



Trade Union
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Evidence against Prop22 - OECD views on false self-employment and platform work

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On 3 November 2020, the citizens of California voted in favour of “Proposition nb 22” which will classify “app-based workers” as independent contractors without access to employment standards. Uber and Lyft reportedly spent USD200 million in campaign activities in favour of the proposition. Unless overturned by State or Judicial proceedings, the vote is a set-back to millions of workers accessing labour protections as it will create an exemption for gig workers to California Assembly Bill 5 enacted in 2018. The voters’ decision under Proposition 22 is essentially creating a third worker category.

To support the argument that a more decisive and straightforward approach is needed (not the creation of third categories), in what follows the TUAC reviews OECD positions of the last few years on non-standard or new forms of work. In doing so, the focus is mostly on platform work in the broader context of non-standard forms of work. Many insights on platform work apply to the much wider and bigger group of workers falling outside the standard employment relationship. OECD positions provide an overall balanced approach to the many underlying problems they are faced with.

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At greater risk of job precarity

Non-standard forms of employment include temporary employment; part-time and on-call work; temporary agency work and other multiparty employment relationships; as well as disguised employment and dependent self-employment (according to the [ILO](#)). The [OECD’s 2019 Employment Outlook](#) regroups non-standard workers in i) workers under temporary contracts; ii) part-time workers; and iii) self-employed workers. In its

most recent account of '[distributional risks associated with non-standard work](#)', the OECD estimates "around 40% of employment on average across OECD European countries" belonging to this group.

In 2016, the [OECD confirmed](#) that platform workers, while potentially benefitting from greater flexibility, face "greater job insecurity, potentially lower earnings and less employer-sponsored training, self-employed are likely to receive less work related benefits than standard employees. This is the case notably for unemployment benefits, eligibility for work injury benefits, as well as for sickness and maternity benefits." The OECD Employment Outlook of 2019 recognises that workers in such jobs suffer from lower job quality: "an association exists between many forms of nonstandard work and poorer job quality, in the form of lower wages, less employment protection, reduced access to employer and social benefits, greater exposure to occupational safety and health risks, lower investments in lifelong learning, and low bargaining power of workers."

A structural problem

Most platform workers are non-standard workers. They carry most risks concerning their health, safety and income individually. [The pandemic just made matters worse](#). The majority of workers, who deliver, drive, clean or repair, are not able to claim and set predictable pay levels and are treated as self-employed – despite evidence that they are not quite that. They are dependent on work supply via intermediary platforms, who set the parameters on prices and access to consumers (users). This results in a gap between the contractual link (self-employed) and the economic reality of the relationship between them. This has been debated at length and labelled as "grey zones" (amongst other [by the OECD](#)). Workers in these zones lack clarity on their rights and status.

Now more than ever revisiting the rules governing such grey zones is key. Unrecognised employment relationships are a structural problem for non-standard workers. And, they are a structural advantage that allows businesses to save money. A survey of the Spanish trade union UGT has shown that online platforms are saving ca. 5000 euros in social contributions per worker. Platform delivery riders in the UK earn at best around two-thirds of the national minimum wage.

Platform business models should not dictate workers' status

The [OECD Jobs Strategy \(2018\)](#) argues that the proposition to create a new third category of worker is not not an ideal solution. Instead, it calls on governments to "revisit each major labour law and policy individually (even those which, at first, seem more difficult to extend to non-standard workers) and carefully assess how it might be tailored to broaden coverage, where appropriate". In short, do not create more ambiguity but see how rights and regulations can extend and benefit more workers than just those in permanent employment contracts.

The 2018 Jobs Strategy further rightly underlines that platform work is part of a much bigger picture affecting many other workers: *“Several countries have seen increases in the number of solo self-employed (or own-account workers) as a result of tax and regulatory incentives embedded in their systems, rather than as a consequence of technological change.”* Importantly, it states that *“platform work is not in and of itself a form of employment, but rather refers to the means through which the work is obtained and (sometimes) carried out. In theory, platform workers could be engaged in any kind of employment relationship. In practice, many are (rightly or wrongly) classified as self-employed and, in particular, as independent contractors (or own-account workers/solo self-employed).”* This is significant since it points to the fact that platform work does not automatically need to be one employment status over the other. It is more so decided by the business model that the worker has to adhere to.

