, and may not protect all gig workers in different types of industries and jobs.

7. THE POSSIBILITY AND LIMITATION OF APPLICATION OF THE CIVIL LAW CONCEPTS OF EMPLOYERS' DUTY OF CARE[43]

Even if the status of being an "employee/worker" as defined under the *Labor Standards Act* and the *Labor Union Act* is denied, the protection under the civil law (usually, damage compensation but could exceptionally include prevention, i.e., refusal of work or demand for performance) could be applied for health and safety. According to precedents in Japan, the orderers' duty of care toward people who receive work orders may arise under a complete contract/service agreement. The duty of care is a civil law obligation generally incidental to a contract established by precedent. Regarding precedent indications, Mishiba (2014)[44] paraphrased the duty of care as a duty of (i) a "person who potentially has a practical influence (in particular, potential control and management)" on (ii) the "health and safety of a subject," that assumes the presence of (iii) "the possibility of avoiding a consequence" (iv) based on the "foreseeability" of accidents and diseases, of (v) "implementing procedures or giving his/her best attention to avoid such a consequence." Article 5 of the *Labor Contracts Act* enacted in 2007 clarified the duty of care in a labor-management relationship, but it goes even further than this. Even if there is no breach of a statutory duty, a violation of this duty of care might arise. Depending on the context of a case, a violation of guidelines not legally binding may constitute a violation of the duty of care.[45] Its broad scope and contents are close to those of the UK's HSWA (*Health and Safety at Work etc. Act 1974*) as well as the Management of Health and Safety at

42) Following this judgment, Article 22 of this Act and eleven relevant ordinances have already been revised and amended (e.g., to require constructors to develop the measures in stages to be taken for protecting self-employed carpenters and others who are not in their employment but engage in work or access their construction sites, even without the state of being under the command and control of the constructors). For details, refer to "Concerning the Enforcement of the Ministerial Order Partially Amending the Ordinance on Industrial Safety and Health, etc." Labour Standards Notice No. 0415 Article 1, dated April 15, 2022. In addition, the Committee to Review the Health and Safety Measures for Sole Proprietors and Other Individual Business Operators has held meetings since May 2022. Its agenda includes the necessity of more strict regulations for protecting self-employed carpenters and others, how to regulate digital platforms, and rules necessary for assuring the health of sole proprietors. The author (Mishiba) is a member of the Committee and reported on the UK and Australian legal systems.

43) As mentioned in Section 1, in Japan, this concept is commonly called the "duty of 'safety' consideration," but it also covers mental and physical health issues.

44) For details, see Mishiba (2014); Mishiba (2017).

45) The Ministry of Health, Labour and Welfare of Japan issued a notice under the joint signatures of relevant administrative bodies to raise awareness about road safety among food delivery service platforms and delivery staff (Safety Division Chief, Ministry of Health, Labour and Welfare "Prevention of a traffic accident in food delivery using the bicycle and motorized bicycle." Issued October 26, 2020. Safety Division Notice 1026. No.2, Attachment). It is not legally binding but might be used as a reference by the judiciary to examine the detail of a duty of care.

Work Regulations 1999, general duty clauses specified by laws related to the industrial safety and health including in those European countries, and Canada's Part II, Canada Labour Code of 1985.

A leading case of the Supreme Court concerning the duty of care is the *Japan Ground Self-Defense Force Hachinohe Vehicle Maintenance Factory* Case (Supreme Court of Japan Third Petty Bench decision, February 25, 1975, Supreme Court Reports, Vol. 29, No.2, p.143). In this case, a Self-Defense Force official was run over and killed by a large vehicle driven by a peer, and the bereaved family sued the Government for compensation. The Supreme Court ruled that "between the parties who are involved in a social contact with each other following certain legal relations, the duty of care should be commonly recognized as an obligation one party owes to the other, or the parties owe to each other in good faith, that is ancillary to such legal relations." That means even if there is no employment relationship, the parties with some social contact between them may be bound to the duty of care under the principle of good faith. Following this judgment, decisions were made that a principal contractor owed the duty of care to its subcontractors without an employment relationship (a representative case is *Mitsubishi Heavy Industries Kobe Shipyard Case* (*Hearing Impairment*); Supreme Court of Japan First Petty Bench decision, April 11, 1991, Supreme Court Reports, No.162, 295).

Therefore, when an incident occurs, caused by work materials (such as raw materials, means to work, etc.) supplied by a platform business to its gig workers, or when an orderer's dangerous instructions (such as requesting transportation of excessively heavy goods or speeding up delivery) result in a traffic accident, the platform may be liable to damages due to its failure of performing its duty of care, given that the party enters into a special social contact relationship with the other. This, however, does not apply unconditionally. To impose the duty of care on those other than the employer, there must be "a special social contact relationship." Moreover, civil liability for damages requires the failure to perform the duty of care, that is, a reason adequate to make the party liable (fault) and negligence. This would require, therefore, a relationship between the platform and the gig worker such that the platform can establish, control, and manage work conditions with high accident rates or command authority over the worker, which would allow the risks of work-related accidents (damages) to be easier to predict and control. In addition, even if the failure to perform the duty was recognized, claims for prevention, such as demanding performance of the duty, are not accepted in most cases.[46)]

8. A LABOR-RELATED LAW: THE HOME WORK ACT (ACT NO. 60 O/F 1970)[47)]

This law aims to protect industrial home workers (non-employees) who usually engage in material processing. In Japan, the *Factory Act*, which came into force in

46) For example, *Takashimaya Kosakusho Co., Ltd. Case*, Osaka District Court, November 28, 1990. Labor Economy Court Precedent Preliminary Report. No.1413, p.3.

47) In this section, the authors referred to Hashimoto (2009), Hamaguchi (2020), and Kitaoka (2022).

1956 and aimed to protect people working at factories (especially minors and women), was a predecessor of the *Labor Standards Act* (Act No. 49 of 1947). A system was later developed where independent self-employed workers, according to a legal framework, perform cottage labor (homework) for factory owners to avoid the application of this law and compensation for workers' injuries or diseases. This system has remained to date. In around 1958, deadly accidents occurred where homeworkers who had glued the soles of wedge mules, which were in fashion at that time, in a closed space died due to the exposure to benzene contained in rubber adhesive.

Based on these circumstances, the *Home Work Act* likens the relationship between homeworkers and businesses who outsource jobs to that between labor and management. In other words, although homeworkers were excluded from the subjects of the *Factory Act*, the necessity of social protection for them was recognized from economic, health, and safety aspects and the *Home Work Act* was established.

Accordingly, this law aims to extensively improve the working conditions of homeworkers by, for example, requiring persons who outsource work to prepare a slip that clarifies details of outsourced tasks, deadline/delivery date, wages, payment due date, and other conditions so that clients themselves and third parties (supervisory authority, etc.) can check the appropriateness of these conditions. Worthy of special note is Article 4, which is only an efforts clause but aims to dissuade the clients from asking homeworkers to work long hours.

The circumstances of its enactment are similar to those surrounding the gig economy in a sense (business operators try to evade their responsibility as an employer), and some protection measures prescribed by this law may be effective also in ensuring the health and safety of gig workers. In specific, the viewpoint of "extensively improving working conditions" will support psychological and physical health measures, which are regarded as of major importance by recent occupational health and safety laws.

For general health and safety issues, Paragraph 1 of Article 17 of this Act requires businesses who outsource jobs to take hazard prevention measures when they provide or supply machines and tools, raw materials, and other materials to homeworkers. Paragraph 2 of the same article specifies the obligations of homeworkers to "take" measures to prevent hazards due to machines tools and raw materials, as well as gas, steam, and dust. Paragraph 3 of the same article specifies the obligations of a homeworker's relatives residing together who are used by the homeworker as "assistants" to "perform" hazard prevention measures under Paragraph 2. Paragraph 2 is considered to impose on homeworkers obligations to protect the health and safety not just of themselves but also of their "assistants."

This law assumes workers work from home, and in the course of its enactment, the necessity of privacy protection was called for. The law thus focused mainly on supporting homework(ers) and adopted an approach to minimize restrictions. These circumstances may lead to a difference from the *Industrial Safety and Health Act*. For example, the *Industrial Safety and Health Act* has provisions the *Home Work Act* does not have, that require a person obliged to take measures (such as a business

operator) to make the subjects of protection (such as employees) adhere to “Dos” (such as having the worker wear personal protective equipment under Paragraph 1 of Article 327 of the Ordinance on Industrial Safety and Health) and “Don’ts” (such as prohibiting workers from entering the dangerous area under Article 245 of the same Ordinance).[48)]

Major executive authorities of the *Home Work Act* are Chiefs of the Labour Standards Inspection Office and Labour Standards Inspectors (Article 29) and in the event of non-compliance with Paragraph 1 or 2 of Article 17 concerning general health and safety matters, they can order the non-compliant person (orderer or homeworker) to stop issuing or accepting contract and/or using machines, tools, raw materials, etc. (Article 18). In violation of Article 17 concerning general health and safety matters or Article 18 concerning administrative dispositions, a penal provision (fine) will apply (Article 35).

The *Home Work Act* with these provisions may not suit modern gig workers who usually engage in data processing, system construction, or similar tasks. However, there is an opinion that legal measures should be taken in reference to the *Home Work Act*.[49)] In particular, it is worth learning the approach of this law to make a person, who outsources work, control risks generated by the person him/herself and to require both the client and contractor to take necessary health and safety measures. Revising this law for gig jobs may be possible.

It is, therefore, difficult to protect the health and safety of modern gig workers only with the current version of labor and labor-related laws and regulations.

The following sections will consider the feasibility of ensuring health and safety protection under economic laws. The Japanese *Industrial Safety and Health Act* actively addresses workers’ psychosocial stress such as by developing a new stress test system[50)] (Article 66-10). In this regard, workers’ working and economic conditions could be general issues at least in the context of the *Industrial Safety and Health Act*.

9. ECONOMIC LAWS AND THE HEALTH AND SAFETY OF PLATFORM MEDIATED GIG WORK

A. Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors (Act No. 120 of 1956)

This law targets people (parent enterprises) who are, for a particular transaction, a party involved in the transaction themselves (contracting for work from a client) and entrust a subcontractor to all or a part of their duties. It aims to prevent parent enterprises from abusing a dominant bargaining position as an orderer to the subcontractor (sole proprietor or legal entity whose capital is less than that of the parent enterprise). Transactions to be regulated under this law are: the manufacture, repair, processing, etc., of goods and consignment of these processes (Paragraphs 1 and 2 of Article 2); consignment where the parent enterprise engaging in the creation, provision, or use

48) Kitaoka (2022).

49) Emeritus Prof. Sugeno proposes the introduction of a scheme which ensures the minimum wage under the *Home Work Act* also for freelance workers (Keidanren 2019).

50) See Mishiba (2021).

of the information-based product including software, video content, and different designs entrusts the subcontractor all or part of their duties (Paragraph 3 of the same); service contract where the parent enterprise entrusts the subcontractor all or part of the provision of a service the parent enterprise is engaging in (Paragraph 4 of the same). Under its provisions, these parent enterprises are obligated to deliver documents containing the details of work of the agreement (Article 3) and to fix the due date of payment of the proceeds of the subcontracted work (Paragraph 2 of Article 2) and are prohibited from refusing to receive the work from a subcontractor or return the goods once received without adequate reasons (Items (i) and (iv) of Paragraph 1 of Article 4), delay the payment or reduce the amount of the proceeds of the subcontracted work (Items (ii) and (iii) of Paragraph 1 of Article 4), and retaliate against a subcontractor because the subcontractor informed the Fair Trade Commission or other administrative organs of any of these acts (Item (vii) of Paragraph 1 of Article 4). The law has provisions applicable in case of a violation of the above provisions, such as recommendation or collection of reports by the relevant authority and sanctions in case of failure to meet these requirements. The penal provisions, however, have not applied in general (Kanai, Kawahama, and Sensui 2018, 363), and successive illegal acts have taken place; thus, the Fair Trade Commission started to publish a list of companies the Commission gave notification of a need for improvement.[51)]

Gig workers could be protected under this law as long as they are engaged in business specified in the law but the scope is limited. In addition, the law does not have a provision concerning general health and safety protection, such as a requirement for occupational risk assessment on parent enterprises. As a natural result, the law does not work for securing a transaction itself between a parent enterprise and a subcontractor.

B. *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947)*

In principle, this law intends to regulate any act that practically contributes or may contribute to impeding or restraining fair competition, falling under any of the following: (i) private monopolization, (ii) unreasonable restraint of trade, and (iii) unfair trade practices. The purpose of this law is such as to promote fair competition and the wholesome development of business activities and secure the interests of general consumers. Case (i) means an act such that an existing enterprise, in conspiracy with other enterprises, “excludes” new or other enterprises by, for example, impeding their entry into the market, or “controls” them and hinders their autonomous decision-making process by placing them under its umbrella (Paragraph 5 of Article 2). Case (ii) means an act such that existing enterprises form a cartel or use other means to fix the transaction price (for example, bid-rigging). Case (iii) means an act such that an existing enterprise refuses or causes another enterprise to refuse to supply to a certain enterprise with goods, or unjustly

51) Japan Fair Trade Commission website: https://www.jftc.go.jp/shitauke/shitaukekankoku/index.html, accessed February 11, 2022.

fix responsibility for or inflicts a loss on a certain enterprise by making use of its superior bargaining position over the counterpart such as a continuous business relationship (Paragraph 9 of Article 2). The ways to secure the implementation of regulations (i) and (ii) include an order by the Fair Trade Commission to cease and desist a relevant act of violation (the Cease and Desist Order; Article 7), and to pay to the national treasury a surcharge of an amount as an administrative penalty (Paragraph 2 of Article 7-2), and a criminal penalty (Item (i) of Paragraph 1 of Article 89). The ways to secure the implementation of the regulation (iii) include the Cease and Desist Order (Article 7).

The Fair Trade Commission has also published "The Policy on the Franchise System under the *Antimonopoly Act* (June 23, 2011)"[52) and has conducted research on the current situation of the convenience store industry in an attempt to protect franchisees (member stores) that had not been covered under the *Labor Contracts Act*.

Hence, this act may apply to self-employed gig workers. If applied, however, it would directly modify the principle of a free economy; thus, this law tends to be interpreted and applied very carefully.[53) The scope of the provisions governing the abuse of a superior bargaining position, whose applicability is most frequently examined, is limited. In reality, these provisions have been applied in a controlled manner and so it cannot be said that they are flexibly and individually applicable to settle various disputes. Moreover, the general obligations of business operators to ensure health and safety are not governed by this act.

C. Act on Improving Transparency and Fairness of Digital Platforms (Act No. 38 of 2020)

In the economic and industrial field, the *Act on Improving Transparency and Fairness of Digital Platforms* (TFDPA) was established (promulgated on June 3, 2020) and enforced in 2021. This law well represents the soft-law nature of Japanese laws.

The Act targets the digital platform providers and aims to control (not forbid) certain of their behaviors such as, by using their superior bargaining position, imposing unfair transaction conditions to a counterparty to transactions, and unilaterally changing an agreement once concluded. On the other hand, the law specifies that the involvement of the state must be kept to the minimum necessary (Article 3). This law adopts a mechanism (called "co-regulation") whereby the law forms a broad framework of regulations and encourages designated digital platform providers to voluntarily take measures to ensure transparency and fairness in transactions.

52) The Commission says as follows: "Under the franchise system, the member is integrated into the system of the head office, including the system of comprehensive guidance. It is especially important, therefore, that a party contemplating becoming a member makes the proper judgment before deciding to participate. It is desirable that the head office discloses sufficient information to a party contemplating becoming a member when the member is invited to participate in the franchise. In addition, the business transactions between the head office and the member after the franchise agreement has been signed should not cause a disadvantage to the member unilaterally nor should it place unjust restrictions on the member."

53) Japan Fair Trade Commission website: https://www.jftc.go.jp/dk/guideline/unyoukijun/gyouseishidou.html, accessed February 11, 2022.

Specifically, among digital platform providers with a specific business category and scale, this law targets only those designated by the administrative body (designated digital platform providers). Its basic regulation policy is to require those subject to the law to submit annual self-evaluation reports about measures taken, following which the administrative authority will review the business status of the platforms based on their submitted reports and publish the results. Basic measures required to be taken by the designated digital platform providers include the disclosure of transaction conditions and the establishment of systems and procedures necessary to ensure fair transactions and handle complaints.

In April 2021, five companies including Amazon Japan G.K., Rakuten Group, Inc., and Yahoo Japan Corporation became designated digital platform providers.

Although this Act may not be commonly thought of as a law to protect gig workers, it is significant that some restrictions have now been placed on digital platforms. Future amendments could contribute to the broader protection of gig workers using digital platforms.

D. Small and Medium-Sized Enterprise Cooperatives Act (Act No. 181 of 1947)[54]

The purpose of this act is to provide for the organizations (each small- and medium-sized enterprise cooperative and the federation of small- and medium-sized business associations) necessary for persons engaged in a small- and medium-sized commercial business, industrial business, mining business, transport business, service business or any other business and other workers (both of these types of member are cooperative members), and to achieve an improvement in their economic status. Small- and medium-sized enterprise cooperatives (hereinafter referred to as the “cooperatives”) are categorized into five groups based on the member’s business types and other factors (Article 3),[55] but must be a juridical person (Article 4), and the member is able to join or withdraw from the cooperative voluntarily (Article 5). The member has equal voting rights and the cooperative has the purpose of serving its members through its activities (Article 5). A cooperative consisting of members whose amount of capital and number of employees do not exceed the specified values will be exempted from the application of the *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade* (Article 7). The

54) In 2020, a legislation introduced by a Diet member, the *Worker Cooperatives Act* (Act No. 78 of 2020), was established. It aims to protect workers who are actively engaged in public services (such as visiting care, after-school childcare, self-reliance support for unemployed youth) as laborers. The act will be enforced on October 1, 2022, except for some provisions. This is a part of the process to create a legal system for the consumers’ co-operative that was originally founded by Robert Owen in the UK and has been developed uniquely in Japan. This act takes over the *Small and Medium-Sized Enterprise Cooperatives Act* in many parts, but its most characteristic point is that the act defines the cooperative member is an individual and aims to protect the member as laborer in light of the relationship with the worker cooperative (i.e., acknowledging the legal status of the individual as a person who is a member of management and a laborer at the same time). Although this act does not have enough compelling force, it might be useful for some types of gig jobs in the future.

55) A worker’s collective is one of the groups where a worker or other member starts and runs business by providing one’s own capital and also provides labor.

main activities conducted by the cooperative include joint activities related to the business of members, loaning of business funds, and the conclusion of collective agreements with clients to improve the economic status of members (Paragraph 1 of Article 9-2, emphasis added).

Worthy of special note is that, under this Act, counterparties on transactions with the cooperative and member have an obligation to negotiate in good faith for the conclusion of collective agreements by the cooperatives. Paragraph 12 of Article 9-2 specifies that an enterprise (excluding small-scale enterprises) that has a business relationship with a cooperative or a member is to start negotiations with sincerity when the representative person of the cooperative or the member states an intention to start negotiations to conclude a collective agreement on the trade terms and conditions. This act has no sanctions in this regard, but a collective agreement is valid directly for members. In the case that the conditions of an agreement are inconsistent with the terms of the collective agreement, only these inconsistent terms would be corrected pursuant to the collective agreement. When the parties concerned do not reach an agreement through the negotiations for concluding a collective agreement or the interpretation and application of the collective agreement, either of them may file a request for mediation or conciliation with an administrative authority (who is usually a competent authority governing the cooperative operation; if there is no competent authority, then it is the Small and Medium Enterprise Agency) (Article 9-2-2).

Importantly, the Federation of Small Business Associations (FSBA), which governs each cooperative, may make proposals on the particulars concerning small- and medium-sized enterprises directly to the Diet, a council of a local government, or an administrative authority (Articles 74 and 75). The provisions aim to secure the political influence of small- and medium-sized business associations through the FSBAs.

As shown above, this act intends to enable small and medium-sized business operators, who are generally economically weak, to organize trade associations or guilds, enhance bargaining power against clients and economic power, and promote mutual assistance (note that Paragraph 3, Article 5 of this act requires political neutrality). The small- and medium-sized enterprise cooperative under this law is both a profit-making corporation and nonprofit corporation, and thus is theoretically regarded as an intermediate corporation (NFSBA 2016, 10). Examples of cooperatives under this law include the Federation of Akabou Light Vehicle Transportation Cooperatives, which is organized by sole proprietors engaging in the transportation business under the same brand, and the Soka Senbei Cooperative which is organized by local manufacturers of rice crackers. This law has been applied in few cases (there have been no cases in which a party filed a request for mediation in negotiations with its client) and has not been focused on in the labor field in Japan, but it may be useful for gig workers. If gig workers set up a cooperative, they would be able to conduct collective bargaining under legal protection for improving working conditions and occupational health and safety based on the characteristics of each occupational type.

This Act, however, has the following problems for practical use.

First, the law is not compulsory as

compared with the provisions of the *Labor Union Act* in terms of restricting unfair labor practices (for example, employers cannot refuse to bargain collectively and must not treat any cooperative member in a disadvantageous manner). The administrative body does not have the authority to give a relief order to correct an illegal condition. Therefore, even for an important problem such as health and safety, there are no countermeasures available when a platform or an orderer refuses to engage in collective bargaining with the cooperative.

Second, there are no guarantees for gig workers such as the right to strike or take part in other collective activities, and they have no exemption from civil liability or indemnity from prosecution for reasonable cooperative operations, which are guaranteed for labor unions by the Constitution or the *Labor Union Act* (Paragraph 2 of Article 1 and Article 8), respectively. If a cooperative makes a protest or takes disputing action, it would have civil liabilities including that the cooperative would become liable to compensate damages to an orderer or the platform would be able to terminate a contract because of the breach of the contract. Moreover, the cooperative would be subject to criminal punishment depending on the method/mode of its acts, such as forcible/fraudulent obstruction of business (Articles 233 and 234) or breaking into a residence (Article 130). Therefore, if the cooperative holds collective bargaining with the platform or orderer and the parties are at an impasse, the cooperative does not have any effective solutions.

Third, if the platform's office or the address of a company that operates the platform is located abroad, the practical problem of where they will engage in bargaining may arise (but this problem may arise in labor unions as well).

We should address a number of challenges to using the *Small and Medium-Sized Enterprise Cooperatives Act* for gig workers to realize that important working conditions such as health and safety are correctly ensured; however, since there are various gig jobs such as transportation and software development, the industry type, job type, region, and other factors should be considered in collective bargaining to ensure feasible health and safety. The government should commit to providing information and collecting data about the best practice and notices by publishing guidelines,[56] and establishing the minimum requirements, if necessary.

Moreover, considering the income insecurity and the current expanding scope of health and safety regulations, it is desirable that the government includes the following matters in the subjects of collective bargaining between a gig workers' cooperative and a client: clarifying contract terms, determining proper remuneration and securing payment, providing social security (for illness, aging, unemployment, etc.), supporting career development, guaranteeing pay during leave

56) The Ministry of Health, Labour and Welfare has already issued the Guidelines for the Appropriate Introduction and Implementation of Off-Site Work Using Information and Communications Technology on February 22, 2018, and the Occupational Health Guideline for VDT Work (Labour Standards Notification No.0405001) on April 5, 2002. The National Institute of Occupational Safety and Health, a comprehensive research institute for occupational safety and health in Japan, has also conducted research on occupational risk during teleworking, etc. However, the purpose of both of them is to provide the protection only for employees.

for childbirth, childcare, and nursing care, preventing harassment, covering liability for damage caused to a third party and securing dispute resolution measures (when a platform is based overseas).[57, 58]

10. SUGGESTIONS FROM OCCUPATIONAL HEALTH

This section presents the findings from a review of occupational health literature concerning risks inherent to gig work and control measures, as reference materials to be considered for theories of legal interpretation and bargaining between relevant parties about the duty of care, as well as for future legislative processes.

In Japan, no research has been conducted on the health management and occupational health and safety of gig workers. In other countries, a few studies have been published on gig workers' health and safety. A study in the U.S. warned that the health and safety risk has been increasing because many gig workers use their own cars for work or work at home, which invalidates the existing protection against the known occupational risk factors (Tran and Sokas 2017). In addition, Bajwa et al. (2018) gave the following three categories in examining the factors influencing the health of gig workers: a) hazards inherent to the work (occupational vulnerabilities), b) poor protection (precarity), and c) hazards arising from the use of platforms (platform-based vulnerabilities). Factors for category a) include the increase in the risk of traffic accidents for drivers and musculoskeletal injury due to prolonged typing and other repetitive movements. Factors for category b) include the necessity to prepare tools and equipment through one's own efforts as well as the limited opportunity for training and career development. The above two categories are applicable also for other jobs, but category c) is unique to gig work. In using a platform, for example, the feeling of loneliness among workers who have no personal relationship in the platform, discriminatory treatment due to uncontrollable factors, and stress due to the income decrease have been observed.

A German researcher's study of crowd workers in Germany (using the Somatic Symptom Scale-8; SSS-8) showed a significant increase in the number of physical conditions among crowd workers compared to general workers (Schlicher et al. 2021). A study in the US examined the piecework system (the amount of pay is directly linked with the volume of products produced or services delivered by workers) of the gig economy and indicated that such a system is a risk factor for health (Davis and Hoyt 2020). This study analyzed the results of a cohort study (questionnaire survey of gig workers and comparison of outcomes) conducted

57) See JILPT (2011).

58) Note that JTUC Research Institute for Advancement of Living Standards (2018) examines the framework to protect "workers (not employees)," stating, "because in many cases, the conventional theory of including workers in a business organization is not applicable for people, especially crowd workers, if there is inequality of bargaining power in a relationship with the other party, a status of being a 'worker' under the *Labor Union Act* should be broadly applied for them" and "even if they are considered as self-employed workers, it should be accepted to conclude a collective agreement with similar effect as in a labor agreement and require the other party to do collective bargaining by applying the *Small and Medium-Sized Enterprise Cooperatives Act*." Hamamura (2018, 12) holds a similar view.

by the Bureau of Labor Statistics (BLS). The questionnaire survey asked a question about the presence or absence of "health obstacles" (whether there is any health problem that may restrict the daily life or work life regardless of whether it is caused by work) and self-evaluation data was collected. It was a subjective scale, but annual and cumulative odds ratios of health obstacles were significantly higher among piece workers than wage and salary workers (95% CI: annual 1.75 (1.16, 2.62); cumulative 1.42 (1.03, 1.96)).

A paper indicated various influences of the COVID-19 pandemic on gig workers. Research conducted in Seattle in the US revealed that only 31% of app-based drivers were given appropriate masks and disinfectants from their companies (Beckman et al. 2021). A result of research analyzing the responses of an interview survey on gig workers during the COVID-19 pandemic showed that some gig workers accepted diverse dangerous jobs that entailed direct contact with other people, mainly caused by the mechanism of the algorithmic management (if workers maintain a high customer satisfaction rate, the system offers more opportunities to them) (Cameron, Thomason, and Conzon 2021). The research also revealed that some of the gig workers figured out a way to mitigate physical risks, while some of them could not accept the risks and temporarily stopped doing gig work.

Gig work is similar to teleworking in that computers and other digital devices are used and tasks are performed outside the sites of clients and platforms. Concerning the risks inherent in teleworking and the recommended controls, a joint technical brief was published recently by the WHO and ILO (2021). This article seemed to grasp the immediate expansion of teleworking during the COVID-19 pandemic and adopted the approach of firstly securing teleworkers' health and safety, but did not mention a controversial issue, the teleworkers' status of being a "worker/employee." This technical brief took into account an employment relationship in principle and used the term "employer" but did not use the term "employee" and rather used "worker." Generally, this technical brief listed the advantages of teleworking (based on investigation results including job opportunities for individuals with chronic conditions, reduction of blood pressure, mitigation of the risks of developing depression, and increase of physical activities) and aimed to promote a proper teleworking arrangement. Assuming the difficulty of the health and safety management that could be taken in practice in the offices, the article also listed the following inherent occupational risks: (i) physical conditions due to prolonged computer use (musculoskeletal injury, eye strain), (ii) social isolation, (iii) cyberbullying and harassment, (iv) disorder of the daily rhythm, (v) too much or too little work, and (vi) increase of mental stress due to interruptions caused by family members, especially children.

Concerning the controlling measures, these papers, based on the difficulty of supervision and management by employers, highlight the importance of cooperation among workers and labor-management consultations (especially, consultations in the safety and health committee and with a representative in charge of safety and health). They also place importance on the following factors: periodic social communication (such as online meetings, etc.), flexible working schedule (such as introduction of flexitime, etc.),

avoidance of contact from employers during days off, clarification of work performance and the priority order of tasks, proper labor management using rules on work hours and disciplines (e.g., no drinking, no smoking, etc.), workplace risk assessment using online checklists, online education based on risk assessment results, response to overworked workers, positive feedback, promotion of exercises, and support by occupational health services. In addition, they recommend that employers provide workers with supplies necessary for work, including computer hardware and software, office furniture, and insurance including worker's compensation insurance and home contents insurance. They require that the government authorities monitor and analyze matters about occupational diseases and/or disorders. These statements are also suggestive for the gig economy. However, periodic social communication, proper labor management using work rules, online education, promotion of exercises, and other matters are founded on the employment relationship. It is, therefore, difficult to require those other than employers to realize these conditions.

11. CONCLUSION: THE NECESSARY LEGAL RESPONSE

This section concludes the article by drawing out its key points.

First of all, concerning the status of gig workers as "employees," expanding the scope of the category of being "employees" is difficult. We should apply labor-related laws properly to protect people falling under this category by flexibly interpreting these laws. Especially for important law-protected interests such as health and safety, efforts should be made to achieve protection under laws including the *Industrial Safety and Health Act*, the *Labor Standards Act*, and the *Labor Union Act* by flexibly interpreting the existing criteria. However, there are limitations to this approach. People who do not fall under this category but need to be protected in a similar manner to employees should be protected by applying, for example, the *Small and Medium-Sized Enterprise Cooperatives Act* (See Section 9(D) above, i.e., a law for small- and medium-sized businesses to strengthen the solidarity, enhance bargaining power, and promote mutual assistance and political influence) and by revising the same act, the *Home Work Act* (See Section 8, i.e., a law to ensure the health and safety of industrial home workers who work at home under contracts from clients).

In principle, health and safety are to be managed by the assessment of different risks inherent (incidental) to work (risk management for health and safety within the scope of one's work). Therefore, (i) labor-management consultations, (ii) the utilization of industry health professionals,[59] and (iii) investigation of common risks inherent to work (by industry and job), creation of guidelines, and other measures by the Government would be effective.

Since the *Industrial Safety and Health*

59) The Ministry of Health, Labour and Welfare of Japan has established prefectural occupational health and safety support centers to offer free consultation services for workers and employers about occupational health. Mishiba (2020, 13) recommend the utilization of these centers partly because the Japanese Government is committed to promoting freelance work.

