

Client Alert

Global Human Capital and Compliance

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New Challenge for Global Platforms Operating in the EU

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On December 13, 2023, negotiators from the EU Parliament and Council announced they had reached a provisional agreement on a directive to improve working conditions for platform workers¹. Since then, negotiations have continued, with an aim towards reaching a definitive agreement by Spring 2024.

As a basis for this agreement, the 27 Member States of the EU agreed on a common position for a proposed directive on June 12, 2023,² which, once adopted, will **introduce a legal presumption for the existence of an employment relationship in favor of platform workers** under certain conditions ("Proposal"). This new legal presumption could benefit at least 5.5 million out of the 28 million (expected to reach 43 million by 2025) self-employed platform workers in the EU who the European Commission has said are misclassified.³

The Proposal focuses on the gig economy: it would only apply to digital platforms, *i.e.*, platforms rendering services:

- (i) at a distance through electronic means (website, mobile application);
- (ii) at the request of a recipient of the services;
- (iii) which involve, as a necessary and essential component, the organization of work performed by individuals in return for payment, irrespective of whether that work is performed online or in a certain location; and
- (iv) which involve the use of automated monitoring or decision-making systems.

The Proposal has a far-reaching geographical scope of application as it would apply to persons performing platform work in the EU as well as platforms organizing platform work performed in the EU (irrespective of the place of establishment of the platform and irrespective of the law otherwise applicable). As an example, platforms based in the UK,



although itself no longer part of the EU, would be caught by these new rules where using platform workers who are located within the EU.

LEGAL PRESUMPTION FOR THE EXISTENCE OF AN EMPLOYMENT RELATIONSHIP

Under the Proposal, digital workers would be legally presumed to be employees if the digital platform “*exerts control and direction*” on them, which would be the case if the platform satisfies at least **two** of the following five criteria:

1. It determines upper limits for the level of remuneration;
2. It sets specific rules with regard to appearance or conduct towards the recipient of the service and restricts their freedom to organize their work;
3. It supervises the performance of work including by electronic means;
4. It restricts the freedom, including through sanctions, to organize one’s working hours or periods of absence; or
5. It restricts the freedom, including through sanctions, to control one’s allocation of tasks.

This list could be expanded by member states as a matter of national law.

The Proposal creates a “presumed” employment relationship and places the burden of proof on the platform to rebut the presumption and prove there is no employment relationship under applicable local law.

TRANSPARENCY REQUIREMENT ON PLATFORM WORK

The Proposal also introduces a reporting obligation for platform providers, which would require them to regularly provide national authorities and employee representatives with detailed information on platform work, including the number of persons performing work through the platform and their contractual or employment status as well as the intermediaries with whom they may be working. The responsibility will fall on member states to ensure providing outsourced labor enjoy the same level of protection as those with a direct work relationship.

AI: LIMITATIONS ON THE USE BY PLATFORMS OF ALGORITHMS

The Proposal also lays down the first EU rules on the use of artificial intelligence (AI) in the workplace by regulating how digital platforms can use automated monitoring or decision-making systems with platform workers. With the new rules, platform providers will need to ensure sufficient human resources for monitoring and evaluating the impact of individual decisions taken or supported by automated monitoring or decision-making systems, especially for significant decisions such as the suspension of accounts.

NEXT STEPS

The provisional agreement, once finalized, will then need to be formally adopted by the EU Parliament and Council as a Directive. Subsequently, EU Member States should transpose the Directive in their own legislation.

Companies with digital platforms using EU-based workers should keep a close eye on the transposition of the Directive’s measures and objectives by Member States in their national law. Other countries such as Spain are considering their own legal changes in the meantime; post-Brexit, UK workers are not covered by these rules and there are no current plans for legal changes, although litigation as to gig worker status continues in the UK Courts. It would be prudent for multinational companies to start planning now in anticipation of the impact this Proposal will have on their organizations and operations, and how it fits within the wider global landscape where gig worker status is increasingly subject to scrutiny.



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¹ Council press release on agreement for the proposed directive <https://www.consilium.europa.eu/en/press/press-releases/2023/12/13/rights-for-platform-workers-council-and-parliament-strike-deal/> .

² Proposal for a directive of the European Parliament and of the Council on improving working conditions in platform work – General approach, Doc. 10107/23, <https://data.consilium.europa.eu/doc/document/ST-10107-2023-INIT/en/pdf>.

³ Commission staff working document, Impact Assessment Report, December 10, 2021, <https://op.europa.eu/en/publication-detail/-/publication/48491c8f-59bb-11ec-91ac-01aa75ed71a1>.