In an [expert meeting on own-account workers](#), the OECD went into detail on the appropriate classification of workers: *“Some platform and own-account workers have simply been misclassified as self-employed workers and are, therefore, deprived of the rights and protections they are in fact entitled to. In other cases, there is genuine ambiguity about workers’ status as they share characteristics of both employees and the self-employed. Workers in this “grey zone” exhibit some of the vulnerabilities of employees (for instance, income dependency on a single firm/client) and yet, if classified as self-employed, will not have access to typical employee rights and protections. Finally, there will be some own-account workers who face unbalanced power relationships vis-à-vis certain firms/buyers of labour with monopsony power, and have limited options to provide services to other buyers. These workers will be price-takers and have little say over other working conditions as well.”*

Detecting misclassification

Classifying workers is not a straightforward endeavour. The ambiguity that exists is due to the fact that workers are not a homogenous group either and some want to remain genuinely self-employed. The main issues lie with those who find themselves in labour monopsony situations (more on this below) and are not entitled to redress any of the vulnerabilities in protections due to their status (or the mis-classification thereof). This comes on top of the challenge that translating the ‘grey zone’ into operational, legal definitions of dependent self-employment is not easy since the majority of OECD countries do not have them.

To determine if there is a mis-classification issue, hence false self-employment is equally not straightforward. The Jobs Strategy confirms that *“In most countries, economic dependency on a single client (i.e. dependent self-employment) will not be sufficient for a person to be considered to be falsely self-employed. Indeed, one can be financially dependent on one client, while still being genuinely self-employed. In general, for an employment relationship to be labelled as false self-employment, there also needs to be an element of control by the client/employer so that the individual has little freedom to decide over working hours, the way work is carried out, the place of work, etc. In other words: the*

characteristics of the employment relationship must closely mirror those of an employer-employee relationship.”

Factors to prove dependence are hence crucial towards defining the status of workers. Platform workers might be the ones amongst all the non-standard workers for whom the degree of control over working conditions (including the time and speed) and prices (financial dependence) might be the most visible. In other words, if a solution for them was to be found, many other non-standard workers could profit from it.

On **misclassification**, the OECD’s 2019 report on [Policy Responses to New Forms of Work](#) devotes an important discussion on how to handle workers in the “grey zone” between dependent employment and self-employment. The approach recommended by the OECD relies on three essential pillars: clarifying worker classification (through employment tests, labour inspections, etc.) to ensure that dependent workers can bargain collectively, introducing exemptions from labour/competition law for certain occupations, reduce incentives (e.g. by reviewing tax regimes) and continually engaging with social partners to ensure that collective bargaining and workers’ rights are honoured. As the report states: *“Ensuring the correct classification of workers (and tackling misclassification) is essential to ensure that workers have access to labour and social protection, as well as to collective bargaining and lifelong learning.”*... as does the 2019 Employment Outlook: *“Aside from the need to resolve potential ambiguities in classification, governments should consider policy avenues to give nonstandard workers greater access to collective representation, better training opportunities, and stronger social security, as well as adequate employment protection.”*

Level playing field

With a clear recognition of the underlying challenges, the [Going Digital Synthesis report](#) proposes the following comprehensive policy response: *“It is essential for countries not only to ensure that existing regulations are properly enforced, but also to examine their legal frameworks to determine whether they need to be updated and/or adjusted so that all workers, regardless of contract type, receive adequate rights, benefits and protections. This includes employment protection legislation, minimum wage laws, policies that determine working time, and occupational health and safety regulations. Countries should also consider how existing regulations can be more effectively enforced in the face of new business models, and what complementary legal and regulatory measures can help.”*

[Chapter 12 of the 2018 Jobs Strategy](#) insists on an approach that restores job quality and workers’ rights and more competition, but retains the benefits from newer business models: *“The objective of policy makers should be to balance innovation, entrepreneurship and flexibility, on the one hand, with job quality and worker rights and protections, on the other. The latter is important not only from a worker perspective, but also to ensure a level playing field between competing firms.”* To do so, it sets out the following policy responses, summarised here:

- **Balancing incentives** (“Where strong fiscal and regulatory imbalances between employment forms exist, governments should aim to reduce them.”, e.g. through reviewing tax incentives);
- **Addressing worker classification** (suggestions include the “principle of “primacy of facts””, a burden of proof on the employer, clearer differentiation between employment types under current frameworks);
- **Regulating platform work** (e.g. review of the terms of use against working conditions; “regulatory interventions are likely to have to come primarily from outside the labour domain, including in the fields of commercial, competition and tax policy, or even specific sectoral regulation (e.g. transport or accommodation)”);
- **Improving working conditions** (pay, working time, OHS, anti-discrimination);
- **Strengthening social protection.**