Act focuses on the prevention of industrial accidents rather than a legal systematization or consistency, it imposes obligations on not only employers who directly employ workers but other certain, various individuals. This law values a normative way of thinking about who should be liable for health and safety while adopting a practical way of thinking about who can fulfill health and safety obligations more easily and effectively.

The UK's HSWA, which has often been referred to by the Japanese Safety and Health Act, identifies targets (subjects who are bearers of obligations) in a broader manner including employers and risk generators (persons who have risk-related information and can control risk, such as those who control and manage work conditions), focusing comprehensively on health, safety, and welfare. The HSWA has general regulations with sanctions that require the targets to take reasonable and feasible measures to protect not only their employees but other persons who may be affected thereby (S.2 through S.7). In addition, a significant fine is specified for a breach of this law and is implemented accordingly. As mentioned in footnote 12, in Australia, S.19 of the harmonized *Work Health and Safety Acts* targets all persons who conduct a business or undertaking (PCBU), including an employer, and requires them to ensure, so far as is reasonably practicable, the health and safety of workers engaged, or caused to be engaged by the person. The policy of these laws is similar to the concept that a person who generates risk or can control and manage risk must ensure the health and safety of the workers exposed to the risk.

Although the *Industrial Safety and Health Act* in Japan does not have radical provisions as the UK and Australian laws do, the concept of civil responsibility for the employer's duty of care formed by judicial precedents in Japan plays a similar role as the provisions of these laws. In other words, this concept of the duty may contribute to the protection of self-employed workers and other non-employees by imposing obligations on those who are not employers for risks specified and not specified by laws. The original scope of this duty, however, is not as broad as that of the Australian *Work Health and Safety Acts*. In addition, the courts tend to consider the background of each case (individual circumstances and social background) comprehensibly to determine a specific obligation and the presence or absence of the violation; therefore, even the text of the *Industrial Safety and Health Act* does not always directly represent the practical duty of care. Since this is a civil liability, an affected person needs to actively claim and verify a violation by a person obliged to take measures to the court, which indicates the passive nature of the act (adversary system and dispositive principle). Even if the claim is accepted, a remedy will be only the payment of damages. It is difficult to use this concept of duty to enable the demand for the performance of the duty and other preventive approaches.

The point in question is whether Uber and other platforms are risk generators because of their algorithmic management. It is reasonable that orderers and clients decide whether they conclude a new contract/service agreement with the other party according to the work performance of the other party. However, if algorithmic management is a strong factor causing a large number of ride-share drivers' traffic accidents or health damage under the

conditions that there is a contractor's economic dependency and a one-sided contract, the legislation discussed herein will be required. Mishiba considers that there could be a legal interpretation theory with a social policy approach to regard an individual as an "employee," even to a limited extent, until proper legislation is established. The co-author Kurashige has a different view on this point. Kitaoka (2022) emphasizes the need to control risks, especially for young and/or unskilled workers.

In an attempt to control (interpret flexibly) the concept of being an "employee" for gig workers, flexibly apply existing laws and regulations (the *Industrial Safety and Health Act* and the *Labor Union Act*, and those listed herein) to those not falling under the category of "employees," and protect gig workers with new legislation, the basic grounds are the economic dependency and accessoriness of contracts (a contractor must accept terms specified by a client or operation manager to conclude a contract). In addition, when considering the broader health and safety concept including mental health, the facts that clients and operation managers generate risk (liability for risk), control and manage gig workers' working conditions, and have a close social contact relationship with a contractor may be additional grounds. In some cases, there may arise the obligation to protect contractors under civil and penal laws based on these backgrounds.[60)] Since these factors are often observed among platforms, they are to be those obliged to ensure health and safety in most cases.

Duties to be imposed on platforms are risk assessment, provision of assessment results to gig workers, and a sincere response to collective bargaining, while measures to be taken by the government include investigations of general risks associated with gig work and of ideal countermeasures and the provision of relevant information. In Japan, the government has taken initiative to promote freelance work; therefore, providing a sense of security is necessary by preparing a proper social safety net as a public policy, regardless of whether freelance workers fall under the category of "employees" or not. At present, financing systems (such as those offered by the Japan Finance Corporation), health check-up systems (for example, a community health system run by municipal governments, services of health insurance societies by industry, and specific lifestyle health check-ups and health guidance[61)]) are available for those who are

60) In Japan, Article 218 of the Penal Code specifies that when a person who is responsible for the care of a person of old age, a child, a person with a disability or illness, abandons or fails to provide the necessary care to them, the person is punished. The protection responsibility hereunder may be deemed to arise due to the presence of an antecedent action as well as an applicable law and contract (Tokyo High Court decision, May 11, 1970, Hanrei Times Co.,Ltd., No.252, 231). In a civil context, delivery obligation and at least between a creditor and a debtor, it is said that both parties are liable to protect the other party as duty of care (Schutzpflicht) not to cause death or bodily injury or infringement of property of the other party, in addition to contractual basic performance and concomitant duties (Okuda 1992, 18).

61) A scheme where, in accordance with the *Act on Assurance of Medical Care for Elderly People*, each medical insurer executes specific lifestyle health check-ups to find diabetes and other lifestyle-related illnesses for the insured aged 40 or over by measuring chest circumference, BMI, blood pressure, neutral fats, high-density lipoprotein (HDL) cholesterol, and other indicators, and gives specific health guidance for those with metabolic syndrome.

not employees. Startup support facilities called "Incubation Centers" have also been founded that are run by public organizations providing entrepreneurs with a workspace and access to expert advisors.[62)] However, according to JILPT (2019), there is an increasing need among freelancers for unemployment insurance and worker's compensation insurance. At least, it is necessary to expand the scope of coverage of worker's compensation insurance including compensation for commuting injuries (the special insurance coverage scheme). Demands for occupational health services such as health care consultation seem not to be developing. That is partly because such consultation does not always result in a solution. Hence, the promotion of collective bargaining is required using such as the *Small and Medium-Sized Enterprise Cooperatives Act*.[63)] For example, it is necessary to establish a scheme as follows: if cooperatives that are protected under this law assign industrial physicians to conduct interviews with cooperative members (gig workers) when the physicians deem it necessary to do so, cooperatives can approach platforms or clients to improve the working conditions of the members in question.

Furthermore, in the modern labor-related law context, the structure of conflict between labor and management has been transformed into a conflict between artificial intelligence (AI) and human intelligence, or between legal restrictions and human society and interdisciplinarity of academic fields. The problem is how to provide values differentiating from what AI provides and how to harmonize legal restrictions with human society and use them effectively. More specifically, we should find a way to realize dialogue and cooperation between the parties concerned for problem solving, by using applicable laws and regulations. This challenge is highlighted in the gig economy. The gig economy has certainly created new styles of work. None of the Japanese laws have addressed issues in the gig economy sufficiently; however, different laws with different principles exist in order to combat labor issues and monitor behaviors of business owners with the help of group dynamics (such as worker and customer trust in business owners). As a result of monitoring, if the legislative body decides there is a lack of support, a more advanced statutory approach will be developed. In terms of versatility and flexibility, labor laws in Japan may, to some extent, serve as a useful reference in a global context.

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62) A good example is an incubation center run by Tokyo Metropolitan Small and Medium Enterprise Support Center (https://www.tokyo-sogyo-net.metro.tokyo.lg.jp/incu_office/kosha/).

63) Mishiba (2020, 7) stated that statutory restrictions are required on any contract that interferes with collective bargaining by freelancers.

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ACKNOWLEDGMENTS

We are deeply indebted to Prof. Richard Johnstone whose advice significantly contributed to improving this article. We are also thankful to Prof. Koichi Kamata for his valuable suggestions.

CONFLICT OF INTEREST STATEMENT

No conflict of interest to disclose.

Regulating Health and Safety in Work for Digital Labor Platforms in Australia: The Example of Food Deliverers

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Abstract: This article aims to examine how the health and safety of platform workers can be protected through legal regulation, in the context of the significant regulatory challenges posed by critical connections between subcontracting, low pay, unregulated hours, and work health and safety (WHS). The article applies a legal analysis of the contemporary Australian approach to WHS regulation to platform work, and examines regulatory initiatives to protect the WHS of food deliverers. It finds critical deficiencies in the application of WHS laws to this sector, and identifies the need for a broader refashioning of labor regulation to such highly articulated and geographically diffuse work arrangements.

Key words: Regulation, Safety, Labor platforms, Australia, Food delivery

1. INTRODUCTION

In Australia, as in other countries, engaging workers through digital labor platforms is a significant and growing trend in the labor market. At least 100 platforms operate in diverse industry sectors spanning food, transportation, professional, writing and translation, clerical, data entry, creative and multimedia services, as well as work in software development, sales and marketing, caring, skilled trades, odd jobs and maintenance (James 2020, 32–34). Around 7.1 percent of respondents (aged 18 to 74) to a national, representative survey had participated in platform mediated work in the 12 months prior to the survey, and 13.1 percent had done platform work at some time (McDonald et al. 2019, 3). Individuals often work across platforms and combine platform work in a "portfolio" of subcontracting or wage and salary jobs, with the income earned from platform work largely supplementing their other earnings (James 2020, 26–27).

The key problem addressed in this article is how to regulate health and safety in the triangulated work arrangements of platform work. There is considerable ambiguity about how responsibility for work health and safety (WHS) is, and should be, allocated among the platform businesses that organize work as intermediaries, aggregators, or mediators; the clients or end-users of services; and the platform workers. As is noted in the Editors' Introduction to this special issue, digital labor platforms differ in their operating models—from "crowdwork" platforms that exert only

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incidental control over how work is performed, to "work on demand" platforms that offer their clients a service, supply the labor for that, and stipulate and enforce standards of performance. Yet, in all such arrangements the contracts that workers sign with labor platforms typically cast them as self-employed contractors and not waged employees (Choudary 2018, 25, 32–33; De Stefano 2016, 473–474; Stewart and McCrystal 2019, 9–11). Until 2022, determining the nature of a particular arrangement in Australia required consideration of the multiple indicia (Stewart and McCrystal 2019, 6–8), as well as the practical realities of the relationship between the platform in question, those working through that platform, and the customers or clients obtaining services through the platform (James 2020, 105–110). Recently, however, the High Court of Australia[1] has taken a narrower approach. It has reaffirmed the importance of the terms of a written contract when ascertaining a worker's status, and so it is less likely that an Australian court will invoke the practical reality of the working relationship to find that platform workers are "employees."

Of all platform work, food delivery is amongst the most closely managed and monitored by the particular mediating platforms, but ambiguity about responsibility for WHS matters still favors platform businesses to the detriment of delivery workers. This is especially the case because many of these platform workers have few alternatives to earn (sufficient) income, the work they do through platforms is irregular and insecure, and they are more likely to be young, migrants or students on temporary visas, and to speak a language other than English at home (Convery et al. 2020; McDonald et al. 2019, 3). These workers are vulnerable to exploitation because of their desperation for work, unfamiliarity with local institutions (including unions), language difficulties, reliance on informal networks within particular communities, insecure visa status, and the inability of some to access basic protections and supports like funded health care (Bogle 2020; and see Marson, Ferris, and Dirisu 2022).

Moreover, vulnerable platform workers encounter an array of hazards in the course of their work, including musculoskeletal hazards, infectious agents (including COVID-19) and psychosocial hazards relating to job insecurity, unpredictable income, irregular and sometimes extended working hours, lack of workplace support, and the monitoring and surveillance of worker performance enabled by digitalization and artificial intelligence (AI) (Bérastégui 2021, 85–93; Lenaerts et al. 2021; Moore 2019, 2, 6; Stacey et al. 2018, 6–7). For the food delivery workers in focus in this article, a particular hazard is the potential for road and traffic related accidents, exacerbated by the pressure to rush to reach customers as food deliverers face the persistent threat of termination if they take longer than the platform expects (Convery et al. 2020; Rawling and Riley Munton 2021, 7). For those riding bicycles or scooters, further hazards are vehicle instability from transporting food bags or boxes, and weather conditions including heat, cold, wind, and rain that can also contribute to road accidents, and slips and falls when on foot. Interactions with food providers, customers and members

1) *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting* [2022] HCA 1; and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2.

of the public are potential sources of stress, verbal abuse, physical assault, intimidation, and robbery (Convery et al. 2020). During the COVID-19 pandemic, many food deliverers have not had enough face masks, disposable gloves, and hand sanitizer, and even where platform businesses have initiated contactless delivery practices, customer cooperation can be lacking (Rawling and Riley Munton 2021, 80). Any approach to regulating WHS in platform work needs to embrace the range of physical and psychosocial hazards in work for particular platforms and their manifestation in public and private spaces, and portfolios of jobs, which are managed and controlled by different entities (Port 2021).

Furthermore, our analysis of regulating health and safety in work for digital labor platforms in Australia places current debates in the wider historical and comparative context (see the Editors' Introduction to this special issue), as this is essential to understanding the WHS problems arising in platform work and the challenges for regulating WHS in such work arrangements. In particular, the persistence of certain longstanding and profitable features of capitalism, and their renewal through digitalization, point to the futility of regulatory approaches grounded in the employer/employee relationship, or even those deeming specific types of workers to be employees. Here we are referring to the persistence of precarious work over time and, in particular, on-call employment and dependent subcontracting, and triangular work arrangements involving middle-men and labor contractors (Quinlan 2012, 2013a, 2013b; and see Gregson and Quinlan 2020). In addition, the long-term practice of engaging immigrant or foreign workers in precarious work roles (Toh and Quinlan 2009) reinforces the need for consideration of worker vulnerability as a contributor to adverse WHS outcomes, through lower capacity and support to enable these workers to raise WHS concerns and having them addressed. Also pertinent to our discussion is the general weakening of collective negotiation and industrial relations processes resulting from the progressive decline in union density and unions' difficulty recruiting workers in irregular, insecure, and low paid work. Further, the economic pressures (including incentive pay regimes), minimal training, fragmented management regimes, limited union presence, and weaknesses in legislative coverage, inspection and enforcement that characterize platform work, can be expected to be linked with poor WHS outcomes, as the extensive global evidence suggests for precarious work generally (Quinlan 2015; Quinlan, Mayhew, and Bohle 2001; Underhill and Quinlan 2011).

Therefore, in addressing the key question considered in this article—how can the health and safety of platform workers be protected through legal regulation?—it is essential to take into account the complexity of the platform business, client/end user and worker relationships, the precarity and vulnerability to exploitation of platform workers, and the wider historical and comparative context to these issues. These are significant regulatory challenges and essential considerations, over and above the practical concerns about how to control the hazards arising in particular work.

One approach to legal regulation explored in Australia is the use of consumer protection law, which the ILO (2021, 208) suggests could be applied to contracts imposed by platform businesses on individual workers. However,

legal provisions potentially relevant to dealing with worker exploitation—those relating to termination, access to data, business conduct, dispute resolution, and collective bargaining by small businesses—will not necessarily assist platform workers and their representatives to challenge substandard working conditions or remuneration (Hardy and McCrystal 2022; Stewart and Stanford 2017). Nor are consumer protection agencies an obvious "go to" for platform workers seeking redress for unfair or unsafe working conditions (James 2020, 171). Alternative approaches, as found in parts of Europe, are based on deeming platform workers to be employees rather than self-employed individuals, in order to extend the application of labor standards to platform workers (De Stefano and Aloisi 2021; Rodriguez 2022).[2] However, this approach may be short lived or have limited application, as platform businesses make changes to their operating models in order to nullify the legal basis for such deeming (Aranguiz 2021) (see also other articles in this issue).

We argue, therefore, that there is more promise in legal regulation specifically designed to address the wide array of work arrangements and relationships, including triangulated work arrangements. An approach that has begun to address this complex regulatory problem is the existing WHS regulatory framework in Australia, and we examine the key provisions of the state, territory, and federal *Work Health and Safety Acts (WHS Acts)* in the next part of the article. Part 3 then uses the case of food delivery work to illustrate the application of worker representation provisions in the *WHS Acts*, and critiques some guidance developed for this sector. The final part draws the analysis together and makes a number of observations and suggestions about future directions in labor regulation to protect platform workers.

2. THE CONTEMPORARY AUSTRALIAN APPROACH TO WHS REGULATION

A. The Rationale for the Harmonized Work Health and Safety Acts in Australia

For constitutional reasons, in Australia WHS is largely regulated by the six states and the two territories, and the federal government's jurisdiction is confined to regulating federal government departments and statutory authorities, as well as very large companies that self-insure under the federal workers' compensation system. The first WHS laws were based on the United Kingdom (UK) *Factories Acts*, and the later 1970s reforms were also strongly influenced by the UK *Health and Safety at Work etc. Act 1974* (UK) (see Gunningham 1984, chap. 4). From 2008, Australian WHS laws were again reformed—for two principal purposes (Johnstone, Bluff, and Clayton 2012, 81–89, 107–130). The first was to harmonize the nine relevant statutes at the time, and the second was to develop legislation that addressed "the changing nature of work and employment arrangements" (Australian Government 2008, iii). A National Occupational Health and Safety Review Panel (Review Panel), appointed by the then federal Labor government, produced two reports which included recommendations for provisions of a Model Work Health and Safety Act (Model Act) to be adopted by the states, territories, and federal government.

2) For some Australian proposals see The Senate (2022, chap. 8).

The Model Act was subsequently drafted and enacted by the federal, New South Wales (NSW), Queensland, Australian Capital Territory, and Northern Territory governments in 2011; the governments of South Australia and Tasmania in 2012; and later by the government of Western Australia in 2020. Only the Victorian government has not adopted the Model Act. For ease of reference, we will refer to the statutes that have adopted the Model Act as the *Work Health and Safety Acts*, abbreviated to *WHS Acts*.

B. The Key Provisions in the WHS Acts

The *WHS Acts* set out regulatory standards requiring key parties to ensure the health and safety of all kinds of workers and others affected by work, and enabling worker representation, consultation, and other kinds of worker participation in WHS. None of these provisions assume a fixed workplace. Rather, they aim to ensure that all persons carrying out work in any kind of work arrangement are protected from WHS hazards, and can be represented and participate in WHS. Even though these provisions were designed before the widespread use of digital labor platforms, they are easily adaptable to such work arrangements, as the following explains.

(i) The duty of a person who conducts a business or undertaking

The centerpiece of the *WHS Acts* is the primary duty of care in section 19 which places the duty on a "person who conducts a business or undertaking" (PCBU), rather than on "an employer" (see Johnstone 2019, 44–51). As explained below, the duty is not only owed to "employees" but to all "workers" who carry out work in any capacity for a PCBU, and to "others." The Review Panel was concerned to develop new legislation with a "wide coverage," "without requiring frequent amendments," and that protected workers in all kinds of work arrangements arising from new and changing business models, and from all existing and emerging hazards (Australian Government 2008, iii). It concluded that to impose the primary duty of care upon an employer and upon a self-employed person was "too limited, as it maintains the link to the employment relationship as a determinant of the duty of care" and "the changing nature of work arrangements and relationships make this link no longer sufficient to protect all persons engaged in work activities" (Australian Government 2008, [6.32]). It also recommended that the primary duty of care should not be limited to the workplace, but "should apply to any work activity and work consequences, wherever they may occur, resulting from the conduct of the business or undertaking" (Australian Government 2008, Recommendations 17 and 3(a)–(b)).

The PCBU's duty in the *WHS Acts* is set out in section 19(1), which requires a PCBU to:

> ensure, so far as is reasonably practicable,[3] the health and safety of:
> (a) workers engaged, or caused to be engaged by the person; and
> (b) workers whose activities in carrying out work are influenced or directed by the person,
>
> while the workers are at work in the business or undertaking.

3) "Reasonably practicable" is defined in s 18 of the *WHS Acts* (see also s 17). See also *Baiada Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at [15].

Any person who carries on any business or undertaking is a PCBU, whether they do so on their own or with others, and whether or not the work is carried out for profit or gain (*WHS Acts* s 5). The phrase "business or undertaking" is "intended to be read broadly" (Safe Work Australia 2010, para 24; 2021a, 1) and it is clearly envisaged that all businesses, whether franchisors, principal, or head contractors, retailers at the top of a supply chain, labor hire agencies and client firms, head contractors, subcontractors, and all kinds of digital labor platforms are PCBUs (Australian Government 2008, 50–51; Safe Work Australia 2010, para 23; 2021a, 2. See also Johnstone and Tooma 2022, 49–53). A natural person can be both a PCBU and a "worker": for example, a self-employed subcontractor engaged by a contractor is a "worker," and if they run their own business, they are also a PCBU (*WHS Acts* sections 7(3), 19(5)).

The section 19(1) duty is owed to "workers," who are defined as persons who carry out work "in any capacity" for a PCBU (*WHS Acts* s 7(1)) and include contractors, employees of contractors, labor hire employees, outworkers, and volunteers. Note that this definition only requires the worker to work for *a* PCBU—it does not require the worker to work for *the* PCBU who owes the section 19(1) duty. Clearly workers at the bottom of supply chains *are* carrying out work *for* one or more of the businesses in the supply chain and a labor hire worker is carrying out work *for* the client firm (Australian Government 2008, [6.9] Table 4). Persons provided with work through a digital labor platform can be carrying out work *for* their *own* business or undertaking, and *for* the end user. It is also likely they are carrying out work *for* the platform business where the platform is a vertically integrated (or disintegrated) firm, like the "work on demand" food delivery platforms. The issue is more complex if the platform plays an intermediary role, as with "crowdwork" platforms that bring together end-users and persons selling their labor through their own businesses. Each case will depend on the exact nature of arrangements and the relationship between the intermediary and the worker (see Johnstone 2019, 46–47).

Also important is that the section 19(1) duty is owed to workers who are "engaged," "caused to be engaged," "influenced," or "directed" by the PCBU "while they are at work in the business or undertaking." Nothing in section 19(1) suggests that there must be a direct contractual relationship between the PCBU and the worker. The term "engaged" has been broadly interpreted to include not only contractors engaged by the PCBU, but also subcontractors, sub-subcontractors, and so on further down the contractual chain.[4] The expression "caused to be engaged" most likely covers situations where the PCBU "'causes' workers to be engaged as part of the PCBU's undertaking, even where the PCBU is not a contractual party to any of the arrangements" (Johnstone and Tooma 2022, 56), so that a digital labor platform bringing together buyers and sellers of labor would satisfy this element of "caused to be engaged." "Influenced" and "directed" have their everyday meaning, and so food delivers would be influenced or directed by their work on demand platforms (Oxford Dictionaries 2007, 1379, 692; Safe Work

4) See *R v ACR Roofing* (2004) 11 VR 187; (2004) 142 IR 157; [2004] VSCA 215 at [54] per Nettle J; *Moore v Fielders Steel Roofing Pty Ltd* [2005] SAIRC 75.

Australia 2010, paras [74]–[75]; Australian Government 2008, [6.69]).

As the Review Panel pointed out, the "only limiter in the duty should be that labour is provided for the purposes of, or in the course of, the conduct of a business or undertaking" (Australian Government 2008, [6.69]). Section 19(1) expresses the limiter as requiring the PCBU to ensure the health and safety of workers "while the workers are *at work in* the business or undertaking." The Australian and UK courts have usually taken a broad interpretation of "conduct of the undertaking" (see the cases discussed in Johnstone 2019, 48).[5] The extent of the business or undertaking is a question of fact to be determined on a case-by-case basis. In most cases, the answer will be obvious, but it might require careful analysis of complex business structures (Johnstone 2019, 48). The issue of whether the PCBU has "control" over the work is not a relevant factor.[6] More than one person may be conducting a business or undertaking in any one situation (Johnstone 2019, 48).[7] The words "business" and "undertaking" are also to be given a broad meaning:

> deliberately to ensure that the [duty] is effective to impose the duty it states. … A business or enterprise … may be seen to be conducting its operation, performing work or providing services at one or more places, permanent or temporary and whether or not possessing a defined physical boundary. The circumstances may be as infinite as they may be variable.[8]

The courts have found that "ancillary activities" are also part of the conduct of the undertaking (Johnstone 2019, 49). These include obtaining supplies, making deliveries, cleaning, maintenance, repairs, and the like.

The *WHS Acts* make it clear that duties—including the section 19 duty—cannot be delegated (section 14), that one person can owe a number of duties (section 15), that more than one person can hold a duty, and that each person must comply with the duty even though it might also be owed by others (section 16). These principles mean that a platform business cannot shift liability, responsibility, or risk onto smaller businesses or workers.

If, for some reason, the person carrying out the work does not fall within section 19(1)—for example if a platform worker is not "at work in" the labor platform's business or undertaking—they are owed the section 19(2) duty, which provides that a PCBU:

> must ensure, so far as is reasonably practicable, that the health and safety of *other persons* is not put at risk from work carried out as part of the conduct of the business or undertaking.

For example, a worker allocated work through the digital labor platform is still owed the section 19(2) duty even though they may not be "at work in" the platform's business.

The Australian courts will require PCBUs

5) *R v Associated Octel Co Ltd* [1996] 4 All ER 846; *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268 at [47]; [1998] VSC 175; *DPP v Vibro-Pile (Aust) Pty Ltd* (2016) 49 VR 676; *R v Mara* [1987] 1 WLR 87.

6) *R v Associated Octel Co Ltd* [1996] 4 All ER 846; *DPP v Vibro-Pile (Aust) Pty Ltd* (2016) 49 VR 676 at [169]–[179].

7) *WorkCover Authority of New South Wales v Techniskil-Namutoni Pty Ltd* [1995] NSWIRComm 282; [1995] NSWIRC 127 (July 10, 1995); *Mara*, above n 14.

8) *Whittaker v Delmina*, above n 14, at [47]. See also *WorkCover Authority of New South Wales v Chubb Security Australia Pty Ltd* [2005] NSWIRComm 263.

to take a structured, systematic approach to WHS (Johnstone 2019, 50). PCBUs must actively assess and take account of all risks that might foreseeably arise; create systems to deal with these risks and, to the extent possible, eliminate them; instruct and train workers to apply these systems and supervise; and assess from time to time whether those systems are working. For a platform business to ensure the health and safety of food deliverers, the platform arguably needs to ensure that its algorithms allocating work to food deliverers do not expose food deliverers to risk of injury, and that the context within which food deliverers work, including surveillance of worker performance, low pay, and the use of piece rates, do not engender psychosocial pressures or induce food deliverers to take risks on the road (see further the article by Aude Cefaliello in this special issue).

This systematic approach includes significant responsibilities in triangular work arrangements. For example, a labor hire agency has been required:

> to take positive steps to ensure that the premises to which its employees are sent to work do not present risks to health and safety. This obligation would, in appropriate circumstances, require it to ensure that its employees are not instructed to, and do not, carry out work in a manner which is unsafe … The labour hirer has a positive obligation … to directly supervise and monitor the work of the employee to ensure a safe working environment.[9)]

A labor hire company always has one measure of control—"simply a refusal to supply its employees to [the host] until appropriate and sufficient measures to ensure safety were implemented."[10)] The section 19 duties of a platform business acting as an intermediary to *arrange*, rather than facilitate, a work relationship between a worker and end user may be, in some circumstances, analogous to the duties of a labor hire agency.

(ii) The duty on officers

Section 27(1) of the *WHS Acts* imposes a duty on *each* "officer"[11)] of *each* PCBU to "exercise due diligence to ensure that" the PCBU "complies with" a duty or obligation that the PCBU owes under the Act. It is a positive and proactive duty in that an officer can breach their section 27 duty, even in circumstances where the PBCU has not breached or been found guilty of an offense under the Act (section 27(4)). Note that the standard is "due diligence," a standard "well known by" officers, who have due diligence obligations under Australian corporations law (Australian Government 2008, [8.29]). Section 27 simply applies this standard to WHS matters.

Section 27(5) defines "due diligence" to include taking "reasonable steps" to:

> (a) "acquire and keep up-to-date knowledge of work health and safety matters", including knowledge of WHS legal obligations and of human, technical, organizational and environmental factors that determine the health and safety of the system as a whole.

9) *Drake Personnel Ltd v WorkCover Authority of New South Wales* (1999) 90 IR 432; [1999] NSWIRComm 342 at 456.
10) *WorkCover Authority of New South Wales v Labour Co-operative Ltd (No 1)* (2001) 108 IR 283; [2001] NSWIRComm 223 at [53].
11) Defined in s 4 of the *WHS Acts*, referring to *Corporations Act 2001* (Cth) s 9.

(b) "gain an understanding of the nature of the" PCBU's operations "and generally of the hazards and risks associated with those operations."

(c) ensure that the PCBU "has available for use, and uses, appropriate resources and processes to eliminate or minimize risks to work health and safety from work carried out as part of the conduct of the business or undertaking."

(d) ensure that the PCBU "has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information."

(e) ensure that the PCBU "has, and implements, processes for complying with any duty or obligation under the Act."

(f) "verify the provision and use of the resources and processes" referred to above, including by commissioning and monitoring WHS audits, officers exercising a reasonable degree of supervision and control over the company executive officers' management of WHS. Officers should not just rely on assurances from others (see further Johnstone and Tooma 2022, chap. 3).

Exercising due diligence is therefore a far-reaching duty. In the context of platform work, it requires each company secretary, director, and senior manager of a digital labor platform to have extensive knowledge of the arrangements, and the WHS risks faced by all persons who carry out work in any capacity for the platform, and to take steps to ensure compliance by the platform business. This will include taking steps to ensure that the platform has sufficient resources to institutionalize systematic WHS management in order to ensure the health and safety of workers engaged by the platform.

(iii) The consultation duties

Another very important duty with a major impact on WHS management in platform work arrangements is the section 46 duty. This addresses the problem of hazards arising from fractured, complex, and disorganized work processes—and ensures the involvement of *all* PCBUs and officers in WHS. It provides that:

> If more than one person has a duty in relation to the same matter under this Act, each person with the duty must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.

The evidentiary *Code of Practice: Work Health and Safety Consultation, Cooperation and Coordination* (Safe Work Australia 2018) makes it clear that PCBUs in complex business structures must find out who else is carrying out work and must work together with other PCBUs (in food delivery, the restaurants, and food outlets that provide the food) in a cooperative and coordinated way to eliminate or minimize risks so far as is reasonably practicable.

Another key provision, section 47, provides that a PCBU must, so far as is reasonably practicable, consult with workers (and their health and safety representatives (HSRs)) who carry out work for the business or undertaking and who are, or are likely to be, directly affected by a WHS matter. Therefore, each platform business must consult all workers carrying out work for the platform, to the extent that consultation can be suitably accomplished in the circumstances, and must consult, cooperate, and coordinate (section 46) with other PCBUs in doing so.

