

Bernd Waas / Wilma B. Liebman / Andrew Lyubarsky / Katsutoshi Kezuka  
**Crowdwork – A Comparative Law Perspective**

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# **Crowdwork – A Comparative Law Perspective**



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# Foreword

As the world becomes increasingly digitalized, we are confronted with new, often disruptive, business models also leading to new forms of labour. One feature of this development is the dual phenomenon of crowdsourcing and crowdworking, which spans the whole value-chain of the economy and represents a global labour market. The working conditions in this sector cannot be ignored, because they have a great impact on the situation of established employees, on the competition between crowdworkers, and on the sustainability of the systems of social security.

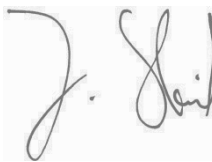
Although it is too soon to give a final assessment of this emerging workplace, we can be sure it will have a significant influence on the labour market, including (labour) law institutions. Against this background the HSI decided to have a closer look at the factual and legal developments crowdsourcing has brought about in three major legal landscapes. We are very happy and grateful to have found three high-ranking legal experts to fulfill this task. The findings in this study can be seen as a preliminary evaluation of the dynamic and erratic developments in the “platform economy”.

Crowdworkers work under very different arrangements (as our authors show), and each case presents a slightly different employment picture, some crowdworkers perhaps amounting to employees, others more like self-employed contractors (and others somewhere in between). But because few crowdworkers currently enjoy social protections, this study also offers a broad variety of legislative options that could work to address such shortcomings within several legal systems.

We wish you inspiring reading.



Dr. Thomas Klebe



Dr. Johannes Heuschmid



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# A. Introduction

Bernd Waas<sup>1</sup>

Just a few years ago, crowdwork was virtually unheard of. That has changed. As if a synonym for the transformation of work in the digital age, crowdwork is a crucial element of today's platform economy in which firms such as Uber, Alibaba, Facebook, Google and Airbnb operate. What characterises these firms are their various "brokerage" services, positioning themselves as intermediaries between conventional suppliers of goods and services and their customers.<sup>2</sup> Entrepreneurial imagination knows no bounds in this regard. Rumours have it that Google plans to introduce a feature brokering the services of tradespeople (builders, carpenters, mechanics, etc.).

## I. The Notion of Crowdwork and Its Different Forms

"Crowdwork" is the term used to describe work done in the context of crowdsourcing of commercial activities. But what actually is "crowdsourcing"? The term first appeared in a 2006 article for *Wired* magazine written by the American journalist Jeff Howe. He wrote: "Remember outsourcing? Sending jobs to India and China is so 2003. The new pool of cheap labor: everyday people using their spare cycles to create content, solve problems, even do corporate R & D."<sup>3</sup> The online Merriam-Webster dictionary defines crowdsourcing as "the practice of obtaining needed services, ideas, or content by soliciting contributions from a large group of people and especially from the online community rather than from traditional employees or suppliers".<sup>4</sup> Others define the term differently. The Internet encyclopaedia *Wikipedia* boasts no fewer than 40 differ-

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<sup>1</sup> Bernd Waas, Professor of Labour Law and Civil Law at Goethe University Frankfurt am Main.

<sup>2</sup> For an analysis of this model, see Jean-Charles Rochet and Jean Tirole, 'Platform competition in two-sided markets', (2003) 1 *Journal of the European Economic Association* 990.

<sup>3</sup> Jeff Howe, 'The Rise of Crowdsourcing', (2006) *Wired* 14.06, available online: <http://archive.wired.com/wired/archive/14.06/crowds.html> [accessed: 2 May 2017].

<sup>4</sup> <http://www.merriam-webster.com/dictionary/crowdsourcing> [accessed: 2 May 2017].

ent definitions for the term.<sup>5</sup> At any rate, what is clear is the close connection with outsourcing, as identified by Jeff Howe. That is why some writers prefer, in place of “crowdsourcing”, the term “online outsourcing”, defined in a recent World Bank report as follows: “Online outsourcing refers to the contracting of third-party workers and providers (often overseas) to supply services or perform tasks via Internet-based marketplaces or platforms”.<sup>6</sup>

The multiplicity of definitions with relation to crowdsourcing reflects the many forms in which crowdsourcing (and, as a consequence, also crowdwork) appears. The term “crowdsourcing” is indeed used to describe very different processes. Crucial in this regard is the distinction between internal and external crowdsourcing. In the case of internal crowdsourcing, the process remains within the confines of the firm. Here, the firm establishes an intranet platform on which jobs are advertised exclusively to its own permanent workforce. External crowdsourcing is a completely different matter. Here, it is not the firm’s own workers but third parties i.e., external workers that the platform addresses. Hybrid forms are also often found in which, for example, an internal crowdsourcing process incorporates individuals from outside the firm.

In relation to external crowdsourcing, two main variants, a bilateral model and a trilateral model, can be distinguished. In the first case, the firm itself establishes a platform on which communication and the exchange of services take place. Other client companies cannot participate. In its report, the World Bank refers to these as “managed services platforms”.<sup>7</sup> The trilateral model—which is far more widespread and will be at the heart of this study—is different. In this case, a third party operates an online platform through which firms can connect with crowdworkers. These platforms are referred to by the World Bank as “open services platforms”.<sup>8</sup> Firms operating in the online outsourcing industry generally may have a dual function. First, they are often “transformers” in the sense that they “split” assignments received from their customers into smaller tasks manageable for an individual worker. Second, they act as “aggregators” in the sense that they assemble the crowd that ultimately delivers the product required.<sup>9</sup> What is indeed apparent is that crowdsourcing, not only in the context

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<sup>5</sup> <https://en.wikipedia.org/wiki/Crowdsourcing> [accessed: 2 May 2017].

<sup>6</sup> World Bank, *The Global Opportunity in Online Outsourcing* (2015), p. 1. Available online <http://documents.worldbank.org/curated/en/2015/06/24702763/global-opportunity-online-outsourcing> [accessed: 2 May 2017].

<sup>7</sup> World Bank (note 6), p. 12.

<sup>8</sup> *Ibid.*, p. 11.

<sup>9</sup> *Ibid.*

of open services platforms, takes on many different forms. The services offered by firms in the online outsourcing industry vary considerably, e.g., in terms of quality control and selection of workers.<sup>10</sup>

Also the tasks involved vary considerably, encompassing many different levels of skill. Some tasks are very simple for which “almost anyone” is capable. Others are much more sophisticated tasks for which specialist knowledge and skills are needed. Recognising these differences, the World Bank report draws a distinction between microwork, on the one hand, and online freelancing, on the other. Microwork is the result of splitting one assignment into many individual microtasks. Performing tasks of this kind, sometimes referred to as “human intelligence tasks” or “HITs”, generally involves no more than a few minutes, sometimes only seconds. There are hardly any restrictions on access, with no particular knowledge or skills required. However, the earnings that a crowdworker can make from such tasks are also very modest.<sup>11</sup> The situation is very different in the case of online freelancing. Here, firms use the Internet to obtain the services of experts to carry out sophisticated tasks. These assignments are better remunerated, often involving work of several months’ duration. Typical microtasks are the sorting of images and the entering of data. In contrast, examples for online freelancing include web design or research and development tasks. However, the distinction is not clear-cut. Many instances of crowdwork cannot be easily classified under either of the two headings.<sup>12</sup> There can be no doubt, however, that depending on the tasks performed, there is immense variation in the earnings crowdworkers can achieve. In the case of microwork, earnings can be shockingly low. However, in the area of online freelancing, incomes can be obtained that are comparable with those in the offline economy.<sup>13</sup>

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<sup>10</sup> Ibid., p. 12. For greater detail on the management of the work processes arising in the context of crowdwork see, for example, J.-M. Leimeister, S. Zogaj and I. Blohm, ‘Crowdwork – digitale Wertschöpfung in der Wolke’ in C. Benner (ed.), *Crowdwork – zurück in die Zukunft? Perspektiven digitaler Arbeit* (Bund Verlag 2015), p. 9, at p. 22 et seq.

<sup>11</sup> On the notion of “cognitive piecework” see also A. Felstiner, ‘Working the crowd: Employment and labor law in the crowdsourcing industry’, (2011) 32 *Berkeley Journal of Employment & Labor Law* 143, at p. 147 et seq.

<sup>12</sup> On the whole issue, see World Bank (note 6), pp. 1 and 8.

<sup>13</sup> Ibid., pp. 3-4.

It is readily apparent, simply from a cursory examination, that crowdwork does not exist in a singular form. This is true in many different ways. As an illustration of this diversity, consider, for example, the phenomenon of “contest-based crowdwork” found primarily in creative industries.<sup>14</sup> Under this model, the crowdworker’s efforts lead to no more than a chance of remuneration. As the client only intends to pay for the “finished product”, and only when it is chosen in preference over designs produced by other competitors, all those who are unsuccessful in the contest will receive nothing.<sup>15</sup> Even if crowdwork is not “contest based”, crowdworkers may not be in a position to reap the rewards of their labour. The homepage of Mechanical Turk, the platform created by the Internet firm Amazon, explains the advantages of its crowdwork model to businesses as follows: “As a Mechanical Turk Requester you (i) have access to a global, on-demand, 24 x 7 workforce; (ii) get thousands of HITs completed in minutes; (iii) pay only when you’re satisfied with the results”.<sup>16</sup>

## II. The Extent of Crowdworking

Crowdsourcing and the crowdwork associated with it have expanded considerably, if not dramatically, in recent years. According to experts, in 2013 there were some 48 million individuals registered on crowdworking platforms, of whom around 20% were active workers. The gross revenue generated by online outsourcing in that year is estimated at \$2 billion. Future developments are not easy to predict. However, the global market for online freelancing is projected to increase to \$4.4 billion by 2016, while microwork is expected to reach \$0.4 billion. This may not sound like much. However, there are some experts who see crowdworking as expanding further, achieving revenues of between \$15 and \$25 billion by 2020.<sup>17</sup> In any event, there can be no doubt that crowdsourcing has already become a global industry drawing on workers from across the world. The distribution of these workers is very uneven. Two-thirds of them come from just three countries: the U.S., India and the Philippines. In Africa, crowdworkers

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<sup>14</sup> See, for example, F. Schmidt, ‘The Good, the Bad and the Ugly - Warum Crowdsourcing eine Frage der Ethik ist’ in C. Benner (ed.), *Crowdwork – zurück in die Zukunft? Perspektiven digitaler Arbeit* (Bund Verlag 2015), p. 367, at p. 378.

<sup>15</sup> Leimeister et al. (note 10) make a distinction in this regard, at page 27, between two forms of work, one following a competition-based approach and the other following a cooperation-based approach.

<sup>16</sup> <https://www.mturk.com/mturk/welcome> [accessed 2 May 2017].

<sup>17</sup> World Bank (note 6), p. 3.



are found principally in Kenya and South Africa.<sup>18</sup> In Europe, Serbia and Romania are the countries which, relative to their total populations, provide the most crowdworkers. However, German platforms have also experienced considerable growth in recent years both in terms of revenues and the number of registered “clickworkers”.<sup>19</sup>

The main driver behind crowdsourcing is the private sector. Demand for online freelancing comes principally from smaller companies, whereas for microwork the main users are larger companies.<sup>20</sup> However, it is by no means certain that the private sector will retain this dominant role. Industry experts predict that the public sector will significantly expand its use of crowdsourcing.<sup>21</sup>

Currently, the companies making greatest use of crowdsourcing are primarily in the technology and Internet sectors. However, the increasing presence of big data means that crowdwork is likely to expand into other sectors. Examples already exist of organisations far removed from the IT sector taking advantage of the cost savings resulting especially from the division of complex projects into manageable microtasks.<sup>22</sup> At the same time, the range of skills demanded by firms online continues to grow.<sup>23</sup> Crowdwork clearly has the potential to reach areas in which it is currently unknown.

### III. Opportunities and Risks of Crowdwork

What are the advantages and disadvantages of crowdsourcing? From the perspective of businesses, the advantages are readily tangible. Crowdsourcing offers firms additional opportunities to access (specialist) workers. These are available in principle to start at any time without any need for drawn-out recruitment processes. In addition, the potential workforce is not limited by na-

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<sup>18</sup> Ibid.

<sup>19</sup> For greater detail see W. Däubler and T. Klebe, *Crowdwork: Die neue Form der Arbeit – Arbeitgeber auf der Flucht*, (2015) *Neue Zeitschrift für Arbeitsrecht* 2015, p. 1032.

<sup>20</sup> World Bank (note 6), p. 14. Cf. also Liebman, B IV. 1. referring to a recent Pew Research Center study.

<sup>21</sup> Ibid. As Liebman, B II. will point out in her contribution, the public sector is increasingly using open innovation platforms.

<sup>22</sup> As an example for the use of microwork, the World Bank cites the humanitarian response to the Haitian earthquake (note 6, p. 16).

<sup>23</sup> World Bank (note 6), p. 15.

tional borders. This means that businesses can harness “24-hour productivity”.<sup>24</sup> The major advantage from their perspective is that they are essentially free to determine, in accordance with their own operational needs, when and for how long workers should provide their services. This is an advantage that online outsourcing firms specifically promote. According to its website, Amazon’s Mechanical Turk “gives your business access to a scalable, on-demand workforce. [It] lets you get results faster by having multiple workers complete individual Human Intelligence Tasks (HITs) in parallel. The global worker community on Mechanical Turk lets you get work done at a lower cost than was previously possible”.<sup>25</sup>

The advantages for crowdworkers are not so obvious. However, before making any snap assessment, the global reach of crowdsourcing needs to be stressed. From this perspective, it is clear that, in particular in developing countries, the resulting employment opportunities are considerable. Accordingly, the World Bank draws attention to the fact that online work can help combat youth unemployment and encourage women’s labour market participation.<sup>26</sup> Namely, to get started as a crowdworker, what is essential is a computer and an Internet connection. In industrialised countries, too, crowdwork should not be condemned out of hand. For some individuals, crowdwork is an opportunity for making extra cash. Why shouldn’t teenagers, students, pensioners or even employees use their spare time outside of work to sort photographs or carry out other simple tasks and thereby earn additional money to pay for a treat? There are other reasons, too, why pessimism appears inappropriate. Crowdwork can in fact contribute to the development of a worker’s skills and abilities. It is not limited per se to simple and repetitive tasks. Crowdwork can also provide individuals with advantages in other respects. As crowdworkers are free to determine where and when they work and which tasks they undertake, they can tailor their work to their own circumstances. Crowdwork is extremely flexible not only for businesses but also for workers.<sup>27</sup>

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<sup>24</sup> Ibid., p. 1.

<sup>25</sup> <https://requester.mturk.com/tour> [accessed: 2 May 2017]. Felstiner (note 11) writes at p. 151: “The two most touted advantages are the twin grails of scalability and on-demand labor. Given a sufficiently large networked pool (less difficult to assemble on the Internet than in physical locations), the crowd can accomplish tasks of practically any size. The workforce can also grow and shrink over time, according to the firm’s needs”. At pp. 153-154 he also points out some of the possible downsides (e.g. ensuring adequate quality control or intellectual property rights).

<sup>26</sup> World Bank (note 6), pp. 4-5.

<sup>27</sup> For greater detail, see Felstiner (note 11) at pp. 154-155.

However, the analysis cannot stop here. There are unquestionably also disadvantages. It can hardly be contested that a crowdworker enjoys considerably less security – above all in relation to earnings – than an individual working in a standard employment relationship. A crowdworker can scarcely predict whether opportunities for work will arise and, if so, when this will be and the actual volume of work available.<sup>28</sup> It is readily apparent that under crowdwork an individual’s professional and personal life are much more difficult to plan<sup>29</sup> and that, at present, it constitutes in many cases an occupational “dead end”.<sup>30</sup> Admittedly, not all “open services platforms” are the same. There are some which do offer crowdworkers training to improve their skills.<sup>31</sup> However, the incentives to provide this are likely to be much weaker than in the case of a firm’s own regular employees. Crowdwork may also imply other risks. For example, the asymmetry of information can be so great that crowdworkers do not know for which firm they are actually working.<sup>32</sup> Risks also result from the isolation of crowdworkers. They carry out their tasks not within a “community of workers” but independently of any colleagues, at the kitchen table or elsewhere.<sup>33</sup> Although there is evidence that crowdworkers often develop virtual communities,<sup>34</sup> it is unclear whether these compensate adequately for the disadvantages resulting from working in isolation.

In an individual case, crowdwork can result in a win-win situation. That is particularly so where an employment opportunity arises that would have been impossible or extremely hard to come by without the Internet. However, serious risks abound. This is particularly apparent if we recall what makes crowdwork attractive for businesses. If the Internet allows businesses to access a workforce on other continents, this also implies that the performance of many tasks is opened up to global competition. And if crowdwork provides businesses with the scope to tailor their recourse to labour exactly according to their needs—for example, by splitting complex activities into microtasks – this also means that security and predictability for workers generally falls by the wayside. In this

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<sup>28</sup> World Bank (note 6), p. 45.

<sup>29</sup> *Ibid.*, p. 44.

<sup>30</sup> To counteract this, there are suggestions to develop “career ladders” for crowdworkers. See, for example, A. Kittur, J. Nickerson, M. Bernstein, E. Gerber, A. Shaw, J. Zimmerman, M. Lease and J. Horton, ‘The Future of Crowdwork’, p. 10: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2190946](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2190946).

<sup>31</sup> World Bank (note 6), p. 11.

<sup>32</sup> See, for example, Felstiner (note 11), at pp. 156-157.

<sup>33</sup> World Bank (note 6), p. 45.

<sup>34</sup> *Ibid.*, p. 4.

context, the question needs to be asked whether and, if so, to what extent labour law rules apply to crowdworkers. Without seeking to anticipate the answer, it is noticeable that online platforms often seek to emphasise the (supposed) advantages that result from the inapplicability of labour law. For example, the FAQs on Mechanical Turk explain the service in the following terms: “For businesses and entrepreneurs who want tasks completed, the Amazon Mechanical Turk service solves the problem of accessing a vast network of human intelligence with the efficiencies and cost-effectiveness of computers. Oftentimes people do not move forward with certain projects because the cost to establish a network of skilled workers to do the work outweighs the value of completing it. By turning the fixed costs into variable costs that scale with their needs, the Amazon Mechanical Turk web service eliminates this barrier and allows projects to be completed that before were not economical”.<sup>35</sup> This could hardly make things clearer. The traditional employment relationship belongs to the past. And a good reason for using crowdwork is the opportunity to avoid the fixed costs that result from the application of labour law rules. A further factor, not expressly mentioned, is that crowdwork also offers firms the possibility to save on social security costs. Namely, if crowdworkers do not qualify as employees but are “self-employed”, firms do not have to make contributions on their behalf. The crowdworker alone is responsible for ensuring health insurance and pension coverage.

#### **IV. Problems Associated with Crowdwork and the Need for Regulation**

Crowdwork raises many legal problems, less so perhaps in the case of internal crowdsourcing, which as the term implies is directed to the firm’s own regular employees, but most certainly in the case of external crowdsourcing. The core question is how to ensure effective protection for crowdworkers. It is immediately apparent that the answer is anything but straightforward. From an empirical perspective, this follows from the fact, as discussed earlier, that crowdwork takes many different forms. Accordingly, the phenomenon needs to be captured in a precise and above all differentiated manner if the problems are to be correctly identified.

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<sup>35</sup> [https://requester.mturk.com/help/faq#what\\_does\\_mturk\\_solve](https://requester.mturk.com/help/faq#what_does_mturk_solve) [accessed: 2 May 2017].

Difficulties also arise from a legal perspective, as the problems encountered are often of an elementary nature. First, a legal analysis is required of the triangular relationship between client, open services platform and crowdworker. Evidently, contractual relationships exist between the first two parties and the latter two parties. On the other hand, it will often appear difficult to establish a contractual relationship between the client and the crowdworker, at least, if one assumes that the platform is acting on its own account and not simply as an agent. This is (naturally) without prejudice to the existence of other legal relationships – not of a contractual nature – between the client and crowdworker.<sup>36</sup>

Following an analysis of the contractual matrix, the next crucial question concerns the conditions under which a crowdworker can be classified as an employee. This question is fundamental to the whole debate, as it determines whether the entire spectrum of labour law rules – from the protection of fixed-term and part-time workers to, as far as they exist, dismissal protection rules – are applicable or not. Unless supranational norms apply, it is for domestic law to determine whether an individual is classified as an employee. If the rules of domestic labour law also provide for categories of individuals to which labour law can be extended even though these individuals do not qualify as employees, as is the case, for example, in Germany, these categories must also be considered.

Nonetheless, the central question is whether an individual crowdworker can be classified as an employee. This is not the place for “sentimental” concerns. The mere fact that crowdworkers often take the place of regular employment relationships cannot suffice as an argument for their blanket inclusion within the scope of labour law.<sup>37</sup> Instead, it must simply be asked whether, in the circumstances of the individual case, classification as an employee is justified. However, the difficulty here is that the criteria established by legislation and case law for determining this question are poorly adapted to “virtual work”.<sup>38</sup> A comparative law enquiry into the notion of “employee” reveals that in very many legal systems the criterion of “dependency” is of crucial importance for determining employee status, though in common law systems like the U.S. the applicable

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<sup>36</sup> On this point, see, for example, M. Risak and J. Warter, ‘Decent Crowdwork – Legal strategies towards fair employment conditions in the virtual sweatshop’, Paper presented at the Regulating for Decent Work 2015 Conference, Geneva, 8-10 July 2015, unpublished.

<sup>37</sup> To the same effect, see Felstiner (note 11), at p. 160.

<sup>38</sup> In a similar vein, see, for example, M. Cherry, ‘Working for (virtually) minimum wage: Applying the Fair Labor Standards Act in cyberspace’, (2009) 60 *Alabama Law Review* 1077.

tests may be different. If one considers that this criterion relates above all to the idea that an individual is subject to the authority, control and direction of another, it is clear that this is much more difficult to demonstrate in the context of online outsourcing than in traditional industrial production. Thus it remains to be resolved whether and, if so, to what extent, the current labour law framework is capable of adaptation to the phenomenon of crowdwork. This applies not only with regard to determination of employee status but also to other labour law questions. For example, domestic law may contain provisions governing the provision of work in an individual's own home (or another place chosen by that person) adopted long before the possibilities of the Internet could even be imagined. The question then is whether such rules "fit" in relation to digital crowdwork.

In addition to these questions of individual labour law, questions of collective labour law also need to be considered. An important issue is, for instance, whether crowdworkers can form trade unions or join existing trade unions to obtain protection by means of collective agreement.<sup>39</sup> This is closely connected to the question whether strikes or other forms of industrial action are conceivable by which crowdworkers can voice their demands for an improvement in their employment situation.

However, the inquiry should not be limited simply to labour law. Even if it is concluded that labour rules cannot be applied to crowdworkers, this does not mean that these workers are necessarily without any protection. Instead, it should be asked whether provisions from other areas of law could apply, establishing at least a certain basic level of protection. These could include, depending on the domestic legal system, general civil law principles (for example, outlawing transactions *contra bonos mores*, or contrary to the principle of good faith) or principles of competition or consumer law.<sup>40</sup>

The legal issues surrounding crowdsourcing acquire a further level of complexity when consideration is given to its transnational character. One of the reasons why crowdsourcing is attractive to firms is not least the possibility to access a

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<sup>39</sup> It should be noted in this context that the right to organise provided for in Article 2 of ILO Convention No 87 is framed in universal terms, i.e., includes individuals who are not employees. For more detail, see J. Hodges-Aeberhard, 'The right to organise in Article 2 of Convention No 87 – What is meant by "workers without distinction whatsoever"?' (1989) 128 *International Labour Review* 177, at p. 193.

<sup>40</sup> On the possibilities available under German law, see W. Däubler, 'Crowdwork – Schutz auch außerhalb des Arbeitsrechts?' in C. Benner (ed.) *Crowdwork – zurück in die Zukunft? Perspektiven digitaler Arbeit* (Bund Verlag 2015), p. 243.

global labour market. However, this results automatically in additional legal issues. Once crowdsourcing crosses national boundaries, it has to be clarified not simply which courts are competent but which is the applicable law.

## B. Crowdworkers, the Law and the Future of Work: The U.S.

Wilma B. Liebman and Andrew Lyubarsky<sup>1</sup>

### I. Introduction

“It cannot be helped, it is as it should be, that the law is behind the times.”<sup>2</sup> So observed U.S. Supreme Court Justice Oliver Wendell Holmes in 1921. Sixty years later, U.S. Court of Appeals Judge David L. Bazelon reflected on Holmes’ statement: “Whatever benefits of stability this truism heralds, it also announces the never-ending need for law reform.” He continued, “This ongoing reform is especially necessary in light of the massive scientific and technological developments of the last half-century, developments that have transformed our world.”<sup>3</sup> Judge Bazelon called for “far-reaching and farsighted” reform to telecommunications law “if the law is ever to catch up with the reality of our times.”<sup>4</sup>

Scientific and technological developments continue to transform the nature of work, the relationship between workers and firms and between firms, ownership structures and business models, and the operations of firms and markets.<sup>5</sup> But as 21st-century workplace realities evolve while the industrial-era legal regime that governs them remains unchanged, Holmes’ observation and Bazelon’s admonition are all the more timely. The problem of reforming the law to keep up with technological innovation is placed in high relief by crowdwork, the outsourcing of work to the human cloud, and, more broadly, the gig (or on-demand) economy. Venture capital, Silicon Valley and their media watchers are

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<sup>1</sup> Wilma B. Liebman, Visiting Distinguished Scholar, Rutgers University School of Management and Labor Relations 2015-2016. Chairman, National Labor Relations Board, 2009-2011; Member, National Labor Relations Board, November 1997-January 2009. Andrew Lyubarsky, New York University School of Law 2016.

<sup>2</sup> OW Holmes, ‘Law and the Court’ in *Collected Legal Papers* 291, 294 (1921).

<sup>3</sup> DL Bazelon, ‘Student Symposium: Communications Regulation – Foreword’, (1981) 69 *California Law Review* 442.

<sup>4</sup> *Ibid.*, 443, 445.

<sup>5</sup> D Weil, *The Fissured Workplace: Why work became so bad for so many and what can be done to improve it* (Cambridge, MA, Harvard University Press, 2014).



consumed, perhaps obsessed, with companies like Uber, marketplace platforms that instantly bring together buyers and sellers in an unending stream of enterprises that supply labor and services on demand.<sup>6</sup>

Companies aimed at “disrupting” an existing set of economic arrangements launch with rapidity, some with outsized valuations.<sup>7</sup> Unlike businesses in the 19th and 20th centuries, which needed investment capital to build factories and stores and acquire equipment and inventory, “Internet startups don’t require much in the way of physical assets beyond office space, and they can have global reach instantaneously.”<sup>8</sup> The business models are glorified for offering flexibility and opportunity, “find[ing] spaces for employment in the inefficiencies of capitalism and exploit[ing] them through the sheer scale of ... the Internet.”<sup>9</sup> Government regulation of these startups is viewed with suspicion.

Yet observers and participants are questioning these models as they become increasingly uncomfortable with the “power dynamics built into web platforms, and in particular [the platforms’] relationship to established power in the form of capital investment.” Despite the promise “to expand knowledge, deliver economic opportunity and solve big problems ... in ways that haven’t been possible previously,” one venture capitalist cautions against “the imbalance of power between peer economy platforms and the participants they support... The problem is essentially one of trust. ... [A]s this space has matured, platforms have a tendency ... to do more, take more, and exert more control. So the

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<sup>6</sup> ‘There’s an App for that’, *The Economist* (London, 3 January 2015) <[www.economist.com/news/briefing/21637355-freelance-workers-available-moments-notice-will-reshape-nature-companies-and](http://www.economist.com/news/briefing/21637355-freelance-workers-available-moments-notice-will-reshape-nature-companies-and)>; ‘Workers on tap’, *The Economist* (London, 3 January 2015) <[www.economist.com/news/leaders/21637393-rise-demand-economy-poses-difficult-questions-workers-companies-and](http://www.economist.com/news/leaders/21637393-rise-demand-economy-poses-difficult-questions-workers-companies-and)>.

<sup>7</sup> AR Sorkin, ‘Why Uber Keeps Raising Billions,’ *The New York Times*, (New York, 3 June 2016) <[www.nytimes.com/2016/06/21/business/dealbook/why-uber-keeps-raising-billions.html](http://www.nytimes.com/2016/06/21/business/dealbook/why-uber-keeps-raising-billions.html)>; Startups Instacart, JustFab and Prosper Marketplace are all valued at \$1 billion or more. L Chapman, “‘Unicorn’ Startups Say High Valuation Justified, Citing Big Growth Ahead’ *Wall Street Journal* (New York, 7 May 2015) <[blogs.wsj.com/venturecapital/2015/05/07/unicorn-startups-say-high-valuations-justified-citing-big-growth-ahead](http://blogs.wsj.com/venturecapital/2015/05/07/unicorn-startups-say-high-valuations-justified-citing-big-growth-ahead)>.

<sup>8</sup> N Lemann, ‘Letter from Silicon Valley: The Network Man’, *The New Yorker* (New York, 12 October 2015) <[www.newyorker.com/magazine/2015/10/12/the-network-man](http://www.newyorker.com/magazine/2015/10/12/the-network-man)> (“Technology investing, especially at this moment, represents a highly specialized form of hypercapitalism”).

<sup>9</sup> T Adams, ‘My father had one job in his life, I’ve had six in mine, my kids will have six at the same time,’ *The Guardian* (London, 29 November 2015) <[www.theguardian.com/society/2015/nov/29/future-of-work-gig-sharing-economy-juggling-jobs](http://www.theguardian.com/society/2015/nov/29/future-of-work-gig-sharing-economy-juggling-jobs)>.

question becomes, are participants here getting a fair deal, and do they have an appropriate amount of freedom and control?"<sup>10</sup>

It is no accident, according to some, that these ventures took off following the 2008 financial crisis, "mobilizing casual workers, monetizing underutilized assets, and disrupting sclerotic industries. These firms have also attracted sharp criticism charging that they contribute to the erosion of labor standards and are at the heart of a new 'gig' economy that promotes exploitation under the guise of enhanced flexibility."<sup>11</sup> Rather than the flexibility millennials supposedly prefer, say skeptics, anxiety is the true reality of the gig economy, for the business model relies not on regular employment (with all the rights, benefits and protections that entails) but episodic contracting arrangements for often paltry pay.<sup>12</sup>

At the forefront of this phenomenon is the \$62.5 billion-valued Uber, which engages drivers as independent contractors. TaskRabbit, with its web-based marketplace that pairs people willing to do casual household tasks with customers looking for help, has also garnered attention.<sup>13</sup> But even before Uber, TaskRabbit and other examples of this budding "concierge economy"<sup>14</sup> burst on the scene, crowdwork platforms offered opportunities for matching jobs to workers. Unlike online marketplaces for real-world services, these platforms

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<sup>10</sup> N Grossman, 'Venture capital vs. community capital', (22 May 2015) <[www.nickgrossman.is/2015/05/22/venture-capital-vs-community-capital](http://www.nickgrossman.is/2015/05/22/venture-capital-vs-community-capital)>.

<sup>11</sup> M Cohen, 'How Platform Cooperativism Can Accelerate Sustainable Consumption', *Shareable* (21 October 2015) <[www.shareable.net/blog/how-platform-cooperativism-can-accelerate-sustainable-consumption](http://www.shareable.net/blog/how-platform-cooperativism-can-accelerate-sustainable-consumption)>.

<sup>12</sup> See, e.g., N Scheiber, 'Growth in the "Gig Economy" Fuels Work Force Anxieties', *New York Times* (New York, 12 July 2015) <<http://www.nytimes.com/2015/07/13/business/rising-economic-insecurity-tied-to-decades-long-trend-in-employment-practices.html>>; E Jacobs, 'The silent anxiety of the sharing economy', *Financial Times* (London, 25 June 2015) <<http://www.ft.com/cms/s/0/e61ca2e2-18f0-11e5-a130-2e7db721f996.html#axzz4Cv3dEMS7>>; T Adams (n 9) ("In the 'gig' or 'sharing' economy ... we will do lots of different jobs as technology releases us from the nine to five. But it may also bring anxiety, insecurity and low wages.")

<sup>13</sup> See, e.g., R Kuttner, 'The Task Rabbit Economy', *American Prospect* (Washington, Sep./Oct. 2013) <[prospect.org/article/task-rabbit-economy](http://prospect.org/article/task-rabbit-economy)>; Z Tufekci, 'The Trouble with the "uber for..." Economy', *The Medium* (20 October 2015) <[medium.com/message/the-trouble-with-the-uber-for-economy-d2a6fa1bd28f#ho7e1feh0](http://medium.com/message/the-trouble-with-the-uber-for-economy-d2a6fa1bd28f#ho7e1feh0)> (The "well-paid, chronically over-worked" are "now outsourcing more and more of [their] tasks to ...the under-paid, chronically underemployed who wait on-demand for scraps of jobs. That's the "uber for..." economy that generates so much anxiety.")

<sup>14</sup> J Naughton, 'Meet tech's new concierge economy, where serfs deliver stuff to rich folk', *The Guardian* (27 December 2014) <[www.theguardian.com/commentisfree/2014/dec/28/uber-amazon-tech-concierge-economy](http://www.theguardian.com/commentisfree/2014/dec/28/uber-amazon-tech-concierge-economy)>.

allow their clients to access a truly global crowd of workers to take on jobs completed exclusively online.

Amazon Mechanical Turk, Upwork, Topcoder and InnoCentive present four different models of paid online outsourcing arrangements that involve a buyer/client, an intermediary platform and a pool of virtual suppliers, largely invisible and atomized. Work options on these platforms range from low-skill, low-pay microtasks (sometimes referred to as cognitive piecework); to online freelancing; to high-skill, more remunerative, challenge-based competitions. Crowdwork clients are generally businesses or professional entities like academic researchers. The estimated number of suppliers on these platforms varies widely, with the three largest online freelance platforms said to engage 3.7 million individuals.<sup>15</sup>

In this study we profile these four different crowdwork platforms, which all rely on an external, unknown crowd. (In contrast, internal crowdsourcing involves a firm extending problem solving and idea generation to a large and diverse group known to the firm, generally within the firm itself but reaching beyond its formal internal boundaries, such as across business divisions, or bridging geographic locations. As such, internal crowdsourcing does not pose the same legal issues that external platforms like the four profiled in this study present.) These four platforms provide a perspective for considering the ongoing debates about the platform economy and its power dynamics, especially its independent contractor model of providing services.

We examine the institutional setting of these debates: longstanding philosophical clashes over a belief in markets and the wisdom of regulating the workplace and labor markets; the unraveling of the mid-20th-century social compact governing the workplace; and the emergence of the gig economy, including crowdwork, as the latest phase of the “fissured workplace.”<sup>16</sup> We define the boundaries of workplace regulation in the U.S., based on a binary classification of workers as either employees or independent contractors, with “employee” status a prerequisite to the rights, benefits and protections of the law. Next, we analyze the opportunities and perils of working on these four platforms and how the “employee” classification issue plays out for each.

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<sup>15</sup> E Kaganer et al., ‘Managing the Human Cloud’ (2013) 54 *MIT Sloan Management Review* 26.

<sup>16</sup> Weil (n 5).

A lively debate about the future of work is under way in the U.S. We discuss the three key themes that have emerged: rethinking the nature of employment, including the ambiguous definition of “employee” under existing workplace laws and whether a third category of worker should be created; reexamining the link between social protections and employment; and restoring worker voice and power. We conclude with a series of recommendations targeted to the crowdwork sector and, more broadly, for reforms addressed to changing workplace realities.

Crowdwork and the broader gig economy plainly have put a spotlight on fundamental public policy challenges facing our nation and others. Debates about the impact of the platform economy on the labor market are in progress in the European Union,<sup>17</sup> as well as in the U.S., with more questions than answers at this point: How do we maximize the opportunities and efficiencies offered by technology and evolving business models while preserving the basic values underlying our labor laws and advancing equitable outcomes? How do we modernize legal doctrines in keeping with changing premises, arrangements and structures? And how can we guarantee a decent standard of living for the growing segment of the American populace at work in a nontraditional or crowd-workplace?

## **II. The Institutional Setting**

### **1. The Workplace Regulation Debate**

With the emergence of the gig economy and the fascination with technological innovation, the persistent debate over a belief in markets and the wisdom or utility of labor market regulation has resurfaced. Silicon Valley and its boosters exalt gig economy companies as offering flexibility, expanding opportunity and promoting economic growth. They insist that young workers in particular pre-

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<sup>17</sup> On June 2, 2016, the European Commission issued an “agenda for the collaborative economy,” to provide “guidance on how existing EU law should be applied to this dynamic and fast growing sector, clarifying key issues faced by market operators and public authorities alike,” including market access requirements, liability, consumer protection, employment relationships and tax rules. Press Release, *European Commission* (2 June 2016) <europa.eu/rapid/press-release\_IP-16-2001\_en.htm>. See also J Drahokoupil and B Fabo, ‘The platform economy and the disruption of the employment relationship’, *European Trade Union Institute* (2016) <www.etui.org/Publications2/Policy-Briefs/European-Economic-Employment-and-Social-Policy/The-platform-economy-and-the-disruption-of-the-employment-relationship>.

fer the flexibility of self-employment arrangements and wish to be “liberated” from the strictures of stable 9-to-5 traditional jobs. Regulation, they claim, would “impede innovation ... [and] slow the growth of employment that involves individuals providing goods, services, labor, and capital through peer-to-peer platforms.” This, they say, is “a form of work that will in future years constitute a larger fraction of the economy than it does today,” and “regulatory obstacles” would threaten the business model.<sup>18</sup>

Ideological and political clashes between notions of employment and self-employment, flexibility and stability, date back more than 150 years, to the burgeoning debates over “free labor” and “wage labor.” In the 19th century an entrepreneurial spirit arose that glorified the initiative and choice artisans had in their daily lives, as opposed to their loss of freedom to the factory system.

In the case of *In re Application of Jacobs*,<sup>19</sup> for example, the high court of the state of New York invalidated an 1884 law, enacted under the state’s police power to protect public health, which made it a crime for an individual living in a tenement house to produce cigars at home. The court instead envisioned each cigarmaker as a self-employed artisan carrying on a lawful trade in his home. It saw the statute as inequitable because it “interferes with the profitable and free use of his property ... trammels in him the application of his industry and the disposition of his labor” and “arbitrarily deprives him of his property and ... personal liberty.” Under free labor ideology, homeworking was seen as offering the worker the promise of becoming a propertied citizen and an entrepreneur. The court viewed the anti-tenement law, in contrast, as an effort to hold Jacobs down, to drive him out of his own shop, to reduce him to a factory wage earner.

One legal historian described the case as an “eloquent if ironic statement of Gilded Age courts’ vision of ‘free labor’ and workers’ dignity and independence.”<sup>20</sup> Thereafter, over the 20th century, public policy in the U.S. shifted to a system mixing reliance on market forces with regulation, beginning comprehensively with the New Deal legislative enactments of the 1930s and continuing for

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<sup>18</sup> M Cohen and A Sundararajan, ‘Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy’ (2015) 82 *University of Chicago Law Review Dialogue* 116, 116 (“Self-regulation is not the same as deregulation or no regulation. Rather, it is the reallocation of regulatory responsibility to parties other than the government.”).

<sup>19</sup> 98 N.Y. 98 (N.Y. 1885).

<sup>20</sup> W Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, Harvard University Press, 1991).

several decades.<sup>21</sup> Yet the 19th-century vision of the independent worker and a suspicion of government “interference” with free markets through regulation have persisted in American culture,<sup>22</sup> and the late 1970s saw the start of deregulatory trends. After the economic crisis of 2008, Americans began to see the social and economic consequences of those trends. Decades of stagnating wages<sup>23</sup> and accelerating income inequality refocused attention on the loss of worker bargaining power and erosion of workplace rights and standards.

These long-standing, competing views about entrepreneurialism and the role of regulation in our society also feature in the debates about Silicon Valley startups and the future of work. More particularly, for purposes of this study, the questions posed are whether crowdworkers and the digital, on-demand labor force should be afforded the legal rights and protections of “employees,” whether and how platforms should be regulated, and whether our existing legal arrangements are adequate to and well aligned with changing realities.

## **2. The Workplace Legal Regime: From the New Deal to the Present**

Existing within a liberal and market-oriented system, the U.S. employment legal regime is relatively laissez-faire and provides a limited safety net, with only partial social insurance protections. By international standards, U.S. law imposes fairly modest requirements on employers.<sup>24</sup> Basic laws regulate wages, hours,

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<sup>21</sup> See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the constitutionality of the National Labor Relations Act). The U.S. Supreme Court had declared earlier New Deal measures unconstitutional. See, e.g., *Schechter Poultry Corp v U.S.*, 295 U.S. 495 (1935) (declaring the National Industrial Recovery Act of 1933 unconstitutional).

<sup>22</sup> This vision has persisted notwithstanding New Deal-era Supreme Court decisions that changed course on the legality of enactments like the New York state law. For a bold statement of that view, see, e.g., *Hettinga v. United States*, 677 F.3d 471, 480 (D.C. Cir. 2012) (Brown, J., concurring) (arguing that “the courts, from which the victims of burdensome regulation sought protection, have been negotiating the terms of surrender since the 1930s,” and condemning the Supreme Court for consigning economic liberty and property rights “to a lower echelon of constitutional protection than personal or political liberty.”)

<sup>23</sup> E Gould, ‘2014 Continues a 35-Year Trend of Broad-Based Wage Stagnation,’ *Economic Policy Institute* (Washington, 19 February 2015) <[www.epi.org/publication/stagnant-wages-in-2014](http://www.epi.org/publication/stagnant-wages-in-2014)> (finding this to be the “country’s central economic challenge”).

<sup>24</sup> The U.S. has the least-regulated labor market of any nation within the Organization for Economic Co-operation and Development. M Wolf, ‘America’s labour market is

working conditions and the right to form unions, but these are often weak or poorly enforced. The rights, protections and obligations of all of these laws turn on “employee” status, and those who are not “employees” have no rights under the laws. Further, absent a statute or agreement providing otherwise, workers are employed “at will,” with very few mandates on employment terms, including no required vacation or pension and no paid family or medical leave.<sup>25</sup>

An array of federal statutes governs employment.<sup>26</sup> The fundamental U.S. labor laws were a product of the Great Depression of the 1930s and President Franklin Roosevelt’s New Deal. In 1935 Congress enacted the National Labor Relations Act (NLRA), intended to guarantee the rights of employees to organize and bargain collectively with their employers, and the Social Security Act, which provides benefits to retired and disabled workers and temporary income to unemployed workers. In 1938 Congress enacted the Fair Labor Standards Act (FLSA), banning child labor and mandating minimum wages, maximum hours and overtime pay.

Beginning in the 1960s, a series of laws were enacted outlawing discrimination in employment, requiring safe workplace conditions and imposing other limited mandates.<sup>27</sup> Then, in 2010, following a century of debate over what role the

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not working,’ *Financial Times* (London, 3 November 2015) <[www.ft.com/intl/cms/s/0/4dcb5c58-818d-11e5-8095-ed1a37d1e096.html](http://www.ft.com/intl/cms/s/0/4dcb5c58-818d-11e5-8095-ed1a37d1e096.html)>.

<sup>25</sup> A few cities and states (e.g., California) are beginning to enact paid family or medical leave laws. See, e.g., S Segarin, ‘Paid leave laws are sweeping the nation’, *Bloomberg BNA* (18 June 2016), <[www.bna.com/paid-leave-laws-b57982074380](http://www.bna.com/paid-leave-laws-b57982074380)>.

<sup>26</sup> The labor and employment law regime in the United States is balkanized, divided between the 50 states and the federal government, and, at the federal level, between different cabinet-level departments and independent agencies. Where the federal government has not legislated, the states are generally free to do so. The National Labor Relations Act and the Employee Retirement Income Security Act (see the following note) broadly preempt all analogous state laws, but otherwise most federal employment statutes allow the states to enact laws that are more protective of workers than the federal law. Thus, states may maintain their own safety, minimum wage, overtime and maximum hours rules, which can be no lower than the federal floor. States administer their own unemployment insurance and workers’ compensation systems.

<sup>27</sup> These include Title VII of the Civil Rights Act of 1964, which prohibited discrimination in employment decisions on account of race, color, religion, national origin and sex; the Age Discrimination in Employment Act of 1967 (ADEA), which prohibited discrimination in employment decisions on account of age; the Occupational Safety and Health Act of 1970 (OSHA), which imposed a “general duty” to maintain safe conditions and authorized the Department of Labor to create minimum safety and health standards; the Employee Retirement Income Security Act of 1974 (ERISA), which imposed fiduciary operating standards and reporting and disclosure obliga-

government should play in making medical care affordable, the Patient Protection and Affordable Care Act (ACA) was enacted.<sup>28</sup> The ACA put in place a comprehensive health insurance overhaul that includes employer-shared responsibility provisions and sets up a new competitive health insurance marketplace. Previously, there were no employer mandates, and health insurance benefits were solely the result of employer choice or collective bargaining. The ACA remains hugely controversial.

Indeed, the profoundly polarized politics in the U.S. make chances of workplace law reform seem impossibly slim, at least at the federal level. The last major revision to the basic labor law occurred in 1947, and efforts over the past 40 years to amend the statute in any broad fashion resulted in legislative stalemate.

### **3. The Unraveling of the Postwar Social Compact**

The New Deal's labor legislation, coupled with the collective bargaining system that it created, formed the foundation of the post-World War II social compact. The laws were designed with a particular workplace model in mind, exemplified by the manufacturing plants of the 1930s and 1940s. The assumptions of the emerging social compact were a working life spent at a large organization in a major sector of the economy, under a stable contract of hire between a single employer and employees engaged in work of a continuing nature at a fixed location, with hierarchical organization of work, promotion ladders, and job security. For several decades these assumptions about the employment model were accurate. Management's priority in employment practice was to build a steady, loyal workforce, with health insurance and pension plans structured to tie workers to the firm.

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tions for employee benefit plans and funding requirements on pension plans; the Worker Adjustment and Retraining Notification Act of 1988 (WARN), which required 60 days' advance notice of plant closings and mass layoffs; the Americans with Disabilities Act of 1990 (ADA), which prohibited discrimination in employment decisions on account of disability; and the Family and Medical Leave Act of 1993 (FMLA), which required employers to provide job-protected unpaid leaves of absence for certain family and medical reasons.

<sup>28</sup> "Other developed countries have had some form of social insurance (that later evolved into national insurance) for nearly as long as the US has been trying to get it." KS Palmer, 'A Brief History: Universal Health Care Efforts in the US', *Physicians for a National Health Program* (1999) <[www.pnhp.org/facts/a-brief-history-universal-health-care-efforts-in-the-us](http://www.pnhp.org/facts/a-brief-history-universal-health-care-efforts-in-the-us)>.



Beginning in the late 1970s, however, this social order began to unravel. The workplace – and the nature of work itself – evolved in complicated ways in response to global and domestic competitive pressures and accelerating technological innovation. Foreign trade surged; major domestic industries were deregulated; financial, product and labor markets were globalized; manufacturing shrank and the service sector exploded. Deregulatory laissez-faire economic policies took hold. The role of finance and Wall Street expanded dramatically. Corporate governance changed, elevating shareholder value over the interests of other stakeholders, especially labor. Organized labor’s power declined, and workers’ bargaining power eroded. Responding to mounting competitive pressures, firms began to seek “flexibility” by altering business models and the nature of the employment relationship. The goal of lifetime employment faded, and employment became more precarious, with regular full-time work less common. For workers, what was once secure became uncertain.

Increasingly, the dominant employment relationship, between market leaders and the workforce that made or delivered their products, shifted. Vertically integrated corporations began to “dis-integrate,” with firms choosing to specialize. Non-core functions were moved to other entities and risk shifted away from the corporation to networks of smaller business units, with greater use of sub-contractors, independent contractors and franchising. Ownership of capital became more distant from workers. The employer “vanished,” the workplace “fissured,”<sup>29</sup> and arrangements for securing labor became “market-mediated,”<sup>30</sup> with firms contracting for services rather than hiring employees. “Fissured employment fundamentally changes the boundaries of firms ... By shifting work from the lead company outward ... the company transforms wage setting into a pricing problem.”<sup>31</sup> The “standard contract of employment” that was the norm through much of the 20th century began to disappear, perhaps never to return.<sup>32</sup> Technological advances enabled this transformation by “creat[ing] new ways of designing and monitoring the work of other parties.”<sup>33</sup> Competitive pressures in this fissured employment landscape often result in low-wage work, volatile employment, poor benefit coverage and a tendency to labor standards

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<sup>29</sup> See generally Weil (n 5).

<sup>30</sup> P Cappelli, ‘Market-Mediated Employment: The Historical Context’ in MM Blair and TA Kochan (eds), *The New Relationship: Human Capital in the American Corporation* (Washington, Brookings Institution Press, 2000) 66-90.

<sup>31</sup> Weil (n 5) 20.

<sup>32</sup> KVV Stone and H Arthurs (eds), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (New York, Russell Sage Foundation, 2013).

<sup>33</sup> Weil (n 5) 44.

violations. Wage theft is believed to be widespread, as is (mis)classification of workers as independent contractors, removing them from workplace rights and protections altogether. Misclassification results in costs to workers, but also to tax and social insurance systems, as local, state and the federal governments lose billions of dollars in revenue.<sup>34</sup>

Crowdwork can be viewed as the ultimate stage in this process of fissurization:

“First came outsourcing of IT and business processes. Next came offshore outsourcing. Now comes the human cloud. A third-generation sourcing ecosystem ... the human cloud is centered on an online middleman that engages a pool of virtual workers that can be tapped on demand to provide a wide range of services to any interested buyer.”<sup>35</sup>

Some see the “human cloud as potentially more disruptive” than the earlier sourcing waves.<sup>36</sup> Rather than contractors and suppliers vying for work from lead firms, platforms have allowed individual workers to compete directly by the task, with little or no intermediation. Workers are paid only for the task performed, and both platforms and their clients have avoided protective labor and employment law obligations, developing few, if any, legally binding commitments to this segment of their workforce.

The practices that have fissured the conventional employer-employee relationship in favor of a reliance on market forces are not new. Today’s crowdwork recalls the “putting-out” arrangements of the late 19th century.<sup>37</sup> Under that system, each worker was essentially an independent contractor, turning out products (like shoes or cigars) usually at home. “The firm played the role of coordinator – providing workers with materials and paying them based on finished product (minus material costs).”<sup>38</sup>

These arrangements had advantages for firms, like pushing the risks of doing business from the firm onto contractors. But while it was “cheap and easy for

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<sup>34</sup> Ibid. 17-18. See also F Carré, ‘(In)dependent Contractor Misclassification’ *Economic Policy Institute* (8 June 2015) <[www.epi.org/files/pdf/87595.pdf](http://www.epi.org/files/pdf/87595.pdf)>. It is estimated that employers reduce labor costs by up to 30 percent by using independent contractors rather than employees, saving on payroll taxes and company provided benefits.

<sup>35</sup> Kaganer et al. (n 15), 1.

<sup>36</sup> Ibid. 3.

<sup>37</sup> MW Finkin, ‘Beclouded Work, Beclouded Workers in Historical Perspective’ (2016) *37 Comparative Labor Law & Policy Journal* 603.

<sup>38</sup> P Cappelli, *The New Deal at Work: Managing the Market-Driven Workforce* (Cambridge, Harvard Business School Press, 1999) 51-52.

the manufacturer to use contractors,”<sup>39</sup> there were also costs. Eventually, as Alfred Chandler has written in his classic history of the modern corporation, these practices – the “invisible hand of market forces” – were replaced by the “visible hand of management” of the vertically integrated corporation, with its internal labor markets. The “[m]odern business enterprise was thus the institutional response to the rapid pace of technological innovation and increasing consumer demand.”<sup>40</sup>

These “visible hand” realities prevailed when U.S. workplace laws were enacted in the mid-20th century, yet current business trends hark back to an earlier era. There is, then, an apparent tension between today’s economic realities and the assumptions about the employment model underlying the industrial-era statutes. In this study of crowdwork, we will see how the boundaries of U.S. workplace laws, especially the definition of a covered employee, and the employment relationship that the laws contemplated, are challenged by “new” employment arrangements that reallocate risk from employers to employees.

#### 4. The Data Debate

Meanwhile, analysts are debating not just the hype about the gig economy but also how big it actually is. In 2015 Upwork and the Freelancers Union commissioned a survey of freelancing in America.<sup>41</sup> Survey results showed that nearly 54 million Americans – 34 percent of workers – had worked as freelancers at some point over the previous year, including independent contractors, who were 36 percent of the independent workforce. Sixty percent of freelancers said they were freelancing by choice and 40 percent out of economic necessity. When asked to choose between flexibility and greater work opportunities, 54 percent chose flexibility. Sixty percent who left traditional employment reported earning more as freelancers. A relatively small percentage of freelancers relied on “sharing economy” platforms for a significant part of their income.<sup>42</sup>

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<sup>39</sup> Ibid. 54.

<sup>40</sup> AD Chandler, *The Visible Hand: The Managerial Revolution in American Business* (Cambridge, Harvard University Press, 1977).

<sup>41</sup> Results were based on “an online survey of 7,107 U.S. adults who have done paid work in the past 12 months.” ‘Freelancing in America: 2015’, *Freelancers Union & Upwork* <[www.freelancersunion.org/blog/dispatches/2015/10/01/freelancing-america-2015/](http://www.freelancersunion.org/blog/dispatches/2015/10/01/freelancing-america-2015/)>.

<sup>42</sup> According to the study, sixty-nine percent of freelancers get less than 10% of their monthly income from sharing economy platforms; 20% get between 10% and 50% of their income from such platforms; 8% get between 50% and 90%, and 3% get 90 to 100%.

These results – particularly the 34 percent of workers working as freelancers – have been sharply questioned. In August 2015 the *Wall Street Journal* reported, “Americans are becoming slightly less likely to be self-employed, and less prone to hold multiple jobs. Official government data shows around 95% of those who report having jobs are accounted for on the formal payroll of U.S. employers, little changed from a decade ago.”<sup>43</sup> The Economic Policy Institute’s president, Larry Mishel, agreed, insisting “the self-employed (those with no paid employees working for them) comprised only 7 to 8 percent of total employment in 2014. What’s more, self-employment was stable in the 20 years before then.”<sup>44</sup> He also argued that “dwelling on [gig economy] companies too much distracts from the central features of work in America that should be prominent in the public discussion: a disappointingly low minimum wage, lax overtime rules, weak collective-bargaining rights, and excessive unemployment, to name a few.”<sup>45</sup>

The last comprehensive Bureau of Labor Statistics survey of labor force trends including data on contingent work and alternative work arrangements was in 2005. In the absence of more recent data, there have been mixed signs of a major change in the nature of the U.S. employment relationship over the last decade. Internal Revenue Service evidence showed that self-employment was rising, while U.S. Census Bureau data showed a declining trend.

To come up with a more accurate picture, Larry Katz and Alan Krueger surveyed a sample of individuals “broadly similar to the U.S. workforce,” and in March 2016 they released their initial analysis of the data.<sup>46</sup> Their findings point

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<sup>43</sup> J Zumbun and AL Sussman, ‘Proof of a “Gig Economy” Revolution is Hard to Find’, *Wall Street Journal* (New York, 26 July 2015) <[www.wsj.com/articles/proof-of-a-gig-economy-revolution-is-hard-to-find-1437932539](http://www.wsj.com/articles/proof-of-a-gig-economy-revolution-is-hard-to-find-1437932539)>. See also B Mahoney, ‘So is This A Gig Economy Or isn’t It?’ *Politico* (Washington, 28 July 2015) <[www.politico.com/tipsheets/morning-shift/2015/07/notes-on-the-gig-economy-boy-scouts-lift-gay-ban-ufcw-backs-pence-challenger-212543](http://www.politico.com/tipsheets/morning-shift/2015/07/notes-on-the-gig-economy-boy-scouts-lift-gay-ban-ufcw-backs-pence-challenger-212543)> (“A study by Moody’s said that the percentage of the workforce identifying as self-employed was at a 70-year low. The source was the Census Bureau’s Current Population Survey. The percentage identifying as holding multiple jobs was at a 20 year low.”); J Weissmann, ‘The Rise of the Gig Economy is a Giant Myth’, *Slate* (28 July 2015) <[www.slate.com/blogs/moneybox/2015/07/28/the\\_rise\\_of\\_the\\_gig\\_economy\\_it\\_s\\_a\\_giant\\_myth.html](http://www.slate.com/blogs/moneybox/2015/07/28/the_rise_of_the_gig_economy_it_s_a_giant_myth.html)> (“The gig economy is still a figment of the Internet’s imagination.”).

<sup>44</sup> L Mishel, ‘Uber is not the future of work,’ *The Atlantic* (Washington, 16 November 2015) <[www.theatlantic.com/business/archive/2015/11/uber-is-not-the-future-of-work/415905](http://www.theatlantic.com/business/archive/2015/11/uber-is-not-the-future-of-work/415905)>.

<sup>45</sup> Ibid.

<sup>46</sup> LF Katz and AB Krueger, ‘The Rise and Nature of Alternative Work Arrangements in the United States’ (29 March 2016) 2, 5 <[http://krueger.princeton.edu/sites/default/files/akrueger/files/katz\\_krueger\\_cws\\_-\\_march\\_29\\_20165.pdf](http://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-_march_29_20165.pdf)>.

to a 50 percent rise from 2005 to 2015 in the incidence of alternative work arrangements for U.S. workers, with a particularly sharp increase in the share of workers hired through contract firms.<sup>47</sup> They also found that “[w]orkers who provide services through online intermediaries, such as Uber or Task Rabbit, accounted for 0.5 percent of all workers in 2015. ... Thus the online gig workforce is relatively small compared to other forms of alternative work arrangements, although it is growing very rapidly.”<sup>48</sup>

Katz and Krueger suggest that the dislocation caused by the 2007-2009 great recession may have caused many workers to seek alternative work arrangements. Strikingly, they found that since 2005 all net employment growth in the U.S. economy appears to be in these arrangements, while employment in traditional jobs slightly declined. They also suggest that “technological changes that lead to enhanced monitoring, standardize job tasks and make information on worker reputation more widely available” may be reducing the transaction costs associated with contracting out tasks, “thus supporting the greater disintermediation of work.”<sup>49</sup>

A recent JPMorgan Chase Institute study has provided interesting data on the online platform economy and income volatility.<sup>50</sup> Americans, the authors report, experience tremendous income volatility, which is on the rise and hard to man-

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<sup>47</sup> The percentage of workers engaged in alternative work arrangements rose from 10.1 percent in February 2005 to 15.8 percent in late 2015. The percentage of workers hired out through contract companies showed the sharpest rise, increasing from 0.6 to 3.1 percent in 2015. *Ibid.* 1-2. Of the four categories of nonstandard workers – temporary help agency workers, on-call workers, contract workers and independent contractors (or freelancers) -- independent contractors are the largest group (8.9% in 2015). *Ibid.* 6.

<sup>48</sup> *Ibid.* 1, 3.

<sup>49</sup> *Ibid.* 17-18.

<sup>50</sup> D Farrell and F Greig, ‘Paychecks, Paydays, and the Online Platform Economy: Big Data on Income Volatility’, *JPMorgan Chase & Co. Institute* (February 2016) <[www.jpmorganchase.com/corporate/institute/report-paychecks-paydays-and-the-online-platform-economy.htm](http://www.jpmorganchase.com/corporate/institute/report-paychecks-paydays-and-the-online-platform-economy.htm)> (analyzing data from a sample of 1 million Chase customers between 2012 and 2015, with a dataset of over 260,000 individuals who have offered goods or services on one of 30 distinct platforms). In a follow-up study, the authors found that the rate of growth in online platforms peaked in 2014 and has since slowed; that monthly earnings on labor platforms has fallen since June 2014; that turnover among the online platform workforce is high; and that as the labor market has strengthened, the share of participants with outside employment (and lower attachment to online platform work) has increased. D Farrell and F Greig, ‘The Online Platform Economy: Has Growth Peaked?’, *JPMorgan Chase & Co. Institute* (November 2016) [www.jpmorganchase.com/corporate/institute/document/jpmc-institute-online-platform-econ-brief.pdf](http://www.jpmorganchase.com/corporate/institute/document/jpmc-institute-online-platform-econ-brief.pdf)>.

age. The “flexible” and “highly accessible” work opportunities offered by online platforms can help people “buffer against income and expense shocks” by becoming a secondary source of income. Although the number of people participating increased steeply, reliance on platforms remained stable in terms of the time that participants were active and the portion of total income earned on platforms in active months.<sup>51</sup> In a given month, 1 percent of adults earned income from the online platform economy, but over the course of the three-year study, 4.2 percent of adults, an estimated 10.3 million people, did so – a 47-fold jump over the three years. The study also found that individuals can and do generate additional income, around 15%, on labor platforms when they experience a dip in regular earnings or when they are between jobs. Participation in labor platforms is highest precisely among those who experience the highest levels of income volatility, especially the young and the poor.

There is consensus about the further need for good data.<sup>52</sup> Even assuming that crowdwork and other platform economy companies are a small piece of today’s overall economy, if their model proves profitable and efficient, it may become more prevalent. Knowing what the trends are is essential for making public policy choices and setting the rules of the game.

### **III. The Boundaries of the Employment Relationship: An “Ambiguous Dichotomy”**

Eligibility for the rights and protections of U.S. workplace laws turns on status as an “employee,” defined variously in the different statutes, often unhelpfully, if not circularly.<sup>53</sup> The self-employed – or independent contractors – do not enjoy employee status. Unlike the law in some countries, U.S. law does not include an intermediate category.<sup>54</sup> The binary determination is said to represent “a

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<sup>51</sup> Labor platform participants were active 56% of the time. While active, platform earnings equated to 33% of total income. *Ibid.* at 6.

<sup>52</sup> President Barack Obama’s 2017 budget request had included \$1.6 million for the Bureau of Labor Statistics to collect information about labor force trends, including data on contingent work and alternative work arrangements. It is unclear whether funding for such studies will be available under the new Administration.

<sup>53</sup> The NLRA, for example, defines an “employee” as “any employee.” 29 U.S.C. § 152(3) (1935). The FLSA defines an employee as a person employed by an employer. 46 U.S.C. § 203(g) (1938).

<sup>54</sup> *See, e.g.*, Symposium, ‘Self-Employed Workers’ (2010) 31 *Comparative Labor Law and Policy Journal* 231-66 (discussing Spanish, German, and Canadian law).

choice between two fairly conflicting views,<sup>55</sup> and yet the legal battles in large part turn on the gray areas. Distinguishing employee from independent contractor often involves drawing fine lines. Litigation over the issue of employee status is extensive, and has long been so. The Supreme Court observed in 1944 that “[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing.”<sup>56</sup> Once employee status is established, there remains the related question of which entity (or entities) is the “employer,” an issue of growing significance with fissured workplace practices, such as outsourcing and hiring through intermediary staffing agencies. For the purpose of this study, the threshold issue is employee status.<sup>57</sup>

Broadly speaking, the tests for defining employee status can be placed along a continuum, ranging from the narrowest – the common law test – to the broadest – the “suffer or permit” test that often encompasses an assessment of the economic reality of the relationship. In between fall the hybrid test<sup>58</sup> and the “ABC” test.<sup>59</sup> If employee status is established under common law (the narrowest test),

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<sup>55</sup> NLRB v. United Insurance Co., 390 U.S. 254, 260 (1968).

<sup>56</sup> NLRB v. Hearst Publications, Inc., 322 U.S. 111, 121 (1944).

<sup>57</sup> In Part V, we address a joint employer theory that might be advanced, assuming crowdworkers’ employee status can be established.

<sup>58</sup> In cases alleging unlawful discrimination, in particular cases under Title VII of the Civil Rights Act of 1964 (prohibiting discrimination in employment on the basis of race, color, sex, and national origin, and the creation of hostile workplaces on those grounds) and the Americans with Disabilities Act, some courts will apply a “hybrid” test that takes into account both the economic realities of the working relationship and the extent to which the employer is able to control the details and means of the work being done. *See, e.g.,* Oestman v. National Farmers Union Ins. Co., 958 F.3d 303, 305 (10<sup>th</sup> Cir. 1992)(holding hybrid test governs determination of “employee” status under the Age Discrimination in Employment Act; discussing factors considered in applying hybrid test.). Some courts see no real difference between the tests. *E.g.,* Murray v. Principal Fin. Group, Inc., 613 F.3d 943, 945 (9<sup>th</sup> Cir. 2010).

<sup>59</sup> Under the “ABC” test, applicable to unemployment insurance and wage and hour laws in some states, services performed by an individual will be “employment” unless three conditions are met:

- (a) The individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and
- (b) Such service is either outside the usual course of the business for which such service is performed, or such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- (c) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

coverage under other statutes is likely, although the courts may differ in how they weigh the facts applied to the relevant criteria.

## 1. The Common Law Test

The common law test is applicable to the National Labor Relations Act, the Internal Revenue Code, and many state employment laws.<sup>60</sup> It derives from earlier master-servant doctrine governing the master's vicarious liability to third parties for the torts of his servants within the scope of their employment, "an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant."<sup>61</sup> But turning employer and employee into master and servant is widely recognized as problematic, for "the very terminology ... evokes a nostalgic Victorian image of authoritarianism."<sup>62</sup>

As originally enacted in 1935, the National Labor Relations Act excluded from its definition of "employee" domestic workers, agricultural laborers, public employees and employees of rail and air carriers, but *not* independent contractors. Then in 1944 the Supreme Court handed down a decision in a case arising from the refusal of Hearst Publications to bargain with a union representing "newsboys" who distributed papers on the streets of Los Angeles. Hearst claimed that the newsboys were not its "employees," arguing that common law standards must govern the employee relationship under labor law and that, by

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*See, e.g.,* Hargrove v. Sleepy's, LLC, 106 A.3d 449 (N.J. 2015). Twenty states use this test for unemployment compensation.

<sup>60</sup> The common law test also applies to the Employee Retirement Income Security Act (ERISA), the Federal Insurance Contributions Act (federal tax withholding) and Federal Unemployment Tax Act (FUTA). A similar test is used in most states to determine status under workers' compensation laws.

<sup>61</sup> Restatement (Second) of Agency §219 comment a (1958).