Workers’ voice

The OECD also acknowledges **workers’ representation** (and hence freedom of association) **and collective bargaining** as part of the solution. In its assessment on [own-account workers](#), it states that “addressing the challenges that these own-account workers face is not only desirable for equity reasons, but also for correcting market failures and improving the efficiency of the labour market. While there are several possible solutions (including government regulation, labour law enforcement and efforts to address the sources of monopsony power), collective bargaining can be a flexible and complementary tool for improving working conditions and countering power imbalances in relationships between firms and workers.”

As discussed, non-standard workers cannot easily organise because of the misclassification of their employment status (resulting in competition law barriers), multi-employer relationships and anti-organising strategies by employers but also unpredictable schedules and a lack of contact with co-workers. The OECD has recognized this dynamic and calls for the legal extension of collective bargaining to help such workers: “For those workers, who share vulnerabilities with salaried employees, and for some self-employed workers in unbalanced power relationships, adapting existing regulations to extend collective bargaining rights may be necessary.” (2019 Employment Outlook).

Collective bargaining vs competition rules

Beyond these recognitions, labour market monopsonies are a prominent issue for all non-standard workers. It occurs when there is a sole or dominant firm in a labour market, and more broadly when the market power of an individual firm is such that it can exert downward pressure on wages and working conditions, or unilaterally sets prices. Such dynamic decreases aggregate welfare as it pushes competition between workers for compensation at the margins of what is acceptable as living minimum wages. The OECD’s 2019 Employment Outlook recommends collective bargaining to counter this dynamic: “In many situations, employers’ buyer power is not compensated by sufficient bargaining

power on the side of the workers – in particular in the absence of collective bargaining – and may, therefore, lead to lower employment and pay as well as worse working conditions.” A [public hearing on ‘competition](#) issues in labour markets’ arrived at a similar conclusion: *“unionisation and collective bargaining might [...] be a relevant factor to be considered, since it would reduce the scope for the incentives provided by downward wage pressure to be acted upon.”*

For the time being, competition law forbids collective bargaining for self-employed workers and independent contractors. As an alternative solution to address monopsony power, the 2019 Employment Outlook supports the view that the status of employee under labour law should be extended to specific groups of workers in the “grey zone” between employees and self-employed.

Trade unions have tried to address some of these issues. In doing so, they are faced with barriers. One of the first collective agreements in Denmark between a domestic workers’ platform and the 3F union allowed for flexibility and compromise. Workers could decide themselves if they wanted to obtain the employment status, while others could remain freelancers – yet benefit from minimum fees. The latter component is now being challenged by [domestic antitrust legislation](#). At the European level, there is hope that the new public consultation on allowing self-employed platform workers to bargain. If it does, agreements like this could become more prominent.

Next steps

In conclusion, the OECD’s most recent work displays the challenges of non-standard workers, definition and classification issues, and the limitations to unionisation and collective bargaining well. Policy solutions that the OECD is suggesting include broadening access to collective bargaining and an expansion of the employee category. The OECD argues against a third category and rather delves into resolving classification issues. With so many workers in non-standard work hit hard by the Covid-19 crisis and within that group, platform workers, seeking more protections if not the recognition of their employee status, it is time to act. The OECD’s suggestions for a horizontal approach read well on paper. Decisive actions by regulators and the revision of existing legal frameworks has been mostly lacking. When implementing the 2018 Jobs Strategy, OECD members should assess the make-up of their labour markets against the situation of their non-standard workers.

To take these considerations one step further, both OECD evidence gathering and a collective OECD members’ response is needed on the following:

- Classify workers better and limit the grey zone by streamlining legal definitions and thresholds based on data on gross hourly income of non-standard workers, their working hours and working conditions (and the parameters of control governing it).

- Review access parameters to social protection, short-time working schemes and training.
- Address competition law barriers to collective bargaining irrespective of the workers' status, and pave ways to unrestricted worker representation and engagement.
- Assess the way certain business operate against existing taxation, competition, data privacy and protection, and responsible business conduct frameworks.