(iv) Worker representation and further participation

The *WHS Acts* make further provision, in Part 5, for workers to organize themselves in "work groups," including across multilateral business arrangements. Any worker who carries out work for a business or undertaking may ask the PCBU to facilitate the process of negotiating work groups and the conduct of elections, in each work group, of one or more HSRs to represent workers who carry out work for the business or undertaking (*WHS Acts* Part 5, Div. 3). All workers who would like to, can negotiate with one or more PCBU to establish work groups (sub-div 3). The *WHS Acts* are clear that workers in the work group may determine how the election of a HSR for the work group is to be conducted, and that the PCBU only has a facilitative role, which includes providing resources, facilities, and assistance, in the election process (section 61). The PCBU must allow elected HSRs to spend as much time as is reasonably necessary to exercise their powers and perform their functions under the Act, with the pay that they would otherwise be entitled to, and must provide any resources, facilities, and assistance that are reasonably necessary to enable the elections to be conducted (section 70). Apart from requiring the PCBU to begin negotiations over work groups within two weeks of being requested to do so (section 52(2)), defining a "failure of negotiations" for a work group as including a failure to reach agreement "after a reasonable time" (section 54(3)(b)), and a provision stating that a PCBU must not unreasonably delay the election of a HSR (*Work Health and Safety Regulation 2017* (NSW) regulation 19) the *WHS Acts* do not include any mandatory time requirements for the completion of the processes for negotiating work groups or electing of HSRs.

An elected HSR has extensive powers, including to inspect workplaces, investigate worker complaints, be present at interviews between workers and PCBUs or inspectors, receive information about WHS, be consulted on WHS issues, confer with a PCBU over WHS issues, and monitor PCBU compliance with the *WHS Acts*. Each HSR can participate in processes to resolve WHS issues (sections 80–82) and has the power to direct that work cease if it causes a serious, imminent, and immediate risk to workers (section 85). The HSR also has the power to issue a provisional improvement notice (PIN) if the representative has the reasonable belief that a PCBU or other duty holder is not complying with provisions of the *WHS Act* (Part 5, Div 7) including the officer's due diligence duty under section 27.

It is important to note that each "worker" also has an *individual* right, under section 84, to refuse work that causes a serious, imminent, and immediate risk to the worker. Further, all workers can be members of, and represented by, health and safety committees (sections 68(2)(e), 75–79). Part 6 of the *WHS Acts* enacts important provisions protecting workers and HSRs from being discriminated against for exercising their rights, powers, or functions under the Act, or from being coerced to exercise or not exercise their powers and functions. Finally, Part 7 of the *WHS Acts* includes union entry provisions enabling WHS permit holders to investigate suspected contraventions of the Acts.

These representation and participation provisions are not, however, without some potential shortcomings. It will sometimes be difficult for such vulnerable workers as

platform workers to trigger and benefit from the consultation provisions. Also, some PCBUs will have to devote significant resources to worker consultation, representation, and participation.

C. Compliance Monitoring and Enforcement

The WHS inspectorates, as external state regulators, have broad powers to monitor and enforce the provisions of the *WHS Acts* (Parts 9–13; and see Bluff and Johnstone 2017). These include issuing statutory notices, which are improvement notices (sections 191–193), prohibition notices (sections 195–197), and, apart from in Western Australia, infringement notices (on-the-spot fines) for some contraventions. The WHS inspectorates can require PCBUs to produce documents (sections 155 and 171). The inspectorates can also accept enforceable undertakings (EUs) offered by a person who is alleged to have breached an obligation in the *WHS Acts* and can generally require the EU to include improvements to WHS at the offender's workplace, in the industry, or in the general community.

Finally, the inspectorates can initiate a *criminal* prosecution for an offense against the *WHS Act*, with potential maximum fines as high as A$3 million (for corporations "reckless as to the risk of death or serious injury or illness"),[12] A$1.5 million (for corporations where there is a risk of death or serious injury or illness),[13] and in some jurisdictions, A$10 million or more for industrial manslaughter (see the Legislation Note in this issue). The Acts also contemplate a range of orders for non-pecuniary sanctions, including adverse publicity orders, restoration orders, WHS project orders, court-ordered WHS undertakings, injunctions, and training orders (*WHS Acts* Part 13, Div 2).

As this part of the article has shown, the Australian *WHS Acts* contain provisions that, in principle, require platform businesses to take steps to address WHS matters in relation to workers and others. They enable WHS inspectorates to address WHS issues in work for labor platforms. The WHS Acts also envisage a role for worker advocates to help strengthen the potential protections for platform workers, as we illustrate next.

3. HOW WHS REGULATION HAS BEEN APPLIED TO FOOD DELIVERY WORK

A. The Election of Health and Safety Representatives for Deliveroo Workers

The potential to elect HSRs to represent on demand platform workers, and some of the challenges in doing so, have been demonstrated recently for food delivery work in the Sydney metropolitan area.[14] The process began when the NSW Branch of the Transport Workers Union (TWU) held preliminary consultations with about ten food delivery workers about a practical approach to establishing work groups. The TWU also contacted a network of food delivery riders to seek expressions of interest in engaging in the process. Subsequently, on November 1, 2019, six food deliverers, represented by the TWU, requested Deliveroo to negotiate with them to determine work groups (NSW *WHS Act* sections 50 and 51). From the outset, Deliveroo made it clear that

12) *WHS Acts* s 31 (category 1 offenses). Individuals, including officers, committing category 1 offenses may face up to five years' imprisonment.

13) *WHS Acts* s 32 (category 2 offenses).

14) We thank Jack Boutros at the Transport Workers Union who was a key informant for this case study of HSRs for food delivery workers.

it would only agree to work groups that did not disrupt its business model, which is built on a skeletal human managerial infrastructure with an automated arms-length approach to managing a large workforce. The TWU favored work groups localized around key shopping districts in which there are large numbers of food delivery workers, in order to ensure that HSRs elected from those work groups could easily communicate with work group members.

During the long negotiations the TWU rejected the first two work group structures proposed by Deliveroo in December 2019 and January 2020. On December 12, the riders proposed work groups based on Deliveroo's zones. Deliveroo rejected this and proposed one work group for all workers in the state. When this was rejected, on January 24, Deliveroo proposed four work groups based on four regions in Sydney. Each area spanned between three to five Sydney suburbs, resulting in very large work groups that would make communications between HSRs and work group members very difficult. In the face of this "failure in negotiations," in late February 2020 the TWU requested the WHS regulator, SafeWork NSW, to appoint an inspector to determine the work groups under section 54 of the *WHS Act*. The inspector considered and modified the work group structure proposed by the TWU, and on May 13, 2020, determined that there be five work groups, each comprised of two, three, or four zones, and with two HSRs in each work group. Deliveroo was not satisfied with the inspector's decision and, on May 27, 2020, applied for an internal review of the decision by SafeWork NSW (*WHS Act* section 224). On June 18, the internal reviewer set aside the inspector's decision on the technical ground that there had not been a "failure of negotiations," and decided that Deliveroo should take all reasonable steps to commence negotiations with the TWU and the six food delivery workers.

The union and workers then sought an external review of the internal reviewer's decision (*WHS Act* section 229). To prevent the negotiations "dragging on," on October 12, 2020 (nearly eleven and a half months after negotiations for the work groups were initiated), the Industrial Relations Commission of NSW decided to vary the internal reviewer's decision, on the grounds that the work group structure proposed by the TWU, and largely implemented by the inspector's decision, did not achieve the objects of the *WHS Act* in sections 3(1)(a) and (b), because some of the workers in the Sydney region would not be covered by a work group. The Commission favored the work group structure proposed by Deliveroo and determined that work groups in Sydney were to be formed according to the four regions (central, north, south and west), with each region containing "selected zones/clusters" (*Marcello Batista & Ors and SafeWork NSW*).[15] Food deliverers in each region were to be allocated to work groups according to the three types of vehicle they used (bicycles, scooters or motorcycles, and cars). Because of the low number of bicycles in each of the north, south, and west regions, those regions were each determined to have a

15) *Marcello Batista and others and SafeWork NSW*, ex tempore and unreported, Industrial Relations Commission of New South Wales, Murphy C, October 12, 2020, Commissioner Murphy, 8. For another case where the Industrial Relations Commission decided to implement the PCBU's proposed work group structure, see *Mark Rolph v SafeWork NSW and Anor* [2019] NSWIRComm 1043.

work group for two-wheel vehicles (bicycles and scooters) and a separate group for cars (*Marcello Batista & Ors and SafeWork NSW*, 8–10). The central region, which had a low number of cars and many bicycles, was to have a motorized work group (cars and scooters) and a second work group for bicycles only. The Commission thus proposed eight work groups for the four zones, together with "an appropriate number" of HSRs for these work groups. The central region was to have eight HSRs; the north region three HSRs; the south region two HSRs; and the west region two HSRs—up to 15 HSRs in total.

On November 10, 2020, the TWU applied for leave to appeal the decision before a Full Bench of the Industrial Relations Commission of New South Wales. Another 20 months passed before the Full Bench,[16] on July 6, 2022, quashed the orders of Murphy C and remitted the matter to a single commissioner to determine the external review. The Full Bench held that Murphy C incorrectly included Deliveroo "riders" because this involved making "a determination which had the effect of creating work groups in respect of workers who were not involved or represented in the negotiations" between the TWU and Deliveroo, "and whose views about the relevant matters were not known." ([58]) It also held that Murphy C had not adequately considered the matters that needed to be taken into account in determining work groups set out in regulations 16 and 17 of the *Work Health and Safety Regulation 2017* (NSW) (see [63]–[68]).

At the time of writing, the matter had not yet been determined. Thus, well over two and a half years after the process to initiate work groups had begun, the issue still had not been fully resolved. This delay is partially due to the failure of the *WHS Acts* to impose timelines on the process, and partially to the ability of large PCBUs to raise technical issues to delay the process.[17] As the Australian Senate Select Committee on Insecure Work commented, "Deliveroo took exception" to the application of the *WHS Acts* to "its business model, in attempts first to deny and then water down its obligations to worker safety" (The Senate 2021, 125).

Rather than wait for the decision of the Full Bench, the TWU decided to work with the structure set out in the single Commissioner's decision of October 12, 2020, and to start the process again if, and when, the Full Bench found in its favor on the appeal. The TWU provided explanations to food delivery worker members of the process for electing HSRs under the *WHS Acts*, and explored possible voting mechanisms for conducting elections. Given the nature of food delivery work and the structure of the work groups, it became clear that the only viable option was online voting. But even this was difficult to implement, because it required a list of Deliveroo workers that the TWU could contact about the election process, which could only be provided by Deliveroo. After protracted negotiations, Deliveroo agreed to send, to all Sydney-based food delivery workers, the TWU communications about the election process and inviting them to nominate and vote for candidates for the HSR positions. However, this was not before Deliveroo tried to get all workers to sign a series of undertakings that they would not use any information they

16) *Transport Workers Union of Australia, New South Wales v SafeWork New South Wales* [2022] NSWIRComm 1050.
17) See, for example, *Transport Worker' Union of NSW and Ors v SafeWork NSW and Anor* [2021] NSWIRComm 1018.

obtained for any other purposes. The result was that, as one TWU officer wryly commented, Deliveroo "effectively controlled the process to elect the HSRs" for the eight work groups, and participation in the process was very poor—in work groups with thousands of members, only about half a dozen voted. Nevertheless, in the second half of December 2020, Deliveroo workers elected HSRs for each of the work groups covering the four Sydney metropolitan regions (Marin-Guzman 2021). The Federal Secretary of the TWU was quoted as saying that HSRs were "commonplace at most workplaces" but a "milestone for the gig economy in Australia" (Marin-Guzman 2021). Some of the HSRs subsequently resigned, and Deliveroo quickly organized elections for their replacements without consulting the TWU.

Once elected, the HSRs are able to exercise all of the powers vested in them under the *WHS Acts*. There have been ongoing negotiations as to how HSRs are to be paid by Deliveroo for their work as HSRs. There is some agreement that an average hourly rate of pay should be calculated, but there is not yet agreement as to the number of hours of HSR work that will be paid for, including whether there should be a cap on the number of hours. The HSRs have experienced other challenges in exercising their functions and powers. As noted earlier, the large size of work groups established by the Commission's decision in October 2020 (each work group covering a quarter of the size of the Sydney metropolitan area, in some instances 40 suburbs) has prevented face-to-face discussions between HSRs and the members of their work groups, thereby rendering effective consultation untenable. Also, HSRs have regularly been challenged by Deliveroo when they seek to exercise their powers. For example, the TWU initiated a process of coordinated workplace inspections with HSRs, including a health and safety survey, aimed at identifying the localized hazards and risks faced by food delivery workers. The HSRs and the TWU were half-way through the process of working out preventive measures to address the identified hazards when Deliveroo challenged the HSRs' right to further inspect workplaces, citing the need to give further notice of inspections, and arguing that they were not necessary. This is contrary to section 68(2)(a)(i) of the *WHS Acts* which empowers HSRs to inspect any part of the workplace "at any time after giving reasonable notice" to the PCBU, but does not require evidence that inspections are "necessary."

Further, HSRs requested Deliveroo to establish a health and safety committee, and there were negotiations over the constitution of the committee, which were drawn out by Deliveroo insisting, for example, that the committee would not be able to discuss any issues involving the terms on which food deliverers were engaged. Consequently, the efforts of HSRs have been largely confined to enforcing basic rights and obligations, detracting from their ability to consult workers and to manage risks. The time and energy of HSRs has been drawn into near constant battles with Deliveroo, and many have resigned or disengaged. Most notably, HSRs have not been able to address the unsustainable contracting pressures that workers face, especially inadequate and inconsistent pay, long, unpaid periods of time waiting for orders, tight delivery timeframes, and hazards arising from algorithmic control. Deliveroo refuses to accept that these issues are negotiable health

and safety issues.

One lesson from the process described in this part of the article is that work groups could not be negotiated, and HSRs elected, without the strong guidance and support of a committed union. Large and well-resourced PCBUs, such as Deliveroo, are able to drag out negotiations and strongly contest legal issues. They are likely to do so on a regular basis, because they have a lot to lose if there are interpretations of the statutory provisions that have adverse consequences for their business model. In these circumstances, HSRs face significant challenges because their efforts to perform their functions are regularly challenged, and they are likely to spend much of their time arguing about their functions, rather than engaging in preventive work.

B. Modest Interventions by WHS Agencies

Despite a series of work-related fatalities involving platform workers, the WHS regulators have tended to favor guidance (see below) and, at most, some direction rather than strong enforcement of WHS regulation in this sector, also accepting a strict division between WHS and wider "industrial relations" issues (like remuneration and work schedules). For example, the NSW regulator, SafeWork NSW, has investigated at least one of the incidents that have led to the deaths of five food delivery workers working for the Uber Eats and Hungry Panda platforms, but at the time of writing there has been no indication of whether there will be a prosecution. Also, in exercising the many dispute resolution functions delegated to it under the *WHS Act*, the NSW regulator generally seeks to conciliate issues rather than make determinations.

The food deliverer fatalities prompted the NSW Ministers for Better Regulation and Innovation and for Transport and Roads to establish, in November 2020, a Joint Taskforce to explore the circumstances leading to the fatalities "and identify safety improvements for the industry" (SafeWork NSW and Transport for NSW 2021, 4). As part of the development of an "intelligence profile," the Taskforce identified locations with high numbers of bicycle and motorcycle crashes. SafeWork NSW inspectors were then involved in "compliance deployments" in these areas, during which they "conducted 214 observations of food delivery riders and 101 interactions with individual food delivery riders" (SafeWork NSW and Transport for NSW 2021, 10). SafeWork NSW issued 28 Warning Notices to food delivery riders, for failure to use or wear adequate personal protective equipment (PPE) and/or riding in an unsafe manner. SafeWork NSW inspectors also issued seven improvement notices to food delivery platforms for failing to provide adequate instructions and information to food delivery workers about the risks associated with riding (SafeWork NSW and Transport for NSW 2021; Taylor 2022).

It appears that SafeWork NSW's approach is to target its enforcement efforts (principally issuing warnings and improvement notices) to the training and PPE provided by digital platforms, and the equipment and safety practices of food delivery workers (see SafeWork NSW and Transport for NSW 2021, 12, Recommendations 2, 8), rather than examining the systems that the platforms use to engage and control workers and their work schedules. This is evident in the food delivery industry action plan for 2021-2022, supported by Transport for NSW, which commits "partners to make improvements in five

priority areas—safe design of work, safe riders, safe bikes and equipment, safe workplaces and communities, and safe working environment and safe roads" (NSW Government 2021).[18) While, in principle, the safe design element could address platforms' systems and algorithms that create the economic and work pressures and drive risky rider behavior, the action plan suggests actions like app features to prompt food deliverers to complete a checklist of safety precautions (checking tires, brakes and gears, and following road rules) and to confirm they are wearing PPE before they can start delivering with the app.

The "safe practices and equipment" emphasis is also reflected in the NSW government's amendment, in April 2022, of the *Work Health and Safety Regulation 2017* (NSW) to require food delivery platforms to provide PPE (high visibility vests and bags, and shirts/jackets appropriate for night and day) and induction training[19) to riders in NSW. The regulation makes it an offense for platforms to fail to comply with these requirements, and for food delivery riders to fail to wear or use their PPE or make their training verification records available for inspection when requested by a WHS inspector or a police officer. Again, these proposals are aimed at changing the behavior of food deliverers rather than addressing underlying pressures causing workers to adopt unsafe practices. Further, the NSW Police will also focus on worker behavior in conducting "ongoing enforcement activities targeting food delivery riders to ensure compliance with the NSW Road Rules" (SafeWork NSW and Transport for NSW 2021, Recommendation 7). Subsequently, there has been a significant increase in police blitzes targeting food delivery workers. The police have fined workers for riding on footpaths and using illegal types of e-bikes. This has placed greater pressure on food delivery workers, and in many instances has undermined safety.

C. *The NSW Food Delivery Guide and the Safe Work Australia Facts Sheets*

The Food Delivery Guide (SafeWork NSW 2021) was developed by SafeWork NSW in response to the deaths of the five food deliverers discussed above and an associated campaign by Unions NSW and the TWU, as well as academic and widespread public concern at the absence of regulatory protection for these workers (Patty 2020). Notwithstanding a period of consultation and public submissions on a draft guide, which drew criticism and attention to the weakness of this proposed measure, the NSW government remained committed to a guide rather than an evidentiary code of practice or mandatory regulation (other than the PPE and training provisions outlined above). The guide provides advice about protecting food deliverers riding bicycles and motorcycles but, in an industry marked by volatility and intense competition amongst service providers, and where the workforce is acutely vulnerable (see part 2 of this article), incentives for platform businesses and workers to follow such a guide, and comply

18) The food delivery industry action plan, which commenced on April 1, 2021, has been developed through collaboration between government, food delivery platforms, food outlets, unions, and advocacy groups, including in the Taskforce's processes, and by bringing together data, research, advice, and actions, to support a coordinated and safer food delivery industry. The partners committed to 50 actions to improve the health and safety of their riders.

19) The regulation took effect on July 1, 2022. The training is to cover hazard and fatigue management; general road safety; selection, use, and maintenance of PPE; and the WHS duties that apply to riders and platforms.

with WHS legal duties, are very low. The persuasive capacity of guides must, therefore, be questioned. At best a guide provides evidence of a reasonably practicable standard of care, which could support WHS regulator inspections, improvement, and prohibition notices, and prosecutions under the WHS Act. However, there is little evidence of such enforcement to date and prosecutions, if they were ever to occur, would be most likely "after the event" following a serious incident. (For a review of different regulatory mechanisms in the light of changing work arrangements, see Walters et al. 2021, 132–138; Johnstone et al. 2012.)

The NSW guide purports to identify and allocate the responsibilities of food deliverers, platform businesses, the food outlets and, very briefly, of officers. It specifies, in general terms, the duties of food delivery platforms as PCBUs under sections 19(1) and (2) of the NSW *WHS Act*, but provides minimal indication of what this means (in terms of actions and expectations) in relation to specific hazards identified elsewhere in the guide. Among the hazards listed are hours of work and unsafe systems of work. The guide advises food delivery platforms to design controls into their apps to prevent riders working excessive hours, remind riders to take sufficient breaks, and ensure that their apps are based on average rider speeds and predicted traffic conditions. It also advises platforms to ensure that the systems of work (including apps, products, and logistics processes) are designed with the safety of riders and others in mind and do not encourage unsafe rider behavior. However, the guide fails to recognize the fundamental imbalances of power and resources between platform businesses and food deliverers, which militate against genuine systemic changes and protection of food deliverers. Instead, the guide has a "safe worker behavior" orientation.

A section of the guide headed "Duties and Rights of Workers" includes clauses on the need to take reasonable care, and to comply with reasonable instructions from a PCBU. The only right specified is the entitlement to cease work when exposed to imminent risk, but the real issue is the capacity of such vulnerable and insecure workers to exercise this right. There are also a number of conspicuous omissions from the array of hazards addressed by the guide (for an overview of key hazards, see section 1). The Ministerial introduction to the guide notes that COVID-19 has contributed to the growth of food delivery work but there is no reference to communicable disease or infection in the guide. The only advice about wearing a mask is for protection against environmental smoke or traffic fumes. Also, there is no clarification on the respective responsibilities of platform businesses and food deliverers in ensuring access to, and use of, safety measures such as PPE, and the quality of delivery bikes and motorcycles, among other key measures.

Perhaps the most fundamental limitation of the guide is its failure to deal with the key drivers of WHS problems confronting food deliverers, namely the economic pressures and low financial returns that encourage overwork, stress, and hazardous behavior. This limitation was identified in submissions responding to a draft guide, but no subsequent changes were made to the guide. In particular, the TWU submissions pointed to extensive research highlighting the link between inadequate remuneration and poor WHS outcomes for transport workers and others. Low and irregular

pay has been associated with poor WHS in a number of industries marked by extensive precarious work arrangements including long-haul trucking, home-based clothing manufacture, and horticulture/harvesting. In the trucking sector, a specialist tribunal was established to set minimum rates for all drivers (see Rawling, Johnstone, and Nossar 2017) and in agriculture, in November 2021, the Australian Fair Work Commission responded to the hyper-exploitation of harvest workers by setting a new legal minimum for piece workers of A$25.41 per hours irrespective of output[20)] (employers were paying workers using output-based rates that could amount to as little as A$3 per hour).

The NSW guide emphasizes the importance of consultation, including the legislative provisions for HSRs, but does not indicate how this is to operate in such a challenging industry with significant power imbalances. In particular, the guide provides minimal advice as to how work groups are to be negotiated and HSRs elected. For example, at page 7, the guide states that, if a request is made by a worker, the PCBU must "negotiate with workers to establish work groups," but provides no more detail about how negotiations should be carried out, or the criteria for determining work groups. It then states that the PCBU must "facilitate the election of" HSRs "for those work groups" but doesn't make it clear that the workers decide how the election is to be conducted and whether they, or someone they choose, will conduct the election.

Finally, new approaches are needed to monitor the application of measures in the guide, and to achieve broader compliance with the *WHS Acts*. "Virtual inspections" in which inspectors discuss and view WHS conditions in workplaces through the digital interface, and anonymous reporting through the SafeWork NSW "Speak up Save Lives" app are potentially useful initiatives, but it is likely that tailor made strategies are needed for monitoring and enforcing compliance in the work of this mobile, remote, and vulnerable workforce.

Four months after the NSW Guide was released, Safe Work Australia produced three "fact sheets" titled "Managing Risks in the Food Delivery Industry," which focus on work undertaken by delivery riders on bicycles and scooters, and are aimed at food delivery platforms, food outlets, and workers (Safe Work Australia 2021b, 2021c, 2021d). A fact sheet provides information about managing particular risks, but is even less authoritative than a "guide." By and large the information provided by the three fact sheets is similar to the material in the NSW guide (but even less specific), and the focus is also on safe riding practices and compliance with the road rules. The discussion of the processes for negotiating work groups and electing HSRs is very brief, and in the fact sheets for platforms and for workers (Safe Work Australia 2021b, 6; 2021d, 4) there is only very brief mention of "the economic pressures that may encourage workers to take unnecessary risks" and "unrealistic delivery times leading to unsafe riding." There is no reference at all to the pressures in delivery workers resulting from inadequate remuneration.

20) Fair Work Commission, *Summary of Decision 3 November 2021 Application to vary the Horticulture Award 2021* AM2020/104 [2021] FWCFB 5554.

4. CONCLUSION

The tentative steps to regulate work for digital labor platforms, or at least some aspects of it in NSW, are indicative of wider international trends—for example, in December 2021 the European Commission released a Proposal for a Directive on improving working conditions in platform work (see further the articles by Aude Cefaliello and Cristina Inversi in this special issue). Around the world, the platform industry has vigorously resisted moves to regulate platform work. This is especially so for attempts to deem platform workers as employees, one instance of which was their overturning of the AB5 Bill in California through a direct ballot initiative, Proposition 22 (Cherry 2021). In one sense, the belated and limited response to the health and safety of platform workers in Australia simply continues a longer term lag in addressing the WHS risks exacerbated by the renewed growth of precarious work arrangements since the 1970s—a trend at least partly explained by the ongoing dominance of neoliberal ideology. As discussed in the Editors' Introduction to this special issue, there is a need to see the health effects of platform work within the wider context of precarious work with its well-documented adverse health effects (see also Tran and Sokas 2017). The COVID-19 pandemic accentuated the threats that precarious work poses to worker and community health because many workers deemed "essential" in transport (including food delivery), logistics, and the like held these types of jobs (Quinlan, 2021). Yet even a global pandemic highlighting the manifest human and social costs of neoliberalism has failed, as yet, to secure a fundamental shift in government policy and the development of new regulatory measures to protect precarious workers. Indeed, if anything, the pandemic served to reinforce the acceleration in work arrangements associated with digital labor platforms.

As we have shown, the Australian *WHS Acts* contain provisions that, in principle, require platform businesses to take steps to protect platform workers. They enable all types of workers, including food deliverers, to elect HSRs and participate in WHS, and WHS inspectorates to address WHS issues in work for labor platforms. Yet it is unions, particularly the TWU, rather than the WHS regulators, that have put most effort into attempting to apply the provisions of the *WHS Acts* to platform work. The NSW regulator has conducted some inspections and produced an action plan and some guidance for the food delivery sector. These initiatives, however, are limited in the risks they address, and emphasize worker safety practices, training, and PPE as the measures to protect workers, rather than addressing platforms' systems and algorithms that create the economic pressures, overwork and stress that drive risky behavior. As with a number of other types of work, irregular and task- or piecework-based payment lies at the core of at least some of the hazardous practices in work for labor platforms.

There is a strong case to be made for optimal application and enforcement of the *WHS Acts* in relation to digital labor platforms. By protecting all persons who carry out work for businesses, the broad definition of "worker" in these statutes goes a long way to overcoming the problems for platform workers arising from labor law's twentieth century focus on protecting "employees" but not independent contractors (see further the

articles by Aude Cefaliello and Eric Tucker in this special issue). Two further issues need to be addressed to ensure that platform workers are fully protected. First, WHS regulators need to take a stronger, and more strategic approach to enforcement (Weil 2010), principally by seeking to understand the factors determining non-compliance, by making greater use of general deterrence, and by focusing inspection and enforcement on the key businesses that control work arrangements and the allocation of work (Nossar 2021; Johnstone 2017; Walters et al. 2021, 132–138).

Second, the historically separate development in Australia of laws for WHS, workers' compensation, and industrial relations (including minimum wages, maximum hours, and worker representation), constrains or at least discourages attention to the fundamental drivers of risk in platform work. At the very least, effective regulation of platform work (and other types of precarious work) requires closer integration of these realms. There are examples of closer integration that set important precedents, including the textile clothing and footwear supply chain regulation in Australia (Marshall 2010) and the safe rates regimes applying to some truck drivers in South Korea (KSRRG 2021) and formerly in place in Australia.[21] The digital platforms that mediate platform work strongly resist any suggestion that labor regulation of platform mediated work should address the way in which workers are remunerated, and that off-road parties are responsible for the pressures inducing delivery workers to take risks on the road.[22] To date the NSW government and SafeWork NSW have acceded to this pressure. As discussed above, the NSW guide makes no mention of remuneration issues and focuses instead on the more obvious on-road hazards, and the April 2022 amendment to that state's WHS regulations concerns high-visibility protective equipment and induction training, again focusing on the behavior of food deliverers rather than addressing underlying systemic pressures.

Nonetheless, there are some positive recent remuneration and safety developments both at a general level and in relation to food delivery workers. At the general level the Australian Labor federal government elected in May 2022 has committed to reinstituting a safe rates regime for all parties in the supply chain. Further, the safe rates concept is gaining traction elsewhere. In June 2022, following a major strike affecting export supply chains, the South Korean transport union reached agreement with the incoming conservative government and industry to extend the term of the safe rates legislation and to consider incorporating additional categories of truck drivers (KPTU 2022). The International Labour Organization (ILO 2022) has formally recognized the safe rates concept and has also recently added occupational health and safety to its fundamental principles and rights at work.

There are also promising developments more specific to food delivery workers. The

21) In May 2022, a new Australian Labor Party federal government was elected. Its platform includes reintroducing a "strongly enforced national safe rates scheme for all parties in the supply chain."

22) Cf the Australian *Heavy Vehicle National Law*, which acknowledges that truck drivers' on-road behavior will be influenced by the behavior and demands of off-road parties and set out "a chain of responsibility" for all parties involved in road transport work (including persons scheduling transport work and firms packing, loading and receiving goods), even if they had no direct role as a driver or transport operator.

first digital platform initiative to improve remuneration for delivery work, the "Proposed On Demand Delivery Services Award covering Menulog employees" (Fair Work Commission 2021), has been resisted by some unions because it is based on an "employment" model, and will further entrench inequalities between workers who are "employees" and "independent contractors," rather than ensuring decent wages for all food delivery workers, regardless of whether they are employees or independent contractors. Then the TWU, in May 2022, reached an important agreement with the global food delivery PCBU DoorDash on future industry wide regulation of platform mediated gig work (TWU 2022). The parties agreed to a statement of principles that create a flexible framework that allows workers their independence and extends to them "appropriate rights and entitlements"; provides them "with transparency in relation to how work is monitored, controlled and remunerated"; ensures that they have "the opportunity to contribute to a collective voice"; and provides access to dispute resolution before an independent government body. It is proposed that this will be followed by a more detailed memorandum of understanding that will operationalize the principles as a framework for regulation and reaching agreement about industry-wide standards. The parties also agreed that they will jointly lobby governments to adopt the standards.[23)]

Eleven days after this agreement was announced, the Australian Labor Party won the federal election and came into government with a platform that includes "a better deal for gig workers." It includes a promise to extend the powers of the Fair Work Commission to make minimum standards for "employee-like" forms of work "to better protect people in new forms of work, including gig work, from exploitation and dangerous working conditions." In a further development late in June 2022, the TWU and Uber signed an agreement that both would support federal government legislation for an independent tribunal responsible for creating industry wide standards, including setting "minimum and transparent enforceable earnings and benefits/conditions for platform workers based on the principle of cost recovery, taking into account the nature of the work" (Workplace Express 2022). A few days later, the federal Minister for Employment and Workplace Relations announced that the new federal Labor government will legislate to give the Fair Work Commission new powers to set minimum standards for gig workers.