<sup>62</sup> *See, e.g.,* HW Arthurs, 'The Dependent Contractors: A Study of the Legal Problems of Countervailing Power' (1965) 16 *University of Toronto Law Review* 89, 95 (factors that invoke vicarious liability bear no relation to those which invite a regime of collective bargaining, which is the antithesis of authoritarianism). *See also* M Linder, 'Towards Universal Worker Coverage Under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors and Employee-Like Persons' (1989) 66 *University of Detroit Law Review* 555, 574 ("Since an enactment like the NLRA was designed to mitigate the harshness of the common law which served to limit employers' responsibilities, it has never been adequately explained why the common-law distinction between employee and independent contractor should govern the scope of employer-employee disputes.").



those standards, the extent of Hearst's control and direction of the newsboys' activities created no more than an independent contractor relationship.<sup>63</sup>

The Court disagreed. Observing that “[m]yriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation’s economy,” it concluded that the NLRA’s protections and the “mischief at which the Act is aimed ... are not confined exclusively to ‘employees’ within the traditional legal distinctions separating them from ‘independent contractors.’”<sup>64</sup> Focusing on the purposes of the statute and the economic realities of the relationship between the newsboys and Hearst, the Court agreed with the National Labor Relations Board (NLRB), the administrative agency charged with enforcing the law, that the “vendors, misnamed boys,” were employees. These were “generally mature men, dependent upon the proceeds of their sales for their sustenance.”<sup>65</sup>

The Court’s dynamic approach was short-lived. In 1947, spurred by the 1944 ruling, Congress enacted the Taft-Hartley amendments to the NLRA, which included an express exclusion of independent contractors from the NLRA’s definition of “employee.” In so doing, Congress specifically rejected the Hearst Court’s focus on the economic realities of the relationship in light of the NLRA’s goals. The legislative history made clear that the NLRB must consider only the common law test for independent contractor status.<sup>66</sup> As a result, if workers are treated as independent contractors, they are excluded from the protected right to organize and bargain collectively “or to engage in other concerted activities for the purposes of collective bargaining or other mutual aid and protection,” nor are they allowed to vote in an NLRB representation election.

In 1968, the Supreme Court confirmed that the “obvious purpose” of Congress’ 1947 independent contractor exclusion was to “have the Board and the courts apply general agency principles in distinguishing between” the two types of workers.<sup>67</sup> The Court emphasized that under the common law agency test “there is no shorthand formula or magic phrase” and that an evaluation of “all of the

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<sup>63</sup> NLRB v. Hearst Publications, Inc., 322 U.S. 111, 120 (1944).

<sup>64</sup> Ibid. 126.

<sup>65</sup> Ibid. 116.

<sup>66</sup> H.R. REP. NO. 245, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess. 18 (1947).

<sup>67</sup> NLRB v. United Insurance Co., 390 U.S. 254, 256 (1968).

incidents of the work relationship” is required, with “no one factor being decisive.”<sup>68</sup>

The relevant factors that the NLRB will evaluate look to the control exercised over the physical details of work, as well as other aspects of the relationship that determine whether or not the individual is free to make entrepreneurial decisions in his own economic interest. The factors include:

- The extent of control that the employing entity exercises over the details of the work;
- Whether the individual is engaged in a distinct occupation or work;
- The kind of occupation, including whether, in the locality in question, the work is usually done under the employer’s direction or by a specialist without supervision;
- The skill required in the particular occupation;
- Whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work;
- The length of time the individual is employed;
- The method of payment, whether by the time or by the job;
- Whether the work in question is part of the employer’s regular business;
- Whether the parties believe they are creating an employment relationship; and
- Whether the principal is in the business.

The NLRB’s most recent rulings on this issue involved package delivery company FedEx, which has consistently, and largely unsuccessfully, claimed that its local delivery drivers are independent contractors.<sup>69</sup> One notable exception that upheld FedEx’s claim was in the U.S. Court of Appeals for the District of Columbia, which ruled in 2009 (in a 2-1 decision) that the NLRB had mistakenly found the drivers to be employees.<sup>70</sup> According to the court, the key factor in the determination was whether the drivers retained – rather than exercised – a sig-

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<sup>68</sup> Ibid. 258. *Accord* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 752 n. 31 (1989).

<sup>69</sup> FedEx drivers have prevailed in various wage and hour lawsuits around the country on their claimed status as “employees.” *See, e.g.,* Alexander v. FedEx Ground Package System, Inc., 765 F.3d 981 (9<sup>th</sup> 2014) (“powerful evidence” indicated that FedEx retained right to control manner in which drivers perform their work, the “principal test of an employment relationship” under California law, and none of the remaining right to control factors sufficiently favored FedEx to allow finding the drivers to be independent contractors).

<sup>70</sup> FedEx Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009).

nificant entrepreneurial opportunity for economic gain or loss. The court noted the drivers' ability to operate multiple routes, hire substitute drivers and helpers and sell routes without permission.<sup>71</sup>

In 2014 a divided NLRB decided a new FedEx case, responding to the D.C. Circuit court of appeals' opinion.<sup>72</sup> First, the board reaffirmed that "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive" and that "[c]onsistent with Supreme Court precedent, our inquiry remains guided by the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency § 220 (1958)."<sup>73</sup> Second, the board declined to accept the D.C. Circuit court of appeals' holding,<sup>74</sup> to the extent it "treats entrepreneurial opportunity ... as an 'animating principle' of the inquiry." Instead, the board sought to "more clearly define the analytical significance of a putative independent contractor's entrepreneurial opportunity for gain or loss," giving "weight to actual but not merely theoretical entrepreneurial opportunity" and evaluating whether the individual is truly "rendering services as part of an independent business."<sup>75</sup>

The NLRB explained that the "more comprehensive independent-business factor ... synthesizes the full constellation of considerations that the Board has addressed under the rubric of entrepreneurialism."<sup>76</sup> A vigorous dissenting

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<sup>71</sup> Judge Merrick Garland dissented, emphasizing the factual finding that there was "little room for the contractors to influence their income through their own efforts or ingenuity" and that any abstract "rights" to make entrepreneurial decisions, like the use of trucks for shippers other than FedEx or the sale of a route for profit, were in practice foreclosed.

<sup>72</sup> FedEx Home Delivery, 361 NLRB No. 55 (2014), vacated and enforcement denied, FedEx Home Delivery v. NLRB, 2017 U.S. App. LEXIS 3826 (D.C. Cir. March 3, 2017).

<sup>73</sup> Ibid. 1. Restatements of law are legal treatises that set out basic U.S. law on a variety of legal subjects. They are written and updated by legal scholars and published by the American Law Institute. While Restatements do not have the force of law, they are considered prestigious and carry some weight. Courts have regularly looked to the Restatement of Law (Second) Agency for guidance in deciding whether a common law employment relationship exists. The Restatement of the Law Second, Agency, is now out of print and has been superseded by the Restatement of the Law Third, Agency.

<sup>74</sup> The NLRB adheres to a policy of "non-acquiescence" to adverse circuit court decisions, meaning that it will not back away from a legal ruling simply because it has been rejected by one or more circuit courts of appeals.

<sup>75</sup> Ibid. 1.

<sup>76</sup> Ibid. 12. The NLRB added that this "formulation tracks the forthcoming Restatement of the Law Third Employment Law, and thus is consistent with contemporary developments in jurisprudence." In 2015 the American Law Institute issued this new

opinion was filed supporting the appeals court’s opinion, and FedEx sought review of the board’s decision in the D.C. Circuit Court of Appeals. In March 2017 the court of appeals vacated and denied enforcement to the board’s decision, adhering to the court’s earlier reasoning. Subsequent to its *FedEx* decision, the board applied it both to find<sup>77</sup> and reject<sup>78</sup> employee status.

## 2. The Suffer or Permit/Economic Realities Test

As the Supreme Court has explained, for purposes of the minimum wage, overtime and child labor provisions of the Fair Labor Standards Act, the common law classifications “are not of controlling significance... This Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category.”<sup>79</sup> The Supreme Court later reaffirmed this principle, instructing that courts are to interpret the FLSA term “employ” expansively and stating that the FLSA “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”<sup>80</sup>

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Restatement, which provides guidance on drawing the boundary for employment law purposes between employees and independent contractors, exploring the factors relevant to whether a service provider retains entrepreneurial control over the allocation of capital and labor. As the Restatement discusses, truly independent businesspersons are those who are able to enhance their returns or profits by making important business decisions in their own interest. The hiring party’s control over “the manner and means by which the product is accomplished” can determine whether the individual retains such entrepreneurial discretion. Relevant questions are whether controlled workers can schedule their own time, determine the use of their own equipment or make their own investments in equipment. An employer’s lack of effective control over the details of their work will not preclude employee status if the employer does not allow them discretion over decisions of labor and capital allocation that businesspersons would otherwise make to enhance their own returns independently from those of the employer.

<sup>77</sup> See, e.g., *Sisters Camelot*, 363 NLRB No. 13 (2015)(cavassers who worked flexible schedules found employees).

<sup>78</sup> See, e.g., *Porter Drywall*, 362 NLRB No. 6 (2015) (crew leaders in drywall installation business found independent contractors).

<sup>79</sup> *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947).

<sup>80</sup> *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992).

The FLSA defines “employee” as “any individual employed by an employer.”<sup>81</sup> It defines “employ” as to “suffer or permit to work,”<sup>82</sup> covering work that the employer directs or allows to take place. “A broader or more comprehensive coverage of employees ... would be difficult to frame” consistent with the remedial purpose of the FLSA.<sup>83</sup>

To apply the “suffer or permit” language, the courts developed a multifactor “economic realities” test, rather than “technical concepts,” as a framework for analysis.<sup>84</sup> The totality of the working relationship is determinative, and all facts relevant to the relationship between the worker and the employer must be considered. Formal descriptions, like an agreement stating that the worker is an independent contractor, are not controlling.<sup>85</sup> The “ultimate concern”<sup>86</sup> is whether workers are truly in business for themselves or are economically dependent on the business of someone else who can require (or allow) employees to work and prevent them from working. The relevant factors generally taken into account are:

- The extent to which the work performed is an integral part of the employer’s business;
- Whether the workers’ managerial skills affect his or her opportunity for profit and loss;
- The relative investments in facilities and equipment by the worker and the employer (though a worker’s investment does not necessarily indicate independent contractor status, because the tools/equipment may be required to perform the work for the employer);

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<sup>81</sup> 29 U.S.C. § 203(e)(1). “Employer” is defined as including “any person acting directly or indirectly in the interest of an employer in relation to an employee.” 29 U.S.C. § 203(d).

<sup>82</sup> 29 U.S.C. § 203(g). Prior to the enactment of the FLSA in 1938, the “suffer or permit” standard was used in state laws regulating child labor and was “designed to reach businesses that used middlemen to illegally hire and supervise children.” *Antenor v. D. & S Farms*, 88 F.3d 925, 929 n. 5 (11<sup>th</sup> Cir. 1996). Besides the FLSA, the “suffer or permit to work” test applies to most state minimum wage laws, the Equal Pay Act and the Family and Medical Leave Act.

<sup>83</sup> *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945).

<sup>84</sup> *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33 (1961).

<sup>85</sup> *See, e.g., Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728-29 (1947); *Estrada v. FedEx Ground Package Sys., Inc.*, 64 Cal. Rptr. 3d 327, 335-336 (Cal. Ct. App. 2007)(drivers are employees under California labor code notwithstanding agreement describing them as independent contractors).

<sup>86</sup> *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988).

- The worker’s skill and initiative: to be an independent contractor, the worker’s skills should demonstrate the exercise of independent business judgment and the worker should be in open-market competition with others;
- The permanency of the worker’s relationship with the employer;
- The nature and degree of control by the employer.

Many of these factors, of course, mirror those of the common law test, as supplemented by the Restatement (Second) of Agency § 220 (1958). Although the FLSA economic realities test may be more focused than the common law test on whether the worker is operating an independent business, it is hard to predict outcomes with multifactor tests, as the decision maker may be more important than the actual test being applied.

In July 2015 the administrator of the Department of Labor’s Wage and Hour Division issued an interpretive guidance on the standard to identify employees misclassified as independent contractors.<sup>87</sup> The guidance makes economic dependence key in determining employee status. Several factors are emphasized that could support an argument for “employee” status for crowdworkers under the FLSA. For example:

- “A relatively flexible work schedule alone ... does not make an individual an independent contractor rather than an employee.” Flexibility in work schedules is common to many businesses and is not significant in and of itself.
- Work can be “integral to an employer’s business” even if it is performed away from the employer’s premises at the worker’s home.
- An employer’s lack of control over workers is not particularly telling if the workers work from home or offsite. The fact that workers could control the hours during which they worked and were subject to little direct supervision is typical of homeworkers in general and largely insignificant in determining their status.

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<sup>87</sup> D Weil, Administrator’s Interpretation No. 2015-1, “Suffer or Permit” Standard in the Identification of Employees Who Are Misclassified as Independent Contractors’, *U.S. Department of Labor, Wage and Hour Division* (15 July 2015). While not binding on the courts, the guidance suggests the position the Wage and Hour Division will take in enforcement.

### 3. Rulings on Platform Workers as Employees: “Round Holes, Square Peg”?

The courts have not yet finally determined the “employee” status of crowdworkers or platform workers more generally. But a number of lawsuits have been filed, and preliminary decisions are beginning to issue – so far largely favorable to plaintiffs’ arguments. A review of litigation involving CrowdFlower, Uber and Lyft follows.<sup>88</sup>

#### a) CrowdFlower

To date, the first and only (known) wage and hour litigation filed against a digital crowdwork platform involved CrowdFlower, self-described as “the essential data enrichment platform for data scientists.”<sup>89</sup> CrowdFlower’s customers submit projects “in the form of data sets which must be mined or appended by human intelligence.”<sup>90</sup> CrowdFlower breaks down each project into discrete tasks and presents them on third-party platforms (called “channels”), like Amazon Mechanical Turk (AMT), that are integrated with the CrowdFlower platform. Workers known as “contributors” “log onto the Channel and then voluntarily identify, select and perform these tasks.”<sup>91</sup> In 2013 two CrowdFlower “contributors” on the AMT platform sued CrowdFlower for minimum wage and waiting time violations under the FLSA and Oregon law. They did not name AMT as an employer or joint employer. They sought class action certification. CrowdFlower defended that it did not employ its “contributors.”

The court denied CrowdFlower’s motion to dismiss the suit. While the court provided no detailed analysis of the “employee” status issue, it found that CrowdFlower monitored the quality and ensured accuracy of work by identifying workers through “contributor IDs,” comparing the performance of multiple contributors on the same task and assigning tasks based on past performance.<sup>92</sup> The parties then chose to settle. In July 2015 the court approved a settlement on behalf of a FLSA “opt-in” class of all workers located in the U.S. who performed

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<sup>88</sup> For a litigation overview, see M Cherry, ‘Beyond Misclassification: The Digital Transformation of Work’ (2016) 37 *Comparative Labor Law & Policy Journal* 577.

<sup>89</sup> CrowdFlower Website (last visited June 28, 2016), <[www.crowdfLOWER.com](http://www.crowdfLOWER.com)>.

<sup>90</sup> CrowdFlower’s Memorandum of Law in Opposition to Plaintiff’s Motion for Conditional Collective Action Certification, at 2, filed Aug. 2, 2013, in *Otey v. CrowdFlower, Inc.*, No. 12-CV-05524-JST.

<sup>91</sup> *Ibid.* 3.

<sup>92</sup> *Otey v. CrowdFlower, Inc.*, No. 12-CV-05524-JST, 2013 WL 5734146 (N.D. Cal. Oct. 22, 2013).

CrowdFlower-managed tasks posted on AMT after 2009 and whose earnings from performing these tasks was more than \$5. CrowdFlower estimated that there would be about 19,992 members in the settlement class. The net settlement amount available for class members' claims was about \$297,673.<sup>93</sup>

## b) Uber and Lyft

Highly publicized class action lawsuits have been filed against a variety of “on-demand” platforms, most notably Uber and Lyft, the two leading American “transportation network companies.”<sup>94</sup> Drivers for both companies allege that they are employees entitled to the protection of wage and hour laws, while the companies claim to be merely technological intermediaries connecting potential riders with independent contractor drivers who own their cars and pay their own expenses. On March 11, 2015, two federal judges in the Northern District of California issued rulings in the separate lawsuits, denying motions for summary judgment filed by Uber and Lyft seeking a ruling that the plaintiffs were independent contractors as a matter of law. For different reasons, as discussed below, neither case is presently proceeding to trial. Nonetheless, these preliminary decisions provide a glimpse of how courts are likely to wrestle with the difficulties of the employee classification question for the entire gig economy writ large. Meanwhile, a United Kingdom employment tribunal has rejected Uber’s claim that its drivers are self-employed, finding that the “drivers provide the skilled

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<sup>93</sup> See *Otey v. CrowdFlower, Inc.*, No. 12-CV-05524-JST, 2015 WL 4076620 (N.D. Cal. July 2, 2015) (order approving settlement); *Otey v. CrowdFlower, Inc.*, No. 12-CV-05524-JST, 2016 WL 304747 (N.D. Cal. Jan. 26, 2016) (order approving parties’ second modified FLSA collective action settlement).

<sup>94</sup> Drivers have filed numerous lawsuits against Uber around the country. C Farivar, ‘More Uber Drivers file labor lawsuits: One claims he makes only \$80 per week’, *arstechnica* (11 February 2016) <[arstechnica.com/tech-policy/2016/02/more-uber-drivers-file-labor-lawsuits-one-claims-he-only-makes-80-per-week](http://arstechnica.com/tech-policy/2016/02/more-uber-drivers-file-labor-lawsuits-one-claims-he-only-makes-80-per-week)>. See also A Feuer, ‘Uber Drivers Up Against the App’, *New York Times* (New York, 19 February 2016) <[www.nytimes.com/2016/02/21/nyregion/uber-drivers-up-against-the-app.html](http://www.nytimes.com/2016/02/21/nyregion/uber-drivers-up-against-the-app.html)>; N Scheiber, ‘Uber Drivers and Others in the Gig Economy Take a Stand’, *New York Times* (New York, 2 February 2016) <[www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html](http://www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html)>. Similar cases have been filed against other platforms, including Homejoy (house cleaning), Postmates (food delivery services) and Try Caviar (restaurant meal delivery), alleging misclassification and claiming that workers are owed reimbursements for expenses, like vehicle maintenance, cleaning supplies and gas, as well as overtime and in some cases minimum wage. K Steinmetz, ‘Homejoy, Postmates and Try Caviar Sued Over Labor Practices’, *Time* (19 March 2015) <[time.com/3751745/postmates-homejoy-try-caviar-lawsuits](http://time.com/3751745/postmates-homejoy-try-caviar-lawsuits)>.



labour through which” Uber “delivers its services and earns its profits.” Concluding that the drivers “fall full square within” the statutory definition of “worker” entitled to minimum wage and paid leave, the tribunal observed that “[t]he notion that Uber in London is a mosaic of 30,000 small businesses linked by a common ‘platform’ is to our minds faintly ridiculous.”<sup>95</sup>

Like the UK tribunal, both Judge Edward Chen in the Uber case and Judge Vince Chhabria in the Lyft case had no difficulty, in their preliminary decisions, in dispatching the companies’ initial claim that they are mere technological intermediaries and not transportation companies, calling that argument “fatally flawed”<sup>96</sup> and “obviously wrong.”<sup>97</sup> Both judges noted that the companies market themselves directly to riders as “transportation systems” or “on-demand ride services,” and Judge Chen observed that Uber derives the totality of its revenues from fares, not software distribution.

Having crossed this threshold, both judges then examined the question whether drivers are employees or independent contractors. Both judges decided that there were factual disputes that they could not resolve as a matter of law and that would have to be tried before a jury.<sup>98</sup> In their respective rulings, both judges specified that the relevant legal factors went both ways – some showing employee status and some showing independent contractor status.

Judge Chen focused his analysis on whether under California law Uber controls the means of reaching the result it wants. In dispute was Uber’s claim that drivers could work as much or as little as they wished, but, as the judge commented, that freedom does not rule out employee status.<sup>99</sup> More relevant, he said, is the control Uber has over drivers while they are on duty. The judge examined Uber’s instructions to drivers (e.g., on dress and behavior with customers) and its ability to monitor compliance. Focusing on Uber’s requests that passengers rate drivers on a scale of 1 to 5 after each trip, the judge found:

“Uber drivers . . . are monitored by Uber customers (for Uber’s benefit, as Uber uses the customer rankings to make decisions regarding which drivers to fire)

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<sup>95</sup> Reasons for the Reserved Judgment, Employment Tribunals between Mr. Y Aslam, et al., and Uber B.V. et al., Case No. 2202550/2015 and others (28 October 2016) <[www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf](http://www.judiciary.gov.uk/wp-content/uploads/2016/10/aslam-and-farrar-v-uber-reasons-20161028.pdf)>

<sup>96</sup> O’Connor v. Uber Techs., Inc., 82 F.Supp.3d 1133 (N.D. Cal. 2015).

<sup>97</sup> Cotter v. Lyft, Inc., 60 F.Supp.3d 1067, 1078 (N.D. Cal. 2015).

<sup>98</sup> The judges’ rulings that the cases would have to be decided by a jury highlight how difficult the multifactor tests are to apply in practice.

<sup>99</sup> O’Connor, 82 F.Supp.3d. at 1149.

during each and every ride they give, and Uber's application data can similarly be used to constantly monitor certain aspects of a driver's behavior. This level of monitoring, where drivers are potentially observable at all times, arguably gives Uber a tremendous amount of control over the 'manner and means' of its drivers' performance."<sup>100</sup>

Given conflicting claims, Judge Chen denied summary judgment. As he wrote:

"The application of the traditional test of employment – a test which evolved under an economic model very different from the new 'sharing economy' – to Uber's business model creates significant challenges. Arguably, many of the factors in that test appear outmoded in this context. Other factors, which might arguably be reflective of the current economic realities (such as the proportion of revenues generated and shared by the respective parties, their relative bargaining power, and the range of alternatives available to each), are not expressly encompassed by the [California law] test. It may be that the legislature or appellate courts may eventually refine or revise that test in the context of the new economy. It is conceivable that the legislature would enact rules particular to the new so-called 'sharing economy.' Until then, this Court is tasked with applying the traditional multifactor test ... to the facts at hand."<sup>101</sup>

In the Lyft case, Judge Chhabria first emphasized that the classification issue should be decided with an eye toward the purposes the employment laws were meant to serve and the workers – particularly unskilled, low-wage – they were meant to protect, essentially engaging in *Hearst*-type reasoning. The judge said that at least some Lyft drivers look like the kind of worker the California laws were intended to protect: they rely largely or solely on the Lyft platform for their livelihood, but lack any real bargaining power over their terms and conditions of employment.

Turning to the California law test, the judge found that Lyft "retains a good deal of control over how [drivers] proceed" once they choose to work, that it gives drivers affirmative instructions (which could be interpreted as either suggestions or commands), that it reserves the right to (and actually does) punish drivers for breaking these rules and that the terms of service give Lyft a right to bar drivers from the platform "for any or no reason." The judge also found that the work was wholly integrated into Lyft's business – the company could not exist without its drivers – and that driving for Lyft requires no special skill of the sort

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<sup>100</sup> Ibid. 1151.

<sup>101</sup> Ibid. 1153.

that independent contractors are often expected to possess. Factors weighing in favor of independent contractor status, the judge said, were that the drivers enjoyed flexibility in when and how often to work, could choose which parts of their city to accept rides, had minimal actual contact with Lyft management while driving, and neither of the two named plaintiffs drove full time or had Lyft as their primary source of income (although other Lyft drivers might have heavier or more regular schedules).

Judge Chhabria's opinion was most widely quoted for his suggestion that current employment law doctrines are outdated:

"As should now be clear, the jury in this case will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn't very helpful in addressing this 21st Century problem. Some factors point in one direction, some point in the other, and some are ambiguous. ... [P]erhaps Lyft drivers should be considered a new category of worker altogether, requiring a different set of protections. But absent legislative intervention, California's outmoded test for classifying workers will apply in cases like this. And because the test provides nothing remotely close to a clear answer, it will often be for juries to decide. That is certainly true here."<sup>102</sup>

In February 2016 the parties to the Lyft litigation announced a settlement for \$12.25 million, but on April 7 Judge Chhabria denied approval, finding that it represented an unacceptably low percentage (less than 9%) of the drivers' monetary claims for expense reimbursement.<sup>103</sup> Five drivers, along with the Teamsters Union, had objected to its proposed terms, in part because it did not reclassify drivers as "employees." However, the judge rejected that specific objection as one "based largely on policy arguments better made" to the legislature and because "it disregards the risks the drivers would face if they took their case to trial."<sup>104</sup> The parties then reached another agreement that more than doubles the

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<sup>102</sup> *Cotter*, 60 F. Supp. 3d at 1081-82.

<sup>103</sup> *Cotter v. Lyft, Inc.*, No. 13-cv-04065-VC, 2016 WL 1394236 (N. D. Cal. Apr. 7, 2016)) (order denying motion for preliminary approval of class action settlement). In addition to the monetary sum, the agreed to terms included: an end to Lyft's ability to terminate drivers at will, allowing for deactivation only for enumerated reasons; notice and opportunity to cure shortcomings for drivers at risk of deactivation; and opportunity for drivers to challenge deactivation decisions before a neutral arbitrator at Lyft's expense.

<sup>104</sup> *Ibid.* 1.

monetary payout to \$27 million; Judge Chhabria approved the new deal on June 23, 2016, again emphasizing litigation risks.<sup>105</sup>

In April 2016 the parties to the Uber litigation announced an \$84 million settlement, which also did not reclassify drivers and required approval by Judge Chen.<sup>106</sup> Objections were filed, including by the lead plaintiff. In August 2016, after a hearing, Judge Chen rejected the proposed settlement “as currently structured” as “not fair, adequate and reasonable.” Although the judge acknowledged the plaintiffs’ “substantial” litigation risks, he pointed out that the settlement “yields less than 5% of the total verdict value of all claims being released”.<sup>107</sup> It is unclear how the case will now proceed.

Compounding the uncertainty, both the Lyft and Uber cases faced real obstacles because the agreements between both companies and their drivers contain arbitration provisions that purport to waive both the drivers’ rights to sue in court and to proceed in class actions. Indeed, when plaintiffs’ counsel explained the Lyft settlement, she expressly cited this arbitration agreement. In the Uber case, the settlement was announced soon after the Ninth Circuit Court of Appeals granted Uber’s request to appeal Judge Chen’s earlier rulings that the agree-

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<sup>105</sup> M Kendall, ‘Judge approves \$27 million Lyft settlement’, *siliconbeat* (23 June 2016) <[www.siliconbeat.com/2016/06/23/judge-approves-27-million-lyft-settlement](http://www.siliconbeat.com/2016/06/23/judge-approves-27-million-lyft-settlement)>; J Vincent, ‘Lyft doubles its settlement with California drivers to \$27 million’, *The Verge* (12 May 2016) <[www.theverge.com/2016/5/12/11661996/lyft-driver-settlement-california-double](http://www.theverge.com/2016/5/12/11661996/lyft-driver-settlement-california-double)>.

<sup>106</sup> See, e.g., RE Silverman and L Weber, ‘Uber Reaches a Tipping Point With Its Drivers’, *Wall Street Journal* (New York, 24 April 2016) <[www.wsj.com/articles/uber-reaches-a-tipping-point-with-its-drivers-1461490205](http://www.wsj.com/articles/uber-reaches-a-tipping-point-with-its-drivers-1461490205)>. The key terms were: \$84 million paid out to California and Massachusetts drivers, with an additional \$16 million added if the company’s valuation hits 1.5 times its current value; implementation of a warning system and a chance to correct problems prior to termination; end of the company practice of deactivating drivers who turn down too many rides; institution of an internal process to manage driver pay disputes; creation of appeals panels, arbitration at Uber’s expense and creation of a drivers’ association to contest deactivations; and permission for drivers to solicit tips from customers.

<sup>107</sup> O’Connor v. Uber Techs., Inc., No. 13-cv-03826-EMC; Yucesoy v. Uber Techs., No. 15-cv-00262-EMC (N.D. Cal. Aug. 18, 2016) (order denying plaintiffs’ motion for preliminary approval). B Hancock, ‘Uber Deal Takes Hits in Contentious Hearing’, *The Recorder* (San Francisco, 2 June 2016) <[www.therecorder.com/id=1202759201306/Uber-Deal-Takes-Hits-in-Contentious-Hearing](http://www.therecorder.com/id=1202759201306/Uber-Deal-Takes-Hits-in-Contentious-Hearing)>; H Somerville and D Levine, ‘Two U.S. judges defer decisions on deals to settle Uber, Lyft driver lawsuits’, *Reuters* (2 June 2016) <[www.reuters.com/article/us-uber-tech-lyft-settlement-idUSKCN0YO1A5](http://www.reuters.com/article/us-uber-tech-lyft-settlement-idUSKCN0YO1A5)>.

ment's arbitration clauses were unenforceable.<sup>108</sup> Shortly after Judge Chen rejected the settlement agreement, the court of appeals ruled in separate cases (challenging Uber's background-check practices), that most of Uber's driver arbitration agreements are enforceable and, because they contain provisions allowing a driver to "opt out", not unconscionable, reversing Judge Chen's contrary rulings.<sup>109</sup> Assuming that the appeals court's ruling is applied to the driver "employee" classification suit, it will severely curtail the class action litigation, potentially sending thousands of cases to arbitration. What impact it will have on possible settlement negotiations is unclear.

#### **4. A Note About Class Action Litigation and Arbitration Agreements**

The class action lawsuit is an important mechanism for aggregating in a single suit relatively modest claims arising from alleged wrongdoing affecting a large number of people. Class action lawsuits are permitted under Rule 23 of the Federal Rules of Civil Procedure, which is followed in cases filed in federal courts that allege violations of state wage and hour laws (like the Uber and Lyft cases). The exact composition and scope of the group represented are established by the class definition, the causes of action plead in the complaint and the relief sought. If the judge certifies a class, everyone in that class is bound (other than those who opt out) to whatever the lawsuit covers, including the particular causes of action and claims arising under the laws it invokes.<sup>110</sup>

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<sup>108</sup> O'Connor v. Uber Techs., Order, No. 15-80220 (9<sup>th</sup> Cir., Apr. 5, 2016) (granting petition for appeal); O'Connor v. Uber Techs., Inc., 311 F.R.D. 547 (N.D. Cal. Dec. 9, 2015) (finding 2014 and 2015 arbitration agreements unenforceable); O'Connor v. Uber Techs., Inc., No. C-13-3826 EMC, 2013 WL 6407583 (N.D. Cal. Dec. 6, 2013) (enjoining Uber from circulating arbitration agreement with onerous opt-out provisions). B Hancock, 'Uber ADR Pact May Get Green light', *Law.com* (16 June 2016) <[www.law.com/sites/almstaff/2016/06/16/ninth-circuit-likely-to-revive-uber-adr-agreement-with-drivers](http://www.law.com/sites/almstaff/2016/06/16/ninth-circuit-likely-to-revive-uber-adr-agreement-with-drivers)> (panel of appellate judges signaled that it is ready to reverse Judge Chen's findings that the arbitration agreements were unenforceable); B Hancock, 'Ninth Circuit Halts Uber Driver Suit', *The Recorder* (San Francisco, 5 April 2016) <[www.therecorder.com/id=1202754196010/Ninth-Circuit-Halts-Uber-Driver-Suit](http://www.therecorder.com/id=1202754196010/Ninth-Circuit-Halts-Uber-Driver-Suit)> (company's legal team accused Judge Chen of "setting the stage for a 'runaway class action' with radical rulings that crippled its arbitration clause").

<sup>109</sup> Mohamed v. Uber Techs., Inc., No. 15-16178, 2016 U.S. App. LEXIS 16413 (9<sup>th</sup> Cir. 2016).

<sup>110</sup> Section 216(b) of the Fair Labor Standards Act provides a private cause of action against an employer "by any one or more employees for and in behalf of himself or themselves and other employees *similarly situated*". 29 U.S.C. § 216(b) (emphasis

Any judgment in a class action case is binding on (1) the named plaintiffs, (2) the defendant or defendants, and (3) all of the unnamed plaintiffs who are part of the approved class. If a class-action case settles, the settlement is binding in the same way as a judgment would be. But because a settlement affects the claims of unnamed parties, the judge must approve it. The class action settlement procedure permits individuals in the class to either *object* to a proposed settlement by filing a written objection with the judge, or to *opt out* of the class action in writing. Objections are heard and disposed of by the judge in a special hearing on approval of the class action settlement. Any individual who opts out of the class does not get a hearing, does not share in whatever benefits might be conferred by the judgment or settlement, and is free to pursue individual remedies against the same defendant on the same legal theory as that involved in a class action.

Any individual within a defined class is bound by all of the terms of the judgment or settlement approved by the judge. Thus, for example, Uber drivers in California who are included in a class action which goes to judgment or which is settled may not sue Uber again on the same legal theory that was stated in the case. And if, for instance, a class defined in an Uber case settlement in California would encompass the claims of Uber drivers who have brought other lawsuits against the company, further pursuit of those claims would be foreclosed if the judge approved a class-action settlement. But drivers not included in the class, for example drivers in other states, drivers with distinctly different claims or drivers with claims arising in a different time period than that covered in the Uber case, would be free to bring their own claims against Uber. Importantly, a judgment or settlement only resolves claims that arise within the class period, the span of time covered by the lawsuit. New claims may arise from alleged wrongs occurring *after* the judgment or settlement.

As the aggregation of claims in class suits has become an efficient way of litigating modest claims, as well as a “powerful instrument[] of social and economic

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added). The decision to certify an opt-in class under §216(b) is within the discretion of the court. Unlike Rule 23 class actions, FLSA collective actions require putative class members to affirmatively opt *into* the case. Employees bringing the action must demonstrate they are similarly situated, and only those who opted in are bound by any judgment or settlement. Anyone who does not opt in will not be part of the suit and will not share in any award. They are free to bring their own claims against the employer individually, if they wish. The CrowdFlower litigation was settled as an FLSA opt-in class action.

policy,"<sup>111</sup> it has become controversial. Companies typically seek to avoid class actions because,

"[o]nce a class is certified, the damages sought are often so enormous that the only rational calculation is to settle even if the chances of losing at trial are small. The costs of litigation – for lawyers, experts and the exchange of information – are also far larger in class actions. And it is not always clear that the plaintiffs, as opposed to their lawyers, receive very much in the settlements.

Plaintiffs' lawyers, on the other hand, say class actions are the only way to vindicate small harms caused to many people. The victim of, say, a fraudulent charge for a few dollars on a billing statement will never sue. But a lawyer representing a million such people has an incentive to press the claim. 'Realistically,' Professor [Arthur] Miller wrote, 'the choice for class members is between collective access to the judicial system or no access at all.'<sup>112</sup>

Increasingly, many firms, like Uber and Lyft, are imposing arbitration agreements as a condition of employment (or of the working arrangement), under which the workers waive any right to sue in court and may also waive – knowingly or not – rights to act collectively either in court or in arbitration.<sup>113</sup> Amazon Mechanical Turk includes similar waivers in the Participation Agreement with its labor providers.

Over the last decade, the Supreme Court has made it harder for workers (and consumers) to bring class action lawsuits to vindicate statutory rights, either by stiffening the procedural requirements for bringing a class action, or by allowing firms to eliminate the option altogether through mandatory arbitration clauses. In *Circuit City Stores, Inc. v. Adams*,<sup>114</sup> the Supreme Court (by a 5-4 vote) upheld mandatory employment arbitration agreements as within the coverage of the Federal Arbitration Act,<sup>115</sup> which, the Court ruled, compels their judicial

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<sup>111</sup> A Miller, 'Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure', (2013) 88 *New York University Law Review* 286, 321-22.

<sup>112</sup> A Liptak, 'Corporations Find A Friend in the Supreme Court', *New York Times* (New York, 4 May 2013) (quoting Miller (n 111)).

<sup>113</sup> See, e.g., J Silver-Greenberg and M Corkery, 'Start-Ups Embrace Arbitration to Settle Workplace Disputes', *New York Times* (New York, 14 May 2016).

<sup>114</sup> 532 U.S. 105 (2001).

<sup>115</sup> 9 U.S.C. §§1, 2.

enforcement, thereby barring an employee who has signed such an agreement from going to court to litigate disputes against the employer.<sup>116</sup>

A decade later, in *AT&T Mobility v. Concepcion*,<sup>117</sup> the Supreme Court held (also by a 5-4 vote) that class-action waivers in consumer arbitration agreements are enforceable. It rejected a California court's ruling that under state contract law the waiver was unenforceable as an unconscionable contract of adhesion.<sup>118</sup> The Court held that the Federal Arbitration Act preempted the California's court's ruling, because that statute reflects a federal policy favoring arbitration, and, hence, California must enforce arbitration agreements even if the agreement requires that consumer complaints be arbitrated individually, instead of on a class-action basis.

The legality of class action waivers has been challenged under the National Labor Relations Act. A divided NLRB has held that requiring employees to agree to a class action waiver as a condition of employment violates the labor law's Section 7 and 8(a)(1) protections of the right of employees to act in concert for the purpose of improving their working conditions.<sup>119</sup> To date, two federal

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<sup>116</sup> Mandatory arbitration agreements are receiving a lot of publicity. In late 2015, The New York Times published a comprehensive three-part series ("Beware the Fine Print") on the use of these agreements, describing them as a "far-reaching power play by American corporations." J Silver-Greenberg and R Gebeloff, 'Arbitration Everywhere, Stacking the Deck of Justice' *New York Times* (New York, 31 October 2015) <[www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html)>. Legislation banning these agreements has been introduced in Congress but has not advanced. Entitled the "Arbitration Fairness Act," it would outlaw mandatory pre-dispute arbitration for consumer and employment disputes. Outside of a collective bargaining agreement, it would allow arbitration only where agreed to *after* a dispute arises.

<sup>117</sup> 563 U.S. 333 (2011).

<sup>118</sup> Contracts of adhesion are standardized contracts, drafted and imposed by a party with superior bargaining power, leaving the other party the option only to "take it or leave it." They are ubiquitous in commercial dealings and a "familiar part of the legal landscape." *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 171 (Cal. 1981). They are said to have certain advantages in terms of uniformity, simplicity and efficiency, and are not intrinsically unenforceable, or unlawful under American law. A few courts, as in California, have refused to enforce adhesion contracts under a doctrine of unconscionability, meaning that they are so unfair to the weaker party that there could have been no meeting of the minds of the parties. Unconscionability turns on both procedural and substantive considerations.

<sup>119</sup> *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *review granted in pertinent part*, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5<sup>th</sup> Cir. 2015). The NLRB filed a petition for certiorari with the U.S. Supreme Court, which was granted in January 2017. Section 7 of the NLRA sets out the basic rights of employees under the law, including



appellate courts have upheld the NLRB's position.<sup>120</sup> Other courts have rejected it, based largely on *AT&T Mobility v. Concepcion*.<sup>121</sup> With the split of authority, the Supreme Court has granted certiorari over the issue. Resolution can be expected in 2018. Meanwhile, unfair labor practice charges have been filed with the NLRB alleging that the class action waiver contained in the Uber arbitration agreement is unlawful. No decision has yet been made by the NLRB's general counsel whether to issue a complaint against Uber in these cases, in which the threshold issue, of course, is whether the drivers are "employees."

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Hopefully, the preceding discussion gives a sense of the uncertainty of the employee classification issue in the gig economy, and the considerable litigation hurdles. Nonetheless, new lawsuits continue to be filed against Uber, Lyft and other platforms raising employee status claims.<sup>122</sup> Legal developments in the gig economy occur faster than we can record them.

#### IV. Crowdfork Platforms: Four Different Models

Crowdfork is as varied as the economy itself. A stay-at-home mom fills in the gaps between childcare responsibilities by transcribing receipts or categorizing photographs for pennies a task on Amazon Mechanical Turk; or an unemployed nurse unable to find a job in a depressed formal economy takes on online tasks

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the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," and section 8(a)(1) prohibits employer interference with "the exercise of the rights guaranteed in section 7."

<sup>120</sup> *Morris v. Ernst & Young*, No. 13-16599 (9<sup>th</sup> Cir., 2016); *Lewis v. Epic Systems Corp.* 823 F.3d 1147 (7<sup>th</sup> Cir. 2016). The Supreme Court in January 2017 granted petitions for certiorari filed in both of these cases and consolidated them with the *Murphy Oil* case for consideration.

<sup>121</sup> *AT&T Mobility*, 563 U.S. 333. The Second, Fifth, and Eighth Circuit Courts of Appeals, as well as the Supreme Courts of California and Nevada, have determined that provisions waiving class and collective arbitration in the employment context are enforceable under the Federal Arbitration Act.

<sup>122</sup> For example, lawsuits were filed in June 2016 against both Uber and Lyft after they terminated operations in Austin, Texas, alleging that they violated the Worker Adjustment and Retraining Notification (WARN) Act, which requires 60-days advance notice to "affected employees" of an expected loss of employment due to a mass layoff.

full time.<sup>123</sup> A skilled graphic artist picks up a series of gigs designing corporate logos for \$25 an hour on Upwork; or someone with basic secretarial training performs simple data entry tasks for less than the minimum wage. Computer programmers compete against one another for prizes and recognition on coding “challenges” on Topcoder, while multinational teams of scientists are brought together online through InnoCentive to resolve a critical medical question. Remuneration ranges from one cent to tens of thousands of dollars; tasks can last 30 seconds or several months. Crowdworkers may differ in education, skills and social class, but they inhabit a common world, populated by different platforms, all hard to categorize under labor and employment law regulation.

In “Managing the Human Cloud,”<sup>124</sup> the authors identify four business models of crowdwork platforms. The models represent different ways to confront two key obstacles to extensive adoption of crowdsourcing: the perceived risk of dealing with unknown, “virtual workers” and limited capacity to handle complex and large-scale projects. The typology is organized around two questions: (1) Who provides the project governance: platform or buyer (client)? and (2) where is the buyer’s trust placed for quality control and project-related risks: platform or supplier? The key characteristics of the models are captured in their names:

- *Aggregator*. This model aggregates hundreds or thousands of microtasks performed by multiple suppliers. Typical uses are for transcription, content generation, categorization and Internet search. A key benefit is the ability to have large quantities of standardized work completed quickly. A salient feature is task aggregation. Governance is provided by the buyer; trust is placed in the platform. Examples are Amazon Mechanical Turk and CrowdFlower.
- *Facilitator*. This model connects suppliers and buyers directly through a bidding process. It is used for almost any kind of service. Its key benefit is access to a large pool of suppliers and tools to facilitate the engagement. A salient feature is supplier transparency, platform features that provide information about suppliers to reduce anonymity. Governance is provided by the buyer; trust is placed in the supplier(s). Examples are Elance and oDesk (merged now as Upwork) and Freelancer.

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<sup>123</sup> M Marvit, ‘How Crowdworkers Became the Ghost in the Digital Machine’, *The Nation* (New York, 5 February 2014) <[www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine](http://www.thenation.com/article/how-crowdworkers-became-ghosts-digital-machine)>.

<sup>124</sup> Kaganer et al. (n 15).

- *Governor*. This model provides project governance and certifies supplier quality. Typical uses are software development and testing, sales and marketing. A key benefit is assurance of qualified coordination and management of complex projects. A salient feature is project governance. Governance is provided by the platform; trust is placed in the platform. Examples are Top-coder and Trada.
- *Arbitrator*. This model engages multiple suppliers through competitions. Typical uses are graphic design, complex scientific problem solution, and idea generation. A key benefit is the ability to choose from among multiple completed projects. A salient feature is supplier redundancy that enables the buyer to better evaluate quality. Governance is provided by the platform; trust is placed in the supplier(s). Examples are InnoCentive and crowd-SPRING.

In our detailed descriptions below, for each platform we explain the relationship between the platform, the client and the service provider; the types of services provided or challenges extended; the governance or management system provided by the platform; and dispute resolution procedures, if any.

## 1. **Aggregator: Amazon Mechanical Turk**

Amazon Mechanical Turk was launched publicly in 2005, after development for Amazon's internal use. It is the archetypal provider of low-wage, low-skilled crowdwork – “micro-tasks that are trivial to humans, but challenging to computer programs.”<sup>125</sup> Basic tasks (labeled as Human Intelligence Tasks, or HITs), such as transcription of text from receipts, identification of images or paraphrasing of sentences, are posted online with a fixed price unilaterally set by the client company (the “requester”). Academic researchers are frequent requesters, posting surveys for online data collection. The price for certain tasks can be as low as one cent. HITs have a set time limit by which they must be completed; if workers (termed “providers” and often called Turkers) do not complete them by this time, they are released to others and no payment is made. AMT offers no hourly or time-based compensation and provides no mechanisms to ensure that the amount of compensation for HITs complies with the federal hourly minimum wage.

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<sup>125</sup> J Wang, PG Ipeirotis, and F Provost, ‘A Framework for Quality Assurance in Crowdsourcing’, *NYU Stern School of Business Research Working Paper* (13 June 2013).

AMT charges requesters a fee of 20% of the total payment received by providers. For tasks requiring more than ten responses, such as surveys, an additional 20% surcharge is added, raising the total fee going to AMT to 40% – far more than higher-skilled crowdwork platforms.<sup>126</sup>

*AMT Demographics:* A recent Pew Research Center study showed roughly equal numbers of academics and businesses participating as requesters on AMT, though business accounted for 83% of the HITs posted and academics for only 9%.<sup>127</sup> In fact, out of a pool of almost 300 requesters, the study found that 53% of HITs were generated by only 5 businesses, which posted identical tasks on a daily basis.<sup>128</sup> 86% of the work posted by these leading requesters consisted of transcription of information from images (such as receipts), audio or video.<sup>129</sup>

It is estimated that there are between 20,000 and 30,000 active users on AMT at any given time, with a turnover rate of about 25%, though there are hundreds of thousands of users registered with the platform. According to web traffic data, in December 2015 the site had no fewer than 750,000 unique visitors.<sup>130</sup> The great majority of Turkers are located in the U.S. (80%), with most of the others based in India.<sup>131</sup>

Somewhat surprisingly given the extremely low remuneration predominating on the site, U.S.-based Turkers tend to be better educated than the average working adult in the United States. In a study of 3,370 U.S.-based Turkers, the Pew Research Center found that 51% had a college degree, while 87% had completed at least some college.<sup>132</sup> Turkers are also significantly younger than average working adults; 88% of the Turkers are 49 or under, and 41% are 29 or under.<sup>133</sup> Three-quarters of Turkers (74%) surveyed say they live in households

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<sup>126</sup> 'Pricing', *Amazon Mechanical Turk*, <requester.mturk.com/pricing> accessed 8 January 2016.

<sup>127</sup> P Hitlin, 'Research in a Crowdsourcing Age, a Case Study' *Pew Research Center* (11 July 2016) 17 <[www.pewinternet.org/files/2016/07/PI\\_2016.07.11\\_Mechanical-Turk\\_FINAL.pdf](http://www.pewinternet.org/files/2016/07/PI_2016.07.11_Mechanical-Turk_FINAL.pdf)>. During the study period, the researchers found that 36% of requesters were academics, 31% were businesses, 1% were non-profit organizations. The researchers were unable to determine the identity of 31% of requesters.

<sup>128</sup> *Ibid.* 17.

<sup>129</sup> *Ibid.* 18.

<sup>130</sup> *Ibid.* 15.

<sup>131</sup> Interview with PG Ipeirotis, Stern School of Business, NYU (2 February 2016). For regular tracking of AMT activity, including active requesters and provider demographics, see [www.mturk-tracker.com/#/general](http://www.mturk-tracker.com/#/general).

<sup>132</sup> Hitlin (n 127) 21. In the U.S. working adult population, the figures are 36% and 65%, respectively.

<sup>133</sup> *Ibid.* In the U.S. working adult population, these figures are 69% and 23%.

earning \$75,000 a year or less, compared with 47% of adult workers, with 42% of Turkers in households earning \$40,000 a year or less.<sup>134</sup>

While approximately 50% of Turkers used the platform for 10 hours a week or less, a sizeable minority of 18% used it between 21 and 40 hours a week, and 5% for over 40 hours a week – equivalent to a part-time or even full-time job.<sup>135</sup> Accordingly, while 53% of Turkers indicated that they derived “very little” of their income from AMT, a full 25% indicated that they received “all or most” of their income from the platform.<sup>136</sup> Although the sub-population of those who indicated that they received all or most of their income from AMT was overall less educated than the whole pool of Turkers, 81% of them had completed at least some college and 32% had a college degree.<sup>137</sup> 30% of workers under 29 stated that they relied on the platform for all or most of their income, versus only 22% of those between 30 and 49 and 17% of those 50 and over.<sup>138</sup>

These statistics raise questions when coupled with the finding that 52% of Turkers reported earning less than \$5 an hour on the platform, while 91% reported earning less than \$8 an hour, making it clear that a substantial majority of work performed on the platform is being remunerated at rates below the federal minimum wage of \$7.25 per hour, and any applicable higher state minimum wages.<sup>139</sup> At the rate of \$5/hour, which less than half of Turkers are able to make, even a single individual without children would fall under the federal poverty level after working 40 hours a week without any breaks.<sup>140</sup>

*AMT’s General Participation Agreement.* All requesters and providers are required to sign a general participation agreement; there are no HIT-specific contracts. Compared to sites for higher-skilled and higher-paid crowdwork, the participation agreement is minimalist, offering workers no minimum wage, no system to resolve disputes with requesters and no protection for workers denied payment. Indeed, while the agreement states that “Requesters must pay Providers for their Services,” it also gives requesters an unqualified right to reject the work: “If a Requester is not reasonably satisfied with the Services, the Requester may

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid. 24.

<sup>136</sup> Ibid. 27.

<sup>137</sup> Ibid. 28.

<sup>138</sup> Ibid. 30.

<sup>139</sup> Ibid. 26.

<sup>140</sup> Ibid. (calculating the income of such a person at \$10,379.20, pre-tax).

reject the Services.”<sup>141</sup> It is possible to get disconnected from AMT with the accumulation of three “blocks,” a requester’s statement that a provider’s work is so bad that it wants to block the provider from working on its projects ever again.<sup>142</sup>

The participation agreement states that providers are independent contractors and that AMT is only an intermediary for services.<sup>143</sup> Beyond the question of employment classification, the participation agreement imposes a number of other restrictions, falling most heavily on workers. Providers are prohibited from using “robots, scripts or other automated methods” to complete projects and must provide the requester with “any information reasonably requested in connection with the performance of services.”<sup>144</sup> Both provider and requester are required to “recognize and agree” that AMT will “implement mechanisms allowing [AMT] and others to track your requests for, or your performance of, Services and rate your performance and to post such feedback on the Site,” and both requesters and providers are responsible for determining any tax liability/withholding requirements imposed by law.<sup>145</sup>

AMT also requires providers to exclusively submit, and requesters to exclusively accept, work product via the platform, not directly from one another.<sup>146</sup> Unlike Upwork, for example, AMT offers no method by which companies can pay their way out of the anti-circumvention provisions; presumably, the penalty for noncompliance by either requester or provider would be termination from the platform. AMT reserves for itself the right to terminate or suspend any requester or provider account without notice and for any reason, without needing to show that the participation agreement was violated.

*Quality Control on AMT.* Because requesters draw from a vast, relatively undifferentiated pool of workers who do not have the ability to send “quality signals” in the form of resumes and specific work histories, they may find it diffi-

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<sup>141</sup> Amazon Mechanical Turk Participation Agreement 3(a), <[www.mturk.com/mturk/conditionsofuse](http://www.mturk.com/mturk/conditionsofuse)> accessed 2 May 2017.

<sup>142</sup> Interview with PG Ipeirotis (n 131). Ipeirotis said he believed there is some sort of appeals process, and whether the “blocks” came from large, reputable requesters or from unknown new participants is taken into consideration.

<sup>143</sup> Mechanical Turk Participation Agreement (n 141) 3(b)(v) and (vi).

<sup>144</sup> *Ibid.* 3(b).

<sup>145</sup> *Ibid.* 3(d). Though both requesters and providers must agree to AMT’s ratings mechanisms, in practice, AMT maintains a one-way feedback system, which only produces ratings for providers.

<sup>146</sup> *Ibid.* 3(a)-(b).

cult to monitor work quality.<sup>147</sup> AMT mitigates this problem by letting requesters know the number of tasks providers have completed and the percentage rate at which their work was accepted. Requesters have the option of restricting tasks only to those providers who have completed a certain number/percentage of tasks successfully. Moreover, AMT also features “master” tasks that are often more highly remunerated and accessible only to those workers who have reached “master” status by performing tasks accurately. Requesters are assessed an additional 5% surcharge in order to post master tasks. The unskilled character of most of the tasks means that these rather rough forms of worker differentiation are sufficient for most requesters’ needs; however, many choose to have multiple providers do the same task in order to have more certainty in the work product, under the theory that they should reach the same or similar results if they are working in good faith. AMT offers providers no information about requesters, including ratings, or data such as the hourly rate for tasks.<sup>148</sup>

*Disputes with AMT.* AMT’s participation agreement features a broad mandatory arbitration clause that requires providers and requesters to submit any dispute with AMT to arbitration in Seattle, Washington, under the rules of the American Arbitration Association. There is also a class arbitration waiver, stating that “to the fullest extent permitted by applicable law, no arbitration under this Agreement shall be joined to an arbitration involving any other party subject to this Agreement, whether through class arbitration proceedings or otherwise.”<sup>149</sup> On the other hand, if there is any allegation of a violation of AMT’s intellectual property rights, the company reserves for itself the right to seek injunctive or other appropriate relief in any state or federal court in Washington State, and requesters and providers must consent to jurisdiction in those courts.

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<sup>147</sup> See, e.g., PG Ipeirotis, F Provost, and J Wang, ‘Quality Management on Amazon Mechanical Turk’ (25 July 2010) <miscr.csom.umn.edu/workshops/2012/fall/Ipeirotis.pdf>.

<sup>148</sup> Interview with PG Ipeirotis (n 131); see generally SC Kingsley, ML Gray, and S Suri, ‘Accounting for Market Frictions and Power Asymmetries in Online Labor Markets’ (2015) 7 *Policy and Internet* 383 (lack of transparency and information asymmetry are characteristics of the AMT platform).

<sup>149</sup> Mechanical Turk Participation Agreement (n 141) 10.

## 2. Facilitator: Upwork

Upwork was created in early 2015 by the merger of Elance (founded in 1999) and oDesk (founded in 2003).<sup>150</sup> It is one of the world's largest freelance marketplaces, claiming three million jobs posted annually and providing a vast array of work opportunities in a variety of fields. These tasks tend to be of higher complexity than those of "clickwork" providers such as Amazon Mechanical Turk; they can range from copywriting to secretarial tasks, computer programming, webpage design and legal research. The platform is used to hire workers for longer-term projects as well – a sampling included companies looking for patent attorneys for a six-month stint, marketing consultants and "virtual secretaries" or administrative workers to take on jobs on an hourly basis.

Given the diversity and complexity of tasks the platform provides, the platform-worker relationship differs significantly from the AMT "take-it-or-leave-it" model, where requesters (who Upwork calls "clients") unilaterally set all of the terms and conditions for providers (called "freelancers" on Upwork). Instead, all services rendered for Upwork are subject to a competitive bidding and negotiation process where workers and employers exchange offers and experienced workers have the possibility of securing greater compensation.

Upwork does not allow workers to apply to an unlimited number of open jobs; applying to any position uses up credits that the site calls "connects."<sup>151</sup> Most jobs require two connects; some require more. All freelancers are automatically allotted 50 free connects per month, which do not roll over. Highly active workers have the ability to upgrade to a paid membership plan for \$10 a month, which gives them 10 additional connects and the opportunity to buy more connects at \$1 a piece, as well as the ability to see the high, low and average bids on jobs. Upwork requires that a job be conducted exclusively via the platform for 24 months after it has been accepted. Clients and freelancers can opt out of this obligation only if they pay a stiff fee.<sup>152</sup>

Upwork plays a limited affirmative role in matching workers with potential jobs. When a worker views a job posting, Upwork presents him or her with a representative sample of past jobs that the client company has posted, together

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<sup>150</sup> E Pofeldt, 'Elance-oDesk Becomes "Upwork" In Push To Build \$10B In Freelancer Revenues', *Forbes* (New York, 5 May 2015) <[www.forbes.com/sites/elainepofeldt/2015/05/05/elance-odesk-becomes-upwork-today-odesk-brand-gets-phased-out](http://www.forbes.com/sites/elainepofeldt/2015/05/05/elance-odesk-becomes-upwork-today-odesk-brand-gets-phased-out)>.

<sup>151</sup> 'Connects & Memberships FAQ', *Upwork* <[support.upwork.com/hc/en-us/articles/211062878-Connects-Memberships-FAQs-for-Freelancers](http://support.upwork.com/hc/en-us/articles/211062878-Connects-Memberships-FAQs-for-Freelancers)> accessed 3 May 2017.

<sup>152</sup> *Ibid.* at 7.



with pay rates and workers' ratings of their experiences with the company. Upwork also recommends five workers with an appropriate skill level and positive reviews to the client, which has the option of reaching out to the workers directly. The workers still participate in the bidding process but because of the "quality signal" sent by the platform's endorsement may be able to command a wage premium.<sup>153</sup>

Upwork also offers its clients extra levels of service. "Upwork Pro" provides pre-screening and "handpicked" matching services.<sup>154</sup> "Upwork Enterprise," described as an "end-to-end Freelancer Management System," is designed to assist large companies and includes a worker classification process. Workers are evaluated based on their work history and classified as employee or independent contractor. An Upwork compliance and legal team reviews the determinations and provides guidance in borderline cases. Indemnification against misclassification risks is promised.<sup>155</sup> Should Upwork clients wish to establish formal employment relationships with freelancers, "Upwork Payroll" is available and functions like a traditional staffing agency.<sup>156</sup>

*Upwork's contracts and fee structure:* Upwork provides for two primary types of contracts, fixed-rate and hourly, on which it charges the freelancer a fee.<sup>157</sup>

In June 2016, Upwork revised its pricing structure. Previously, freelancers were charged a 10% fee for each engagement. (So, for example, if the freelancer performed a fixed price contract for \$500, she was paid \$450.) Under the revised agreement, fees on smaller projects are increased, but fees are decreased when relationships with clients become more permanent (20% for the first \$500 billed, 10% for billing between \$500 and \$10,000, and 5% for billing above \$10,000).

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<sup>153</sup> Interview with J Horton, Stern School of Business, NYU (1 March 2016).

<sup>154</sup> <[www.upwork.com/pro/?channel=hp](http://www.upwork.com/pro/?channel=hp)> accessed 29 November 2016.

<sup>155</sup> 'Upwork Enterprise' <[www.upwork.com/enterprise/?channel=hp](http://www.upwork.com/enterprise/?channel=hp)> accessed 29 November 2016.

<sup>156</sup> 'Upwork Payroll Agreement' <[www.upwork.com/legal/upwork-payroll-agreement](http://www.upwork.com/legal/upwork-payroll-agreement)> accessed 30 March 2016. The client must affirmatively declare that it wants to treat certain workers as employees, and they then become employees, not of Upwork or the client, but of a third-party "staffing provider" that administers wages and benefits. Upwork Payroll provides clients with an array of services for which it charges 21% of the payment. Upwork expressly disclaims its power to require a freelancer to start or stop work and its control over any term or condition of a freelancer's employment. It states that it merely provides the platform for a client to assign work to a freelancer and separately facilitates the relationship between staffing provider and freelancer, but it is not an employer or joint employer of the freelancer. *Ibid.* at 8.

<sup>157</sup> 'Upwork Service Fee' <[support.upwork.com/hc/en-us/articles/211062538-Upwork-Service-Fee](http://support.upwork.com/hc/en-us/articles/211062538-Upwork-Service-Fee)> accessed 29 July 2016.

Upwork explains that this “sliding service fee” will give “our customers an incentive to continue building long and substantial relationships on Upwork.”<sup>158</sup> The agreement states expressly “Upwork does not charge a fee when a Freelancer finds a suitable Client or finds an Engagement.”<sup>159</sup> Rather, the fees charged to freelancers are “for use of the Site’s communication, invoicing, dispute resolution and payment services, including Payment Protection.”<sup>160</sup>

*Upwork’s fixed-rate contracts:* For fixed-rate contracts, the client sets a maximum budget for a project (e.g., \$50 to design a logo), and freelancers can present proposals up to that amount. Freelancers who have more experience and positive reviews from other clients using Upwork can command a higher premium. The client has the option of interviewing candidates and selects one or more of the freelancers to complete the task.

On these fixed-rate contracts, Upwork offers “payment protection,”<sup>161</sup> which involves dividing all but the simplest projects into “milestones” that allow workers to get paid for completing portions of the work, as opposed to waiting until the project’s conclusion. Upwork requires clients to submit the payment for each milestone into an escrow account, but final payment is dependent on the client’s satisfaction with the work.

A two-tier dispute resolution process handles conflicts relating to fixed-rate contracts.<sup>162</sup> The worker/company has thirty days to submit a dispute, upon which Upwork contacts both parties for information, then conducts an independent analysis and provides a nonbinding recommendation to the parties. If the parties accept the recommendation, any funds that Upwork determines the worker is entitled to are released to the worker in accordance with the agreement.

If a party disagrees with the Upwork recommendation, arbitration is available. If the party does not choose to proceed to arbitration, the disputed funds are released back to the client. The total fee for arbitration before the American Arbitration Association is \$873, which is paid equally by the freelancer, client,

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<sup>158</sup> ‘Freelancer Pricing’ <[www.upwork.com/i/pricing/freelancers](http://www.upwork.com/i/pricing/freelancers)> accessed 29 July 2016.

<sup>159</sup> ‘User Agreement’ <[www.upwork.com/legal](http://www.upwork.com/legal)> accessed 29 July 2016.

<sup>160</sup> ‘Fee and ACH Authorization Agreement’ <[www.upwork.com/legal/fees](http://www.upwork.com/legal/fees)> accessed 29 July 2016.

<sup>161</sup> ‘Upwork Fixed-Price Protection for Freelancers’, <[support.upwork.com/hc/en-us/articles/211063748-Upwork-Fixed-Price-Protection-for-Freelancers](http://support.upwork.com/hc/en-us/articles/211063748-Upwork-Fixed-Price-Protection-for-Freelancers)> accessed 30 March 2016.

<sup>162</sup> ‘Fixed-Price Escrow Instructions’, *Upwork* <[www.upwork.com/legal/fp/](http://www.upwork.com/legal/fp/)> accessed 30 March 2016.

and Upwork. If arbitration is initiated and the opposing party fails to make the arbitration payment, all funds are disbursed to the party that began the arbitration.

*Upwork's hourly contracts:* For hourly projects, the freelancer rather than the client names the price. On a certain project, a client may ask for a particular experience level (entry-level, intermediate or expert) and set other skill-based parameters. Freelancers present proposals and suggested hourly rates, and the client interviews and hires the desired number of workers for the project. The platform unilaterally sets a minimum rate of \$3.00 per hour on these contracts, preventing a complete race to the bottom but obviously far below U.S. minimum wage laws.<sup>163</sup> Because Upwork has workers from developing countries, not all of these contracts would be illegal, even if workers were found to be employees, but there are no mechanisms in place to stop American workers from signing contracts – including contracts for long-term hourly work – that pay below legal minimum wage. The average rate for most jobs appears to be well over \$10.00 an hour.

Once selected for projects, freelancers create time logs of the hours they work and submit them every Monday by 11:59 p.m. “Work diaries” support these logs by automatically taking screenshots of the workers’ computers every ten minutes while they are on the clock, allowing clients to review whether workers were advancing diligently.<sup>164</sup> A journalist researching the platform found that the program also records minute-by-minute keystroke and mouse data, provides clients with a “productivity rating” and sends “inactivity alerts” to freelancers who have been idle for too long.<sup>165</sup>

After workers have submitted their time logs, Upwork invoices the clients, who have four days to review and dispute any overbilling of hours. Unlike requesters at AMT, Upwork clients may not unilaterally decline to pay workers; rather, they must submit disputes to Upwork, which investigates and determines “in its sole discretion,” based on its review of the time log and screenshots, whether a given dispute has merit.<sup>166</sup> As long as they have used the screenshot function to adequately document their work, Upwork provides lim-

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<sup>163</sup> ‘Elevating our Workplace with a New Minimum Rate’, *Upwork Blog* <[www.upwork.com/blog/2014/08/minimum-rate](http://www.upwork.com/blog/2014/08/minimum-rate)>.

<sup>164</sup> ‘Hourly, Bonus, and Expense Payment Agreement with Escrow Instructions,’ *Upwork 2* <[www.upwork.com/legal/escrow-hourly](http://www.upwork.com/legal/escrow-hourly)>.

<sup>165</sup> E Kaplan, ‘The Spy Who Fired Me’, *Harper’s Magazine* (New York, March 2015) <[harpers.org/archive/2015/03/the-spy-who-fired-me](http://harpers.org/archive/2015/03/the-spy-who-fired-me)>.

<sup>166</sup> *Ibid.* 8.

ited “payment protection” for hourly workers. In this program, Upwork directly compensates a worker with the client’s escrowed funds when a client has refused to pay for hourly work in part or in full.<sup>167</sup> There is no arbitration or other dispute resolution process for hourly contracts.

*Disputes with Upwork and its User Agreement.* The dispute resolution systems described above apply to disputes between freelancers and clients; the platform’s user agreement creates different rules for disputes arising between freelancers and Upwork itself. The user agreement makes clear that from Upwork’s perspective, no employment relationship exists between Upwork and freelancers. When signing up for an account, freelancers must state that they “have an independent business (whether it be as a self-employed individual/sole proprietor or a corporation or other entity).”<sup>168</sup> The platform also requires parties to

“expressly acknowledge, agree, and understand that: (a) the Site is merely a venue where Users may act as Clients and/or Freelancers; (b) Upwork is not a party to any Service Contracts between Clients and Freelancers; (c) you are not an employee of Upwork, and Upwork does not, in any way, supervise, direct, or control the Freelancer or Freelancer Services; (d) Upwork will not have any liability or obligations under or related to Service Contracts or any acts or omissions by you or other Users; (e) Upwork has no control over Freelancers or the Freelancer Services offered or rendered by Freelancers; and (f) Upwork makes no representations as to the reliability, capability, or qualifications of any Freelancer or the quality, security, or legality of any Freelancer Services, and Upwork disclaims any and all liability relating thereto.”<sup>169</sup>

Clients assume all liability for determining whether freelancers are independent contractors or employees and engaging them accordingly. Upwork does specify that unless clients classify workers as employees, they may not request that “freelancers” work exclusively for them; as independent contractors, they must be free to work for any client.<sup>170</sup>

Like most other platforms, Upwork retains the right to suspend or revoke access to the site. However, it may do so only for breaches of the user agreement or

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<sup>167</sup> Ibid. 6. In addition to Upwork’s satisfactory review of the work diaries, the program requires that both client and freelancer have agreed to use work diaries and have accounts in good standing, that the number of hours billed be within the hours authorized by the client, and that a dispute be properly submitted within five days of notification or rejection or unpaid time,

<sup>168</sup> ‘Upwork User Agreement’ 3.1, <[www.upwork.com/legal](http://www.upwork.com/legal)> accessed 30 March 2016.

<sup>169</sup> Ibid. 13.1.

<sup>170</sup> Ibid. 8.7.

other parts of the site's terms of service; if Upwork suspects or becomes aware that a user has provided false or misleading information; or if Upwork believes, in its sole discretion, that a user's actions may create legal liability for the user or Upwork or otherwise be contrary to the interests of the site or user community.<sup>171</sup> While the user agreement does give Upwork a significant amount of discretion, it does not allow for termination without any justification whatsoever, thus imposing some sort of just cause requirement.

A standard mandatory arbitration clause purports to cover all disputes with Upwork. Prior to requesting arbitration, parties must notify Upwork, which then has 60 days to attempt to informally resolve the claim. If the informal dispute resolution is unsuccessful, parties are subject to mandatory arbitration. Upwork specifies that freelancers may bring claims to administrative agencies such as the Equal Employment Opportunity Commission, the U.S. Department of Labor, and the NLRB.

There is a class action and jury trial waiver, and the arbitrator has authority to hear claims on a collective basis only if the arbitrator finds the waiver to be unenforceable.<sup>172</sup> Users do, however, have thirty days after they sign up to opt out of the waiver.<sup>173</sup>

### **3. Governor: Topcoder**

Founded in 2000, Topcoder is a complex, competition-based crowdwork platform that claims to be "the world's largest platform for digital open innovation" and boasts nearly a million members worldwide. Its "business model [is] based on the wisdom of crowds and the reach of the Internet to find 24/7 talent and solve problems in a record period of time in a cost-effective manner."<sup>174</sup> Topcoder challenges seek experts to work on problems that focus on design, development and data science. Each of these three challenge areas has different rules, but all operate under a set of basic premises.

Much like Amazon Mechanical Turk, Topcoder functions via the disaggregation of tasks that would normally be done by computer programmers or developers in-house and cannot be completed automatically by computers. But unlike

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<sup>171</sup> Ibid. 20.

<sup>172</sup> Ibid. 21.4(C).

<sup>173</sup> Ibid. 21.4(D).

<sup>174</sup> S Srinivasan, "TopCoder steps into void", *Hartford Business Journal* (Hartford, 29 April 2013) <[www.hartfordbusiness.com/article/20130429/PRINTEDITION/304269973/topcoder-steps-into-void](http://www.hartfordbusiness.com/article/20130429/PRINTEDITION/304269973/topcoder-steps-into-void)>.

AMT, with its enormous volume of basic, low-skilled tasks that can be performed by most lay individuals, Topcoder has a smaller volume of tasks that require highly specialized knowledge.

All Topcoder challenges are conducted on a “competition” structure, with individuals submitting entries for either the client or Topcoder itself to evaluate. Usually, several winners are chosen and compensated and then transfer their right and title to the winning submission to the platform. Those who do not win retain ownership over their submissions but waive a right to sue Topcoder if the site uses materials similar or identical to those submissions for any reason.<sup>175</sup>

In contrast to AMT and Upwork, Topcoder has no explicit non-competition provision in its terms and conditions of use – that is, it does not per se prohibit clients from directly contracting with programmers outside the Topcoder program. The terms do, though, require users to agree not to give out to prospective employers any of their Topcoder personal information, such as their username and ratings, unless they have Topcoder’s written consent, and they must inform the platform if a third party contacts them about employment opportunities or media interest.<sup>176</sup>

As opposed to those of other platforms, Topcoder’s terms and conditions of use do not declare that competition participants are not employees or are independent contractors, and they do not address the question in any way. Payment comes directly from Topcoder, and winning competitors must fill out tax forms used for contractor relationships as well as internal Topcoder forms assigning Topcoder rights to all information produced in the competition.

There does not appear to be any mention of arbitration in the Topcoder terms of use that competitors must sign to access the platform. Rather, they provide that

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<sup>175</sup> ‘Terms and Conditions of Use at Topcoder’ <[www.topcoder.com/community/how-it-works/terms](http://www.topcoder.com/community/how-it-works/terms)> accessed 30 March 2016 (“As an inducement to us or a Competition sponsor to accept your Submission for entry into the contest, you hereby waive any claim or right of action against us, the Competition sponsor’s and their successors in connection with use of any Materials (or any portions thereof) whether or not such Materials are similar or identical to your Submission or contain any features, ideas, material and/or elements that are similar or identical to those contained in your Submission.”).

<sup>176</sup> *Ibid.* As there is no stated penalty for accepting employment outside the platform, it is not entirely clear whether Topcoder is primarily concerned with maintaining its proprietary information about employees’ performance on the platform, or has more traditional exclusivity concerns.

California law governs disputes that may arise, which are to be submitted “to the exclusive jurisdiction of the courts of San Francisco County, California.”

*Topcoder Platform Governance.* As described in *Managing the Human Cloud*, the governor platform model takes on complex projects by using a combination of “human project managers” and a “sophisticated software-enabled framework for monitoring and coordinating individual tasks.” Compared to other models, the governor model, like Topcoder, provides a “thicker layer of project governance, including collecting project requirements from the client, breaking them up into microtasks, coordinating completion and sequencing of individual tasks, conducting supplier certification and ensuring quality of the final deliverable.” The platform is the “primary point of contact” for clients and “assumes responsibility for project-related risks.” As “perhaps the most advanced example” of the governor model, TopCoder

“relies on breaking down traditional steps of a ... project ... into a series of online competitions, which are then structured as a ‘game plan.’ Multiple suppliers take part in each of the competitions, and the winning output of each preceding round (as determined by more experienced members of the community) becomes an input to the subsequent one. Atomization allows for deeper ... specialization, leading to better quality. A TopCoder employee – the platform manager – often coordinates completion of the game plan and serves as a liaison between the community and the buyer....”<sup>177</sup>

Like InnoCentive, Topcoder emphasizes the “community,” talent-building aspect of the platform. Competitors communicate and receive feedback from clients, and highly successful Topcoder competitors in the design and development fields are permitted to apply to act as peer reviewers assigning scores to competitors’ work or as “copilots” who help clients present challenges to the Topcoder community.<sup>178</sup> As such, winning competitions is presented as a way to build prestige that can be leveraged into better results in both the Topcoder and larger tech worlds.

Unlike peer reviewers, copilots are paid, although presumably not as employees. Topcoder pays them between \$300 and \$600 per contest. Copilots’ responsibilities are expansive: they work with clients at every step to create contest specifications and manage specification reviews; set up, launch and monitor con-

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<sup>177</sup> Kaganer et al. (n 15) 27.

<sup>178</sup> ‘Copilot Overview’, *Topcoder* <[apps.topcoder.com/wiki/display/tc/Copilot+Overview](https://apps.topcoder.com/wiki/display/tc/Copilot+Overview)>.

tests; and test submissions. They also coordinate with the Topcoder customer team to meet deployment schedules.<sup>179</sup>

*Topcoder Challenges.* Topcoder has three basic types of challenges: design, development and data science. Design challenges are non-programming oriented and run the gamut from graphic design of logos, postcards, banners, icons and business cards to flat, non-interactive graphic files for a website or mobile application.<sup>180</sup> An “idea generation” design challenge could be to conceptualize a new application. Some design challenges are run as “checkpoint challenges” in two rounds. The client screens first-round submissions for compliance with copyright norms and design standards and provides feedback on each design. At this stage it might also award small prizes to encourage competitors to continue refining their designs in line with the client’s preferences before choosing a final winner after all designs are resubmitted in round two.<sup>181</sup>

In general, payments are triggered immediately upon selection of a winner. However, in some design challenges a client is entitled to ask a winning competitor to conduct a “final fix,” either to finalize a requirement that was not completed or to conduct “simple, small, reasonable modifications.” The client must make its request within five days of announcing the challenge winner, and the winner must complete the final fixes within 72 hours or see payment reduced by 25%.<sup>182</sup>

The design section also provides limited opportunities for Topcoder workers who have won at least five competitions to serve as “reviewers.” Reviewers ensure that challenges are ready for posting and meet Topcoder specifications and screen submissions for copyright infringement, cheating and incorrect file types; they do not screen for merit. Reviewers do not appear to be paid for their services.

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<sup>179</sup> Ibid. No information is readily available on the site about the role of the rest of the Topcoder management team, but we infer that the macro level tasks of negotiating a price and conceptualizing the project are done by Topcoder staff before being passed off to copilots.

<sup>180</sup> ‘Choosing a Design Challenge’, *Topcoder* <[help.topcoder.com/design/submitting-to-a-design-challenge/choosing-a-design-challenge](http://help.topcoder.com/design/submitting-to-a-design-challenge/choosing-a-design-challenge)> accessed 30 March 2016.

<sup>181</sup> ‘Multi-Round (Checkpoint) Design Challenges’, *Topcoder* <[help.topcoder.com/design/submitting-to-a-design-challenge/multi-round-checkpoint-design-challenges](http://help.topcoder.com/design/submitting-to-a-design-challenge/multi-round-checkpoint-design-challenges)> accessed 30 March 2016.

<sup>182</sup> ‘Design Final Fixes Policies’, *Topcoder* <[help.topcoder.com/design/submitting-to-a-design-challenge/design-final-fixes-policies](http://help.topcoder.com/design/submitting-to-a-design-challenge/design-final-fixes-policies)> accessed 30 March 2016.



With development challenges, Topcoder's system of disaggregating the different tasks needed to create a website, program or application becomes most evident. By splitting up work that might previously have been completed by one in-house programmer or team, Topcoder allows a company to take advantage of competitors with different specializations and skill sets and to choose the best product at each step of a project's development. Competitors in Topcoder's development challenges might pick from among a long list of individual tasks, such as producing a technical architecture document and a plan for software system integration, creating discrete functional units of code based on a component design, defining a testing strategy for an application and identifying software defects in an application.<sup>183</sup>

Experienced Topcoder development competitors, like design competitors, may join an unpaid review board that vets submissions to a challenge to make sure they meet eligibility criteria and to assign scores that are passed on to the clients.<sup>184</sup> While the division of responsibility between the client and Topcoder's reviewers is not entirely clear, it appears that the review process often does play a decisive role in selecting winners for development competitions.<sup>185</sup>

Winning competitors are responsible for conducting "final fixes" on their work in a similar fashion to the design category.<sup>186</sup> They are also responsible for providing support for their submission for 30 days after approval, including fixing any bugs. However, these requests must be relatively minor; demands for substantive enhancements to a winning submission should result in additional payment to the winner.<sup>187</sup>

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<sup>183</sup> 'Choosing a Development Challenge', <[help.topcoder.com/development/competing-in-development-challenges/choosing-a-development-challenge](http://help.topcoder.com/development/competing-in-development-challenges/choosing-a-development-challenge)> accessed 30 March 2016.

<sup>184</sup> 'Development Screening and Review', *Topcoder* <[help.topcoder.com/development/development-screening-and-review](http://help.topcoder.com/development/development-screening-and-review)> accessed 30 March 2016.

<sup>185</sup> 'Topcoder Review Process', <[www.topcoder.com/member-onboarding/topcoders-peer-review-process](http://www.topcoder.com/member-onboarding/topcoders-peer-review-process)> accessed 30 March 2016.

<sup>186</sup> 'Development Challenge Final Fix Process', *Topcoder* <[help.topcoder.com/development/competing-in-development-challenges/development-challenge-final-fix-process](http://help.topcoder.com/development/competing-in-development-challenges/development-challenge-final-fix-process)> accessed 30 March 2016.

<sup>187</sup> 'Supporting Your Winning Submission', *Topcoder* <[help.topcoder.com/development/competing-in-development-challenges/supporting-your-winning-submission](http://help.topcoder.com/development/competing-in-development-challenges/supporting-your-winning-submission)> accessed 30 March 2016.

First-place finishers receive 75% of their prize at the completion of the competition and the remaining 25% following the 30-day support period. The second-place prize is awarded in its totality at the completion of the competition.<sup>188</sup>

Data science competitions are either algorithm “single round matches” (SRMs) or “marathon matches.” In algorithm SRMs all contestants compete online to solve the same problems under the same time constraints. The competitions are divided into three phases: a 75-minute “coding phase,” where all contestants are presented with the same three questions representing three levels of complexity and different point earnings potential; a 15-minute “challenge phase,” where each competitor has a chance to challenge the functionality of other competitors’ code to win bonus points and reduce competitors’ scores; and a “system testing phase,” where Topcoder tests all code that has not been successfully challenged.<sup>189</sup>

Marathon matches are graded on solution quality: how close the return values match a theoretical correct answer, how fast solutions run or other metrics. The competition is divided into two phases. In the “submission phase,” competitors are permitted to submit small sets of test cases to receive feedback before turning in a full submission against a larger set of test cases. In the “system testing phase,” all full submissions are evaluated for automated system testing, run against a large set of test cases and accorded a final score.<sup>190</sup>

#### **4. Arbitrator: InnoCentive**

InnoCentive is a high-end, “challenge-based” platform first launched in 2001 with seed funding from Eli Lilly; in 2005 it was spun out of Eli Lilly. It markets itself as serving leading corporate and nonprofit actors such as Nature.com, Popular Science, Procter & Gamble, Roche, the Rockefeller Foundation, and the Economist. It has also been used by government agencies such as NASA and the Department of Defense.

The platform is an innovative use of the crowdwork principle of the “open call” to solve complex problems requiring a high level of specialization. Challenge participants (whom InnoCentive calls “solvers”) respond to idea, design, proto-

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<sup>188</sup> ‘Payment Policies and Instructions’, *Topcoder* <[help.topcoder.com/general-help/getting-paid/payment-policies-and-instructions](http://help.topcoder.com/general-help/getting-paid/payment-policies-and-instructions)> accessed 30 March 2016.

<sup>189</sup> ‘Getting Started in Data/Algorithm Challenges’, *Topcoder* <[cshelp.wpengine.com/data-science/competing-in-algorithm-challenges/getting-started-in-dataalgorithm-challenges](http://cshelp.wpengine.com/data-science/competing-in-algorithm-challenges/getting-started-in-dataalgorithm-challenges)> accessed 30 March 2016.

<sup>190</sup> *Ibid.*

type or business-based challenges, submitting proposals for how best to resolve a given problem. As the challenge period concludes, the company using InnoCentive (called a “seeker”) chooses a winning individual or team, who receives public recognition and financial compensation. This structure allows the seeker to choose from a wide variety of proposals that can range far beyond the expertise of any single individual who might otherwise have been hired.

*InnoCentive Rewards and Terms.* While there is a hefty reward for the winning entrant or entrants (no prize currently online is less than \$10,000, and many are substantially more), the chances of winning are no greater than, for example, successfully submitting a grant proposal to a traditional funder. Solvers cannot, then, expect to be economically dependent on the platform for all or a significant part of their earnings.

Instead, it seems that solvers are motivated by InnoCentive’s skills-building and prestige-enhancing possibilities. For example, solvers have the opportunity to join “Team Project Rooms,” where they can work collaboratively on proposals with professionals around the world.<sup>191</sup> Compensation in the event of a successful proposal can either be split evenly among all participants, or half of the funds can be disbursed evenly and the other half given to a designated “room leader,” who decides how to distribute the winnings. Recognition as an InnoCentive winner significantly raises participants’ public profiles and so the chance to secure more desirable work.<sup>192</sup> Unlike other platforms, InnoCentive imposes no barriers on solvers attempting to seek direct employment with its client companies.

Because each challenge is governed by a separate draft contract, the terms for different projects may vary, though InnoCentive appears to favor several “model” contracts. No contracts analyzed discuss the employment status of participants in any way. Likewise, no contract seems to feature any mandatory arbitration provisions, which are present in AMT and Upwork but not in Topcoder.

*InnoCentive and Intellectual Property.* However, InnoCentive’s model might raise intellectual property concerns. Solvers agree to grant “exclusive option rights” to their solution to InnoCentive and the “seeker” company, meaning that they cannot use their solution or disclose, grant, assign or transfer any rights to it to any third parties for 90 days. During this period, the seeker selects a winning

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<sup>191</sup> ‘Forming a Team’, <[www.InnoCentive.com/for-solvers/forming-team](http://www.InnoCentive.com/for-solvers/forming-team)>accessed 30 March 2016.

<sup>192</sup> ‘Solver Benefits’, <[www.InnoCentive.com/for-solvers/solver-benefits](http://www.InnoCentive.com/for-solvers/solver-benefits)> accessed 30 March 2016.

proposal by exercising this “exclusive option”; exclusive option rights to all proposals not selected are then terminated and seekers retain no rights to them. In most cases, having a proposal selected does not transfer intellectual property rights from the solver to the seeker company, though solvers agree to grant “a non-exclusive, worldwide, unlimited, perpetual, and irrevocable license to use, make, have made, market, copy, modify, lease, sell, distribute, and create derivative works” relating to an accepted solution.<sup>193</sup> While the solver retains ownership of the idea or concept, then, the company may make any use of the property it finds appropriate and has no obligation to provide the solver with any compensation or attribution, even if the company reaps massive profits off of the idea.

Moreover, as contracts are individualized to each challenge, a minority of challenges do require the conveyance and assignment of the winning solution unless barred by statutory law.<sup>194</sup> Whether or not conveyance/assignment of intellectual property rights or the granting of a nonexclusive license is required is generally stated clearly within the overview of the challenge, as well as within the contract terms themselves.

*InnoCentive Challenges.* InnoCentive offers four kinds of challenges: ideation, theoretical, reduction-to-practice, and electronic request for partners. Billed as a “global collaboration for producing a breakthrough idea,” an ideation challenge begins with a company’s request for ideas on new product lines, creative solutions to technical problems, marketing ideas and so on. These challenges guarantee a money award, and the victorious solver grants the seeking organization a license for the idea’s intellectual property. Multiple winners are also possible.<sup>195</sup> Examples of ideation challenges include the design of a system to collect small, “aborted” oranges rich in pharmaceutical properties (reward = \$15,000)<sup>196</sup> and highly specialized research regarding the in vivo modulation of gene ex-

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<sup>193</sup> See, e.g., ‘InnoCentive Theoretical (Non-Exclusive License) Challenge-Specific Agreement’, <[www.InnoCentive.com/ar/contract/printUnsigned/159](http://www.InnoCentive.com/ar/contract/printUnsigned/159)> accessed 30 March 2016.

<sup>194</sup> See, e.g., ‘InnoCentive Theoretical (IP Rights Transfer) Challenge-Specific Agreement’, <[www.InnoCentive.com/ar/contract/printUnsigned/158](http://www.InnoCentive.com/ar/contract/printUnsigned/158)> accessed 30 March 2016 (calling for winning party to “assign and convey to InnoCentive, as escrow agent for Seeker, all rights, title, and interests in and to the [winning solution], [retaining] no rights to the Proposed Solution or the Work Product insofar as they are related to the InnoCentive Challenge”).

<sup>195</sup> ‘Premium Challenge Types’, *InnoCentive* <[www.InnoCentive.com/for-solvers/premium-challenge-types](http://www.InnoCentive.com/for-solvers/premium-challenge-types)> accessed 30 March 2016.

<sup>196</sup> ‘A More Efficient Way to Collect Aborted Small Oranges’, *InnoCentive* <[www.InnoCentive.com/ar/challenge/9933796](http://www.InnoCentive.com/ar/challenge/9933796)> accessed 30 March 2016.

pression in lymphocytes (reward = \$15,000 and the possibility for research funding).<sup>197</sup>

A theoretical challenge relates to a “feasible design that may not yet be reduced to practice.” Solvers are asked to provide detailed descriptions and specifications to put such designs into effect, and awards need be made only if all of the challenge criteria are met.<sup>198</sup> Examples of theoretical challenges include a proposal for nondestructive methods to detect biological contamination and microleaks in beverage concentrates packed into plastic bags (reward = \$15,000)<sup>199</sup> and a maintenance-free filter system for an industrial vacuum cleaner (reward = \$15,000).<sup>200</sup>

In a “reduction-to-practice” (RTP) challenge, solvers are asked to create a prototype that shows an idea in actual practice, including physical evidence that their solution will work within the seeking organization’s needs.<sup>201</sup> As with theoretical challenges, awards need be made only if a solver meets all of the challenge criteria. Examples of RTP challenges include the design of an algorithm that predicts whether a customer will purchase a product after learning the purchase price based on a database of past transactions and given independent variables (reward = \$20,000)<sup>202</sup> and the development of a minimally invasive skin biopsy technique including delivery of a prototype (reward = \$30,000).<sup>203</sup>

In an “electronic request-for-partners” (eRFP) challenge, solvers are asked to provide materials or expertise to help solve a business challenge. Companies use this to find consultants or businesses that already have the technology or experience they need. Instead of predetermined cash awards, winners of such challenges typically negotiate contract terms directly with the seeking organization.<sup>204</sup> The eRFP challenges are comparably rare; two recent examples involve a

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<sup>197</sup> ‘New Approaches for *In Vivo* Modulation of Gene Expression in Lymphocytes’, *Innocentive* <[www.InnoCentive.com/ar/challenge/9933821](http://www.InnoCentive.com/ar/challenge/9933821)> accessed 30 March 2016.

<sup>198</sup> ‘Premium Challenge Types’ (n 195).

<sup>199</sup> ‘Non-Destructive Inspection of Biological Contamination and Microleaks in Plastic Bag Packaging’, *Innocentive* <[www.InnoCentive.com/ar/challenge/9933812](http://www.InnoCentive.com/ar/challenge/9933812)> accessed 30 March 2016.

<sup>200</sup> ‘Maintenance Free Filter System for an Industrial Vacuum Cleaner’, *Innocentive* <[www.InnoCentive.com/ar/challenge/9933699](http://www.InnoCentive.com/ar/challenge/9933699)> accessed 30 March 2016.

<sup>201</sup> ‘Premium Challenge Types’ (n 195).

<sup>202</sup> ‘Predicting Product Purchases’, *Innocentive* <[www.InnoCentive.com/ar/challenge/9933493](http://www.InnoCentive.com/ar/challenge/9933493)> accessed 30 March 2016.

<sup>203</sup> ‘Minimally Invasive Skin Biopsy Technique for Gene Expression Measurement’, *Innocentive* <[www.InnoCentive.com/ar/challenge/9933669](http://www.InnoCentive.com/ar/challenge/9933669)> accessed 30 March 2016.

<sup>204</sup> “Premium Challenge Types” (n 195).

multinational pharmaceutical company seeking research partners<sup>205</sup> and an international poverty relief nonprofit seeking to work with community-based organizations to offer health care services to young children.<sup>206</sup>

## V. An Examination of Crowdwork Realities and Legalities

In the following section, we examine the four crowdwork platforms from three perspectives: first, we outline the opportunities and risks that the platforms present for workers; second, we analyze the employment status of each platform's labor suppliers under existing legal tests, and third, we briefly pose questions about the enforceability of several of the platforms' contractual terms.

### 1. Opportunities and Risks

In a global context, as several scholars have cautioned, crowdsourcing could become like the "modern-day sewing machine... At its best, this could be a powerful bootstrap for a billion people. At its worst, this can lead to unprecedented exploitation."<sup>207</sup>

Online outsourcing presents opportunities in endless matchmaking transactions worldwide that could not happen without the enabling technologies. It allows individuals to work when they wish, from wherever they happen to be, choosing from a variety of jobs. They have the freedom both to work for a wide spectrum of firms and to avoid working for firms that don't live up to their expectations or needs. Through these platforms some workers make more money than they otherwise could or simply make money they otherwise couldn't: for those fixed at home because of disability or caring for children or the elderly, this contingent work may be their only option for getting by. For others, it supplements income from regular jobs.

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<sup>205</sup> 'AstraZeneca Challenge: Automating Drug Administration and Removal in Multiwell Plates', <[www.InnoCentive.com/ar/challenge/9933721](http://www.InnoCentive.com/ar/challenge/9933721)> accessed 30 March 2016.

<sup>206</sup> 'GSK & Save the Children: \$1M Healthcare Innovation Award for Improving and Increasing Healthcare for Children', *Innocentive* <[www.InnoCentive.com/ar/challenge/9933768](http://www.InnoCentive.com/ar/challenge/9933768)> accessed 30 March 2016.

<sup>207</sup> M Cooper, P Ipeirotis, and S Suri, 'The Computer is the New Sewing Machine: Benefits and Perils of Crowdsourcing', *20<sup>th</sup> International World-Wide Web Conference* (Hyderabad, India, 28 March 2011) <[www.ipeirotis.com/wp-content/uploads/2012/01/p325.pdf](http://www.ipeirotis.com/wp-content/uploads/2012/01/p325.pdf)>.

As described by a recent McKinsey Global Institute Report, online talent platforms (OTPs) can ease a variety of labor market dysfunctions: for example, by more effectively bringing together individuals with work; drawing in new participants; serving as clearinghouses; helping workers find work that more closely suits their talents, skills or preferences; and shortening job searches and thereby reducing periods of unemployment. OTPs, the report claims, also can create transparency around the demand for skills, enabling young people to make more informed educational and career choices and cast their nets wider.<sup>208</sup>

Upwork is a prototype of a platform that competes with the traditional staffing agency (or direct employment) model by matching individuals with contingent or freelance projects, and it likely offers the greatest opportunity of the four platforms profiled here.<sup>209</sup> Upwork claims that it has brought together millions of businesses with millions of freelancers from at least 180 countries. It provides mechanisms for negotiation over compensation and for protecting workers' rights to be paid. Upwork further provides a measure of transparency for workers with a feature that allows rating of clients directly on the platform. Thus, clients can study workers' reputations, and vice versa.

For those who participate on challenge-based platforms like Topcoder or InnoCentive, the opportunities differ markedly from those on other crowdwork platforms. For one, the participating labor pools are distinctive – InnoCentive boasts that 65.8% of its solvers have PhDs – and their work involves either hyperspecialization (Topcoder) or demanding and ambitious research challenges (InnoCentive). InnoCentive allows research labs and other clients to “broadcast scientific problems” with prizes for solutions – “a mechanism to tap scientific

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<sup>208</sup> J Manyika et al., ‘A Labor Market That Works: Connecting Talent With Opportunity in the Digital Age’ *McKinsey Global Institute* (June 2015) <[www.mckinsey.com/global-themes/employment-and-growth/connecting-talent-with-opportunity-in-the-digital-age](http://www.mckinsey.com/global-themes/employment-and-growth/connecting-talent-with-opportunity-in-the-digital-age)> (estimating that up to 540 million individuals could benefit from OTPs by 2025; 230 million could shorten search times between jobs, reducing the length of unemployment; 200 million who are inactive or working part time could work additional hours through freelance platforms; 60 million could find work that more closely suits their skills or preferences; 50 million could shift from informal to formal employment).

<sup>209</sup> SC Kuek et al., ‘The Global Opportunity in Online Outsourcing’ *World Bank* (1 June 2015) <[documents.worldbank.org/curated/en/138371468000900555/The-global-opportunity-in-online-outsourcing](http://documents.worldbank.org/curated/en/138371468000900555/The-global-opportunity-in-online-outsourcing)> (estimating that in 2013 the online freelancing market was over 7 times larger than the microwork market in terms of numbers of active workers and 10 times larger in terms of annual revenue (grossing about \$1.9 billion); Upwork is the clear leader of the three top online freelancing firms, with \$750 million in revenues in 2013, projected to be \$10 billion in 2020).

knowledge that's widely dispersed geographically, and not always in obvious places."<sup>210</sup> Topcoder provides the IT sector an online venue where a global "community" of engineers and designers can connect with clients worldwide. Even if they do not win, participants on these platforms can gain experience and learn from the people around the globe with whom they work collaboratively. "For the young workers looking to build a resume," these platforms present, at least in theory, the prospect to "tear down barriers and facilitate entry into the profession."<sup>211</sup>

Yet because crowdwork platforms are in large part completely unregulated, the quality of work being produced is uneven and under scrutiny, and there are real concerns about the use or infringement of intellectual property that crowdworkers create. As with all independent contractor arrangements, risks and responsibilities are shifted entirely to the worker, including buying health or other types of insurance, saving for retirement and investing in skills and training. Additionally, crowdworkers, like all freelancers, do not enjoy the rights or protections of workplace laws.

Amazon Mechanical Turk's model of crowdwork is one of "'digital sweatshops' where workers are exploited for very low wages."<sup>212</sup> More than half of workers surveyed have indicated that their hourly wage is less than \$5 an hour, falling woefully below the federal minimum wage.<sup>213</sup> According to one researcher: "Forget the rise of robots and the distant threat of automation. The immediate issue is the ... fragmenting of jobs into outsourced tasks and dismantling of wages into micropayments."<sup>214</sup> And not only can microtask-sized work become

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<sup>210</sup> D Wessel, 'Prizes for Solutions to Problems Play Valuable Role in Innovation', *Wall Street Journal* (25 January 2007). See also KJ Boudreau and KR Lakhani, 'Using the Crowd as an Innovation Partner', (Cambridge, April 2013) *Harvard Business Review* 4 (the crowd "can operate at a scale that exceeds even that of the biggest and most complex global corporation...").

<sup>211</sup> A Marshall, 'Is spec work evil?' *Wikinomics* (3 April 2009) <[www.wikinomics.com/blog/index.php/2009/04/03/is-spec-work-evil](http://www.wikinomics.com/blog/index.php/2009/04/03/is-spec-work-evil)>. See also Boudreau (n 210) ("crowds, research shows, are energized by intrinsic motivations – such as the desire to learn" and the "opportunity to burnish one's reputation among a large community of peers" – as well as money).

<sup>212</sup> TW Malone, RJ Laubacher, and T Johns, 'The Age of Hyperspecialization', (Cambridge, June/August 2011) *Harvard Business Review* 10.

<sup>213</sup> Hitlin (n 127) 26.

<sup>214</sup> ML Gray, 'Your job is about to get "taskified"', *Los Angeles Times* (Los Angeles, 8 January 2016) (reporting that her Microsoft Research team spent two years studying the lives of hundreds of American and Indian crowdworkers to learn how they manage this form of employment "and the capaciousness that comes with it").



“dull and meaningless, perhaps even producing ill psychological effects on the people who perform it,” but “dividing work into miniscule fragments allows the unscrupulous to conceal the goals toward which workers’ efforts are directed. Thus workers may unknowingly be contributing to something counter to their personal beliefs.”<sup>215</sup>

Of all the platforms profiled here, then, AMT presents the most serious risks for crowdworkers in its combination of microtasks and micropayments as well as untimely payment, nonpayment, and even deactivation from the platform. Typically, Turkers will work for many requesters, hedging their bets that they won’t get paid by one or more. The lack of a mechanism for assessing the length of time a task will take both adds unpredictability and exacerbates low wages: while two tasks may be similarly advertised, one could take twice as long.<sup>216</sup>

Compounding these problems, Turkers are completely without appeal rights or recourse for complaints on the platform, and the participation agreement they are required to sign includes a waiver of the right to sue and to proceed on a class action basis.

Researchers who have recently examined the power dynamic on AMT find that the “vast majority of market power” flows to requesters.<sup>217</sup> They attribute this imbalance to uncompetitive, ex-ante wage posting by requesters (dictated by the platform application programming interface, or API), and asymmetric information and reputation systems between workers and requesters. “Participant interactions [are structured] in such a way that workers disproportionately absorb the cost of searching for tasks.”<sup>218</sup> At least as now structured, AMT would be hard to consider a net positive in the labor market.

Despite Upwork’s good reputation as a freelance platform, it, too, poses concerns, high among them surveillance on the platform (through its “work diaries” function) that allows clients to verify what the electronically connected workers are actually doing at any given time. This surveillance surpasses that which an employer could typically exercise in a traditional workplace; the “work diary” takes screenshots of freelancers’ personal computers at ten-minute

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<sup>215</sup> Malone et al. (n 212) 16.

<sup>216</sup> Interview with PG Ipeirotis, (n 131). Unlike Upwork, for example, AMT also has no built-in mechanisms for transparency or negotiation or other features that could provide a more fair work experience. According to Ipeirotis, there is no reason why AMT could not add these transparency features to its platform.

<sup>217</sup> Kingsley et al. (n 148) 2.

<sup>218</sup> Ibid.

intervals, provides minute data on keystrokes and mouse function, and even provides clients with a “productivity rating.”<sup>219</sup> While freelancers can delete screenshots that they find invasive, this raises the concern of potential wage theft, as they forfeit ten minutes of pay by doing so.<sup>220</sup> Other freelancers may conduct some work such as proofreading off-the-clock, because the work diaries would detect a low keystroke level and report a low productivity rating, which might affect client satisfaction with their work.<sup>221</sup>

Another complaint is that because the platform creates a global marketplace, workers in high-wage countries must compete against those in low-wage countries, driving down pay and limiting the appeal of the platform to U.S. workers.<sup>222</sup> And to the degree that people are more likely to depend economically on Upwork than on the contest platforms, all workers suffer from the costs associated with procuring their own benefits.

Overall, Upwork presents an instructive model of both the promises and inadequacies of corporate self-governance in the crowdwork sector. On the one hand, the platform provides various mechanisms to ensure fairness to freelancers in their relationships with clients and provides abundant job options generally well above the U.S. minimum wage. Nonetheless, Upwork users do not enjoy workplace protections against discrimination or the right to engage in collective activity. Like all independent contractors, they have no way to access medical and other fringe benefits, no matter how many hours of work they perform on the platform, unless they pay for the benefits themselves. While the platform has partnered with the Freelancer’s Union to raise awareness of their group benefit plans, ultimately neither Upwork nor its clients contribute to these benefits in any way even for workers in long-term hourly relationships that strongly resemble traditional employment. Nor, of course, do Upwork clients fulfill the tax obligations owed by employers.

For competitors on challenge-based platforms like Topcoder or InnoCentive, the key risks are the investment of time coupled with the unlikelihood of winning and making any money, along with concerns about protecting their intellectual property. All bidders will put in significant hours working on the project, and if only

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<sup>219</sup> See Malone et al. (n 212) (some “intermediaries have pushed electronic surveillance to a degree many find ominous”).

<sup>220</sup> Kaplan (n 165).

<sup>221</sup> *Ibid.*

<sup>222</sup> Pofeldt (n 150); Malone et al. (n 212) (discussing concerns about surveillance and labor market arbitrage).

one wins, not only will all the others have forfeited monetary compensation but also time they could have devoted to a useful outcome. As one observer noted:

“In many cases, InnoCentive works well because it connects company X working on project Y with a scientist elsewhere in the world who, unbeknownst to them, has also been working on project Y; a win-win. But what if InnoCentive were promoting spec work? If a \$1,000,000 award is offered to a scientist who can solve a specific problem, and 2000+ scientists drop their current projects to spend two weeks working on it, doesn't this seem problematic, in terms of lost production?”<sup>223</sup>

The rise of online design competitions (e.g., to create company logos) has triggered online debates about the value of this type of crowdsourcing. Some are persuaded that these contests democratize the industry by giving more people broader access to opportunities, even if they do not win, but others are equally persuaded that these contests devalue the work of highly trained professionals. They criticize the onetime transaction that replaces the development of relationships between clients and designers and are dubious about claims that these contests help build portfolios and recognition. Some observers see them as enabling thinly disguised, even unethical, spec (speculative) work that allows clients to source material for free. Others are more ambivalent, regarding this design spec work as “here to stay.”<sup>224</sup>

Assuming that these kinds of competitions are indeed here to stay, especially as the public sector and private companies look to cut costs,<sup>225</sup> questions remain about the tradeoffs of this business model. The value that these challenge-based platforms offer could be enhanced by choices made by both government regulators and platforms themselves targeted at limiting the risks of unethical spec work practices and displacement of established professionals, protecting intellectual property, and maximizing opportunities for collaboration and innovation.

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<sup>223</sup> Marshall (n 211). See also Malone et al. (n 212) (“[T]he contest-based business models of some intermediaries rely much more heavily on spec than typical freelancers’ work arrangements do”).

<sup>224</sup> See, e.g., ‘The “Pros” and Cons of Spec Work’, *JUST Creative* (12 August 2009) <[just-creative.com/2009/08/12/the-pros-and-cons-of-spec-work](http://just-creative.com/2009/08/12/the-pros-and-cons-of-spec-work)>; Marshall (n 211).

<sup>225</sup> Tightening budgets are causing government agencies to “look[] outside the traditional technology-sourcing model” and “creating big opportunity for the big thinkers at TopCoder Inc.” Srinivasan (n 174). The TopCoder model of disaggregation and hyperspecialization is said to be tremendously cost-effective. “TopCoder can often provide its clients with development work that is comparable in quality to what they would get by more traditional means but at as little as 25% of the cost.” Malone et al. (n 212) 4.

## 2. Legal Analysis: Employee or Independent Contractor?

Arguments undoubtedly can be made that crowdworkers' relationships with platforms and/or platforms' clients satisfy several of the multiple legal factors for employee status, and rigorous enforcement of workplace rights and employer tax obligations should be an option in solid cases of misclassification. Prevailing on claims for such status would not, however, be easy, under either the narrow common law or broader economic realities test. As "branded" companies, Uber and Lyft may present stronger cases for establishing an employment relationship than a crowdwork platform that more closely resembles a marketplace. Even so, as the recent settlements in the class action lawsuits against Uber and Lyft suggest, there are no guarantees of winning. There is huge uncertainty of outcome and substantial expense in time and money in litigating these cases,<sup>226</sup> and the arbitration and class action waivers that appear in some crowdwork agreements, like AMT's and Upwork's, compound these hurdles.

Below we assess the relationships and work arrangements on the four profiled platforms under the relevant legal factors as defined by the NLRB's *FedEx* decision on the common law test and its "more comprehensive independent-business factor" (tracking the new Restatement of the Law Third Employment Law<sup>227</sup>) as well as the economic realities test applicable to the Fair Labor Standards Act. Keeping in mind that no one factor is decisive, this discussion should underline the analytical ambiguities and the challenge of fitting crowdwork into extant legal concepts of "employment," even under the broader test. That is true for each of the different models, but particularly for the contest-based platforms. More promising regulatory avenues may be found by looking beyond employment status.

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<sup>226</sup> The only known litigation raising claims that crowdworkers are employees of the platform is the CrowdFlower case, which also settled. *See* n (89-93) and accompanying text. While the court denied CrowdFlower's motion to dismiss, it provided no detailed analysis of the claims of employee misclassification. The settlement efforts, including the court's rejection of a first attempt, highlighted the considerable difficulty in identifying settlement classes, and finding plaintiffs, given that individuals may work for a single "requester" 40 hours a week or 1 hour a week. AMT was not named as a defendant.

<sup>227</sup> *See* n 76 and accompanying text. While this Restatement is new, its approach to this issue may provide analytical weight, and Restatements generally are considered authoritative. Further, as noted (n 74), the NLRB does not automatically acquiesce to an adverse appellate court decision. For now, at least, it continues to apply its 2014 *FedEx* decision, notwithstanding the court of appeals' 2017 refusal to enforce that ruling.

## a) Amazon Mechanical Turk

*The Case for Employee Status.*<sup>228</sup> The work of providers is not only an integral part of AMT's business; it is its sole business and source of revenue. Whether or not the work is an integral part of a requester's business may vary. Certain businesses rely critically on the AMT platform.<sup>229</sup> For example, Casting Words, an online audio transcription service, appears to use only AMT to find its workers. Addressing this issue, the AMT participation agreement has requesters "acknowledge that, while Providers are agreeing to perform Services for you as independent contractors and not employees, repeated and frequent performance of Services by the same Provider on your behalf could result in reclassification of that employment status."<sup>230</sup>

AMT's participation agreement can be construed as giving the platform a measure of control over workers. AMT has the strongest exclusivity provisions of any of the four profiled platforms, requiring requesters and providers to deal with one another solely through the platform.<sup>231</sup> Unlike Upwork, AMT seems to preclude requesters and providers from buying their way out of the provision, meaning that a potential penalty for violation would be disconnection from the platform.

While AMT's terms explicitly empower requesters to reject work whenever they please, it is AMT, not the requesters, which has ultimate control over whether to deactivate providers, essentially "firing" them from the platform because of high rejection scores or negative feedback from requesters. AMT thus seems to delegate control to requesters then acts on their responses (somewhat like Uber deactivates drivers who receive few stars in its customer rating system).

There are other elements of control in the relationship between requesters and providers. Requesters, not AMT, set the price for each task posted and design the interface for each HIT, often giving detailed instructions for how to complete the tasks that are complemented by AMT's prohibition on the use of ro-

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<sup>228</sup> For a detailed analysis of Amazon Mechanical Turk under the common-law and FLSA tests, see generally AL Felstiner, 'Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry' (2011) 32 *Berkeley Journal of Employment and Labor Law* 143.

<sup>229</sup> See Hitlin (n 127) 17 ("For [the most active requesters], Turkers may have become part of their regular workforce and the use of Mechanical Turk may be an important part of their business model. These companies post[] identical tasks on a daily basis.").

<sup>230</sup> *Ibid.* 3(a).

<sup>231</sup> Amazon Mechanical Turk Participation Agreement at 3(a)-(b).

bots and scripts. Requesters have the right to communicate with workers if they desire, and the participation agreement instructs workers to respond to reasonable requests for information. Although requesters cannot exercise real-time control over workers while they complete tasks, requesters can promote adept providers to more challenging tasks, deny compensation for work not up to standards, and expect answers to questions about the work. While a requester may choose not to exercise all of the control delegated by the platform, the relevant question is whether or not it has the right to direct and control the work performed on the platform.

Providers are free to work for other companies, but they have little opportunity for profit or loss while working on AMT. AMT and its requesters promulgate terms and conditions of employment unilaterally; these terms allow for no negotiation and are highly favorable to requesters. Providers have no ability to bargain for work based on their experience or managerial skill but must accept work at the rate offered, which is normally extremely low. Providers retain no proprietary or ownership interests in their work. Other than deciding whether to work on AMT and which HITs to undertake, they have no real business decisions to make, such as hiring employees, purchasing tools, or committing capital. For the most part, the tasks on the AMT interface are low skill.

There are only a few ways providers can advance on AMT. With the “master” qualification for having successfully finished a high number of tasks, they have access to better (but still low) paying tasks. But even if providers advance to better assignments, that does not amount to real entrepreneurial opportunity. On the contrary, since they are prevented from using automated software, their productivity is constrained. Nor does it appear to be permissible for providers to start agencies, pool talents, or hire subcontractors, as each user account must be tied to a single specific individual.

While the participation agreement between AMT and providers explicitly states that providers are independent contractors, those kinds of provisions are not legally dispositive, although they may factor into whether providers believe they are creating an employment relationship. On the other hand, notwithstanding those terms, providers who derive a significant amount of their income from working on AMT may reasonably believe that they are in an employment relationship with AMT in all but name. Some providers may reasonably believe that the quantity of work they perform for a single requester approaches an employment relationship because of the degree of control that requesters exercise over their tasks, especially if the relationship with a single requester develops signs of permanence. Given the Pew Research Center’s finding that over half of the thousands of HITs on the platform were posted by just five requesters dur-

ing its study period, this may often occur, notwithstanding the brief duration of each individual task.<sup>232</sup>

*The Case for Independent Contractor Status.* Other factors do weigh in favor of independent contractor status. Providers are free to work when, where, and for whom they choose for as many hours as they want, and they are not engaged to work on the platform for any fixed period. They are paid by the task and could work for multiple requesters and even other platforms, all in the course of a day. Indeed, they may have regular jobs and work on AMT to supplement income.

AMT does not control the actual content of jobs posted on its platform, provides no dispute resolution or other governance mechanisms, and delegates all of the work involved in designing the interface in which providers work to the requesters who post tasks. For their part, requesters cannot exercise real-time control over workers while they complete tasks and have no control over which workers ultimately perform a task.

Whether a provider's work is an integral part of a requester's business may vary. A large multinational such as Microsoft or Google might post hundreds if not thousands of tasks, but these would be quite secondary to its overall business. Even if providers work for the same high-volume requester time and again, the length of each task is short, sometimes minutes or even seconds long. The structure of the AMT marketplace does nothing to encourage providers to become dependent on one requester, and performing a task for a requester gives rise to no obligation to continue to do so.

Again, while not dispositive, the participation agreement is clear that AMT considers itself to be only an intermediary market for services and that providers are independent contractors. The agreement states that it does not "create an association, joint venture, partnership or franchise, employer/employee relationship" between providers and requesters or providers and AMT. Providers are expressly prohibited from "represent[ing] themselves as an employee or agent of a Requester or of AMT."<sup>233</sup> It also specifies that providers will not be entitled to "any of the benefits that a Requester or AMT may make available to its own employees, such as vacation pay, sick leave, insurance programs, including group health insurance and retirement benefits."<sup>234</sup>

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<sup>232</sup> Hitlin (n 127) 17.

<sup>233</sup> *Ibid.* 3(b)(v).

<sup>234</sup> *Ibid.* 3(b)(vi).

*On Balance.* Several factors seem to incline the balance toward employee status when considering the providers' relationship to requesters, AMT or both. To the extent that economic dependence is treated as a relevant legal factor, the low-skill, low-wage nature of the work, the inability to negotiate wage levels and the total disparity in bargaining power would be relevant considerations. The Pew Research Center study demonstrates that many, though not a majority, of Turkers indeed depend on AMT for all or most of their income, and a substantial minority work hours consistent with full-time employment on the platform.<sup>235</sup> Given the little ability that providers have to enhance their profits working on the platform, it would be difficult to construct an argument that providers are engaged in a distinct occupation or independent business. To the degree that AMT-type work exists outside of the context of that platform, it would invariably be done under the direction of an employer.

The strongest case for employee status would be made by those providers who develop some permanence in their relationship with AMT or particular requesters, performing a high volume of HITS for one or more, on a regular basis, becoming in effect part of their workforce. Indeed, AMT recognizes this possibility, as its participation agreement has requesters "acknowledge that ... repeated and frequent performance of Services by the same Provider on your behalf could result in reclassification" of the independent contractor status.

Aside from this class of AMT providers, significant challenges arise if we try to apply all of the factors mechanically to this marketplace platform, even under the broader economic realities test. While AMT has the ultimate ability to deactivate providers, its system architecture provides minimal governance, giving it comparably little "control" over providers' work. Requesters can reject work submitted, but they exercise little direct supervision over providers and may in fact rely on multiple providers to respond to tasks as a way to ensure quality.

For their part, providers can enter relationships with a dozen requesters in the span of an hour and many more in the span of a week. Their working time is measured in seconds, not hours. As with other gig economy platforms, providers have unfettered discretion as to how many hours per week they decide to work, if at all. There is no permanence to the relationships unless they so choose. Whatever the limits on their entrepreneurial opportunities while working on the platform, they are completely free to schedule their own time, determine the use of and make investments in their own equipment, and work for any other platform, or any other business. It is true that flexible work schedules

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<sup>235</sup> Hitlin (n 127).



standing alone do not preclude employee status; nor does a lack of direct control over individuals who work from home. Nonetheless, evaluating all of the incidents of the work relationship on this platform would likely yield an ambiguous answer at best.

Finding that providers are employees could prompt AMT to impose quantitative restrictions on work time to avoid health care obligations under the Affordable Care Act or overtime pay, and at the very least to prevent providers from working on several tasks at once so that work time could be properly measured (thus potentially limiting their productivity). Requesters may be unwilling to pay the minimum wage and benefits for the type of work that predominates on the platform, and to the extent they see this work as necessary, they may look for other models. Given the strong potential for exploitation that the current model fosters, however, this may not amount to a real loss.

## **b) Upwork**

*The Case for Employee Status.* The work performed by freelancers on Upwork is not ancillary to Upwork's business: it is Upwork's business, as the platform's revenues are the commissions charged as a percentage of freelancers' earnings. Upwork plays a limited matchmaking role by suggesting that clients contact certain freelancers for their jobs, and highlighting certain jobs for freelancers in accordance with their skills and ratings, but neither the client nor the freelancer is obliged to accept the platform's recommendation, nor do they suffer any penalty by declining to do so.<sup>236</sup> Upwork provides the platform for submission and monitoring of work and other governance functions.

Upwork retains a significant amount of indirect, if not direct, control over the manner in which work posted on the platform is conducted. For hourly contracts, Upwork effectively requires regular screenshots of the freelancer's computer to allow clients to monitor work and provides clients with highly detailed information about freelancers' activities, as well as an Upwork-generated "productivity rating". Besides quality assurance, these "work diaries" are then used as the basis for the resolution of any disputes that may arise between the freelancer and the client, and, at Upwork's discretion, can lead to reimbursement through its payment protection plan.

Upwork's clients may exert substantial control over how freelancers carry out work in hourly contracts through the "work diaries," which in turn allow them

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<sup>236</sup> Interview with J Horton, Stern School of Business, NYU (1 March 2016).

to refuse payment (subject to Upwork’s adjudication). For fixed-rate contracts, clients can design “milestones” that release payment upon delivery of part of a project and withhold payment if work is unsatisfactory (subject again to Upwork’s dispute resolution mechanisms). Moreover, Upwork allows and encourages clients to communicate with freelancers, and clients are permitted to provide direct instruction and feedback on their work. Especially on hourly contracts, when a client’s ability to provide direct guidance and instruction is combined with screenshots offering virtually contemporaneous monitoring and detailed data about a freelancer’s minute-to-minute productivity, the client is equipped to exercise control which can be as or even more direct as that exercised over an employee in a traditional office setting. While a client may choose not to exercise all of the control that it is delegated by the platform, merely accepting final work product without ever glancing at the work diaries or communicating with the worker, the relevant question is whether or not it has the right to direct and control the work performed on the platform.

Some clients may use Upwork to find freelancers to perform their core business functions, such as a translation agency regularly contracting with an Upwork translator, or a law office contracting with a secretary. Hourly (as opposed to fixed-rate) pay suggests employee status, as does the performance of lower-skilled and lower-compensated work (like administrative or secretarial tasks) that is likely to be supervised, either when contracted through Upwork or through a direct hire. A long-term hourly arrangement may be indistinguishable from an employment relationship and generate the same expectations, especially those with an indefinite term, for ongoing work, not linked to the production of a specific deliverable.

Upwork’s recently updated sliding-scale fee schedule, in which the fees range between 5% and 20% depending on the dollar amount earned from a specific client, provides freelancers with significant financial incentives to develop indefinite, long-term relationships. In an effort to reduce its infrastructure costs, the platform has signaled its clear preference in favor of the types of open-ended or consistently renewed contracts with the greatest similarities to a traditional employment relationship.<sup>237</sup>

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<sup>237</sup> In justifying the change, Upwork has openly stated that small projects hosted by the platform are not profitable, and therefore its priority would be to invest almost exclusively in fostering long-term relationships between “freelancers” and their clients. ‘Upwork’s New Pricing: A Message from the CEO’ <[www.upwork.com/blog/2016/05/upwork-pricing](http://www.upwork.com/blog/2016/05/upwork-pricing)> accessed 1 August 2016 (“On small projects, the costs we incur outweigh the fees charged; because they aren’t profitable, we haven’t been in-

With respect to whether the parties believe they are creating an employment relationship, Upwork generally places the responsibility on client companies, and in fact offers the Upwork Payroll option. The site advises clients that seeking to limit freelancers to work exclusively for them is incompatible with classifying them as independent contractors. Given the nature of certain agreements reached between a client and a freelancer via the Upwork platform – especially long-term hourly contracts – it would be reasonable, then, for one or both parties to believe they were creating an employer-employee relationship. Upwork Enterprise provides large clients seeking a higher level of service from the platform with a worker classification tool, guidance on the determination, and indemnification for misclassification.

*The Case for Independent Contractor Status.* Freelancers may take jobs from Upwork as they choose, for as many or as few hours as they wish. Upwork does not control the actual content of jobs posted on its platform, nor does it control when and where workers carry out the work. Freelancers provide their own tools of work, and neither Upwork nor the client invests in training.

Many clients may use Upwork for one-off tasks ancillary to their core business, such as an accounting firm requesting the translation of a certain batch of documents or an online company contracting for the design of a logo. A freelancer's relationship with the client may be a clearly finite arrangement to finish a discrete task, and some simple, one-shot tasks can be performed in several hours. Upwork's fixed-rate contracts point to independent contractor status.

Some freelancers performing labor on Upwork (unlike on AMT) appear to have some opportunity for profit or loss based on their managerial and technical skills. Upwork does not set the prices for services on the platform, allowing workers to present offers to clients offering jobs. As a result, the cultivation and presentation of a worker's reputation—educational qualifications, finished jobs, and, most importantly, client feedback—significantly change the remuneration that a worker can command. While the physical investments that freelancers make are almost invariably negligible beyond the purchase of a computer and an Internet connection, the reputational profile allows them to send quality signals to employers. Higher-remunerated tasks may involve advanced programming, graphic design or translation abilities and training, and higher-skilled freelancers may well be working in fields that usually have no employer

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vesting in growing the number of these projects. At the same time, client relationships that result in larger, repeat projects incur fewer of these costs because of the trust that's been developed . . . .”).

supervision. The terms and conditions under which workers operate tend to be negotiated and are not merely promulgated and changed unilaterally by either Upwork or the client, though lower-skilled freelancers may often lack real bargaining power.

While most Upwork freelancers work independently, Upwork does permit them to create “agencies” that, in turn, allow them to pool talents. In this structure, prices are negotiated and payment is made to the agencies, and those workers in charge of the agencies can exercise significant managerial responsibilities, involving branding the services, selecting new participants, negotiating rates from clients and compensation for freelancers. (Of course, the agency itself could be found to be an employer.) Upwork freelancers do have a realistic ability to work for other companies, and in the agency context, could have control over important business decisions.

With respect to whether the parties believe they are creating an employment relationship, while not dispositive, the user agreement which freelancers are required to sign in order to work on Upwork expressly disclaims any employment relationship between the parties.<sup>238</sup> While freelancers do not get to bargain over this term – or any term – of the Agreement, their assent to these terms may lead to an inference that they did not view themselves as creating an “employee” relationship.

*On Balance.* As discussed, the freelancers who develop some regularity or permanence in their relationship with Upwork or a particular client present the strongest case for employee status. Upwork’s revised fee structure certainly creates incentives for building those kinds of indefinite long-term relationships with a client. The control mechanisms that Upwork makes available to clients through its platform architecture, like the work diaries function for hourly contracts, also support an employee status claim, as well as a claim of indirect, if not direct, control against Upwork itself by virtue of the platform’s payment dispute resolution function.

Beyond this class of Upwork freelancers, an employee status claim becomes more questionable, especially for those working on fixed rate contracts or hourly contracts of short and irregular duration. Upwork has carefully structured its model to be a marketplace through which services are performed. It is not, for example, in the graphic design, translation, or programming business; therefore, freelancers performing those services are not engaged in Upwork’s business

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<sup>238</sup> See Upwork User Agreement (n 168) 13.1 (quoting in full).

(though they may or may not be engaged in the same business as the clients). Freelancers are free to schedule their own time, determine the use of and make investments in their own equipment, and work for any other platform or business. They are free to work as many hours per week as they wish, if at all. Unlike Turkers, they have some ability to enhance their returns or profits while working on the platform and in that sense more closely resemble independent businesspersons. As such, there is very little that the client (or Upwork) does to restrict freelancers' entrepreneurial discretion.

### **c) Topcoder and InnoCentive**

We analyze Topcoder and InnoCentive together given their unique "competition-based" structure, which makes it challenging to shoehorn them into the labor and employment law framework. It is hard to envision the competitors as either employees or independent contractors, and yet they are clearly performing valuable work for the clients, for which the platform earns a fee, regardless of whether a winner is chosen.

*The Case for Employee Status.* With respect to Topcoder, the foremost factor suggesting employee status is the governance role it provides. Topcoder plays a significant part in the disaggregation of larger projects into tasks, sequencing them according to a detailed "game plan" in which each task utilizes inputs from prior work. The platform also takes an active role in the evaluation and approval of competitors' work. Topcoder's peer review boards have the authority to determine winners and losers, and to send winners "final fixes" that they must complete in order to be paid. In deciding on winners, the "peer reviewers" (who are unpaid), follow guidelines expressly laid down by Topcoder, and can be overruled by Topcoder staff. Topcoder copilots, who are paid on a per-contest basis, have expansive responsibilities in creating contests and generating project plans, subject to Topcoder staff approval. It appears that Topcoder control over copilots' work is extensive and points to employee status, and copilots could reasonably believe that they were creating an employment relationship.

InnoCentive provides a governance role, although less powerful than Topcoder, by giving its seekers on-demand access to a specialized community of skilled solvers, allowing them to tap into the global talent pool and engage multiple competitors to work on the same project.

Unlike AMT and Upwork, neither Topcoder nor InnoCentive get paid on a commission basis in relation to the awards given to competitors, but receive instead a negotiated fee (paid by clients/seekers) depending on the complexity of the projects. Both platforms are dedicated exclusively to hosting specific

types of competitions and both derive all of their business ultimately from the work that competitors perform on their sites.

Both Topcoder and InnoCentive provide complex platforms for submission and evaluation of work and possibilities to collaborate with other participants. Both platforms do invest in substantial infrastructure to facilitate the challenges, dividing up tasks into their constituent elements (in Topcoder's case), and generating interfaces for submitting and receiving feedback on work. InnoCentive's "Team Project Rooms" require additional support to ensure that participants can communicate with one another and collaborate on shared documents.

*The Case for Independent Contractor Status.* Many of the relevant factors point to independent contractor status. The relationship between Topcoder and InnoCentive and the challenge participants is quite attenuated. The platforms do not control the number of participants in a competition, and the terms of each competition require them only to compensate a small group of winners. The platforms do not rely on any particular individual submitting work for any specific competition, as long as there is enough quality work generated by the crowd for either the platform or the client to select a winner that suits its needs. There is no minimum number of challenges that participants must enter, and they may exit a competition at any time, even if they have already joined.

For most of the Topcoder challenges, and notwithstanding its governance mechanisms, competitors work quite independently. Indeed, because of its competition structure, the platform's interest is in selecting winners, not in supervising their work, and it would be costly for Topcoder to attempt to exercise control over any significant portion of the contestants. InnoCentive's control appears to be even more limited than Topcoder's. Although the criteria for selecting winners is not entirely transparent, it seems that the companies posting the challenges, not InnoCentive, are ultimately responsible for deciding who wins. Neither InnoCentive nor the seekers oversee the work. Indeed, the whole point is for solvers to think of new solutions. The relationship of InnoCentive and the competitors appears to be more like that between a foundation and grant seekers than that between an employer and either an employee or an independent contractor.

The method of payment on Topcoder and InnoCentive is effectively by the job, though the platforms do not guarantee payment for any of their competitions and the vast majority of competitors are not rewarded. Topcoder copilots are also paid by the job, not by time worked. The competitor on both platforms provides the place of work (which can be anywhere) and most of the instrumentalities or tools of work (computer, Internet connection, certain programs). The

time that it takes to complete a project can vary from hours (for a simple Topcoder task) to months (for a complicated InnoCentive challenge). However, the platforms would not consider participants to be employed (or under contract) for that time period.

With respect to opportunity for profit or loss, certainly the level of skill, talent and experience that participants have (often truly advanced or expert) will affect their relative ability to win competitions on either platform. Topcoder competitors with consistently good results can become peer reviewers (with no pay) or co-pilots (for additional payment). The most important opportunity for gain or loss from both platforms would seem to derive from potentially being hired directly by a client company. Certain InnoCentive challenges explicitly provide that the winning submission will lead to an offer to continue developing the product on the company's staff, while Topcoder's "employee placement services" appears to directly refer successful Topcoder participants to employment at companies.

Nevertheless, it would be inconceivable for a participant to operate an independent business predicated entirely on winning contests on Topcoder or InnoCentive. While some users may be quite successful at contests, the competition arrangement makes payoff too speculative. However, InnoCentive does allow competitors to form "Team Project Rooms," where they can share knowledge and strategies in order to maximize their chances of winning.

Topcoder and InnoCentive competitors do have a realistic ability to work for other companies, and likely do so. Notably, neither Topcoder nor InnoCentive has an exclusivity or non-competition clause written into their user or competition agreements. However, Topcoder does appear to try to control the ability of workers to use their Topcoder information in seeking permanent employment. Its terms require competitors to agree that they will not use their Topcoder reputation to secure employment without Topcoder's consent.

*On Balance.* There is little likelihood that those who participate in Topcoder and InnoCentive competitions would prevail in a claim that they are employees of the platforms, or that the platforms have created an "employment" relationship by hosting competitions. While Topcoder, in particular, plays a strong governance role on both the "front end" – breaking up project requirements into discrete tasks and coordinating completion and sequencing of the "game plan" – and on the "back end" of competitions – selecting winners along the way and delivering a finished product to the client – it does not control the actual details of the work of competitors. More precisely, the platform "curates" and exercises control over the contest mechanics and results, but is indifferent to the perfor-

mance of any individual participant, the vast majority of whom will not win a competition or be compensated.

Competitors on both platforms have complete freedom to schedule their own time, determine the use of and make investments in their own equipment, and work for any other platform, or any other business. The platforms do nothing to restrict their entrepreneurial freedom.

Even a cursory view of the platforms' rules reveals that competitors cannot expect to get paid merely by virtue of performing work, or reasonably believe that they are entering into an employment relationship. Neither Topcoder nor InnoCentive has any provision about employee/independent contractor status in their terms of use or challenge-specific agreements, suggesting that both are certain that those participating in their challenges could not possibly be considered their employees. In contrast, these agreements have fairly extensive sections on the assignment of intellectual property, privacy and other concerns.

It would be inconceivable for the platforms to have a wage or benefits obligation to all contest participants, who are not pre-screened before participation. Particularly in Topcoder's case, which takes jobs that would otherwise likely have been performed by in-house employees and breaks them down into discrete tasks appropriate to be sourced to "the crowd," the platform has found a way to put real work into a structure truly beyond employment as the legal tests comprehend. Both Topcoder and Innocentive have created efficiency gains for businesses, who can now choose the best work from dozens of unremunerated submissions. However, this could also over time diminish full-time jobs – with health benefits and retirement plans – for IT and research professionals.

### **3. Platform Accountability: A Joint Employer Analysis?**

With the fissuring of the workplace since the 1980s, more and more business models include employment relationships that involve third-party intermediaries, with greater use of contracting arrangements and reliance on staffing and leasing agencies. These practices have complicated the "who is the employer" legal issue and led to a growing focus on the joint employer doctrine as a way to hold accountable employers that exercise control over outsourced operations but seek to insulate themselves from workplace law obligations and standards. For crowdwork or online outsourcing, the threshold to a winning joint employer claim would, of course, be proving that both entities – platform and client – are separately in an employment relationship with crowdworkers. With respect to the four profiled platforms, that, as just discussed, is not a simple proposition.



Nonetheless, in any possible legal challenge, joint employer doctrine is also an important and viable theory.

In 2015 the NLRB issued an opinion on joint employment under the labor law. The NLRB decision in *Browning Ferris* involved a unionization effort by employees of a staffing firm that supplied workers to a recycling plant, who sought to bargain with both firms. Browning Ferris (operator of the recycling plant) denied that it employed the workers.<sup>239</sup> Rejecting that claim, the NLRB majority clarified the test for joint employment, emphasizing strict reliance on common law criteria.

Under the decision, the NLRB may find that two or more statutory employers are joint employers of the same employees if they share or codetermine those matters governing the essential terms and conditions of employment. The initial inquiry is whether there is a common law employment relationship. If so, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. Central to this inquiry is the existence, extent and object of the putative joint employer's control, including evidence of direct and indirect control, as well as the right to control essential terms and conditions of employment. The decision is significant in allowing employees to bargain not only with the direct employer but also with another party with sufficient control over essential employment terms.

In January 2016 the Department of Labor's wage and hour administrator issued an interpretation of joint employment stressing that the definition of "employ" under the Fair Labor Standards Act is more expansive than common law agency principles. The interpretation describes both horizontal and vertical joint employment relationships, but for the crowdwork platform context it is vertical joint employment that is most relevant.<sup>240</sup> It exists "where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and the economic

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<sup>239</sup> *Browning Ferris Industries, Inc.*, 362 NLRB No. 186 (Aug. 2015), *petition for review filed*, *Browning Ferris Industries, Inc., v. NLRB*, No. 16-1028 (D.C. Cir. Jan. 20, 2016).

<sup>240</sup> Horizontal joint employment exists "where the employee has employment relationships with two or more employers and the employers are sufficiently associated or related with respect to the employee such that they jointly employ the employee." The analysis turns on the relationship between the two employers. D Weil, Administrator's Interpretation No. 2016-1, 'Joint Employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act', *U.S. Department of Labor, Wage and Hour Division* (20 January 2016).

realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work.” The requisite analysis “examines the economic realities of the relationships” between the employee of the intermediary employer and the other purported joint employer and does not focus only on control. Different courts might emphasize different factors, but the ultimate inquiry is one of economic dependence on the potential joint employer.<sup>241</sup>

While untested in the crowdwork context,<sup>242</sup> a joint employer theory might be tried comparing outsourcing arrangements to the relationship between staffing or leasing agencies and their clients, as in the *Browning Ferris* case. Upwork’s model, for example, is close to this traditional relationship, especially after it adopted the sliding-scale fee structure that strongly incentivizes freelancers to work repeatedly for the same clients, and may provide the strongest joint employer case of the profiled platforms. A threshold issue would be whether the worker has a direct employment relationship with the platform, as the intermediary, or with the client, and – in a wage and hour case – whether the worker is economically dependent on one or both. The answers would turn on the platform governance mechanisms and system architecture at issue as well as the realities of the relationship with each – for example, the duration or recurrence of any arrangement.