Finally, it is critical to recognize that what has been examined here is but a fragment of the vast and expanding array of highly articulated business arrangements refashioning work (see for example Amazon-type operations). Such arrangements fracture, segment, and isolate work and groups of workers in ways that render institutional arrangements like unionized collective bargaining or minimum labor standards enforcement problematic, even when the latter are not bypassed altogether as with much platform work. Ultimately, these are problems that can only be addressed by labor laws that overcome the bifurcation between WHS and industrial relations issues and address the working conditions of all kinds of workers. This challenge extends well beyond platform work and requires a fundamental

23) For the full agreement, see https://www.workplaceexpress.com.au/files/2022/10DoorDashprinciples.pdf

refashioning of the social protection regulatory architecture erected in the late nineteenth century and early twentieth century.

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ACKNOWLEDGMENTS
The authors would like to thank Jack Boutros at the Transport Workers Union (national office) who was a key informant for the case study of health and safety representatives for food delivery workers in part 3 of this article.

CONFLICT OF INTEREST STATEMENT
No conflict of interest to disclose.

An Occupational Health and Safety Perspective on EU Initiatives to Regulate Platform Work: Patching up Gaps or Structural Game Changers?

Aude CEFALIELLO[*]

Abstract: Rather than being new, platform work extends pre-existing trends: greater control and surveillance, greater job precarity, and greater worker isolation and workplace fragmentation. Nevertheless, platform work distinguishes itself by its unique usage of algorithmic management software to constantly monitor, organize, and evaluate workers. These two features of platform work adversely affect both workers' physical and mental health. Platform workers are exposed to layers of risks: traditional risks and risks due to the usage of artificial intelligence (AI) at the workplace. Even if these risks are preventable, the widespread misclassification of platform workers as independent contractors shifts the legal and financial responsibilities to prevent the risks onto these workers, even if they do not have the organizational means and powers to do so. After providing a mapping of the risks that platform workers are exposed to, and the challenges they are facing in practice due to their fragmented employment setting (often combining offline work with platform work), this article examines the recent European Union (EU) initiatives affecting platform work—the Directive to improve working conditions of platform work, and the Artificial Intelligence Act (AI Act). Thus, using a socio-legal methodology, the article aims to contribute to on-going debates on the platform economy and AI by providing a critical analysis of whether these two recent EU initiatives to regulate platform work address *a minima* the challenges previously raised by the increased use of digital platforms, and, in particular, whether they contain provisions that will effectively empower and protect platform workers. The article argues that the proposal for a Directive on Platform Work represents a potential step forward by recognizing the impact of AI management on workers' health and safety, including by addressing psychosocial risks. This Directive, however, has its weaknesses and does not address all relevant issues—for example, it doesn't distinguish between psychosocial risks factors, work-related stress, and how to address them, and, in practice, there is a risk that only a limited number of workers will be able to benefit from these provisions. Meanwhile, the AI Act imposes additional requirements on the user of the AI (the labor platforms) but does not provide additional rights for the end-users (the workers). Further, because the AI Act is a form of product safety regulation (horizontal regulation), it does not take into consideration the specificities of the employment dynamic (e.g., the imbalance of power, subordination, etc). The article concludes that these two EU initiatives show awareness on current issues arising from platform work but fail to address them in an effective way.

Key words: Gig economy, Platform work, Artificial Intelligence, Occupational Health and Safety, European Union

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1. INTRODUCTION

> *We must make the most of the job-creating potential of digital platforms. But we should also make sure that they are quality jobs, that don't promote precariousness, so people working through them have security and can plan for their future.*[1]

With this statement, the European Commissioner for Jobs and Social Rights, Nicolas Schmit, verbalized the balancing exercise that regulating platform work in the European Union (EU) demands. On one hand, the European Commission wants to foster the digital transition and the role of digital platforms in it. On the other hand, the jobs provided by labor platforms should not impose unfair costs on workers, including on their health and safety. The European Commission reports that 28 million people perform work via a platform in the EU;[2] while a recent European survey estimated that 4.3 percent of the working population has performed platform work over the past 12 months (Piasna, Zwysen, and Drahokoupil 2022, 15). Even if the scope of platform work in the EU is debatable, the labor law literature has examined the platform economy for almost a decade now, and, in particular, the challenges (in new and old ways) that it poses to the core values of workers' protection (Dukes 2020; De Stefano 2016). Thus, what labor platforms currently are does not matter as much as what they could be. As Lobel (2017, 52) suggests, a lot of existing jobs will potentially be "uberized":

> Gig workers are drivers, delivery-people, personal assistants, handymen, cleaners, cooks, dog-sitters, and babysitters but increasingly are also more specialized professionals, including nurses, doctors, teachers, programmers, journalists, marketing specialists and, well yes, lawyers too. … The technology is here: as long as you have the time, skill, knowledge, and empty couch, and unoccupied vehicle, or an idle lawnmower, you can swiftly become a corporation. **The platform economy channels anything, and everything sitting idle into the market and monetizes it** (emphasis added).

Rather than being new, platform work extends pre-existing trends: greater control and surveillance, greater job precarity, and greater worker isolation and workplace fragmentation (Bérastégui and Garben 2021, 97). Other scholars have identified broader challenges for labor law emerging from debates around platform work, such as: (i) the adequacy of the methods and criteria to define workers' status, (ii) the limited scope of labor regulation, and (iii) whether labor and social security paradigms need adjustment to address changes in the labor market (Aloisi 2022, 5).

Initially, public and academic debates mainly focused on the employment status of platform workers and on determining if, and under which conditions, people performing work for a platform should be classified as workers benefitting, at least in theory, from all labor law protections. All over the world, and particularly in Europe, platform workers have initiated litigation to obtain recognition of their "worker status" (De Stefano et al. 2021). The consequences of not having employee status include poor workers' health and safety and

1) https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605 (Accessed August 17, 2022).

2) Twenty-eight million represent 14.6 percent of the European working population in 2020 (19.5 million), data available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_-_annual_statistics (July 15, 2022).

higher risks of injury and death due to a lack of protective equipment.[3] Thus, the recognition of workers' status is the pre-requisite to examining whether existing labor legislation, including occupational health and safety (hereafter OHS) legislation, could effectively protect platform workers (Cefaliello 2022, 13–14). Still, in some respects, platform work is different from previous forms of employment. The two main distinctive characteristics are the use of artificial intelligence (AI) to manage workers who previously would have been out of the direct sight of managers, and the ability and flexibility of platform workers to log-in and log-off remotely (Ivanova et al. 2018). More than ever, the way work is organized by a digital platform aims at maximizing the number of tasks completed on time and with good quality (Bérastégui 2021).

Concerns have already been raised about the potential inadequacy of OHS regulation to protect platform work (Garben 2019, 101; Eurofound 2020, 54). In 2020, the European Commission launched an initiative to address the challenges to labor protection posed by platform work, and after consultation with the European social partners, published the draft of a Directive on improving working conditions in platform work (COM/2021/762, hereafter the Directive on Platform Work). This initiative is part of a bigger political program on digitalization, including parallel discussions on an Artificial Intelligence Act (hereafter AI Act), covering, from a product safety perspective, questions of AI software intended to be used in the context of employment. Unlike the Platform Work Directive, which could be described as "reactive," the AI Act aims to be "proactive" and regulates the use of AI in anticipation of its increased use in the coming years. The EU aims to be the first to actively regulate AI. In the labor law field, the use of AI at work has been discussed by the European social partners during the finalization of the European framework agreement on digitalization (2020). The AI Act is one of the first attempts in the world to enact horizontal regulation of AI; most of the previous efforts to regulate platform work occurred at the national level (De Stefano et al., 2021: 18–29). The proposal for a platform work Directive is a promising instrument for improving platform working conditions by simultaneously addressing employment status misclassification, algorithmic management, and the enforcement of existing rules (Kelly-Lyth and Adams-Prassl, 2021). Consequently, the analysis in this article of these two European initiatives might contribute to future international comparative studies or policy initiatives.

After providing a mapping of the risks that platform workers are exposed to, and the challenges they are facing in practice due to their fragmented employment setting (often combining offline work with platform work), this article examines the two recent EU initiatives seeking to regulate aspects of platform work. Thus, using a socio-legal methodology, the article aims to contribute to the on-going debates on platform economy and AI by providing a critical analysis of whether these two recent EU initiatives to regulate platform work address *a minima* the challenges

3) COM/2021/762 final. European Commission. Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:762:FIN, 14.

previously raised by the increased use of digital platforms, and, in particular, whether they contain provisions that will effectively empower and protect platform workers. The paper is structured as follows. Drawing on a review of recent academic and grey literature, section two provides a summary of occupational hazards that platform workers are exposed to. Having clarified the background, section three proceeds to analyze the latest EU regulatory proposals in the form of the Platform Work Directive, and the AI Act, and to assess the extent to which they adequately address these concerns.[4] Section four provides concluding remarks, and argues that even if these initiatives seem promising, there are reasons to believe that they will not contribute much more than marginal improvements to the protection of platform workers in practice.

2. WORKING CONDITIONS IN THE PLATFORM ECONOMY CHALLENGING OHS ON ALL FRONTS

A. New Technologies Exacerbating Old Hazards

The COVID-19 pandemic brought considerable public attention on the working conditions, and the threats to health and safety, of the platform workers performing food delivery services and passenger transport services (Andersson and Novitz 2022, 11). The deterioration of platform workers' working conditions included increased health and safety risks to on-location platform workers, particularly in the transport, delivery, household maintenance, and care sectors.[5] Even before the pandemic, the daily working conditions of on-location platform workers, such as riders, have been dangerous, and included the risks of being attacked or involved in incidents causing injury or death (Gregory and Maldonado 2020). Various other studies have reported numerous physical and psychological hazards faced by transport platform workers (Tran and Sokas 2017, 64; Malenfer, Defrance, and Hery 2018, 16–17). Even though digital labor platforms are reluctant to report injuries of platform workers, a 2019 survey reported that around 42 percent of people working through delivery platforms have been involved in a collision (Christie and Ward 2019).

However, these figures most likely understate the incidence of injuries and death because statistics on incidents, injuries, and occupational diseases related to platform work are not systematically collected or available (Lenaerts et al. 2021, 1). Transport platform workers have been the focus of media and research; however, an European Trade Union Institute (ETUI) survey on platform work shows that work involving the transport of people is the least frequently reported type of specific platform work (Piasna, Zwysen, and Drahokoupil 2022, 17). This survey shed new light on the extent of platform work in Europe. It reported that activities covered by platform work include: remote click work (e.g., data entry or sorting, transcriptions, paid online surveys), remote professional work,[6]

4) For a more general assessment of legislative developments related to the platform economy in Europe, see Aloisi (2022).

5) COM/2021/762 final. European Commission. Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:762:FIN, 65. Also, for the healthcare sector in particular, see Franklin (2020).

6) Which include writing and translation, graphic design and multimedia, software and web development, other remote

on-location work,[7] and transport and delivery work. The most frequent type of platform work is remote click work. Lenaerts et al. (2021, 14) have recently identified the lack of attention to other types of platform work than transport work as a gap in the OHS literature.

Based on the existing literature, it is possible to conclude that platform workers face a combination of "traditional risks" (i.e., risks that existed before the organization of the work via a platform) and risks specially related to platform work (e.g., algorithmic management) (Garben 2017, 24). Platform work raises concerns about the way work is performed and, especially, the increasing use of algorithmic management (either partly or fully) in the way in which work is organized. One distinguishable feature of platform work is its use of an algorithmic management process to allocate tasks, organize, and evaluate work based on metrics and ratings collected via workers' monitoring (De Stefano et al. 2021, 33). The degree of control performed by the algorithm might vary, but there is a direct relation between the degree of algorithmic control and the rise of occupational risks (Bérastégui 2021, 87). Algorithmic management can assess inter-worker competition and provide rating mechanisms, encourage a rapid pace of work without breaks, which may induce pressure that leads to accidents. The risk factors that are most exacerbated by automated management processes are psychosocial risks, with around 50 percent of platform workers suffering from clinical levels of social anxiety, compared to 7-8 percent found in the general population (Bérastégui 2021, 16).

Even if algorithmic management as a means to allocate, monitor, or evaluate work is the most distinguished feature of platform work compared to traditional forms of work (Lenaerts et al. 2021, 6), its impact is not limited to the platform economy. Algorithmic management is already being used in many conventional employment settings such as warehouses, factories, or marketing firms to direct, to discipline, or to evaluate workers (Wood 2021, 6–7). A study has identified the following occupational risk factors originating from algorithmic work management: constant monitoring, work intensification, lack of autonomy, bias and discrimination caused by the algorithm, and complexity and lack of transparency (Todolí-Signes 2021, 436–441).

Thus, one consequence of platform work is that risks are layered, and workers are exposed to both physical and psychological risks (Lenaerts et al. 2021, 15–16; Huws 2015). Depending on the tasks performed, a distinction should be made between location-based platform work and online platform work (with an additional distinction between micro and macro-tasks) (Bérastégui and Garben 2021, 96). Risks involved in both micro- and macro-tasks in online platform work include the risks traditionally observed in computer-based work (Lenaerts et al. 2021, 13) and in precarious forms of employment, as well as the risks related to the use of algorithmic management. For on-location platform work, there is an accumulation of the traditional risks (e.g., exposure to chemicals or other dangerous substances when cleaning) (Lenaerts et al. 2021, 13) and risks of inter-personal violence and harassment, in addition to the pressure to

professionals, and sales and marketing support.

7) Includes handywork, babysitting, and tutoring.

complete work within tight deadlines leading to breaches of OHS rules, including failures to take breaks (Huws 2015). Considering that platform work is one form of atypical work, some conclusions have been drawn from research on similar groups, based on the key characteristics of people performing platform work—for example, being young or working alone are recognized to be risk factors (Garben 2017, 3). Overall, the predominating risk is often determined by the work environment (Huws 2015).

B. Legal Loopholes in the OHS Framework for Platform Workers

As we can see, the organizational choices made by the platforms impact on both the mental and psychological health of the workers. Is this preventable? Absolutely. Previous research has stressed that platforms could use their constant monitoring to improve workers' safety (Malenfer, Defrance, and Hery 2018, 14–15), and other research has shown that algorithmic management software could be developed with the aim to protect workers' health rather than just economic maximization (Lee et al. 2021). From a technical point of view, means exist to prevent both the physical and psychosocial risks. The remaining question is: who is legally responsible to prevent them?

Previous studies have highlighted that the misclassification of platform workers as "self-employed persons" is a factor that dilutes OHS responsibilities (Aloisi and De Stefano 2022, 37; Garben 2017, 4). As previously noted, because platform workers are repeatedly and wrongly classified as self-employed, they are legally and financially responsible for the prevention of all risks linked with their activity without having the organizational means to do so. Indeed, as self-employed workers, platform workers bear business risks associated with self-employed status while having little control over the business strategy or how to perform their work (Georgiou 2022, 122). Consequently, platforms benefit from the employers' prerogatives without carrying the employers' obligations (Prassl and Risak 2015, 636). Platform workers have a narrow understanding of how the platform controls their work, yet they are legally and financially responsible without having the freedom or means to protect themselves. The situation of the delivery riders or drivers during the pandemic is a good example. Self-employed on-location platform workers were expected to prevent the risks of being affected by COVID-19, for example by purchasing their own Personal Protective Equipment. Meanwhile, because of algorithmic management and the sanctions imposed upon them when they refused "proposed" rides, drivers could not freely refuse a client (which a truly self-employed worker can do) even if they thought the ride would put them at risk. And because they were not considered as "workers" under Article 3(a) of the Directive 89/391/EEC,[8] they could not benefit from the right to withdraw from a situation of immediate danger (Article 8(5) Directive 89/391/EEC).

Up to now, the only possible avenue to fight misclassifications has been either to rely on labor inspectorates, or for the worker to go before the courts. Even though litigation has been relatively successful to fight the misclassification of platform workers (De

8) Council Directive 89/391/EEC of June 12, 1989, on the introduction of measures to encourage improvements in the safety and health of workers at work. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31989L0391.

Stefano et al. 2021), this individual approach has not led to an improvement in the health and safety of platform workers' working conditions. In most cases, after the judgment, the default setting remains that platform workers are regarded by the platform as self-employed and responsible for their OHS prevention, even if in fact, the platform should be responsible for it. Even if platform workers, individually, are recognized by the courts to be workers, this will not have an impact on the way work is organized by the platform. By the time the judgment is applicable, the terms and conditions of the platform would have changed and made the ruling irrelevant to the "current" organization. The only way to ensure that OHS legal frameworks apply to workers in the platform economy could be having a presumption that platform workers are employees—workers presumed to be employees would fall within the scope of the Framework Directive (89/391/EEC).

In the EU, the Directive 89/391/EEC is the cornerstone of the OHS legal framework. It provides employers with the obligation to prevent risks related to all aspects of work (Article 5); and they should therefore protect workers' physical and mental health. The employers should follow the general principles of prevention: after conducting a risk assessment, the employers must consult the workers or their representatives to adopt collective (or individual) measures to either eliminate or reduce the risks. The financial burden of the prevention cannot be borne by workers (Article 6(5) Directive 89/391/EEC). The Directive has vested workers with some rights, including the right to withdraw from work if there is any serious and immediate danger (Article 8(4) Directive 89/391/EEC). Workers and their representatives have also the right to appeal to national authorities responsible for OHS if they consider that the measures adopted at work do not protect them adequately (Article 11(6) Directive 89/391/EEC). The Directive does not only set down rules but the organization of work to be centered around prevention and the participation of the workers and their representatives (James and Walters 2002). To benefit from this protective framework, platform workers need to be "workers" under Article 3(a) (Cefaliello 2021a). To guarantee the purpose of OHS framework, we need a broad approach to the categorization of "workers," as illustrated in the recent judicial review decision in the United Kingdom (Hobby 2021).

Indeed, in the England and Wales High Court decision in *R (on the application of the IWGB) v SSWP and Others*, one key discussion revolved around the personal scope of Directive 89/391/EEC and the meaning of worker (Article 3(a)). The Trade Union (IWGB) argued for a broad understanding of the definition of "worker" by claiming that a purposive approach must be applied to the interpretation of the OHS Directives. In the High Court ruling, Judge Chamberlain J supported this approach by referring to Article 31 of the Charter as an interpretive aid to determine the purpose of the Directive, and to support an interpretation as broad as possible of the definition of "worker" used in the Framework Directive. This ruling confirms that OHS protective framework applies not only to employees but also to (limb(b)) workers.[9)]

9) In the United Kingdom, limb(b) workers are defined in s 230(3) of Employment Rights Act 1996. The employer exercises a different degree of control over a limb(b) worker and an employee. According to the Health Safety

Another way to "trigger" the application of the Directive 89/391/EEC for the benefit of platform workers would be to focus on the level of control exercised by the platform. Indeed, Article 3(a) defines as an employer with OHS responsibility the entity who has the means and the control of the undertaking. One can argue that regardless of the workers' status for other labor rights, the platform should be responsible for OHS prevention because it is the only entity with the means, control, and powers to collectively organize work and effectively to prevent risks at work.

However, even if the presumption of employment proposed by the European Commission applies, there would be strong challenges to the effective application of OHS protection in the platform economy. Indeed, even if the draft Directive to regulate working conditions in the platform economy is adopted, it would provide platforms with legal obligations to prevent the risks, but it will not automatically lead to strong workers' organization with empowered health and safety representatives. Indeed, the Directive 89/391/EEC provides that the employer shall consult the workers or their representatives. Yet, the rules and processes for the appointment of health and safety representatives vary from one country to another (Walters and Nichols 2007). Moreover, depending on the sector and the country, the platform economy is extremely difficult to organize, in particular by "traditional unions" (Bertolini and Dukes 2021, 674). Without the collective organization of workers, the platform will most likely organize OHS prevention in a unilateral way without meaningful consultation of the workers (James and Walters 2002).

The second challenge would be regarding the enforcement of OHS prevention in the platform economy and the fact that the enforcement will depend on the intervention of the Labor Inspectorates. The way the platform economy is organized raises the broader question of the control and enforcement of the law when workplaces are fragmented. Indeed, the absence of fixed working places and working time is one of the challenges to the application and enforcement of OHS standards to platform work (Garben 2017, 4). For both online and offline platform work, the tasks are temporary and can happen anywhere, at any time. Platform work is not performed at a "workplace" in the traditional sense—work can be carried out in public places (e.g., on the road), in private workplaces which do not belong to the platform (e.g., cleaning), or in private, domestic places (either belonging to the client or a worker). Overall, platform work often involves remote or solitary work, which limits the possibilities that labor inspectorates might intervene and makes the enforcement of established OHS standards more complex (Eurofound 2020, 10). The enforcement challenges are similar for workers teleworking from their homes (and more generally, for remote work), and for mobile workers and temporary workers. Not only are workplaces more fragmented, but inspectors need to take

Executive (HSE), "Limb (b) describes workers who generally have a more casual employment relationship and work under a contract for service," whereas for employee "if there is a contract between a worker and a business, and the business exercises significant control over that worker, there may be an employment relationship between the worker and the business during actual working hours, even if there is no contract outside actual working hours." (https://www.hse.gov.uk/vulnerable-workers/gig-agency-temporary-workers/employer/definitions.htm#:~:text=Limb%20(b)%20workers,under%20a%20contract%20for%20service, accessed August 22, 2022).

a broader approach to inspection; they should examine not only the physical risks but also the risks emerging from the work organization, which requires more time.

C. The Reality of Working Conditions in the Platform Economy: A Difficult Mix and Match of Occupational Hazards

In practice, benefiting from the Directive 89/391/EEC might not be enough to protect platform workers. As previously mentioned, the 2022 ETUI survey reports that often platform work is combined with the platform worker's other occupation (i.e., offline job) (Piasna, Zwysen, and Drahokoupil 2022, 36). Indeed, half of the people doing platform work are employees (either in open-ended or fixed-term contracts) in their offline jobs (Piasna, Zwysen, and Drahokoupil 2022, 37). However, for people doing platform work as their main occupation, this percentage falls to around 40 percent and almost 25 percent are self-employed without employees in their offline jobs. Another key finding is that "internet and platform work is clearly **an addition** to offline work and does not appear to substitute for it" (emphasis added) (Piasna, Zwysen, and Drahokoupil 2022, 47). The following discussion will build upon the findings of the ETUI survey and try to draw some conclusions on the legal challenges they represent for the effective application of OHS regulation.

Different scenarios involving workers who do both offline and platform work are examined, combining different aspects outlined in Table 1 and Table 2. For each situation, we will hypothesize how the Directive 89/391/EEC would apply within these fragmented employment settings. The tables are constructed as follows: a first distinction is made between situations where people performing work via platform fall within the scope of "worker" (as defined by Directive 89/391/EEC) or self-employed (Table 1). The assumption is that "offline work" is the main source of income and/or the worker's main occupation, and "platform work" is an additional job (Table 2). Then, to be consistent with existing literature on platform work and the OHS risks outlined previously, the nature of the tasks is divided

Table 1 Worker's status depending on employment settings.[10)]

Offline Work	Platform Work	Worker's status
Worker	Worker	A. Fully worker
Worker	Self-employed	B. Mostly worker
Self-employed	Worker	C. Mostly self-employed
Self-employed	Self-employed	D. Fully self-employed

Table 2 Nature of occupational tasks depending on employment settings.

Offline Work	Platform Work	Nature of the tasks
Online	Online	1. Fully Online tasks
Online	On-location	2. Majority of Online tasks
On-location	Online	3. Majority of on-location tasks
On-location	On-location	4. Fully on-location tasks

10) "Worker" refers to the definition provided in Article 3(a) Directive 89/391/EEC.

between "online" and "on-location" (Table 2). When people performing work via platforms qualify as "workers," both for their offline and platform work (Table 1, status A), they will always benefit from the protective scope of the Directive 89/391/EEC. The main OHS challenge would be a "traditional case" of multiple employers (Nygren et al. 2017). In principle, both the offline employer and the platform should assess the risks and then take preventive actions to either eliminate or mitigate the risks with collective and individual measures. In practice, there is a concern that if the platform is the "minority employer," it will be more incentivized to prevent risks leading to injuries at work rather than occupational diseases. Considering that people working for platforms only do so for a short period of time (Piasna, Zwysen, and Drahokoupil 2022, 20), platform work might focus on health and safety situations that would instantly engage their liability (i.e., an incident leading to injury at work) and will not prevent risks which will materialize in years (e.g., exposure to psychosocial or musculoskeletal disorders).

Regarding the nature of the risks, there are two distinct situations. If the nature of the work performed offline and for the labor platform is the same, then the preventive measures from the offline employment might benefit workers in their platform work: for example, if the offline work requires to work on a computer and the platform work is online. Nevertheless, even in this scenario, the worker will be exposed to similar risks for a longer period of time. In the example of computer work, it would be the exposure to a display, causing visual fatigue, and musculoskeletal disorders, amongst others. However, if the nature of the risks is different (Table 2, cases 2 and 3) then it is a "mix and match" of risks, and most likely only the risks of the offline work will be fully prevented (depending on the nature of the contract of the offline work). It should be noted that previous research has pointed out that platform work involves extra work when compared to similar jobs outside of the platform economy (Lenaerts et al. 2021, 15–16). For example, people doing platform work that entails performing physical on-location tasks might still be required to use a computer or technological devices to interact with the labor platform.

There is a similar analysis when people working via a platform can be considered as "workers" in the course of their main employment (Table 1, status B). Here, only offline employers will have obligations under the OHS legislation and will have to prevent all risks related to work. As self-employed persons engaging in the platform work, workers will fall outside of the OHS legal framework and will be financially and legally responsible for the risks arising from their platform activity (even though, this is contestable, as explained later in this paper). Here, if there are similar occupational exposures and/or occupational hazards, the prevention measures for the offline employment relationship might benefit workers during their self-employed platform work. However, if the exposure is different (e.g., working on a computer as part of the offline occupation and delivering goods as platform work—case 2, Table 2) then workers will have to prevent their own risks.

When people performing work through platforms are mostly or completely in a situation of being self-employed (status C and D, Table 1), the legal and financial burden of OHS prevention will fall on them. Once again,

the only exception would be in the case where they are considered as workers by the labor platform, but then the prevention might be limited to work injuries. Here, depending on whether the occupational hazards are of similar nature or not, workers might have to assess and prevent injury and ill-health in two different work situations (a combination of status D and case 3 or 4, Table 2).

Thus, it means that the "safest" situation for workers is when they are employees in both their online and offline work (status A, Table 1) and face similar risks in both occupations (either case 1 or 4—only if the on-location work is the same). Workers with status B (Table 1) and in case 1 or 4 (Table 2) will be "relatively safe," because they could benefit indirectly from the preventive measures of their main employment and use it in the context of their platform work. Workers with status C and D (Table 1) are in the most dangerous situation because most of the prevention burden will be on them. One could argue that if, in their offline work, workers are self-employed, they might be familiar and aware of the OHS legal framework and requirements. Thus, the cases that would be more problematic is status C (Table 1) and case 2 (Table 2), where workers would have to prevent the on-location risks "on the side," with a risk of not being familiar with, or aware of, their obligations. These observations underline that falling within the scope of Article 3 of the Directive 89/391/EEC might not resolve everything for platform workers. It would give them rights, in theory, but considering that in many cases platform work is an additional job, some concerns might be raised on how the risks are going to be assessed, in particular for online platform workers.

To conclude, workers involved in the platform economy (either for on-location or online work) are exposed to psychological and physical risks. Some risks are well-known and are related to the nature of the tasks, but the organization of the work via a platform with algorithmic management adds a new layer of risks and exacerbates psychosocial risks. These risks can be prevented. Legally, the prevention of these risks is either the responsibility of the platform worker or the platform. As soon as the person performing work for the platform falls within Article 3 of the Directive 89/391/EEC, the platform is recognized as employer for OHS purposes and should assess and prevent the risks after consultation with the workers or their representatives. However, in practice, people use platform work as an additional source of income and (usually) accumulate jobs and employers. Therefore, even if the platform is considered to be an employer, there is a risk that it will only prevent risks potentially leading to workplace incidents and not occupational diseases.

3. THE ANALYSIS OF THE LATEST EU INITIATIVES IMPACTING PLATFORM WORK

Aware of the challenges and the legal uncertainty that the platform economy represents for the working conditions of the people involved, in December 2021, the European Commission published a draft of a Directive on working conditions for platform work. Another parallel initiative with the potential to improve the health and safety of platform workers is the draft of the EU Regulation on Artificial Intelligence published in April 2021 (i.e., AI Act). The next section will examine to what extent these initiatives

address the challenges raised by the platform economy and complement the existing EU OHS framework.

A. Directive to Improve Working Conditions of Platform Workers: Good Intentions Falling Short

After a year of consultation with the European social partners, the European Commission published in December 2021 a draft of a Directive on working conditions platform workers.[11] The key points of the proposal are: (i) the way it addresses the issue of the employment status of platform workers by proposing that there be a presumption of employment (including a reversal of the burden of proof), (ii) its approach to algorithmic management, and (iii) its approach to transparency, remedies, and enforcement.

The rebuttable presumption of employment has been one of the main demands of the Trade Unions and has been supported by the European Parliament.[12] It addresses the problem of misclassification of the employment status when digital labor platforms exert a certain level of control over the performance of work.[13] The draft Directive provides, in Article 5, a list of indicators of employment status, and specifies that the presumption should be triggered if two of those indicators are applicable.[14] The presumption of employability should be enforced by relevant administrative authorities (e.g., the Labor Inspectorates) and judges (Recital 24). The Directive aims to reduce litigation about workers' status and to increase legal certainty (Recital 24), even if some criticisms have been raised regarding the expected effects of this presumption (Aloisi and Georgiou 2022). Even if the phrasing of the presumption needs to be improved to guarantee that as many platform workers as possible will benefit from the workers status (ETUC 2022), this Directive could address the problem of misclassification and avoid situations where workers would have the legal and financial responsibility to prevent OHS risks without having the organizational means to do it. Indeed, all the people performing work for a platform who will benefit from the presumption of employability will also benefit from the OHS protective framework (and fall within the scope of Article 3(b) Directive 89/391/EEC).[15]

In addition, Article 7(2) of the draft Directive on Platform Work addresses specifically OHS considerations, as follows:

> Without prejudice to Council Directive 89/391/EEC and related directives in the field of safety and health at work, digital labour platforms shall:
>
> (a) **evaluate the risks of automated monitoring and decision-making systems** to the safety and health of platform workers, in particular as regards possible **risks of work-related accidents, psychosocial and ergonomic risks;**

11) COM/2021/762 final. European Commission. Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work. https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2021:762:FIN.

12) European Parliament resolution of September 16, 2021 on fair working conditions, rights and social protection for platform workers—new forms of employment linked to digital development (2019/2186(INI)). https://www.europarl.europa.eu/doceo/document/TA-9-2021-0385_EN.pdf.