Another possible theory for holding a platform like AMT accountable as a joint employer might be through the Fair Labor Standards Act’s “suffer or permit to work” definition of “employ.” This concept was derived from earlier state child labor laws that imposed liability on an entity that was in a position to know about work being performed and had the power to prevent that work. With the language, Congress intended to counter the ability of companies to insulate themselves from liability for child labor violations by erecting layers of contractors between themselves and their employees. A strict application of this principle to the platform-provider relationship would be novel and the outcome uncertain. The courts are often reluctant to burden contracting arrangements, not to mention unpredictable in applying multifactor tests.

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<sup>241</sup> The Interpretation lists seven factors that the courts look to as indicators of economic dependence: directing, controlling, or supervising the work performed; controlling employment conditions; permanency and duration of relationship; repetitive and rote nature of work; integral to business; work performed on premises; performing administrative functions commonly performed by employers. *Ibid.*

<sup>242</sup> No joint employer claim was made in the *CrowdFlower* case, and AMT was not named.

The consequences of a joint employer finding would vary. For purposes of wage and hour law, if the direct employer failed to pay wages, or paid less than the minimum wage, or failed to correctly pay overtime, both joint employers would be liable. Under the National Labor Relations Act, if “employees” selected union representation, both employers would be obligated to bargain with the union, to the extent that the joint employer possesses sufficient control over essential terms and conditions of employment to permit meaningful bargaining. In terms of liability for remedying a discriminatory employment action that violates the NLRA, in a case where employer A supplies employees to employer B, A will not automatically be held vicariously liable for the action committed by B. If, for example, B fires a worker for union organizing (an unfair labor practice that turns on motive), A will be held liable only if it was involved in, or knew or had reason to know about, the unlawful conduct, and if it acquiesced in the unlawful action by failing to protest.<sup>243</sup>

#### **4. A Note about Platform Legalities**

Questions may arise about whether the various terms and conditions imposed by these four platforms on labor providers are lawful. The simple answer is that, under existing law, most of these terms are, at least, not unlawful, but, to our knowledge, none have been directly challenged. The notion of freedom of contract is deeply embedded in American legal culture. This principle assumes that the parties are free to choose with whom to contract, whether to contract, and on what terms to contract, and therefore that their agreed-to terms should not be invalidated. Generally, the courts are reluctant to intervene or police the quality or fairness of the “deal.” This is largely true even for one-sided contracts of adhesion where there is no ability to negotiate terms imposed on a take-it-or-leave-it basis, and where the parties’ bargaining power is not equal.<sup>244</sup> That said, below we briefly flag a few questions of enforceability prompted by the platform terms.

First, some U.S. courts might find a forum selection clause to be “unreasonable” and thus unenforceable if the forum chosen for the resolution of disputes is seriously inconvenient.<sup>245</sup> The AMT participation agreement requires that all

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<sup>243</sup> Capital EMI Music, 311 NLRB 997 (1993), *enfd. per curiam* 23 F.3d 399 (4<sup>th</sup> Cir. 1994).

<sup>244</sup> See n 118 and accompanying text.

<sup>245</sup> The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 16 (1972)(“Courts have also suggested that a forum clause, even though it is freely bargained for and contravenes no important public policy of the forum, may nevertheless be ‘unreasonable’ and unenforceable if the chosen forum is seriously inconvenient for the trial of the action.”);

disputes with AMT go to arbitration in Seattle, Washington. It also specifies that if AMT has any cause of action against a Turker it will be brought in a court in the State of Washington. Topcoder provides that all disputes will be litigated in the courts of San Francisco County, California. It would hardly be reasonable to expect a Turker in India to appear in a court in Washington State, or a Russian Topcoder competitor to appear in San Francisco. A question is therefore raised whether these exclusive forum selections are seriously inconvenient.

Second, the AMT participation agreement states that “Requesters must pay Providers for their Services,” but it also specifies that “[i]f a Requester is not reasonably satisfied with the Services, the Requester may reject the Services.” This appears to give the requester an almost unqualified right to reject work, limited only by the undefined, ambiguous term “reasonably satisfied”, and it suggests that “[i]n practice requesters can reject work for any or no reason....”<sup>246</sup> This practice raises the question whether a failure to pay could be challenged, perhaps under a “*quantum meruit*” equitable theory, for the reasonable value of the services rendered, based on establishing that services were performed under circumstances where compensation could be expected. Of course, given the micropayment nature of AMT tasks, realistically, the actual value of most claims would be miniscule.

Third, Upwork’s freelancer fee provisions may pose a legal question. If Upwork is analogized to a real-world staffing agency, then an argument might be made that it is, or should be, subject to laws regulating staffing agencies, which several states have enacted.<sup>247</sup> Some of these laws prohibit charging workers a referral fee; only the clients may be charged. Notably, however, the Upwork agreement seems carefully worded to imply that the fees charged to freelancers are not for referral per se. Thus, the agreement states expressly “Upwork does not charge a fee when a Freelancer finds a suitable Client or finds an Engagement.” Rather, the fees charged are “for use of the Site’s communication, invoicing, dispute

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Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991)(heavy burden of proof required to set aside forum selection clause on the basis of inconvenience not satisfied here; refining the analysis of *The Bremen*, the Court held that just because a forum selection clause is not negotiated does not mean it is never enforceable).

<sup>246</sup> MS Silberman and L Irani, ‘Operating an Employer Reputation System: Lessons from Turkooption, 2008-2015’ (2016) 37 *Comparative Labor Law & Policy Journal* 505, 514-515. Indeed, according to Silberman and Irani, “[w]hen rejecting work, requester must offer some explanation for the rejection. But this is enforced simply by disallowing requesters from leaving the explanation text field entirely blank, so sometimes they offer unhelpful ‘explanations’ such as ‘1,’ ‘X,’ or ‘.’”

<sup>247</sup> See n 368-371 for a discussion of state regulation of staffing agencies.

resolution and payment services, including Payment Protection.” It is by no means clear that a direct challenge under existing state law would succeed; regulatory change or modification of state laws would likely be required to address any perceived inequity in these fee provisions.

Last, with respect to intellectual property created by a competitor, the Topcoder terms reserve a nonexclusive right for the platform to use the work product, even if the competitor does not win. While those who do not win retain ownership over their submissions, they waive a right to sue Topcoder if the site uses material similar or identical to these submissions for any reason. In form this term is an agreement not to sue, but, in substance, it is effectively a non-exclusive right to use the submission of a competitor who has been paid nothing. It is not at all clear what if any consideration has been given for that contractual waiver, or for that prospective right to use the submission. If Topcoder were to use the rejected intellectual property, there might be a claim for unconscionability or unjust enrichment, based on the inequity of allowing a party to accept benefit without paying the value.

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As the preceding discussions show, prevailing on a legal claim of “employee” status may be difficult for crowdworkers on any of the platforms analyzed or their peers. Some arguments can be made for employee status, and strategic litigation should be an option if strong cases of misclassification arise. But more likely an application of existing legal tests to the relationships on the four profiled platforms will yield answers which are either ambiguous or place crowdworkers outside the scope of legal protection. However, the question need not begin and end with employment classifications, whether under current tests or an updated framework. In Part VII we offer several specific policy recommendations targeted to the crowdwork sector intended to achieve more equitable outcomes for platform participants, regardless of employment status. But first we turn to the broader future of work debate.

## **VI. The Debate over the Future of Work in the U.S.**

Over the past 18 months, the U.S. Department of Labor, universities, legal and policy organizations, worker organizations, and others have been engaged in debates about the platform economy and workplace trends more broadly, trying

to imagine how work will evolve and, in particular, how technological innovation will transform work and jobs.<sup>248</sup> Are the premises of our 20th-century social compact still accurate? Is anything new really happening? Are changing technologies and workplace arrangements making law reform necessary? From these debates, three key themes have emerged: rethinking the notion of employment itself and the existing binary legal classification, reexamining the link between social protections and employment and restoring worker voice and power.

Assuming that crowdwork persists (whether in the form of microtasks, freelancing or challenge-based competitions), it invites a recalibration of all three strands of this debate. To the extent that crowdworkers are legitimately treated as independent contractors under the existing legal framework – or fail in their efforts to challenge that categorization – their economic security (and that of freelancers generally) may turn on rethinking notions of “employment” and/or our system of social protections by expanding access to rights and benefits now enjoyed only by “employees.” It will also depend on restoring some measure of voice and bargaining power to them, perhaps as an alternative or supplement to traditional collective bargaining.

## 1. Rethinking Employment: An Intermediate Classification?

As litigation against Uber and Lyft progressed, the perception spread, as Judges Chen and Chhabria said, that the two old concepts of “employee” and “independent contractor” don’t fit easily with the 21st-century-technology-enabled gig economy. While some dispute that view – and indeed that the platform

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<sup>248</sup> See, e.g., ‘The Next Big Idea: Portable Benefits for Independent Workers’, *Aspen Institute* (Washington, 16 December 2015) <[www.aspeninstitute.org/events/2015/12/16/Portable-Benefits-for-Independent-Workers](http://www.aspeninstitute.org/events/2015/12/16/Portable-Benefits-for-Independent-Workers)>; Z Church, ‘How Will an On-Demand Economy Work’, *MIT Initiative on the Digital Economy*, (Cambridge, 17 March 2016) <[mitsloan.mit.edu/newsroom/articles/how-will-an-on-demand-economy-work](http://mitsloan.mit.edu/newsroom/articles/how-will-an-on-demand-economy-work)>; PC Evans and A Gawer, ‘The Rise of the Platform Enterprise: A Global Survey’, *Center for Global Enterprise* (New York, 14 January 2016) <[thece.net/archived-papers/the-rise-of-the-platform-enterprise-a-global-survey](http://thece.net/archived-papers/the-rise-of-the-platform-enterprise-a-global-survey)>; S Strom and M Schmitt, ‘Protecting Workers in a Patchwork Economy’, *The Century Foundation* (New York, 7 April 2016) <[tcf.org/content/report/protecting-workers-patchwork-economy](http://tcf.org/content/report/protecting-workers-patchwork-economy)>; ‘Annual Conference: The Next Social Contract’, *New America Foundation* (Washington, 19-20 May 2016) <[annualconference.newamerica.org](http://annualconference.newamerica.org)>; ‘NELP Releases New Studies of “Gig Economy” Workers’ Rights’, *National Employment Law Project* (24 June 2016) <[www.nelp.org/blog/3-new-studies-of-gig-economy-workers-rights](http://www.nelp.org/blog/3-new-studies-of-gig-economy-workers-rights)>; ‘Future of Work’ *U.S. Department of Labor Blog* <[blog.dol.gov/category/future-of-work](http://blog.dol.gov/category/future-of-work)>.

economy is even the future of work – it has nonetheless gained traction. In response, the notion of creating an intermediate category – as exists, for example, in the laws of Canada, Germany and elsewhere in Europe – has surfaced.

### a) An Intermediate Category in Canadian Law

Where an intermediate legal category exists, its purpose is to extend certain protections to individuals who would otherwise not fall under the protection of labor law but who suffer from some of the same vulnerabilities as those classified as “employees.” The German legal doctrine is discussed in Professor Waas’ article about crowdwork in Germany. In Canada a “dependent contractor” category was created for purposes of collective bargaining eligibility under provincial labor laws. The intent was to cover a class of workers who are legally independent but economically dependent, “in order to provide some degree of protection to very small businesses – mostly those operated by a single person – that depend economically (to a large extent) on a single client.”<sup>249</sup>

These provincial enactments followed the influential scholarship of Harry Arthurs, who argued that dependent contractors should be eligible for collective bargaining because they share the same labor market as employees. A key purpose of expanding the labor law protection was to free the collective activities of dependent contractors, such as strikes for higher wages, from anti-competition law restrictions to which they would be subject absent the labor law protection.<sup>250</sup> “[Arthurs’ scholarship] approached the longstanding issue of the employee/independent contractor distinction, not as a matter internal to labor law doctrine, but through the lens of competition policy more broadly conceived. . . . an extraordinarily important intellectual reframing of the issue.”<sup>251</sup>

The primary critiques of Canada’s dependent contractor classification rest on claims that it is: (1) underprotective in that the classification appears in the collective bargaining law but *not* in minimum labor standards legislation, so dependent contractors enjoy the right to bargain collectively but not the full range of protections that apply only to employees; (2) based on the same factors (control and economic dependence) commonly used to distinguish between independent contractor and employee, though they may not be the most relevant; and (3) underinclusive, requiring 80% of a

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<sup>249</sup> G Davidov, ‘Who is a Worker?’ (2005) 34 *Industrial Law Journal* 57, 61.

<sup>250</sup> Arthurs (n 62).

<sup>251</sup> BA Langille and G Davidov, ‘Beyond Employees and Independent Contractors: A View from Canada’, (1999) 21 *Comparative Labor Law and Policy Journal* 7, 21.

dependent contractor's income to come from a single employer, which would exclude freelancers who work for several companies on a stable basis.<sup>252</sup>

In 2006 the Canadian government appointed Arthurs to review Canada's federal labor law in light of evolving economic conditions. Arthurs concluded that the existing categories (including dependent contractors) were insufficient and called for the introduction of a new category of "autonomous workers" who would enjoy some of the minimum terms of employment provided by Canadian law. His report argued for a sectoral approach in determining both the scope of this new status and which employment protections should be extended.<sup>253</sup> Canada has thus far taken no steps to adopt this proposal.

## **b) An Intermediate Category for U.S. Law? Pro and Con**

In January 2015 a *Wall Street Journal* article floated the idea of creating an intermediate category in U.S. law:

"A handful of legal scholars have argued that labor policy should expand to include a third category, one that extends some protections to those who take on project-based work but have little leverage or power in their work arrangements. Workers like Uber drivers or Handy cleaners, for example, can choose when and where they work, but lack control over their payment and wage rates, and they can't negotiate their work contracts. People seeking work on apps often have no choice but to accept the platform's terms electronically or they cannot access assignments."<sup>254</sup>

The idea grabbed the attention of several experts who saw the platform model as "a new reality,"<sup>255</sup> different from the traditional business model that employs workers. Andrei Hagiu argues that marketplace platforms choose to exert different degrees of control over the interactions or transactions they enable, and as

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<sup>252</sup> See, e.g., J Fudge, 'A Canadian Perspective on the Scope of Employment Standards, Labor Rights, and Social Protection: The Good, The Bad and The Ugly', (2010) 31 *Comparative Labor Law and Policy Journal* 253; Langille and Davidov (n 251) 34-35.

<sup>253</sup> HW Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century*, (Canada Federal Labour Standards Review, 2006).

<sup>254</sup> L Weber, 'What if there were a new type of worker? Dependent Contractor', *Wall Street Journal* (New York, 28 January 2015).

<sup>255</sup> *Ibid.* (quoting Elance-oDesk [now Upwork] CEO Fabio Rosati as stating "this is a new reality that needs to be embraced... In many cases, the law catches up with very strong innovations and adapts to it, but it may take a few years.").



“a result, there is a fine-grained spectrum of intermediate business models between pure marketplace and pure ... employer.” In his view, for those that operate somewhere in between, the binary legal choice creates an inefficient either/or situation.<sup>256</sup>

Arun Sundararajan also believes that labor law should be updated “to provide a social safety net to people whose chosen form of work is something other than full-time employment.” He claims that “[s]haring economy’ companies themselves might even participate to make their platforms more attractive to workers, if the law gave them a way to do so that did not burden them with onerous obligations that are ill-suited to their flexible labour model.”<sup>257</sup> In other words, the idea of an intermediate classification also gained interest not as a way to expand protections of workplace law but rather to give platforms “a safe harbor to make contributions to the cost of benefits”<sup>258</sup> without running the litigation risk of being found to be an “employer.”

Resistance followed, driven by the worry that a new classification would further complicate an already complicated legal determination and increase litigation.<sup>259</sup> An even more serious fear was that a new classification would further erode workplace standards rather than expand the groups of workers entitled to statutory protections. The disagreement in part stems from differing perspectives on whether the gig economy actually represents a new reality.<sup>260</sup> Some labor law experts were also quick to reject the idea of creating a third category based on economic dependence on a single client as out of place in the platform economy. Because workers move from platform to platform rapidly and derive income from a variety of clients, critics argue that a test based on a set level of economic

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<sup>256</sup> See, e.g., A Hagiu and R Biederman, ‘Companies Need an Option Between Contractor and Employee’, *Harvard Business Review* (Cambridge, 21 August 2015); A Hagiu and J Wright, ‘Controlling Versus Enabling’, *Harvard Business School Working Paper* (Cambridge, 16 July 2016).

<sup>257</sup> A Sundararajan, ‘A safety net fit for the sharing economy’, *Financial Times* (London, 22 June, 2015).

<sup>258</sup> S Clark, ‘“Uber” Benefits: The New Safety Net for the On-Demand Economy’, *Forbes* (22 July 2015) <[www.forbes.com/sites/valleyvoices/2015/07/22/uber-benefits-the-new-safety-net-for-the-on-demand-economy/#5aa0b9f22078](http://www.forbes.com/sites/valleyvoices/2015/07/22/uber-benefits-the-new-safety-net-for-the-on-demand-economy/#5aa0b9f22078)>.

<sup>259</sup> See, e.g., R Smith and S Leberstein, ‘Rights on Demand: Ensuring Workplace Standards and Worker Security in the On-Demand Economy’, *National Employment Law Project* 10 (September 2015) <[www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf](http://www.nelp.org/content/uploads/Rights-On-Demand-Report.pdf)> (“Adding a third category, with a separate fact-intensive test to apply in order to determine the worker’s status, especially if easy to manipulate by an employer, would likely create more confusion and litigation.”).

<sup>260</sup> See e.g., Mishel (n 44).

dependence on a single client would “write off many of the workers we would be intending to cover.”<sup>261</sup>

On the other hand, Guy Davidov, who has written extensively on the employee/independent contractor distinction, particularly under Canadian law, recently expressed his view that adding an intermediate category to U.S. law “is warranted.”<sup>262</sup> While opposing calls to abolish the employee/independent contractor distinction, he urges a purposive approach to interpretation of statutory coverage issues, so that the workers who need protection the most can receive it.<sup>263</sup>

### c) An “Independent Worker” Proposal and Its Discontents

In December 2015 Seth Harris and Alan Krueger<sup>264</sup> set out a formal proposal for a new employment classification because “forcing these new forms of work” in the online gig economy “into a traditional employment relationship could be an existential threat to the emergence of online-intermediated work.”<sup>265</sup> The third legal category they suggest, the “independent worker,” is identified by “three guiding principles.” The first is immeasurability of hours. Harris and Krueger assert that a worker classification system should recognize that the line between work and nonwork can be impossible to draw, some work involving hours that cannot be apportioned or measured for the purpose of assigning benefits. They cite an example of a driver waiting for a customer, with apps open on separate electronic devices for two different platforms. The second principle is neutrality. A worker classification system, say Harris and Krueger, should ensure that “businesses do not have an incentive to organize themselves to fit a certain status in order to gain an unfair advantage over other employers by skirting

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<sup>261</sup> B Sachs, ‘A New Category of Worker for the On-Demand Economy?’ *On Labor* (22 June 2015) <[onlabor.org/2015/06/22/a-new-category-of-worker-for-the-on-demand-economy](http://onlabor.org/2015/06/22/a-new-category-of-worker-for-the-on-demand-economy)>. Under Canadian law, the requisite level of dependence on a single client is 80%; in Germany it is more than 50%, or, in the media sector, at least one third of income.

<sup>262</sup> G Davidov, ‘The Status of Uber Drivers – Part I: Some Preliminary Questions’ *On Labor* (17 May 2016) <[onlabor.org/2016/05/17/guest-post-the-status-of-uber-drivers-part-1-some-preliminary-questions](http://onlabor.org/2016/05/17/guest-post-the-status-of-uber-drivers-part-1-some-preliminary-questions)>.

<sup>263</sup> *Ibid.* See generally G Davidov, *A Purposive Approach to Labour Law* (Oxford, Oxford University Press, 2016).

<sup>264</sup> Seth Harris is a former Deputy Secretary of Labor in the Obama administration, and Alan Krueger a former head of President Obama’s Council of Economic Advisers.

<sup>265</sup> SD Harris and AB Krueger, ‘A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The Independent Worker’, *The Hamilton Project* (Washington, December 2015), <[www.hamiltonproject.org/assets/files/modernizing\\_labor\\_laws\\_for\\_twenty\\_first\\_century\\_work\\_krueger\\_harris.pdf](http://www.hamiltonproject.org/assets/files/modernizing_labor_laws_for_twenty_first_century_work_krueger_harris.pdf)>.

legal protections and required benefits.” They explain that some businesses may grab the opportunity for “regulatory arbitrage” and misclassify employees as independent contractors to avoid providing benefits and protections. Their third principle is efficiency. They maintain that the legal uncertainty around classification contributes to inefficiencies, such as not providing benefits to reduce the chance of an employment ruling. They suggest large advances if intermediaries are able to pool independent workers for the purpose of purchasing or directly providing a range of benefits, including insurance and financial services and tax preparation assistance.

According to Harris and Krueger, the category of independent worker would encompass those in both online gig economy jobs and traditional jobs involving an intermediary in a triangular relationship. Under their proposal, workers in this category would have rights to organize and collectively bargain with intermediaries and customers free from antitrust law liability; they would be allowed employer-provided benefits that would not mean reclassifying them as employees; and they would see income tax withholding and intermediary-paid payroll taxes for Social Security and Medicare (one half of workers’ contributions). But because they believe hours cannot be readily measured, Harris and Krueger would not require compliance with workers’ compensation, overtime requirements or minimum wage guarantees.

Harris and Krueger’s proposal has been challenged on a number of grounds.<sup>266</sup> In March 2016 the Economic Policy Institute found their premise of the immeasurability of hours “empirically flawed.”<sup>267</sup> It also stressed that Uber exerts substantial controls over a driver’s time while the driver is on the app, so “[r]ather than pursue a legislative fix along the lines offered by Harris and Krueger, a better approach is simply to establish that Uber and Lyft drivers and similar workers are employees with all attendant rights.”<sup>268</sup> Craig Becker, general counsel of the American Federation of Labor-Congress of Industrial Organizations

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<sup>266</sup> See, e.g., B Sachs, ‘Do We Need an “Independent Worker” Category?’, *On Labor* (8 December 2015) <[onlabor.org/2015/12/08/do-we-need-an-independent-worker-category](http://onlabor.org/2015/12/08/do-we-need-an-independent-worker-category)>.

(“claim that Uber drivers don’t fit the definition of employee is legally and factually questionable”); S Greenhouse, ‘A Safety Net for On-Demand Workers?’, *American Prospect* (8 December 2015).

<sup>267</sup> R Eisenbrey and L Mishel, ‘Uber business model does not justify a new “independent worker” category’, *Economic Policy Institute* (Washington, 17 March 2016) <[www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category](http://www.epi.org/publication/uber-business-model-does-not-justify-a-new-independent-worker-category)>.

<sup>268</sup> *Ibid.*

(AFL-CIO), raised broader questions. He suggested that there was no necessary connection between platforms' technological innovations and their use of non-employees, that the proposal would not necessarily reduce legal uncertainty and litigation costs, make "independent worker status neutral when compared with employee status" or prevent "regulatory arbitrage."<sup>269</sup>

The "independent worker" proposal produced a lot of buzz but little apparent backing. Even support from the platforms seems missing, likely because their chief interest in a third category is to safely provide benefits to platform workers without jeopardizing the "independent contractor" legal relationship<sup>270</sup> and to operate outside of *all*, not just some, workplace law obligations.<sup>271</sup> Nonetheless, the conversation has inspired valuable and overdue thinking about fundamental notions of employment and the soundness of existing legal doctrines, partic-

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<sup>269</sup> C Becker, Remarks, 'Modernizing Labor Laws in the Online Gig Economy' *Hamilton Project* (video) (9 December 2016) <[www.hamiltonproject.org/events/modernizing\\_labor\\_laws\\_in\\_the\\_online\\_gig\\_economy](http://www.hamiltonproject.org/events/modernizing_labor_laws_in_the_online_gig_economy)>. Becker suggested that in countries such as Italy where the third category was implemented, there has been more, not less, litigation over employment status. *See, e.g.,* V DeStefano, 'The Rise of the "Just-In-Time Workforce": On-Demand Work, Crowd Work and Labour Protection in the "Gig – Economy"' (2016) 37 *Comparative Labor Law & Policy Journal* 471, 497 (critiquing Italy's experience with the para-subordinate category as creating lots of litigation, adding even more legal uncertainty and providing "no panacea for addressing the changes in business and work organization driven by the disintegration of vertical firms.").

<sup>270</sup> A few Silicon Valley startups have decided to embrace the employment model, motivated in part, for example, by the desire to offer training as well as equity shares. These companies include Instacart (grocery delivery), Shyp (mail-sending), Sprig (on-demand meals), Managed by Q (maintenance and cleaning), Honor (home health care) and Juno (ride-sharing). By contrast, Homejoy (cleaning services) shut down after it was sued for wage and hour violations. *See* C DeAmicis, 'Another One Bites the Bullet: Sprig Switches to Employee Model', *Recode* (6 August 2015) <[recode.net/2015/08/06/another-one-bites-the-bullet-sprig-switches-to-employee-model](http://recode.net/2015/08/06/another-one-bites-the-bullet-sprig-switches-to-employee-model)>; K Chayka, 'Why the "Uber for janitors" doesn't 1099 its employees', *Crain's New York Business* (New York, 4 November 2015) <[www.crainnewyork.com/article/20151030/TECHNOLOGY/151039985/why-the-uber-for-janitors-doesnt-1099-its-employees](http://www.crainnewyork.com/article/20151030/TECHNOLOGY/151039985/why-the-uber-for-janitors-doesnt-1099-its-employees)>; J Goff, 'Uber's New Competitor Could Transform the Ridesharing Market', *The Zebra* (23 February 2016) <[www.thezebra.com/insurance-news/2683/uber-v-juno](http://www.thezebra.com/insurance-news/2683/uber-v-juno)>.

<sup>271</sup> Uber and Lyft have lobbied heavily for state-level legislation that would statutorily determine that their drivers are independent contractors as a matter of law. Three states – Indiana, Arkansas and North Carolina – have passed such laws, and other states are considering them. S Slone, 'State Regulation of Rideshare Companies', *Council of State Governments Knowledge Center* (14 April 2016) <[knowledge-center.csg.org/kc/content/state-regulation-rideshare-companies](http://knowledge-center.csg.org/kc/content/state-regulation-rideshare-companies)>.

ularly in the platform context and in light of statutory goals.<sup>272</sup> The debates have also brought to the public's attention the plain fact that millions of workers are excluded from the rights, protections and benefits of "employment," and indeed have been for decades, long preceding Uber.

## 2. Reexamining the Link between Social Protections and Employment

While there has been resistance to any legislative change that would add an intermediate legal classification, there is greater openness to rethinking the traditional U.S. model of social protection. The U.S. has done less to guarantee the social welfare of its citizens than almost any Western democracy. This is especially true with respect to health care, treated not as a right for all citizens but as part of a social insurance package that directly links benefits to employment. Without employers, the self-employed (or independent contractors) are on their own, "left to assemble a patchwork of employment insurance to go along with their patchwork of jobs" – or to struggle without.<sup>273</sup> For workers treated as "employees," some of these benefits are mandated, like unemployment insurance and workers' compensation, but some are purely voluntary, such as vacations, pensions and training. Indeed, even for employees, the post-World War II social compact has unraveled, little by little, since the late 1970s. Today, when it comes to retirement, for example, the "stark fact" is that "workers are on their own," and most young workers do not or cannot afford to save for retirement.<sup>274</sup> Crowdwork and the gig economy's self-employment arrangements complicate this stark fact.

Past debates over the proper role that government should play in the social protection scheme have come up with a range of notions, from directly provid-

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<sup>272</sup> See, e.g., J Prassl and M Risak, 'Uber, Task Rabbit, and Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37 *Comparative Labor Law and Policy Journal* 619; B Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' (2016) 10 *Harvard Law and Policy Review* 479; V Dubal, 'Wage Slave or Entrepreneur?: Contesting the Dualism of Legal Worker Identities' (2017) 105 *California Law Review* 65.

<sup>273</sup> T Ghilarducci, 'The Welfare State: A Terrible Name for an Essential System', *The Atlantic* (3 December 2015), <[www.theatlantic.com/business/archive/2015/12/the-welfare-state-a-terrible-name-for-an-essential-system/418500](http://www.theatlantic.com/business/archive/2015/12/the-welfare-state-a-terrible-name-for-an-essential-system/418500)>.

<sup>274</sup> T Ghilarducci, 'When It Comes to Retirement Savings, Most Workers Are on Their Own', *The Atlantic* (19 October 2015) <[www.theatlantic.com/business/archive/2015/10/when-it-comes-to-retirement-savings-most-workers-are-on-their-own/411259](http://www.theatlantic.com/business/archive/2015/10/when-it-comes-to-retirement-savings-most-workers-are-on-their-own/411259)> (about half of workers have no pension plan besides Social Security).

ing workers with benefits to simply encouraging companies to provide such benefits to obviating the need for the other two by giving all Americans a guaranteed annual wage. The latest conversations take up a fresh medley of ideas, everything from wage insurance<sup>275</sup> and mandatory savings plans<sup>276</sup> to protections for all who work, regardless of label, and a universal basic income.<sup>277</sup> A reinvention of our social safety net would, of course, entail huge and comprehensive changes to an array of laws, including the tax code. These reforms would be highly contentious and, given the polarization and gridlock at the federal level, are hardly likely to be taken up anytime soon. Nonetheless, and “regardless of whether the gig economy is growing, now is as good a time as ever” to weigh these major issues.<sup>278</sup>

In his last State of the Union Address, President Obama spoke about the need in “this new economy” for “benefits and protections that provide a basic measure of security.” Recognizing that few people “work the same job, in the same place, with a health and retirement package for 30 years” and that “saving for retirement or bouncing back from job loss has gotten a lot tougher” for working people, the president proposed both a system of wage insurance for the worker who suffers a pay cut when changing jobs and portability of retirement savings. “[E]ven if he’s going from job to job, he should still be able to save for retirement and take his savings with him. That’s the way we make the new economy work better for everyone.”<sup>279</sup>

One proposal, advocated by David Rolf, a Service Employees International Union (SEIU) official, and Nick Hanauer, a venture capitalist,<sup>280</sup> would endow

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<sup>275</sup> See, e.g., Wage Insurance, Creative Compensation, *The Economist* (London, 3 January 2016) <[www.economist.com/news/united-states/21688921-insuring-workers-against-lower-wages-one-lefts-better-ideas-creative-compensation](http://www.economist.com/news/united-states/21688921-insuring-workers-against-lower-wages-one-lefts-better-ideas-creative-compensation)> (if a worker loses a job and takes a new one that pays less – and less than \$50,000 – the government would make up half the shortfall for two years, up to a total of \$10,000).

<sup>276</sup> See, e.g., M Miller, ‘Pushing Aside 401(k)’s for Mandatory Savings Plans’, *New York Times* (New York, 11 December 2015).

<sup>277</sup> See, e.g., A Stern, *Raising the Floor: How a Universal Basic Income Can Renew Our Economy and Rebuild the American Dream* (New York, PublicAffairs Books, 2016).

<sup>278</sup> Ghilarducci (n 273).

<sup>279</sup> B Obama, State of the Union Address (12 January 2016) <[www.nytimes.com/2016/01/13/us/politics/obama-2016-sotu-transcript.html](http://www.nytimes.com/2016/01/13/us/politics/obama-2016-sotu-transcript.html)>.

<sup>280</sup> N Hanauer and D Rolf, ‘Shared Security, Shared Growth’ (2015) 17 *Democracy Journal* 6. See also S Hill, ‘New Economy, New Social Contract: A Plan for A Safety Net in a Multiemployer World’, *New America Foundation* (Washington, 4 August 2015) <[www.newamerica.org/economic-growth/policy-papers/new-economy-new-social-contract](http://www.newamerica.org/economic-growth/policy-papers/new-economy-new-social-contract)> (calling for a fully portable safety net based on multiemployer Individual

workers with a “shared security account,” funded by automatic payroll deductions, where they could accrue the benefits traditionally provided by full-time salaried jobs. The benefits would be prorated, portable from job to job (platform to platform, contract to contract) and universal, including those accrued over time, which retain a specific dollar value, and those that provide insurance against life events. A set of “shared security standards,” such as paid leave, a livable minimum wage, overtime pay, pay equity between men and women and fair scheduling notice, would reinforce each account. In line with this proposal, in November 2015 a disparate “group of business representatives, worker advocates, and thought leaders” (including Rolf and Hanauer) signed a letter to lawmakers agreeing to principles on portable benefits for independent workers. As they wrote, “Businesses should be empowered to explore and pilot safety net options regardless of the worker classification they utilize.”<sup>281</sup>

Over the past year, U.S. Senator Mark Warner (a Virginia Democrat) has been pursuing the possibility of launching pilot projects in a few cities that would experiment with mandates on portable benefits.<sup>282</sup> At his behest, in December 2015 the Aspen Institute convened a forum on “The Next Big Idea: Portable Benefits for Independent Workers.” In June 2016 it published a report, its key theme that “all workers, regardless of employment classification, [should] have affordable access to a safety net that protects them when they are sick, injured, and when it’s time to retire.”<sup>283</sup> The guiding principles for the Aspen initiative echo those of Rolf and Hanauer’s shared security system: Portable, so that workers own their own benefits; prorated, so that every firm contributes to a worker’s benefits at a fixed rate; and universal, so that benefits cover all workers. The report examines several historical models for guidance in how to create

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Security Accounts and greater legal parity between 1099 workers, part-timers and regular fulltime workers).

<sup>281</sup> ‘Common Ground for independent workers: Principles for delivering a stable and flexible safety net for all types of work’ *Medium* (10 November 2015) <[medium.com/the-wtf-economy/common-ground-for-independent-workers-83f3fbcf548f#rkbb84268](http://medium.com/the-wtf-economy/common-ground-for-independent-workers-83f3fbcf548f#rkbb84268)>. See also L DePillis, ‘Tech companies, labor advocates, and think tankers of all stripes call for sweeping reforms to the social safety net’, *Washington Post* (Washington, 12 November 2015); C Kang, ‘Coalition of Start-Ups and Labor Call for Rethinking of Worker Policies’, *New York Times* (New York, 9 November 2015).

<sup>282</sup> MR Warner, ‘Asking tough questions about the gig economy’, *Washington Post* (18 June 2015).

<sup>283</sup> D Rolf, S Clark, and CW Bryant, ‘Portable Benefits in the 21st Century: Shaping a New System of Benefits for Independent Workers’, *Aspen Institute* 3 (Washington, 2016) <[assets.aspeninstitute.org/content/uploads/files/content/upload/Portable\\_Benefits\\_final.pdf](http://assets.aspeninstitute.org/content/uploads/files/content/upload/Portable_Benefits_final.pdf)>.

a portable benefits system. One model is multiemployer benefit plans (e.g., health and welfare, pension and apprenticeship and training), established by collective bargaining agreements with multiple employers, requiring contributions, designed for workers in industries where transient employment is common (such as construction, entertainment and trucking) and characterized by provisions allowing individuals who switch jobs to earn and retain credits toward future benefits from work with multiple employers.<sup>284</sup> Other models profiled include the Black Car Fund established by statute in New York in 1999 to provide for-hire drivers access to workers compensation,<sup>285</sup> and the Ghent system, prevalent in Scandinavian countries, where trade unions, rather than a government agency, administer unemployment compensation funds.<sup>286</sup>

In May 2016 Elizabeth Warren, U.S. Senator for Massachusetts and a leading progressive voice within the Democratic Party, delivered an address at the New America Foundation arguing that it was “time to rethink the basic bargain between workers and companies.” Connecting the problems facing gig workers to the growing lack of secure benefits for employees in contingent relationships, Warren made several recommendations. She called for mandatory payments by all workers, whether employees or independent contractors, into the national Social Security system to ensure that they receive adequate retirement benefits and qualify for disability insurance, universal catastrophic insurance coverage, and mandatory vacation time and paid family and medical leave. She also proposed the formation of new, portable retirement benefit plans for independent contractors, which could be financed by automatic contributions and administered in the interest of workers and retirees by unions or other organizations.<sup>287</sup>

Among the many pieces critical to the conversation about social protections are identifying what benefits are essential and should be treated as universal, as

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<sup>284</sup> Multiemployer plans are created under § 302(c)(5) of the Labor-Management Relations Act of 1947 (the Taft-Hartley Act). This law requires that the plans be governed by a board of trustees made up of employer and union representatives, each having equal representation.

<sup>285</sup> See New York Black Car Fund <[www.nybcf.org](http://www.nybcf.org)> accessed 2 August 2016.

<sup>286</sup> M Dimmick, ‘Labor Law, New Governance, and the Ghent System’ (2012) 90 *North Carolina Law Review* 319.

<sup>287</sup> E Warren, ‘Strengthening the Basic Bargain for Workers in the Modern Economy’, *New America Foundation Annual Conference* (Washington, 19 May 2016) <[www.warren.senate.gov/files/documents/2016-5-19\\_Warren\\_New\\_America\\_Remarks.pdf](http://www.warren.senate.gov/files/documents/2016-5-19_Warren_New_America_Remarks.pdf)> (Senator Warren also urged that existing labor laws be vigorously enforced and that the complicated and often inconsistent tests for employee status be streamlined; she concluded with a spirited defense of collective bargaining for all workers, including independent contractors and gig workers).



opposed to delivered selectively based on employment status; to what extent “employer” mandates should be imposed so that new mechanisms are not strictly voluntary; how benefits should be funded (e.g., businesses, workers, customers, the public), provided and administered (e.g., government, unions, other organizations); and if there are opportunities for private-public partnerships.

Although contested, the topic of a universal basic income should also be on the table. A range of advocates from right to left are embracing the idea, including some Silicon Valley entrepreneurs and former Service Employees International Union president Andy Stern.<sup>288</sup> As Stern explains, the usual progressive policy solutions (such as spending on infrastructure and raising the minimum wage) are designed to put up “dikes for a major storm that has been brewing and will continue to brew. But what we really have is a tsunami on the way – one that is hard to imagine given the acceleration of technology and the way it will rearrange work and produce more and more low wage jobs.”<sup>289</sup> British academic Guy Standing, who has stressed the political risks of ignoring the insecurities of the “precariat,” also reasons:

“We need a new model of social protection. Let us accept that jobs are not the magic solution – and that in a globalized market job guarantees are a false promise. Let us accept flexible labour too. But in return let us have a society in which everybody has a right to basic security and a more equal access to other insurance-based schemes. A multi-tier social protection system must be based

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<sup>288</sup> See, e.g., Stern (n 277); S Altman, ‘Basic Income’, *Y Combinator Posthaven* (27 January 2016) <[blog.ycombinator.com/basic-income](http://blog.ycombinator.com/basic-income)>; A Flowers, ‘What Would Happen If We Just Gave People Money?’ *FiveThirtyEight* (25 April 2016) <[fivethirtyeight.com/features/universal-basic-income](http://fivethirtyeight.com/features/universal-basic-income)>; F Manjoo, ‘A Plan in Case Robots Take the Jobs: Give Everyone a Paycheck’, *New York Times* (New York, 2 March 2016); D Matthews, ‘Why a bunch of Silicon Valley investors is suddenly interested in universal basic income’, *Vox* (28 January 2016) <[www.vox.com/2016/1/28/10860830/y-combinator-basic-income](http://www.vox.com/2016/1/28/10860830/y-combinator-basic-income)>; N Schneider, ‘Why the Tech Elite is Getting Behind Universal Basic Income’, *Vice* (6 January 2016) <[www.vice.com/read/something-for-everyone-0000546-v22n1](http://www.vice.com/read/something-for-everyone-0000546-v22n1)>; V Navarro, ‘Why the Universal Basic Income is Not the Best Public Intervention to Reduce Poverty or Income Inequality’, *Social Europe* (24 May 2016) [www.socialeurope.eu/2016/05/why-the-universal-basic-income-is-not-the-best-public-intervention-to-reduce-poverty-or-income-inequality](http://www.socialeurope.eu/2016/05/why-the-universal-basic-income-is-not-the-best-public-intervention-to-reduce-poverty-or-income-inequality).

<sup>289</sup> R Kuttner, ‘A Conversation with Andy Stern on the Case for a Universal Basic Income’, *American Prospect* (28 June 2016).

on a modest basic income, so as to enable the precariat to build lives involving a balance of different types of work, not just labour in jobs.”<sup>290</sup>

Although we cannot know what the effects of technological innovation will be on jobs ten years from now or whether the techno optimists or pessimists will be proven more correct,<sup>291</sup> we can think strategically about public policy choices. Many things “can and should be done to spread the benefits of advancing technology” to “ensure that the gains to society are broadly distributed.”<sup>292</sup> A fundamental goal should be to assure basic economic security to all workers, regardless of legal classification, and to preserve the values underlying the earlier social compact, albeit through new mechanisms or institutions.

The need to reimagine the social safety net is by no means broadly accepted, and it is hardly clear where a Trump administration will stand on these issues. The reality, however, is that millions of Americans work without a safety net and have done so for years. Whether or not Uber survives or platform work is part of the future, business models will continue to treat significant portions of the labor market as independent contractors. Some will be misclassified, but more will fall into the gray areas of the law. The uncertainties, expense and time entailed in winning a legal challenge will discourage most from pursuing litigation. Besides, a sizable number of workers will seek self-employment arrangements. Their economic security – and indeed the economic security of millions of employees themselves – would likely improve with broader, more universal access to social protections.

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<sup>290</sup> G Standing, ‘Job security is a thing of the past—so millions need a better welfare system’ *The Guardian* (London, 21 May 2013).

<sup>291</sup> For example, contrast M Arntz, T Gregory and U Zierahn, ‘The Risk of Automation for Jobs in OECD Countries: A Comparative Analysis’, *OECD Social, Employment and Migration Working Papers* (Paris, OECD Publishing, 2016) <[www.oecd-ilibrary.org/social-issues-migration-health/the-risk-of-automation-for-jobs-in-oecd-countries\\_5jlz9h56dvq7-en](http://www.oecd-ilibrary.org/social-issues-migration-health/the-risk-of-automation-for-jobs-in-oecd-countries_5jlz9h56dvq7-en)> (predicting that 9% of jobs in the U.S. are at risk from automation; technology will impact far fewer jobs than predicted by Oxford study, but automation will likely have a greater impact on lower skilled workers) and CB Frey and MA Osborne, ‘The Future of Employment: How Susceptible are Jobs to Computerisation?’ (Oxford, September 2013) <[www.oxfordmartin.ox.ac.uk/downloads/academic/The\\_Future\\_of\\_Employment.pdf](http://www.oxfordmartin.ox.ac.uk/downloads/academic/The_Future_of_Employment.pdf)> (suggesting that 47% of all persons employed in the U.S. are working jobs that could be performed by computers and algorithms within the next 10-20 years).

<sup>292</sup> J Sachs, ‘How to Live Happily With Robots’, *The American Prospect* (Summer 2015) 37-39. See also RB Freeman, ‘Who Owns the Robots Rules the World,’ *Harvard Magazine* (Cambridge, May-June 2016).

### 3. Restoring Worker Voice and Power

For several decades, the workplace regime of limited employer mandates, such as minimum wage and overtime requirements, coupled with a voluntarist system of collective bargaining, delivered shared prosperity and relative income equality. Now, however, union membership in the U.S. is at a record low, and collective bargaining is diminished in its overall impact on the economy. The loss of worker bargaining power is a key factor in more than 30 years of stagnant wages and growing inequality, and attempts over the last 40 years to strengthen protection of collective bargaining rights have all ended in legislative gridlock.

The latest challenges – if not opportunities – come from the gig economy and the digital labor force. Crowdwork and on-demand platforms are operating in a largely unregulated environment, treating their labor suppliers as independent contractors, beyond requirements of workplace laws. In this regulatory vacuum, worker influence and bargaining power assume far greater importance. Impressive innovation in worker organizing and collective action is currently afoot,<sup>293</sup> and although some initiatives are limited in scale, resource capacity and long-term sustainability, they perhaps foretell the opening to something more substantial, including this century's regulatory reform.

#### a) Emerging Worker Activism

Working people in every imaginable type of workplace and occupation are emerging from years of acquiescence, joining together, with and without unions, to improve life on the job. Despite data on declining union density, workers are demonstrating that grassroots mobilization can move an issue into the mainstream. Paramount is the fast food workers' "Fight for 15" campaign, which since late 2012 has gained momentum in the U.S. and abroad.<sup>294</sup> This campaign, by low-wage workers who are "employees" but traditionally hard to organize, has triggered a wave of minimum-wage hikes in cities and states around the country. It has also, little by little, introduced hundreds, if not thousands, of workers to collective action.

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<sup>293</sup> S Greenhouse, 'On Demand, and Demanding Their Rights', *American Prospect* (28 June 2016) <[prospect.org/article/demand-and-demanding-their-rights](http://prospect.org/article/demand-and-demanding-their-rights)>.

<sup>294</sup> See, e.g., L Whipp and S Fleming, 'US workers on nationwide strike to raise minimum wage: Fast-food and healthcare workers picket McDonald's in 320 cities', *Financial Times* (London, 14 April 2016).

In the last five years, drivers who transport Silicon Valley entrepreneurs have voted to join the Teamsters Union, a striking symbol of confronting inequality.<sup>295</sup> Workers excluded from the basic labor law's coverage, including farmworkers, home health care workers, fashion models and others treated as independent contractors, have mobilized for better pay and improved working conditions, some joining traditional labor unions and some allying with "alt-labor" groups.<sup>296</sup> The latest display of these collective efforts is by Uber drivers, who have embraced a range of different strategies. Some have engaged in protest demonstrations,<sup>297</sup> some have sought to unionize as "employees,"<sup>298</sup> others (as discussed below) are seeking to deal or bargain with Uber as "independent contractors,"<sup>299</sup> and, of course, some are pursuing claims in litigation.

The country's labor unions have differing perspectives on the emergence of the gig economy.<sup>300</sup> The American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), the country's largest trade union federation, representing over 12.7 million workers, has taken a strong stance against public policy proposals that facilitate the independent contractor model, arguing that much of the growth in the on-demand economy is the product of rampant misclassification of employees as independent contractors.<sup>301</sup> The federation specifically criticized proposals that would allow on-demand companies the option to "experiment" with certain aspects of employment, such as training and benefits

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<sup>295</sup> V Goel, 'Silicon Valley Shuttle Drivers Vote to Join Union', *New York Times Blog* (28 February 2015) <[bits.blogs.nytimes.com/2015/02/28/silicon-valley-shuttle-drivers-vote-to-join-union](http://bits.blogs.nytimes.com/2015/02/28/silicon-valley-shuttle-drivers-vote-to-join-union)>.

<sup>296</sup> J Eidelson, 'Alt-Labor', *American Prospect* (29 January 2013).

<sup>297</sup> Scheiber (n 94).

<sup>298</sup> C Stangler, 'A Union Turf War Is Snuffing Out the Campaign to Organize uber Drivers at LaGuardia Airport', *International Business Times* (New York, 22 February 2016) [www.ibtimes.com/union-turf-war-snuffing-out-campaign-organize-uber-drivers-laguardia-airport-2303877](http://www.ibtimes.com/union-turf-war-snuffing-out-campaign-organize-uber-drivers-laguardia-airport-2303877).

<sup>299</sup> N Wingfield and M Isaac, 'Seattle Will Allow Uber and Lyft Drivers to Form Unions', *New York Times* (14 December 2015); 'Uber drivers in New York form labor association', *Reuters* (1 May 2016) [www.reuters.com/article/new-york-uber-idUSL2N17Y0H7](http://www.reuters.com/article/new-york-uber-idUSL2N17Y0H7); Press Release, 'Uber Drivers in California Seek to Form Association with Teamsters', *Teamsters Joint Council 7* (22 April 2016) <[www.prnewswire.com/news-releases/uber-drivers-in-california-seek-to-form-association-with-teamsters-300256244.html](http://www.prnewswire.com/news-releases/uber-drivers-in-california-seek-to-form-association-with-teamsters-300256244.html)>.

<sup>300</sup> See S Kessler, 'In Quest to Organize Gig Economy Workers, Unions Sometimes Clash', *Fast Company* (24 May 2016) <[www.fastcompany.com/3060161/the-future-of-work/in-quest-to-organize-gig-economy-workers-unions-sometimes-clash](http://www.fastcompany.com/3060161/the-future-of-work/in-quest-to-organize-gig-economy-workers-unions-sometimes-clash)>.

<sup>301</sup> 'The Policy Choices We Make Now Will Help Determine the Future of Work', *AFL-CIO* (24 February 2016) <[www.aflcio.org/About/Exec-Council/EC-Statements/The-Policy-Choices-We-Make-Now-Will-Help-Determine-the-Future-of-Work](http://www.aflcio.org/About/Exec-Council/EC-Statements/The-Policy-Choices-We-Make-Now-Will-Help-Determine-the-Future-of-Work)>.

provision, without being subject to the full slate of employment law.<sup>302</sup> The Service Employees International Union, which represents approximately 2 million workers and is the largest union outside the AFL-CIO, has declared that platforms should be held accountable for employment responsibilities when they act as “true employers,” but that the union should also pursue approaches such as the creation of portable benefit programs “to drive standards for workers who will likely never be classified or reclassified as employees.”<sup>303</sup> The SEIU document cautioned against “simply defending the existing 20th century legal and regulatory structures” and instead stated that the union would adapt to new forms of work with different organizational structures that would include improving conditions for independent contractors, as well as traditional employees.<sup>304</sup>

In line with the SEIU’s position, a number of organizations are actively seeking to empower workers engaged in precarious or gig economy work, particularly those excluded from workplace laws. In November 2015, for instance, the Domestic Workers Alliance, which has advocated on behalf of caretakers, called on online economy companies to commit to a set of eight values it called the “Good Work Code.” Twelve companies immediately announced their agreement, pledging to improve working conditions in the sector.<sup>305</sup> Today the Freelancers Union, formed in the 1990s, has about 300,000 members from various occupations, including online work.<sup>306</sup> While these organizations do not negotiate collective bargaining agreements – presumably because they perceive their roles as different, or perhaps because of antitrust law concerns – they function like unions in many ways, such as making health care and other insurance protections accessible for members and engaging in political and policy advocacy.

Worker-focused Internet or app-based platforms and online forums are also arising. The AFL-CIO’s Working America, for example, has launched an online workplace advocacy site called [fixmyjob.com](http://fixmyjob.com). [Coworker.org](http://coworker.org) is a global platform

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<sup>302</sup> Ibid.

<sup>303</sup> ‘SEIU Guiding Principles for Engaging the Gig Economy’, *SEIU* (5 May 2016) (on file with author).

<sup>304</sup> Ibid.

<sup>305</sup> S Lee, ‘On-Demand Companies Embrace Code of Ethical Conduct’, *Bloomberg BNA* (16 November 2016). The eight values are safety, stability and flexibility, transparency, shared prosperity, a livable wage, inclusion and input, support and connection, and growth and development.

<sup>306</sup> N Cook, ‘The Insecure World of Freelancing’, *The Atlantic* (25 July 2015) <[www.theatlantic.com/business/archive/2015/07/building-social-safety-net-freelancers/399551](http://www.theatlantic.com/business/archive/2015/07/building-social-safety-net-freelancers/399551)>.

begun in 2013 that enables groups of employees to launch campaigns for workplace improvements. These initiatives are beginning to actualize a vision of “open source unionism,” extending advantages that technology offers for expanding communication and mobilizing workers.<sup>307</sup>

**b) Open Source Collective Action: New-Generation Platforms for Voice, Exit and Advocacy in the Gig Economy**

One observer has suggested that “‘Union 2.0’ will be a platform, more than an organization, and its power will derive from the data leverage it’s able to attain over the platforms that employ its workers.”<sup>308</sup> The notion is that by correcting information asymmetries, workers will gain power. Critical in achieving this goal are technology-enabled platforms, which provide a meeting place where workers can build community and organize, essential for digital labor like crowdworkers who do not interact in the physical world. Platform-based collective action may be ideal for millennials, “the world’s first generation of digital natives,” who “function in networks” and are accustomed to hunting for jobs and communicating “in multiple kinds of channels ... on multiple screens using multiple apps.”<sup>309</sup>

For workers in the platform economy, an “ecosystem of emerging worker support services” is also being created.<sup>310</sup> These platforms offer assistance with locating jobs; managing finances, expenses and taxes; finding health care and other forms of insurance and accessing personal data on work history and performance. Apps like SherpaShare, for example, allow drivers to input their revenue data, hours worked, expenses for gas, depreciation and insurance and to calculate their real earnings per hours worked.<sup>311</sup> UberPeople bills itself as an “independent community of rideshare drivers.”<sup>312</sup> Because these apps offer

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<sup>307</sup> RB Freeman and J Rogers, ‘Open Source Unionism’, 5:4 *WorkingUSA* 8 (March 2002); J Rogers and RB Freeman, ‘A Proposal to American Labor’, *The Nation* (New York, 6 June 2002).

<sup>308</sup> N Grossman, ‘Venture capital vs. community capital’, (22 May 2015) <[www.nickgrossman.is/2015/05/22/venture-capital-vs-community-capital/](http://www.nickgrossman.is/2015/05/22/venture-capital-vs-community-capital/)>.

<sup>309</sup> P Taylor and the Pew Research Center, *The Next America: Boomers, Millennials, and the Looming Generational Showdown* (New York, Public Affairs, 2014) 26, 146-147.

<sup>310</sup> N Grossman and E Woyke, *Serving Workers in the Gig Economy: Emerging Resources for the On-Demand Workforce* (California, O’Reilly Media, 2015).

<sup>311</sup> ‘Sherpashare’, <[www.sherpashare.com](http://www.sherpashare.com)>. See N Singer and M Isaac, ‘An App That Helps Drivers Earn the Most From Their Trips’, *New York Times* (New York, 9 May 2015).

<sup>312</sup> ‘UberPeople’, <[uberpeople.net](http://uberpeople.net)>.

drivers information they need to assess the fairness of the bargain Uber is imposing and enable them to share stories and complaints and seek advice on navigating the platform landscape, they serve as a potential source of power.

Crowdworkers have their own apps and online forums. Dynamo, for example, is a website for Mechanical Turkers to share information, collaborate and develop guidelines for academic requesters in setting wages and task design.<sup>313</sup> As such the site gave workers a voice in deciding what is fair pay, although not through face-to-face or real-time bargaining. Dynamo also hosted a letter-writing campaign to Amazon's CEO Jeff Bezos, to let him "and the rest of the world know all about who we are ... for you to see that Turkers are not only actual human beings [and not algorithms], but people who deserve respect, fair treatment and open communication."<sup>314</sup> Dynamo has been proposed as a model for how requesters and crowdworkers can come together to address noncompetitive wage structures and labor market frictions such as imperfect information and imbalances of power.<sup>315</sup>

Specifically in response to information asymmetries on Amazon Mechanical Turk (which gives access to information about Turkers but not about requesters), researchers created Turkocticon, a browser extension allowing Turkers to rate requesters and view ratings submitted by fellow Turkers.<sup>316</sup> Turkers, it seems, find this tool valuable in identifying "good jobs" and avoiding bad requesters, in effect fighting wage theft and substandard employment online.

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<sup>313</sup> See, e.g., V Williamson, 'Can crowdsourcing be ethical?' *Brookings Institution* (3 February 2016) <[www.brookings.edu/2016/02/03/can-crowdsourcing-be-ethical-2](http://www.brookings.edu/2016/02/03/can-crowdsourcing-be-ethical-2)> (describing "exploitative" system of crowdsourced academic research, as on Amazon Mechanical Turk, paying workers about \$2 an hour to complete surveys).

<sup>314</sup> 'Dear Jeff Bezos', *Dynamo* <[www.wearedynamo.org/dearjeffbezos](http://www.wearedynamo.org/dearjeffbezos)>. L Weber and RE Silverman, 'On-Demand Workers: "We Are Not Robots"', *Wall Street Journal* (New York, 27 January 2015); N Salehi et al., 'We Are Dynamo: Overcoming Stalling and Friction in Collective Action for Crowd Workers', <[hci.stanford.edu/publications/2015/dynamo/DynamoCHI2015.pdf](http://hci.stanford.edu/publications/2015/dynamo/DynamoCHI2015.pdf)> (studying "online workers' unique barriers to collective action").

<sup>315</sup> Kingsley et al. (n 148).

<sup>316</sup> Silberman and Irani (n 246).

A study of Turkopticon concluded that requester ratings have real effects: good requesters get their task offers accepted 100 percent quicker than bad requesters, and Turkers can earn 40 percent more from good requesters.<sup>317</sup> The findings also suggest that reputation can discipline opportunistic employers, illustrating the value of employer reputation to the labor market.<sup>318</sup> But “[w]hile tools like Turkopticon have helped mitigate some information asymmetries generated by the AMT platform’s ‘algorithmic authority’... Turkopticon does not solve the asymmetry of market power. Requesters can still unilaterally reject work and block workers.” It also does not provide any way for workers “to have their reputation repaired or to regain lost wages.”<sup>319</sup>

Despite some promising innovation in worker activism and advocacy, challenges persist. To begin, there are significant questions about the limits of digital organizing and whether it can be a substitute for face-to-face interaction and real-world collective action, a concern particularly relevant for crowdworkers. Indeed, collective action among crowdworkers seems minimal. Upwork freelancers were recently reported to be “[u]p in arms” about increased fees on smaller contracts and had “taken to Twitter and Reddit to make their voices heard.”<sup>320</sup> But there is no sign that collective action has emerged beyond social media postings. There is a range of likely reasons, chief among them that crowdworkers are a global, atomized labor market, working in isolation. Some, especially Turkers, may fear that collective action would kill the platform and the source of work, however low paid. And most of those who compete on Topcoder and InnoCentive may value the challenges presented by the contests.

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<sup>317</sup> A Benson, A Sojourner, and A Umyarov, ‘Can Reputation Discipline the Gig Economy? Experimental Evidence from an Online Labor Market’, *Forschungsinstitut zur Zukunft der Arbeit* (November 2015) <[ftp.iza.org/dp9501.pdf](http://ftp.iza.org/dp9501.pdf)>.

<sup>318</sup> S Estreicher, ‘Employer Reputation at Work’ (2009) 27 *Hofstra Labor and Employment Law Journal* 1. See also C Estlund, ‘Just the Facts: The Case for Workplace Transparency’ (2011) 63 *Stanford Law Review* 351. The importance of employer reputation has been heightened as attachment to a single employer has decreased, with worker mobility increasing and with platform-based work now growing. As the barriers to “exiting” a relationship with employers or platforms offering poor conditions decrease, workers’ interest and incentive in exercising “voice” to restructure these relationships may diminish.

<sup>319</sup> Kingsley (n 148) 5.

<sup>320</sup> E Pofeldt, ‘Upwork’s New Pricing Model Sparks Outcry’, *Forbes* (7 May 2016) <[www.forbes.com/sites/elainepofeldt/2016/05/07/freelance-giant-upworks-new-pricing-model-sparks-outcry/#23f8b1b8683d](http://www.forbes.com/sites/elainepofeldt/2016/05/07/freelance-giant-upworks-new-pricing-model-sparks-outcry/#23f8b1b8683d)>.



It remains to be seen whether these new mechanisms and initiatives can be replicated and expanded to reach large numbers of dispersed workers. Because they are not dues-based organizations, like labor unions, long-term funding is an issue. And though they surely have the capability to hurt the reputations or brands of client firms, as yet none of these mechanisms has demonstrated that their “sources of power” are equivalent to “the power generated through collective bargaining in the past.”<sup>321</sup> Nevertheless, traditional labor unions have taken note of the realities of crowdwork: in Germany, the IGMetall has led the way, launching faircrowdwork.org as a support network and information clearinghouse for crowdworkers in 2015 and assembling a gathering of union and worker representatives and researchers from the U.S. and Europe to explore international strategies for the platform economy in 2016.

Any collective action that independent contractors were to engage in, of course, would fall outside any labor law protections from discrimination or retaliation. Additionally, while collective action by “employees” comes within a labor exemption from antitrust law,<sup>322</sup> independent contractors are “prisoners of the regime of competition.”<sup>323</sup> Were gig workers to take collective action – perhaps entirely online – such action could theoretically be tested as violating price-fixing prohibitions of the Sherman Anti-Trust Act,<sup>324</sup> despite cogent arguments that this would be an incorrect application of antitrust principles.<sup>325</sup>

### c) Bargaining Power for Independent Contractors

In a first-of-its-kind initiative, the Seattle City Council in December 2015 unanimously approved an ordinance granting taxi, for-hire and transportation network company drivers treated as independent contractors the right to unionize.

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<sup>321</sup> TA Kochan, *Shaping the Future of Work* (New York, Business Expert Press, 2016) 107.

<sup>322</sup> *See, e.g., United States v. Hutcheson*, U.S. 219 (1941); *Amalgamated Meat Cutters v. Jewel Tea Co., Inc.*, 381 U.S. 676, 709-10 (1965) (“[T]he labor exemption from the antitrust laws derives from a synthesis of all pertinent legislation,” and “collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws”). *See generally* S Estreicher and MT Bodie, *Labor Law* (St. Paul, MN, Foundation Press, 2016) 195-199.

<sup>323</sup> H Arthurs (n 62) 89.

<sup>324</sup> Sherman Anti-Trust Act of 1890, 15 U.S.C. §§ 1 et seq. (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states ... is hereby declared to be illegal”).

<sup>325</sup> For a comprehensive analysis of these issues, see SM Paul, ‘The Enduring Ambiguities of Antitrust Liability for Worker Collective Action’, (2016) 47 *Loyola University of Chicago Law Journal* 969.

While its collective bargaining scheme is modeled roughly on the NLRA, it is more labor-friendly in several respects and reserves a powerful role for the city in approving contracts (the city has authority under state law to regulate the taxi industry). The ordinance was the result of lobbying and advocacy by the Teamsters Union in Seattle, with support from the Seattle local affiliate of the Service Employees International Union.

The Seattle Department of Finance and Administrative Services (DFAS) will implement the ordinance, which will apply to companies that hire, contract with or partner with at least 50 for-hire drivers in Seattle, including taxi associations, for-hire vehicle companies and app-based companies such as Uber and Lyft.

The ordinance provides a right for independent contractor drivers to unionize, company by company. The DFAS agency director will first determine what qualifications an organization must have to represent drivers, such as whether it is a nonprofit or whether it is democratically controlled by drivers. After “qualified driver representatives” are selected, they must state their intent to organize drivers in a specific company within 14 days. At that point, companies must provide them with the names, addresses, email addresses and phone numbers of all “qualifying drivers.”<sup>326</sup> The organization seeking to represent the drivers will submit to the agency statements of interest signed by a majority of a company’s qualifying drivers. The agency director will decide which drivers are eligible to select or reject an organization (“qualifying drivers”), based on crite-

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<sup>326</sup> The ordinance requires that such a list be provided no later than 75 days after its commencement date. While the NLRA itself has no equivalent provision, the NLRB long ago imposed the requirement that companies disclose employees’ names and addresses to the labor organization seeking to represent them 7 days after the approval or direction of a union election – a later point in the organizing process than required by Seattle’s Ordinance. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). The union seeking a representation election must file a petition with the NLRB with the signatures of at least 30% of the workers in the proposed bargaining unit, which it must collect without the benefit of any list. The requirement that an employer disclose employee information is the substitute for the union’s right to physically access the workplace, and is meant to promote an equitable dissemination of information. *Ibid.* 1240-41 (“[W]ithout a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view.”). In April 2015 the NLRB implemented new regulations governing the election process: employers must now provide the union not only with employee names and addresses, but also phone numbers and email addresses, and they must now do so within 2 business days after the approval or direction of an election. 29 C.F.R. § 102.67(l) (2015).

ria related to the frequency and regularity of their work on the platform, but all drivers would be covered by any agreement negotiated.<sup>327</sup>

If a company's drivers select an organization to represent them, the company is obliged to seek an agreement with the representative organization on issues such as equipment standards, safe driving practices, background checks, pay, minimum hours of work and conditions of work. If the parties can't reach an agreement after 90 days, an arbitrator would propose an agreement. The agency director must approve all agreements, renewals or modifications, whether proposed by the arbitrator or reached by the parties; appeals of the director's determinations would be filed in the county superior court.

The law faces major legal challenges and will likely be tied up in litigation for some time. The ordinance became effective in January 2017 and in March the Chamber of Commerce filed a lawsuit challenging the ordinance in the federal court in Seattle.

The chamber's complaint raises two key claims: first, that only the federal government has the right to regulate collective bargaining and as such the ordinance is preempted by federal labor law; and second, that the ordinance would violate antitrust law by allowing independent contractors to collude on prices.<sup>328</sup> In challenging the ordinance's grant of organizing and collective bargaining rights to independent contractors, the complaint relies on supposedly competing policy preferences. It asserts:

"The unfettered ability of individuals to go into business for themselves has long been an important engine of American economic growth. This entrepreneurial tradition is an exceptional feature that distinguishes our economy from much of the rest of the world.

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<sup>327</sup> The Seattle ordinance's provisions regarding the recognition of a bargaining representative are substantially more favorable to labor than the NLRA's in several respects. First, the ordinance presumes that there will be one negotiated master contract for each transportation company operating in the city; the NLRA would require a fact-specific inquiry into the appropriateness of the bargaining unit. Second, the ordinance allows for organizations to represent all of a company's qualifying drivers upon securing the signatures of a majority. In contrast, the NLRA does not obligate employers to recognize a union upon a showing of majority support through signatures, and calls for an election process in which employers are free to oppose unionization.

<sup>328</sup> Complaint, Chamber of Commerce v. City of Seattle, No. 2-17cv370 (W.D. Wash. filed Mar. 9, 2017).

The power of America’s entrepreneurial spirit has only grown as technology has transformed the way Americans can do business.”

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“Seattle’s Ordinance reflects a broadside attack on the fundamental premises of independent contractor arrangements, as well as the nascent on-demand economy that relies on it. Federal labor and antitrust laws were designed precisely to avoid this result, and to encourage innovation and the free flow of commerce among private services providers across the Nation.”<sup>329</sup>

While the chamber’s federal labor law preemption arguments are unconvincing, given the exclusion of independent contractors from the NLRA, there are more serious questions about the ordinance’s validity under current U.S. antitrust law. Generally, agreements to fix wages or a concerted refusal to do work between independent contractors would be unlawful, but the U.S. Supreme Court has recognized a “state action” exemption for private anticompetitive conduct that is appropriately authorized and monitored by a state or local government. Conduct otherwise prohibited by antitrust laws may be permitted if the state has articulated a “clear policy to allow the anticompetitive conduct”<sup>330</sup> and has provided “active supervision of [the] anticompetitive conduct.”<sup>331</sup> The standard for finding that the requirements for the exemption are met are to be applied rigorously, and in a doubtful case antitrust liability applies.<sup>332</sup>

Municipalities such as Seattle can avail themselves of the “state action” exemption only if they show that they have been delegated authority by the state to act or regulate anticompetitively and prove that their regulation is a “foreseeable result” of state authorization of local power.<sup>333</sup>

In the Seattle case, there is a strong argument that the role of the director of finance in approving all agreements, with broad powers to enforce the ordinance, meets the “active supervision” requirement for the “state action” exemption. However, whether it can be shown that the State of Washington had a “clear policy to allow the anticompetitive conduct” may be more problematic. As there is no state law directly addressing collective bargaining for drivers, the ordinance relies on a broad grant of state authority allowing municipalities to

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<sup>329</sup> Ibid. 2, 4.

<sup>330</sup> Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

<sup>331</sup> Ibid.

<sup>332</sup> FTC v. Ticor Title Ins. Co., 504 U.S. 621, 632 (1992).

<sup>333</sup> Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42 (1985).

impose “any other requirements adopted to ensure safe and reliable for hire transportation service.”<sup>334</sup> In opposition, the Chamber of Commerce argues that a complex collective bargaining regime is not within the scope of the state’s grant of power to municipalities to regulate transportation safety. If it ultimately prevails, that would successfully block the ordinance.

If the ordinance survives an ultimate legal challenge, it could be a model for independent contractors to achieve bargaining power through unionization outside of the traditional NLRA regime. It remains to be seen, of course, whether Uber or other drivers – let alone remotely located and atomized crowdworkers – would choose union representation. But given the total resistance to legislative change of U.S. labor law and complete partisan gridlock at the federal level, the ordinance is significant and emblematic of innovative laws being enacted around the country where progressive city council members are testing municipal authority.<sup>335</sup>

Highlighting the experimentation under way, as well as the multiple Uber strategies, in May 2016 the Machinists District 15 in New York (an affiliate of the International Association of Machinists and Aerospace Workers) announced that it had entered into a five-year agreement with Uber, under which the Machinists will create the Independent Drivers Guild to give Uber’s 35,000 New York City drivers a voice and support.<sup>336</sup> The drivers will have a forum for regular dialogue with Uber management, and they will be able to appeal deactivation decisions with guild representation. They will also have access to certain benefits and protections.<sup>337</sup> The Freelancers Union will play an advisory role in “how to best bring portable benefits to independent workers in the on-demand economy.”<sup>338</sup> This agreement is a breakthrough, although not without its critics, as it does not challenge the independent contractor classification. The agreement

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<sup>334</sup> RCW § 46.71.160(6) (2015).

<sup>335</sup> L DePillis, ‘Meet the lefty club behind a blitz of new laws in cities around the country’, *Washington Post Wonkblog* (4 January 2016) <[www.washingtonpost.com/news/wonk/wp/2016/01/04/meet-the-lefty-club-behind-a-blitz-of-new-laws-in-cities-around-the-country](http://www.washingtonpost.com/news/wonk/wp/2016/01/04/meet-the-lefty-club-behind-a-blitz-of-new-laws-in-cities-around-the-country)> (“Being the first takes both political will and financial resources to enforce new mandates and weather the inevitable legal hiccups....”).

<sup>336</sup> N Scheiber and M Isaac, ‘Uber Recognizes New York Drivers’ Group, Short of Union’, *New York Times* (New York, May 10, 2016).

<sup>337</sup> New York’s Black Car Fund will be one model. Machinists District 15 general counsel Jim Conigliaro is a member of the board of that fund.

<sup>338</sup> S Horowitz, ‘Freelancers’ Unions Looks to Bring Portable Benefits to On Demand Workers Nationwide’, *Freelancers Union* (10 May 2016) <[blog.freelancersunion.org/2016/05/10/freelancers-union-looks-to-bring-portable-benefits-to-on-demand-workers-nationwide-2](http://blog.freelancersunion.org/2016/05/10/freelancers-union-looks-to-bring-portable-benefits-to-on-demand-workers-nationwide-2)>.

has no binding consequence for drivers in other regions, and they, or other organizations, are free to continue the “employee” status legal battles against Uber, even though the Machinists will not do so themselves. Machinists District 15 general counsel Jim Conigliaro declared that the “guild is the first of its kind” and a “step forward for organized labor, which will now have an opportunity to shape this new economy in a way that protects our values.”<sup>339</sup>

As the Machinists’ initiative reveals, there is growing fascination with the medieval model of the “guild” to represent independent contractors or provide benefits.<sup>340</sup> Though “guild” and “union” may now be used interchangeably, neither term has legal significance for the antitrust analysis, though an organization that calls itself a “guild” may be signaling that it will not engage in traditional collective bargaining. Historically, guilds were associations of craftsmen or artisans – i.e., independent businesspeople. Today’s guilds exist in the professions (the newspaper guild, for example) and entertainment industries (where they represent actors, writers, directors and musicians), and do engage in collective bargaining. Hollywood’s guildlike unions, whose members often bounce from production to production, are even said to represent “the future of work.”<sup>341</sup>

Worker ownership in the platform economy is also attracting interest as another “way for workers to gain power in the digital age.”<sup>342</sup> Several scholars are advancing the case that worker ownership, with its “long tradition in America,” is

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<sup>339</sup> L Hook, ‘Uber strikes deal with Machinists Union for NY drivers’, *Financial Times* (London, 10 May 2016) <next.ft.com/content/5a14398e-16df-11e6-9d98-00386a18e39d> (“Uber has been trying to repair relations with drivers, after repeated fare cuts sparked an outcry. Drivers have made scattered efforts to organize themselves and protest around the US, but the guild will be the first with formal links to an organized union.”). See also J Hirsch and JA Seiner, ‘A Modern Union for the Modern Economy’, (forthcoming 2018) *Fordham Law Review* <papers.ssrn.com/sol3/papers.cfm?abstract\_id=2935400&download=yes##>

<sup>340</sup> N Schneider, ‘The New Guilded Age’, *New Yorker* (New York, 12 October 2015); RJ Laubacher and TW Malone, ‘Flexible Work Arrangements and 21st Century Worker’s Guilds’, *Sloan School of Management – Massachusetts Institute of Technology* (October 1997) <ccs.mit.edu/21C/21CWP004.html>.

<sup>341</sup> Schneider (n 340). See also C Fisk, ‘Hollywood Writers and the Gig Economy’ (2017) *University of Chicago Legal Forum* (forthcoming). Since the passage of the NLRA in 1935, the unions and guilds representing employees in television and film all bargain with the networks and production companies for wage scales, pension and other benefits. In the television industry, the term “union” is used to refer to the technical personnel—e.g., set designers, make up artists, construction, etc.; the term “guild” refers to creative workers.

<sup>342</sup> M Konczal, ‘Socialize Uber: It’s easier than you think’, *The Nation* (10 December 2014). See also Freeman (n 292).

the only real solution to income inequality.<sup>343</sup> “Employee stock ownership plans, which have been around for years, are lately seeing a bit of a comeback,”<sup>344</sup> and in the platform economy there is experimentation with giving workers an equity stake in the company<sup>345</sup> and with worker-developed and -owned cooperatives.<sup>346</sup> In Denver, for example, Communications Workers Local Union 7777 has backed the development of a worker-owned taxi cooperative, and some observers see big potential “for unions to help create situations where workers define their own labor conditions.”<sup>347</sup> To date, however, we are aware of no worker-owned crowdwork platform.

## VII. Conclusion and Recommendations

Innovations in digital technology have empowered the rise of the platform business model. According to the recent book *Platform Revolution*, North America has more platform firms creating value (as measured by market capitalization) than anywhere else in the world.<sup>348</sup> While there is a certain fascination with the promise of platforms, concerns are rising about what this business model

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<sup>343</sup> JR Blasi, RB Freeman and DL Kruse, ‘Capitalism for the Rest of Us’, *New York Times* (New York, 17 July 2015) (“To restore prosperity for all, we need to spread the benefits of economic growth to entrepreneurial citizens through profit-sharing and the ownership of capital.”).

<sup>344</sup> R Reich, ‘The Third Way: Share-the-Gains Capitalism’, *Social Europe* (9 May 2016) <[www.socialeurope.eu/2016/05/third-way-share-gains-capitalism](http://www.socialeurope.eu/2016/05/third-way-share-gains-capitalism)> (“Research shows that employee- owned companies...tend to out-perform the competition”).

<sup>345</sup> For example, drive-sharing Juno and home health care Honor. See S Kolhatkar, ‘Juno Takes on Uber’, *New Yorker* (New York, 10 Oct, 2016).

<sup>346</sup> See, e.g., A Cortese, ‘A New Wrinkle in the Gig Economy: Workers Get Most of the Money’, *New York Times* (New York, 20 July 2016) (describing stocksy.com, an online stock photography site, owned and governed cooperatively by the photographers who contribute their work, as “part of a new wave of start-ups that are borrowing the tools of Silicon Valley to create a more genuine ‘sharing’ economy”); T Scholz, ‘Platform Cooperativism vs. the Sharing Economy’, *Medium* (5 December 2014) <[medium.com/@trebors/platform-cooperativism-vs-the-sharing-economy-2ea737f1b5ad#.1kh476768](http://medium.com/@trebors/platform-cooperativism-vs-the-sharing-economy-2ea737f1b5ad#.1kh476768)>; N Schneider, ‘Owning Together is the New Sharing’, *YES! Magazine* (30 December 2014) <[www.yesmagazine.org/new-economy/owning-together-is-the-new-sharing](http://www.yesmagazine.org/new-economy/owning-together-is-the-new-sharing)>.

<sup>347</sup> M Hansen, ‘What If Uber Were a Unionized, Worker-Owned Co-Op? These Denver Cabbies Are Making it Happen’, *Yes! Magazine* (10 April 2015) <[www.yesmagazine.org/new-economy/uber-unionized-worker-owned-co-op-denver-cabbies](http://www.yesmagazine.org/new-economy/uber-unionized-worker-owned-co-op-denver-cabbies)>.

<sup>348</sup> GG Parker et al., *Platform Revolution: How Networked Markets Are Transforming the Economy and How to Make Them Work for You* (New York: W.W. Norton, 2016) 33.

means for the nature of work itself and for wages, labor rights and access to social protections for platform workers. We are in “a disequilibrium time,” with the platform “radically changing business, the economy, and society at large” even as it is itself “continually evolving.”<sup>349</sup>

In this “disequilibrium time,” scrutiny of the platform economy has catalyzed a brisk debate over the future of work generally. Opinions are deeply held and divided. While some exalt the “power of America’s entrepreneurial spirit” as an “important engine of American economic growth,” others worry about the erosion of the New Deal’s basic values of economic equity and industrial democracy or seek to reimagine the social compact beyond the existing boundaries of employment law. These views evoke the thoughts of Justice Holmes and Judge Bazelon with which we began. Gauging whether, how and when to reform the law in response to changing realities may be difficult, but ignoring the transformations or insisting that existing legal arrangements are adequate to address them would be shortsighted.

The 20th-century collective bargaining model has undeniably faltered, and we cannot realistically expect that it will return to its best days. U.S. labor law has been “ossified”<sup>350</sup> too long already, and years before the existence of Uber, the binary classification system that sets the boundaries of our legal regime excluded far too many. As one labor law scholar implored nearly two decades ago:

“[E]mployee-independent contractor jurisprudence, especially as guided by anti-purposive interpretation, is an intellectually bankrupt means of exposing larger and larger segments of the working population to the unshielded rigors of the labor market. Rather than refining the definitions, it is time to recognize just how ambiguous this alleged dichotomy has become. . . . [L]egislatures, courts, and agencies should seek ways of assimilating [self-employed workers] into a regime of universal security.”<sup>351</sup>

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<sup>349</sup> Ibid. 31, 56, 60. See also Boudreau (n 210) (“The technology that has turbocharged crowdsourcing’s potency and application is still relatively new, so it is too early to fully understand the depth and reach of crowds across the economy. Nevertheless, recent experience and mounting research suggest that we may just now be seeing the outlines of a genuine expansion in capabilities...”).

<sup>350</sup> CL Estlund, ‘The Ossification of American Labor Law’ (2002) 102 *Columbia Law Review* 1527; WB Liebman, ‘Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board’ (2007) 28 *Berkeley Journal of Employment and Labor Law* 569.

<sup>351</sup> M Linder, ‘Employed or Self-Employed? The Role and Content of the Legal Distinction: Dependent and Independent Contractors in Recent U.S. Labor Law: An Am-



Public policy discourse is finally beginning to acknowledge this dilemma, which has been magnified by changing and ever more creative business models. Platforms like Uber and Lyft, with their reliance on external participants rather than internal employees, encapsulate the problem, and crowdwork platforms that depend on those who work virtually rather than in the “real world,” present an even more obvious example of the quandary: “National regulators and tax officials worried about the Ubers of this world will find it even harder to get to grips with the borderless ‘human cloud.’”<sup>352</sup> Applying multifactor employee-independent contractor tests to crowdwork platform relationships is complex, particularly for contest-based platforms like Topcoder and InnoCentive. But even for Upwork, whose model most closely resembles a traditional staffing agency, or Amazon Mechanical Turk, with its legion of low-wage workers, the resolution of the status issue is by no means certain. It would be even more challenging to establish joint employer status, in an effort to hold accountable both the client and the platform.

Not only do many of the relevant factors cut in opposite ways, but those factors may not fairly resolve whether individuals who might work sporadically on platforms, or for many different platforms and clients in the course of a week, under an often attenuated form of control, should enjoy the protections of our workplace laws. The premises of the binary classification – an employment relationship between a worker and a sole employer who has a right to control the employee’s work – are increasingly inaccurate, and this is especially so because Congress and the Supreme Court have made clear that the classification issue under the common law test cannot be decided with an eye toward the purposes the labor law was meant to serve or the workers the law was meant to protect.

Crowdwork realities highlight the need for approaches that reach beyond the existing “ambiguous dichotomy” – and the multiple factors that judges must weigh – to provide some governance in this unregulated sector of the global economy. The goals should be to seek solutions that would minimize the risks of working under these new business models without jeopardizing their potential efficiencies; to better align the evolving realities of work with protective legislation; and to preserve the objectives of our earlier social compact, albeit with new mechanisms or labor market institutions that would supplement the existing collective bargaining model in addressing disparities of bargaining power and economic insecurity.

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ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness’ (1999) 21 *Comparative Labor Law and Policy Journal* 187, 230.

<sup>352</sup> S O’Connor, “The gig economy is neither “sharing” nor “collaborative”, *Financial Times* (London, 14 June, 2016).

## 1. Sectoral Regulation of Crowdwork Platforms

Strict definitions of “employee” and “employer” need not constrain other avenues of reform targeted to the crowdwork sector that could secure better outcomes for crowdworkers while preserving labor market flexibility. Below we make a series of discrete recommendations including proposed regulatory measures, voluntary initiatives and areas for further study. With a globalized labor force, though, questions inevitably arise over what country’s laws apply in the event of disagreements with U.S. companies and in turn whether U.S. law applies extraterritorially. Without delving deeply into this knotty issue, we can look at several principles.

Basically, while Congress has the authority to enforce its laws beyond the boundaries of the U.S., it is the “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”<sup>353</sup> This “presumption against extraterritoriality” is based on the notion that Congress is “primarily concerned with domestic conditions” when it legislates.<sup>354</sup> So, absent clearly expressed evidence that Congress intended otherwise, a federal statute would not apply outside the U.S. If a claim is brought based on events that occurred abroad, the burden is on the plaintiff to overcome the “presumption against extraterritoriality.” The courts have found that the activities abroad of employees of U.S. companies are not governed by the NLRA.<sup>355</sup> The FLSA specifically does not apply to an employee whose services are “performed in a workplace within a foreign country.”<sup>356</sup> Any prospective regulation of crowdwork platforms, then – like any effort to establish “employee” status under existing laws – would presumptively cover only workers based in the United States. Yet given the global reach of crowdwork platforms and their potential to undercut labor standards in higher-wage nations in a way far exceeding earlier waves of outsourcing, the still more challenging question of transnational regulation may eventually have to be addressed.

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<sup>353</sup> EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

<sup>354</sup> *Foley Bros.*, 336 U.S. at 285.

<sup>355</sup> *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 12-13 (1963).

<sup>356</sup> 29 U.S.C. § 213(f).

## a) Compliance with Wage and Hour Standards

A statute tailored precisely to the online platform economy could be designed which would afford basic guarantees for crowdworkers, including compliance with federal and state minimum wages and overtime, as well as impose record-keeping and transparency requirements on platforms. After all, regulating specific industries that situate precarious workers at the border of employment and entrepreneurship is hardly unprecedented.

Online crowdwork may be new, but, as Matthew Finkin has argued, plausible analogies can be drawn to industrial homework and the “putting out” system particularly common in the garment industry in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries.<sup>357</sup> This system “preserved substantial worker autonomy,” compensated workers based “on their individual productivity linked to piece-work rather than hourly wages or monthly salaries” and involved separate work locations.<sup>358</sup> The considerations for the home-based outsourcers and crowdwork companies themselves are similar: the lack of need to supervise the work, the desire to control labor costs and the benefit of avoiding collective action and legal regulation.<sup>359</sup>

Over time, both federal and state laws were enacted to regulate this sort of work. The FLSA permits the secretary of labor to regulate or prohibit industrial homework “to prevent the circumvention or erosion of and to safeguard the minimum wage.”<sup>360</sup> All homework is subject to minimum wage, overtime and recordkeeping requirements, regardless of whether the worker is paid by time, piece, job, incentive or any other basis. Employers must provide workers with handbooks to record time, expenses and pay information.<sup>361</sup>

In the state of New York, Labor Code §350, still in force today, is directed at the “uncontrolled continuance of homework ... [where] wages are notoriously lower and working conditions endanger the health of the worker.”<sup>362</sup> The statute provides that all industrial homeworkers “shall be presumed to be employees of

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<sup>357</sup> Finkin (n 37).

<sup>358</sup> M Bucheli, JT Mahoney and PM Vaaler, ‘Chandler’s Living History: The Visible Hand of Vertical Integration in Nineteenth Century America Viewed Under a Twenty-First Century Transaction Costs Economic Lens’ (2010) 47 *Journal of Management Studies* 864-65.

<sup>359</sup> Finkin (n 37) 607-08.

<sup>360</sup> 29 U.S.C. § 211(d).

<sup>361</sup> 29 C.F.R. § 531 (recordkeeping pertaining to industrial homeworkers).

<sup>362</sup> NY Labor Code § 350 (2015).

their employer and not independent contractors”<sup>363</sup> even if the workers control their hours, place of work and the manner and means of performing work. The definition of “employer” is broad, intended to eliminate any potential subterfuge of the statute through the use of subcontractors or arms-length supply chain strategies.<sup>364</sup> Strict reporting requirements are imposed on employers, including lists of all persons engaged in homework, all places where they work, all goods manufactured and all wages paid.<sup>365</sup>

The New York statute and the FLSA demonstrate that the dispersed nature of the workforce – or the fact that the work is done in homes – does not make work impossible or inadvisable to regulate. A crowdworker protection law could similarly state that crowdworkers are to be presumed employees of the platform—for the limited purpose of ensuring that minimum wage, overtime and child labor provisions are complied with. This sort of regulation would obligate platforms to calibrate the average prices offered to U.S.-based workers to ensure that they do not violate wage and hour laws. Pro rata contributions for Social Security or other social protections might be mandated as well.

To be sure, imposing such requirements may cause platforms to place restrictions on crowdworkers that could eliminate some flexibility. To avoid having to pay overtime wages, platforms might limit the number of hours crowdworkers would be able to work; to avoid double-counting of hours, platforms might institute mechanisms to ensure that only one task is being worked on at a time. To prevent people from working on more than one platform at a time and thus collecting the equivalent of the minimum wage from several sources at once, platforms might seek to adopt a version of Upwork’s work diaries to be able to monitor workers more closely. Alternatively, they could just establish the outward bounds of what constitutes a reasonable time to spend on a type of task and refuse to compensate for any hours beyond this (assuming an empirically based “reasonable time” calculation).

Application of wage and hour regulations would be more challenging for the minority of platforms that, like Topcoder and InnoCentive, are “challenge-based.” There might be regulatory exemptions for this type of platform, if the model is judged to be socially valuable and consistent with the objectives of labor regulation. Thus, while we would not permit an employer to summon ten workers into a factory, have them all labor to assemble a product, and then

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<sup>363</sup> NY Labor Code § 361-a.

<sup>364</sup> NY Labor Code § 350 (2b), 354-a.

<sup>365</sup> NY Labor Code § 354(4).

compensate only one, we may find justifiable a situation in which ten scientists do significant work on different proposals yet only one receives compensation. Relatedly, these types of platforms, for the most part, engage individuals with advanced knowledge in a field of science or learning. Presumably, a carefully tailored statute, perhaps informed by a labor market study of whether or not a specific category of challenge-based crowdwork is replacing full-time employment, could include exemptions for those classifications, much like the FLSA exemptions.<sup>366</sup> Imposing a commitment that all participants (including non-winners) be paid at least the equivalent of the hourly minimum wage for work done on the platform could destroy the “supplier redundancy” key to these platforms’ competition model.

## **b) Recordkeeping and Disclosure Requirements**

Strict disclosure and recordkeeping requirements could also be imposed on crowdwork platforms, and these requirements could mirror not only industrial homework laws but also current regulation of temporary or staffing agencies.<sup>367</sup> Such requirements would not only permit government authorities to monitor compliance with basic wage and hour protections but also mitigate the asymmetry of information that exists on platforms that lack transparency about remuneration and client reputation.

For example, in Massachusetts the Temporary Worker Right to Know Act requires the temporary or staffing firm to provide workers with basic information before going to a job, such as the staffing agency’s contact information; workers’ compensation carrier; the rate of pay for the job; shift start and end time; details related to any meals or transportation; whether the position requires special clothing, tools, licenses, or training; and the name of the worksite employer. Agencies are also required to keep records for each worker and each client company regarding the rate of wages agreed upon, and they must obtain a license and remain subject to inspection.<sup>368</sup> Illinois has enacted a similar bill.<sup>369</sup>

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<sup>366</sup> 29 U.S.C. §§ 213(a)(1), (17).

<sup>367</sup> Unlike some countries, U.S. federal law does not regulate these agencies, such as by requiring them to register with the government, or limit the amount of time that a worker can be employed as a temporary worker. However, a number of states have begun to enact laws aimed at triangular relationships, as discussed.

<sup>368</sup> 2012 Act Establishing a Temporary Worker’s Right to Know, Title XXI Massachusetts General Laws, Chapter 149, Section 159C(a) et seq.

<sup>369</sup> Day and Temporary Labor Services Act, 820 Illinois Compiled Statutes (ILCS) 175.

California has a “responsible contractor” law that prohibits a firm from entering into a contract for certain types of labor if the contracting party knows, or should have known, that the contract does not provide “sufficient” funds to allow compliance with applicable labor laws.<sup>370</sup> In September 2014 a new measure was enacted requiring companies who use workers provided by staffing agencies to “share with a labor contractor all civil legal responsibility and civil liability” for the payment of wages and the provision of workers’ compensation insurance, supplemental to any other legal theories of liability.<sup>371</sup>

Applied to the crowdwork context, elements of these laws could be adapted as a model for requirements on specialized registration, licensing, disclosure and recordkeeping. At a baseline, all platforms, even those that operate on a microtask basis, should be required to keep records of essential information, including all tasks performed, remuneration paid per task, and average hourly pay per worker. Regulation could also cover information crowdwork platforms must give to workers. Platforms could be obligated to disclose the identity and contact information of the client and the purpose of the project, so that workers would know what their labor was contributing to and clients could not hide behind anonymous usernames. They should also be asked to report the estimated hourly wage for a specific task, as well as the average hourly earnings for crowdworkers completing the client’s tasks. The law could also mandate structural mechanisms that would enable wage bargaining or negotiation between clients and crowdworkers and a transparent bilateral reputation system, in which both clients and workers have the opportunity to rate and comment on one another’s work.

In platforms based on a structure such as Upwork, where neither the clients nor the platforms unilaterally set rates but rather negotiate them with workers, an additional set of disclosures could be mandated. This information should, at the very least, enable workers to knowledgeably submit bids and could include, for example, existing bids on specific open jobs (range and average), wage rates paid by the client to workers in prior jobs or, where feasible, a platform-wide average rate disaggregated by type of job or level of experience/educational attainment required. At a minimum, platforms should be encouraged to voluntarily make this kind of information available, even if not required by law.

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<sup>370</sup> Section 2810 California Labor Code (covering construction, farm labor, garment, janitorial, security guard, and warehouse contractors). To recover, workers must show that the outsourcing entity “knows or should know” of the contract’s insufficiency in funds.

<sup>371</sup> Section 2810.3 California Labor Code.

Further, as with California's law, liability and statutory penalties could be imposed on platforms like AMT that fail to ensure that their clients are paying the equivalent of an hourly minimum wage. California's imposition of joint liability on companies that use staffing agencies could also be modified to impose legal responsibility on platforms for any non- or underpayments by clients; all platforms might then choose to institute payment protection policies much like those Upwork already uses.

### **c) Payment Protection**

One of the critiques of AMT in particular is the clients' ability to decline work performed with virtually no explanation. Although crowdwork sites are "sites of employment ... the right to be paid for one's labor is no longer guaranteed."<sup>372</sup> One possible reform, then, would be to require platforms to operate on a presumption that completed work is remunerable and to institute some kind of dispute resolution process that places the burden on the client to demonstrate that the work was not, in fact, completed.

A different model would be the Freelance Isn't Free Act recently enacted by the New York City Council and signed into law by the Mayor.<sup>373</sup> This law requires any client who hires a freelancer for a project in excess of \$800 to execute a written contract describing, at a minimum, the rate and method of payment and the payment due date. It allows for aggrieved freelancers to bring a complaint to an administrative agency, which is empowered to issue payment orders as well as civil penalties. While microtasks would not fall under the bill's minimum amount-in-controversy requirement, a similar bill could apply to platforms offering larger projects (above and beyond any dispute resolution mechanisms they institute voluntarily or in compliance with a prospective legal requirement). In theory, at least, a platform like AMT might be held accountable for unpaid microtasks performed for multiple requesters (assuming that any provider had suffered a significant number of rejected tasks within a reasonable period).

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<sup>372</sup> Gray (n 214) (describing Indian man who hired his own team and after three years, and dependent on the income, their accounts were shut down with no explanation given beyond "I am sorry but your Amazon Mechanical Turk account was closed due to a violation of our Participation Agreement.... Any funds that were remaining on the account are forfeited, and we will not be able to provide any additional insight or action.").

<sup>373</sup> N.Y.C. Council, Bill Int. 1017-2015, enacted November 16, 2016. <[legistar.council.nyc.gov/LegislationDetail.aspx?ID=2530972&GUID=61F8754B-80AF-493E-895E-D6D17209776E](http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2530972&GUID=61F8754B-80AF-493E-895E-D6D17209776E)>.

#### **d) Voluntary Initiatives**

Government regulation is critical to promoting the well-being of crowdworkers, especially in framing minimum standards. Nonetheless, given serious legislative gridlock in the U.S. at the federal level and worker-friendly legislatures in only some cities and states, voluntary initiatives are also important. Platforms can and should be urged to self-regulate and adopt best practices even where not legally required; indeed, some platforms have begun discussions with a number of unions and other worker organizations.

One concern often raised by crowdworker advocates that could be addressed by voluntary initiative is reputation portability. At present a crowdworker working on multiple platforms is unable to transfer positive ratings from one platform to another, even though the work performed across the platforms may be similar. A challenge, however, is that different platforms target different demographics and work subjects: the fact that one is an accomplished Turker might have little relevance to one's performance on Topcoder, and vice versa. The optimal mechanisms for ensuring reputation portability is a good example of an issue that may be better determined by crowdwork platforms (and participants) than by government regulators, as platforms are likely to be more knowledgeable and sensitive about which kind of reputation information is most useful and for which platforms. Likewise, mechanisms that enable bilateral ratings – of workers by clients and vice versa – should be a part of platform architecture.

Another area for voluntary platform action is that of worker voice. At a minimum, platforms should be encouraged to establish online forums and channels of dialogue with workers, whether to allow negotiation over rates, to address specific disputes or to solicit feedback on improvements to the system as a whole. Platforms should also be nudged to go further: to provide links to relevant unions and advocacy organizations on their platforms, so that workers can find information and support, and, beyond that, to establish relationships with independent unions or worker organizations that could represent crowdworkers in disputes, advocate on their behalf and confer with the platforms over the adoption of standards for good crowdwork.

Finally, the area of benefits provision is key. At a minimum, platforms should, as Upwork has done in its collaboration with the Freelancers Union, provide workers with access to information about affordable health, life and retirement benefits. But platforms could go further. By slightly raising the fees that they charge clients, platforms could contribute pro rata to a benefits fund, thus par-



tially subsidizing crowdworkers' benefits costs (even if not shouldering the full burden as a traditional employer would do).<sup>374</sup>

### **e) Areas for Additional Study**

Wage and hour norms, recordkeeping and disclosure requirements, and guaranteed payment mechanisms are all time-tested solutions to problems as old as the modern labor market itself. But certain crowdwork platforms raise novel questions that will take more innovative answers.

One such issue relates to intellectual property protection, particularly on the challenge-based platforms like Topcoder and InnoCentive that involve submissions of many proposals and the selection of only a few winners. While clients and platforms do not formally acquire the rights to intellectual property of entrants whose work has not been selected, there may be risks of appropriation nonetheless. Further research is needed to determine whether misappropriation ever occurs and how any intellectual property disputes might be resolved. Whether existing intellectual property protection rules are a good fit with the crowdwork model and whether sufficient safeguards exist to prevent client property from being misappropriated by competitors should be evaluated as well.

Because the labor market implications of crowdwork have largely been presented by the platforms themselves or a handful of independent researchers, we have no clear answers to crucial questions such as whether or not jobs are actually being replaced by contingent freelance—or even competition-based—work. Whether platforms like Topcoder, InnoCentive and Upwork are creating new jobs or merely replacing existing jobs with a structure that offers less security, protections and remuneration to workers is a key issue in determining if their models are truly socially beneficial and how pervasively they should be regulated.

Another important issue is the demographics of the workforce on these platforms. Regulatory responses may differ, for example, if otherwise employed individuals use crowdwork platforms almost exclusively as supplemental in-

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<sup>374</sup> The provision of benefits is a factor weighing toward employment status under the common law agency test used by numerous states, as well as by the NLRB and the Internal Revenue Service for tax purposes. As discussed above, this has apparently deterred some platforms from contributing to their workers' benefits, for fear that doing so would jeopardize their independent contractor status.

come on a part-time basis or if large numbers of workers rely on them for a significant amount of their total income.

Closely related to the impact on labor markets is the effect of regulation on the crowdwork industry itself. Large, established crowdwork platforms (that do not operate on a race-to-the-bottom model) may be able to bear the costs of adapting to regulatory requirements because of their economies of scale, but these may make it more difficult for new entrants to the field. Still, given that what is proposed are a set of minimum standards to promote basic, fair working conditions and to offset information asymmetries, it may be that a platform that cannot comply with these should not be in business in the first place.

## **2. Broader Reforms for the Changing Workplace**

We now return to the discussion of larger reforms that could be introduced to address transformations in work relationships more generally, not just those in the crowdwork or platform economy. As discussed, three key themes have emerged from the broader dialogue on the future of work: rethinking the notion of “employment,” especially the question of creating an intermediate category; reexamining the link between social protections and employment; and restoring worker voice and power. These themes are interconnected, and each requires choices that will not be easy in the highly polarized political atmosphere in the U.S. Nonetheless, there has already been some dynamic thinking and experimentation, particularly at the local level and by workers and their advocates, directed at finding ways to tackle the anxieties of the “new” economy’s “flexible” working arrangements.

The proposal to create an intermediate category that would give so-called independent workers in triangulated relationships the rights and benefits of some laws but not others has drawn little support, probably wisely, for the reasons explained. But the proposal has successfully focused attention on the limits of the existing legal regime’s binary classification in setting the boundaries for workplace protections. At a minimum, we should consider adoption of a single definition of “employee” and “employer” for all workplace laws to eliminate inconsistent results.<sup>375</sup>

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<sup>375</sup> This recommendation was included in the 1994 Final Report of the Dunlop Commission on the Future of Worker-Management Relations, established in 1993 by the Secretary of Labor and Secretary of Commerce. The commission’s recommendations did not result in labor law reform. <[www.dol.gov/\\_sec/media/reports/dunlop/dunlop.htm](http://www.dol.gov/_sec/media/reports/dunlop/dunlop.htm)>.

But beyond that, and consistent with the issues explored in this crowdwork study, we should be considering a range of questions: For instance, should changes in the coverage provisions of labor laws be made so that workers performing services have protections, including the right to effectively organize and bargain collectively, taking into account sweeping changes in technologies, business models, the nature and organization of work and the employment relationship? Are the law's exclusions still justifiable? For those excluded as independent contractors, should antitrust law constraints on their collective action be lifted? And who should be held accountable for compliance with labor law obligations, in light of evolving business practices and alternative work arrangements that increasingly allow firms less accountability, leaving large numbers of workers on their own to shoulder the risks of a ruthless economy? Indeed, a range of scholars and policy analysts are beginning to rethink the notion of employment itself as the gateway for rights and social protections, particularly in the platform context.

Meanwhile, more concrete proposals are emerging that would reimagine our patched-together social safety net to create a system of social protections that do not depend on an employment relationship, with universal access to benefits that would be portable and prorated, with mandatory contributions made for all work performed. A wide range of ideas is in play, looking at models both old and new, and various pilot projects are under consideration at both the local public level and by private actors. At this early stage of the discussion, all of these ideas warrant exploration and experimentation.

Restoring worker voice and power is critical to this conversation, especially in an environment with weak labor market institutions and given the time, costs and uncertainties of litigating employee status. Workers' bargaining power has steadily eroded for decades, and the basic labor law has been totally resistant to legislative change. Comprehensive reform is not politically viable for now. But stronger law would follow from a stronger labor movement, not the other way around, and there are signs that workers are up to the task, as the fast food workers' "Fight for 15" campaign has shown.<sup>376</sup> "Collective action is indispen-

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<sup>376</sup> N Scheiber, 'Eyeing the Trump Voter, "Fight for \$15" Widens Its Focus', *New York Times* (New York, 29 November 2016) <[www.nytimes.com/2016/11/29/business/economy/fight-for-15-wages-protests.html?ref=business&\\_r=0](http://www.nytimes.com/2016/11/29/business/economy/fight-for-15-wages-protests.html?ref=business&_r=0)> ("Many of the movement's successes came in cities and states, where its pressure helped enact new minimum wage laws, and with individual employers whom the movement helped persuade to lift wages voluntarily").

sable to the success of every social human endeavor,<sup>377</sup> and in a regulatory vacuum, the exercise of worker voice and power can provide a check on unfettered, unilateral or exploitative business practices.

Given the experience they can bring to the table, established labor unions and worker advocates can play obvious roles, and some (like the IGMetall in Germany) are beginning to explore those possibilities, even aside from traditional collective bargaining. These range from introducing excluded workers to collective action and assisting their efforts to improve their conditions of work through both offline and emerging online mechanisms; to engaging with platforms (and other firms) to give them incentives to commit to good job codes setting fair labor standards, like the Domestic Workers Alliance has pursued; to providing services and benefits to individuals working outside the protections of the law; to seeking to represent and advocate for the excluded; to exploring worker ownership opportunities. The Teamsters' legislative initiative in Seattle and the Machinists' recent agreement with Uber, for example, will test what is possible.

These public policy challenges call for a multitiered reform agenda, mixing rigorous enforcement of existing laws and strategic litigation over "employee" status, where there are achievable objectives, with both public and private strategies at the local and federal levels. For Americans, "as history teaches us, most social and economic shifts that improve lives don't actually begin with a national policy." It is at the state and local level where "innovations and social movements are born and tested for their ability to address emerging tensions."<sup>378</sup> Should the political moment arrive for legislative action at the federal level, there will be a record to build on. But notwithstanding impressive efforts through litigation, advocacy and private initiatives, it seems fanciful to expect that the goal of improved conditions can be achieved on any scale without government intervention, relying solely on the market's ability to correct or self-regulate.

The current exploration of public and private strategies offers a glimmer of hope of finding ways to maximize the opportunities presented by technological

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<sup>377</sup> N Hanauer, 'Confronting the Parasite Economy', *American Prospect* (16 May 2016) <[prospect.org/article/confronting-parasite-economy](http://prospect.org/article/confronting-parasite-economy)>.

<sup>378</sup> T Kochan, 'Election rage shows why America needs a new social contract to ensure that the economy works for all', *The Conversation* (16 November 2016) <[theconversation.com/election-rage-shows-why-america-needs-a-new-social-contract-to-ensure-the-economy-works-for-all-68296](http://theconversation.com/election-rage-shows-why-america-needs-a-new-social-contract-to-ensure-the-economy-works-for-all-68296)>. See also RC Schragger, 'Mobile Capital, Local Economic Regulation, and the Democratic City' (2009) 123 *Harvard Law Review* 482.

change without further aggravating persistent labor market strains, like stagnating wages, disappearing jobs, power imbalances and accelerating income inequality. While technological disruption has proceeded largely indifferent to its impact on labor,<sup>379</sup> the adverse effects of technology are not inevitable. With wise public policy choices to change the rules of the game, informed by accurate data and careful research, we could do a better job to ensure that the gains from technological advance are broadly shared, not “mostly seized by the rich and powerful.”<sup>380</sup>

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<sup>379</sup> S Zuboff, 'Disruption's Tragic Flaw', *Frankfurt Allgemeine* (17 April 2016) <[www.faz.net/aktuell/feuilleton/debatten/the-digital-debate/shoshana-zuboff-on-the-sharing-economy-13500770.html](http://www.faz.net/aktuell/feuilleton/debatten/the-digital-debate/shoshana-zuboff-on-the-sharing-economy-13500770.html)>.

<sup>380</sup> R Skidelsky, 'The Rise of the Robots', *Project Syndicate* (19 February 2013) <[www.project-syndicate.org/commentary/the-future-of-work-in-a-world-of-automation-by-robert-skidelsky](http://www.project-syndicate.org/commentary/the-future-of-work-in-a-world-of-automation-by-robert-skidelsky)>.

## C. Crowdwork in Germany

*Bernd Waas*<sup>1</sup>

### I. Legal Status of Crowdworkers

#### 1. Legal Framework: The Triangular Relationship of Crowdworker, Platform and Crowdsourcer

Crowdwork is part of a much larger phenomenon: the platform (or sharing) economy. Companies that are advancing this concept (Uber, Airbnb, etc.) now count among the world's largest businesses in transportation, hospitality and other sectors. In Germany, too, this sector is progressing.

A report issued by the Economics and Statistics Administration of the U.S. Commerce Department in June 2016 defines "digital matching firms" by the four following characteristics: (1) use of information technology (IT systems), typically available via web-based platforms, such as mobile apps on Internet-enabled devices, to facilitate peer-to-peer transactions; (2) reliance on user-based rating systems for quality control, ensuring a level of trust between consumers and service providers; (3) offer of flexibility in deciding their typical working hours to workers who provide services via digital matching platforms; (4) reliance on the workers using their own tools and assets to the extent that tools and assets are necessary to provide a service.<sup>2</sup> Crowdwork basically meets all these characteristics. It is unique, however, in the sense that it is about "obtaining needed services, ideas, or content by soliciting contributions from a large group of people and especially from the online community rather than from traditional employees or suppliers".<sup>3</sup> Moreover, with Uber and others the exchange of services and money takes place in the "real world," whereas crowdwork is instead performed on a "virtual level".<sup>4</sup>

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<sup>1</sup> Bernd Waas, Professor of Labour Law and Civil Law Goethe University Frankfurt am Main.

<sup>2</sup> <http://www.esa.doc.gov/sites/default/files/digital-matching-firms-new-definition-sharing-economy-space.pdf>.

<sup>3</sup> This is the definition of "crowdsourcing" provided by Merriam-Webster.

<sup>4</sup> *Däubler*, SR 2016, p. 2 (9).

Though the definition of crowdwork provided above may be to the point, a closer look reveals that there are various forms of crowdwork and various forms of crowdworking.<sup>5</sup> Correspondingly, the platforms that do exist have different business models,<sup>6</sup> ranging from services that are close to that of (traditional) employment agencies<sup>7</sup> to “‘take-it-or-leave-it’ model(s), where requesters (...) unilaterally set all of the terms and conditions for providers”.<sup>8</sup> In any event, crowdwork is based on a triangular relationship between the crowdworker, crowdsourcer and platform. To arrive at a legal definition of crowdwork, it must first be analysed. However, the problem arises that the underlying approaches are frequently completely different. It seems that the manifestations in practice, at least, can be traced back to two basic types: in one case, in addition to the legal relationships between platform and crowdsourcer as well as between platform and crowdworker, a direct legal relationship between the crowdsourcer and crowdworker exists as well. In the other case, a contractual relationship between the crowdsourcer and crowdworker is precluded.<sup>9</sup> The question thus arises how these approaches can be legally defined.

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<sup>5</sup> Cf. also *Liebman*, B. IV.: „Crowdwork is as varied as the economy itself”.

<sup>6</sup> Cf. again *Liebman*, B. IV., who on the basis of *Kaganer et al.*, ‘Managing the Human Cloud’ (2013) 54 MIT Sloan Management Review 26, differentiates between four different models of paid online outsourcing arrangements.

<sup>7</sup> See the description of the set-up at the platform Upwork by *Liebman*, B IV. 2.: “All services rendered for Upwork are subject to a competitive bidding and negotiation process where workers and employers exchange offers and experienced workers have the possibility of securing greater compensation”. In any event, the service “Upwork Payroll,” according to *Liebman*, *ibid.*, “functions like a traditional staffing agency”.

<sup>8</sup> *Liebman*, B IV. 3. See also her discussion of the business model of the platform Topcoder, according to which the platform „relies on breaking down traditional steps of a (...) project (...) into a series of online competitions, which are then structured as a ‘game plan’”. In terms of German law, the question would arise whether the platform is to be qualified as a so-called “contractor” within the meaning of section 631(1) of the Civil Code who “is obliged to produce the promised work” with the crowdworkers being his subcontractors.

<sup>9</sup> Cf. only § 2 sentence 3 of the GTC of the clients of clickworker GmbH: “Contractual relationships between the client and clickworkers of clickworker are not established”. According to § 1 no. 4 of the GTC of Testbirds GmbH, contractual relationships are established between Testbirds and the “testers”.

A double observation serves as a point of departure for the consideration that will follow: on the one hand, that platforms often, if not predominantly, function as mere “intermediaries”,<sup>10</sup> and on the other, that the services platforms offer are targeted at companies in particular, holding out the prospect of flexible access to a nearly inexhaustible reservoir of workers. Against this background one may consider the possibility of viewing the platform as a legal representative of or even only an intermediary of the crowdsourcer. In the former case, the platform would conclude a contract with the individual crowdworker in the name of the crowdsourcer. In the latter case it would only “deliver” the crowdsourcer’s offer of a contract. In the one case as in the other, a contract with the crowdsourcer would be established with the crowdworker’s mutual consent. The legal basis for the activity of the platform would in both cases be discernible through a contractual relationship between it and the crowdsourcer. Such an approach is theoretically conceivable. Yet a position of the platform in the above-described sense is usually not wanted by the parties.<sup>11</sup>

Alternatively, one could consider that the platform is obliged to provide services to the crowdsourcer. German law does in fact cover the so-called contract for the procurement of services (*Dienstverschaffungsvertrag*).<sup>12</sup> Different variations on such contracts exist: if the contract covers the provision of so-called dependent services, either provision of temporary employees (*Arbeitnehmerüberlassung*) or job placement (*Arbeitsvermittlung*) exists. As regards the provision of temporary employees – which to some extent represents the “classical triangular relationship under labour law” – the only obligation is to confer authority to the contracting party to give relevant instructions; a contractual relationship between the crowdsourcer and crowdworker would thereby not be established. As regards placement services, the obligation is based on providing the contracting party the possibility of concluding an employment contract. This would entail the establishment of a contractual relationship between platform and crowdworker once he or she concludes an employment relationship brokered by the platform. The situation differs when the contract aiming at the provision of services covers independent services. In this case it may be that the parties didn’t want to grant a third party a right to claim the service. In that case a

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<sup>10</sup> Consider, by contrast, companies like Uber or Lyft which „may present stronger cases for establishing an employment relationship than a crowdwork platform that more closely resembles a marketplace”, *Liebman*, B V. 2.

<sup>11</sup> Cf. only § 3.1 of the GTC for the use of the online platform twago, which explicitly excludes acting as a “representative or agent of a user”.

<sup>12</sup> This may not be regulated in the Civil Code, but is generally accepted; cf. only *Fuchs*, in: *Bamberger-Roth, BeckOK-BGB*, 42<sup>nd</sup> ed., 2017, § 611 BGB note 12.



*Dienstvertrag* (contract of service) would exist between the platform and the crowdworker, which would be implemented by the latter through services provided for the crowdsourcer. If by contrast the status of creditor and thus a claim to the services is to be granted to the crowdsourcer, the underlying contract represents a brokerage agreement (*Maklervertrag*). Just as in the case of the placement of services, a contract would be concluded between the crowdsourcer and the crowdworker based on activities of the platform; this would not, however, be an employment contract but a (freelance) contract of service.<sup>13</sup> Finally, it is also conceivable that the commitment entered into by the platform does not focus on the procurement of services but on achieving a specific objective.<sup>14</sup> In this case, either a contract for work and services (*Werkvertrag*) between the platform and the crowdworker would be established, which would have to be implemented by the latter for the crowdsourcer, or it again would be considered a brokerage agreement which would, however, be aimed at eventually concluding a contract for work and services. It cannot be excluded from the outset that a classification in individual cases into one of those contract types takes place. The relationships the platform CrowdFlower establishes are, for example, reminiscent of employment contracts or contracts for work and services, which are implemented by the crowdworker who performs services requested by the crowdsourcer.<sup>15</sup> In the majority of cases, however, recourse to the mentioned contract types does not seem to be an option.

It should be noted that when taking a closer look, the commitment platforms explicitly enter into is usually limited to effectively making available a “meeting place” for the participants.<sup>16</sup> The best example for this might be the platform Amazon Mechanical Turk: under the arrangements with the parties concerned, the service rendered by the platform does not consist of brokerage services. Instead, firms and individuals are provided the possibility to build a business network.<sup>17</sup> Even if direct contractual relationships between a crowdworker and

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<sup>13</sup> Cf. *Hamann*, in: Schüren/Hamann, AÜG, 4<sup>th</sup> ed., 2010, § 1 AÜG notes 216 et seq.

<sup>14</sup> Cf. *Fikentscher*, AcP 1990 vol. 190, p. 34.

<sup>15</sup> Cf. § 4 sentence 1 of the GTC for clients of clickworker GmbH: “Work products produced by the Clickworker are made available by them to clickworker and are thereafter transmitted by clickworker to the client”.

<sup>16</sup> Cf. also *Hötte*, MMR 2014, 795 (797) with qualification as a service contract. See also *Leimeister/Zogaj*, Neue Arbeitsorganisation durch Crowdsourcing, Hans Böckler Stiftung, Arbeitspapier 287, 2013, p. 46 referring to platforms as „tools for interaction“.

<sup>17</sup> Cf. also § 1.1 of the GTC for using the online platform twago: “Object of this contract is access to the online platform twago (“online platform”) for the purposes as described in the preamble of the GTC, on which the users may represent themselves

crowdsourcer arise, these would then definitely not have been established because of brokerage services of the platform, but because the crowdworker and crowdsourcer used the opportunity made possible by the platform to access business contacts.<sup>18</sup>

The following legal analysis cannot reasonably take all the different forms of crowdwork/crowdsourcing into account.<sup>19</sup> Instead, it will focus on the widespread use of platforms as “intermediaries” to offer relatively small and clear-cut “work packages” to the crowd. Establishing this focus allows the problems that crowdwork poses for labour law to become most obvious.<sup>20</sup> The key question, then, would be whether and when a crowdworker qualifies as an employee.

## 2. The Crowdworker as Employee

This would require that an employment contract can be established within the scope of the relationship between the crowdworker and the crowdsourcer or within the scope of the relationship between the crowdworker and the platform.<sup>21</sup> This question could now indeed cancel itself out on its own if we consider the results of the initial analysis carried out above. It reveals that the platform’s contractual promise is often limited to providing users the possibility of “meeting”. Moreover, platforms regularly undertake every effort to exclude the establishment of an employment contract (and the qualification of crowdwork-

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and contact other users. twago creates, services and maintains the online platform, however does not itself act as an intermediary between the users”; cf. moreover § 3.1 sentence 3: “The users will negotiate their projects independently among themselves. twago will provide the users solely with the necessary infrastructure (...)”.

<sup>18</sup> Cf. in this regard also *Kotzian-Marggraf*, in: Bamberger-Roth, BeckOK-BGB, 42<sup>nd</sup> ed., 2017, § 652 BGB note 3 (for Internet auctions). For qualification as a contract for work and services, supplemented by the application of landlord-tenant laws, in cases in which there is no more on offer than the mere creation of the possibility (...), to make business contacts”, *Redeker*, in: *Redeker*, IT-Recht, 5<sup>th</sup> ed., 2012, D: Rechtsprobleme von Internet und Telekommunikation note 1183.

<sup>19</sup> Cf. In this regard also *Prassl/Risak*, Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork, in: *Comparative Labor Law and Policy Journal* 2016, p. 619 referring to “the sheer heterogeneity and complexity of underlying fact patterns”.

<sup>20</sup> In the U.S. chapter, this model is referred to as the “aggregator” model; see *Liebman*, B IV. 1.

<sup>21</sup> Leaving aside at this stage the possibility of the platform and the crowdsourcer being “joint employers” of the crowdworker.

ers as employees) in their general terms and conditions.<sup>22</sup> One should not feel discouraged, though. As regards the question of the qualification of a legal relationship as an employment relationship it is, as will be demonstrated shortly, less about the designation chosen by the participants than the actual contract implementation. Accordingly, it is not unthinkable that we would ultimately agree that an employment relationship does in fact exist (between the crowdworker and crowdsourcer or between the crowdworker and platform).

### a) Concept of Employee in Germany

Without elaborating the concept of employee in German law in detail here, it should nonetheless be noted that the employment contract – as opposed to the so-called freelance contract of service – requires the provision of dependent services,<sup>23</sup> whereby this dependence usually manifests itself in such a way that the employee is subjected to the instructions of another.<sup>24</sup> Case law lays down the so-called typological method for qualifying specific legal relationships. It is defined by the insight that it is impossible from the outset to determine criteria that can claim validity for all employment relationships. Instead, qualification depends on the “overall picture”.<sup>25</sup> According to case law, there is no single criterion out of a multitude of criteria that is indispensable in order to be able to speak of a so-called personal dependence (*persönliche Abhängigkeit*). Likewise, there is no single criterion for dependence that does not at times also apply to self-employed workers.<sup>26</sup> Furthermore, an employment relationship only differs from the legal relationship of a freelance worker “by the degree of personal dependence (...) in which the service provider finds himself”.<sup>27</sup> The extent of

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<sup>22</sup> According to 1.1 of the General Terms of the platform *twago*, for instance, the contract opens access to the platform and aims at „users to come into contact with each other“. Pursuant to § 2 of the General Terms for principals of *clickworker GmbH* „Clickworker provides the technical for the operation of a marketplace“.

<sup>23</sup> The concept of employee developed in law (and essentially adopted by case law) is defined as follows: “An employee is a person who, based on a private law contract or an equal contractual relationship, is obliged to perform work in the service of another”; so Hueck/Nipperdey, *Lehrbuch des Arbeitsrechts*, vol. 1, 7<sup>th</sup> ed., 1963, § 9 II. The criterion “in the service of another” refers to the requirement of personal dependence; cf. only Richardi, in: Richardi a.o. (ed.), *Münchener Handbuch des Arbeitsrechts*, 3<sup>rd</sup> ed., 2009, § 16 note 16.

<sup>24</sup> See section 611a(1), sentences 1-3 which came into force as of 1 April 2017. This provision basically reflects the criteria that have been developed by the courts.

<sup>25</sup> See also section 611a(1) sentence 5 of the Civil Code.

<sup>26</sup> Federal Labour Court, AP BGB § 611 Abhängigkeit No. 34.

<sup>27</sup> Federal Labour Court, AP BGB § 611 Abhängigkeit No. 26.

possible “subservience to instructions” hence plays a significant role in the determination of personal dependence. However, being subjected to another person’s power to issue instructions is not equivalent to personal dependence. Rather, “subservience to instructions” is only one of several distinctive features, and it could be entirely missing in the performance of individual services, such as is usually the case with chief physicians, researchers or artists (bearing in mind that these individuals are not regularly subjected to issues regarding the content of their duties).<sup>28</sup> Accordingly, this much can be said: the stronger the “subservience to instructions” in relation to place of work, working hours and type of work to be performed, the more likely the assumption that an employment relationship exists.

In addition to the question about “subservience to instructions”, the courts often focus on whether a person is integrated in the business of another. The question then arises whether that person is dependent on the work organisation established by someone else and uses its instruments/equipment.<sup>29</sup> In this context, reference is often made to “organisational dependence” (*organisatorische Abhängigkeit*). What this implies is a dependence on the equipment and tools provided by another, as well as the requirement to collaborate with others.<sup>30</sup> Legal literature has occasionally been critical of the fact that the question of integration must fail if no work organisation exists. Apart from that, it has been noted that the additional value of focusing on integration is limited when ultimately only the concept of personal dependence is being described.<sup>31</sup> In any case, the concept of integration is inefficient when, as is repeatedly the case in the rulings of the Federal Labour Court, integration is deduced simply from personal dependence on another.<sup>32</sup>

In the legal literature, it is sometimes argued that the legal qualification of a relationship should basically depend on a risk assessment. Accordingly, the key question must focus on the existence or nonexistence of entrepreneurial risk. Anyone who voluntarily bears such risks shall be qualified as being self-

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<sup>28</sup> Federal Labour Court, AP BGB § 611 Abhängigkeit No. 16.

<sup>29</sup> Federal Labour Court AP BGB § 611 Abhängigkeit No. 73.

<sup>30</sup> This in particular refers to cases when similar tasks are carried out by employees within the same organisational context; so Federal Labour Court, AP BGB § 611 Abhängigkeit No. 17.

<sup>31</sup> *Richardt*, in: *Richardt a.o. (ed.), Münchener Handbuch des Arbeitsrechts*, 3<sup>rd</sup> ed., 2009, § 16 note 25.

<sup>32</sup> Federal Labour Court, AP BGB § 611 dependence No. 74 (under B.I.1.): “Integration in another’s work organisation is specifically indicated when the employee is subjected to the employer’s right to instruct”.

employed. On the other hand, persons who either do not bear such risk or do so involuntarily shall be qualified as employees.<sup>33</sup> The Federal Labour Court, however, is reluctant to apply this approach and basically sticks to the “dependence-test” as described above.<sup>34</sup>

As already mentioned, the designation of the contractual relationship by the parties does not play a decisive role in the qualification of a specific contract as a contract of employment. The objective content of the contractual relationship, i.e., the actual contract implementation, takes centre stage. Indicators of the contractual arrangements and practical implementation of the employment relationship can be drawn on, e.g., the obligation to exclusively provide services (exemption from performing work for others), the provision of work-related equipment by the contracting party, remuneration (single fee or monthly salary), the payment of taxes and social security contributions, request for an income tax card or granting of leave. In other words: the qualification of a contract is based on the actual content of the contract, regardless of its designation.<sup>35</sup> If an assessment of the objective circumstances indicates that the parties have concluded an employment contract (notwithstanding a contrary designation), the courts will correct their erroneous classification of the contract type—in compliance with the principle of the so-called transgression of legal form (*Rechtsformverfehlung*).<sup>36</sup> More specifically: those who “in reality” execute an employment contract *must* use the contract type “contract of employment”.

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<sup>33</sup> See, especially *Wank*, *Arbeitnehmer und Selbständige*, 1988, p. 391, see also *Prassl/Risak*, *Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdfwork*, in: *Comparative Labor Law and Policy Journal* 2016, p. 619 pointing at the relevance of „economic dependency”.

<sup>34</sup> See Federal Labour Court of 25 May 2005 – 5 AZR 347/04 according to which the bearing of entrepreneurial risk was “irrelevant”. The court did, however, acknowledge that the person in question was an “employee-like person”. Cf. also with regard to the U.S., *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (D.C. Cir. 2009). According to the court, the key factor in the determination was whether the drivers retained – rather than exercised – a significant entrepreneurial opportunity for economic gain or loss.

<sup>35</sup> Cf. only Federal Labour Court, AP BGB § 611 dependence No. 26: “The guaranteed social protection of an employee based on mandatory labour laws cannot be circumvented because the parties designate the existing relationship to be another form of relationship than one of employment and that they consciously or unconsciously waive the legal consequences associated with the existence of an employment relationship”.

<sup>36</sup> Cf. only *Preis*, in: *Müller-Glöße i.a. (eds.), Erfurter Kommentar zum Arbeitsrecht*, 17<sup>th</sup> ed., 2017, § 611 BGB note 41. See also section 611a(1) sentence 6 of the Civil Code according to which the facts prevail over the designation of the contract.

## **b) Legal Qualification of Crowdworkers**

If we now turn to the question whether the status of employee might apply to a crowdworker, we must from the outset differentiate between the relationship between the crowdworker and the crowdsourcer and that between the crowdworker and the platform.

### **aa) Relationship Between Crowdworker and Crowdsourcer**

As regards the former relationship, verifying the existence of an employment relationship is especially challenging from the outset: though qualification as an employment contract is also possible according to the above-mentioned transgressor of legal form even if the parties did not initially want to conclude such a contract, a prerequisite is in any case that a contractual relationship exists between the parties. In the relationship between the crowdsourcer and crowdworker, however, the existence of a contract is often explicitly excluded. The argument of transgressor of legal form does not hold: an erroneous contract choice can of course be corrected. However, the fact that the parties did not want to conclude a contract cannot be disregarded.<sup>37</sup>

There are cases, however, where contractual relationships between crowdworkers and crowdsourcers come into existence despite a lack of direct communication.<sup>38</sup> If that is the case, it must be asked whether the relationship is such that it amounts to sufficient “dependence”.<sup>39</sup>

### **bb) Relationship Between Crowdworker and Platform**

As regards the relationship between the crowdworker and the platform, two issues in particular must be raised: on the one hand, one needs to determine whether based on “traditional” evidence there are any indications for the exist-

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<sup>37</sup> Often crowdworkers don’t even know for what company they provide their services at the end of the day; cf. *Däubler*, SR 2016, p. 2 (8).

<sup>38</sup> See in this regard, for instance, 3.1 of the GTC for the use of the online platform twago, according to which contracts are exclusively concluded (and performed) by the users of the platform. Contractual relations exist between crowdworker and crowdsourcer in the case of Amazon Mechanical Turk, too; see also *Däubler/Klebe*, NZA 2015, p. 1032 (1033).

<sup>39</sup> Cf. *Prassl/Risak*, Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork, in: *Comparative Labor Law and Policy Journal* 2016, p. 619 pointing at the fact that “the relationship usually will only last for very limited time (...) and that the contractual partners often change frequently”.

ence of an employment relationship between the crowdworker and the platform. On the other hand, one needs to determine whether the conditions of the “gig economy” require a further development of the existing evidence on the basis of which the contractual relationship between the platform and crowdworker can be concluded to be one of employment.<sup>40</sup>

It is clear at the outset, before further examining the questions raised, that neither the fact that the services provided are by persons working from their homes nor the (related) fact that the crowdworker is not visibly integrated in the (physical) organisation of the platform precludes qualification of the relationship as employment. This becomes obvious when we compare this case with one that was recently decided in Germany: in that case the court qualified an IT programme developer as an employee, even though he worked from home and was (thus) not spatially integrated in the premises of the employer’s business.<sup>41</sup> The court found that subordination in terms of time and place was indeed lacking. But these factors were not decisive in the court’s view given the actual type of services being provided.<sup>42</sup> This is not, however, to be understood as opening the door to generally qualifying crowdwork as an employment relationship. The fact that caution continues to be warranted in this regard results from the fact that the court in its decision did indeed emphasise the aspect of integration, distinctly referring to the fact that the worker in the given case “contributed to an overall project in close collaboration with staff members [of the employer]”.<sup>43</sup> The decision is illustrative in two respects: on the one hand, that the lack of (place and time) dependence does not at all exclude verification of an employment contract. On the other hand, however, also that the lack of such depend-

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<sup>40</sup> Cf. in this regard also the most recent Communication from the Commission, European agenda for the collaborative economy, COM(2016) 356 final, p. 13: “In order to help people make full use of their potential, increase participation in the labour market and boost competitiveness, while ensuring fair working conditions and adequate and sustainable social protection, Member States should assess the adequacy of their national employment rules considering the different needs of workers and self-employed people in the digital world as well as the innovative nature of collaborative business models; provide guidance on the applicability of their national employment rules in light of labour patterns in the collaborative economy”.

<sup>41</sup> Interestingly, in terms of the so-called works constitution it may be worth noting that the courts define an „undertaking“ within the meaning of section 5 of the Works Constitution Act (*Betriebsverfassungsgesetz*) in a functional rather than a spatial sense, see: Federal Labour Court, 27.1.2004, NZA 2004, 556 (557). Accordingly, teleworkers as well as sales representatives may count as employees associated with a given undertaking.

<sup>42</sup> State Labour Court Hesse, BeckRS 2016, 65115 (note 49).

<sup>43</sup> State Labour Court Hesse, BeckRS 2016, 65115 (note 49).

ence must be outweighed by through other conditions, if the existence of an employment relationship is to be determined.

We can now actually turn to the questions raised above. In connection with the first question, some authors have pointed to the fact that platforms often monitor the performance of crowdworkers by developing so-called screenshots or by using other control mechanisms.<sup>44</sup> In fact, in addition to the “classic” element of subordination for qualification as an employment relationship, the control exercised by the contractual partner also plays a certain role; in fact, it actually seems that its significance, also from a comparative law perspective, is increasing.<sup>45</sup> That the employee status of a crowdworker could be verified based on the aspect of control is indeed anything but impossible. Some platforms identify the individual crowdworker, measure the quality of their work performance and compare it to other crowdworkers.<sup>46</sup> In such a case it can certainly be claimed that the aspect of control points towards the existence of an employment relationship.<sup>47</sup> However, this aspect cannot be considered all too promising if we consider those cases in which crowdworkers do not perform more than so-called microtasks. In that regard it seems implausible from the outset that any real control of the conduct of service providers actually takes place: the fact that the underlying tasks are not

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<sup>44</sup> Cf. *Risak*, ZAS 2015, 11 (16); *Krause*, Digitalisierung der Arbeitswelt – Herausforderungen und Regelungsbedarf – Gutachten B zum 71. Deutschen Juristentag, 2015, B 104 (with regard to micro-tasks, dependence only in exceptional cases, however). See also *Leimeister/Zogaj*, Neue Arbeitsorganisation durch Crowdsourcing, Hans Böckler Stiftung, Arbeitspapier 287, 2013, p. 43 ff.

<sup>45</sup> Cf. in particular *Rebhahn*, RdA 2009, 154 (163): “While work had to be dictated in the past, the checking of results often suffices today. The criterion primarily used to delineate the employee from external determination of the work itself (subordination) has therefore lost some discriminatory power (...)”. Cf. also *Perulli*, Study on economically-dependent work/parasubordinate (quasi-subordinate) work, 2003, p. 15 et seq. On the other hand, it should be noted that in the case of so-called trust-based working hours (*Vertrauensarbeitszeit*) there is an employment relationship even if the person works autonomously and independently without the other party exerting control or recording time.

<sup>46</sup> Cf. *Liebman*, B III. 3a) based on the example of CrowdFlower.

<sup>47</sup> Similarly *Däubler*, SR 2016, p. 2 (36). This applies in particular in cases in which the crowdworker is obliged to keep “work diaries”; cf. in that regard also *Liebman*, B V. 1.: surveillance on the platform (through its work diaries function) “surpasses that which an employer could typically exercise in a traditional workplace”. Cf. also *Otey v. CrowdFlower, Inc.*, No. 12-CV-05524-JST, 2013 WL 5734146 (N.D. Cal. Oct. 22, 2013). The court provided no detailed analysis of the employee-status issue, but found that CrowdFlower monitored the quality and ensured accuracy of work by identifying workers through “contributor IDs”.



only especially simple but can also be carried out without requiring too much time typically makes control superfluous.<sup>48</sup>

Against this background, the question arises whether the existence of an employment relationship could perhaps in fact be determined on the basis of the element of dependence. In many cases crowdworkers may not receive detailed instructions on how to perform their tasks. Yet a sufficient level of subordination could still be determined, namely, when it could be said that it suffices when the conduct of the person providing services is already determined to a high degree in the contractual agreement.<sup>49</sup> There are concerns, however, in this regard as well.<sup>50</sup> The question arises under which conditions one can actually speak of such a strong “determination” or “pre-programming” of the conduct of that person based on contractual agreements, that a parallel to the “exercised right to instruct” is justified. Even if that person only has the choice whether to

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<sup>48</sup> This would clearly need to be taken into consideration with regard to the relationship between the crowdsourcer and the crowdworker, if it is to be presumed that the control exercised by the platform could ultimately be attributed to the crowdsourcer.