13) COM/2021/762 final, 9–10.

14) Ibid, 16.

15) Ibid, 2.

(b) assess whether the safeguards of those systems are **appropriate for the risks** identified in view of the specific characteristics of **the work environment;**

(c) introduce appropriate preventive and protective measures. They shall not use automated monitoring and decision-making systems in any manner that puts **undue pressure** on platform workers or otherwise puts **at risk the physical and mental health of platform workers**. (emphasis added)

This provision not only makes it clear that all the provisions of the Directive 89/391/EEC would apply (including the consultation, information, and training of the workers), but also provides new obligations for the platform (as employer) regarding some distinctive aspects of health and safety. If this provision remains and is adopted in the final version, it will be the first European legislation to recognize the impact of algorithmic management (automated monitoring and decision-making systems) on workers' health and safety and provides an obligation on the platform to evaluate these risks and adopt preventive measures in addition to safeguards to the systems.[16] It will also be the first directive mentioning work-related psychosocial risks and pressure at work (which is a psychosocial risk factor) and explicitly stating that both physical and mental health of platform workers should be protected. By completing the existing EU OHS provisions (Directive 89/391/EEC) with additional requirements addressing the specific features of platform work, this provision has the potential, if applied by the platforms, to provide adequate prevention to all the risks that platform workers are exposed to. Even if the platforms do not respect it, this provision provides a promising legal ground for litigation.

It is also worth stressing that Article 9(1) of the proposed Directive on Platform Work should ensure that information is provided to platform workers and their representatives, and that platform workers and their representatives are consulted, by digital labor platforms, on decisions likely to lead to the introduction of or substantial changes in the use of automated monitoring and decision-making systems. This provision echoes the Directive 89/391/EEC with Article 6(3)(c) ensuring that platforms must consult with the workers or their representatives on decisions to plan and introduce new technologies with the consequences for workers' health and safety. Any substantial change to AI could also be understood as a measure which may substantially affect safety and health of the workers (Article 11(2)(a)) and thus be an issue on which workers, or their representatives, should be consulted. Even if Article 9 of the proposed directive does not refer to Directive 89/391/EEC, the Framework Directive has been mentioned repeatedly and the phrasing should confirm that workers or their representatives should be consulted when the platform plans to introduce or modify the algorithmic management software.

However, even if some aspects of the proposed directive are encouraging, there are still some strong limitations and obstacles that should be addressed.

The first factor which might limit the positive impact of the proposed Article

16) Ibid, 29, Recital 38.

7(2) is that the provisions only mention psychosocial risks but neither define what they are nor provide additional obligations. As emphasized in the previous section, platform work increases exposure of workers to psychosocial risks, in particular from the constant surveillance and monitoring. Currently, there is no specific directive on work-related psychosocial risks in the EU and only the general principles for prevention of the Directive 89/391/EEC apply, alongside two European autonomous framework agreements on work-related stress (2004) and workplace bullying (2007) (Cefaliello 2021b, 2). It means that the implementation of this provisions would rely on the national rules on psychosocial risks. Yet, a mapping of national legislation, collective agreements, and jurisprudence in 26 European Member States shows that there is a fragmented approach to work-related psychosocial risks which leads to inequal protection of workers (Franklin et al. 2021, 143). This inequality is confirmed by the ESENER-3 survey, which reports a huge discrepancy between the percentages of companies in Europe reporting assessing OHS risks, and the companies reporting having procedures in place to address psychosocial risks factors, stress and workplace bullying or harassment (EU-OSHA 2019). One hypothesis might be that this inequal protection amongst sectors and countries will be replicated in the platform economy despite the adoption of this provision, unless it is complemented by another general European Directive on psychosocial risks.

The second element which might limit the positive impact of the proposal is that the provisions on health and safety at work are specific to workers and do not apply to self-employed.[17] Moreover, Recital 28 provides that a person can be self-employed "even though the digital labor platform controls the performance of work on a given aspect." This means that these self-employed persons would still be monitored and controlled by the platform and will remain in the position where they have the legal and financial OHS obligations without the organizational freedom to protect themselves. This exception might weaken considerably the positive effect of the presumption of employment and would leave the platform in a situation where they would benefit from the employers' prerogatives without the responsibilities. This approach follows the anti-domination principle currently used to distinguish employee and self-employed (Garben 2017, 20; Rogers 2016, 483). However, an alternative approach is possible. The functional approach shifts the focus from the worker to the employer (Prassl and Risak 2015, 632). As a consequence of receiving labor and its fruits, the platform may be the appropriate party to ensure compliance with OHS Standards (Garben 2017, 21). This would have the benefit to provide better OHS protection to all people providing work to the platform and being impacted by the conduct of the undertaking.

The third limitation is the narrow understanding of "measures controlling the performance of work." Indeed, according to Recital 25: "Measures or rules which are required by law or which are **necessary to safeguard the health and safety of the recipients of the service** should not be

17) Ibid, 17.

understood as controlling the performance of work" (emphasis added).[18] The problem is that sometimes measures that are initially implemented to protect the customers are also mechanisms that control the performance of work (Cefaliello and Kullmann 2022, 546). In the United States, there have been already examples of AI being used to predict the likelihood of the driver being involved in an incident or a conflict. This measure aims at guaranteeing the safety of the customers and leads to drivers being controlled and temporarily suspended if the driver is considered by the AI system to be dangerous, which is a form of sanction (Lin 2021). Already in some countries, employers are legally authorized to monitor workers' behaviors to ensure compliance with OHS requirements, and to manage risks (Aloisi and De Stefano 2022, 58). I would argue that regardless of the reason for the implementation of AI, its impact on workers' health and safety should be evaluated and harms from the AI system prevented.

A fourth limitation relates to the enforcement of the presumption of employability, and of the requirements for OHS prevention. In its proposal, the Commission underlined the crucial role of "robust monitoring and inspection" in ensuring compliance and enforcement. Some authors advocate for "platforms (to) be compelled to supply any such inspectorate with appropriate and sufficient information to inform policy development around social protection and rights for gig workers" (Forde et al. 2022). This would mean that national authorities would not have to actively collect information but would receive it automatically. Placing the "burden" of communicating the relevant information on the platforms (which are the entities already in possession of such information) would also be a way to address the difficulties faced by labor inspectorates previously outlined in this paper.

To conclude, the Platform Work Directive addresses some of the key challenges that platform workers have to face, such as misclassification, risk of algorithmic management, and work-related psychosocial risks (amongst other risks). However, some limitations (whether in the scope or in the definition in the draft Directive) might lead to a restrictive impact of these provisions in practice, leaving some platform workers unprotected even if they are under the control of the platform. Also, this Directive covers only platform workers and does not address the problem of algorithmic management (and associated risks) for other workers who might face similar pressure.

B. The AI Act: A Missing Opportunity to Start Addressing Risks that AI Represents at Work

Some provisions of the Directive on Platform Work resonate with another European initiative under review: the regulation on artificial intelligence in the AI Act. Indeed, the proposed Directive on Platform Work aims at ensuring human monitoring of the impact of automated systems on working conditions with a view to safeguarding basic workers' rights and health and safety at work.[19] Article 6(1)(b) (and Recital 32) imposes an obligation of transparency for platforms in relation to: "automated monitoring and decision-making systems that are used to monitor, supervise,

18) Ibid, Recital 25.
19) Ibid, 4.

or evaluate the work performance through electronic means; and automated decision-making systems which are used to take or support decisions that significantly affect working conditions, … their occupational safety and health.”

According to the Commission, further clarity and understanding of “the algorithmic practices used to influence the behavior of people working through platforms (e.g., nudges such as bonuses for faster food delivery during peak demand periods) would allow to prevent health and safety risks, including stress and psychosocial risks which are widespread in platform work”.[20)]

The Commission recognizes that the Directive on Platform Work intends to complement the AI Act provisions. The AI Act is product safety legislation aiming to introduce safeguards before AI systems are placed on the market, put into service, and used. The European Commission stressed that the rules for AI should be human-centric and guarantee that this technology is used in a way that is safe and respectful of fundamental rights.[21)] Thus, the AI Act adopts a risk-based approach and differentiates between AI creating (i) an unacceptable risk, (ii) a high risk, and (iii) low or minimal risk. AI creating unacceptable risks is prohibited. However, AI systems creating a high risk to health and safety or fundamental rights to natural persons (including workers) are permitted on the European market if they comply with a list of requirements (Title III). Algorithmic management systems are considered as high-risk AI systems. Annex III, 4 to the AI Act specifies that high risk AI systems include:

> (b) AI intended to be used for making decisions on promotion and termination of work-related contractual relationships, for task allocation and for monitoring and evaluating performance and behavior of persons in such relationships.

Before being placed on the market, and in order to be considered safe, the provider of high-risk AI should conduct a risk assessment, including of the risks that may emerge when the high-risk AI system is used in accordance with its intended purpose and under conditions of reasonably foreseeable misuse (Article 9(b)). Amongst other obligations, providers of the AI should design and develop these systems in a way that guarantees sufficient transparency to enable users to interpret the system’s output and use it appropriately (Article 13). Similarly, these AI should include human-machine interface tools allowing a natural person (e.g., a worker) to oversee AI functioning (Article 14). Human oversight should aim at preventing and minimizing risks to health and safety. Additionally, the users of such an AI system also have obligations (Article 29) such as to monitor the functioning of the AI and report any serious incident or malfunctioning, to keep the log generated by the high-risk AI, and to use the AI according to the instructions of use accompanying the systems.

Even if the AI Act belongs to product safety regulatory framework, scholars have already identified the risks that this proposal

20) Ibid, 38.

21) COM/2021/206 final. European Commission. Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain union legislative acts. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0206, 1.

represents for labor law (Ponce De Castillo 2021; De Stefano and Aloisi, 2021). Indeed, as soon as AI is intended to be used in employment context, it is integrated in the work organization, as it is the case in platform economy, and the employer becomes subject to both labor law (including OHS) and the AI Act (as a user, and sometimes, a provider). Regarding the impact on the OHS regulation, Cefaliello and Kullmann (2022) have identified overlaps between the AI Act and the Directive 89/391/EEC and argue that AI software intended to be used in the employment context should be developed and deployed in a way that guarantees the protective purposes of OHS legislation. For example, when the provider identifies a risk for the health and safety of the (end) user, some space should be left to the workers' representatives to adjust the functioning of the AI to the work organization (e.g., setting target goals that guarantee the physical and mental health of workers and not placing them under undue pressure).

Additionally, reporting mechanisms to third-party agencies should be accessible to workers and their representatives, which is not the case in the current draft of the AI Act. Such adjustment of the AI Act would also be coherent with the provisions proposed by the Platform Work Directive. Indeed, it is not clear how the platform can assess and prevent the risks of algorithmic management if there is no way to adjust the functioning of the algorithm. Even if the platform workers and their representatives have the right to be consulted when new AI is introduced to the work process (or if there is a change in the work organization impacting their health and safety), their inputs will be limited if the way the software is used cannot be adjusted to the needs of the specific work process.

Thus, even if the AI Act does not take into account the specific dynamics of employment relations, it still applies to situations of employment. None of the provisions of the current draft would address the problem of misclassification but acknowledging the link between the development of the algorithmic management software and the risks it might create for the workers could be a way to influence how AI should be developed. If providers adopt a "worker-centric" approach while developing AI software intended to be used in the employment context, it will have the potential to leave some space for the participation of health and safety representatives and lead to real prevention of occupational risks.

4. CONCLUSION

Platform workers are exposed to traditional risks linked to the nature of their jobs (either online or on-location), and the specificities of platform work, and especially the use of algorithmic management, add another layer of risks. The constant monitoring and evaluation of workers by platforms exacerbate psychosocial risks and place workers under additional pressure, which may lead to work injuries. All these risks are preventable but under the current approach, the agent legally and financially responsible for OHS prevention—the "self-employed" platform worker—is not the one with the organizational powers required for effective collective prevention. In some respects, the recent draft Directive on Platform Work offers interesting possibilities to improve the health and safety of workers involved in the platform economy.

First of all, regarding the misclassification

of platform workers as "self-employed" that places them in situations where they are expected to prevent OHS risks while being under the control of the platform, the proposed directive provides the possibility that workers might benefit from a presumption of employment. By introducing the presumption of employment, this Directive aims at reducing legal uncertainty and guaranteeing that OHS standards will apply to platform workers. However, the requirements needed to trigger the presumption, and the fact that some workers who are controlled by the platform can still be considered as self-employed, might limit the impact of this presumption in practice. Issues like the one faced with litigation efforts might appear. Indeed, even if litigation to recognize platform workers as "workers" (and not self-employed persons) has mostly been successful, it has not led to structural changes in the way platforms operate.

Secondly, in its Article 7(2), the Directive recognizes for the first time the impact of algorithmic management on workers' health and safety; and refers for the first time to psychosocial risks and mental health. This is a good start, but merely mentioning the risks is not enough to adequately prevent them. Indeed, national examples of legislation on psychosocial risks factors, such as The Danish Executive Order adopted in September 2020,[22] take a more sophisticated approach to these issues. Thus, if the draft Directive is adopted as it is, it signals that those work-related psychosocial risks are a topic which needs to be better addressed at a later stage, not only for platform workers but for all workers, with the adoption of a Directive on work-related psychosocial risks.

Thirdly, the Directive on Platform Work provides that platforms should inform and consult the workers or their representatives, which could signal a step toward social dialogue, and which should address the consequences of the planning or introduction of AI at work. However, in practice, traditional trade unions have experienced difficulties in the past in organizing platform workers.

Fourthly, the platform work proposal relies on relevant administrative authorities (e.g., Labor Inspectorates) and judges to enforce the presumption of employability, and relevant provisions. Platform work embodies and combines more general OHS challenges, in terms of both the nature of the risks and organization of OHS prevention. Effective prevention requires strong health and safety representatives, labor inspectorates, and possibilities to litigate, and even when they will be considered as workers, it might be difficult to establish health and safety representatives in some countries. Additionally, labor inspectorates are under-resourced and are not (yet) equipped to monitor compliance with OHS standards in fragmented workplaces (both in private and public spaces).

Thus, even if this proposal seems promising, some aspects which might lead to a narrower protection of platform workers than expected should, hopefully, be addressed during the on-going ordinary legislative process. Some provisions of the Directive on Platform Work could be a source of inspiration to address the gaps that have been identified in the AI Act for AI software intended to be used in the employment context. To conclude,

22) Available in English at: https://at.dk/en/regulations/executive-orders/psychosocial-working-environment-1406/ (accessed August 17, 2022).

platform workers have suffered from being the "guinea pigs" of the un-regulated development of the gig-economy; but it seems that the European Directive to improve their working conditions might open paths to address broader OHS challenges, in particular regarding the use of AI. Let's hope that it will not end up as a dead end.

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CONFLICT OF INTEREST STATEMENT

The author confirms that there is no potential source of conflict of interest.

Reconsidering Working Time Regulation for the Protection of Platform Workers' Health and Safety

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Abstract: This paper addresses health and safety regulation and working time in platform work, with a focus on food delivery services. In recent years, platform work has highlighted many challenges in legal debates, and health and safety is one of the "hot topics" informing academic discussion. The paper reviews existing literature on working time and health and safety in platform work and draws on qualitative research on delivery riders' working experiences to identify some of the pressing issues. It then presents the current legal regulatory framework, from European Union and United Kingdom perspectives, identifies challenges, and establishes the importance of working time regulation to improving riders' health and safety protection.

Key words: Working time, Platform work, Health and safety, Labor law, Gig-economy, OSH regulation

1. INTRODUCTION

New structures of work organization, such as platform work, have profoundly affected the legal debate on employment regulation from many angles and perspectives. While the discussion around the legal classification of platform workers has been at the forefront of the analysis, due to the implications of the subordinated relationship between the platform and the worker, for rights and obligations, other themes have been crucial to increase the understanding of the organization and regulation of platform work. Forms of collective negotiation and resistance (Tassinari and Maccarrone 2017; Prassl 2018a), algorithmic management and work organization (Aloisi 2019; Lehdonvirta 2018; Prassl 2018b; Wood 2021), health and safety (Christie and Ward 2019; Apouey et al. 2020; Beckman et al. 2021), and gender issues (Gerber 2022; Warren 2021) have been central themes in research on platform work, both in developed and developing countries. The global scale of the phenomenon of platform work holds much wider implications than those strictly connected with national regulations, and it has required the intervention of international actors, as in the case of the European Union (EU), to avert social dumping and a race to the bottom on labor and social welfare rights. Furthermore, globalization in platform work brings challenges of integration of services in global supply chains, reproducing old dynamics of labor exploitation (to the extreme of gang-mastering practices and forced labor) which have required the intervention of strict measures and criminal sanctions (Inversi 2021).

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In this context, platform workers' health and safety has been at the center of public debate. Issues of risks to workers and their well-being, especially during the COVID-19 pandemic, have dominated the media debate (Inversi, Cefaliello, and Dundon 2020), with little response from legislators. However, the legal context for platform workers is rapidly changing, with more and more jurisdictions in Europe attributing employment status and connected rights (and therefore the application of occupational safety and health [OSH] rights and obligations), although a comprehensive framework for the regulation of platform workers' health and safety is still to be established. At the moment, the most important legislative initiative within the European context is the *Proposal for a Directive of the European Parliament and of the Council on Improving Working Conditions in Platform Work (2021/0414 (COD))*, which aims to provide common rules around platform work and employment status recognition within the EU member states, alongside basic regulation on algorithmic management, thereby providing minimum rights for genuine self-employed people. Despite this being an important step within the EU framework of social rights, as will be outlined later, the current regulatory initiative to fill the gaps in platform workers' protections brings challenges, in particular in regard to algorithmic management regulation and the possible implications for health and safety. As this paper draws on qualitative empirical research conducted in the United Kingdom (UK) between 2016 and 2019 (Inversi 2018), it looks at platform work from the perspective of health and safety regulation in the UK and EU. The paper considers working time regulation as one of the fundamental pillars of health and safety regulation and takes into account the influence that the EU legal framework has on the UK regulatory system. Indeed, the EU debate on working time regulation has been one of the contested terrains, among others, that widened the fracture between the UK government and the EU, and resulted in the so-called "Brexit" process. Despite the UK leaving the EU, effective as of February 1, 2020, it is important to highlight that the two legal systems are intertwined and therefore require parallel analysis. Furthermore, as will be outlined later, the global scale of platform work calls for international responses which need to be further explored.

The aim of the paper is thus to present the current regulatory framework on working time for platform workers, considering working time as a fundamental dimension of health and safety, in order to advocate for greater attention by regulators. This is both to address current issues and to regulate for better, more transparent, fair, and participative working standards. The paper first reviews existing literature on working time regulation and its effects on health, safety, and work-life balance, with a special focus on the opportunities and the risks arising from platform work, especially for food delivery services. Then, the paper draws on qualitative research to further describe current practical challenges and issues that delivery riders face while performing their jobs, or as a structural effect of platform business models. Finally, the paper addresses some of the legal responses that have been put in place in the EU and in the UK, adding to the debate on the regulation of digital platforms from the health and safety perspective.

2. RE-ASSESSING THE IMPORTANCE OF REGULATING WORKING TIME FOR PROTECTING WORKERS' HEALTH AND SAFETY

The evolution of working time regulation (through formal and informal channels) is pivotal to understanding the future of work (Blyton 1985). This is true both from a quantitative perspective, with the expansion of labor markets in new areas of economic activity such as platform work, and from a qualitative one, which entails a discussion of working conditions and employment rights, including health and safety and working time arrangements.

Historically, the purpose of regulating working time was to sustain and organize the industrial model, by treating time as a means of managing and disciplining working relations, both individually and collectively (Thompson 1967). From an individual perspective, working time has been conceived as an instrument of control in exchange for wages; from the collective side, its objective has been to establish discipline and solidarity (Supiot 2001). Only at a later stage, the discourse about working time regulation in labor law has been strongly linked to the protection of health and safety (Sparks et al. 1997; Adnett and Dawson 1998) and to the promotion of work-life balance, especially in relation to gender issues (Rubery et al. 2005; McCrate 2016; Vincent 2016; Zbyszewska 2016).

Within the EU, working time regulation has been specifically introduced as a means to protect workers' health and safety. In 1993, the EU enacted the first directive on working time (Working Time Directive 93/104/EC), as the basis for regulating some fundamental aspects of time at work such as a limit on maximum working hours, rest breaks, and minimum holiday entitlements. This first instrument was then replaced by a second directive (2000/34/EC), which expanded the application of working time protections to sectors previously excluded (such as transport, maritime activities, and medical training). Both directives were then recast in a final directive, the Working Time Directive 2003/88/EC (hereafter WTD).

Considering its reception within EU member states, friction regarding the scope of the first WTD is noteworthy in the UK, which did not have a tradition of regulating working time through statutes and historically delegated negotiations to the collective bargaining system. Indeed, regulations on working time were introduced in the UK following a turbulent path. The scope of the first WTD was challenged before the European Court of Justice as the UK government did not consider the regulation of working time to be a health and safety issue. This claim was made in the attempt to undermine the adoption of the WTD by the EU, challenging its legislative competence (power) and interpretation of labor law definitions. While the EU argued that its competence was legitimated by Article 118A of the Amsterdam Treaty (now Article 153.2 TFEU[1)]), the UK challenged the EU Commission before the European Court of Justice, contending that the WTD should have been adopted on the basis of a different source of legitimacy (namely Article 100 or Article 235 of the EC Treaty), which required a different and more stringent procedure for its adoption (the unanimity of the Council) that

1) TFEU: Treaty on the Functioning of the European Union.

would have guaranteed a sort of "veto power" to countries that opposed it.[2)]

Eventually, the European Court of Justice rejected the UK claim and determined that working time regulation was directly related to issues of the health and safety of workers in their working time environment, thus establishing that the power given by Article 118A (153 TFEU) of the Amsterdam Treaty did have effect in this specific matter (Van Nuffel 1997; Fitzpatrick 1997). This decision has been pivotal to reinforcing the scope of working time statutory regulation, due to the primary importance given to health and safety competences (powers) within the EU institutional and regulatory framework. At the same time, however, the dispute reveals the strenuous opposition of the UK to the WTD, and to the EU competence to regulate the field. The resistance to the WTD, and more broadly to any statutory regulation on this matter, has been explained as the product of an "orthodox economic theory" perspective, which assumes that competition will be able to force any employer to accommodate individual employees' preferences on working time (Adnett and Hardy 2001). Even after reaching the peak of the dispute in terms of legislative competence and sovereignty, and with the ultimate withdrawal of the UK from the EU, this orthodox economic perspective is still part of UK government policy, especially if we consider its position towards new working time regulations and the regulation of digital labor platforms (Inversi, Dundon, and Buckley 2022).

After the enactment of the WTD, the European Court of Justice has played a fundamental role in filling the gaps left by the statutes in the definition of working time, a subject that has been at the forefront of legal discussion and Court disputes. In fact, the dualistic approach outlined by the WTD in Article 2, concerning the definition of working time and rest time, has caused many problems of interpretation, and attracted criticism. The original conceptualization of time in employment regulation rested on a rigid dichotomy between working time and rest time. This bipolar structure can still be found in European statutory regulations and has been strongly criticized for its rigidity and ineffectiveness in embracing a holistic notion of working time (Bavaro 2009), with consequential difficulties in its application in relation to new forms of work organization such as platform work (Inversi 2019). Furthermore, the definition has been condemned for its negligence in considering issues such as "reproductive time,"[3)] "on the job inactivity," and "consumption time"[4)] (Supiot 2001). The dualistic approach outlined by the WTD considers time just as a static and unitary measurement of the working activity, and it is difficult to adapt to non-standard forms of work. Indeed, the current definition of working time in the WTD seems to disregard new forms of work organization, in particular

2) *United Kingdom of Great Britain and Northern Ireland v Council of the European Union* (C-84/94).

3) This concept refers to the time dedicated for social reproduction and care, which has been consistently and historically allocated to women, diminishing their capacity to participate in the labor market and to obtain recognition for unpaid work (Wajcman 2015).

4) These definitions refer to issues of working time organization and utilization, which have been addressed by the European Court of Justice with the attempt to clarify working time definitions in "grey areas" such as on call work, time spent for preparation to work and traveling, etc. (see Inversi 2019).

if we consider new ways of organizing work through algorithmic management.

The intervention of the European Court of Justice has been critical in shedding light on the boundaries of the working time definition, dealing with issues such as on call work, stand-by time, and traveling time.[5] However, the Court of Justice's interpretations have not addressed the lack of an "intermediate category" between working time and rest time, or found a definition able to encompass elements such as work intensity and productivity, thus leaving major space for employers to determine working arrangements and conditions. The position held by the Court of Justice has attracted consequential criticism by some member states, who have sought a substantial revision of the WTD (Roccella and Treu 2012). Since 2004, the EU Commission has launched a process for the review of the WTD, on the premises that changes in the world of work have had on-going impacts on working time, from social, economic, technological, and demographic perspectives. The process has failed at consultation stage, and this failure has led to the adoption of non-binding recommendations on working time. These measures are unusual in OSH regulation, which historically has followed the path of legally binding regulations and provisions.

Further attempts to revise the WTD led to a series of consultations with social partners in March and December 2010. This resulted in the production of a series of reports on the legal implementation of the current directive, and in cessation of negotiations in 2012 as it was impossible to reconcile strategies, objectives, and contents of a revised WTD between European representatives of workers and employers. As a counterbalance to the failure to provide new statutory regulation, the EU Commission then adopted an *Interpretative Communication on Directive 2003/88/EC of the European Parliament and of the Council concerning certain aspects on the organization of working time* (2017/C 165/01). The aim of this was to provide guidance on interpreting the WTD in the light of evolving case law. Since then, revision of the WTD has not been on the agenda, but some steps forward have been made in relation to some areas relevant to working time and casual work, such as the enactment of *Directive 2019/1152 on Transparent and Predictable Working Conditions*, as illustrated below.

From the historical account presented, it is possible to see how working time regulation, despite being recognized as a fundamental pillar of workers' health and safety protection, has been regarded in the last decades as the "Cinderella" of health and safety regulation. This is both for its light touch approach to standard setting, which permits opt-outs (as in the case of the UK in particular) and derogations to the limits for maximum hours (Barnard, Deakin, and Hobbs 2003), and for

5) See, for instance, *Sindicato de Medicos de Asistencia Publica (SIMAP) v Conseilleria de Sanidad y Consumo de la Generalidad Valenciana*, C-303/98, European Court of Justice, October 3, 2000; *Landeshauptstadt Kiel v Norbert Jaeger*, C-151/02, European Court of Justice, September 9, 2003; *Federacion de Servicios Privados del Sindicato Comisiones Obreras v Tyco Integrated Security SL*, C-266/14, European Court of Justice, September 10, 2015; *MG v Dublin City Council*, C-214/20, European Court of Justice, November 11, 2021. (It is important to note that the latter case involves a part-time firefighter who has been permitted to carry out a professional taxi driver secondary activity; this case is potentially interesting for future platform work considerations, when workers need to combine primary work with secondary activities in the platform economy).

the soft-law instruments adopted in attempting to re-regulate the field. However, research on new forms of work and organization indicate the pressing importance of improving working time regulation, both to guarantee basic employment rights, and to advance health and safety protections (Genin 2016; ILO 2019). Indeed, if we look at the evidence presented by scholars linking working time to health and safety and work-life balance, it is possible to highlight how these themes are becoming more and more relevant in the era of "work fragmentation" and platform work (EU-OSHA 2020; HSE 2017). Here, I will refer to some of the possible points of discussion, acknowledging that the limited scope of this paper will not allow consideration of all the possible health and safety implications of regulating working time.

First, it is important to bear in mind that there is a historical divide with the working time experience of high skilled workers and low skilled workers, with the latter having proportionally less autonomy in determining their working time, both from a quantitative dimension (desired number of hours) and an organizational one (when and where to work and at what pace). Low-skilled jobs are over-represented in that portion of the workforce that is more likely to work during unsocial hours (Eurofound 2016), with retail workers suffering "time famine" and schedule unpredictability, thereby increasing stress and anxiety, and reducing work-life balance (Wood 2018). These same issues are found in platform work (EU-OSHA 2020) and, in particular, in the food delivery sector which this paper explores. This may not be obvious, especially as the innovation that the platform economy claims to bring in the world of work is one of higher control on working time (Inversi 2018), in its duration, organization, and tempo.

The "precaritization" trend is even more evident when it comes to analyzing the gender dimension, where female workers are more likely to be found in involuntary part time jobs and those with reduced working hours (McCrate 2005, 2016, 2012; Gerber 2022). In regard to gender, work life balance studies are considered to focus too much on questions about working time from a duration point of view, and not enough on time squeeze, which is a more pressing issue in terms of health and wellbeing when analyzing working time patterns in platform work (Warren 2021). However, it is important to emphasize that, depending on the nature of platform work (Howcroft and Bergvall-Kåreborn 2019; Howcroft, Dundon, and Inversi 2019; De Stefano 2016), experiences around health and safety risks and issues related to work-life balance differ. For example, types of crowdwork performed in workers' own homes entail similar risks to telework, while types of on-demand platform work requiring physical presence at workplaces have features in common with more traditional OSH risks (Cefaliello and Inversi 2022). In this respect, it is important to understand the nature of the risks that platform workers are facing, to have a clearer picture on their needs and demands in terms of protection, as will be done in the next section.

3. RIDERS' EXPERIENCE OF WORKING TIME AND THE HEALTH AND SAFETY IMPLICATIONS

This section outlines some of the possible hazards and OSH issues that riders experience while working through platforms, focusing on

the sector of on-demand delivery services in the food industry (see also the article by Elizabeth Bluff, Richard Johnstone, and Michael Quinlan in this special issue). In a recent report, EU-OSHA (2019) has highlighted that workers in non-standard and poor-quality forms of work tend to have poorer physical and mental health. The report points out that within the platform economy risks are likely to be aggravated by specific features of work organization, such as short notice communication of work availability, punitive measures for not being available, excessive fragmentation of jobs into micro tasks, continuous evaluation and rating of performance, irregular working hours, blurred boundaries between work and private lives, uncertainty of rights linked to unclear employment status, insecure income, lack of training, lack of social welfare and holiday as well as sick pay entitlements, lack of collective representation, and no clarity on OSH responsibility and liabilities (see also the article by Aude Cefaliello in this issue).

Through empirical qualitative data collection, this paper reinforces the evidence of connections between the specific features of food delivery work for digital labor platforms, and the effects on workers' physical and mental health. This qualitative analysis of a case study of Deliveroo riders in three UK cities (Manchester, Brighton, and London)[6] found that OSH is a predominant issue in the on-demand food delivery sector, and it is affected by both the temporal and the specific organization of riders' work. The research identified some important OSH concerns, particularly relating to working time.

First, working time in on-demand delivery services appears to be extremely variable, which has implications for the definition of boundaries between working and private lives, and recognition of time spent while being "on call" (Huws, Spencer, and Syrdal 2018). Depending on the contractual agreements and pay arrangements, some workers experience a true "hours famine" and uncertain shift allocations, for instance, where work is assigned by shifts allocated by the management and paid with an hourly rate. Others, working in areas where work is organized and paid "by delivery," suffer from the oversupply of work by an uncontrolled labor offer which increases the length of unpaid waiting time. Both organizing structures put riders in uncertain working time patterns and irregular schedules, at the detriment of their job, income

6) In order to understand OSH issues and workers' perceptions of them in platform work, I drew data from a large number of qualitative interviews undertaken in 2017-2018, with Deliveroo riders and their trade union representatives. Data were generated in forty interviews with Deliveroo riders, and nine interviews with trade unions officials and think tank representatives at the national (UK) level. Additionally, further data were collected through an online survey which was circulated amongst riders in the UK. The number of responses to the survey was very low (n=19) and therefore not useful for quantitative purposes. However, the survey included a "blank comment box section" where riders could write about working relationships and working time issues at Deliveroo. This information was included in the qualitative data, alongside interviews, and it has been integrated in the findings. The data collected are part of doctoral research and informed part of the PhD dissertation (Inversi 2018).
The interviews with key regulatory informants and Deliveroo riders were conducted through a semi-structured interview format. In some cases, interviews were conducted via Skype or telephone calls. Access to interviewees was obtained by contacting relevant institutional bodies or key actors (management, trade unions, employers' association) and by adopting a "snowball strategy." Interviews with riders were mostly held in public spaces and recorded with the agreement of the rider, following ethical and professional standards in research (according to the University of Manchester guidelines).

security, and work-life balance. These results consistently clash with the idea that platform work can accommodate riders' preferences in terms of work organization. As a rider testified:

> In practice I need to work when it's busy—I can't choose to work during quiet period if I prefer, because there is no work (Brighton rider 43).

The second issue relates to the policy of business incentives to work in unsafe conditions. At the moment, delivery platforms are not obliged to provide riders with regular work (unless riders have been classified as employees) but can call in workers as needed if the service offer is too low. For instance, this practice is very common in times of bad weather conditions, like rain or snow, when riders are given special offers and pay rises to boost the service offer to clients. Through these offers the platform is *de facto* incentivizing workers to work under extreme or undesirable conditions. Because of the high competition between riders and implications in terms of work allocation (i.e., the possibility of having more hours or jobs allocated in the next days or weeks) this system appears to hide forms of constraint towards riders, who ultimately feel pressured to accept work even if this may cause higher risks for their health and safety (increased risks of accidents and illnesses). In terms of mental health, these practices put workers in a similar situation to that in which unemployed people find themselves, if not worse (Chandola 2017).

In addition, the performance pressures that the platform puts on workers affect their physical and cognitive capabilities, to the detriment of riders' health and safety and contrary to the preventive OSH principles.[7] Riders in this study felt pressured to ride faster, not only to maximize income and rewards, but also because of platform policies (and the rules set by algorithmic management) imposing negative outcomes in case of poor performance or low orders acceptance rates. The adverse experience of working time is coupled with hyper fragmentation of tasks, which are all monitored and controlled, generating a sense of anxiety and stress. As a rider explained:

> [work] It's very, very, very, very rushed. So everything is recorded, because it is an app, everything is timed. They know exactly where you are and when you logged in, and they know exactly how long it took it, when you collected and delivered, how long before you accepted and before you got to the restaurant. And so every week they would send you stats on how you are performing … And they would say they actually use this so they can determine whether or not you can get more hours or less (Manchester rider 1).

Third, when considering compliance with the WTD, in terms of hours spent at work, rests and holidays, the study found that the platform

7) Article 6 of Directive 89/391 sets down the following general preventive principles: (a) avoiding risks; (b) evaluating the risks which cannot be avoided; (c) combating the risks at source; (d) adapting the work to the individual, especially as regards the design of work places, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work rate and to reducing their effect on health; (e) adapting to technical progress; (f) replacing the dangerous by the non-dangerous or the less dangerous; (g) developing a coherent overall prevention policy which covers technology, organization of work, working conditions, social relationships and the influence of factors related to the working environment; (h) giving collective protective measures priority over individual protective measures; (i) giving appropriate instructions to the workers.

disincentives riders from taking any time off from the platform. Riders explained that good performance and constant presence (no absences or interruptions due to holidays or sick leave) were the elements considered for allocating time and deliveries, and therefore better pay. On the contrary, the platform "punished" riders for taking time off due to work-related injuries and a diminished capability to get work.

> Eventually this Christmas they really mess me around and that's when I decided that enough was enough … During the end of the year when I was cycling downhill, I hurt my knee and I asked to take shifts off to recover because it is not good to have so many hours with a bad knee. For some reason I got punished about that, I don't know why. I sent emails, the reply I got was "we are very disappointed" and they made it very difficult after Christmas to get my hours back (Manchester rider 2).
> I came back from a holiday, and I have gone from having secure working hours of 40 or even more hours a week to then just nothing (Manchester rider 7).

As a fourth point, constant monitoring enabled by algorithmic management has an impact on workers in terms stress and anxiety (HSE 2017). In particular, when riders are not informed of the extent of control and the possible unilateral use of information by the platform, their agency seems to be restrained and their possibility to challenge the platform appears to lessen. This aspect of work management clashes again with the idea of independent work, which platforms claim in order to underpin the non-existence of an employment relationship.

> They used to give us stats on performance, but they stopped in the interest of trying to defeat our (the Union's) claim against riders being independent contractors. They still measure our performance, but we don't see it. They will fire you if you don't meet the standards. We don't have a good chance of challenging any disciplinary action without knowing what our stats are (Rider from survey).

A further point to highlight is that because platform work is coordinated and overseen by algorithmic management, workers can lose control over work content, pace and schedule, and the way they do their work (Moore 2018). Riders' autonomy appears to be limited. Furthermore, the platform is not supportive and nor is it communicative when the riders try to reach out. The data analysis suggests that a form of middle management does exist, especially in the management of work offers. Workers claim that the management is, in some areas, micro-managing hours, but are frustrated by there being just one-way communication:

> Deliveroo changes hours as they wish, the riders have very little influence on the hours we are offered, and most people are offered significantly less hours than they want (Rider from survey).

> They can get you and breathe on your neck but if you need them they are absolutely not there (Rider from survey).

Finally, there are some crucial points relating to more "traditional" risks that affect the OSH of delivery riders. They are subject to road accidents, physical injuries, and the possibility of physical or verbal abuse (Christie and Ward 2019). As an added layer of risk, riders testified that their sense of being unsafe is increased

because they work alone, and because it is very difficult to communicate with, and receive assistance from, the platform management in case of accidents or when they feel unsafe. When referring to a series of criminal assaults made by robbers through "fake orders" in some isolated areas of Manchester, a rider pointed out:

> They say we know it doesn't happen anymore because we prevent it. They are completely pretending [it] does not happen, but it does. The only thing you can actually do is say to my friend, "hey would you come with me?" And then you would go … every time I went to Moss Side I would say "come with me" and we both ride. And if Deliveroo rang and ask, "why are you going there you are not on a job there it takes so long" I would just say "oh because you made me do dangerous jobs, it's not safe to and I am taking precautions" (Manchester rider 1).

In conclusion, it should be noted that riders in this study had very different experiences in work allocation, which resulted in polarization of working time between them. In areas where shifts were allocated by the platform and paid on an hourly rate, some riders were only able to obtain a few hours a week. By contrast, other riders were allocated a much higher number of hours, and sometimes excessive hours; one of the riders interviewed disclosed that he was working sixty hours a week and he was able to get however many hours he desired. The issue of working time monitoring and control, in compliance with maximum hours of work to protect riders' safety (and others' safety from a road transport accidents point of view), is central to the debate. Considering the potential of algorithmic management and access to data it is contended that, if control can be exerted towards riders' performance and working time, the same could be done to protect their health and safety, by monitoring maximum hours worked, rests periods, holidays, and so on. However, this is particularly challenging from a legal standpoint when regulating for employment rights recognition and transparency in algorithmic management, as is happening (or might happen), for instance, at the EU level.

4. HOW THE PLATFORM ECONOMY RE-CONSTRUCTS ON-DEMAND WORKERS' TIME, SAFETY AND HEALTH, AND THE LEGAL RESPONSES

As anticipated earlier, the present section analyzes some of the legal responses that have been put in place in the UK and EU that address platform workers' health and safety and working time issues. As has been outlined by legal scholars, the OSH regulatory paradigm has been built around the concept of the "standard employment relationship (SER)," leaving major gaps in protection for forms of work that are casualized, precarious, and non-unionized (Johnstone, Quinlan, and Walters 2005). This is particularly true for platform workers, where the uncertainty of the relationship between the platform and workers affects the application of a stable and certain OSH legal framework (Cefaliello and Inversi 2022). However, Courts in various jurisdictions have intervened to address some of the issues around the legal recognition of employment status. It is not within the scope of the present paper to examine in depth such case law and interventions, but it is important to highlight these processes in order to understand the movement in the regulation of platform work.

This section aims to shed light on some

specific issues related to health and safety that are affecting the current debate. First, it is contended that issues of legal recognition impede the application of the current European OSH regulatory framework, and the same is true for the UK. Where an employment relationship is recognized in a particular work arrangement, the application of OSH regulation (either by statute or by case law) appears clearer, both within the EU framework and in the UK. However, when self-employment or *quasi*-self-employment is in place (such as the case for "limb(b) workers"[8)] in the UK) the framework appears to be much more complicated and fewer protections are in place.[9)]

When looking specifically at the issue of working time regulation, its pressing regulatory relevance in platform work can be found in the UK *Uber* case,[10)] where the Working Time Regulations 1998 (which transposed the WTD into UK law) were used to assess drivers' employment status and guarantee basic workers' rights, such as respecting working time protections and equality law.[11)] The same conclusion was not drawn, however, for UK Deliveroo riders, with the Court taking an opposite view regarding employment recognition, and consequently excluding them from the application of the OSH legal framework and from protections granted by the WTD.[12)]

Aside from the UK Deliveroo judgment, Courts' decisions against platform businesses (such as Uber, Deliveroo, and Foodora) in almost all European countries (including the UK) have highlighted working time and health and safety issues for platform workers, intervening with protective judgments to counterbalance legislative inaction at multiple levels. In the UK, this is the case in the judgment of the High Court of Justice (HCJ) in *IWGB v SSWP and others* in October 2020, regarding health and safety concerns for platform workers during the COVID-19 pandemic. The decision addressed the application of health and safety protective measures granted by EU law to platform workers classified as "limb(b) workers" (the legal status recognized in the *Uber* judgment above), granting them some of the traditional employment protections, such as those relating to working time, equality, and some provisions of OSH regulation. The Court found the UK in breach of implementing two fundamental articles:

- Article 8(4) and the second paragraph of Article 8(5) of Council Directive 89/391/EC on the introduction of measures to encourage improvements in the health and safety of workers at work (the so-called Framework Directive).

8) Section 230(3)(b) of the Employment Rights Act 1996 states the following: In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under): (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

9) For a deeper discussion on the UK OSH regulatory framework applied to platform work, see Cefaliello and Inversi (2022).

10) *Uber BV v Aslam* [2021] UKSC 5.

11) The Equality Act 2010.

12) *Independent Workers' Union of Great Britain (IWGB) and RooFoods Limited T/A Deliveroo* [2021] EWCA Civ 952.

- Article 3 of the Council Directive 89/656/EC on the introduction of minimum health and safety requirements for use by workers of personal protective equipment at the workplace (the so-called PPE Directive).

This HCJ decision imposed an obligation on the UK state to guarantee the application of health and safety measures to platform workers. It condemned the inertia of the UK legislator, particularly at a time when these workers have been considered "essential" but at the same time deprived of protections (Hobby 2021).

In a very different case, the Italian Criminal Court of Milan condemned Uber Eats for the use of illegal intermediation and gang-mastering, after the public accusation provided evidence of severe labor exploitation and gang-mastering practices by intermediaries contracting directly to Uber and subcontracting to delivery workers: practices encouraged by Uber Italy Srl.[13] In particular, Uber Italy Srl was found recruiting its riders in refugees homes (the so-called CAS—Centri di Accoglienza Straordinaria) and inflicting a series of abuses such as payment deductions, excessive working hours, threats and punishments, verbal abuses and excessive control to the detriment of workers' freedom, health, safety and dignity, and entailing severe work exploitation. This case highlighted the extreme conditions that vulnerable platform workers may be subjected to, and the extent of workers' exploitation, despite repressive regulation and criminal law being in place (in the Italian case sanctioned by 603-bis of the penal code) (Inversi 2021).

In contrast to some Court decisions, statutory responses to the issues of riders' health and safety have been very timid. In the UK, the state resistance to protective statutory regulation within the platform economy (Inversi, Dundon, and Buckley 2022) has prevented relevant intervention in the field, and major responses have come from judiciary interventions rather than law makers. A first attempt to revise and assess modern working practices through the so-called "Taylor Review" (Taylor et al. 2017), has been highly criticized for its lack of decisiveness, non-inclusion of social actors (and especially trade unions) and extremely light regulatory approach (Bales, Bogg, and Novitz 2018; Inversi 2018; Inversi, Dundon, and Buckley 2022).

Within the EU, statutory changes to address work uncertainty in relation to work schedules, organizational patterns, hours, pay, probationary periods, and so on, have been introduced with *Directive 2019/1152 on Transparent and Predictable Working Conditions*. The directive addresses some of the issues that affect platform workers, such as time unpredictability, fixed working schedules and lack of information on work organization. However, the issue of recognition of employment status remains, as the directive applies to "every worker in the Union who has an employment contract or employment relationship as defined by the law, collective agreements or practice in force in each member state with consideration to the case-law of the Court of Justice" (Article 1.2). Thus, the directive does not specifically apply to platform workers.

An attempt at significant intervention in platform workers' rights and protections

13) Tribunale di Milano, n. 35334/2020 and n. 16233/2021, October 15, 2021.

comes in a new proposal for platform work regulation, published in December 2021 by the EU Commission and now starting its legislative process (see also the article by Aude Cefaliello in this special issue). The proposed directive aims at protecting platform workers and their labor law rights, specifically stating that "the determination of the existence of an employment relationship shall be guided primarily by the facts relating to the actual performance of work, taking into account the use of algorithms in the organization of platform work, irrespective of how the relationship is classified in any contractual arrangement that may have been agreed between the parties involved" (Article 3.2). Furthermore, the innovative aspect of the proposed directive lies with the recognition of a legal presumption of employment relationship. Article 4 states that: "The contractual relationship between a digital labor platform that controls, within the meaning of paragraph 2, the performance of work and a person performing platform work through that platform shall be legally presumed to be an employment relationship. To that effect, member states shall establish a framework of measures, in accordance with their national legal and judicial systems." The presumption is linked to the concept of platform control, which is then understood in relation to five indicators, of which at least two must be present to identify platform control, and therefore an employment relationship. The proposed directive has the specific purpose of extending employment rights to platform work, on a uniform basis within EU member states. Furthermore, the proposal is committed to protecting genuine self-employment status, thereby limiting a generalized and absolute legal presumption of employment relationship.

The proposal contains a number of obligations for platforms in relation to algorithmic management and transparency in platform work. With reference to OSH regulation, the proposal provides that (Article 7.2):

> Without prejudice to Council Directive 89/391/EEC and related directives in the field of safety and health at work, digital labour platforms shall: (a) evaluate the risks of automated monitoring and decision-making systems to the safety and health of platform workers, in particular as regards possible risks of work-related accidents, psychosocial and ergonomic risks; (b) assess whether the safeguards of those systems are appropriate for the risks identified in view of the specific characteristics of the work environment; (c) introduce appropriate preventive and protective measures. They shall not use automated monitoring and decision-making systems in any manner that puts undue pressure on platform workers or otherwise puts at risk the physical and mental health of platform workers.

It is important to note that this provision rightly takes into account specific risks to platform workers, aiming to respond to common issues identified, such as avoiding decisions that may incentivize risks, and to consider not only physical risks and accidents but also the psychosocial dimension. Furthermore, this provision identifies the potential for misuse of monitoring and information that are at the basis of algorithmic management. However, the provision does not introduce any substantial change in employers' health and safety obligations, as the Framework Directive 89/391/EEC and subsequent directives already

provide protections in that sense.

Regrettably, the protection of platform workers who do not hold a recognized employment relationship is still weak. While Article 10 of the proposed directive extends the application of some of the directive's protective provisions on transparency, human monitoring and review (Articles 6, 7 and 8, which relate to the processing of personal data by automated systems), to "persons performing platform work who do not have an employment relationship" (the genuine self-employed), at the same time it specifically excludes the application of "the provisions on health and safety at work, which are specific to workers" (Article 7.2). The lack of application to genuine self-employed of the protections enacted for health and safety purposes is disappointing as it would have extended the possibility of the self-employed contributing to preventive actions and risk assessment. This exclusion is also out of step with the Global Commission's view on the necessity to universalize OSH protections, going beyond employment status (ILO 2019).

In summary, the proposed directive attempts to advance platform workers' rights by granting the legal presumption of employment relationship (thus guaranteeing the application of the EU employment law *acquis*) to many platform workers. It also tries to advance regulation on algorithmic management, recognizing platforms obligation in terms of transparency, information, and consultation. However, a number of gaps in protection can still be identified, especially in regard to the definition of control necessary to invoke the legal presumption of an employment relationship, and when considering the lack of protection for the health and safety of self-employed people from pressures and control, and the lack of risk assessment and prevention related to work organization. From the author's perspective, the proposed directive is still very timid in addressing some of the most pressing issues of platform work, which would require the participation of platforms in the prevention, assessment, and avoidance of any risks that workers may encounter, regardless of their employment relationship. Furthermore, an intervention on working time regulation for health and safety purposes appears to be, again, very far from the priorities of regulators. It seems it is not their intention to enter into this contested organizational terrain.

5. CONCLUSIONS

The paper has outlined some specific issues related to the protection of health and safety of platform workers, in particular those related to working time and its impact of workers' safety, health, and wellbeing. After having presented the health and safety problems connected with platform work (such as extreme flexibility in time at work, pervasive control and unilateral power by platforms, excessive or insufficient working hours, and connected problems of uncertainty, stress and poor wellbeing) the paper has discussed some of the legal responses that have been put in place in the UK and at EU level, considering both relevant case law and statutory regulations. While seeing some improvement in the recognition of specific platform workers' needs and issues, the critical reflection on the measures proposed at EU level still reveals protection gaps and loopholes, and a missed opportunity to expand the protective framework for occupational health and safety to achieve universalization of OSH protections (ILO 2019).

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ACKNOWLEDGMENTS

I am grateful for the support and feedback received from colleagues at the PMO Department of Alliance Manchester Business School.

CONFLICT OF INTEREST STATEMENT

No conflict of interest to disclose.

RESEARCH ETHICS

The data contained in the paper is part of a larger study related to the author's PhD dissertation. The study obtained ethical approval from the University of Manchester.

Work Health and Safety Law Reform in Australia —The Recent Industrial Manslaughter Provisions

Richard JOHNSTONE*

1. INTRODUCTION

This legislative note traces the recent pattern of amendments to five of Australia's nine work health and safety statutes to include the crime of manslaughter.

Australia has a federal system of government. Because there is no legislative power to legislate for work health and safety in the Australian federal constitution, the Commonwealth (federal) government and each of the six state and two territory governments have enacted their own work health and safety legislation. Until recently, Australian work health and safety regulation has largely followed the approach taken in the United Kingdom (UK), originally in the nineteenth-century UK *Factories Acts*, and from the late 1970s, in the *Health and Safety at Work etc. Act 1974* (UK) (see Johnstone, Bluff and Clayton 2012, chap. 2). From 2008 to 2011, there was a process of harmonizing the Australian work health and safety statutes, which culminated in the development of a Model Work Health and Safety Act 2010 (Model Act) which has been adopted by each of the Australian jurisdictions, apart from the state of Victoria, enacting a *Work Health and Safety Act.* This note will refer to these statutes collectively as the "*Work Health and Safety Acts*."

While the key general duty in the Victorian *Occupational Health and Safety Act 2004* is imposed upon an "employer" in relation to its "employees," following the Model Act the *Work Health and Safety Acts* in each of the other Australian jurisdictions[1)] place "the primary duty" (in section 19(1)) on a "person conducting a business or undertaking" (PCBU),[2)] who must ensure, as far as is reasonably practicable, the health and safety of "workers" who are engaged, caused to be engaged, influenced, or directed by the PCBU, but only "while the workers are at work in the business or undertaking." A "worker" is defined in section 7 as "a person who carries out work in any capacity for a" PCBU, and includes all kinds of workers, not just employees. Section 19(2) provides that a PCBU must ensure, so far as is reasonably practicable, that the health and safety of "other persons" is not "put at risk" from "work carried out as part of the

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1) See the Commonwealth's *Work Health and Safety Act 2011* (Cth); New South Wales's *Work Health and Safety Act 2011* (NSW); Queensland's *Work Health and Safety Act 2011* (Qld); South Australia's *Work Health and Safety Act 2012* (SA); Tasmania's *Work Health and Safety Act 2012* (Tas); Western Australia's *Work Health and Safety Act 2020* (WA); Australian Capital Territory's *Work Health and Safety Act 2011* (ACT); and Northern Territory's *Work Health and Safety (National Uniform Legislation) Act 2011* (NT). Readers interested in finding and reading these statutes can find them at http://classic.austlii.edu.au/.

2) For an explanation of who is a PCBU, see Safe Work Australia 2021.

business or undertaking." The primary duty is continuous, preventive and inchoate, in that it is an ongoing duty that can be contravened without a worker or other person actually suffering injury, disease or death.[3)] For further discussion of the approach taken in the *Work Health and Safety Acts*, including the primary duty in section 19, see Bluff, Johnstone and Quinlan in this issue.

2. THE DIFFICULTIES IN PROSECUTING CORPORATIONS AND CORPORATE OFFICERS FOR MANSLAUGHTER UNDER THE GENERAL CRIMINAL LAW IN AUSTRALIA

From the late 1980s in Australia, there were regular calls for manslaughter prosecutions for work-related deaths, usually in response to well-publicized incidents resulting in one or more deaths at work (for an overview of the Australian debate about manslaughter, see Johnstone 2013). Manslaughter differs from the work health and safety general duty offenses in Australia's work health and safety statutes in that it is concerned with an outcome (death), rather than being an inchoate offense, and requires proof of criminal fault (usually gross—or criminal—negligence). In principle, there is no reason why a corporation, corporate officer, or manager could not be prosecuted for manslaughter under the existing general criminal law where their gross negligence causes death at work. The courts have defined "gross negligence" as "a great falling short of the standard of care" which a reasonable person would have exercised, involving "such high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment."[4)]

Indeed, since the early 1990s, there have been a few examples of successful manslaughter prosecutions in Australia, including *R v Denbo Pty Ltd*,[5)] *R v Smith*,[6)] and *R v Turkell*.[7)] What these cases had in common was that they were prosecutions of very small companies, or the owners, officers,[8)] or employees of very small companies. The reasons for the small number of prosecutions and the focus on small companies have to do with the principles that attribute criminal liability to corporations and to corporate officers.

A corporation is an artificial legal entity and can only act through its officers, employees, and/or agents. Early in the twentieth century, the courts used the principles of vicarious liability—holding the corporation, as the principal, responsible for the acts of its agents—to attribute criminal liability to

3) See *R v Australian Char Pty Ltd* (1999) 3 VR 834 at 847; *Haynes v C I and D Manufacturing Pty Ltd* (1995) 60 IR 149 at 157–159; *R v Commercial Industrial Construction Group Pty Ltd* [2006] VSCA 181 at [58]–[61]; *Diemould Tooling Services Pty Ltd v Oaten; Santos Ltd v Markos* [2008] SASC 197, (2008) 101 SASR 339 at [34].

4) *R v Lavender* [2005] HCA 37; endorsing *Nydam v R* [1977] VR 430 at 445; *R v Scarth* [1945] St R Qd 38 at 43.

5) *R v Denbo Pty Ltd* (Supreme Court of Victoria, Hampel J, June 2, 1994), in which the corporate defendant entered a guilty plea.

6) Unreported, District Court of New South Wales, Criminal Jurisdiction, Newcastle, Judge English, 2008/5549, November 6, 2008.

7) Unreported, District Court of New South Wales, Criminal Jurisdiction, Newcastle, Judge English, 2008/5550, November 6, 2008.

8) For the definition of "officer" see s 4 of the *Work Health and Safety Acts*, which refer to an officer within the meaning of s 9 the *Corporations Act*. See further Johnstone and Tooma (2022, 124-130).

a corporation (see ALRC 2020, 143). This indirect, derivative form of liability was soon replaced by "identification theory," a form of direct liability in which the conduct and state of mind of high level-individuals (the directors and senior managers who make the decisions for the corporation) who are the "directing mind and will" of the corporation constitute the conduct and state of mind of the corporation itself.[9] The Australian courts have applied identification theory (the direct liability test) in gross negligence manslaughter provisions in Australia, with the result that large- and medium-sized corporations have escaped liability. For example, in *R v A C Hatrick Chemicals Pty Ltd*,[10] the Victorian Supreme Court held that neither the plant engineer nor the plant manager and safety coordinator, or the two employees who were alleged to have acted with gross negligence, "were acting as the Company,"[11] and consequently the company was found not to be guilty of manslaughter.

There are even greater challenges in proving the elements of manslaughter against directors and other officers of larger companies (Wheelwright 2011, 30). The prosecutor must prove that: (i) the officer was in breach of a duty of care towards the victim, (ii) the breach of that duty caused the death of the victim, and (iii) the breach of the duty should be characterized as gross negligence and therefore a crime.[12] The courts have made it clear that the common law duty to take reasonable care for the health and safety of employees is imposed directly upon the employer, and not upon individual directors of the corporate employer.[13] With the exception of working directors whose involvement may be more immediate, the typical contribution of a director to a work incident causing death arises from an omission—for example, the failure to identify and manage risks or to implement a control for a known hazard. Omissions can support a manslaughter prosecution only where the accused has a duty to act.[14] Officers do not owe that duty merely by virtue of their position as officers. Consequently, it is very difficult to prosecute corporate officers for gross negligence manslaughter under the general criminal law (see further Johnstone and Tooma 2022, 162–163).

3. ATTRIBUTING CORPORATE LIABILITY UNDER THE WORK HEALTH AND SAFETY STATUTES

It is now clear that identification theory does not apply to absolute liability work health and safety offenses that are qualified by reasonable practicability under the Australian work health and safety statutes—for example, section 19 of the *Work Health and Safety Acts*. The UK, Australian, and New Zealand courts have held that work health and safety offenses are personal, including to a corporation, and are non-delegable.[15] The general duties are "duty-based offenses" which "constitute a model

9) *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, approved in *Hamilton v Whitehead* (1988) 166 CLR 212, [1988] HCA 65.
10) (1995) 140 IR 243.
11) At 234.
12) *R v Adomako* [1995] 1 AC 171.
13) *Adar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 per Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ at 446.
14) *R v Taktak* (1988) 14 NSWLR 226.
15) *R v British Steel plc* [1995] 1 WLR 1356; [1995] IRLR 310; *R v Gateway Foodmarkets Ltd* [1997] 3 All ER 78;

of corporate accountability while avoiding issues of attribution" (ALRC 2020, 322). Corporations breach these duties through their acts or omissions, and corporate misconduct is measured directly against the standards in the general duty. As the Victorian Supreme Court, Court of Appeal stated in *R v Commercial Industrial Construction Group Pty Ltd*:

> on the proper construction of s.21 of the [*Occupational Health and Safety Act 1985* (Vic)] no rules of attribution are called for. The only question is whether the employer company has done everything that it was (reasonably) practicable to do to ensure the safety of its employees. If not, the company has breached its duty. It is irrelevant to the question of liability where the failure occurred.[16)]

Where offenses under the *Work Health and Safety Acts* involve recklessness or gross negligence, section 244[17)] provides that:

> (1) For the purposes of this Act, any conduct engaged in on behalf of a body corporate by **an** employee, agent or officer of the body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is conduct also engaged in by the body corporate. (emphasis added)
>
> (2) If an offence under this Act requires proof of knowledge, intention or recklessness, it is sufficient in proceedings against a body corporate for that offence to prove that **the** person referred to in subsection (1) had the relevant knowledge, intention or recklessness. (emphasis added)

In other words, section 244 ousts the direct liability principle, section 244(1) applies to grossly negligent conduct, and section 244(2) applies to recklessness. Section 244 enables the court to attribute the negligent conduct, or the knowledge, intention, or recklessness **of a single** employee, officer or agent of the body corporate, to the body corporate.

The Northern Territory has taken a different approach to attributing criminal liability to corporations. It has adopted section 12.4 of Part 2.5 of the *Criminal Code Act 1995* (Cth)[18)] which provides that if negligence is a fault element in relation to a physical element of an offense it

> may exist for the corporation … if the corporation's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of a number of its employees, agents or officers).

This is known as the "aggregation principle."[19)]

The Northern Territory has also adopted section 12.3 of Part 2.5 of the *Criminal Code Act 1995* (Cth)[20)] which addresses fault elements other than negligence—that is, intention, knowledge, or recklessness—in which case the fault element is taken to exist if

R v Nelson Group Services Ltd (Maintenance) [1998] 4 All ER 331; [1999] 1 WLR 1526 (CA); *Kirk v Industrial Relations Commission of NSW* (2010) 239 CLR 531 at [10]; *R v Commercial Industrial Construction Group Pty Ltd* [2006] VSCA 181; *DPP v JCS Fabrications Pty Ltd and Anor* [2019] VSCA 50; *Linework Ltd v Department of Labour* [2001] 2 NZLR 639.

16) [2006] VSCA 181 at [30].

17) See also ss 245 and 251 which impute conduct to "the State" and to public authorities.

18) Part IIAA, Division 5 of the Criminal Code (NT).

19) For a critique of the aggregation principle, see ALRC 2020: 149–150.

20) Part IIAA, Division 5 of the Criminal Code (NT).

the corporation expressly, tacitly, or impliedly authorizes or permits the commission of the offense.[21] Authorization or permission may be established, amongst other ways, by proving that: (i) the corporation's board of directors intentionally, knowingly, or recklessly engaged in the conduct or expressly, tacitly, or impliedly authorized or permitted the commission of the offense; (ii) a high managerial agent of the corporation intentionally, knowingly, or recklessly engaged in the conduct or expressly, tacitly, or impliedly authorized or permitted the commission of the offense; (iii) a corporate culture existed within the corporation that directed, encouraged, tolerated, or led to noncompliance with the contravened law; or (iv) the corporation failed to create and maintain a corporate culture requiring compliance with the contravened law.