<sup>49</sup> See *Risak*, ZAS 2015, p. 11 (16): “What must also be considered in the assessment is the presence of an additional instruction on work-related conduct, e.g. timeline (i.e. how much time was calculated for the completion of the work)”; cf. also *Däubler*, SR 2016, p. 2 (32): contractual determinations as „anticipated, bundled instructions“; cf. also *Däubler/Klebe*, NZA 2015, p. 1032 (1035): “When the contract stipulates instructions and in addition timelines and continuous control (...) are present, one cannot possibly yet speak of “personal dependence“? Cf. also in this regard the so-called newspaper delivery decision of the Federal Labour Court, NZA 1998, p. 368. The ruling states (under I.): “For simple tasks, especially certain mechanical manual tasks, the scope of intervention possibilities is very low from the outset. Thus, one can no longer really speak of genuine independent organisation of work (...) even when only a few organisational instructions on the performance of work are issued essentially constraining the worker. In such cases, the status of employee can also not be excluded just because the employer included the necessary instructions in the contract”. Nonetheless, *Däubler/Klebe* (ibid.) themselves assert that from this decision, “no convincing arguments for the status of employee can be deduced for crowdworkers”. This can be endorsed against the background that the court explicitly underlines the “circumstances of each individual case”. When the court thus states that the verification of status of employee considerably depends on how the “delivery of newspapers (...) is organised” and in this context focuses in particular on whether the contractual partner “can determine the precise timeframe for the performance of work by the deliverer”, then verification of the status of employee in the present context will be viewed with significant scepticism.

<sup>50</sup> More „optimistic“ *Heuschmid/Klebe*, in: Festschrift Kohte, 2016, p. 65 (68).

work in the morning, afternoon or evening (or at night),<sup>51</sup> doubts arise about the justification of drawing such parallels. After all, he does retain certain freedoms. Apart from that, the question arises whether exercising the authority to give instructions and “contractual pre-programming” can really be equated. That a person is simply “subjected” to the right to instruct suggests dependence, whereas he at least consents to the “pre-programming” in the contract, despite typically being in a weaker negotiating position than his counterpart. The fact that it makes a difference in terms of the extent and “quality” of the need for protection whether the individual is given very little room for manoeuvre from the outset or repeatedly encounters constraints to his independence in the performance of his contractual duties due to a third party’s right to instruct also cannot be ignored. Apart from all this, the problem might be less that the crowdworker’s tasks are pre-programmed on the basis of corresponding agreements, but rather that – at least as regards the performance of microtasks – detailed task descriptions are not necessary at all, because for straightforward, simple tasks it is almost self-evident what is expected from the crowdworker.

Hence, the issue whether the development of “new” indicators could contribute to the qualification of employment relationships takes centre stage.<sup>52</sup> It should be noted that many platforms provide the possibility to rate the crowdworker’s services. Accordingly, it is argued that this option provides the possibility of “disciplining”, which “affects [the crowdworker’s] potential to carry out tasks in the future”.<sup>53</sup> However, even in this case caution is advised. The possibility to rate the crowdworker is (necessarily) afforded *after* the services have been provided. Against this background one is tempted to argue that the rating can hardly contribute to the question whether the (post-) rated service constituted dependent work. At best, it can be said that a rating (or the “subjection” of a person thereto), e.g., because of possible consequences for the prospects of concluding future contracts, entails a certain dependence of the crowdworker. Yet the limitations for the prospects of concluding further contracts do not lead to a personal but rather to an economic dependence<sup>54</sup>, which according to German

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<sup>51</sup> Cf. in this regard also State Labour Court Cologne, BeckRS 2016, 68265 (employee status denied, status as homemaker affirmed).

<sup>52</sup> Cf. in this regard also *Heuschmid/Klebe*, in: Festschrift Kohte, 2016, p. 65 (68) calling for “case law in particular to develop more practical criteria that adequately address individual protection requirements and interests”.

<sup>53</sup> See again *Risak*, ZAS 2015, p. 11 (16).

<sup>54</sup> This would also apply in consideration of the fact that ratings may result in a certain commitment of the crowdworker to a specific platform, as the crowdworker would lose the advantage of having good ratings when switching to another platform.

law gives scope to verify the existence of an employee-like status but not to employee status. The notion of possible “disciplining” also does not lead very far, because the “disciplining effect” of ratings ought not to be more pronounced than that of contractual penalties, though these, just like ratings, are often found outside employment relationships and thus say little about the existence of such a relationship.<sup>55</sup>

Finally, a specific problem must be addressed, which results from the performance of so-called microtasks: when a crowdworker carries out tasks that by definition can be completed within a few hours, if not a few minutes, the question arises whether the existence of an employment relationship is not already excluded simply because of the short-term nature of such work. The literature on crowdwork recognises this problem. The claim is made that a specific minimum duration for verification of an employment relationship cannot be required.<sup>56</sup> It is indeed unclear on which requirement a minimum duration could be based. The question remains whether the element of personal dependence is or can even be present when services of extremely short-term duration are provided.<sup>57</sup> Yet here, at least in principle, an “all clear” can also be given. Tasks of short-term duration may hardly encroach on the service provider: when he sits at the laptop in the evening to sort out photos, he is not prevented from meeting friends for the cherished card game directly afterwards. However, the application of labour law really does not entail whether and the extent to which the commitment entered into constrains a person in his personal arrangements; if this were the case, then it would certainly be plausible to assume that qualification as an employee could fall short due to a minimum threshold. The question is rather whether the service provider is dependent or not *during the performance*

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<sup>55</sup> This aspect will not be further elaborated here. Another problem should be briefly addressed, however: the possibility of rating a worker is aimed at thwarting deficiencies in the performance of services. It is then difficult to discern why this should come with granting a person the benefits of an employment contract. Ratings may also be used to motivate the service provider to provide above average services (which he actually does not owe). Then it is unclear why this should have any influence on the qualification of the contractual relationship when the actual service is not even affected. The question could be raised whether and to what extent ratings are even admissible. Their admissibility in terms of employment relationships raises doubts. However, it is one question whether the inadmissibility of ratings results from the qualification of an employment relationship and a totally different question whether the ratings have any consequences for the existence of an employment relationship.

<sup>56</sup> See *Risak*, ZAS 2015, p. 11 (17); *Däubler*, SR 2016, p. 2 (34).

<sup>57</sup> Also *Risak*, ZAS 2015, p. 11 (17): “Essentially, it is about whether a personal dependence can also be possible for tasks of short-term duration”.

of services, that is, during the actual performance period.<sup>58</sup> In this regard, however, the only thing that can reasonably be said is that the extent of dependence decreases the shorter the duration of the task. Opportunities to give instructions become less and there is hardly anything left to “control” when the tasks can be completed within a few minutes. Verification of an employment relationship does not, however, seem to be excluded from the outset in case of tasks of short-term duration. The short duration of tasks as such, in other words, is less problematic than the circumstance that there is regularly a lack of indicators to determine personal dependence.

What has been said can be summarized as follows: As was already mentioned, very different business models exist in the world of crowdwork. In some of them contractual relationships exist between the crowdworker and the crowdsourcer. Some of those may qualify as employment relationships,<sup>59</sup> though in most cases the working situation of crowdworkers is “atomized in a large number of small and very limited contracts with different partners,” with the individual contract “very likely not to be an employment contract”.<sup>60</sup> In other cases contractual relationships will exist between the crowdworker and the platform. In this legal set-up it is entirely possible that a crowdworker qualifies as an employee. However, the qualification of a crowdworker as employee will often fail because there will regularly be a lack of dependence (and integration). This applies in any case, if it is assumed that the courts will (continue to) be reluctant to regard contractual stipulations as “anticipated instructions”. This does not exclude the possibility of qualifying crowdworkers as employees in individual cases. Such qualification can be justified in particular if the service provided is more demanding and requires the crowdworker to ask for further specifications,<sup>61</sup> or if crowdworkers “develop some permanence in their rela-

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<sup>58</sup> Different in *Risak*, ZAS 2015, p. 11 (17), who concludes that the “untypically short term could be compensated by a high degree of heteronomy in the provision of services”.

<sup>59</sup> It is reported that Instacart, a grocery delivery app, asked some of its workers to become part-time employees, also in order to retain better-trained working force; cf. *Aloisi*, *Commoditized Workers: Case Study Research on Labour Law Issues Arising From a Set of “On Demand/Gig Economy” platforms*, in: *Comparative Labor Law & Policy Journal*, 2016, vol. 3, no. 3. It seems that some other companies, too, indeed reclassified their workers as employees; cf. *de Stefano*, *The rise of the “just-in-time workforce”: On-demand work, crowdwork and labour protection in the «gig-economy*, in: *Conditions of Work and Employment Series No. 71*, ILO, 2016.

<sup>60</sup> *Prassl/Risak*, *Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, in: *Comparative Labor Law and Policy Journal* 2016, p. 619.

<sup>61</sup> *Däubler*, SR 2016, p. 2 (36).

tionship with [a particular platform and/or particular crowdsourcers] performing a high volume of HITS for one or more, on a regular basis".<sup>62</sup> In practice, there are platforms that have a firm base of workers who are requested constantly.<sup>63</sup> By and large, however, qualification of a crowdworker as an employee will meet with major difficulties.

### **cc) Platform and Crowdsourcer as (Joint) Employers?**

As much as it makes sense to start by conducting a legal assessment of the relationships, i.e., the relationship between the crowdworker and crowdsourcer, on the one hand, and between the crowdworker and platform, on the other, the higher the risk that the focus is unnecessarily narrowed. Instead of focusing on the relationship between the crowdworker and crowdsourcer or platform, the possibility that the crowdworker is in an employment relationship with both the crowdsourcer and platform as "joint employers" must be taken into consideration. The possibility of a joint status of employer of both the platform and crowdsourcer shifts our focus on the concept of employer in German law.

Clearly, legal doctrine has thus far paid little attention to the concept of employer in comparison with the concept of employee: neither one nor the other term has been legally defined.<sup>64</sup> Courts primarily derive the concept of employer from that of employee,<sup>65</sup> whereby it is occasionally asserted that the term "employee" forms the starting point for all thinking about the employment relationship.<sup>66</sup> According to case law, the employer is "someone who employs at least one employee".<sup>67</sup> Every (natural or legal person) can be an employer, albeit a group of companies cannot because it is not as such a legal entity.<sup>68</sup>

It is noteworthy that according to German law a joint status of employer involving several persons is not out of the question. Case law states that a so-called uniform employment relationship involving several employers is possible with the result that these persons are, e.g., liable for the payment of remuneration as

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<sup>62</sup> *Liebman*, B V. 2a).

<sup>63</sup> Cf. *Klebe*, AuR 2016, p. 277.

<sup>64</sup> Section 611a of the Civil Code which came into force as from 01 April 2017 recently changed the picture, however.

<sup>65</sup> Cf. Federal Labour Court, AP BGB § 611 Buildings management No. 1 (under II.2.): "An employer is the other party in the employment relationship (...)".

<sup>66</sup> So Federal Labour Court, AP KSchG 1969 § 1 Firm No. 9 (under II.2b).

<sup>67</sup> Federal Labour Court, AP KSchG 1969 § 1 Firm No. 9.

<sup>68</sup> Cf. *Richardi*, in: *Richardi a.o.* (ed.), *Münchener Handbuch des Arbeitsrechts*, 3<sup>rd</sup> ed., 2009, § 23 note 1.

joint and several debtors (*Gesamtschuldner*).<sup>69</sup> The establishment of such a uniform employment relationship is not necessarily tied to the requirement that the employers need to be part of the same group of companies, manage the same business operation or have jointly concluded the employment contract. To this extent, a general associative of employers can be sufficient if it prevents the relationships from being treated separately. A legal relationship in this regard can be based on the interpretation of the contract between the parties. According to case law, it can also be the result of imperative legal values of objective law.<sup>70</sup> A closer look, however, reveals that narrow boundaries exist for uniform employment relationships. Case law assumes that a uniform employment relationship exists when a domestic helper is hired by a married couple, e.g., to work in the shared household.<sup>71</sup> The courts have also occasionally dealt with cases involving several firms and the issue of their joint status of employer.<sup>72</sup> This is not likely, however, to be a viable foundation for an assumption of joint status of employer for the crowdsourcer and platform, at least as long as it is unclear which imperative legal values indicate the existence of such a relationship.<sup>73</sup>

### c) Applicable Labour Law Provisions

If we summarise the ideas presented above, it becomes obvious that a verification of status of employee for crowdworkers will usually meet with major difficulties. However, we are confronted with yet another problem. This becomes clear when we turn from the question of qualification of contracts as employ-

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<sup>69</sup> See section 421 of the Civil Code (*Bürgerliches Gesetzbuch*): „If more than one person owes performance in such a way that each is obliged to effect the entire performance, but the obligee is only entitled to demand the performance once (joint and several debtors), the obligee may at his discretion demand full or part performance from each of the obligors. Until the entire performance has been effected all obligors remain obliged“.

<sup>70</sup> Such an objective legal value can, e.g., be based on employment protection legislation; BAG AP BGB § 611 No. 1 Arbeitgebergruppe (and I. 2b) with (disapproving) commentary by *Wiedemann*.

<sup>71</sup> State Labour Court Hamburg, NZA-RR 2004, 125; cf. also *ErfKomm/Preis*, 17<sup>th</sup> ed., 2017, § 611 BGB note 191.

<sup>72</sup> Cf. *ErfKomm/Preis*, 17<sup>th</sup> ed., 2017, § 611 BGB note 191.

<sup>73</sup> As regards the law in the UK, attempts have been made to identify such objective legal values and to flesh out a „functional concept“ of the employer; see, in particular, *Prassl*, *The Concept of the Employer*, 2015, p. 155 et seq. Though there may be „building blocks“ for introducing such concept in German law, it is highly doubtful at this stage to what extent it could eventually be applied.

ment contracts and instead turn to the question of the possible applicability of labour law provisions. In this regard we face the problem that many labour law provisions require a certain continuity of the relationship between the employer and employee in the sense that they respond to risks that arise because of the permanence of these relationships or are closely associated with this aspect. One example is the regulation in section 616, sentence 1 of the Civil Code.<sup>74</sup> It stipulates that “the person obliged to perform services is not deprived of his claim to remuneration by the fact that he is prevented from performing services for a relatively trivial period of time for a reason in his person without fault on his part.” The underlying notion of this regulation is ultimately the rule of *minima non curat praetor* of Roman law: this rule could freely be translated as “trivialities remain outside the scope of legal assessments”. The risk of work stoppage that is always associated with tasks carried out by persons if the underlying legal relationship is of a certain duration is considered in this context as well. Moreover, it plays a role that temporary (insignificant) absences by the person obliged to provide services are taken into consideration when determining the remuneration he is entitled to.<sup>75</sup> This notion is reflected in the approach courts take to define “comparatively insignificant time”, namely, by contrasting the duration of absence with the duration of the contractual relationship.<sup>76</sup> As according to section 616, sentence 1, the service provider is not deprived of his claim to remuneration despite not providing the agreed services, the regulation reduces risks, which almost necessarily arise “sooner or later” due to the permanence of contractual relationships between the parties.

What plays a more significant role, however, is that many labour law regulations can only be sensibly applied if a certain continuity of the contractual relationship exists.<sup>77</sup> Some examples are the continued remuneration in case of sickness or the leave entitlement of employees. The right to remuneration in case of sickness depends on whether the sick leave falls within a period in which an employment relationship is in effect.<sup>78</sup> And the right to annual leave as an enti-

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<sup>74</sup> This provision not only applies to employees, but also to self-employed persons working under a service contract.

<sup>75</sup> Cf. in this regard only *Joussen*, in: Rolfs i.a. (eds.) BeckOK Arbeitsrecht, 42<sup>nd</sup> ed., 2017, § 616 BGB note 3.

<sup>76</sup> Cf. Federal Labour Court, AP § 616 No. 22.

<sup>77</sup> Moreover, it is self-evident that dismissal protection, for instance, makes little sense in case of a (very) short-term relationship.

<sup>78</sup> Apart from that, section 3(2) of the Act on Continued Remuneration stipulates the requirement that the employment relationship must have been in effect for at least four weeks without interruption at the time the employee falls sick. This requirement seeks to satisfy the principle of reciprocity, as it would seem unreasonable to

tlement to be absent from work requires the existence of a commitment to perform services for a certain period.<sup>79</sup> If services are only provided for hours or even just minutes, neither entitlement is of relevance. As regards the right to continued remuneration, the principle applies that the shorter the duration of service, the more difficult it will be to claim that the service provider fell sick during the period the contract was in effect. And how should the entitlement to continued remuneration be fulfilled despite non-performance of services (due to illness), when a commitment to provide services no longer exists because the contractual relationship has already ceased? This also applies to leave entitlement, whereby in this case it would be difficult to justify the need for leave if a service provider, e.g., only carries out tasks of very short-term duration of a few minutes or hours for another. All these considerations cannot be elaborated. What can be said, however, is that difficult questions would arise in this context even if we were to arrive at the conclusion that the scope of application of labour law could in principle extend to the present context.

### 3. The Crowdworkeer as an Employee-like Person

In light of the difficulties in qualifying the crowdworker as an employee, the question whether he might qualify as a so-called employee-like person (*arbeitnehmerähnliche Person*) could be explored.

#### a) “Employee-like Person”

In fact, German law, unlike most other legal systems,<sup>80</sup> does include a category between employee and self-employed worker. While the employee is character-

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impose the costs of continued remuneration in case of sickness on the employer, when a recently hired employee is absent from work due to illness; cf. only *Ricken*, in: Rolfs i.a. (ed.) *BeckOK Arbeitsrecht*, 42<sup>nd</sup> ed., 2017, § 3 EFZG note 58.

<sup>79</sup> A waiting period must also be observed in this regard, which according to section 4 of the Federal Vacation Act amounts to a total of six months.

<sup>80</sup> In *Austria*, too, the category of “employee-like” persons is acknowledged. The notion is different from *Germany*, however. In *Switzerland*, “employee-like” persons are acknowledged, too, as a specific judge-made category of workers between real self-employed persons and employees. In *Spain*, according to the law, economically dependent self-employed persons are individuals who perform an economic or professional activity, for profit, in a regular, personal, direct and predominant way for a natural person or legal entity (known as the client). In most countries, however, no category of “employee-like” persons is acknowledged; for more details, see *Waas*, in: *Waas/Heerma van Voss* (ed.), *Restatement of Labour Law in Europe*, vol. 1 (The notion of employee), *Comparative overview*, forthcoming.



ised by personal dependence, the qualification as an employee-like person relates to their economic dependence. Employee-like persons are – according to the legal definition of such persons in section 12a(1) of the Act on Collective Bargaining Agreements (*Tarifvertragsgesetz*)<sup>81</sup> – persons who are “economically dependent and in need of social protection comparable to an employee (...), work on the basis of a contract of service or a contract for work and services for other persons, perform the services they are obliged to perform personally and essentially without collaboration with employees and *a*) predominantly work for one person or *b*) on average, more than half of the total remuneration they are entitled to for the performance of work is paid by one person”.<sup>82</sup>

The Federal Labour Court has characterised the legal status of employee-like persons as follows: “Employee-like persons are self-employed. The element of personal dependence that characterises employment relationships is replaced by the element of economic dependence. Economic dependence is usually given when the employee’s livelihood is dependent on the utilisation of his labour and on the income he receives from the tasks he carries out for the contractual partner (...). An employee-like person can work for several clients if he predominantly works for one of them and the ensuing remuneration represents a decisive part of his livelihood. The social status of an economically dependent person must moreover be equivalent to that of an employee in terms of the need for protection (...)”.<sup>83</sup>

## **b) Legal Qualification of Crowdworkers**

At first glance it seems particularly promising to qualify crowdworkers as employee-like persons. The fact that they can independently determine their working hours does not contradict qualifying as an employee-like person, nor does it play a role that the underlying contractual relationship may often be short-lived.<sup>84</sup>

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<sup>81</sup> This directly applies to the Act on Collective Bargaining Agreements only; cf. only *Hromádka*, NZA 2007, p. 838 (840). However, as regards the concept of “employee-like persons” in other contexts, this definition in any event forms the starting point.

<sup>82</sup> A special regulation applies to persons who perform artistic, literary or journalistic tasks. Insofar, according to section 12a, it suffices when these persons receive on average at least one-third of their total remuneration from another for their work.

<sup>83</sup> Federal Labour Court, AP ArbGG 1979 § 5 No. 68 (note 8).

<sup>84</sup> Cf. insofar only Federal Labour Court, NZA 2006, 223 (u. II. 2b): “Employee-like persons are not employees and thus not personally dependent. In contrast to employees, they can determine their working hours on their own (...). The duration of

### aa) Legal Prerequisites of “Employee-like Persons”

Qualification as an employee-like person nonetheless usually seems to fall short. It may well be the case that crowdworkers are often committed to a single platform in practice, as a frequent change of platforms would not be feasible from an economic point of view.<sup>85</sup> This would only contribute to qualifying as an employee-like person, however, if the income of the crowdworker is derived from an existing contractual relationship between the crowdworker and platform. Yet usually this is not precisely the case, as in most cases it is rather the relationship between crowdworker and crowdsourcer which forms the legal basis for the entitlement of the former to remuneration. That this relationship may not have materialised without the platform does not play a role in this regard. If we consider, however, that crowdworkers regularly perform services for very different firms, it would usually be quite difficult to prove economic dependence on one firm.<sup>86</sup> German law recognises the possibility of pooling several independent clients to represent one single client. The requirement to do so according to section 12a(1) is for “these persons to be pooled together, similar to a group of companies (section 18 of the Stock Companies Act), or in an organisational association established by them or on a consortium that is not only temporary”. Accordingly, the fact remains that qualification as an employee-like person falls short when a crowdworker works for several firms via the platform. He might potentially only qualify as an employee-like person if he receives remuneration directly from the platform.

### bb) Applicable Provisions

Apart from this, we should not lose sight of the fact that employee-like persons in accordance with applicable law are only entitled to a minor share of the rights

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contractual relationships is therefore of no relevance for the commitment of an employee-like person to a client”.

<sup>85</sup> Cf. insofar especially *Risak*, ZAS 2015, p. 11 (13) noting that platforms “mostly aim to build longlasting relationships through reputation mechanisms (...) particularly with crowdworkers who regularly work for them and provide good services”; cf. also *Däubler/Klebe*, NZA 2015, p. 1032 (1036).

<sup>86</sup> See also *Däubler/Klebe*, NZA 2015, p. 1032 (1036); *Däubler*, SR 2016, p. 2 (38). Reference of the authors to the so-called attending midwife decision of the BAG, NZA 2007, 700 is also helpful: In the underlying case a so-called attending midwife contract existed between attending midwives and the hospital, which according to the court’s understanding did not open more than an “income opportunity”.

of employees.<sup>87</sup> Employee-like persons thus do not enjoy protection against dismissal, and they are also denied most of the other employee rights. In accordance with section 2, sentence 2 of the Federal Paid Leave Act (*Bundesurlaubsgesetz*), they are, though, entitled to paid annual leave and safety at work regulations; anti-discrimination laws are applicable to them as well.<sup>88</sup> What is furthermore being discussed is whether employee-like persons benefit from limitations of liability, as is the case in relationships between employers and employees.<sup>89</sup> It remains true nonetheless that employee-like persons are excluded from the majority of labour law regulations.<sup>90</sup>

#### 4. The Crowdworker as Homeworker

The difficulties related to the qualification of crowdworkers as employee-like persons may lead to the question whether crowdworkers could at least be qualified as homeworkers within the meaning of the Homework Act (*Heimarbeitsgesetz*) of 1951.<sup>91</sup> The perception of homeworking in Germany may have been considerably influenced by the drama *The Weavers* by Gerhard Hauptmann. The play deals with the uprising staged by weavers in 1844 and describes the social situation of weavers who produced their goods in their own homes and deliver them to a factory. Those who view crowdworkers as the starvation wage earners of the 21st century will almost instinctively focus on a regulation

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<sup>87</sup> Cf. in this regard also *Heuschmid/Klebe*, in: Festschrift Kohte, 2016, p. 65 (69 f), who in terms of legal policy recommend “to further develop the category of employee-like persons in the context of the platform economy” and in particular to extend the legal minimum wage to also cover employee-like persons. According to section 22 of the Minimum Wage Act (*Mindestlohngesetz*), the legal minimum wage only applies to employees, and not to employee-like persons as well; cf. case law, recently State Labour Court Schleswig-Holstein, NZA-RR 2016, 291.

<sup>88</sup> Cf. on the one hand section 2(2) no. 3 of the Act on Health and Safety of Workers (*Arbeitsschutzgesetz*) and on the other section 6(1) no. 3 of the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*).

<sup>89</sup> Cf. for example State Labour Court Hessen, BeckRS 2013, 70404 affirming the application of the relevant principles to specific employee-like persons. From a practical point of view only very few gains would be made by applying these principles, however. This is true at least with a view to the performance of microtasks, since questions of liability, practically speaking, rarely arise.

<sup>90</sup> Cf. for this Federal Labour Court, AP BGB § 611 Employee-like persons No. 15: “Case law has thus far generally not considered it to be problematic that specific regulations on employee protection issued by the legislator have not also been declared applicable in favour of employee-like persons”.

<sup>91</sup> Cf. *Liebman*, B II. 3. “Today’s crowdwork recalls the ‘putting-out’ arrangements of the late 19th century”.

that covers homeworking. However, we should not yield to such impulses, just as we should not yield to the opposite impulse according to which the rules (which seem somewhat dusty) on homeworking are hardly transferable to the conditions of the modern “shared economy”. Instead of following a gut instinct, it is much more reasonable to objectively examine whether crowdwork can, on the basis of the applicable legal requirements, be qualified as homeworking.

### a) The Concept of Homeworker

The status of homeworker is independently regulated in the Homework Act. This law also includes a legal definition of homeworkers. According to section 2(1), sentence 1, a homeworker “works in a work place of his choosing (own home or business premises of their choosing), alone or with family members (...) for profit-making purposes (...), but surrenders the use of the work results to the directly or indirectly contracting entrepreneur”.<sup>92</sup> The homeworker is thus, in contrast to the employee, not personally dependent,<sup>93</sup> so that qualification as a homeworker would certainly not fall short due to a lack of sufficient personal dependence. The Federal Labour Court delineates homeworkers as follows: “They [homeworkers] are self-employed persons, whereby the element of personal dependence that characterises employment relationships is replaced by the element of economic dependence (...). They are thus generally more autonomous than employees due to the lack of or due to only minimal subservience to instructions in the performance of their tasks (...). Moreover, in contrast to employees, they can determine their working hours on their own”.<sup>94</sup>

The key difference between homeworkers and employees is the lack of the element of personal dependence. What should also be mentioned here is another distinction: while work under an employment relationship is generally performed by the employee himself, i.e., in principle he commits himself to exclu-

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<sup>92</sup> The Federal Labour Court recently made it clear that homework includes highly qualified (typically white collar) activities; see Federal Labour Court, NZA 2016, 1453. Section 2(2) of the Homework Act in addition also recognises so-called commercial homeworkers (*Hausgewerbetreibende*). Such worker is comparable with a homeworker as regards choice of work place, work on behalf of employers or intermediaries, freedom from instructions as well as the possibility to employ family members, but is insofar a “true” self-employed person as he has the option of employing up to two employees or homeworkers; for further details, see *Otten*, NZA 1995, 289 (291 and 293).

<sup>93</sup> Ambiguous, therefore *Däubler/Klebe*, NZA 2015, p. 1032 (1036) with reference to “an economic as well as a personal dependence on the contracting entity”.

<sup>94</sup> Federal Labour Court, AP BGB § 611 Employee-like person No. 15 (and note 27).

sively personally render his services,<sup>95</sup> this requirement is excluded from the legal regulations on homeworking and thus does not apply to homeworkers. According to section 2(1) of the Homework Act, homeworkers can provide their services “alone or together with family members”.<sup>96</sup> In contrast to employment contracts, the services do not need to be provided personally. Older literature on homeworking laws may thus be understood in this context, referring to “anonymity” as the defining characteristic of a homeworker, in addition to their economic dependence<sup>97</sup> – a circumstance that certainly provides food for thought with reference to the (equally anonymous) crowd.

The homeworker is not personally dependent. If he were, he would have to be qualified as an employee. It is questionable, however, whether qualification as a homeworker requires a certain degree of economic dependence. This, according to the case law of the Federal Labour Court and as already mentioned, is indeed the case.<sup>98</sup> The original drafters of the Homework Act even considered homeworkers to be “the key example of employee-like persons”<sup>99</sup>, but at the same time granted them special protection rights.<sup>100</sup> Section 1(2) of the Homework Act confirms that the status of homeworkers is conditional on a certain degree of economic dependence. This provision allows equating certain people with homeworkers “because of their need for protection” (section 1(2), sentence 1). If, however, in accordance with section 1(2), sentence 2 of the Act, for “the determination of the need for protection (...) the degree of economic dependence is

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<sup>95</sup> Cf. in this regard § 613a Sentence 1 of the Civil Code: “The person obliged to perform services must perform these services personally in case of doubt”.

<sup>96</sup> For further details, see *Otten*, NZA 1995, p. 289 (290).

<sup>97</sup> *Maus/Schmidt*, Heimarbeitsgesetz, 3<sup>rd</sup> ed., 1976, Supplement § 19 note 14.

<sup>98</sup> Cf. only Federal Labour Court, NZA 1991, 267: “Homeworkers and commercial homeworkers are economically dependent on the employer. They require special protection due to this dependence”. It should also be noted that the question regarding the required “commercial activity” in accordance with section 2(1) sentence 1 of the Homework Act should not depend on whether the income earned suffices to maintain the employee’s livelihood in the long term. The amount of remuneration and the time spent do not play a role in the Federal Labour Court’s opinion; the performance of minimal and irregular tasks could also, according to the court, be considered homework; see Federal Labour Court, NZA 1989, 141 (I. 2a)).

<sup>99</sup> German Parliament Printing Matter IV/785 of 30. 11. 1962, p. 2; cf. also Federal Labour Court, NZA 1989, 141 (note 18).

<sup>100</sup> These only apply to homeworkers, i.e., with reference to the termination of the contractual relationship of an employee-like person the period of notice effective for homeworkers in accordance with section 29(3) and (4) of the Homework Act, are neither directly nor analogously applicable; so Federal Labour Court, AP BGB § 611 Employee-like person No. 15 (note 18).

decisive”, then it is nearly impossible to overlook that this very “degree of economic dependence” must be the key factor determining the homeworke’s need for protection.

Another question, however, is whether a “similarity with employees” should be required or, more specifically, whether the income ratio that is fixed in section 12a of the Act on Collective Bargaining Agreements for employee-like persons must be applied to homeworkers as well.<sup>101</sup> What speaks against this is that the mentioned regulation is considered in literature to “not be generalisable”,<sup>102</sup> i.e., that it is only applicable with regard to the issue of collective agreements and does not apply in other legal contexts, for example, as regards annual leave entitlements of employee-like persons.<sup>103</sup> An analysis of the case law of the Federal Labour Court on the concept of homeworkers also reveals that verification of economic dependence is not necessarily linked to the requirements stipulated in section 12a. It can even be demonstrated that economic dependence of a homeworke differs fundamentally from that of an employee-like person. For instance, in order to determine the existence of a homeworkeing relationship,<sup>104</sup> the Federal Labour Court in one case considered the degree of economic dependence in connection with “how the assignments are awarded”. In that case the court also examined whether the persons involved were bound to “price limits”. What was furthermore considered was whether the service providers had to expect to “lose future assignments, if they declined to accept an assignment (...) or to complete it for the quoted price”. This statement is noteworthy since the court evidently sought to accommodate for this group’s weak negotiating position.<sup>105</sup> The question to what extent the contractor works for the principal was also raised but represented only *one* criterion. If these statements of the court are to be taken seriously, we realise that in the context of homeworkers the law recognises the need for protection without requiring “economic dependence” as defined in section 12a with regard to employee-like persons.<sup>106</sup>

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<sup>101</sup> This seems to be the position of *Däubler/Klebe*, NZA 2015, p. 1032 (1036).

<sup>102</sup> *Schubert*, Note on Federal Labour Court, AP ArbGG 1979 § 5 No. 68 m.w.N.

<sup>103</sup> See above (footnote 49).

<sup>104</sup> In the form of so-called commercial homeworkers.

<sup>105</sup> Federal Labour Court, NZA 1991, 267 (under II.3.). The decision literally states: “It also insofar depends on whether the contractors [seamstresses in the present case] as independent entrepreneurs really had influence over the volume of work as well as over price trends and continued to have influence over time”.

<sup>106</sup> The same result is found in *Otten*, NZA 1995, p. 289 (292): “Homeworkers are at least a special group of employee-like persons”.

Similarly to what applies to employment relationships, if the requirements of a homeworking relationship exist objectively, such a relationship is to be verified independent of the parties' will. What matters for this particular relationship is thus also the "true content". The Federal Labour Court states it very clearly: "The legal restrictions to the freedom of contract and the associated employment protection cannot be circumvented by the parties to the contract by designating their relationship, identified as a homeworking relationship by the legislature, as a different form of legal relationship or to waive legal consequences resulting from it".<sup>107</sup>

## **b) Legal Consequences of Qualification as Homeworker**

A look at the legal consequences stipulated in the homeworking law is interesting: the law accords homeworkers special "working time protection" (sections 10 et seq.). What is of significance in this regard is the regulation in section 11(1) of the Homework Act, according to which "the volume of work (should be distributed) equally among the workers, taking their and their employees' capacity into consideration". The law also contains special regulations on remuneration. The principle applies here that remuneration can generally be agreed freely; the law does, however, ensure far-reaching transparency with the obligation to disclose a list of fees (section 8(1) of the Act). The legislation also paid special attention to collective regulations: Section 17(1) of the Homework Act specifies that "written agreements between trade unions, on the one hand, and the principals or their associations, on the other" are considered to be collective agreements, where these regulations include provisions on "content, conclusion or termination of contractual relationships between homeworkers (...) and their principals". Moreover, the Homework Act includes special protection against dismissal (sections 29a et seq.). What is noteworthy in this regard is the protection of homeworkers from "famishment". Accordingly, the principal is obliged to observe the notice periods if he intends to reduce by more than one-fourth the volume of the work that was regularly sourced to the worker for at least one year or throughout the period of work if it was of a shorter duration (section 29(8), sentences 1 and 2). The regulation in section 6, sentence 4 of the Homework Act is noteworthy, too. It stipulates the principal's obligation to keep lists of all homeworkers he employs (section 6, sentence 1). These lists must not only

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<sup>107</sup> Federal Labour Court, NZA 1898, 141: The decision is particularly noteworthy insofar that the parties in the present case described their legal relationship as one of employment. According to the Federal Labour Court, the protection stipulated in the homework law could thereby not be waived.

be put up in visible areas, but a copy must also be forwarded to the state's highest-ranking labour authority (section 6, sentences 2 and 3). According to section 6, sentence 4 of the Homework Act, the highest-ranking labour authority may at any time request "the responsible trade union and the responsible association of principals" to forward copies of these lists as part of its monitoring of observation of the regulations of law. What is particularly noteworthy in all of this is that the provisions of the Homework Act apply, independent of the awareness of the principal. To put it in the words of the Federal Labour Court: "The most fundamental aspect as regards the application of the Homework Act to the group of persons protected by this law, is the objective legal situation and not whether the principal is subjectively aware of this legal position. Otherwise, the protection of homeworkers (...), which represents the basis of the mandatory legal regulations of the Homework Act, could be circumvented all too easily. An obligation of disclosure in the sense that the homeworker must on his own communicate to the principal that he belongs to the group of persons covered by the Homework Act is not specified in the law. According to the wording and meaning of sections 6 et seq. of the Homework Act, the principal who assigns homework must in a reasonable way ascertain whether the persons he employs in exchange for remuneration falls under the scope of the Act".<sup>108</sup>

Irrespective of the provisions of the Homework Act, homeworkers are treated like employees in numerous legal provisions.<sup>109</sup> According to section 5(1), sentence 2, the Works Constitution Act (*Betriebsverfassungsgesetz*) applies to homeworkers if they work in the company's main line of business. Homeworkers are not entitled to continued remuneration in case of sick leave or to holiday pay; however, sections 10 et seq. of the Act on Continued Remuneration (*Entgeltfortzahlungsgesetz*) includes special regulations adapted to the specific conditions of homeworking. As is the case for employee-like persons, the Federal Vacation Act also applies to homeworkers (section 2, sentence 2); the law (in section 12) includes a specific regulation.<sup>110</sup>

In the present case it makes sense to take a closer look at section 10 of the Act on Continued Remuneration. Homeworkers are not entitled to continued payment because they carry out their work in self-determined working hours and their

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<sup>108</sup> Federal Labour Court, AP HAG § 1 No. 1.

<sup>109</sup> Cf. in this regard State Labour Court Cologne, BeckRS 2016, 68265 (note 23) with explicit reference to economic dependence as a reason for not treating these groups differently.

<sup>110</sup> An overview of the specific regulations in Schaub/*Vogelsang*, *Arbeitsrechts-Handbuch*, 16<sup>th</sup> ed., 2015, § 163 note 10.



income fluctuates (in some cases considerably). Yet section 10 provides for a certain degree of financial protection by requiring the homeworke’s remuneration to be supplemented so that they can accumulate savings for periods of sickness.<sup>111</sup>

Regulations on holiday entitlement in section 12 of the Federal Vacation Act deserve a closer look as well, recognising the special conditions of homeworke, whereby the basic existence of the homeworke’s right to holiday is stipulated in sections 1, 3(1) and 12 of the act. What must, however, be considered is that the homeworke is free to arrange his work and does not enter into a specific time commitment. Hence, an exemption from the duty to work by simply granting holiday leave cannot be provided as would be the case in an employment relationship. Instead, holidays will often only be granted nominally, without the homeworke actually changing his work rhythm.<sup>112</sup> What is interesting in this regard is that the law focuses in particular on those homeworkers who are not continually employed in the period covered. In that case, section 12, no. 2 of the Federal Vacation Act states that the amount of holiday granted must be calculated on the basis of the homeworke’s average daily wage.

Apart from that, the literature on homeworke law occasionally calls for an evaluation whether additional applications of labour law regulations to specific work arrangements might be considered. The starting point of these considerations is that the principal and the homeworke are largely free to determine the arrangement of their contractual relationship and that in practice a number of additional arrangements are frequently concluded. In this regard, calls are being made to examine the application of additional labour law regulations if the agreement with the principal indicates a clear constraint of the homeworke’s personal independence. For instance, the literature makes the following demand: “If the homeworke has obliged himself to complete a given amount of work which resembles the working time of a comparable full-time employee, and if this arrangement holds over a longer duration, then his personal independence in terms of time is affected to such a degree in comparison with a normal ‘homeworke’ that the application of general labour law principles (...) should be examined”.<sup>113</sup> One could summarise that the application of additional labour law regulations could be considered if in the given case the status of the homeworke is very similar to that of an employee without being actually qualified as one.

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<sup>111</sup> Further details in *ErfKomm/Reinhard*, 17<sup>th</sup> ed., 2017, § 19 EFZG note 1. A corresponding regulation can be found in section 11 regarding holiday pay.

<sup>112</sup> Cf. *ErfKomm/Gallner*, 17<sup>th</sup>, 2017, § 12 BUrIG note 8.

<sup>113</sup> See *Otten*, NZA 1995, p. 289 (295).

### c) Legal Qualification of Crowdworker

According to section 2(1) of the Homework Act, the requirement for qualification as a homeworker refers to an activity “on behalf of” another. Case law recognises “that neither the duration or the amount of work nor the income earned are of significance for the assumption of homeworking”.<sup>114</sup> It is, however, hardly debatable that we cannot speak of homeworking if only a single assignment is issued. As regards the establishment of a homeworking relationship, the parties “agree that both sides are prepared to assign or carry out homework”. The establishment of a homeworking relationship as such does not constitute a commitment to perform work. This is only the case when an assignment is issued.<sup>115</sup> The literature describes this as follows: “The establishment of a homeworking relationship—which to some extent represents the outer legal framework—is followed by the actual contractual relationship in which the mutual rights and obligations are established which, subject to differing contractual agreements—usually are defined by the provisions on contracts for work and services (section 631 of the Civil Code)<sup>116</sup> and where applicable by the provisions on contracts for labour and materials (section 651(1) and (2) of the Civil Code<sup>117</sup>)”.<sup>118</sup> In most cases, it might be difficult to claim, however, that a similar legal framework could exist between the crowdsourcer and crowdworker.

Against this background, the question arises whether crowdworkers would benefit from platforms being qualified as “intermediaries”. A legal definition of “intermediary” is included in section 2(3) of the Homework Act. Hence, according to the law, an intermediary is “a person who without being an employer passes on work that was assigned by entrepreneurs to homeworkers”. The literature widely describes the intermediary as a “facilitator” between the entrepre-

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<sup>114</sup> See Federal Labour Court, NZA 1989, p. 141 (and I.2a).

<sup>115</sup> The contractual relationship also does not come to an end when the assignment of homework is discontinued. Instead, it only ends when the parties conclude an agreement to terminate the contract; cf. *Otten*, NZA 1995, 289 (290) with reference to section 11(2) sentences 2 and 3 of the Act on Continued Remuneration.

<sup>116</sup> Section 631: „(1) By a contract to produce a work, a contractor is obliged to produce the promised work and the customer is obliged to pay the agreed remuneration. (2) The subject matter of a contract to produce a work may be either the production or alteration of a thing or another result to be achieved by work or by a service”.

<sup>117</sup> According to section 651 sentence 1, the „provisions of sale of goods law are applicable to a contract dealing with the supply of movable things to be produced or manufactured”.

<sup>118</sup> See *Otten*, NZA 1995, p. 289 (291). This, inter alia, means that homeworkers generally bear the risk of failing to carry out their activities; cf. *ibid.* (294).

neur and the homeworker.<sup>119</sup> Based on this definition, one cannot, at least at first glance, completely rule out qualifying a platform as an “intermediary”. However, the crowdworker would not gain much in terms of protection, as the law considers intermediaries themselves as potentially being in need of protection. According, e.g., to section 1(1) lit. d of the Homework Act, intermediaries can under specific conditions be equated with homeworkers. Any other regulations in the Homework Act that may apply to intermediaries are generally of little value in this context. According to section 21(2) of the act, e.g., the principal is liable for remuneration entitlements in addition to the (contractual) liability of the intermediary. Other provisions, on the other hand, specify that the intermediary does indeed carry some obligations. These in principle relate to the intermediary’s obligation to pay remuneration.<sup>120</sup> Such an obligation mostly does not exist, however, in the cases we are interested in. All of these reflections lead to a fairly sobering conclusion: crowdworkers may well be economically dependent on others, but in most cases might not be considered to be in a homeworking relationship as foreseen by the law as it stands at present. And even if the platform were to be qualified as an “intermediary” in accordance with the Homework Act, no obligations for the intermediary ensue from the law, which in the present context would justify extending the relevant protection to crowdworkers.

## II. Review of the General Terms and Conditions

That crowdworkers do not (potentially) enjoy protection under labour law does not imply that they are not protected at all. Apart from the fact that illegal and immoral agreements are void,<sup>121</sup> and apart from the fact that regulations in particular of cartel law play a relevant role in this regard,<sup>122</sup> the provisions on the review of the general terms and conditions provide a certain level of protection (sections 305 et seq. of the Civil Code). The key focus of these regulations is the so-called content review: the law (in sections 308 and 309) stipulates that certain clauses are not valid.<sup>123</sup> Apart from that, the general clause on content review

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<sup>119</sup> See Schaub/Vogelsang, *Arbeitsrechts-Handbuch*, 16<sup>th</sup> ed., 2015, § 163 note 6.

<sup>120</sup> Cf. sections 24, 28 of the Homework Act. Furthermore, section 29 includes a regulation on protection against dismissal.

<sup>121</sup> Section 134 or section § 138 of the Civil Code, respectively.

<sup>122</sup> Cf. here only *Däubler*, *Internet und Arbeitsrecht*, 5<sup>th</sup> ed., 2015, p. 355 et seq.

<sup>123</sup> Section 308 BGB, in contrast to section 309, grants courts certain possibilities of assessment.

found in section 307 must be taken into consideration. Accordingly, provisions in general terms and conditions are void “if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user” (section 307(1), sentence 1). Such an “unreasonable disadvantage” must be presumed to exist in case of doubt, when a provision’s “fundamental notion deviates from and is incompatible with legal regulations” or when it “limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised” (section 307(2)). In light of this regulation the question arises whether the underlying general terms and conditions of platforms would withstand a content review.

## 1. Scope of Review of General Terms and Conditions with Regard to Crowdworkers

However, we face a problem right from the start in this regard. Review of the general terms and conditions (GTC) is restricted when the user’s [e.g. platform’s] contractual partner is an “entrepreneur” within the meaning of section 14 of the Civil Code; the content review just described is considerably reduced in this case.<sup>124</sup> This is unsatisfactory because crowdworkers in fact frequently qualify as “entrepreneurs” under section 14 instead of qualifying as “consumers” within the meaning of section 13. An “entrepreneur” is someone who “acts in the exercise of his commercial or self-employed activity” upon conclusion of the contract.<sup>125</sup> As “every planned and permanent supply of goods and services against payment” is considered a commercial activity in this context,<sup>126</sup> every crowdworker is an entrepreneur, provided he uses this activity as his

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<sup>124</sup> Cf. section 310(1) and (3) of the Civil Code; see also *Deinert*, *Soloselbstständige zwischen Arbeitsrecht und Wirtschaftsrecht*, 2015, p. 42 (judicial control of terms and conditions not fully applicable to “small entrepreneurs”).

<sup>125</sup> The characteristic of “self-employed activity” refers primarily to members of *independent professions* (doctors, lawyers and the like), which cannot be traditionally assigned to a specific “profession”.

<sup>126</sup> Cf. only *Bamberger*, in: *Bamberger/Roth* (eds.), *BeckOK*, 42<sup>nd</sup> ed., 2017 § 14 BGB note 8 with further references. In this regard, it neither depends on the regularity nor on the amount of work. It is also of no relevance whether it is the main or only the secondary activity; in particular, secondary activities from the Internet meet the requirements of entrepreneurial activity depending on the specific conditions; cf. *ibid.*, notes 8 and 8a with further references; see also *Micklitz/Purnhagen*, in: *Säcker a. o., Münchener Kommentar zum BGB*, 7<sup>th</sup> ed. 2015, § 14 note 33 (size or form not relevant though EU-law, Commission Recommendation of 06.05.2003, Official Journal L 124/36, in particular, may point into another direction).

source of income and does not just “now and then” carry out clickwork.<sup>127</sup> This does mean, however, that crowdworkers are fully excluded from the review of the GTC, though they are in one way or other dependent on assignments from the Internet (and thus have a special need for protection according to labour law principles).<sup>128</sup> A qualification as “consumer” (and thus full exposure to review of the GTC) could, at best, be considered if the crowdworker fulfilled the requirements of an employee-like person.<sup>129</sup> This, however, also does not seem to be the case based on the above-mentioned comments.<sup>130</sup>

The results (full protection of “casual crowdworkers”, no protection for crowdworkers engaged in entrepreneurial activities) call into question whether the underlying concepts of “consumer” and “entrepreneur” should be reconsidered in the context of the “gig economy”.<sup>131</sup> However, caution is advised in this regard, as labour law principles can certainly not be readily transferred to a review of the GTC. The review of the GTC follows another logic: It is true that GTC law comprehensively protects “in principle, legal transactions from one-sided power without differentiating on the basis of business experience, need for protection or intellectual capacities of the other party”.<sup>132</sup> Yet this protection is deliberately omitted from contracts with entrepreneurs “in the interest of higher flexibility and more freedom of contract”,<sup>133</sup> that is, “symmetrical contractual relationships”, which can be found on either side of occupational activities, are not covered.<sup>134</sup>

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<sup>127</sup> For a general classification of crowdworkers as “entrepreneurs” *Hötte*, MMR 2014, p. 795 (796) for paid activities; other view and appropriately *Däubler/Klebe*, NZA 2015, p. 1032 (1037).

<sup>128</sup> Critical, for instance, *Däubler/Klebe*, NZA 2015, p. 1032 (1037).

<sup>129</sup> Cf. *Bamberger*, in: *Bamberger/Roth* (eds.), BeckOK, 42<sup>nd</sup> ed., 2017, § 14 BGB note 11 with further references (“an employee-like person is a consumer in need of protection, not an entrepreneur”).

<sup>130</sup> This, in any event, might apply if the crowdworker provides services for more than one company; cf. in this regard also *Däubler*, SR 2016, p. 2 (38).

<sup>131</sup> Cf. in this regard also *Dietz*, ZUM 2005, p. 499, who in view of flexibilisation tendencies on the labour market criticises an all too “stereotypical application of the concept of entrepreneur” and contends that “from the point of view of protection for the weaker party, a full application of the provisions of GTC law would be appropriate for other groups of users as well”; also critical *Adomeit*, NJW 2004, p. 579 (581).

<sup>132</sup> *Becker*, in: *Bamberger/Roth* (eds.), BeckOK, 42<sup>nd</sup> ed., 2017, § 310 BGB note 2.

<sup>133</sup> *Becker*, in: *Bamberger/Roth* (eds.), BeckOK, 42<sup>nd</sup> ed., 2017, § 310 BGB note 2.

<sup>134</sup> See also *Basedow*, in: *Säcker i.a.* (eds.), MünchKomm, 7<sup>th</sup> ed. 2016, § 310 BGB note 42.

## 2. Content Review

Even if the content review of the general terms and conditions is limited, the clauses included are not fully removed from such a review. This applies in particular to the general clause of section 307 of the Civil Code mentioned earlier. In this regard, it makes sense to ask whether and to what extent the user's clauses unreasonably disadvantage the contractual partner "contrary to the requirement of good faith". Such a disadvantage is discussed with a view to clauses that leave it at the user's discretion to reject the services provided by the crowdworker (and thus deprive the crowdworker from his fundamental claim to remuneration).<sup>135</sup> In fact, section 307(2), no. 2 prohibits the limitation of "fundamental rights or obligations" in such a way that "jeopardises the achievement of the purpose of the contract". This implies that the user may not evade his principal obligations.<sup>136</sup> In other words, the mutuality of obligation may not be impinged.<sup>137</sup> In the present context, however, the special feature is that the user (platform) and the debtor to the claim of remuneration do frequently not coincide. Nevertheless, the case can be made that such an atypical arrangement represents a violation of section 307(2), no. 2.<sup>138</sup> Against this background, clauses which do not necessarily assert an unlimited right of refusal but lay down "conflict resolution" through the platform in case of disputes between the crowdworker and crowdsourcer on payment transactions also seem problematic. Additional questions arise from the fact that section 307(1), sentence 2 includes a so-called transparency principle: accordingly, a clause may also be unreasonably disadvantageous if it is "not clear and comprehensible". This principle must also be observed in entrepreneurial business transactions.<sup>139</sup>

The literature also discusses clauses that grant a claim for remuneration only to those whose performance is approved by the opposite party. In this regard, it is alleged that such "pay in the manner of a 'contest'"<sup>140</sup> violates the fundamental

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<sup>135</sup> Cf. *Däubler/Klebe*, NZA 2015, p. 1032 (1037 f.) with reference to "foreign platforms".

<sup>136</sup> *H. Schmidt*, in: Bamberger/Roth (eds.), BeckOK, 42<sup>nd</sup> ed., 2017, § 307 BGB note 64.

<sup>137</sup> Cf. in this regard also Federal Labour Court, AP BGB § 307 No. 59 (note 26).

<sup>138</sup> Generally on the applicable measures to contracts that are not subject to any contract type regulated in the Civil Code, *H. Schmidt*, in: Bamberger/Roth (ed.), BeckOK, 42<sup>nd</sup> ed., 2017, § 307 BGB note 65.

<sup>139</sup> Cf. only *H. Schmidt*, in: Bamberger/Roth (ed.), BeckOK, 42<sup>nd</sup> ed., 2017, § 307 BGB note 48.

<sup>140</sup> Cf. also *Liebman*, B V 2c), referring to the business model of the platform Topcoder according to which challenges are conducted on a "competition" structure, with individuals submitting entries for either the client or Topcoder itself to evaluate. This structure, by the way, points into the direction of self-employment as "the platform's interest is in selecting winners, not in supervising their work". See also the discus-

principles of the law of both contracts of service as well as contracts for work and services.<sup>141</sup> Indeed, for contracts between principals and contractors, section 649(1) of the Civil Code stipulates that the latter – whose contract can be terminated at will by the principal until the “completion” of the assignment – can claim the agreed-upon remuneration (and only has to allow set-off of the expenses saved because of premature termination of the contract).

Clauses that regulate intellectual property rights between the crowdworker and crowdsourcer are also discussed in the literature. The question is of practical significance, which is not to be underestimated, as crowdwork often involves projects that raise copyright issues. We must consider that a full transfer of copyright-protected rights is not possible in accordance with section 29(1) of the Copyright Act (*Urheberrechtsgesetz*). Usage rights can be conceded to other persons according to section 31(1), sentence 1 of the act. Yet in light of the lack of a contractual relationship between the crowdsourcer and the crowdworker in many if not most cases, such a transfer to the crowdsourcer requires the platform for its part to have a usage right. With an eye towards the general terms and conditions, a clause is void if it also stipulates a transfer of rights if the final product is rejected.<sup>142</sup> Such an arrangement would contradict the regulation included in section 32(1) of the Copyright Act, which states that the creator is entitled to adequate remuneration for transferring usage rights and the permission to use the output.<sup>143</sup> It should thereby be considered that section 32(1), sentence 2 applies not only when the parties did not regulate the amount of remuneration but also when remuneration has not been decided at all, i.e., when it has not yet been determined whether remuneration will even be paid.<sup>144</sup> A formal waiver of the right to be named and designated as the creator of the given output is also problematic.<sup>145</sup> These few examples might suffice to demon-

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sion of the model used by the platform InnoCentive where the principle of the “open call” applies; *ibid.*, B IV. 4.

<sup>141</sup> For further details, see *Däubler/Klebe*, NZA 2015, p. 1032 (1038); *Däubler*, in: Benner (ed.), *Crowdwork – zurück in die Zukunft?*, 2015, p. 253.

<sup>142</sup> *Klebe/Neugebauer*, AuR 2014, p. 6.

<sup>143</sup> The regulation in section 36(1) sentence 1 of the Copyright Act supplements section 32 of the same Act, whereby associations of creators in order to determine adequate remuneration decide on rules on remuneration together with associations of output users or individual output users.

<sup>144</sup> Cf. *Soppe*, in: Ahlberg/Götting (ed.), BeckOK, 13<sup>th</sup> ed., 2017, § 32 UrhG note 11.

<sup>145</sup> Cf. *Nordemann*, NJW 2012, p. 3121 (3124) with further references.

strate that a certain level of protection could be achieved on the basis of the regulations on the review of the GTC.<sup>146</sup>

### III. Legal Policy Considerations

The above considerations show that the protection of crowdworkers based on existing law is only possible in a very limited way. This leads to the question how such protection could be formulated *de lege ferenda* – leaving aside at this stage the question that has already been addressed above whether and to what extent the criteria applied by the courts to determine existence of an “employment relationship” could be further developed to better accommodate the need for offering meaningful protection to crowdworkers (or workers in the gig economy in general). Enlarging the circle of employee-like persons and at the same time expanding the corresponding legal protection could be considered.<sup>147</sup> It is in fact being discussed whether the legislature ought to enact special protection provisions for so-called solo self-employed persons (*Soloselbstständige*)<sup>148, 149</sup> Labour law would in that case be divided into individual “modules”, where appropriate, and would fully apply to (specific) employees, while individual “building blocks” would apply to other types of workers. Such suggestions may have their justifications, but we will not further elaborate on them because the associated problems are bigger than the issues addressed here,<sup>150</sup> and we would have to go farther afield than is possible at this point.

Another look at homeworking law promises more tailor-made solutions. The existing regulation on homeworking in fact lends itself as a model to some degree.<sup>151</sup>

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<sup>146</sup> Cf. in full also *Däubler*, *Internet und Arbeitsrecht*, 5<sup>th</sup> ed., 2015, p. 344 ff.

<sup>147</sup> Cf. For instance *Klebe*, *AuR* 2016, p. 277 advocating for a lowering of the according threshold from 50 p.c. to 25 p.c. which would then lead to qualification as an “employee-like person” if *on average*, at least a quarter of the total remuneration he is entitled to for the performance of work is paid by one person.

<sup>148</sup> That is, persons who do not have any employees.

<sup>149</sup> Cf. in this regard, e.g. *Deinert*, *Soloselbstständige zwischen Arbeitsrecht und Wirtschaftsrecht*, 2015.

<sup>150</sup> Other forms of manifestations of the platform economy, for example, remain, such as the case of Uber-drivers.

<sup>151</sup> For a “modernization” of the Homework Act with a view to crowdwork also in *Krause*, *Digitalisierung der Arbeitswelt – Herausforderungen und Regelungsbedarf – Gutachten B zum 71. Deutschen Juristentag*, 2015, B 106; *Krause*, *NJW-Beil.* 2016, p. 33 (36); cf. also *Heuschmid/Klebe*, in: *Festschrift Kohte*, 2016, p. 65 (71): “interesting



## 1. Homework Act as a “Model for Regulation”

Several circumstances allow for a comparison between crowdwork and homeworking: from the entrepreneur’s perspective, both are characterised by a certain degree of anonymity. Contrary to the rule of the employment relationship, the enterprise in both cases does not care which specific person renders the service. From the perspective of the employees, this entails that they usually perform their work in a home setting but certainly in a place of work of their own choosing. As regards the organisation of working time, both the crowdworker and the homeworker are (relatively) free. Despite specific differences in the organisation of content, the performance of both homeworking and crowdwork must be embedded in framework agreements.<sup>152</sup>

Other similarities exist as well: homeworkers are rarely in contact with each other; no “company community” exists.<sup>153</sup> The same applies to the crowdworker. The special need for protection that is characteristic of homeworkers can be traced back to the fact that it is much more difficult for them “owing to circumstances” to collectively represent their interests than is the case among employees.<sup>154</sup> This must also be taken into account when considering a higher level of protection for crowdworkers.

The similarities that exist between homeworking and crowdwork<sup>155</sup> are so pronounced that one is inclined to think about whether a higher level of protection for crowdworkers may be possible solely on the basis of the analogous application of the provisions of the Homework Act. This indeed does not seem entirely impossible, as both requirements of analogy – the existence of unintentional legal loopholes and a comparability of interests – are determined not according to the

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option”. In favour of an “adaptation of the Homework Act also *Schindele*, *ArbRAktuell* 2015, p. 363 (366).

<sup>152</sup> Cf. on homeworking *Otten*, § 1 HAG preliminary note 12. The legislator obviously assumes that the homeworker typically works for several principals; cf. *ibid.*, § 1 HAG preliminary note 17 (with reference i.a. to sections 2(1) and (2), 29(3) of the Homework Act.

<sup>153</sup> See *Otten*, § 1 HAG preliminary note 8, who in addition justifies homeworkers’ special need for protection by pointing out that the amount of their work is in some form dependent on economic cycles and that the increasing automatisisation puts strong downward pressure on prices and costs.

<sup>154</sup> Cf. in this regard also *Otten*, § 1 HAG preliminary note 7 with explicit reference to the fact that both contracting parties in a homeworking relationship “are generally unorganised as far as this area is concerned” and that collective agreements only exist where “homeworking is spatially concentrated”.

<sup>155</sup> Cf. in this regard *Risak/Warter*, *Decent Crowdwork – Legal Strategies towards fair employment conditions in the virtual sweatshop*: <http://www.rdw2015.org>.

benchmark of the ideas of past legislators but rightly on the basis of an objective interpretation of the law.<sup>156</sup> Nevertheless, these considerations should not be fraught with legal methodological problems.<sup>157</sup> The question should therefore only focus on whether a higher level of protection for crowdworkers could be designed, at least *de lege ferenda*, along the lines of the homeworking law.

There are a number of glitches in the homeworking law. The regulation in section 11 of the Homework Act is noteworthy, as it aims to prevent an unequal distribution of work to homeworkers.<sup>158</sup> The purpose of the regulation is obviously to ensure that the amount of homework distributed and the income opportunities opened thereby do not hinge upon the principal's arbitrariness. Specifically, it aims to ensure "that individual homeworkers do not have to drastically increase their working time because they are overloaded with assignments, while others suffer severe financial hardship due to a low number of assignments." The provision moreover seeks to counteract the emergence of serious competition among homeworkers.<sup>159</sup> With reference to crowdwork it might be considered to request the platforms to take appropriate technical measures to preclude an overexertion of individual crowdworkers. Along the lines of section 11(2), sentence 2 of the Homework Act, the amount of work could be measured in such a way that it "can be mastered by a single worker without help in the working time needed by a comparable company worker".

As regards the important question about remuneration, the provision in section 8 of the Homework Act could be followed for crowdwork. This provides for a certain transparency insofar as it requires the principal to "publicly make available a list of fees and other contractual requirements". To create a similar statutory obligation for platforms could be considered. The regulations of the homeworking law could further serve as a source of inspiration. This applies in particular to the establishment of so-called homework committees (cf. section 4 of the Homework Act), which are tasked with, inter alia, specifying legally binding pay rates and other contractual requirements for all principals and workers if the pay rates or

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<sup>156</sup> Cf. with reference to the "subsequent legal loophole" *Larenz*, *Methodenlehre der Rechtswissenschaft*, 4<sup>th</sup> ed., 1979, p. 365 (questionable content "outside the legislator's imagination").

<sup>157</sup> This, by the way, also does not seem reasonable because an analogy only allows specific legal consequences to be linked to "similar" situations that are not regulated by law, though this is not a justification to modify these legal consequences. However, the legal consequences fixed in the Homework Act cannot be taken one to one, as will be shown shortly.

<sup>158</sup> *Otten*, § 11 HAG note 7.

<sup>159</sup> Government Draft, p. 22 f.

other contractual requirements are inadequate (section 19, sentence 1 of the Homework Act).<sup>160</sup> In this regard, it is noteworthy that legally binding arrangements made by the homework committees are the last measure according to the Homework Act.<sup>161</sup> The law relies primarily on the regulations determined by the parties themselves. Accordingly, the key task of the homework committees is to work towards the conclusion of collective agreements (section 18 lit. a).<sup>162</sup> Legally binding arrangements as discussed above are only considered when “no trade unions or associations of principals exist for a specific area or if they only consist of a minority of principals or workers” (section 19(1), sentence 1). Collective agreements are hence a priority in homeworking. As discussed above, section 17(1) of the Homework Act explicitly states that agreements between trade unions and principals or their associations are considered to be on a par with collective agreements.<sup>163</sup> Both the establishment of committees as well as introducing the possibility of concluding collective agreements could also be considered for crowdwork. The same applies for the monitoring of pay rates and other contractual requirements, which, according to section 23(1), is the task of government bodies, whereas section 25 remarkably even establishes the possibility of filing a “public action” in favour of the homeworker.<sup>164</sup>

The protection against dismissal and wage protection for homeworkers could also serve as an example. Such protection is by far not as pronounced as it is for employees. The law does, however, at least protect homeworkers from unilateral changes by the principals, which would effect an abrupt reduction of their

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<sup>160</sup> According to s 19(3) sentence 1 of the Homework Act, this legally binding arrangement is equivalent to a generally binding collective agreement; for further information on the legal nature of binding arrangements and on the constitutionality of the according legal regulations, see Federal Constitutional Court, NJW 1973, 1320.

<sup>161</sup> Cf. in particular Government Draft, p. 26: “This provision [section 18 of the Homework Act] should be deemed noteworthy as legally binding arrangements on pay rates cannot be made if associations of principals or trade unions exist for the professional area of responsibility of a homework committee and do not consist of only a minority of participants”.

<sup>162</sup> The practical significance of this provision is, however, minimal; cf. *Otten*, § 18 HAG note 4.

<sup>163</sup> This does not depend on the association’s capacity to bargain collectively (nor in particular on its “social mightiness”); cf. *Otten*, § 17 HAG note 6. From a European law perspective, the decision of the European Court of Justice in der Rs. C-413/13 (FNV) should be noted. The issue cannot be elaborated further here; however, cf. *Heuschmid/Klebe*, in: *Festschrift Kohte*, 2016, p. 65 (72 f.).

<sup>164</sup> Cf. here *Otten*, § 1 HAG preliminary note 10; in terms of case law, cf. State Labour Court Cologne, BeckRS 2012, 70845. As opposed to the position in the U.S., there is no class action in German labour law.

earnings prospects. The “protection from famishment” stipulated in section 27(8) was already mentioned above. Another example may be section 27(7) of the Homework Act, which guarantees the homeworker specific compensation during the notice period, independent from the amount of work carried out during this period.<sup>165</sup>

The legal position of the homeworker could also be of significance for improved protection of crowdworkers in other respects. Reference can be made to the already discussed regulation in section 10 of the Act on Continued Remuneration: While it is true that homeworkers are not entitled to continued remuneration in case of sickness, section 10 stipulates their right to receive a supplement to regular pay in addition to the homeworker’s entitlement to sickness allowance. Establishing a similar claim for crowdworkers could be considered. Reference to the legal position of homeworkers as regards the right to annual leave could also be considered. It must, however, be emphasised that annual leave can only be granted nominally in both cases due to the specificities of the provision of services. The regulation in section 12, no. 2 of the Federal Vacation Act in any event could provide a guideline as regards the amount of annual leave a crowdworker would be entitled to.

Finally, it should again be emphasised that the law assigns an important role in the area of homeworking to trade unions and associations of principals in terms of monitoring compliance with the legal obligations. This is particularly evident in the regulation of section 6 of the Homework Act, according to which trade unions and associations of principals have the right to inspect the lists of homeworkers principals must keep. The law thereby explicitly recognises that interest in such information by associations is justified.<sup>166</sup>

The particularly prominent role associations play in accordance with the Homework Act (here reference can also be made to the equal status of agreements concluded with that of collective bargaining agreements, as discussed above) gives reason to consider whether this would also make sense for crowdwork. A specific demand that is made in this context is the right of trade

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<sup>165</sup> Cf. *Otten*, § 29 HAG note 46.