4. THE MANSLAUGHTER PROVISIONS IN THE AUSTRALIAN WORK HEALTH AND SAFETY STATUTES

In order to overcome the difficulties in prosecuting corporations and corporate officers for manslaughter under the general criminal law, as explained in part 2 of this Legislation Note, new manslaughter provisions have been enacted in three Australian states—Queensland, Victoria, and Western Australia—and in the Northern Territory and the Australian Capital Territory. As this part will show, the new provisions have been enacted *ad hoc* and outside the Australian harmonization process. They seek to overcome the problem of attributing liability to corporations by enacting new manslaughter crimes for PCBUs in the *Work Health and Safety Acts* in Queensland, Western Australia, and the two territories, and for employers and other "persons owing a duty" in the Victorian *Occupational Health and Safety Act 2004*. Each of these Acts already contains attribution principles (for example, section 244, outlined in part 3 above) that displace the identification theory (that is, direct liability as established by the *Tesco* decision). They also create new manslaughter crimes for officers if their gross negligence (and in at least one jurisdiction, their recklessness) causes a death of a worker, and in some jurisdictions, other persons.

The first of these provisions were enacted in Queensland in 2017, prompted by separate multiple fatalities at the Dreamworld theme park and in construction work at the Eagle Farm Racecourse in 2016. Following the recommendations of the *Best Practice Review of Workplace Health and Safety Queensland* (Lyons 2017), in 2017 the *Work Health and Safety Act 2011* (Qld) was amended to include the crime of gross negligence industrial manslaughter which can be committed by PCBUs (section 34C) or senior officers (section 34D, also see Johnstone and Tooma 2022, 129) who are not volunteers if their gross negligence results in the death of a worker in the course of carrying out work for the business or undertaking. One of the reasons that the *Best Practice Review* recommended that the industrial manslaughter crimes should be enacted in the *Work Health and Safety Act* was that the Act already had provisions attributing

21) Section 12.3 explains some of the ways in which authorization or permission may be established. These include proving that a corporate culture existed within the corporation that directed, encouraged, tolerated, or led to non-compliance with the contravened law, or proving that the corporation failed to create and maintain a corporate culture requiring compliance.

liability to corporations in section 244 discussed above. The industrial manslaughter offense in Queensland attracts a maximum penalty of A$10 million for corporations and 20 years imprisonment for individuals. To date, only two successful prosecutions of PCBUs for manslaughter, one of a small company[22] and the other of a sole proprietor,[23] have taken place in Queensland.

In the Northern Territory, manslaughter provisions were added in 2019 to the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) in a new Part 2 Division 6. Any person who: is not a volunteer, has a "health and safety duty" under the Act, and is a PCBU or an officer who has a duty in section 27 to exercise due diligence to ensure that their PCBU complies with its obligations under the Act, commits industrial manslaughter if they intentionally engage in grossly negligent or reckless conduct that breaches their health and safety duty and causes the death of an individual to whom the duty is owed. This provision is broader than its Queensland counterpart because in the Northern Territory the elements of the crime include the death of a person other than a worker, recklessness in addition to gross negligence. Also, as discussed above, the principles attributing liability to corporations in the Northern Territory are broader than those in Queensland.[24] The maximum penalty for an individual who commits manslaughter is life imprisonment, and for a corporation it is just over A$10 million.

In 2020, the Victorian *Occupational Health and Safety Act 2004* was amended (Part 5A) by the addition of new crimes of "workplace manslaughter." Manslaughter can be committed by a person (including a corporation) who is not a volunteer and whose conduct is grossly negligent (see section 39E) if they breach "an applicable duty" in Part 3 of the Act "that the person owes another person." This means that an employer, a self-employed person, and a person who manages or controls a workplace, as well as "upstream" duty holders such as the persons who design plant, buildings, or structures; manufacture plant and substances; supply plant and substances; and install, erect, or commission plant can commit the crime of manslaughter. Manslaughter can also be committed by an officer of an "entity" (for example a corporation, unincorporated association, or a partnership) who is not a volunteer if their conduct is negligent and constitutes a breach "of an applicable duty that the entity owes to another person." The maximum penalty is 25 years imprisonment for an individual and just over A$18 million for a corporation. The Victorian provisions are narrower than the Queensland and Northern Territory provisions because the employer and self-employed person's duty in Victoria is narrower than the PCBU's duty in the *Work Health and Safety Acts*. However, the Victorian provisions are broader than the Queensland provisions in that manslaughter includes deaths caused to persons who are not employees (and in particular, members of the public); and because the principles attributing liability to corporations are broader than those

22) *R v Brisbane Auto Recycling Pty Ltd & Ors* [2020] QDC 113 where the PCBU was fined A$3 million.
23) *R v Jeffrey Owen* [2022] QDC 325 in which Cash DCJ sentenced PCBU to 5 years imprisonment suspended after 18 months.
24) Part IIAA, Division 5 of the *Criminal Code* (NT).

found in section 244 (and 245 and 251) of the Queensland Act. Section 39E of the Victorian *Occupational Health and Safety Act 2004* provides that, in determining whether the body corporate's conduct is "negligent," what matters is the conduct engaged in by the body corporate itself; and it does not matter whether the conduct is, or is not, conduct imputed to the body corporate under section 143 (which is the same as section 244 in the *Work Health and Safety Acts*); or whether any of the body corporate's officers were involved in all or any part of the conduct. The standard to be applied is the standard of care that would have been taken by a reasonable body corporate in the circumstances in which the conduct was engaged in.

The *Work Health and Safety Act 2020* (WA) has taken a different approach to industrial manslaughter. A PCBU commits the crime of industrial manslaughter if: it engages in conduct which constitutes a failure to comply with its health and safety duty, the conduct causes the death of an individual, and the PCBU knew that the conduct was likely to cause the death or serious injury of the individual but disregarded that likelihood (that is, recklessness) (section 30A(1)). The maximum penalty for a PCBU who is an individual is 20 years imprisonment and a fine of A$5 million; and for a corporate PCBU, a fine of A$10 million. An officer of a PCBU commits an industrial manslaughter offense if their PCBU commits an industrial manslaughter offense and the PCBU's conduct is (i) attributable to any neglect on the part of the officer or (ii) engaged in with the officer's consent or connivance; and if the officer engages in the conduct knowing that the PCBU's conduct is likely to cause the death of, or serious harm to, an individual and nonetheless is in disregard of that likelihood. The maximum penalty for an officer is 20 years imprisonment and a fine of A$5 million.

Finally, in June 2021, the Australian Capital Territory repealed the industrial manslaughter provisions in the *Crimes Act 1900* (ACT) and created industrial manslaughter offenses in the *Work Health and Safety Act 2011* (ACT). Section 34(1) provides that a PCBU or an officer of a PCBU commits an offense if the PCBU or officer has a health and safety duty, engages in conduct which results in a breach of that duty and causes the death of a worker or of another person, and the PCBU is reckless or negligent about causing the death of the worker or other person by the conduct. The maximum penalty for a PCBU or officer who is an individual is imprisonment for 20 years, and where the PCBU or officer is a body corporate, A$16.5 million. A significant consequence of this reform is that now the relevant provision attributing liability to corporations is section 244 of the *Work Health and Safety Act*, rather than sections 51 and 52 of the *Criminal Code Act 2002* (ACT) (that is, the attribution principles adopted in the Northern Territory).

5. CONCLUSION

Even though the National Review Panel that recommended the provisions in the Model Act preferred to address the issue of prosecution for work-related fatalities at work by focusing on the inchoate nature of WHS offences (Department of Employment and Workplace Relations 2008, 123-124, and especially Recommendation 51), faced with political pressure (especially from the families of deceased workers, their support groups, and

unions), five of the Australian jurisdictions have now introduced manslaughter provisions into their work health and safety statutes. But there has been little coordination or consistency in these reforms, and the analysis above makes it clear that the enacted provisions differ significantly—including in: who can be prosecuted for manslaughter, whether manslaughter is committed if a person who is not a worker is killed at work, whether recklessness is an element of the crime, the provisions that attribute liability to corporations, and the maximum available penalties.

Two other Australian states have indicated an interest in enacting manslaughter offenses. In 2021 a private members' Bill, the *Work Health and Safety Amendment (Industrial Manslaughter) Bill 2021*, was introduced into the New South Wales Parliament. The Bill includes maximum penalties of 25 years imprisonment for "senior officers" and A$10 million for bodies corporate that negligently or recklessly engage in conduct that "substantially contributes to" the death of a worker or another person at a workplace. In late March 2022, the South Australian Labor Party won government in South Australia, with an industrial relations policy that included introducing "industrial manslaughter laws with a focus on avoiding preventable deaths" (see "New industrial manslaughter laws to follow SA election" (OHS Alert 2022)).

A review of the Model Work Health and Safety Act in 2018 (Boland 2018, 117-124) recommended that the Model Act should be amended to provide for a new offense of gross negligence industrial manslaughter by a PCBU or a corporate officer, that a body corporate's conduct should include "the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents, or officers"; and that the offense should "cover the death of an individual to whom a duty is owed." This recommendation was rejected by the Work Health and Safety Ministers in May 2021; however, the incoming Federal Labor Government, elected in May 2022, has indicated that it intends to implement all of the recommendations of the review. This may lead to another round of manslaughter provisions and an opportunity for the existing provisions to be strengthened.

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As a reference 1

Journal of Occupational Health Law (Japanese journal) Volume 1, No. 2 Contents

Special Feature

Health and work management issues and regulations for the establishment of telework

Introduction: Purpose of planning the special feature and outline of individual reports

Koichi Kamata, Professor Emeritus, Toyo University

[Abstract]
Telework was initially introduced as an emergency- and evacuation-based measure due to the spread of COVID-19. However, since it is no longer necessary to restrict the movement of people or avoid on-site work, there has been a shift from such teleworking back to the conventional commuting style, mainly among small and medium-sized enterprises. Meanwhile, some companies have viewed telework as a way of working that improves the well-being of their employees and are taking novel measures such as making telework a regular work style. At present, there is a mixture of conflicting trends regarding telework. Given such circumstances, this special feature views telework as one of the sustainable working styles of the future. This feature includes five papers that examine the efforts made toward establishing such a style and the issues that have emerged as a result, especially those relating to the ideal form of health management, labor management, and legal policy from various perspectives.

1. Issues for the establishment of telework from a medical perspective

Koji Kandabashi, Director, Bunkyo Hakusan Occupational Health Consultation Industrial Physician Office

[Abstract]
Telework was rapidly introduced as a measure against COVID-19. When examining the spread of telework from a medical perspective, the greatest problem is that the health impact on workers is unknown. Many papers have been published recently, but these have several problems, including (1) the difficulty of distinguishing between the effects of the COVID-19 crisis and the unique effects of telework, (2) the presence of effects unique to Japan, and (3) the fact that most were cross-sectional studies. Nevertheless, there has been slow but steady progress in industrial health management methods.

[Keywords] Coronavirus, COVID-19, Telework, Remote, Industrial health

2. Health effects of working from home: Effects during the spread of COVID-19 and the future

Makoto Okawara, Assistant Professor, Environmental Epidemiology, Institute of Industrial Ecological Sciences, University of Occupational and Environmental Health, Japan

[Abstract]
This study summarizes the situation to date regarding telecommuting due to the COVID-19 crisis. How telecommuting has affected domestic workers is also discussed by introducing some relevant research from a survey on changes in work styles and workers' health during the coronavirus pandemic (CORoNaWork project). The survey was conducted by a project team centered on seven departments at the University of Occupational and Environmental Health, the author's affiliated university. The author's personal opinions on teleworking, including telecommuting after the end of the COVID-19 pandemic, are also included.

[Keyword] COVID-19, Work from home, Telework, Health effects of working from home

3. Establishing telework and current challenges —Reviewing working methods and improving employee well-being through telework, in a society with a low birthrate and an aging population

Mikiko Tamayama, Secretariat, Social Health Strategy Research Institute

[Abstract]
It has already been three years since COVID-19 forced the accelerated introduction of telework. Although telework continues to be established in society even as the pandemic recedes, many companies are returning to on-site work. Telework has led to the emergence of legal issues relating to work styles as well as problematic issues identified by human resources departments. Therefore, I describe here the necessity of telework and the issues in its establishment, improved well-being due to telework, and management methods that should be thought of as sustainable.

[Keywords] Telework, Sustainable management, Work-life balance (WLB), Diversity, Improved well-being

4. Job characteristics associated with the promotion of telecommuting policy use: An analysis of coworkers' fairness perceptions

Masaki Hosomi, Associate Professor, Faculty of Commerce, Kansai University
Tetsushi Fujimoto, Professor, Department of Policy Studies, Doshisha University

[Abstract]
This study investigated how the work environment increases coworkers' fairness perceptions toward telecommuting users based on work-life balance research and equity theory. The survey results showed that task autonomy

and job complexity increased fairness perceptions toward telecommuting policy users. Additionally, high task interdependence strengthened the relationship between task autonomy and fairness perception and between job complexity and fairness perception.

[Keyword] Telework, Fairness perception, Task autonomy, Job complexity, Task interdependence

5. Laws and regulations regarding the health of telecommuting workers

Keiichiro Sue, Partner attorney, Blakemore & Mitsuki

[Abstract]
The study provides a summary of the legal issues related to the health problems of telecommuting workers. First, the legal regulations for employers regarding workers' health problems are summarized. This is followed by an investigation of their specific application, with a focus on public law regulations: (1) work environment issues, (2) labor volume issues, (3) labor quality issues, and finally (4) private law liability issues.

[Keyword] Telework, Public and private law regulation of health issues, Working environment, Working hours, Overwork, Work related stress

Original article

State of legal protection for gig worker health and safety: Status in Japan and prospects

Takenori Mishiba, Co, Professor, Faculty of Law, Kindai University
Kotaro Kurashige, Co, Representative Attorney, KKM Law Office
Shoko Nakazawa, Visiting Researcher/Occupational Physician, Basic Clinical Science and Public Health, Department Preventive Medicine, Tokai University School Medicine

[Abstract]
Labor laws in Japan are generally soft laws, and the Japanese legal system has yet to sufficiently recognize gig work; however, different laws with different principles exist in order to combat labor issues and regulate behaviors of business owners with the help of group dynamics (such as worker and customer trust in business owners). One reason to value an agreement with management in setting work rules is to ensure that management strictly follows these rules once they have been established. In terms of versatility and flexibility, labor laws in Japan may, to some extent, serve as a useful reference in a global context.

In Japan, the scope of major labor protection laws for individuals (Labor Standards Act, Industrial Safety and Health Act, Labor Contracts Act, and Industrial Accident Compensation Insurance Act) is not broad enough to appropriately cover gig work. The laws permit several interpretations, but they have limited flexibility. Laws that govern labor-management relations, including the Labor Union Act, may apply to gig work. In cases where they do, employers cannot refuse to bargain collectively with the representatives of the workers, which would allow the representatives to discuss safety and health matters with the employer in question. The Industrial Safety

and Health Act includes provisions reflecting the principle that a person who generates risk is responsible for risk management. The scope of the act has been gradually extended through legal interpretation and amendments. Still, it may not apply to all gig work. The Home Work Act for homeworkers or home handicraft workers requires both contractees and contractors to implement diverse health and safety controls. Although the act has been applied to limited types of work, in view of its similarity in terms of formative background (including the prohibition of evasion of responsibility by employers), some amendments could make the act applicable to a broader range of job types. The civil responsibility of employers for employees' occupational health and safety may bolster the principle that a person generating risk is responsible for risk management, and this part of the law has the highest potential to be applied to gig work. This would require, however, a relationship between the platform and the gig worker such that the platform can establish, control, and manage work conditions or command authority over the worker, which would allow the risks of work-related accidents (damages) to be easier to predict and control. Regarding economic laws, the Small and Medium-Sized Enterprise Cooperatives Act provides a legal basis for the solidarity of sole proprietors and for negotiations with their clients. Still, it has been utilized very rarely to date.

As described above, there are almost no direct restrictions on health and safety in the gig economy or its users; if serious cases of law evasion occur, however, courts will, based on the intent of applicable laws, attempt to offer remedies for workers with flexible judicial discretion with regard to the employer's duty of care, and this initial step may lead to the formulation of concrete laws in the future. Essential duties to be imposed on platforms after new legislation is formulated in the future are risk investigation, provision of investigation results to gig workers, and a sincere response to collective bargaining, while measures to be taken by the government include investigations of general risks associated with gig work and of ideal countermeasures and the provision of relevant information. In addition, a scheme is necessary to make it possible that in cases where cooperatives that are protected under the Small and Medium-Sized Enterprise Cooperatives Act assign industrial physicians to conduct interviews with cooperative members, when the physicians deem it necessary to do so, cooperatives can approach contractees to improve the working conditions of the members in question. Furthermore, because research in industrial health and other fields has identified risks associated with gig work, in addition to future legislation, these schemes should be used to interpret the duty of consideration for safety and in mandatory negotiations between platforms and gig workers.

[Keywords] Gig worker, Platformer, Industrial Safety and Health Act, Safety consideration obligations, Risk assessment, Principle of risk creator management liability, Small and Medium-Sized Enterprise Cooperatives Act, Home Work Act

Contribution

Labor issues and laws related to emerging infectious diseases in Japan

Hajime Yoshida, Executive Board Member of the Japan Association of Occupational Health Law, Former Guest Professor at Kyoto University Law School, Attorney

[Abstract]
In Japan, COVID-19 countermeasures in workplaces have not been enforced as legal obligations; rather, voluntary responses have been sought primarily in the form of requests for cooperation and recommendations, and resolutions have thus been attempted. However, many labor issues have arisen in this process.

Research activities in the Ministry of Health, Labour, and Welfare FY2021 Industrial Disease Clinical Research Grant "Research on the creation of guidelines, system maintenance, and tool development that

contributes to comprehensive infectious disease prevention measures in the workplace" were used as a basis to report primarily on the following: (1) The authority to order individuals to undergo vaccination or COVID-19 testing, rationale and limits of the right to order transfers of non-vaccinated individuals, and effects of the violation of orders. (2) The spread of COVID-19 and obligation of workers to work, work-from-home requests, and user safety consideration obligations.

[Keywords] Vaccination, COVID-19 testing, Work order authority, Transfer order authority, Work obligation, Safety consideration obligation

Judicial precedent introduction/judicial precedent research

A Case concerning the Japan Fishing Vessel lnsurance Association:

Takeshi Hayashi, Occupational Health Precedent Study Group
Director of Occupational Health Promotion Center, Health Management Promotion Department.
Health and Safety Management Promotion Headquarters, Hitachi Ltd

[Abstract]
X, who works for Association Y on a promotional track, applied for reinstatement into Association Y twice during their leave of absence due to schizophrenia. Both applications were rejected, and the individual was treated as retired after the leave of absence period expired. This is a case in which a lawsuit was filed to the effect that this decision was illegal and invalid. In the judgment, all of X's claims were dismissed as groundless, and the case of Japan Fishing Vessel Insurance Association (Tokyo District Court Judgment dated August 27, 2020), whose treatment of the individual as retired at the end of the leave of absence period was deemed valid although the attending physician judged that the individual could return to work, is examined here, with commentary provided.

[Keywords] Schizophrenia, Medical certificate, Reinstatement criteria, Occupational physician's opinion, Reasonable accommodation, Support for returning to work

Literature commentary

"Healthy and safe telework: Technical brief-Geneva, 2021" Japanese translation and practical implementation of 'Healthy and safe telework: Technical brief-Geneva, 2021' issued by ILO/WHO

Go Muto, Design Research Institution, Japan Society for Occupational Health.
The Scientific Committee of Remote Occupational Health. Japan/Department of Hygiene,
Kitasato University School of Medicine. Japan/Center for Preventive Medical Science,
and Design Research Institution, Chiba University, Japan
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Koji Kandabashi, Japan Society for Occupational Health, The Scientific Committee
of Remote Occupational Health, Japan/DB-SeeD, LLC, Japan

[Summary]
The technical brief for 'Healthy and safe telework' was developed by a joint WHO/ILO technical advisory group in February 2022. This document addresses the following questions: l) What are the impacts of telework on the physical and mental health and social well-being of workers and their families? 2) How can employers and workers organize and carry out teleworking in a healthy and safe manner? 3) What are the roles and responsibilities of employers in protecting workers' health and safety, and providing a supportive environment for telework? 4) What are the roles and responsibilities of workers and their representatives in protecting and promoting health and safety while teleworking? 5) How can occupational health services and primary health care providers support the health and safety of teleworkers? This document was developed based on a rapid review of evidence about health impacts of telework as of June 2021, and an examination of existing relevant WHO guidelines and ILO norms and standards regarding occupational safety and health, health behaviors and working environments. In this article, we introduce the Japanese translation of the technical brief and interpret the implementation into workplaces in Japan.

[Keywords] Telework, COVID-19, ILO, Ergonomics, Information and communications technology (ICT)

Trends in labor administration

"Trends and commentary on revision of certification criteria for brain/heart disease and mental disorders"

Fumio Koyano, Director, Industrial Injury Certification Office, Compensation Division,
Ministry of Health, Labour and Welfare of Japan

[Abstract]
In September 2021, the Ministry of Health, Labour, and Welfare of Japan revised the certification criteria for industrial injuries related to brain and heart disease based on the latest medical knowledge. It has been almost 20 years since the last revision. Additionally, it has been over 10 years since the establishment of industrial injury certification standards for mental disorders. Given the current trend of diversifying working styles, we have been verifying the overall criteria to conduct revisions. The latest situation for industrial injury compensation for brain/heart diseases and mental disorders (e.g., karoshi (overwork)) is introduced in this study, and the process and thinking behind revisions to the certification criteria for brain/heart disease are explained.

[Keyword] Karoshi, Industrial injury insurance, Brain and heart disease, Mental disorders, Certification criteria

As a reference 2

Journal of Occupational Health Law (Japanese journal) Volume 1, No. 1 Contents

Toward the Inaugural Issue of the Journal of Occupational Health Law

Koichi Kamata, Representative of Japan Association of Occupational Health Law, Professor Emeritus of Toyo University

Chairman's speech

The Aim of establishing the Japan Association of Occupation Health Law (JAOHL)

Takenori Mishiba, The First Academic Congress Chairman
The Initiator of this Association, Deputy Representative Director, Law Professor of Kindai University Faculty of Law

[Abstract]
Currently, in the field of occupational health, there are many problems such as mental illness and lifestyle-related illness for which it is difficult to determine who is responsible for treating them, and to clarify the appropriate preventive method. There are some unclear issues in this regard, such as whether the relevant problems are due to illness or personality. In order to solve these problems, it is not enough that the legal system simply pits labor against management tries to square their interests to the greatest extent possible. It is also necessary to devise a legal system for cooperation between labor and management and other related parties (hospitals, rehabilitation institutions, families, etc.). There are many other complicated risks in the workplace, and these are on the rise, but the Occupational Safety and Health Act is not tackling all of them. Therefore, based on our knowledge of the law, we decided to gather the wisdom of related multidisciplinary academic fields and carry out research to solve such problems.

The greatest characteristic of this association is its orientation towards problem-solving and prevention. We welcome everything from the latest academic research to practical debates concerning the challenges in the field.

In our educational activities, we emphasize the practical legal education of occupational health professionals, such as industrial physicians.

The establishment of this society was supported by many organizations and individuals, including the Ministry of Health, Labor and Welfare.

[Keywords] Occupational Safety and Health Law, Industrial Safety and Health Act, Mental health, Adult diseases, Interdisciplinary, Problem solving

Invited Lecture

Organizational Systems and Culture: A Social Psychology Perspective

Yukiko Muramoto, The University of Tokyo, Graduate School of Humanities and Sociology

[Abstract]
When an organization introduces new rules or systems, it is challenging for employees to adapt and utilize them. Employees' attitudes and behavior tend to be defined more by the implicit culture of the workplace than by explicit rules, and culture is difficult to modify even in the face of environmental changes. Specifically, we need to pay attention to cases where the old culture is maintained by "pluralistic ignorance." The present article will introduce selected empirical research in social psychology on pluralistic ignorance. Furthermore, it will discuss the relationship between organizational systems and culture.

[Keywords] Cultural lag, Pluralistic ignorance, Organizational inertia, Diversity, Social psychology

Special Lecture

Administrative review and judicial review of Workers' Compensation —A practical observation of medical criteria and legal criteria of occupational disease—

Shigeya Nakajima, Former Representative Director of Japan Association of Occupational Health Law

[Abstract]
This paper investigates the author's thesis that verification and ruling on cause and effect (causality of injury or illness), a challenge in medical disputes, involves both the medical standard of natural scientific verification and the legal standard of litigatory verification. It also discusses how both of the above standards are positioned theoretically and function practically, as well as what courses of action should be aimed for in the future, if the above thesis is correct, in cases of occupational illnesses (for which this paper focuses chiefly on cardiovascular conditions) that have proven to be particularly challenging under the workers' compensation system.

[Keywords] Medical lawsuit, Administrative review, Judicial review, Legality and illegality of administrative action, Causal law and attributability

Educational Lecture 2

Will the ESG/SDGs raise the level of occupational health?

Tomohisa Nagata, Department of Occupational Health Practice and Management, Institute of Industrial Ecological Sciences, University of Occupational and Environmental Health, Japan

[Abstract]
Occupational health and safety is included in Corporate social responsibility (CSR) and Environment, Social & Governance (ESG). Although many listed companies disclose information on their occupational health and safety activities, small and medium-sized companies have not made progress in disclosing such information. Companies are built on transactions and relationships with many stakeholders. Organizing the content of information disclosure on occupational safety and health required by stakeholders and increasing the number of companies that disclose such information are necessary measures to raise the level of occupational safety and health.

[Keywords] CSR, ESG, SDGs, Information disclosure, Health and productivity management, Occupational health and safety

Symposium 1

Lessons from the Kanagawa SR Management and Labor Center Incident
—What should I have done and what shall we do from now on?—

Symposium 1 Facilitator
Hajime Yoshida, Former Guest Professor at Kyoto university law school, Executive Board Member of the Japan Association of Occupational Health Law, President of Tenma Law Firm, Attorney

[Abstract]
In this case, in which an industrial physician refused permission for reinstatement to work although the psychopathology that was the cause of the leave had abated, citing considerations such as the high likelihood of problems arising with other employees, the court ruled in favor of reinstatement regardless of the reasons for leave. The symposium participants' comments included the argument that an industrial physician's decisions on reinstatement should be based on the degree of recovery of the ability to work and should not reflect matters such as interpersonal relations in the workplace, which should be handled by administrative sections. Throughout the discussions as a whole, it was pointed out that it is important for attending physicians, industrial physicians, workplaces, labor and social security attorneys, and attorneys at law to perform their roles by sharing information and cooperating appropriately with each other.

[Keywords] Returning to work, Industrial physician, Primary doctor, Certified social insurance labor consultant, Attorney

Symposium 2

Legal measures for managing chemical substances
—Based on an asbestos lawsuit and biliary cancer issues—

The present status of and issues regarding chemical substance management in workplace

Symposium 2 Facilitator
Arimichi Handa, General Incorporated Association, Japan Boiler Association Executive Director,
Former Director of Safety and Health Department of the Ministry of Health, Labor and Welfare Ministry

[Abstract]
The control of chemical substances in Japan has been developed under the Labor Standards Act and Industrial Safety and Health Act frameworks, with the aim of contributing greatly to preventing workplace accidents involving chemicals. However, the basic concept underlying this approach has been one of analyzing accidents and other incidents and taking measures to prevent their reoccurrence. While this enables specifications and standards that are easy to understand, inevitably it involves an ex-post approach. It is hoped that progress will be made in the future on development of performance requirement standards that demand results but do not require specific methods, and of rules on communication of information for this purpose.

[Keywords] Control of chemical Substances, Specifications and standards, Performance requirement standards, Rules on communication of information

Enhancement of the educational system for the management of chemical substances and the work environment

Fujio Kayama, Jichi Medical University Department of Medicine Professor Emeritus

[Abstract]
The government has taken a step toward letting stakeholders in chemical manufacturing industries take responsibility in autonomous chemical risk assessment and risk management. It has done so as 80 percent of chemical-related occupational diseases is due to chemicals other than those included in the list of special hazardous chemicals. To fulfill the new amendment of the law, we need new educational programs and new reforms in certification processes for industrial hygienists and occupational health specialists, as well as for the workers installing environmental safety equipment in the workplaces. We need to prepare comprehensive educational programs for all the stakeholders in occupational health.

[Keywords] (Mandatory) Risk assessment of chemical substance, Self-management of chemical substance, Creating the national certification of industrial hygienist, Human resource development inside and outside of corporations

Chemical substance management and liability —Suggestions from the judicial decisions

Yukiko Ishizaki, Yokohama National University, Associate Professor

[Abstract]
Amid calls for management of chemical substances to migrate to a structure of autonomous control based on the principles of self-assessment of risks and taking necessary measures by businesses, it is expected

that communication of information on hazards will become increasingly important. The importance of such communication of information also has been suggested in court cases on demands for compensation for damages in response to on-the-job accidents. This paper elucidates points on which employers and manufacturers should pay close attention, based on previous judicial decisions.

[Keywords] Chemical substance management, Dangerous toxicity, Autonomous management, Information transmission, Judicial decisions

From the standpoint of guiding chemical substance handlers

Katsumi Okubo, Ichinomiya Labor Standards Office, Deputy Office Chief

[Abstract]
Some companies are making progress on control of chemical substances but finding that these efforts are not proceeding as planned due to issues involved with specific chemical substances. Many other companies have not even made it to the starting line. Efforts are needed on the part of regulators in implementing legal and regulatory restrictions.

While the details of the Report of the Investigative Group on Control of Chemical Substances etc. in the Workplace are groundbreaking, issues still remain with regard to implementation. It is important to ensure that atmospheric concentrations of harmful substances are kept at or below threshold limits in areas where they could be inhaled by workers, and they probably will need to be checked by regulators as well.

[Keywords] "Report from the examination board regarding the management of chemical substance in workplace", Chemical substance management

Challenges and responses to communication of chemicals in products through the supply chain

Toru Suzuki, Japan Chemical Database Ltd.

[Abstract]
As a goal for beyond-2020 following the WSSD 2020 goal, it is expected that information communication throughout the life cycle of chemicals in products will become increasingly important. On the other hand, information on the chemicals in products is often confidential business information, and disclosure of all chemicals in a product can threaten the survival of the company. Therefore, it is necessary to clarify the chemicals whose names should be disclosed based on the relevant science.

[Keywords] Chemicals in products, Hazard communication, Supply chain, Confidential business information

Review of the mechanism of chemical substance regulations
—Toward a mechanism based on autonomous management—

Uichi Nakamura, Ministry of Health, Labor and Welfare, Industrial Safety and Health Department, Former Assistant Director of Chemical Hazards Control

[Abstract]
The Ministry of Health, Labour and Welfare of Japan has formulated a policy of thorough revision of regulations on control of chemical substances in the workplace, based on study by a working group that included academic experts, industry representatives, and labor organizations. This policy calls for migration from regulations based on individually specifying controlled substances and establishing specific measures to use in a system of autonomous control, in which means are used such as labeling and use of safety data sheets (SDS) to communicate information on the risks of chemical substances and protective measures reliably throughout the supply chain, and where each enterprise and workplace chooses and implements measures itself based on this information.