<sup>166</sup> See Government Draft, p. 23. It might be interesting to compare this with the issue of granting bargaining power to independent contractors; see in this regard *Liebman*, B VI. 3c). Note in this context also demands put forward in legal literature to create a framework for „collective self-help“; see, in particular, *Krause*, Digitalisierung der Arbeitswelt – Herausforderungen und Regelungsbedarf – Gutachten B zum 71. Deutschen Juristentag, 2015, B 107 (a right of trade unions to establish virtual notice boards and a right to be provided with an anonymised email-list).

unions “to access the intranet as well as the Internet pages of the platform operators”.<sup>167</sup> Such a right could clearly be harmonised with the *de lege lata* values that need to be observed. The Federal Labour Court has explicitly recognised a “virtual” right of access (in the form of email membership campaigns). The court emphasised, inter alia, that on the part of the trade unions “in particular, in view of the widespread dissolution of the ‘classic’ business premises in favour of telework from home and in view of flexible working hour models without fixed working hours calculable for outsiders”, considerable interest exists in using modern communication channels.<sup>168</sup>

## 2. Possible Addressees of Obligations

The homeworking law thus provides a number of regulations which could be referred to in the further elaboration of the legal status of crowdworkers. What is far more problematic is the answer to the question about the addressee of these obligations: clearly, the platform shares certain similarities with the “intermediary” covered by the homeworking law; this is evident terminologically, as “go-betweens” are often mentioned in this context.<sup>169</sup> However, there may be no way around accepting that in line with the conceptual design of the Homework Act it is the principal and not the intermediary who is the primary addressee of the obligations arising from law. This implies that anyone who seeks to impose obligations on platforms, as is the case in the relationship between principals and homeworkers, must provide an autonomous point of reference.<sup>170</sup>

One is well advised to quickly refrain from drawing parallels to “intermediaries” in the Homework Act. This law defines the “intermediary” as an entity that “transfers” assignments issued by the principals. This, however, is often not the case with platforms, as they do not “transfer” assignments but either independently distribute tasks or create the possibility for companies to (directly) distribute tasks. Neither in one nor in the other case can it be said that platforms are “engaged” by third parties to place assignments. And this certainly does not

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<sup>167</sup> Heuschmid/Klebe, in: Festschrift Kohte, 2016, p. 65 (74).

<sup>168</sup> Federal Labour Court, NZA 2009, 615 (note 49).

<sup>169</sup> Cf. only *Leimeister/Zogaj*, Neue Arbeitsorganisation durch Crowdsourcing, Hans Böckler Stiftung, Arbeitspapier 287, 2013, p. 49.

<sup>170</sup> Cf. in this regard, for instance, *Prassl/Risak*, Uber, Taskrabbit, & Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork, in: Comparative Labor Law and Policy Journal 2016, p. 619 applying the so-called “functional concept of the employer”; cf. also *Kocher*, NZA 2016, 984 building on the position of platforms as “responsible coordinators of work”.

only entail dealing with terminological questions. Yet this clarification makes it much clearer that precisely because of the independent position of platforms, it may be justified to impose certain legal obligations on them with respect to crowdworkers. These obligations, which are based on the example of the Homework Act regulations, would then make platforms into “employer-like persons”.

Another question is whether it is justified to assign responsibility to crowdsourcers as well. In this regard, it must be considered that platforms may offer companies the possibility to divide permanent tasks into single-service packages (including microtasks) and to offer these to an indefinite number of interested parties to complete. As a power to give instructions is superfluous in particular in cases of “fine-slicing” of tasks, the foundation for an application of labour law regulations for the most part dissolves. What needs to be taken into account as well is the fact that as regards Internet-based tasks, the need to work “in a company” is very limited from the outset. That is, the starting point for an application of labour law provisions is lacking in this regard as well. This point seems to make crowdsourcing particularly attractive for businesses: as the “assignment of tasks to many” replaces “permanent employment of a few”, the costs associated with meeting labour law obligations (for example, the protection against dismissal) can be cut. The possibility of offering individual service packages creates the potential for a far-reaching shift of economic and business risks to the service provider.<sup>171</sup> If all this is taken together, the case can definitely be made – from a legal policy perspective – that the businesses engaged in crowdsourcing should assume some degree of responsibility to ensure that the protection of crowdworkers is strengthened. The purpose would certainly not be to hold on to obsolete forms of work and to disregard technical changes. The debate would not involve the status of employer for such businesses, but at best to bring the (very low) level of protection of crowdworkers to the level of that of homeworkers.

Such imposing of obligations on businesses seems legitimate based on our assessment of the applicable law. Reference could be made to regulations such as those in section 14(1) of the Act on Posted Workers (*Arbeitnehmer-Entsendegesetz*)<sup>172</sup>

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<sup>171</sup> Cf. also *Liebman*, B II. 3.: “Workers are paid only for the task performed, and both platforms and their clients have avoided protective labor and employment law obligations, developing few, if any, legally binding commitments to this segment of their workforce”.

<sup>172</sup> Under this provision, clients of services and project-services, especially general contractors, are liable in case that a sub-contractor does not pay his employees the wages determined in collective agreements. According to section 13 of the Minimum

and section 28(2), sentence 1 of Social Code Book (*Sozialgesetzbuch*) IV.<sup>173</sup> Moreover, reference could be made to what is called the “indirect employer” (*mittelbarer Arbeitgeber*) in German case law. This legal concept, developed by case law, is controversial in the traditional scope of application.<sup>174</sup> Nonetheless, the underlying assessments are of particular interest in the present context: according to case law, an indirect employment relationship exists when a worker is employed by a go-between, who himself is in turn employed by a third party (company), whereby the services are directly provided for the company with the company’s knowledge.<sup>175</sup> As the third party directly benefits from the provided services, he shall, according to the Federal Labour Court, “at least subsidiarily” be responsible for the fulfillment of the worker’s claims.<sup>176</sup>

Reference to the figure of the indirect employer should not be made prematurely, however. This becomes clear when realizing that according to case law, go-betweens, as already mentioned, are themselves employees.<sup>177</sup> Only when the go-between is an employee and not self-employed, according to the Federal Labour Court, would the employee require additional protection.<sup>178</sup> This limitation does not, however, need to be of interest to the legislator. Lawmakers could also be guided by the consideration that businesses ought to also assume certain (subsidiary) responsibilities when they – from an objective point of view – avoid the application of labour law regulations, for example, by fine-slicing tasks, and thus use other businesses, the platforms, as a “person in front” or in any event “capitalise” on platforms’ intervening.

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Wage Act (*Mindestlohngesetz*), this provision also applies to non-payment of the legal minimum wage; see for more details *Heuschmid/Hlava*, NJW 2015, p. 1719.

<sup>173</sup> The provision stipulates – in case of temporary agency workers – that the user-undertaking assumes subsidiary liability for the temporary agency’s social security contributions.

<sup>174</sup> Cf. in this regard also *Waas*, RdA 1993, p. 153.

<sup>175</sup> Federal Labour Court, NJW 1957, 1165, whereby the court refers in its reasoning to a “general legal principle”. The notion of “abuse of rights” is used in Federal Labour Court, NJW 1983, 645. The go-between is often (also) referred to as “intermediary”; cf. e.g. Federal Labour Court, NJW 1957, 1165.

<sup>176</sup> Federal Labour Court, NJW 1957, 1165.

<sup>177</sup> Apart from the fact that it also envisages the existence of an employment relationship between the go-between and the employee.

<sup>178</sup> Cf. Federal Labour Court, NJW 1957, 1165: “The employees of an independent entrepreneur do not need additional protection. The go-between, who himself is only an employee, usually lacks the material means to carry the employer’s risks”.

## IV. Social Security Protection

This paper presents an assessment of crowdwork based on labour law principles. However, a brief comment should be made about social security law. Since compulsory insurance is tied to “insurable employment” (*Beschäftigungsverhältnis*) in all areas of social security, which largely coincides with “employment relationships”,<sup>179</sup> such protection is not usually foreseen for crowdworkers. Social security continues to provide insurance primarily for dependent employees. An expansion towards establishing an insurance for all gainfully employed persons is continuously being discussed<sup>180</sup> but does not correspond with the existing law. Individual regulations exist according to which certain self-employed workers could be included in social security obligations. In this regard we should mention section 2, no. 9 of the Social Code Book VI, in particular, according to which employee-like self-employed persons are included in the group of persons who are subject to compulsory pension insurance. The requirement is that persons “do not regularly employ workers in connection with their freelance activities who are subject to compulsory insurance and permanently and essentially work for only one principal”. By this provision, the legislation aimed to counter the increasing erosion of the group of insured people owing to the shift of employees into employee-like self-employed activities.<sup>181</sup> The need of self-employed persons for social security protection is generally indicated when no workers are employed and the self-employed person cannot establish sufficient protection outside the legal pension insurance scheme.<sup>182</sup> A self-employed person who does not employ a worker who is subject to compulsory insurance is not capable of earning such considerable amounts so that he can cover himself outside of the statutory pension insurance scheme. The requirement to work for only one principal also indicates an economic dependence and thus typically a need for social protection.<sup>183</sup> This implies that employee-like persons are included in the pension insurance scheme, but must bear the full costs themselves according to section 169, no. 1 of the Social Code Book VI. Against this background, the continued development of the law in different

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<sup>179</sup> Cf. section 7(1) sentence 1 of Social Code IV: “Employment is independent work, especially under an employment relationship”. On the issue of bogus self-employment of “solo self-employed persons”, see *Diepenbrock*, NZS 2016, p. 127.

<sup>180</sup> Cf. for example, *Kreikebohm*, NZS 2010, p. 184; *Ruland*, ZRP 2009, p. 165.

<sup>181</sup> Cf. only *Kasseler Kommentar/Gürtner*, 92<sup>nd</sup> ed. 2016, § 2 SGB VI note 34.

<sup>182</sup> *Kasseler Kommentar/Gürtner*, 92<sup>nd</sup> ed. 2016, § 2 SGB VI note 38.

<sup>183</sup> Cf. Federal Social Court, NZS 2015, 710.



directions is encouraged, with the objective to counter further erosion.<sup>184</sup> In this context, another question that needs to be explored is who should bear the costs of social security contributions, with an orientation towards section 169, no. 3, which envisages a 50-50 division of contribution costs in the specific case of so-called commercial homeworkers (*Hausgewerbetreibende*) and their employers.<sup>185</sup> In this context the person who directly assigns the work is deemed to be the employer (section 12(3) of Social Code Book IV). If the work is assigned by an intermediary, that person is considered to be the employer.<sup>186</sup>

## V. Conclusion

Under existing law, a crowdworker may qualify as a homeworker, an employee-like person or even as an employee, with his contractual counterpart being either the platform or the crowdsourcer. Qualification always depends on the merits of the individual case and, according to the so-called typological method employed by German courts, must be based on an overall assessment in each and every case.

Accordingly, qualification as an employee is not out of the question. However, when applying the “traditional” criteria of “personal dependence” such qualification might be justified in rare cases only. Against this background, the courts may consider further developing their toolbox with a view to bringing about better protection for crowdworkers.

But there is only so much that the courts can do under existing laws. Crowdwork poses a challenge for legislators, too. There are various options, ranging from a big-picture to a more piecemeal approach. The latter, which has been primarily discussed in this paper, would be to take existing provisions in

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<sup>184</sup> Cf. only *Heuschmid/Klebe*, in: Festschrift Kohte, 2016, p. 65 (75f); for a legal comparison in general *Traub/Finkler*, Soziale Absicherung von Selbständigen im internationalen Vergleich, 2013: <https://www.wko.at>. See also *Krause*, Digitalisierung der Arbeitswelt – Herausforderungen und Regelungsbedarf – Gutachten B zum 71. Deutschen Juristentag, 2015, B 108 who suggests establishing a specific occupational pension scheme and treating platforms as employers for the purposes of such a scheme.

<sup>185</sup> Cf. *Baier*, in: Krauskopf (ed.), Soziale Krankenversicherung, Pflegeversicherung, 92<sup>nd</sup> ed. 2016, § 12 SGB IV note 11. According to section 12(3) of Social Code IV, an “employer” is someone who directly assigns tasks. If the tasks are transferred by intermediaries, these intermediaries are considered employers.

<sup>186</sup> Vgl. *Baier*, in: Krauskopf (ed.), Soziale Krankenversicherung, Pflegeversicherung, 92<sup>nd</sup> ed. 2016, § 12 SGB IV Rn. 11.

the law of homework as models for legislation aiming at the specific position of crowdworkers.

Irrespective of that, parts of the law other than labour law should also be taken into account. In this regard, judicial review of the general terms and conditions has a major role to play.

## D. Crowdwork and the Law in Japan

*Katsutoshi Kezuka*<sup>1</sup>

Crowdsourcing involves outsourcing part of a business to a large group of people (a crowd) via the Internet. Because it is one type of corporate outsourcing, users are naturally companies (crowdsourcers). However, looking at crowdsourcing sites shows that crowdsourcing is an intermediary business which enables the transaction of business services among members of an undefined public (workers and clients) on a web platform. Crowdsourcing users are not limited to companies. Many individuals use crowdsourcing platforms to request the creation of logos and websites, perform translation, and so forth. Nevertheless, considering the social and legal problems of crowdsourcing, especially the legal protection of crowdworkers, we should understand crowdsourcing as a method employed by businesses to use a workforce comprising outside people through the Internet.<sup>2</sup>

This paper therefore aims mainly to apprehend the legal relationships of crowdsourcing<sup>3</sup> and ascertain the true state of crowdworkers, and to consider the applicability of labour law and alternative ways to protect crowdworkers. A task for the future will be to investigate how crowdsourcing will change Japanese employment management,<sup>4</sup> or how the platform economy or gig economy will alter the world of labour law.<sup>5</sup>

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<sup>1</sup> Katsutoshi Kezuka, Guest Professor of Hosei University Postgraduate School.

<sup>2</sup> Transactions between crowdworkers and individuals (consumers) on the platform are not the primary subject of this paper. However, the concept of a worker must be understood today not only in relation to a company, but also in relation to consumers. See 2.1.3.B.

<sup>3</sup> Internal crowdsourcing and a bilateral model of external outsourcing are outside of this discussion. For the notion of crowdsourcing, see the introduction of Bernd Waas.

<sup>4</sup> For employment of science and engineering students, it is said that the evaluations on crowdsourcing sites already have decisive significance.

<sup>5</sup> Uber Japan performs dispatch and settlement services for taxi companies and does not yet carry out services using private drivers.

# **I. Current Situation of Crowdsourcing in Japan**

## **1. Features and Types of Crowdsourcing<sup>6</sup>**

### **a) Features of Crowdsourcing and Crowdwork**

Crowdsourcing has the following features. First, the user does not need to make a person (worker) a part of the corporate organisation. Therefore, one can use the workforce of those outside the company system without employing them (high cost-performance of outside human resources). Second, the accessible workforce is not limited to a user's locality because it is possible to use a labour force from anywhere, at any time (easy procurement of diverse human resources). It is always possible to hold down labour costs. Third, users themselves need not evaluate the ability of workers; instead, they use worker evaluations on platforms (easy evaluation through market assessment).

Workers, on the other hand, characterise crowdwork as a working lifestyle in the following way. First, workers need not work at the offices of client companies. They can work any place they want (locational independence). Second, crowdwork is mostly sporadic; workers do not have continuous relationships with clients (ad hoc relationships). Third, crowdwork is always subject to global competition, which means that workers are perforce members of a pure labour force commodity market.

### **b) Types of Crowdwork**

Judging by the order forms for crowdwork on platforms, types of work under crowdsourcing can be divided into microtasks, competitions, and projects.

In microtasking, a client-user divides work into as many small pieces as possible and commissions them to many workers on the web. Work thus subdivided into routine operations can be performed in a very short period. Typical jobs of this type are writing, data entry, dictation from tapes, and answering questionnaires. Jobs typically last a few minutes or a few hours. Clients pay remuneration through platforms. Compensation, with amounts determined in advance, may be either fixed fees or variable fees (hourly wages). Payment amounts are extremely low compared to project-type and competition-type jobs.

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<sup>6</sup> See the detailed information and discussion in the introduction of Bernd Waas.

In competition-type jobs, client-users call for applications to perform jobs such as creating logos or flyers, and occasionally research and development. Remuneration for such work is frequently established in advance and paid only for the work that client-users actually accept. Compared to microtasking, competition jobs are relatively sophisticated work. Payment amounts are generally lower than those for projects. To prevent decreases in proposed payment amounts, on some platforms users must specify a minimum payment for a job in the competition formula.

In project-type jobs, crowdworkers promise to complete a job within a specified period. The client-user concludes a contract with a certain worker for a job. It is therefore crucial for the client-user to select the most appropriate worker from among many user-workers, by referencing the evaluations and past results of their jobs on the platform. Typical project jobs include web development and website creation. Unlike the other types, the client need not determine the budget of the project at the posting stage. After the worker has been chosen, the parties negotiate the remuneration, which is a fixed amount or hourly wage. The payment range is very broad, from several thousand yen to several million yen for a project like core system development.

**Table 1. Types of crowdsourcing**

Type	Projects	Competitions	Microtasks
Subject of the job	Job done in project units determined by production time and deliverables	Job where specific deliverables are submitted	Job where deliverables generated through extremely simple tasks are submitted
Job examples	Web development Website creation	Logo creation Flyer creation	Simple data entry tasks Data collection, etc.
Compensation per order	1,000s to more than several million yen	1,000s to more than hundreds of thousands of yen	Up to several 100 yen

Source: Small and Medium Enterprise Agency, white paper 2014

## 2. Overview of Platforms in Japan

### a) Rapid Growth of the Crowdsourcing Business over the Last Five Years

The 2014 *White Paper on Small and Medium Enterprises in Japan*<sup>7</sup> reported for the first time on crowdsourcing in Japan, suggesting rapid growth with an increase in the registered members of four crowdsourcing companies (Crowdworks, Lancers, Realworld, and Pasona Tech, discussed below) from 54,000 in 2009 to 900,000 in 2013. In 2015 one of the representative daily papers covered the rapid growth of Japan's crowdsourcing business.<sup>8</sup> According to the report, domestic brokers already number about 200 companies, and their sales value on an order base exceeded 21.5 billion yen (€179 million) in FY2013. The increase was almost double that of the previous year, and the sales value will balloon to 182 billion yen in 2018.

In May 2014, leading companies established the Association of Crowdsourcing Industry<sup>9</sup> to promote the crowdsourcing business. The number of members as of March 2016 was 30 companies.

### b) Representative Platforms in Japan

#### aa) Lancers<sup>10</sup>

Lancers Co. Ltd., founded in 2008, is the first crowdsourcing company in Japan. In 2015 Lancers had 78 employees and annual sales of 400 million yen (€3.3 million). Lancers has 230,000 registered members. Its service is limited to Japan. Lancers' site covers all three crowdwork types, but creating logos and designs is its central business area, in competitions and projects. One of the platform's features is a "user evaluation" system. Using the criteria of work experience and skills, the site ranks freelancers according to five stages (top, expert, senior, lancer, and beginner) in each work category.

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<sup>7</sup> [http://www.chusho.meti.go.jp/pamflet/hakusyo/H26/download/2014hakusho\\_eng.pdf](http://www.chusho.meti.go.jp/pamflet/hakusyo/H26/download/2014hakusho_eng.pdf)

<sup>8</sup> The *Asahi Shimbun* of February 15, 2015. The source of the report was the estimation of the private Yano Research Institute.

<sup>9</sup> <https://crowdsourcing.jp/> Chairman of the association is Mr. Yoshida, president of Crowdworks Co. Ltd.

<sup>10</sup> <https://www.lancers.co.jp/>

**bb) Crowdworks<sup>11</sup>**

Crowdworks Co. Ltd., founded in 2011, is the largest crowdsourcing company in Japan. In 2015 Crowdworks Co. employed 98 people averaging 30.6 years of age and registered 350,000 members. Seventy percent of the jobs transacted on Crowdworks' platform are design and system development. This means that registered worker-users are relatively highly qualified engineers.

**cc) Realworld<sup>12</sup>**

Realworld Co. Ltd. operates the crowdsourcing site CROWD. The company, founded in 2005, started its crowdsourcing business in 2008. Realworld Co. specialises in microtasking. The company divides and standardises the work ordered by clients into small tasks performed by a large number of "members" as crowdworkers. Crowdworkers do not know who ordered the work. Jobs done on the site are mainly article creation, data entry, a field survey of photography, data collection, verification of data and classification, and the like. Registered members numbered 810,000 in 2015 and are mostly female homemakers. Realworld pays remuneration with points as virtual money that circulates within its site.

**dd) Crowdgate<sup>13</sup>**

Crowdgate is a site operated by Crowd Gate Co. Ltd, a developer of online games. This platform deals with illustrations, designs, logos, business cards, idea recruitment, and game scenarios. About 6,000 creators are registered and engaged with crowdwork in a competition-based or project-based system. A characteristic of the Crowdgate platform is that crowdsourcers, not crowdworkers, pay the "service fee". Projects have three levels of closed bidding for orders to keep the secret of the client.

**ee) Job-Hub<sup>14</sup>**

Job-Hub is a crowdsourcing site established in 2012 by Pasona Tech Inc. (founded in August 1998, capital 100 million yen). It operates a human resources business offering temporary agency work, job placement, and an outsourcing ser-

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<sup>11</sup> <https://crowdworks.jp/>

<sup>12</sup> <http://www.realworld.jp/crowd/>

<sup>13</sup> <http://www.crowdgate.net/>

<sup>14</sup> <https://jobhub.jp/>

vice. Currently it has about 5,000 registered members. Job-Hub takes a 10% commission from clients, but not from workers. Job-Hub operates the outsourcing service “Job-Hub my team”. It is a team-project scheme in which Job-Hub organises crowdworkers and assigns project managers.

### **c) Platform Types**

A close look at the platforms reveals differences among them. The first difference is the business areas of the companies operating the platforms. In one group (Lancers, Crowdworks) the companies’ only business is operating their crowdsourcing platforms. In the other group (Crowdgate, Pasona) the companies have their main businesses and operate crowdsourcing platforms as side businesses (subsidiary crowdsourcing companies).

The second difference is whether or not a platform accepts job orders. In general, companies operate their platforms exclusively to mediate transactions between client and crowdworkers, and do not take job orders themselves (Lancers, Crowdworks, Crowdgate). However, some companies operating platforms take job orders and divide the jobs commissioned by customers (Realworld, Pasona).<sup>15</sup>

Third, the most salient difference is that service fee payers are different for each platform. Some platforms collect service fees from workers (Lancers, Crowdwork), while others collect them from the clients (Crowdgate, Pasona, Realworld). There is an observable tendency for the companies which operate crowdsourcing sites as a means of supporting their main businesses (Crowdgate, Pasona), or which provide ordering services (Crowdgate), to take the service fee from client companies (crowdsourcers).

## **3. Profile of Individuals Using Crowdsourcing**

Since the crowdsourcing business has a short history, no full-fledged survey on it has been performed. We find only a study in the Small and Medium Enterprise Agency white paper of 2014.<sup>16</sup> The Small and Medium Enterprise Agency commissioned a private company, Y’s Staff, to carry out the survey (online questionnaire investigation) in December 2013 in cooperation with four crowdsourcing companies (Crowdworks, Lancers, Realworld, and Pasona

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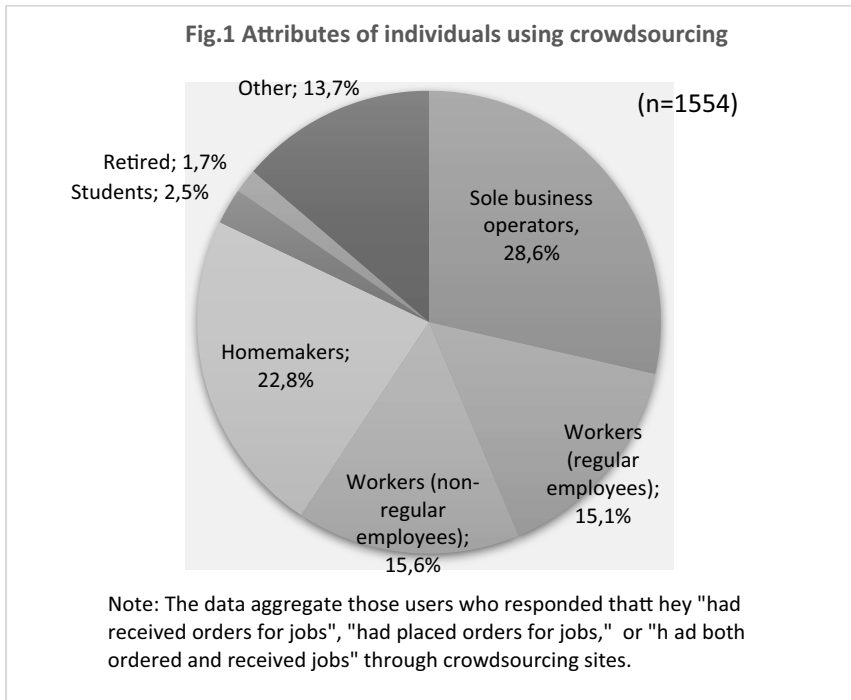
<sup>15</sup> It may be the dual function of the crowdsourcing company as transformer and aggregator. See the introduction of Bernd Waas, p. 13.

<sup>16</sup> See Note 7.



Tech). Based on this “Survey on the Use of Crowdsourcing in Japan” (2013), I will briefly look at crowdsourcing in Japan, especially the profiles of clients (ordering parties) and crowdworkers (order recipients).

Individuals (total 1,554) who have either placed or received jobs on crowdsourcing websites have varied personal attributes (Fig. 1). Regular or non-regular employees<sup>17</sup> (30.7%), sole business operators<sup>18</sup> (28.6%), and homemakers (22.8%) are three typical groups.



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<sup>17</sup> “Regular employees” are normally employees working in an indefinite employment contract.

<sup>18</sup> Sole business operators in the survey include solo self-employed, self-employed with partners or employees and one-person companies.

**a) Profile of Enterprises Using Crowdsourcing (Crowdsourcers)**

**aa) Crowdsourcers Are Mostly Small Companies**

To discuss the legal problems of crowdsourcing, we should focus on the crowdsourcers. Fig. 2 shows the number of employees at enterprises (total 248) which have placed orders at crowdsourcing sites. About 70% of crowdsourcers are companies with five or fewer regular employees, and about 10% of the clients are companies with more than 100 regular employees. This suggests that small and medium-sized enterprises take advantage of crowdsourcing to compensate for their lack of human resources.

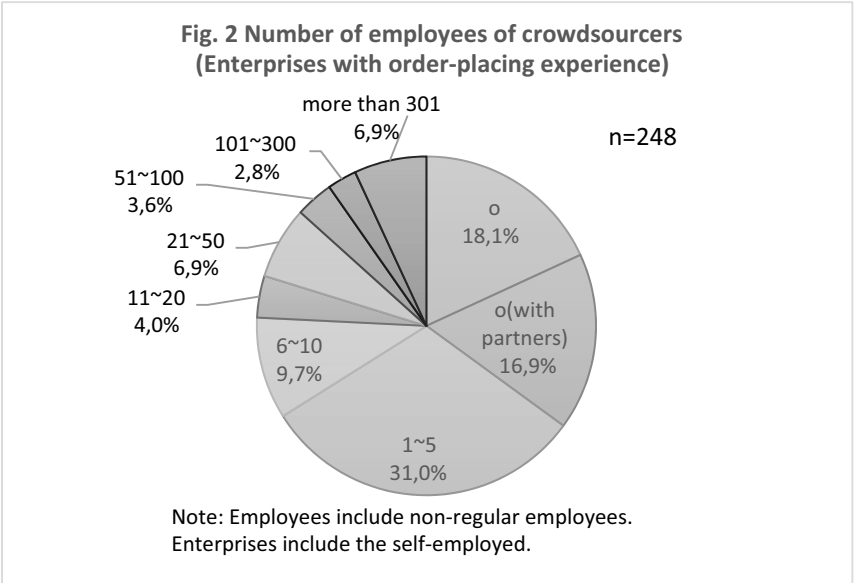
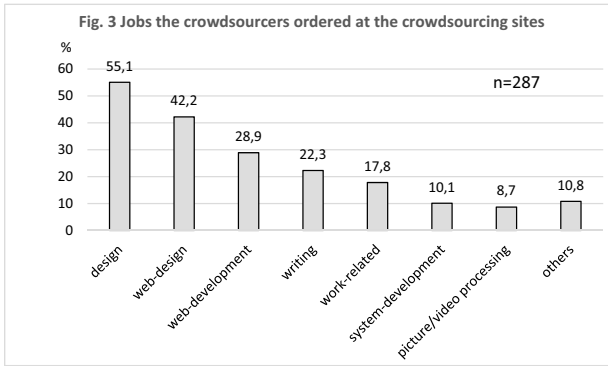
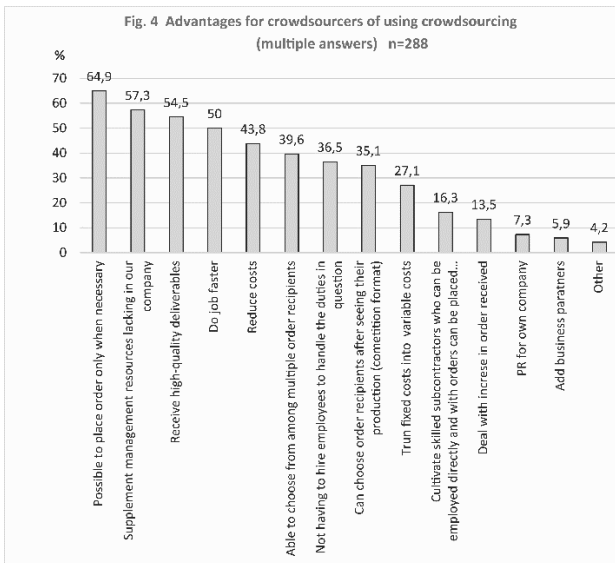


Fig. 3 shows the kinds of jobs that clients have ordered at crowdsourcing platforms. Most of the jobs require skills such as “design”, “web design”, and “web development”. This suggests that companies do not have such in-house human resources. However, client companies also have ordered “writing” and “work-related” tasks which require little in the way of worker qualifications. Companies perhaps thought that it was more efficient to farm out these tasks than to use their in-house human resources.



### bb) Advantages for Crowdsourcers of Using Crowdsourcing

Fig. 4 shows the reasons why crowdsourcers (enterprises using crowdsourcing) find value in using crowdsourcing. About 60% of crowdsourcers (total 288) answered “because we can order when necessary”, and “we can compensate for insufficient in-house human resources”. We can infer that most crowdsourcers benefit from crowdsourcing when they can temporarily use human resources which they could not always employ. Also, crowdsourcers noted the advantages of “getting high-quality products” (54.5%), “completing jobs sooner” (50%), and “reducing costs” (43.8%). This may also signify that they find the benefits of crowdsourcing in rationalising and promoting the efficiency of their businesses.



### **cc) Problems from the Perspective of Crowdsourcers**

When using crowdsourcing, there are three problem categories for crowdsourcers. The first is concern about product quality. Many ordering parties cited “uncertain job quality” (40.8%, total 280), “securing skilled order recipients” (36.2%), and “inability to guarantee quality” (24.8%). The second problem is the difficulty of “communicating with order recipients” (39.7%). The third problem is concern about the “danger of information leaks” (39.7%) and “danger of idea theft” (36.9%).

These three problems are critical for crowdsourcing because crowdwork is a working style that does not share living space. Normally crowdsourcers prefer to place orders with contractors to whom they have previously assigned work in order to assure consistent job quality and have communication with contractors beyond that conducted solely through e-mail and other online methods.

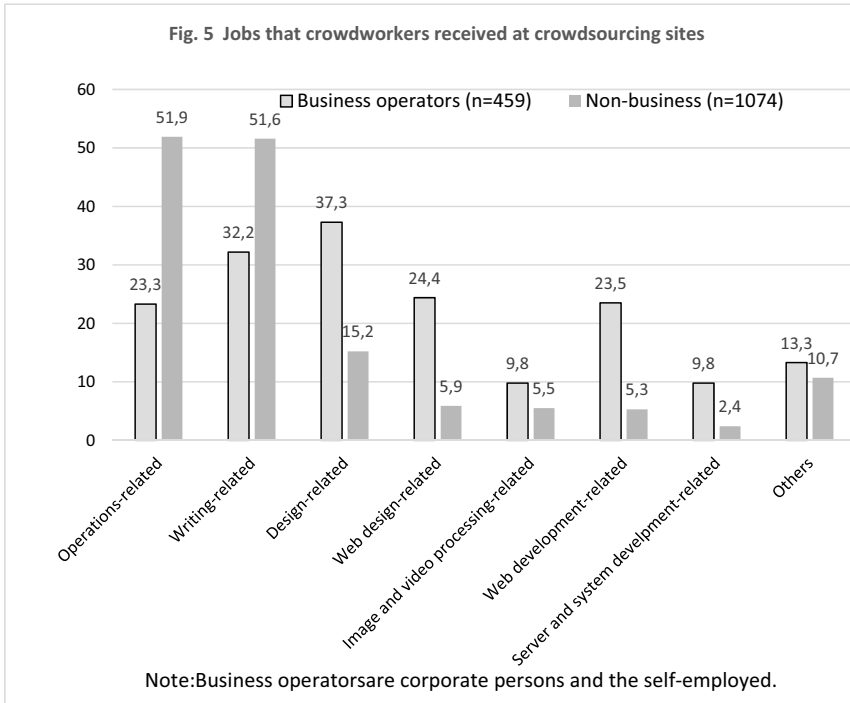
### **b) Profile of Crowdworkers at Crowdsourcing Sites**

#### **aa) Order Recipients Are Mostly Solo Self-Employed<sup>19</sup>**

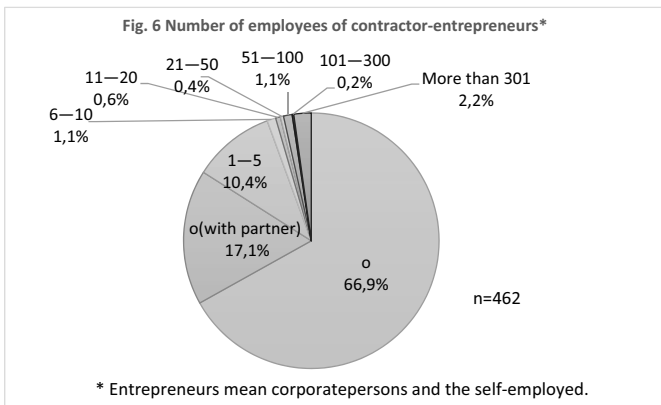
Fig. 5 shows the kinds of jobs that crowdworkers received at crowdsourcing sites. Jobs that non-business operators (total 1,074) received were mainly unskilled ones such as data entry (51.9%) and writing (51.6%). On the other hand, jobs received by business operators (total 459) almost all required skills such as design (37.3%), web design (24.4%), and web development (23.5%).

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<sup>19</sup> In general there are crowdworkers as non-business operators (side-job workers, homemakers, students etc.) and crowdworkers as business operators (solo self-employed, self-employed with employees or partners and corporate persons). Both are the target of labour law. These categories are terms used in the survey.

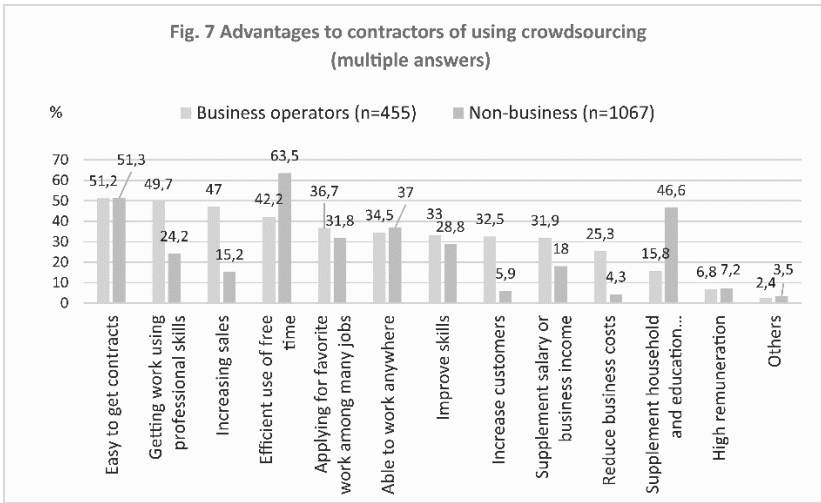


In terms of company size, contractors (crowdworkers) are mostly sole self-employed. Fig.6 shows the number of employees of entrepreneurs (corporate persons and self-employed, total 462) that have received orders from crowdsourcing platforms. About 67% of entrepreneurs have neither employees nor partners, and are therefore solo self-employed. Businesses with partners or employees accounted for 17.1% of crowdworkers.



**bb) Advantages of Crowdsourcing for Crowdworkers**

What benefits do contractors (order recipients) realise from crowdsourcing? Fig. 7 indicates that for both business operators and non-business operators, the use of crowdsourcing sites is the best way “to easily gain contracts”. For non-business users, the benefits of crowdsourcing are the effective use of free time (63.5%), supplementing household income, and paying school expenses (46.6%). For business operators, crowdsourcing is useful “to get work that uses professional skills” (49.7%) and “to increase sales” (47.0%). Considered in conjunction with the fact that most contractors were solo self-employed, we can suppose that small business owners use crowdsourcing to increase customers or sales.

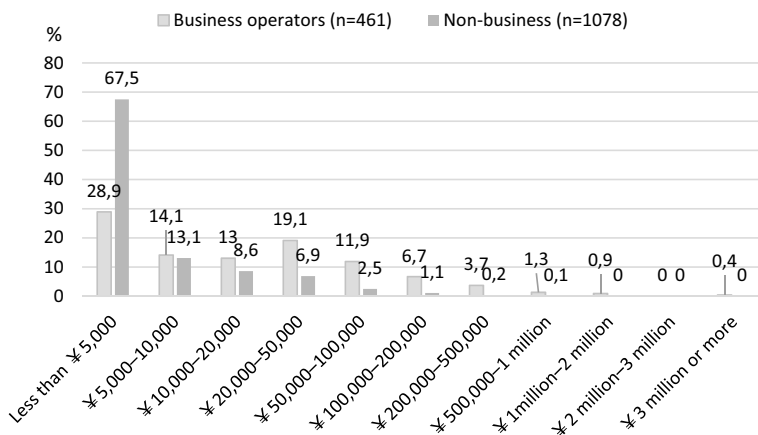


**cc) Income of Crowdworkers**

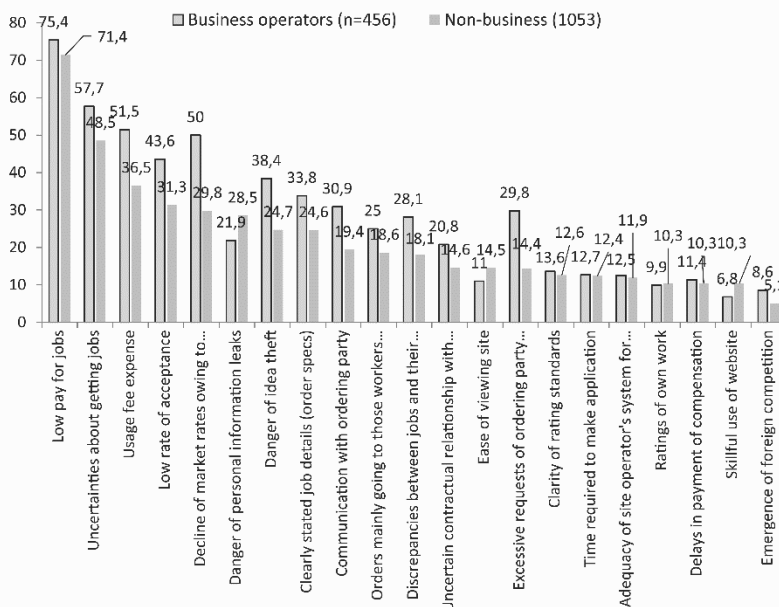
Fig. 8 provides details about the average monthly monetary volume received through crowdwork. Approximately 70% of non-business users (total 1,078) responded that their monthly crowdsourcing income was 5,000 yen (€41.7) or less. One can infer from this that many of the orders that such individuals receive are for low-paying “writing-related” or “operations-related” jobs and the like. The income of business operators (total 461) through crowdsourcing is also very low. Crowdworkers whose monthly income is more than 200,000 yen (€1,667) account for only 6.3%.

Many users also pointed to “uncertainties about receiving jobs” as a problem. To achieve a steady job flow they are likely to seek out clients who regularly offer jobs and get them to deliver orders continuously.

**Fig. 8 Volume in monetary terms of jobs received through crowdsourcing (monthly average)**



**Fig. 9 Problems crowdworkers face when using crowdsourcing (MA)**



#### **dd) Problems from the Perspective of Crowdworkers**

Fig. 9 shows the problems with using crowdsourcing as seen from the standpoint of order recipients (crowdworkers). The biggest problem, cited by more than 70% of crowdworkers, is “low pay for jobs”. Particularly for crowdworkers who are business operators (solo self-employed and self-employed with partners or employees), low pay is critical (75.0%) because of the “decline of market rates owing to competition” (50.0%). The second-biggest problem for business operators is the instability of work, as in the “uncertainty of receiving orders” (57.7%) and “low rate of acceptance” (43.6%). The third-biggest problem is the “expense of paying usage fees” (51.5%). As with crowdsourcers, another concern is “idea theft” (38.4%).

#### **c) Summary**

As the SMA survey of 2013 shows, both sides in crowdsourcing – crowdworkers and clients – are mostly individuals. Seventy percent of enterprises that have placed orders on platforms are small businesses with fewer than five employees. This figure suggests that large businesses had not yet taken advantage of crowdsourcing as of 2013.

On the other hand, most contractors (crowdworkers) are naturally individuals. Approximately one in three is self-employed and a regular or non-regular employee, and the others are people like homemakers and students. Even in the case of enterprises (corporate persons and self-employed), 80% of enterprises that have received orders are one-person businesses employing no other people (Fig. 7). A second suggestion of the figures is that the self-employed are the main concern in a discussion of social problems.

Third, the crucial issue for contractors (crowdworkers) is low income. Regardless of whether a crowdworker is a business owner or a non-business individual, most contractors obtain less than 5,000 yen (€41.7) a month from crowdwork, while contractors with revenues exceeding 200,000 yen (€1,667) a month from crowdsourcing account for only 6.6%.<sup>20</sup> This shows that until 2013 in Japan, crowdwork was nothing more than a means of secondary income.

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<sup>20</sup> K. Higa, *Jissen (Praxis) of Crowdsourcing*, 2014, p. 20 wrote that crowdworkers who earn 200,000 yen or more a month in crowdwork numbered only 150 persons among the registered members of Lancers Co. Ltd.



#### **4. Legal Structure of Crowdwork Seen from the Terms of Service**

##### **a) Tripartite Relationship as the Representative Structure of the Crowdsourcing Business<sup>21</sup>**

Some of the crowdsourcing platforms carry out ordering services for client companies. For example, Realworld Co. Ltd. subdivides the work commissioned by customers into microtasks and subcontracts those to crowdworkers. Crowdworkers cannot know who the customers are. As such, crowdworkers normally have a legal relationship only with the crowdsourcing site. A two-party labour relationship, which is legally uncomplicated, can be accommodated by the traditional framework of labour protection.

However, the typical crowdsourcing business in Japan is a tripartite relationship. Most companies operating crowdsourcing sites serve only an intermediary function between client-users and crowdworkers. Therefore, this paper focuses on crowdsourcing as a tripartite relationship.

##### **b) Microtasking Crowdwork**

i) This task type of crowdwork is, as mentioned above, used for relatively simple typological work such as text entry and writing, or collection and classification of data, with remuneration determined in advance. According to the terms of service (TS), the ordering party (client) must clearly state the unit price of the task and the delivery deadline in advance. The TS of Lancers Co. sets the lower price limit (300 yen), but there is no predetermined deadline. The TS of Crowdworks Co. sets no lower limit on the price, but there is a maximum deadline (14 days).

Provisions for contract completion are also characteristic. The contract between the worker (the worker is generally called a “lancer” by Lancers, a “user” by Crowdworks) and the client (the term used by Lancers, Crowdworks) comes into effect when the client approves the task which the registered worker selects and performs. Once the contract becomes effective, the client cannot reject the task without reasonable grounds, and the refusal of acceptance cannot be more than 30% in any circumstances.

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<sup>21</sup> As to general analysis of crowdwork structures, see the introduction of Bernd Waas.

The contract between the crowdworker and the client is referred to as a “contract for a business service” (*gyoumu itaku keiyaku*) in the Crowdworks TS and a “transfer agreement of all the transferable rights of selected production” in the Lancers TS.

ii) Every TS of crowdsourcing provides that the contract for business service must be a direct contract among or between website members. However, the client must pay, in advance to the platform (transfer or credit card payment), the total amount of remuneration calculated according to the unit price and the total number of tasks. If the crowdworker completes the task, the platform pays the remuneration to the crowdworker. In this way, crowdworkers can avoid payment problems. From the viewpoint of crowdworkers, the platform is an agent which collects and remits remuneration.

iii) Regarding the concluding date of the contract, there is room for discrepancy between the TS and the actual transaction. In the task system, the TS says that the contract between the worker and the client is concluded when the client approves the task to be performed by the worker. However, unlike the competition type described below, the client cannot decide whether to accept or reject the work performed by the worker after having seen it. The client is only able to reject poor work. Therefore, it is enough that the contractual relationship is concluded when the worker for the task is selected.

### **c) Competition Type**

In the competition type of crowdwork, a client calls for submissions by crowdworkers for the creation of logos or illustrations, and pays remuneration for the work after choosing from among many worker submissions. According to the terms of service, the client shall determine the “remuneration amount” and “particulars of the request” and specify the competition format. Additionally, the client must explicitly state the “submission deadline” of a job request (Crowdworks: within 14 days; Lancers stipulates no upper limit) and the “selection decision deadline” after the submission deadline (Crowdworks: within 14 days; Lancers: within 21 days).

The contract between the worker and the client becomes effective when the client adopts the proposal of a specific worker. The contract is a “transfer contract of all the transferable rights for the selected product” (Lancers TS).<sup>22</sup>

Payment of remuneration is the same as with the microtask type: the client must pay the amount of the remuneration as security to the platform in advance. The platform pays the remuneration to the worker after the client decides to adopt his or her work.

The difference with microtasking crowdwork is that the client is entirely free to accept or reject workers’ submissions. On the other hand, after deciding which submission to accept, the client does not have the right to seek modification or confirmation of the chosen proposal without that worker’s consent.

#### **d) Project Type of Crowdwork**

i) Unlike the microtasking and competition types, in project work a job is performed after contract conclusion. The client-user presents the project job with its description, proposed remuneration, the delivery deadline, and other pertinent information. Worker-users apply for the job and await the client’s notification of the chosen contractor. The contract is concluded when the chosen worker is notified and approves it.

ii) Lancers’ platform has a team-order scheme (Crowdworks and Crowdgate do not have the team scheme). To conclude a contract under this scheme, the lead worker approves the winning notice from the client, and then must immediately obtain the consent of all team members about how to divide the remuneration. If the lead worker cannot obtain the consent of all members within seven days after having approved the winning notice, the team is deemed to have declined the project offer (Lancers TS, Art. 13, and para. 2).

iii) In addition to a fixed remuneration amount, there is characteristically an hourly wage paid for the time spent on a job. Paying the hourly rate necessitates measuring “business hours”. Workers are to measure “business hours” on a weekly basis and report the time by the next Monday. When a worker does not

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<sup>22</sup> The competition type is normally (Lancers, Crowdgate, Job-Hub) a transfer contract of all transferable rights including the rights of Art. 27 (translation rights, adaptation rights, etc.) and Art. 28 (rights of the original author in connection with the exploitation of a derivative work) of the Copyright Act of 1970. However, the TS of Crowdworks Co. say that the competition type is also a “contract for business service” (Art. 10).

report business hours, the platform calculates hours using time-card software. Clients are required to approve the hours between Tuesday and Friday.

Clients can, with reasonable grounds, refuse to approve apparently dishonest time reports for the performance of projects, but refusals cannot exceed 30% of the reported time. Additionally, clients must deposit funds for the “maximum amount of business hours” in platform accounts before workers start their jobs (TS of Lancers and Crowdworks, by Sunday of the previous week).

### **e) Summary**

Commonly, crowdsourcing sites structure every type of crowdwork as a two-party contractual relationship between platform members, and platforms take no responsibility for contract performance. Furthermore, the terms of service take care to state that a two-party contract between a worker and a client is a “contract for business service” or a “transfer contract of rights on work”, and that client-users may not give instructions to worker-users.

In project-type jobs, however, because clients instruct workers in the process of performing jobs, this could raise the issue if a contract is an employment contract, especially an hourly-pay contract. Moreover, in the team system, the legal character of the relationship between a team leader and member-workers would be a problem. Section II.2.a) discusses this.

## **5. Role and Legal Status of Crowdsourcing Platforms**

### **a) The Role and Business of Crowdsourcing Platforms**

(1) What role do crowdsourcing sites perform in the relationship between client-users (crowdsourcers) and worker-users (crowdworkers)? First, crowdsourcing-site companies *provide their members with a marketplace* to meet each other. For client-users, such platforms are the best places to find a large number of workers. Client-users can easily select workers by viewing evaluations by third parties on platforms if they are seeking qualified workers for competition- or project-type jobs.

For worker-users, the most important role of crowdsourcing sites is *the agent function of collection and payment of remuneration*. Crowdsourcing sites collect remuneration funds in advance and make payments to workers after job completion. This scheme is the same for project jobs paid by the hour. In this sense, crowdsourcing sites are agents performing collection and payment of remuneration for crowdwork.

(2) No fee is required to become a site member. When member-users trade on a crowdsourcing site platform, they must pay the site a “usage fee” or “service fee”. A usage fee is the site’s commission for concluding a contract between a worker-member and a client-member.

Worker-users pay usage fees on the platforms of Lancers and Crowdworks. On the Crowdgate platform, client-users pay the usage fee. The usage fees of Crowdworks and Lancers vary according to the remuneration amount. If the compensation is under 100,000 yen (€833), the fee is 20%. If it is over 100,000 yen and up to 200,000 yen (€1,667), the fee is 10%, and if it is over 200,000 yen there is no fee (Crowdworks) or 5% (Lancers). Designclue’s site deducts 10% as a commission from designers’ payments. Crowdgate’s site takes a fixed rate of 15% from client-users.

Despite the differences among usage fee payers, crowdsourcing sites make a profit by taking commissions from transactions on their platforms.

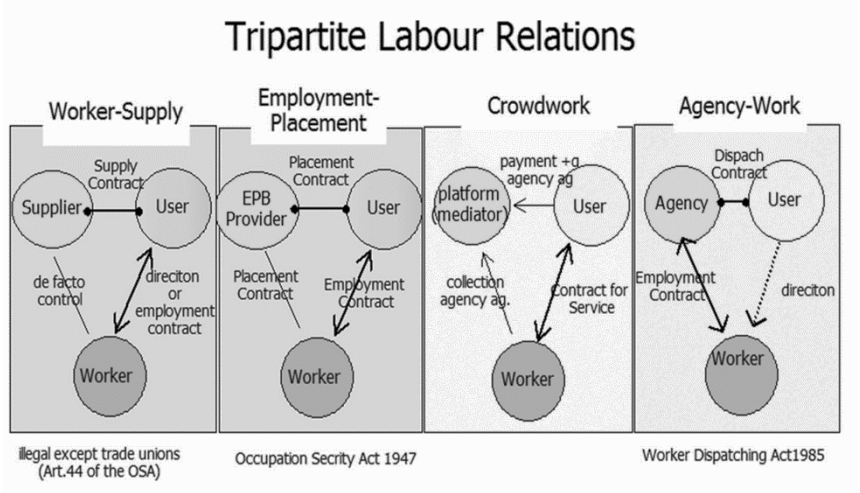
## **b) Legal Status of Crowdsourcing Sites**

One platform’s terms of service state that “trading members carry out every procedure, communication, fulfilment of legal obligations, and dispute resolution occurring between them”, and the crowdsourcing site “takes no responsibility for all matters relating to trade among members” (Lancers TS, Art. 11). Perhaps the intention of crowdsourcing sites is to provide only a marketplace to their members but not to become a party to the crowdwork relationship. Therefore, the terms of service state that they do not guarantee the implementation of contracts among their members.

However, crowdsourcing platforms collect remuneration for jobs in advance and pay it to crowdworkers, deducting usage fees from the remuneration. This is none other than a tripartite labour relationship. Other, pre-existing, types of tripartite labour relationships are agency work and employment placement. Unlike agencies in agency work, crowdsourcing companies do not want to become employers, and therefore crowdsourcing is similar to employment placement. According to Article 4 of the Occupation Security Act, “job placement” means “receiving offers for posting job offerings and offers for registering as job seekers, and extending services to establish employment relationships between job offerers and job seekers”. Judging by this definition, the function of crowdsourcing platforms is not job placement because the relationship between workers and clients is in principle not an employment contract. However, as we have seen, there is still a possibility for a crowdwork relationship to become a de facto employment relationship in certain circumstances. That would raise the

issue of whether the crowdsourcing platform is a kind of illegal labour supply prohibited by the OSA (IV.1.a)).

Moreover, it is not hard to anticipate future legal disputes over service fees, non-payment of compensation, and the leakage of personal information or intellectual property.



**c) Summary**

Crowdsourcing platforms forming tripartite labour relations have two functions: an intermediary function including evaluation which enables the transaction of providing services between parties which are geographically remote from one another, and an agent function which collects and pays the consideration for transactions between parties thus geographically separated. Additionally, in the case of the project-type of crowdwork, the crowdsourcing sites have a management function to verify the progress of projects.

The legal structure created by the crowdsourcing platform is a new type of tripartite labour relation not covered by the OSA. We should consider regulating the crowdsourcing business under the OSA to clearly define the legal relationship of the three parties and to promote the sound development of the business.

## II. The Concept of Workers in Labour Law and the Applicability to Crowdworkers

### 1. The Concept of Workers in Japanese Labour Law<sup>23</sup>

#### a) Characterising the Discussion on the Concept of Workers in Japan

In Japan, too, the scope of labour law has been discussed as a problem concerning the concept of “worker” in labour legislation. However, we can see some differences between the discussion in Japan and that in Germany.

First, the labour contract (*roudou-keiyaku*) in labour law is understood to be the same contract as an employment contract (*koyou-keiyaku*) in civil law. The 1896 Civil Code has some provisions on employment contracts regarding payment after work, non-transferability of rights, and cancellation. It defines employment contracts as follows: “An employment contract shall become effective when one of the parties promises to the other party that he/she will engage in work and the other party promises to pay remuneration for the same” (Civil Code, Article 623). On the other hand, the 1947 Labour Standards Act (LSA), without giving a definition, uses the concept of labour contract instead of employment contract. Additionally, the 2007 Labour Contract Act (LCA) defined a worker as “a person who works by being employed by an employer and to whom wages are paid.” Whatever the definition, the common understanding is that an employment contract according to the Civil Code and a labour contract according to the Labour Standards Act and the Labour Contract Act regulate the same life relationship.

One of the reasons for our understanding that an employment contract in the Civil Code and a labour contract in labour law are the same has been explained by the difference in the concept of mandate (*Auftrag*) in Germany and in Japan.<sup>24</sup> Unlike a mandate in the Japanese Civil Code, a mandate (*Auftrag*) in the German Civil Code does not include a contract for remuneration. Therefore, in

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<sup>23</sup> See, e.g., Takayasu Yanagiya, *Gendai-Rodoho to Rodosha-gainen* (Concept of Workers in modern labour law), Shinzansha, 2005; Koichi Kamata, *Definition of a Worker in Labour Standards Law*, *Hogaku-shinpo* 111(7/8), 2005; Takeuchi-Okuno, Hisashi: *Literature Survey on the Concept of Workers under the Trade Union Act, Kikan-Rodoho* (Labour Law Quarterly) No. 235, 2011; A source available in English is: Shinya Ouchi, *Labor Law Coverage and the Notion of ‘Worker’*, 2004, [http://www.jil.go.jp/english/events/documents/clls04\\_ouchi.pdf](http://www.jil.go.jp/english/events/documents/clls04_ouchi.pdf).

<sup>24</sup> Sakae Wagatusma, *Saiken-kakuron* (The Law of Obligations, Discussions on Individual Contract Types) p. 539, 1962.

Germany the *Dienstvertrag* (contract of service) takes over the life relationship of a mandate contract for remuneration. In Japan, because a mandate contract includes a contract for value, *koyou-keiyaku* in the Civil Code did not have to take over the life relationship of a mandate contract for remuneration.

Second, in Germany working people who are not in personal subordination to but are economically dependent on the other party are given protection under the concept of a person similar to an employee (*Arbeitnehmerähnliche Person*), while Japanese legislation does not have such a category. This means that we must shield such working people with the concept of worker if we intend to protect them.

Third, for these reasons the dominant view in Japan is to see the concept of worker differently according to the purpose of each labour law (how the relative understanding of a worker is conceived). In particular, there is no objection to understanding the worker concept differently in collective labour law and individual labour law. In recent years, even in individual labour law, a relative understanding of the worker is growing.

**Article 623 of Civil Code**

An employment contract shall become effective when one of the parties promises to the other party that he/she will engage in work, and the other party promises to pay remuneration for the same.

**Article 6 of Labour Contract Act**

A labour contract is established by agreement between a worker and an employer on the basis that the worker will work by being employed by the employer, and the employer will pay wages for such work.

Definition of the worker in Japanese labour legislation

**Article 9 of the Labour Standards Act 1947**

In this Act, “worker” means one who is employed at a business or office and receives wages therefrom, regardless of the type of occupation.

**Article 3 of the Trade Union Act 1949**

The term “Workers” as used in this Act shall mean those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation.

**Article 2 of the Labour Contract Act 2007**

(1) The term “worker” as used in this Act means a person who works by being employed by an employer and to whom the employer pays wages.



## **b) The Concept of Workers in Individual Labour Law**

### **aa) “Use-Dependency” Test as Case Law**

Article 9 of the 1949 Labour Standards Act (LSA), which is a crucial labour protection law regarding wages, working time, and health and safety, provides that “in this Act, ‘worker’ means one who is employed at a business or office and receives wages therefrom, regardless of the type of occupation”. Article 2 of the Labour Contract Act provides that “the term ‘worker’ as used in this Act means a person who works by being employed by an employer and to whom the employer pays wages.” In Japan, we call this definition in general the “use-dependency (subordination) test”.<sup>25</sup>

The *fundamental criteria* of the “use-dependency” test are:

- (i) Freedom to accept business requests and instructions on business performance,
- (ii) Instructions on the business and how it should be carried out, and
- (iii) Restriction of working place and time.

To these, the following *supplementary criteria* are added:

- (iv) Whether the worker can outsource the service to others (non-substitutability of performing labour),
- (v) Whether remuneration is calculated on an hourly basis,
- (vi) Which party undertakes the burden relationship of machinery and equipment, and
- (vii) The degree of exclusivity in the relationship.

The following examples show the use-dependency test in case law.

#### **(1) Truck Driver-Owner**

Many lawsuits dispute the applicability of the Workers’ Accident Compensation Insurance Act (WACIA) to vehicle driver-owners who perform transportation services for a particular undertaking. The lower courts have often ruled affirma-

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<sup>25</sup> These criteria were summarised in 1985 by a report of an advisory study panel on the Labour Standards Act organised by the Ministry of Labour, based on precedent case law. Thereafter the courts have mostly adopted this test.

tively, but the Supreme Court denied WACIA applicability in the Yokohama-minami Rokisho (Asahishigyo) Case (SC 28.11.1996).

In this case, vehicle driver X was affiliated exclusively with Company A to perform transportation tasks under instructions from the company's transportation division. The Supreme Court held that X, who owned his truck as commercial equipment, was engaged in transportation business at his own risk: "The company gave X orders on what goods to transport, shipping destinations, and delivery deadlines. That is how the transportation business works, and A failed to exercise self-discipline. Restraints on time and work location were far more moderate than those on general employees. It is not enough to say that X was providing labour under the direction and supervision of A."

## **(2) Self-Employed Contractor**

It is also often disputed whether the Workers' Accident Compensation Insurance Act covers self-employed contractors. In cases where a sole proprietor received a job order as a group member, the substitutability of providing labour was a decisive factor in denying that person status as a worker.<sup>26</sup> However, when a consignor provided a sole proprietor with the machinery, gave him instructions, and determined his working hours, the sole proprietor was regarded as a worker under the WACIA.<sup>27</sup>

For the most part, courts rigidly interpret the WACIA.<sup>28</sup> The applicability of a dismissal notice (Article 20 of LSA) to a carpenter can be more easily affirmed. The court held that a carpenter was a worker because he was engaged in other work concurrently with carpenter work, and attended morning meetings.<sup>29</sup> Moreover, in a different case on a claim for damages based on a violation of the duty to care for safety and health, the court affirmed the liability of the contractor to the sole-proprietor carpenter on the ground of "substantial use-dependency".<sup>30</sup>

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<sup>26</sup> Nishinoda Labour Standard Inspection Office (LSIO) case, Osaka District Court 6.9.1974; Oouchi-LSIO Case Takamatsu DC21.1.1982; Shibata-LSIO case Niigata DC 29.3.1991; Sagamihara-LSIO case 20.7.1995; Kawaguchi-LSIO case Urawa DC 30.3.1998.

<sup>27</sup> Saiki-LSIO case, Oita District Court 29.8.1985.

<sup>28</sup> Note that there is a special enrolment scheme for workers' compensation insurance for truck drivers and sole proprietors (5.a) bb (2)).

<sup>29</sup> Maruzen Juken Inc. case, Tokyo DC 25.2.1994.

<sup>30</sup> Fujishima Construction Co. case, Urawa DC 2.3.1996.

### **(3) Professional Persons**

The courts have often held that system engineers who work for software development companies under service contracts are workers in suits claiming overtime pay and allowing termination notices of contracts<sup>31</sup>. A doctor working as a hospital director with a monthly salary of 2 million yen also enjoyed the protection of the doctrine of abusive dismissal on the grounds that the owner controlled the hospital, and his business focused on medical care<sup>32</sup>.

## **bb) New Approach to the Concept of Workers in Individual Labour Law**

### **(1) Modification of the Use-Dependency Test**

With the increase of self-employed persons, there is more discussion on revising the traditional use-dependency test because there is a greater need to apply the Labour Standards Act and Workers' Accident Compensation Insurance Act to these workers.

#### **(i) "Economic Dependency" Test**

One alternative view is the economic dependency test.<sup>33</sup> The criteria defining a worker in individual labour law are:

- A person who supplies his labour to the business operator,
- A person who takes reward for the labour, and
- A person who is not an independent business operator.

If these criteria are met, all independent contractors can be workers under individual labour law. However, economic dependency, i.e., an imbalance of bargaining power, is not a clear criterion because it exists more or less everywhere in economic transactions.

#### **(ii) "Integration into the Corporate System" Test**

Today's employed labour is mostly labour in companies. Of course, as with childcare and housework, employment contracts also exist for individuals who are consumers rather than business operators. However, the reason employed labour has become the dominant means of using the workforce of others in modern society is the establishment of the company system, which combines

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<sup>31</sup> Exe Inc. case, Tokyo DC 9.5.1994; Hashiba Inc. case, Osaka DC 25.7.1997.

<sup>32</sup> Chuo-Rinkan Hospital case, Tokyo DC 26.7.1996, Rohan No.699, p.22

<sup>33</sup> Miki Kawaguchi, Reconstruction of the Concept of Employees (Rodosha-gainen no Saikosei), 2012.

human resources and material resources in businesses. In other words, a business operator must bring workers into the same living space in a company by hiring them so that they will provide labour in cooperation with other workers. However, the development of information technology enables cooperation among workers without them sharing a living space within the enterprise. There is no absolute need for business operators to create employment relations to organise the labour force of others organically. The corporate boundary policy to minimise the inside workforce of a company is one reason for the current increase in atypical workers.<sup>34</sup>

Given this transformation of the corporate system, including changes in labour organisation, it may be appropriate to focus on the incorporation or integration into the corporate system in determining the scope of workers in individual labour law (as described later, case law already adopts this criterion in collective labour law).

## **(2) Relative Understanding by the Purpose and Methods of Protecting Workers**

Although the Labour Standards Act and the Labour Contract Act are generally regarded as sharing the same concept, but there is a growing tendency to understand the concept of workers differently for the LSA and the LCA. In particular, not a few people subscribe to the view that the worker concept in the LCA is broader than that in the LSA. Considering the differences between the LSA and the LCA in terms of legal stance and regulation methods as described below, there is no need to see them as identical. Rather, it is appropriate to understand the scope of the law, i.e., the worker concept, in accordance with the purpose of contract protection under the LCA.

### **(i) Relative Understanding by Public Law Regulation and Private Law Regulation**

For the LSA, it is essential to establish minimum working condition standards for worker protection and to ensure the law's effectiveness by means of administrative control, penalties, and active involvement of the state. Regulations that provide administrative control and sanctions must be uniform, along with the apparent scope of application, to exclude the abuse of public power. On the

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<sup>34</sup> There are five factors that create atypical workers (AW): labour market policy (fixed-term, agency work), tax and social security systems (short part-time work, mini-jobs), inflexibility of typical work (part-time work), the boundary policies of companies (contract work, self-employed) and information technology (crowdwork).

other hand, protection of contracts as private law under the LCA aims to avoid contractual disputes by cooperation. Therefore, the primary value of contract law as private law is not the uniformity of application, but the contribution to proper resolution of disputes between parties.

### **(ii) Relative Understanding by the Difference in the Economic Burden of Employers and the Institutional Guarantee of the State**

Relative understanding of the worker concept is justified not only by the difference in the legal nature of legislation, but also by the difference in the economic burden on employers and the institutional guarantee of the state.

Worker protection under the LSA comprises five elements:

- Contract protection to exclude pre-modern employment practices,
- Securing wage payment and allowances for absence from work for reasons attributable to the employer (Article 26),
- Protection during working hours to prevent increases in physical and mental burdens and to secure the right to rest (Article 32, Article 39),
- Special protections of motherhood and juveniles,
- Securing health and safety, and compensation for industrial accidents and illness.

What is important here is that worker protection under the LSA assumes the economic burden on employers and institutional support of the state.

This viewpoint affords a flexible understanding of workers under the LCA, which regulates only the formation, change, and elimination of labour contracts. Also, the law seeks neither the special institutional support of the state nor an economic contribution from the employer. It provides that labour contracts are based on work rules (Art. 7), insofar as the rules call for reasonable working conditions, and requires reasonableness in light of the social considerations of the establishment, change, and termination of labour contracts that are based on changing work rules (Art. 10). In other words, these regulations are nothing more than the contractual regulation of the formation, change, and cancellation of contracts based on the general terms and conditions. They are common regulations applicable to every contract.