[Keywords] Chemical substance management, Regulation, Autonomous management, Labeling, SDS

Symposium 3

Health management policy and law in teleworking

Summary of the report and the status of discussion

Symposium 3 Facilitator
Koichi Kamata, Toyo University, Professor Emeritus

[Abstract]
A symposium was held with the objective of raising the issue of and discussing an ideal health management policy and legal issues of workers engaged in telework. The present symposium mainly focused on employed laborers who are working from home. Five attendees at the symposium were asked to report mainly on (1) work time management, (2) measures to improve mental and physical health, and (3) improvements to the working environment at home, including the recently published Ministry of Health, Labour and Welfare “Guidelines for Promoting the Appropriate Introduction and Implementation of Telework.” Afterwards, discussions were held, where the participants answered questions from the venue members.

[Keywords] Reform of working practice, Teleworking, COVID-19 expansion, Teleworking of employees, Telework guideline

Health Impact Assessment and evidence of telework expanded due to the coronavirus pandemic (COVID-19)

Naoto Fukutani, BackTech Inc., CEO, University of Occupational and Environmental Health, Visiting Scholar, Department of Physical Therapy, Human Health Sciences, Graduate School of Medicine, Kyoto University, Health Management Project Researcher

[Abstract]
The purpose of this paper is to evaluate the health effects of telework using the Health Impact Assessment (HIA) method and to share evidence of health issues associated with telework. As a result of the survey, it became clear that workers who are teleworking are more likely to have “decreased physical activity”, “stiff shoulders / backache due to a poor working environment”, and “decreased work-related productivity”. Furthermore, it was clarified that the more frequently people telework, the greater the decrease in work-related productivity.

[Keywords] Teleworking, HIA, Presenteeism, Indefinite complaint, COVID-19

Relationship between personality traits and stress for home workers

Masaki Hosomi, Kansai University Faculty of Business and Commerce, Associate Professor

[Abstract]
This study investigated the relationship between the Big Five personality traits and stress. A questionnaire survey was administered to homeworkers and 602 samples were analyzed. The results showed that extroversion, agreeableness, consciousness, and openness lowered stress, while neuroticism heightened stress in homeworkers. The frequency of homeworking did not significantly affect stress. In terms of moderating effects, consciousness decreased stress when working from home more frequently, but did not significantly affect stress when working from home less frequently.

[Keywords] Teleworking, Stress, Big Five, COVID-19 pandemic

Joint Symposium with Collaborating Societies 1

[Japan Association of Job Stress]
Verifying the certification of job stress by courts (1)

Joint Symposium with Collaborating Societies 1 Facilitators
Kenichi Kojima, Torikai Law Office
Yasumasa Otsuka, University of Tsukuba Humanity Associate Professor

[Abstract]
This symposium explored the controversial stress factors that were or were not acknowledged by the courts as overloading or illegal. It also discussed the presence of these factors by various professions and identified the measures for problem solving. A case involving the chief officer of the Ikebukuro Labor Standards Inspection Office (Tokyo District Court judgment, August 25, 2010) was taken up, and four symposium participants delivered presentations from the perspectives of compensation and prevention.

[Keywords] Certification of workers compensation of mental health, Power harassment, Long hours of labor, Compensation, Prevention

Joint Symposium with Collaborating Societies 2

[Japan Society for Occupational Mental Health] Support for reinstatement and medical treatment for workers' accident compensation insurance recipients: In consideration of people with a mental disorder

[Abstract]
At this symposium, two chairmen raised some problems regarding the current situation of the increase in long-term medical treatment for persons with mental disorders in workers' accident compensation insurance, and showed the purpose of clarifying the ideal way of reinstatement support and medical treatment to solve this problem. After that, After that, three speakers reported on (1) support for reinstatement and medical treatment for persons with mental disorders based on medical knowledge, (2) support for reinstatement and medical treatment from an administrative perspective, and (3) examination of differences in the legal system between Japan and Germany.

A report was made on the ideal way of optimizing benefits. Furthermore, based on the announcement by the symposium participants, a general discussion was held following the designated remarks from the standpoint of a local industrial accident doctor.

Throughout these sessions, problems and issues were pointed out and future measures were discussed, and the perspective of how to achieve fair harmony between medicine, law, and administration was shared.

[Keywords] Recognition as industrial accident compensation, Long-term medical treatment, Medical treatment compensation, Leave compensation, Fixed symptoms (Cure), Return to work

From the two chairmen: To the symposium

Joint Symposium with Collaborating Societies 2 Facilitators

Minoru Arai, M.D., Ph.D., Specially Appointed Psychiatrist of Tokyo Rinkai Hospital

Soichiro Maruyama, M.D., Ph.D., Emeritus professor of Kobe Shinwa Women's University, Psychiatrist, Occupational physician

Long-Term Medical Care after Approval of Industrial Accident Compensation for Mental Disorders: Current Situation and 2 Case Reports

Nobuo Kuroki, MD., Ph.D., Medical Corporation Senjikai Katsutadai Medical Clinic Director, Professor Emeritus of Toho University

[Abstract]
The number of occupational accident claims for mental illness reaches a record high every year, reaching 2060 in FY2019 (up 240 from the previous year), and the actual number of occupational accidents certified in FY2019 was 509 (up 44 from the previous year). The number of certifications has also increased. In particular, the number

of cases of "non-suicidal mental disorders" approved for workers' compensation has increased rapidly, with 4702 cases of "non-suicidal mental disorders" approved for workers' compensation through 2019, accounting for 77.5% of the total 6067 approved cases. We reported on a survey on long-term medical treatment after occupational accident certification, presented cases of long-term medical treatment after occupational accident certification (self-study cases), and examined problems and issues of occupational accident medical care.

[Keywords] Approval of industrial accident compensation, Long-term medical care, Leave compensation, Medical treatment compensation

About "support for reinstatement of workers' accident compensation insurance and the way of medical treatment"

Fumio Koyano, Director, Occupational Disease Certification Countermeasures Office, Compensation Division, Labor Standards Bureau, Ministry of Health, Labor and Welfare

[Abstract]
If a person develops a mental disorder due to a strong psychological burden on his / her work, he / she will be provided with the workers' accident compensation insurance necessary for medical treatment and leave as a work-related illness. Rehabilitation to society is one of the purposes of workers' accident compensation insurance, and it is desirable to return to work as soon as possible. For those who have been receiving medical treatment for a long period of time, we are aiming for them to return to work as soon as possible by using the medical treatment and aftercare system while listening to the opinions of the attending physician.

[Keywords] Job-related events, Return to work, Medical treatment, Aftercare

Measures to Optimize Benefits for Workers' Accident Compensation Insurance Recipients Due to Mental Illness in Germany
— Information Obtained from The German Workers' Accident Insurance Association (DGUV) and Health Insurance Association (GKV) —

Takenori Mishiba, Ph.D., Professor, Faculty of Law, Kindai University Former Public Interest Representative Member of the Safety and Health Subcommittee of the Labor
Policy Council of the Ministry of Health, Labor and Welfare Vice Representative Director, The Japan Association of Occupational Health Law

[Abstract]
How does Germany deal with people with mental illness who have been receiving workers' accident compensation insurance for a long time? A survey of German workers' accident compensation and health insurance systems revealed the following:

a) Social insurance recipients such as those receiving workers' accident compensation insurance are also obliged to cooperate for recovery, and if they do not, insurance benefits can be suspended unless there is a reasonable reason.

b) Obligations to cooperate include (1) reporting accurate facts, (2) taking medical / psychological examinations, (3) consultation and treatment, and (4) partial labor participation. Participation in rehabilitation is also required at the discretion of the insurer.
c) As a general rule, a medical certificate for leave required by a doctor can only be issued for the next two weeks, and insurance benefits will be provided only during that period. In this way, the need for benefits is diligently determined.
d) Workers' accident leave compensation is paid only up to 78 weeks, and if the situation does not improve during the period, it will be reviewed again and disability compensation will be applied.

In this way, at least with regard to the compensation for leave of absence, unreasonable extensions of the receiving period have been stopped. However, social insurance is based on the legal principle of the insured's right in Germany, and the limitation of insurance benefits requires adequate proof.

[Keywords] German workers' accident compensation, Compensation for leave of absence, Disability compensation, Obligation to cooperate for recovery, Participation in rehabilitation

Designated debates on return to work support and medical treatment for recipients of industrial accident compensation insurance who are suffering from mental disorders due to work or commuting related accidents and are losing their wages

Kazuyoshi Yamamoto, M.D., Ph.D., Yamamoto Clinic, EAP Institute of Job Stress Research

[Abstract]
The increasing number of long-term recipients of medical (compensation) benefits and temporary leave (compensation) benefits of industrial accident compensation insurance, who are suffering from a mental disorder due to their work or a commuting-related accident, are not able to return to work, and do not have a recognized disability is recognized as a problem. Three major issues are discussed as the causative factors: firstly, naming an incomplete cure or incomplete remission as cured (stabilized symptoms), secondly, temporary leave compensation benefits are paid until the injury or disease is cured (stabilized symptoms), lastly, the big disparity between temporary leave (compensation) benefits and disability (compensation) benefits. The author notes that comprehensive consideration is necessary on the reduction of segment order of temporary leave compensation benefits according to the recuperating period, generous disability (compensation) benefits and continuation of medical compensation benefits after qualification of disabilities.

[Keywords] Long-term recuperator, Incomplete cure, Medical (compensation) benefits, Temporary leave (compensation) benefits, Disability (compensation) benefits

Joint Symposium with Collaborating Societies 3

[Japanese Society of Occupational Medicine and Traumatology] Health issues of overseas workers and the review of worker's injury cases

Issues related to worker's injury of overseas workers observed in judicial rulings

Keiichiro Sue, Blakemore & Mitsui Law Firm, Partner

[Abstract]
In order to examine the substantial causal relationship between health risks and illness in overseas work, I will examine judicial decisions on administrative decisions regarding occupational injuries. Specifically, I will examine individual judicial cases regarding cerebro-cardiovascular disease, mental illness, and other diseases in which the existence of a reasonable causal relationship between illness and health risks, mainly physical and mental stress unique to overseas work, was an issue. Through these cases, I try to find out relevant points to keep in mind regarding health management in overseas work. Finally, I will examine judicial decisions on administrative decisions regarding the application of workers' compensation for overseas business trips and overseas assignments.

[Keywords] Health risks in overseas work, Legally sufficient causal relationship between overseas work and onset of illness, Criteria for recognition of mental disorders due to psychological burden, Criteria for recognition of cerebrovascular disease and ischemic heart disease due to work that significantly aggravates vascular lesions, etc. Obligation to health and safety of workers, Special enrollment system for workers' compensation insurance

Special insurance system for overseas dispatchers and industrial accident compensation insurance

Atsushi Nakayama, Nakayama Labor Safety & Health Management Office, President

[Abstract]
Industrial accident compensation insurance covers workers who belong to business establishments in Japan. Persons dispatched overseas who do not belong to domestic business establishments will not be covered by the industrial accident compensation insurance unless they have special insurance. On the other hand, overseas business travelers who belong to domestic business establishments are compensated without special insurance. I will introduce examples of disputes between overseas dispatchers and overseas business travelers and the government's response.

[Keywords] Workers' injury compensation, Special participation, Overseas transfer, Overseas trip

Urgent plan

Labor issues and laws related to the COVID-19 infectious disease

Co-Sponsor: General incorporated foundation Japan Association for Preventative Medicine

Urgent plan Facilitators
Tetsuo Nomiyama, Shinshu University Department of Medicine Sanitary Science, Public Health Classroom and Occupational Health Course (serving concurrently), children's environmental health epidemiology research center (concurrently)
Ran Mukai, Kakitsubata Management Law Firm

[Abstract]
In its first general academic conference, the Japan Association of Occupational Health Law held symposia led by experts, followed by general discussions concerning the following issues affecting corporate employees and other related parties in connection with the COVID-19 pandemic: requests for extended leave and refusal to come to work; mandatory PCR testing; COVID-19 and compensation for damages, disciplinary action, and human-resource evaluations; leave, wages, and leave allowance (for direct employees and employees dispatched by placement agencies); and the relationship between working from home and employers' obligations to consider safety. These were based on labor- management issues and laws related to COVID-19, in light of the considerable impact that the spread of the pandemic has had on corporate employers and workers. The general discussions featured debate on subjects such as the pros and cons of vaccine mandates; details of employers' obligations to consider safety, including PCR testing; leave allowance; corporate decision-making procedures in responding to COVID-19; and the relationship between working from home and employers' obligation to consider safety.

[Keywords] Vaccination obligation, Leave allowance, Force majeure, Caring safety obligation

Basic knowledge about COVID-19: essentials of the disease and relevance of social measures

Takashi Kawamura, Professor emeritus, Kyoto University

[Abstract]
In the COVID-19 pandemic, increases in infectivity and attenuation of toxicity are being caused by viral mutations. The PCR test cannot prove that infection is not present because of its insufficient sensitivity, and a positive result does not necessarily mean that the person is infectious as the test may give a positive result irrespective of viral activity. The efficacy of COVID-19 vaccines does neither last long nor fully cover the mutated viruses. Since contact infection with virus-containing droplets is the main route of contagion, the most important policy is to avoid contact with infected surfaces. The four declarations of a state of emergency were ineffective. Enforcement of the medical system is an urgent matter and some concrete plans in this regard will be proposed in this presentation.

[Keywords] Infectivity, Toxicity, Contact infection, Declaration of emergency, Medical system

Legal Mind in the Age of the Coronavirus: On the Subject of Request for Extension of Leave Period and Refusal to Come to Work

Yoichi Inoue, Aisan Nishio Law Firm, Representative, attorney, SME consultants, occupational health law manager

[Abstract]
For problems based on unknown risks or issues for which the evidence is not clear, such as labor issues related to new coronavirus infections, a rational consensus-based response is necessary. Legal responsibility in the field of occupational health is determined by comprehensive consideration of employees, employers, and the environment. Therefore, it is important to create rules for risk analysis and responsibility analysis focusing on these three factors.

In order to ensure the rationality of the consensus, appropriate cooperation among experts and multiple professions is required.

[Keywords] Occupational health, Legal mind, COVID-19, Absence from work, Labor case law

Absence from work, and obligation to pay wages and leave allowance and vaccination & testing package in the job area

Hajime Yoshida, Tenma Law Firm, President, attorney, former guest professor of University of Kyoto Law School

[Abstract]
When placing an employee on leave in response to COVID-19, depending on the reason for leave the employer may be obligated to pay the all of the employee's wages if the employer has refused to receive labor services without good reason (Article 536, Paragraph 2 of the Civil Code), or to pay leave allowance if the leave was due to a fault in the employer's management or administration (Article 26 of the Labor Standards Act). Employment regulations requiring unvaccinated employees to submit proof of a negative test for COVID-19 as a condition of working in operations for which there is a high need to prevent the spread of the virus are considered reasonable in light of considerations such as adequate consideration for disadvantages to workers.

[Keywords] Wage, Leave allowance, Unvaccinated, COVID-19 testing, Vaccine & testing package

Labor Law Issues in the Coronavirus Pandemic
—With a focus on Mandatory PCR tests, etc., focusing on the coronavirus and damage compensation, disciplinary action, personnel evaluation, vaccination, etc.—

Makoto Iwade, Attorney, Meiji Gakuin University Guest Professor

[Abstract]
In preparation for the sixth wave of the new coronavirus (COVID-19), which struck on a larger-than-expected scale with the onslaught of the Omicron strain, and for the mutant strains and new infectious diseases that are likely to strike in the future, this report will discuss various issues that the coronavirus pandemic has caused and brought to light in order to apply valuable lessons learned from the first through fifth waves of the coronavirus. The lecture will focus on PCR testing, compensation for damages, disciplinary actions, personnel evaluations, vaccination, etc., among the various labor law issues that the coronavirus pandemic has caused and brought to light, while introducing the latest coronavirus-related court cases that have recently started to be published.

[Keywords] PCR testing, Vaccination, Infection risk behavior, Damage, Disciplinary action, Mask wearing obligation

Telecommuting and obligation to care for safety

Ryo Yodogawa, Cyber Law Japan Eichi Offices, Kindai University Adjunct Professor

[Abstract]
To maintain the health of employees working from home, employers need to fulfill their duties to consider the health and safety of their workers, by implementing the measures required under occupational health and safety laws and regulations. They also need to ascertain the health status of employees working from home and take steps such as reassignment to other duties and lessening their workloads as necessary in light of considerations such as the details and degrees identified. In doing so, they should probably conform or refer to policies and guidelines published by the national government, medical societies, and other authorities, with the participation of appropriate experts such as occupational physicians. An employer that fails to fulfill its duty to consider safety under civil law could face liability issues such as compensation for damages in the event that an employee working from home contracts a condition such as clinical depression or economy-class syndrome.

[Keywords] Teleworking, Obligation to care for safety, Mental health, Health and Safety Committee, Industrial physician

Moot Court

Judgment of reinstatement of a corporate lawyer who took sick leave for being unable to adapt to the organization

Co-Sponsor: Peace Mind Co., Ltd.

Moot Court Joint-Facilitator

Hajime Yoshida, Former guest professor or University of Kyoto Law School, Executive Board Member of Japan Association of Occupational Health Law, President of Tenma Law Firm

[Abstract]
A case of a conflict of opinions between an attending physician and an industrial physician regarding reinstatement of a company attorney who took sick leave without organizational accommodation was debated in the form of a mock trial. In this mock trial, the issue was brought into relief of whether personality bias should be taken into consideration in decisions on reinstatement from leave for psychological conditions. It also suggested the need for consideration of the meaning and limitations of reworking programs, along with the importance of approaching treatment and acceptance in the workplace through sharing of information and appropriate cooperation between the attending physician and industrial physicians or the workplace.

[Keywords] Reinstatement, Rework program, Primary doctor, Industrial physician, Alignment

Comments on the stance of an industrial physician―After the moot court―

Moot Court Joint-Facilitator
Ginji Endo, Osaka Occupational Health Service Center, Japan Industrial Safety & Health Association

[Abstract]
This session included a mock trial by four persons—an attending psychiatrist, an attorney from the labor side, an industrial physician, and an attorney from the company side—on the theme of a reinstatement judgment for a company attorney who took sick leave without organizational accommodation. The trial included fierce debate on various points at issue. In this paper, the industrial physician reviews the responses that should be taken within the relationship involving the worker, the attending doctor, the employer, superiors, and others, from the standpoint of independence and neutrality as an industrial physician.

[Keywords] Reinstatement judgment, Independence and neutrality of industrial physician, Stance of industrial physician

From the standpoint of an industrial physician who thinks reinstatement should be rejected

Teruhisa Uwatoko, University of Kyoto Department of Medicine Hospital Department of Psychiatry and Neurology

[Abstract]
A mock case of adjustment disorder triggered by maladjustment to the workplace due to personality bias was discussed. To evaluate the degree of adjustment disorder caused by the interaction with the work environment, the company decided to use the rework program to evaluate the adjustment to the work environment, including personality bias, and to consider the possibility of the employee returning to work. In this case, however, the individual refused to be evaluated by the rework program, and the industrial physician determined that it was impossible for the individual to return to work from the standpoint of his duty of care for the safety of the individual and his surroundings.

[Keywords] Reinstatement judgment, Personality disorder, Adjustment disorder, Rework program, Rational care

Judgment of reinstatement of an in-house lawyer who took leave due to injury or illness because he could not adapt to the organization-Examination from the perspective of the enterprise

Makoto Iwade, Attorney, Guest Professor of Meiji Gakuin University

[Abstract]
The following issues will be examined from the perspective of the company regarding the "judgment on reinstatement of an in-house lawyer who failed to adapt to the organization and took sick leave," which was discussed in the mock trial at the 1st Annual Conference (hereinafter referred to as the "mock trial"). The study will also examine the relationship between the termination of grounds for leave due to personal injury or illness and the name of the diagnosed illness at the time of leave, the weight of the judgment of the attending physician and industrial physician, suspicion of personality disorder, and reasonable accommodation under the Act on Promotion of Employment of Persons with Disabilities.

[Keywords] Program's drift of Medical Leave Program, Legal structure of determining the possibility of reinstatement, The relationship between the extinction of personal injury and reason for sick leave and the name of the diagnosed illness during the absence, The relationship of promoting the Act on Promotion of Employment of Persons with Disabilities and rational care

Mock trial: Opinion of a psychiatric physician considering the patient should return to work

Tomoki Takano, Healthcare corporation Incorporated association Kofukai Kanda Higashi Clinic

[Abstract]
Mr. A, who has been absent from work due to mental illness and whose period of leave is about to expire, has a personality that is quite distinctive. He also has a high degree of professionalism, including being a licensed attorney. In addition to Mr. A's problems, there is also the complicated issue of how to deal with him in the workplace. As an attending psychiatrist who recommends that he return to work, I provide my opinion and insights into the situation.

[Keywords] Reinstatement to the workplace, Adjustment disorder, Group mental therapy, EAP, illness nature, Case-related

The forefront of relational study 1

(Psychiatry)
Boundary between personality disorder and autism spectrum disorder: indivisibleness of character and illness

Joichiro Shirahase, Metropolitan Tokyo Saisei-kai Chuo Hospital

[Abstract]
This paper employs the concept of mentalization to explain the impact of the psychological stress we feel, and responses to this impact, when interacting with workers who have personality disorder or autism spectrum disorder. As preparation for doing so, it discusses what it means to understand psychiatry.

[Keywords] Occupational mental health, Typology, Mentalization, Procedural reason

The forefront of relational study 2

(Labor law study, comparative law)
Dismissal of employees with a mental disability in Germany

Tatsuya Sasaki, Nagoya Gakuin University

[Abstract]
Recently, the mental health of employees is a challenge in many companies, and many companies are concerned about measures to prevent mental disease. Moreover, this problem is a common issue in the areas involved, for example jurisprudence, medical science and psychology.

First, I analyze characteristic precedents about dismissal of employees with a mental disability in Germany, then I compare Japanese labour law with German labour law. Through these discussions, this paper clarifies Japanese features of doctrine of dismissal of employees with a mental disability.

[Keywords] Illness nature, Case-related, Protection against Dismissal Act (KSchG), Dismissal on health grounds, Dismissal on grounds of conduct

The forefront of relational study 3

(Occupational health)
What are the outcomes of occupational health activities and are they measurable?

Performance Indicators for Occupational Health: Issues for Consideration

Koji Mori, University of Occupational and Environmental Health, Japan, Industrial ecological science research center, Professor

[Abstract]
In order to evaluate the results of occupational health activities, it is useful to set outcome indicators after clarifying the objectives of the activities, and then combine the indicators for the several steps leading to the outcome. In addition, setting targets for the achievement of each indicator at the planning stage can lead to improvement of the activities. However, it is important to understand that improvements in employee health-related indicators are not the result of occupational health alone, and that the contribution of occupational health is not only expressed in the indicators.

[Keywords] Occupational health, Health and productivity management, Performance indicator, Organizational factor, Intangible resources

An Attempt at Collaboration between Human Resource Management and Occupational Health: What We Really Need to Achieve and What We Need to Study

Yuta Morinaga, Musashi University Faculty of Economics

[Abstract]
The purpose of this paper is to discuss achievements and future research questions regarding occupational health activities, positioning them as a part of human resource management. In this paper, based on previous overseas studies, we propose an expanded view of the outcomes of occupational health from the standpoint of human resource management, to include the achievement of a wide range of employee well-being and organizational outcomes. In addition, we exemplify the research issues found by placing occupational health activities within the trend of human resource management research.

[Keywords] Human resource management, Psychologically healthy workplace, Process of practicing measures, Balancing of work and treatment, Managerial position

Workshop 1

The way of cooperation between a certified social insurance labor consultant and occupational health staff
—The future mission of a social insurance labor consultant considered through the cases ---bringing smiles to working people —

Cooperation between Labor and Social Security Attorneys and Occupational Health Staff
— From the perspective of a physician qualified as a labor and social security attorney —

Workshop 1 Facilitator
Hideki Morimoto, Morimoto Occupational Health Physician office

[Abstract]
Forty to fifty percent of labor and social security attorneys (LSSAs) are consulted about mental health issues. There is also a possibility that they do not cooperate sufficiently with occupational health staff. Past studies have shown that LSSAs are expected to be competent in mental health issues. It is necessary for both occupational health staff and labor and social security attorneys to cooperate with each other according to the size of the company and the type of contract, based on the principle that both should be involved with employees and companies in a fair manner while fulfilling their own responsibilities.

[Keywords] Labor and social security attorneys, Cooperation, Mental health

Cooperation between Labor and Social Security Attorneys and physician in occupational mental health

Yasuna Suzuki, Incorporated association Occupational Health Mental Health Study Group

[Abstract]
This paper considers the roles of labor and social security attorneys and industrial physicians in occupational mental health. The employer's confidence in them is of utmost importance, and this can be achieved by, first, having a sympathetic understanding of the situation in the workplace and, second, using appropriate shared terminology among related parties. In addition, mental health measures are based on job attendance, and suddenly calling in sick for the day citing vague symptoms is a distinctive sign of mental health issues. It is essential to recommend examination in such cases. The paper also explains making recommendations and providing guidance based on reasonable considerations.

[Keywords] Certified social insurance labor consultant, Part-time industrial physician, The situation of work site, Same-day notice absence, Recommendation guidance

Communication between Companies and Workers Mediated by Labor and Social Security Attorneys and Industrial Physicians

Hisanori Shikata, Osaka worker injuries & labor law firm

[Abstract]
Workers' mental health problems cause great costs and losses for both employers and workers. Therefore, it is necessary to detect mental health problems at an early stage, investigate the cause, and take countermeasures. For that purpose, it is necessary that personnel and labor specialists such as labor and social security attorney and occupational health professionals such as occupational physicians relax the minds of workers, give advice to employers on dealing with mental health problems, and work together to eliminate the cause of them by mediating communication between employers and workers.

[Keywords] Mental health, Certified social insurance labor consultant, Industrial physician, Cooperation, Communication

Prevention of disputes and the role of a certified social insurance labor consultant in the resolution

Masato Ishikura, Japan Federation of Labor and Social Security Attorney's Associations

[Abstract]
The main subject of this workshop was to explore forms of cooperation between labor and social security attorneys and occupational health staff through discussion among occupational health staff, attorneys, and labor and social security attorneys, based on examples.
In this paper, the author, an official of the Japan Federation of Labor and Social Security Attorney's Associations, describes the importance, responsibilities, and missions of labor and social security attorneys and explains basic approaches that should be taken in the performance of their duties.

[Keywords] Certified social insurance labor consultant, Significance of existence, Job responsibilities, Mission

Implementation of collaboration between Labor and Social Security Attorneys and Occupational Health Staff
— From the perspective of an occupational physician —

Meiga Ito, Ito Occupational Health Consultant Office

[Abstract]
In a previous study, although many labor and social security attorneys consider their role in occupational safety and health to be important, few of them actively perform safety and health work, citing a gap between their perception and their intention to implement it. The main body of occupational health is the business operator, and voluntary activities are required, but there are many cases where the business operator does not understand the importance of building a health management system or the role of occupational physicians. Particularly in small and medium-sized enterprises occupational physicians and labor and social security attorneys should work together to provide support that will enhance the initiative of employers.

[Keywords] Occupational physicians, Labor and social security attorneys, Health and employment support, Collaboration, implementation

Workshop 3

Remote Occupational Health Activities
— Is It Lawful or Not?—

Workshop 3 Facilitator
Koji Kandabashi, Japan Society for Occupational Health, The Scientific committee of Remote Occupational Health, DB-SeeD, LLC Representative
Yusaku Morita, Japan Society for Occupational Health, The Scientific committee of Remote Occupational Health, Nippon Steel Corporation Headquarters Human Resource Labor Policy Department Health Promotion Division
Chikako Shirata, Exa Corporation Human Resource Department Health Consultation Division
Yoshihito Naito, Naito Law Office
Tetsuro Ishizawa, Japan Society for Occupational Health, The Scientific committee of Remote Occupational Health, Central Medical Support Co., Ltd. Representative

[Abstract]
As working from home has spread rapidly since the COVID-19 pandemic first struck in 2020, occupational health professionals have begun to use information and communication technology in their activities. In this workshop, occupational physicians, occupational health nurses, and lawyers discussed issues related to privacy and responsibility with regard to online health interviews, particularly from a legal perspective. It found that measures vital to prevent disputes include thorough communication to employees of the content of related notifications, obtaining the consent of the worker as appropriate during related activities, and clear documentation of rules.

[Keywords] Remote occupational health, Remote interview, Industrial health, Interview guidance, Health guidance

Workshop 4

Consideration about the responsibility of outsourcers and assignors

[Abstract]
As each symposium participant reported on the responsibilities of clients and contractors under work styles such as side jobs, concurrent jobs, and freelance work that are being promoted today, views such as the following were pointed out:

- In many aspects, legal systems remain underdeveloped with regard to new work styles such as side jobs, concurrent jobs, and freelance work. There has been insufficient discussion of health and safety with regard to freelance work in particular.
- The method of front loading identified as one means of digital transformation (DX) is a revolutionary approach that contributes both to consideration for safety in the design stage and increasing productivity in the workplace. It also contains important hints for industries other than construction as well.
- While technically it would be possible to deploy occupational health services for quasi-employed workers, there are legal issues that must be resolved to enable it.

The discussions in this symposium suggested that there are pressing needs for clarification of the scopes of responsibilities of clients and contractors and measures to protect workers' health under work styles such as side jobs, concurrent jobs, and freelance work, which are likely to be used even more widely in the future.

[Keywords] Extra career, Side job, Freelancing, Obligation to care for safety, Self-health obligation, Risk creator management responsibility, Front loading, Quasi-employment worker

Introduction

Workshop 4 Joint Facilitator
Noritada Kato, Fuji Electric Co., Ltd, Occupational physician

Subcontractor, freelance, the scope and tasks of labor law seen in the safety care obligations for extra career takers and side job takers

Hiroshi Muramoto, Iwatani, Muramoto and Yamaguchi Law Firm

Recent trend of occupational safety and health in construction industry — the move of DX (digital transformation) and utilization of front loading, etc.

Yasuo Toyosawa, President of Scaffolding and Construction Equipment Association of Japan,
Former Director General of National Institute of Occupational Safety and Health, Japan

Consideration about the responsibility of outsourcers and assignors — Utilization of Occupational physician

Toru Takeda, Occupational health consulting service office OHCS President

Epilogue

Workshop 4 Joint Facilitator
Takayoshi Kajiwara, Kajiwara Occupational physician Office President

Contribution

Experience of publishing in an English academic book and message for potential authors — T.Mishiba. *Workplace Mental Health Law*. Routledge, based on the publishing experience in 2020 —

Takenori Mishiba, Kindai University Faculty of Law Professor