### **(3) Summary**

Considering the transformation of the corporate system, especially change of the corporate boundary policy in IT society, the “use-dependency” test is too narrow to define a worker under the LSA. More desirable is the “integration into the corporate system” test, which enables one to include the independent con-

tractors organised by the company. Additionally, considering the difference in the legal nature and responsibility of legislation, we should adopt a relative understanding of the scope of legislation. At the least, the scope of private contract law (LCA) is broader than that of public labour protection law (LSA).

### **c) The Concept of Workers in Collective Labour Law**

#### **aa) “Organisational Dependency” Test**

Article 3 of the 1947 Trade Union Act (TUA) defines workers in collective labour law as “persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation”. Unlike the Labour Standards Act definition, it does not require a person who “is employed at a business or office”. Therefore, it is widely agreed that the “worker” concept of the Trade Union Act is broader than that of the Labour Standards Act. However, there is still not a sufficient explanation of why and how the scope of workers in the TUA is broader than that in the LSA. In particular, it is not clear what criteria should be adopted. The economic and personal dependency test, which has served as the basis for the common understanding, became de facto restricted by personal dependency.

Actually, in recent years lower courts have handed down a series of decisions which refused to order the correction of unfair labour practices by using the “use-dependency” test, i.e., by regarding workers under the TUA as being similar to workers under individual labour law. The litigants were chorus members of the national theatre,<sup>35</sup> customer engineers performing maintenance of housing equipment under a “contract for business and service”,<sup>36</sup> a privately run shop performing repairs of items such as audio products,<sup>37</sup> and a person running a bicycle delivery business based on a “transportation contract agreement”. However, the Supreme Court did not adopt this position of the lower courts, and affirmed that people working under these contracts are also workers under the Trade Union Act. The following Inax Maintenance Co. Case is one of the representative cases.

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<sup>35</sup> Shin-Kokuritsu-gekijo (new national theatre) case, SC 12.4.2011.

<sup>36</sup> Inax Maintenance Co. case, SC 12.4.2011.

<sup>37</sup> Victor-Service Engineering Co. case, SC 21.2.2012.

**【INAX Maintenance Co. Case】**

**[Facts]** 1. X is a Corporation operating a repair service for bathroom housing fixtures as its primary business. Although X had about 200 employees in 2007, only about 27 of them were able to engage in repair services. A large part of its repair service business was carried out by about 590 customer engineers (CEs).

2. The service agreement between X and the CEs, entitled “Memorandum on Outsourcing”, had the following provisions. i) CEs are independent businesspersons. ii) CEs are subject to eligibility requirements and the licensing system (classified every year based on ability, experience, and other criteria). iii) CEs should immediately notify X when they turn down a job, and give the reason. iv) CEs should complete a report after completing each service job. v) CEs should wear the required uniform.

Additionally, X provided CEs with manuals prescribing specific methods for performing service jobs so as not to impair its brand image. X calculated the agent service fee by multiplying the amount charged to the customer (as defined by a nationwide uniform amount) by a fixed rate based on the classification of a CE in the ranking system.

X determined the territory and business day of each CE and allocated CEs according to customer requests using an information terminal. CEs turned down job requests in fewer than 1% of instances. X did not consider a refusal by a CE as a default, even if the reason for refusal was not relevant to the conduct of service.

3. In September 2004, General Union Z, which organised the CEs, asked for collective bargaining with X to improve CE working conditions. X rejected bargaining on the grounds that CEs were not employees of X. Union Z petitioned for administrative relief of unfair labour practices to the Osaka Labour Relations Commission. The Osaka LR Commission ordered X to bargain collectively with Z on the assumption that CEs were X’s workers. The Central Labour Relations Commission (CLRC) rejected a re-examination petition submitted by X, and likewise ordered X to enter into collective bargaining with Z. X filed a complaint with Tokyo District Court seeking the cancellation of the CLRC relief order.

4. Tokyo District Court dismissed X’s claim on April 22, 2009. However, Tokyo High Court did not recognise the establishment of unfair labour practices and cancelled the CLRC remedy (September 16, 2009) for the reason that CEs were not workers of X.

Tokyo High Court issued the following statement:

“According to Articles 1 and 3 of the TUA, a worker is a person who may negotiate working conditions, including wages, with an employer on an equal basis by collective action. The worker is nothing more than a person who provides labour to the other party and under its supervision, in a relationship of legal dependency, and receives a reward as consideration for work performed. Therefore, the applicability of the TUA to workers should be judged by comprehensively taking into account the existence and degree of the elements of basic legal dependency:

- (1) whether the labour provider is free to refuse the request of the business
- (2) whether the labour provider is restricted by time and location
- (3) whether the labour provider is receiving instructions and supervision for carrying out tasks
- (4) whether the reward is a consideration for providing labour.”

“CEs are free to accept or refuse the company’s job requests. CEs were subject to no constraints of time or location, nor particular instructions or supervision by the company for job performance. The reward is not a consideration for the provision of labour. Therefore, CEs are not employees of X.”

[Judgement of the Supreme Court, 12.4.2011]

Company X managed about 590 CEs under a licensing system and ranking system, and had them perform jobs such as day-to-day repairs by allocating them to various geographical areas of Japan. By coordinating working days and holidays, as well as Sundays and public holidays, each CE was asked to take responsibility for operations in alternation with others. In view of these circumstances, *CEs are regarded as being incorporated into X’s organisation as essential labour for the performance of X’s business.*

Additionally, as the operating agreement between the CEs and Company X has been modified by a “Memorandum on Outsourcing” that the company issued, there was no leeway for changing the operating agreement at the request of CEs. Therefore, it is clear that *Company X has unilaterally determined the agreement with CEs.*

X determined CE remuneration by multiplying the amount of the pre-determined bill to a customer by a fixed rate. This is none other than *consideration for the provision of labour.*



When receiving a request for repair service from Company X, a CE is assumed to perform the job, with the rate of job refusal when receiving a repair request being under 1%. X did not renew a one-year outsourcing contract if a CE declined to renew. CE remuneration differs according to the classifications to which Company X assigns CEs every year. Based on these circumstances, *CEs were in a position obliging them to accept requests by X.*

CEs were to carry out repair work at customer locations based on requests from X. On business days, as a rule, CEs received orders from 8:30 am until 7:00 pm. When performing jobs at customer locations, CEs wore Company X uniforms and carried X business cards. At the close of each business day, CEs had to send a prescribed service report form to X. *CEs had been providing labour under the direction and supervision of X and were also under a degree of restraint in terms of time and place.*

In view of these circumstances, CEs are workers of X under the Trade Union Act.

Although the Supreme Court ruling did not present the general framework explicitly, we can see the factors in these case judgements that determine the scope of workers in collective labour law. After the Supreme Court judgment, the Ministry of Labour summarised its framework in the “Workshop Report of Industrial Relations Law”.<sup>38</sup>

According to this report, the *basic criteria* are (i) incorporation into a business organisation, (ii) terms of agreements that are determined arbitrarily and in a formulary manner, and (iii) reward as consideration for labour. *Supplementary criteria* are: (iv) a relationship in which one must obey the business requests of the other party, (v) performance under instructions and supervision of the other party, and restrictions on time and location to some extent, and as a *negative criterion*, (vi) remarkable entrepreneurship.

Criterion (i) indicates that, insofar as the worker integrates into the business organisation as essential and pivotal workforce, the company should make an effort to resolve labour issues pertaining to workforce usage through collective bargaining. Criterion (ii) indicates that the disparity of bargaining power between the worker and the other party should be corrected through collective bargaining. Criterion (iv) reinforces worker incorporation into the business organisation. It signifies the difficulty that workers have in not providing their workforce to the other party. The use-dependency criterion (v) is not a funda-

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<sup>38</sup> MHLW, Workshop Report of Industrial Relations Law, 2011.

mental element, as it is for workers under the LSA, but these circumstances are a positive indication of being workers under the TUA.

“Remarkable entrepreneurship” as a negative criterion (iv) is significant. Remarkable entrepreneurs, who regularly make a profit due to their business acumen and risk appetite, use their labour force for themselves, independent from business organisations of other parties. As such, they are not workers under the TUA. This criterion is important because being an entrepreneur does not automatically mean that a person lacks the characteristics of a worker.

### **bb) “Permissibility of Restrictive Competition” Test**

Certainly, as compared to the use-dependency test, the organisational dependency test is a reasonable way to place workers under the Trade Union Act. Self-employed persons who are incorporated into company systems are without a doubt able to conduct collective bargaining with companies in Japan.

However, the “organisational integration” test is not enough to place workers under the TUA. Workers in collective labour law are people who can enjoy the coalition activities of trade unions. Coalition activities are not limited to collective bargaining with employers and their associations. Historically, trade unions have taken various approaches to ensure the interest of workers above and beyond collective bargaining. Early trade unions used “pledges” to prevent the competitive reduction of wages. Even today, some trade unions obtain labour supplies directly to ensure jobs for their members (IV.4). In consideration of this broad range of activities by trade unions, the organisational dependency test is too narrow a criterion to be based on the collective bargaining system.

Additionally, just as with crowdworkers nowadays, workers do not always make a living by providing labour to just one company. Workers who can obtain only small jobs for short periods must provide labour to many companies and consumers. Needless to say, they also tend to organise trade unions and conduct activities in solidarity to protect their livelihoods. The “organisational dependency” test cannot identify workers who do not have continuous relationships with companies.

Thus, we should not discuss the scope of the “worker” in collective labour law alone in terms of the collective bargaining system. Moreover, we should not see workers under the TUA as being in a relationship with a certain counterparty. Looking back at history, in which trade unions were legally approved by overcoming the idea that collective activity of workers infringes upon the freedom of businesses, we should judge the scope of the worker under the TUA from the viewpoint of whether workers’ collective activity might infringe upon the free-

dom of business or fair trade practice. From this standpoint, workers under the TUA are people providing their services to others in order to support their livelihoods, and whose collective activity has no possibility of conflict with the Antimonopoly Act,<sup>39</sup> i.e., the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (1947), which aims to “encourage business activity, increase employment and actual national income, protect the consumer, and thereby promote democratic development of the national economy” (Art. 1). Even if independent contractors or sole proprietors take collective action to improve their working conditions, we cannot find any danger of violating fair trade practices. It is even more so for the crowdworkers exposed to competition in a borderless market.

## **2. Applicability of Labour Law on Crowdworkers**

### **a) Applicability of Individual Labour Law**

In the light of criteria for workers as described above, let us consider whether crowdworkers can be workers to whom individual labour law applies. As we have seen above, crowdworkers do not have a uniform profile. They include non-business homemakers, students, and retirees, as well as self-employed one-person enterprises.

#### **aa) Examination based on the Use-Dependency Test as Case Law**

##### **(1) Lack of Freedom to Accept Work and Business Requests**

In any crowdwork job, the contract is concluded only when the client approves the choice of tasks and projects by crowdworkers. Therefore, there is no doubt that a crowdworker is free to accept or refuse work and business offered by the client. This means that crowdworkers do not satisfy the first criterion.

##### **(2) Orders and Instructions Pertaining to a Job and to the Method of Work and Business**

Since crowdworkers carry out their work at home in accordance with instructions, they are not basically working under instructions from clients. Particularly in the case of microtasks and competitions, workers intend to carry out their

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<sup>39</sup> Katsutoshi Kezuka, Establishment and Future Issues of the Supreme Court Ruling on “the Worker in the TUA” (Japanese), Chuo Roudo Jihou, No. 1164 (2016).

work as directed in the request form. The instructions of the ordering party are excluded. In that sense, contracts of crowdworkers can be said to contract for service or business more so than employment contracts or labour contracts.

In project-type jobs, however, coordinating the exchange of opinions between workers and ordering parties is necessary to facilitate execution of the project. *In that sense, in the project type of crowdwork, the instruction and command relationship is clearly evident.*

### **(3) Restriction of Working Place and Working Hours**

One of the specific features of crowdwork, through all the categories, is that the working location of workers is not entirely restricted. Although compliance with delivery time is required, there is no constraint on the length and arrangement of working hours. However, *in the case of project-type crowdwork with hourly-based rewards, the discretion of workers for working time and working hours is constrained.*

### **(4) Non-substitutability of Performing Work**

Because in the competition type of crowdwork the contract is deemed concluded when the client chooses a product offered by one of the workers, substitution of performing work does not matter. Likewise in task crowdwork, the replacement of performing work does not matter, because clients can refuse to accept the work if they are not satisfied with the performance. However, considering the fact that in the case of crowdwork client companies find workers based on work evaluations appearing on crowdsourcing platforms, it should be understood that the substitutability of performing work is, in principle, excluded.

### **(5) Burden of Work Equipment**

As crowdwork involves transactions in virtual spaces, it is in general not required that clients provide machinery and equipment. Of course, that would not be the case if there were a special agreement stipulating that workers perform the work using machinery and equipment furnished by clients.

### **(6) Exclusive Agent**

Since clients intend to outsource their work to the crowd, an exclusive relationship between the client and the worker does not exist at the outset. There is no room in the crowdwork scheme for exclusive relationships, as clients do not enter into direct contracts with workers by evaluating their past performance.

## **bb) Summary**

a) From the viewpoint of the “use-dependency” test of workers in individual labour law, a crowdworker cannot be a worker under individual labour law because the working style of crowdwork does not satisfy the fundamental three criteria. However, workers who are engaged in the project type of crowdwork, especially those with contracts stipulating pay by the hour, might be deemed workers under individual labour law because client companies often give instructions to workers in the process of implementing the plan, and because workers are subject to working-time restrictions.

b) When considering the transformation of the corporate system, the integration test is desirable to judge the scope of workers under individual labour law (II.1.b.bb)). Since crowdworkers engaged in microtasks or competitions mostly complete their work in a short period, it is hard, even when using these criteria, to say that crowdworkers are integrated into client companies unless they renew contracts with the same crowdsourcers. In the case of project jobs, it is relatively easy to see the incorporation of crowdworkers into companies.

c) I would like to discuss the team-order system, in which the lead worker must obtain the consent of all members on the sharing of remuneration to get the project. Having done that, each member – not the team leader – enters into the contract for business service with the client company. There is therefore no legal relationship between a team leader and member-workers. On the contrary, under the team-order scheme, in which crowdsourcing site companies organise members and project managers (e.g., Job-Hub My-Team), employment relations between crowdworkers and site companies possibly come into existence because site companies must control project performance in order to discharge their responsibility to complete projects for clients.

## **b) Applicability of Collective Labour Law**

a) Current case law in Japan, based on the “organisational dependency” test, might regard crowdworkers as workers under the TUA only when they continuously enter into contracts with crowdsourcers. Among freelancers, parallel contract workers may fall into this category in some cases (III.1.a)).

b) On the other hand, according to the “permissibility of restrictive competition” test, all crowdworkers are considered workers under collective labour law insofar as they maintain their livelihoods by providing their labour to others. All freelancers not connected with owner-workers (business operators) who have employees are workers under the TUA.

### III. The Necessity for Legal Protection of Crowdworkers

#### 1. Protection Needs for Crowdworkers as Freelancers

##### a) Profile of Freelancers Including Crowdworkers

As we have seen above (I.3.b)), most crowdworkers are self-employed as non-business persons or sole proprietors, and today most of them cannot make a living with crowdwork income alone. To paint a more accurate picture of crowdworkers, it is useful to examine an interesting survey on freelancers that Lancers Inc. carried out in 2015.<sup>40</sup>

In the estimation of Lancers, 12.28 million people are freelancers in a broad sense.<sup>41</sup> They account for 19% of Japan’s working population. Freelancers in a broad sense include 5.93 million workers (48%) who are employed but also take freelance jobs as side jobs (*side-job workers*).

**Table 2. Types of Freelancers**

Types of Freelancers	Definition	
Side-job workers	Workers who are employed but also perform freelance jobs as side jobs	5.93 million (48%)
Self-employed owner-workers	Sole proprietors	4.36 million (36%)
Parallel-contract workers	Workers on a continuous contract basis with two or more companies	1.24 million (10%)
Professional freelance workers	Independent professionals who do not have a specific place of work	0.75 million (6%)

(Lancers, Freelance Fact-Finding Survey 2015)

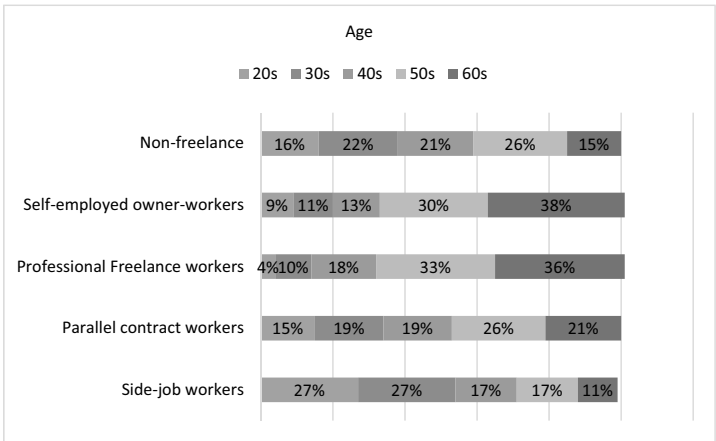
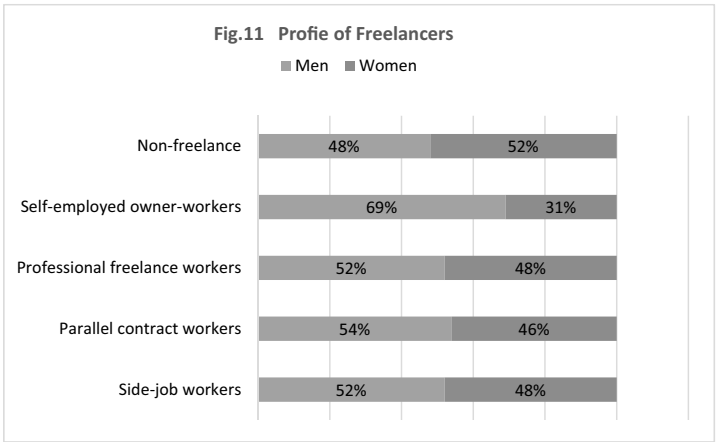
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<sup>40</sup> The survey was conducted online in March 2015 by a research company. It covered men and women 20–69 years of age who received compensation for work during the past 12 months. Valid responses numbered 3,094 (of which 1,548 were freelancers).

<sup>41</sup> It is not known how the estimation was made.

When looking at the breakdown of 6.35 million freelancers in this group, the largest group is sole proprietors (*self-employed owner-workers*), with 4.36 million people (36%). This is followed by the 1.24 million people (10%) working on a continuous contract basis with two or more companies (*parallel-contract workers*), and the 0.75 million independent professionals (6%) who do not have a specific workplace (*professional freelance workers*).

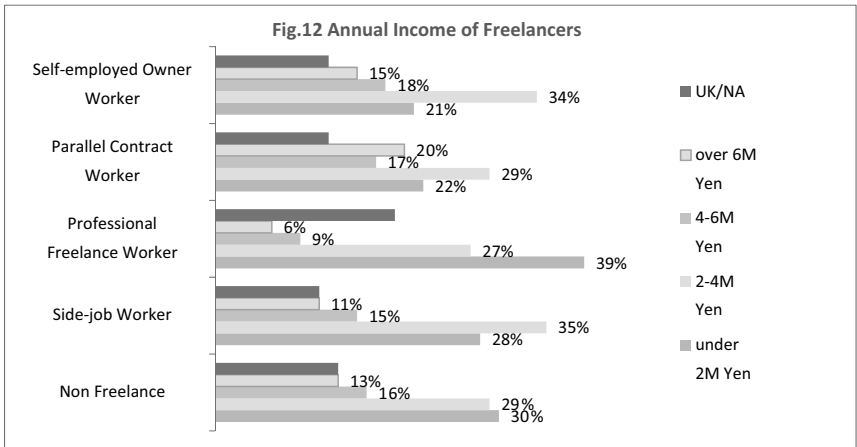
When examined by gender and age (Fig. 11), the “self-employed owner-workers” are mostly male (69%) and middle-aged (50 years or older, 68%). There is no big difference by gender in the other groups. “Side-job workers” are comparatively young (20–30 years old, 54%), while professional freelance workers are middle-aged and older (50–60 years old, 69%). Parallel-contract workers are not characterised by gender and age at the same time.



The 2–4 million-yen bracket is the most common annual income. While 29% of non-freelance workers (employees) receive annual incomes of 4 million yen, higher incomes are realised by parallel-contract workers (37%) and self-employed freelance workers (32%). Side-work freelance workers (26%) and professional freelance workers (15%) rank below this.

Working hours of freelancers are of course few for side-workers, and increase in others in the order of parallel, professional, and self-employed workers.

Although it is hard to characterise crowdworkers directly from this survey, we can easily assume that there are many crowdworkers among side-work freelance workers and professional freelance workers.



(Lancers, Freelance Fact-Finding Survey 2015)

**b) Protection Needs of Crowdworkers According to Freelancer Type**

Among the above-described freelancer types, the side-work freelance workers, who are company employees and perform freelance jobs including crowdwork on the side, are in general not in high need of legal protection.<sup>42</sup> They are usually able to support themselves with their wages as employees, and they are entirely covered by labour and social laws. Their legal problems arise, rather, in relation to their employment contracts, because taking on crowdwork as a side

<sup>42</sup> The increase of employees who cannot make a living without side jobs may cause new social problems in the future. It is the issue of the gig, or sharing, economy.



job possibly violates their contracts' prohibition on side jobs, i.e., the duty not to compete or their fiduciary duty.

"Self-employed owner-workers" and "parallel-contract workers" likewise do not have much need for legal protection even if they occasionally work on crowdsourcing platforms. Self-employed owner-workers, who earn relatively high annual incomes, normally have many clients outside of the Internet community and do business with their accounts at risk. "Parallel-contract workers" have continuous relationships with individual client companies. Since these continuous relationships involve integration into the company systems of clients, today's case law does not exclude them from the contract protection of labour law in relation to client companies.

"Professional freelance workers" may be most often engaged in crowdwork because they have no stable relationship with particular companies. Moreover, 39% of this group have annual incomes of under 2 million yen. They are the only group of freelancers whose percentage of workers is higher than the 30% of non-freelancers (employees) who have annual incomes of under 2 million yen. Considering their lower income, they are the group most in need of legal and social protection to ensure a minimum livelihood.

**Table 3. Need for Protection by Freelancer Category**

Type of freelancer based on the survey of Lancers	Situation	Social need for protection
<b>Side-job workers</b>	Protected as employees	Low
<b>Parallel-contract workers</b>	Mostly protected as workers under the TUA	Relatively low
<b>Self-employed owner-workers</b>	Few high-income earners	Relatively high
<b>Professional freelance workers</b>	40% earn less than 2 million yen	High

## 2. Differences in Labour Issues Between Crowdworkers and Teleworking Homeworkers

Crowdwork is one form of homework, insofar as crowdworkers work at home. However, examining problems faced by teleworking homeworkers reveals crucial differences between crowdworkers and teleworking homeworkers.

According to a survey of teleworking homeworkers,<sup>43</sup> the most common problem they experience is unilateral changes in job content, such as changes in design (25.1%). Other problems in descending order are: delayed payments (17.9%); unreasonably low remuneration (15.3%); unilateral cancellation of jobs before they start (14.8%); unilateral changes in agreements, such as remuneration reduction (13.6%); and unjust refusal to accept completed work and repeated demands for modifications (11.5%).

**Table 4. Problems Experienced by Teleworking Homeworkers (n=1239)**

Unilateral cancellation of work before starting job	14.8%
Unilateral change of job content such as design change	25.1%
Unilateral alteration of contract such as reduction of remuneration	13.6%
Unjust refusal to accept completed work and repeated demands for changes	11.5%
Unjust determination of remuneration	15.3%
Delay of payment	17.9%
Non-payment of remuneration	9.3%
Missed deadlines because of excessive work volume	6.8%
Job uncompleted because of illness	4.5%
Contract nonperformance due to inadequate skill level	1.9%
Security problems owing to leakage	1.3%

(MHLW, Opinion Survey of Teleworking Homeworkers, 2012)

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<sup>43</sup> Ministry of Health, Labour and Welfare, Opinion Survey of Teleworking Homeworkers, 2012. Teleworking homeworkers are not employees of any company, but create information products or provide service at home as freelancers through direct contracts with clients. The survey estimates the number of teleworking homeworkers in 2013 as 1.3 million.

It is interesting that most of the problems which teleworking homeworkers face are uncommon in crowdwork. In particular, delayed payments and unilateral changes in remuneration amounts are in general nonexistent because crowdsourcing platforms function as payment agents. As we have seen, client-users must pay remuneration amounts to platforms in advance when placing their orders. Additionally, the terms of service explicitly prohibit the unilateral alteration of contracts and the refusal to accept completed jobs.

## **IV. Possibility of Legal Protection for Crowdworkers**

### **1. Legal Regulation of the Crowdsourcing Business**

#### **a) Specific Legal Problems of the Crowdsourcing Business**

##### **aa) Intermediary Services and Service Fees**

Crowdworkers are not just freelancers, and are more than teleworking homeworkers. A specific feature of the work is that jobs are mediated by web platforms. It is of course a new and attractive way to match jobs with workers. It is therefore reasonable for users to pay service fees to crowdsourcing platforms. As we have seen, crowdsourcing sites collect commission fees of 10–20% of transaction value from crowdworkers or clients.

However, it is open to dispute whether collecting service fees from workers violates regulations on the job placement business. The Occupation Security Act (OSA) provides that job placement service fees must not exceed 10.8%, and placement agents cannot take fees from job seekers (Article 32-3, Para. 1, 2 of OSA). An exception is that agents collect a “job-seeker acceptance fee” of 690 yen (€5.7) from people seeking jobs as entertainers, models, and people wanting to work for catering and cooking services. Another exception is that “job-seeker fees” equaling 10.8% of six months’ wages are collected only for occupations in entertainment, modelling, executive management, science and engineering, and skilled workers whose annual income exceeds 7 million yen.

Certainly, the service of crowdsourcing sites is not job placement in the sense of the OSA because the purpose of the service is not establishing employment contracts between crowdworkers and client-users. Crowdsourcing sites’ terms of service state that contracts between client-users and crowdworkers are not employment contracts but contracts for business services. But it is still possible that employment

relationships between crowdworkers and clients arise when workers involved in projects perform their jobs de facto under the instructions of client companies.

Even if no employment relationship exists between crowdworkers and crowdsourcing platforms, it is desirable to appropriately regulate the upper limit of the service fee. The nature of the crowdsourcing business is not a mere job intermediary service, but also an agency service which collects and pays the remuneration for crowdwork jobs. As this is indispensable for transactions between parties at a distance, there are reasonable grounds to charge service fees as long as a transaction continues.

## **bb) Prohibition of Direct Transactions**

Both for crowdworkers and for client companies, crowdsourcing site platforms are useful for easily finding business partners. Cooperation may be mostly ad hoc, but once cooperation between a worker and client company becomes effective, they naturally expect to enter into a contractual relationship. And from the viewpoint of labour market policy, it is desirable to produce stable jobs if both parties so desire. But crowdsourcing sites' terms of service contain the following clauses banning direct trading between site members.

Lancers:

### Article 24 Prohibitions

(12) Direct transactions and acts to solicit them without the intervention of this site, or acts responding to such solicitation, including new transactions with members after trade started by this service.

### Article 33 Penalty Charges and Damages

(2) Violations of Article 24, No. 12, Paragraph 1: In the event of direct transactions without the intervention of this service, ... members shall pay as a penalty an amount equal to twice the agency fee that they would have paid without a direct transaction, based on Article 10 (1 million yen, if the amount is less than 1 million).

Crowdworks:

### Article 5

(14) A member or a person who was a member within the past five years shall not conclude or solicit conclusion of such a contract for business services that could be outsourced using this service, without the use of this service directly

with a member or a person who has been a member within the past five years. This clause does not apply if Crowdworks has agreed in advance.

These provisions, which ban direct trade outside of the platform, are legally dubious. Since direct contracts between crowdworkers and client companies are not always employment contracts, such a clause certainly would not directly violate provisions that prohibit intermediate exploitation under Art. 7 of the LSA<sup>44</sup> and the labour supply business of Art. 44 of the OSA.<sup>45</sup> However, at the least such provisions are incompatible with the purpose of these laws. Even the “within five years” provision would be invalid as a violation of the freedom of the workers to choose their occupations (Article 22 of the Japanese Constitution).

## **b) The Need to Revise the OSA**

In view of these issues, we should more clearly regulate the intermediary business of independent contract workers (solo self-employed) as crowdworkers. For this purpose, first, we must enlarge the scope of labour market law. The current Occupation Security Act aims to provide all people with opportunities to find occupations conforming to their abilities using public and private employment placement businesses, leading to smooth and appropriate adjustment of labour force supply and demand. However, because occupations today are not limited to employment labour, the Occupation Security Act should also foster a sound labour market for independent workers.

Second, we must consider carefully whether the crowdsourcing business is job placement for independent workers or agency work for independent workers. According to our study, the crowdsourcing business is none other than a new agency work business for independent workers, and there are reasonable grounds to charge a service fee as long as the service continues to enable transactions with parties in remote areas.

Nevertheless, the crowdsourcing business should not violate the freedom of crowdworkers and client companies to conduct direct transactions between themselves after transactions on crowdsourcing platforms end. Crowdsourcing sites should never do agency business by sacrificing crowdworkers’ freedom to

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<sup>44</sup> Article 6 LSA: Unless permitted by this Act, no person shall obtain profit by intervening, as a business, in the employment of others.

<sup>45</sup> Article 44 OSA: No entity shall conduct a labour-supply business or have workers supplied by an entity which operates a labour-supply business under its own directions or orders, except in cases provided for in the following Article.

enter into contracts. Third, therefore, is that terms of service clauses which prohibit direct transactions between crowdworkers and client-users should be invalid.

Moreover, in terms of legal policy it is worthwhile to discuss whether we should allow a new type of agency business for employees. As we have seen, crowdworkers involved in project-type jobs may be mostly under the direction of crowdsourcers, and therefore it is possible they would become employees. Under the current Worker Dispatching Act<sup>46</sup> it is the temporary staffing agencies, not the users of temporary workers, which are the workers' employers. If a company using temporary workers is the employer, there is no room for tripartite labour relations. But now, two parties in geographically distant locations can create employment relations because the employer can give the worker instructions easily by ICT. They need agencies to guarantee job performance and remuneration payment. This means that employment relations between remotely separated parties inevitably require agencies which need not be employers.

## **2. Legal Protection for Crowdworkers under Individual Labour Law**

### **a) Legal Protection for Crowdworkers as Solo Self-Employed**

#### **aa) Target and Areas of Worker Protection**

As we have seen, the profile of crowdworkers is non-uniform, but when considering protection for crowdworkers, it is sufficient to discuss legal protection for them as self-employed workers. Insofar as crowdworkers are de facto integrated into client companies, labour law applies to them because employment relationships can be certified there. It is not necessary to consider the protection, as workers, of crowdworkers working as entrepreneurs with cooperators or employees. As such, below we discuss mainly the legal protection of crowdworkers as solo self-employed.

Worker protection under individual labour law (Labour Standards Act, Labour Contract Act) consists mainly of four areas: "contract protection" (Chapter 2 of

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<sup>46</sup> Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers. <http://www.japaneselawtranslation.go.jp/law/detail/?printID=&id=75&re=01&vm=02>.

the LCA, and the LSA), “wage protection” (Chapter 3, LSA), “working time protection” (Chapter 4, LSA), and “safety and health” (Chapter 5, LSA). The 1970 Homework Act for homeworkers<sup>47</sup> also provides for the same protections. Where should we now see the need for legal protection of crowdworkers?

**Table 5. Description of Protections for Employees, Homeworkers, and Crowdworkers**

Employees	Homeworkers	Crowdworkers
<b>A. Contract</b>		
Clear statement of working conditions (LSA, Art. 15)	HW-Booklet	+(necessary)
Prohibition of Predetermined Compensation (LSA, Art. 16)	no	+
Notice of dismissal, cancellation (LSA, Art. 20)	Effort (HWA, Art. 5)	- (unnecessary)
Reasonable grounds for dismissal (LCA, Art. 16)	no	-
Prohibition of predetermined compensation (LSA, Art. 16)		+
Altering terms and conditions (LCA, Art. 10)	no	-
Work rules (LSA, Art. 89; LCA, Art. 7)	HW-Booklet	GTC-control
<b>B. Wage</b>		
Direct and full payment in bar (LSA, Art. 24)	no	
Minimum wage (MWA)	MWA	+

<sup>47</sup> The number of homeworkers in 2015 was 111,038, with female workers accounting for 89.3%. By industry, those in the “textile industry” had the highest proportion, at 28.7%, followed by “other (miscellaneous goods, etc.)” at 22.7%. MHLW: Homeworkers Survey Report 2015.

<b>C. Working time</b>		
Length, pause, flexible time (LSA, Art. 32–35, Art. 38)	Effort (Art. 4)	+Length
Overtime, night work (LSA, Art. 36, 37)	no	-
Annual paid leave (LSA, Art. 39)	no	-
<b>D. Safety and Health</b>		
Duty to care for workers' safety and health (LCA, Art. 6)	HWA, Art. 17	+
Liability without fault (LSA, Art. 75)	no	-
Mandatory insurance (WACIA)	Special enrolment	Special enrolment

### **(1) Contract Protection**

**i. Clear Statement of Working Conditions.** When concluding a labour contract, employers shall clearly state the wages, working hours, and other working conditions to workers (Art. 15 of the LSA). Concerning homeworkers, the consignor shall issue a homework specification sheet which states job specifics, the unit price of labour, payment date, and other particulars (Article 3 of the HWA).

Such regulation is crucial in crowdwork because crowdwork involves complicated tripartite relations. Most platform terms of service deliberately describe the “working conditions” (formation of contract, remuneration, service fee, obligations of parties, etc.) by the type of crowdwork.

**ii. Change of Terms and Conditions.** Contractual relationships in crowdwork are mostly short and of fixed duration. Unlike employment relationships, there is no need to modify contract terms as time goes on (Art. 10 of the LCA). However, most crowdsourcing sites' terms of service reserve the right to revise the terms unilaterally (Art. 2., Sect. 1 of Lancers TS), but changes in the general terms and conditions (GTS) do not alter contracts already concluded, according to the old GTS. Apart from that, case law controls changes in the GTS, whether they are reasonable or not.

**iii. Dismissal and Cancellation of Contracts.** Restricting dismissal or cancellation of a contract, which is the most significant contract protection in employment relationships, is not necessary because there is no freedom to cancel in



crowdsourcing relationships. However, there is a need for provisions which exclude agreements on penalties for breach of contract.

**iv. Crowdsourcing-Specific Control of Contracts.** Most crowdworkers suffer anxiety because they have no guarantee of getting jobs all the time (I.3.b.dd)). I suppose it is reasonable in the long run for crowdworkers to work directly with client companies. Therefore, the most important protection is to eliminate the prohibition on future direct transactions between crowdworkers and crowdsourcers for subsequent contracts (3.3.2). Additionally, it is essential to address the concerns that crowdworkers have over idea theft and leaks of personal information.

## (2) Wage Protection

**i. Payment of Wages.** Article 24 of the LSA provides that employers shall pay wages in currency and in full directly to workers, and at least once a month on a certain date. The homework booklet similarly protects homeworkers (Art. 3 of the HWA). Examining every crowdsourcing site would find that payment of remuneration in currency is not adequate because some sites pay by credit cards or virtual money. It might be important and adequate to regulate direct payments to crowdworkers on a definite date within one month after job completion if there are a few complaints of delays in payment of compensation (Fig. 8, business operators 11.3%).

**ii. Minimum Wage.** As we have seen (I.3.b.dd)), the biggest problems faced by crowdworkers as businesses operators are low pay for jobs (75%) and decline of market rates owing to competition (50%). Moreover, compensation for the microtask type of crowdwork is very low. Therefore, it is essential that the minimum wage scheme cover crowdwork.

The Minimum Wage Act of 1959 stipulates that employers pay wages of not less than the minimum wage rate to workers (Art. 4). If an employer pays less than the minimum wage to employees, the employer must pay a penalty of at least 500,000 yen (€4,167) (Art. 40). The Ministry of Health, Labour and Welfare determines the minimum wage based on the opinion of the Minimum Wage Council, which comprises members representing workers, employers, and the public interest in equal numbers (Art. 22). There are actually two minimum wage types. The “regional minimum wage” is set for each of Japan’s 47 prefectures and applies to all workers in a prefecture, while the “industry-specific minimum wage,” which is higher than the regional minimum wage, applies to all workers who work in specific sectors (such as electromechanical machine manufacturing and automotive retailing). The minimum wage does not include overtime pay, commuting allowances, family allowances, bonuses, or other allowances.

The Minimum Wage Act covers only workers as prescribed in Article 9 of the Labour Standards Act (Art. 2 of the MWA). However, the Homework Act of 1970 provided a minimum wage scheme for homeworkers. The Ministry of Health, Labour and Welfare can set the minimum wage for homeworkers in accordance with the Minimum Wage Council’s opinion (Art. 8 of the HWA). Minimum wages of homeworkers are the per-piece labour charges for each work step in the industry (Table 6).

**Table 6. Minimum Wages of Homeworkers in the Electronics Industry (Tokyo 2007)**

Items	Process	Standards	Labour charge
Printed circuit boards	Inset of parts		1.25 yen per piece
	Inset, bend, cut off parts		1.05 yen per piece
	Inset, bend, cut and soldering		5.95 yen per piece
	IC insertion	IC with 28 or fewer pins	2.50 yen per piece
		IC with 30 or more pins	3.20 yen per piece

The HWA defines “homeworkers” as workers who are engaged in manufacturing or processing goods by using the goods of contractors (semi-finished products and parts of articles, including accessories or raw materials).<sup>48</sup> Legally, a homeworker must fulfil the following requirements (Art. 2).

- Receive consignments from manufacturing and processing companies and distributors (wholesalers, etc.) or contractors (including the contract mediators).
- Engage in manufacturing and processing goods using provided raw materials and parts of products.
- Perform manufacturing and processing of goods which are the business of contractors.

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<sup>48</sup> Teleworking homeworkers are not homeworkers in the HWA.

- Work to obtain compensation for labour.
- Work alone, or together with family members, and not employ others.

According to these requirements, the current Homework Act does not cover crowdworkers because they are not workers who are engaged in manufacturing and processing goods by using the raw materials and parts of products provided by the contractors. Therefore, reform of the Homework Act is indispensable for covering crowdworkers as solo self-employed.

**iii. Restrictions on Service Fees.** Rates and payers of service fees differ from platform to platform (1.2.2). Considering that 51.5% of crowdworkers say that service fees are expensive (I.3.b.dd)), it is necessary to set maximum fees by regulation. However, as this is a matter of labour market law, regulation should involve discussion of reforming the Occupation Security Act (IV.1.b)).

### **(3) Working Time Protection**

Regulation of working time is the main concern of labour protection law. The LSA sets daily and weekly working hours (Art. 32), rest periods (Art. 34), days off (Art. 35), overtime (Art. 36), premium wages for overtime, work on days off and night work (Art. 37), calculation of working hours (Art. 38), and annual paid leave (Art. 39). The HWA stipulates that consignors shall endeavour not to make homeworkers perform work beyond the regular working hours of workers engaged in the same or similar businesses in the surrounding geographical area (Art. 4 of the HWA).

Generally speaking, it is hard to cover solo self-employed workers with working time regulations because it is unrealistic to expect administrative control of enforcement. But considering that the remuneration of some groups of crowdworkers is hourly, crowdsourcers and crowdsourcing sites should be obligated to manage working hours in order to observe working-hours regulations. The obligation to manage working hours is the joint responsibility of crowdsourcers and crowdsourcing sites.

In the case of crowdworkers as side-job freelancers, there is a question as to whether working hours in crowdwork should be aggregated into working hours as an employee. Article 38 of the LSA states that total hours worked must be aggregated, even if the hours worked were at different workplaces, so as to assure workers' safety and health. Theoretically, it is thought that such a system should be adopted, on the assumption that crowdworkers give notice of their working hours in advance.

#### **(4) Safety and Health Protection**

For the safety and health of workers, the 1972 Industrial Safety and Health Act provides that employers must take measures to prevent industrial accidents. The LSA provides that employers have liability without fault for industrial accidents, and the 1947 Workers' Accident Compensation Insurance Act protects injured workers regardless of an employer's ability to pay. Additionally, the 2007 Labour Contract Act imposes a duty of care on the employer. The HWA establishes some regulation for homeworkers who work in their own homes and are their own managers. Consignors, who provide machinery and equipment or raw materials to homeworkers, must take measures to prevent hazards, such as by attaching covers to motors, installing safety devices on press machines, and issuing documents which detail "working knowledge" for preventing hazards.

Crowdworkers have no critical need to take protective measures for health and safety because their work is not manual labour. Nevertheless, we cannot exclude the possibility of injuries or illnesses suffered while implementing projects. Accordingly, it is desirable to take preventive measures. As it is normally difficult to recognise the strict liability of clients, it makes sense to deal with this problem through the special enrolment scheme of the WACIA.

#### **(5) Summary**

The most important protection for crowdworkers is to eliminate the prohibition on direct contracts between workers and client companies in the future, and to pay the minimum wage. It is difficult to effectively regulate working time and health and safety protection, but it is possible, as with the HWA, simply to oblige the client to make an effort to observe regulations on working time and safety and health. It is preferable to make clear that crowdsourcers should not give any instruction in how to perform crowdwork besides specifications, because doing otherwise would mean the crowdsourcers would have to take responsibility as employers.

## **bb) Means of Legal Protection**

### **(1) Means of Contract Protection**

#### **(i) The Consumer Contract Act and the Civil Code**

The Consumer Contract Act (CCA) may provide crowdworkers with contractual protection as solo self-employed because they are none other than consumers to crowdsourcing site companies and crowdsourcing platforms.<sup>49</sup> The Consumer Contract Act was enacted in 2000 to protect the interests of consumers in consideration of the disparity in the quality and quantity of information, and in the negotiating power between consumers and businesses.

The act obligates business operators to clarify terms when drafting consumer contracts and to provide the necessary information about the terms of consumer contracts (Art. 3). Moreover, the act states that the following clauses are not legally binding:

- Clauses that totally exempt business operators from the liability to compensate consumers for damage arising from default by the business operators (Art. 8).
- Clauses that stipulate penalties exceeding the reasonable amount of damages that consumers would pay owing to contract cancellation (Art. 9, No. 1).
- Clauses that set annual delay damages over 14.6% (Art. 9, No. 2).
- Clauses that harm the interests of consumers unilaterally (Art. 10).<sup>50</sup>

If regulations control crowdsourcing sites' terms of service, clauses which prohibit direct transactions between crowdworkers and clients after the current contract may be void because they violate Article 10 of the CCA.

In the near future, the Civil Code will introduce new regulations on general terms and conditions (GTC) based on discussions<sup>51</sup> to reform the Obligation Law in effect since 2006. The main rules on the GTC are the requirement for

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<sup>49</sup> Article 48 of the Consumer Contract Act states that the law does not apply to labour (employment) contracts. Because the contracts of crowdworkers are normally not labour contracts, site companies cannot refuse to observe the CCA with respect to legal relations between crowdworkers and site companies.

<sup>50</sup> Article 10 states, "Any Consumer Contract clause that restricts the rights or expands the duties of the Consumer more than the application of provisions unrelated to public order in the Civil Code, the Commercial Code and any other laws and regulations, and that unilaterally impairs the interests of the Consumer... is void".

<sup>51</sup> [http://www.moj.go.jp/ENGLISH/ccr/CCR\\_00001.html](http://www.moj.go.jp/ENGLISH/ccr/CCR_00001.html), Takashi Uchida, Contract Law Reform in Japan and the UNIDROIT Principles, 2011.

their incorporation into contracts, the requirement to alter the GTC, and the prohibition of surprise clauses and unfair terms.

## **(ii) Labour Contract Act**

In the contract protection of crowdworkers, it is also quite possible to consider applying the Labour Contract Act. As mentioned above, in Japan the usual concept of workers in labour law is a relative understanding in the light of the purpose of each law. Accordingly, we can understand the concept of a worker under the LCA as being broader than that under the LSA because the LCA is private law and does not impose an economic burden on the employer or demand the institutional guarantee of the state.

Given the changes in the future of the labour market, the protection of independent contract workers is a very important policy issue. Therefore, the application of the LCA to these independent contract workers or to solo self-employed workers is better than the application of consumer contract law. We can consider the formation and alteration of contracts based on the GTS to be the terms of contract protection for independent contractors.

## **(2) Means of Protection on Wages, Working Time, and Safety**

The legal protection of crowdworkers as solo self-employed workers is, however, not limited to contractual protection. We must also consider the protection of wages, working time, and safety and health. As such, it is desirable that the Homework Act cover them. Since crowdworkers, like homeworkers, are working under service contracts or work contracts, it is natural that the HWA should cover crowdworkers.

As the current HWA does not apply to non-manufacturing industries, the amendment of the act is necessary to cover crowdwork such as design, writing, and software development. The minimum wage can be determined per minute or per piece in particular for microtask jobs. The hourly rate of minimum wage is appropriate for project-type crowdworkers who are paid by the hour.

HWA working time regulation is not legally enforceable because the act requires that consignors endeavour not to commission work beyond the regular hours of workers engaged in the same or similar businesses. However, we should impose legal obligations on crowdsourcing sites and client companies to comply with working-hour limitations because, in the case of project-type jobs, there are hourly pay schemes, and crowdsourcing sites calculate the working hours of crowdworkers using IT equipment.

Because crowdworkers work at home and usually use no hazardous materials or dangerous machines, safety and physical health are not serious issues. However, stress and mental disorders due to intensive work are not unusual. Therefore, it is desirable to cover crowdworkers with the special enrolment scheme of the industrial insurance system.

## **b) Legal Protection of Crowdworkers as Business Operators**

One-third of crowdworkers who are business operators have cooperators or employees (I.3.b)). They do not enjoy the protection of the Consumer Contract Act or the Homework Act because they are neither consumers nor homeworkers.

However, the 1956 Subcontract Act<sup>52</sup> can support business operators performing crowdwork. The Subcontract Act, which aims to prevent unfair trading by parent companies which use their dominant position to take advantage of subcontractors and delay subcontracting payment, applies to “manufacturing contracts”, “repair contracts”, “information-based product-creation contracts”, and “service contracts” between “main subcontracting entrepreneurs” and “subcontractors”, including individuals under particular capital classifications. Since crowdwork such as software and design involves information-based product-creation contracts, and data entry is equivalent to service contracts, the Subcontract Act applies to crowdwork contracts between client companies capitalised at 10 million yen or more and self-employed owner-workers (Art. 2, Para. 7, No. 4).

Under the Subcontract Act, client companies as main subcontracting entrepreneurs have the obligation to deliver documents setting forth job details, subcontracting payment amount, payment date, and payment method when orders are placed (Art. 3). Client companies must pay at a determined date within 60 days after the receipt of the completed work, prepare documents or electronic records that describe the transactions, and preserve them for two years.

Moreover, as discussed later, small business operators can avail themselves of a special enrolment system of the Workers’ Accident Compensation Insurance Act.

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<sup>52</sup> The official name of the law is “Act against Delay in Payment of Subcontract Proceeds to Subcontractors”. The law was most recently amended in 2009.

**Table 7. Prohibited conduct of parent companies  
(Art. 4 of the Subcontract Act)**

Refusing to accept completed jobs (Para. 1, No. 1)	Refusal to accept completed jobs.
Delayed payment (Para. 1, No. 2)	Payment not made by the specified due date within 60 days after receipt of finished job.
Reduction of predetermined subcontract fee (Para. 1, No.)	Reducing the predetermined subcontract fee.
Return of goods (Para. 1, No. 4)	To return received goods.
Abuse of buying power (Para. 1, No. 5)	To set the subcontract fee significantly lower than the market rate for similar goods/services.
Compulsory purchase and use (Section 1, No. 6)	To force subcontractors to purchase and use the goods and services specified by the parent company.
Retaliatory measures (Para. 1, No. 7)	To give disadvantageous treatment, such as reducing transaction volume or stopping trade, to a subcontractor who has informed the Fair Trade Commission or the Small Business Administration of the inequitable conduct of the parent company.
Early settlement of the consideration paid for raw materials (Para. 2, No. 1)	To demand payment or offset of consideration for raw materials supplied at charge to subcontractors before the due date of the subcontracting fee for the work in which such raw materials are used.
Issuing difficult discount bills (Para. 2, No. 2)	To issue bills deemed difficult to discount at ordinary financial institutions.
Unfair request of economic profits (Para. 2, No. 3)	To demand money or provision of labour service from subcontractors.
Unjust change of job and unjust demand that job be redone after receipt (Para. 2, No. 4)	To change the job without the burden of costs, or to demand that a job be redone after it has already been received.



### **3. Legal Protection of Crowdworkers under Collective Labour Law**

#### **a) Legal Support for Collective Bargaining**

As already discussed (2.2.2), current case law holds that self-employed crowdworkers can be workers under the TUA only when they have continuous relationships with client companies, but the “permissibility of restrictive competition” test shows that all self-employed crowdworkers are workers according to collective labour law insofar as they maintain their livelihoods with their labour service to others. Consequently, crowdworkers can organise or join a trade union.

#### **aa) Unfair Labour Practice System**

Currently, the main purpose of organising a trade union is collective bargaining. Article 28 of Japan’s Constitution guarantees workers this right. Since this constitutional right provides the freedom to bargain collectively and immunity from civil and criminal liability, trade unions must first actualise their power of collective bargaining. However, the Trade Union Act of 1949 introduced the administrative support of collective bargaining with an unfair labour practice system based on the Wagner Act in the United States.<sup>53</sup> Under this system, an employer cannot refuse to bargain collectively with unions organising workers employed by the company when the unions demand collective bargaining (Art. 7 of the TUA). If the employer refuses collective bargaining without justifiable reasons, the Labour Relations Commission (LRC) issues a remedial order against the employer to bargain with the union in good faith. An administrative fine will be levied against the employer if it does not comply with the remedy order (Art. 28 of the TUA).

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<sup>53</sup> The unfair labour practice system in Japan is not the same as that in the US. (1) Japan has no provisions on unfair practices of trade unions, meaning that, e.g., trade unions need not accept demands for collective bargaining from employers. (2) Japan has no bargaining units system or exclusive representation system. Every union organised in an establishment, regardless of size, can demand collective bargaining with the employer. (3) The administrative remedy process involves the local and central Labour Relations Commissions. Remedy boards comprise three parties: the representatives of employees, employers, and the public interest.

Article 7 The employer shall not commit any of the following acts:

(i) To discharge or otherwise treat in a disadvantageous manner a worker by reason of such worker's being a member of a labour union, having tried to join or organise a labour union, or having performed justifiable acts of a labour union; or to make it a condition of employment that the worker shall not join or shall withdraw from a labour union.

(ii) To refuse to bargain collectively with the representatives of the workers employed by the employer without justifiable reasons.

(iii) To control or interfere with the formation or management of a labour union by workers or to give financial assistance in paying the labour union's operational expenditures, provided, however, that this shall not preclude the employer from permitting workers to confer or negotiate with the employer during working hours without loss of time or wage, and this shall not apply to the employer's contributions for public welfare funds or welfare and extra funds which are actually used for payments to prevent or relieve economic adversity or misfortunes, nor to the provision of minimal office space.

Therefore, trade unions can now conduct collective bargaining easily with the aid of Labour Relations Commissions. The question is with whom a crowdworkers' union could conduct collective bargaining because Article 7, para. 2 prohibits the refusal of collective bargaining by an employer. Who are the employers of crowdworkers? Are the platforms or the crowdsourcing companies the employers of crowdworkers?

Concerning the prohibition on employers in Art. 7, para. 2 of the TUA, the Supreme Court established the precedent that employers under the Trade Union Act are not limited to being parties to employment contracts in the relatively early stage. Because workers under the TUA include the self-employed (II.1.c)), employers under the TUA do not necessarily have to be parties to employment contracts. Moreover, a direct contract relationship need not exist between an employer and a worker. This is known as the external extension of the employer under the TUA.

## **bb) Extension of the Employer in Collective Labour Law**

### **(1) The “Control of Working Conditions” Test – Case Law**

In the Asahi Broadcasting Corporation case (Feb. 28, 1995), the Supreme Court established the “control of working conditions” test to decide if an employer is a party to collective bargaining.

**[Facts]** Workers employed by three subcontracting companies (Osaka-Dentsu, Daito, and Kanto Denki) were engaged in program production at the Broadcasting Corporation (X). The labour union (Z) which had organised the workers of the subcontracting companies sought collective bargaining with X, demanding higher wages, payment of a lump sum, installation of restrooms, and hiring as regular employees. X refused collective bargaining because X was not the employer of Z union members. The District and Central Labour Relations Commissions delivered a remedial order requiring X to conduct collective bargaining with Z. X went to court for cancellation of the order. The courts of the first and second instances cancelled the remedy of the Labour Commissions, but the Supreme Court rejected the high court ruling.

**[Judgement]** “Generally, an employer is a party to an employment contract. However, considering that Art. 7 of the TUA aims to exclude unfair labour practices and to restore normal labour-management relations, an employer in the sense of TUA Art. 7 means *an entity which is in a position enabling it to control and decide basic working conditions of workers*, even partially, to the same degree as an employer.

Because the Respondent (X) determined work shifts, working methods, and working environments, i.e., the essential working conditions of workers supplied by the three subcontractors, Respondent is deemed to be the employer under the TUA.”

### **(2) The “Authority to Resolve Labour Disputes” Test**

Case law established by the Supreme Court has certainly played an important role in the practice because employers under the TUA must bargain collectively with non-company workers. However, the “control of working conditions” test for determining the employer under the Trade Union Act, i.e., whether an entity exercises control over the working conditions of workers, is today not appropriate because it cannot capture holding companies<sup>54</sup> and investment funds. Such

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<sup>54</sup> GS Yuasa Case, Osaka LRC, 05.12.2006.

stakeholders exercise crucial influence on the survival of a company, but they have no interest in determining wages and working conditions.

In terms of the two functions of collective bargaining, namely, regulating working conditions (resolution of interest disputes) and resolving rights disputes, we should see employers as parties to collective bargaining from the standpoint of whether a person or corporation has the authority to resolve labour disputes. The “authority to resolve labour disputes” test captures holding companies as employers under the TUA, even if those companies do not intervene in the working conditions of employees of subsidiaries because they have the authority to resolve employment disputes caused by company group reorganisation. On the other hand, in interest disputes a holding company cannot become an employer under the TUA if the trade union cannot directly organise at least one employee of the holding company. Since the holding company has no employees to whom the collective agreement applies, the trade union cannot conduct collective bargaining with LRC support to conclude a collective agreement on working conditions for employees of the subsidiary.

## **b) Collective Bargaining by Crowdworkers**

### **aa) Possibility of Collective Bargaining with Crowdsourcers**

If there is a service contract between a crowdworker and a crowdsourcer (I.4.c)), it is not so difficult to regard the crowdsourcer as an employer as defined in Art. 7, para. 2 of the TUA. The LRC and the courts have held that an employer in the Trade Union Act is not limited to parties to employment contracts. It is enough that the workers are workers in the sense of the TUA (II.1.c)) and the contractual relations with the company. Because crowdworkers (except for business operators with one or more employees) fall into the worker category as defined by the TUA, trade unions which have organised crowdworkers can conduct collective bargaining with crowdsourcers.

### **bb) Possibility of Collective Bargaining with the Platforms**

When a trade union has organised crowdworkers and requested collective bargaining with the crowdsourcing site on reducing commissions or revising the terms of service, this raises the question of whether crowdsourcing sites are employers under collective labour law. According to current case law (the “control of working conditions” test), platforms are not employers of crowdworkers because they do not normally determine working conditions or remuneration of crowdworkers, but only charge service fees. However, if companies operating

crowdsourcing sites prepare the orders placed by clients (e.g., Realworld Co.), they are employers of crowdworkers because the crowdworkers receive orders from the site companies and provide work to them. Additionally, platforms also have other businesses, such as software development. Because these companies often expand their crowdsourcing sites to embrace substitute workforces, thereby making them into crowdsourcers as well, their crowdsourcing sites would be regarded as the employers of crowdworkers in the sense of Art. 7, para. 2 of the TUA.

According to the “authority to resolve labour disputes” test, trade unions that have organised crowdworkers to conduct collective bargaining would have no difficulty demanding reduction of service fees because there is no doubt that crowdsourcing site companies are in a position to determine service fees.

#### **4. Labour Supply Business of Trade Unions**

##### **a) Current Situation of the Labour Supply**

Historically, it has been an important function or business of trade unions to guarantee jobs for workers. Therefore the Occupation Security Act, while prohibiting the labour supply business in general, makes an exception by allowing the free-of-charge labour supply business of trade unions.<sup>55</sup> In fiscal year 2013, 91 trade unions engaged in the labour supply business.

A typical labour supply business of trade unions is port transportation. Because the Port Transportation Act prohibits subcontracting in dock labour and the Worker Dispatching Act lists dock labour as an exception, business operators must directly employ day labourers to cover temporary labour demand. In such a market, trade unions organise day labourers and supply them to various business operators constantly.

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<sup>55</sup> Article 44. No person shall carry out a labour supply business or have workers supplied by a person who carries out a labour supply business work under his/her own directions or orders, except in cases provided for in the following article.

Article 45. A labour union may carry out a free labour supply business where it has obtained a license from the Minister of Health, Labour and Welfare.

The labour supply service of trade unions today can be found in the home care service labour market. Because the service fee of this nursing care business is fixed-rate pricing determined officially by the employment insurance system, there is no price competition in service fees. As such, labour supply by trade unions is attractive for home care workers because there is no middleman fee.

Likewise in competitive markets, there is the labour supply business of the Computer Union, which organises software engineers. This union is a trade union of engineers with different abilities which finds jobs for them from among the labour demand for software engineers.

Nevertheless, the labour supply business is not common today in Japan.<sup>56</sup> The first reason is that the worker supply business of trade unions is at a disadvantage compared with temporary staffing agency services, which are mostly available to user companies at lower rates. Second, most trade unions, especially company-specific unions, currently have no interest in the labour supply business. Third, companies do not as a rule like to cooperate with trade unions.

The legal structure of labour supply is one of tripartite labour relations (I.5.b)). Worker supply contracts between supplier (trade unions) and user companies create employment relations between user companies and supplied workers (union members). User companies as employers pay wages to workers directly. The WACIA covers workers. Union membership contracts serve as the contracts between supplier unions and workers. Expulsion and withdrawal from trade unions are understood to be legitimate reasons for termination of employment.

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<sup>56</sup> Hashimoto, Shuich and Kokugakuin-Rokyo-kenkyukai: Rodosha-kyokuyujigyo Hokokusho (Research Report on the Labour Supply Business of Trade Unions), 2012.

**Table 8. Actual labour supply performed by labour unions in fiscal year 2013.**

		Vehicle drivers	Construction	Transportation	Others	Total
Actual supply	Total workers demand	1,433,440	2,322	245,838	11,236	1,793,963
	Total workers supplied	1,421,843	1,447	245,154	111,057	1,779,501
	Actual numbers of workers supplied	30,614	833	1,269	2029	3,4745
Total members of labour supply unions*	Permanent supply	6,687	701	1,119	2,173	10,680
	Temporary supply	608	679	305	122	1,714
	Total	7,295	1380	1424	2295	12,394

\*As of March 31, 2014 (MHLW: Labour Supply Business Report 2013)

**b) Possibility of Labour Supply Business in Crowdsourcing**

As noted above, crowdworkers as solo self-employed workers are mostly workers in collective labour law. Therefore, it is possible for trade unions to run free labour supply businesses by operating crowdsourcing sites. Under the labour supply system it was originally a matter of union policy whether suppliers (trade unions) required employment contracts or service contracts between workers and user companies.

But this raises the question of whether user companies should pay remuneration to crowdworkers directly, or indirectly via platforms. In principle, platforms operated by trade unions need not and should not perform payment

services. Their business was originally to secure jobs for union members. Accordingly, it is not necessary to operate platforms for microtasks. Their platforms should limit themselves exclusively to project-type and competition-type jobs. In so doing, the crowdwork business of trade unions would be nothing more than job placement for self-employed freelancers in cyberspace.

## **5. Social Insurance for Crowdworkers**

### **a) Social Insurance for the Self-Employed**

In considering the protection of crowdworkers, social security is also significant. Unlike workers under employment contracts, client companies are not obliged to make contributions to corporate social insurance programs for self-employed crowdworkers. Given that many crowdworkers are low-income earners, the lack of social security could in the future cause a new poverty problem in the labour market. To start with, the social insurance system for the self-employed should be reviewed.

#### **aa) Employment Insurance**

The employment insurance program pays benefits to unemployed workers in proportion to their salaries when they were still working, for a period that varies with years of employment. Employees pay one-third of the premiums and companies two-thirds. The program also assists workers taking leave to care for children or sick family members. Moreover, it provides workers with leave allowances under the employment adjustment subsidy program, and benefits for skill development courses. The Employment Insurance Act covers employees whose working hours are 20 hours or more per week and whose period of employment is longer than 30 days (Art. 6 of EIA). Therefore, the EIA does not cover the self-employed or most freelancers, except for side-work freelancers who are also employed.

#### **bb) Workers' Accident Compensation Insurance (WACI)**

##### **(1) Employers' Obligation Regarding Industrial Injury and Illness**

The Labour Standards Act (LSA) provides that if workers suffer injuries, illnesses, or death resulting from employment, their employers must provide compensation consisting of: 1) medical compensation (Art. 75), 2) compensation for lost time (Art. 76), 3) compensation for discontinuance (Art. 81), 4) compensation for disabilities (Art. 77), 5) survivors' compensation (Art. 79), 6) payment of compensation in instalments (Art. 82), and 7) funeral expenses (Art. 80). The Workers' Accident



Compensation Insurance Act (WACIA) placed compensation obligations of employers for workers' accidents under the LSA. Therefore, employers are exempted from the responsibility for compensation under LSA if they make payments equivalent to accident compensation under the WACIA (Art. 84 of the LSA).

Under the WACIA, workers can receive various kinds of insurance benefits such as: a) compensation benefits for medical care, b) compensation benefits<sup>57</sup> for being temporarily out of work, c) disability compensation benefits, d) compensation benefits for surviving family members, and e) nursing care compensation benefits in case of occupational injuries. Even if injured while commuting, employees can obtain the same benefits. The WACI system is liability insurance managed by the MHLW, and substitutes for the accident compensation liability that the Labour Standards Act requires individual employers to have. Owing to these characteristics, this insurance system is different from the health insurance system, which is a mutual-aid program. Employers are required to pay the full amount of insurance premiums. Every business that employs at least one worker must join the WACI system.

**Table 9. Insurance Benefits for Employees' Industrial Injuries**

<b>Insured event</b>	<b>Employment injury</b>	<b>Commuting injury</b>
<b>Medical treatment</b>	Medical compensation benefits	Medical benefits
<b>Loss of wages</b>	Temporary absence from work compensation benefit, injury and illness compensation pension	Temporary absence from work benefits, injury and illness pension
<b>Permanent disability</b>	Disability compensation benefits	Disability benefits
<b>Death</b>	Compensation benefits for surviving family Funeral expenses	Benefits for surviving family Funeral expenses
<b>Need for care</b>	Nursing-care compensation benefits	Nursing-care benefits

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<sup>57</sup> Benefits are paid continuously from the fourth day of leave or absence from work if an employee cannot work and earn wages because of medical treatment for injuries due to occupational accidents or commuting accidents (Article 14).

The WACIA covers all workers employed by businesses or at places of business. As we have already seen, case law holds that the scope of “worker” is the same as that in the Labour Standards Act (II.1). Therefore, the WACIA does not apply to self-employed persons. They must visit the hospital under the national health insurance program and pay 30% of their treatment costs themselves, as well as the costs of injury or illness outside of work.

## **(2) Special Enrolment System of Workers’ Accident Compensation Insurance**

Workers’ Accident Compensation Insurance was originally a system that paid insurance benefits for injury, illness, disability, or death of employees. But for some workers who are not employees and who are considered in need of protection in a manner similar to that of employed workers from the viewpoint of business circumstances and the possibility of disasters, there is a Special Enrolment System for Workers’ Compensation Insurance. In 2014, the number of subscribers of the special enrolment system was 1,688,311.<sup>58</sup>

The first type of special enrolment system covers “small and medium-sized business owners.” Persons who can join Workers’ Compensation Insurance are owners and their family workers engaging in:

- (1) Financial services, insurance, real estate, and retail trade (number of employees: up to 50)
- (2) Wholesale trade and service industries (up to 100)
- (3) Other industries (up to 300)

The second type of special enrolment is a sole proprietor who does not employ other people. Such people engage in mainly the following businesses:

- (1) Transportation business (taxi owner-drivers, personal cargo carriers)
- (2) Construction (carpenters, plasterers, scaffolding builders, etc.)
- (3) Fishermen operating fishing boats
- (4) Forestry
- (5) Placement and sale of pharmaceutical products

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<sup>58</sup> The numbers of subscribers by type are: small and medium-sized business owners 1,035,673 (employers 612,497, family practitioners 423,194), sole proprietor type 438,484, specified occupations 117,846, and employees sent overseas 96,308.

(6) Collection, transportation, sorting, and disassembly of wastes for recycling

For special enrolment, a sole proprietor must join the organisation of the same business, which performs an enrolment procedure.

The third type of special enrolment covers people who are engaged in the following specified occupations:

(1) Specified agricultural workers

(2) Specified agricultural machinery workers

(3) Training workers to be implemented by the state or local governments

(4) Homeworkers and their assistants

(5) Full-time officers of trade unions

(6) Long-term care workers

These specified workers must join the organisation that is composed of the same workers and performs the enrolment procedure.

Thus, the third type of special enrolment includes homeworkers, but at present it is limited to, for example, manual workers using presses, drills, or milling machines, or to workers using organic solvents.

## **cc) Health Care and Pensions**

Insofar as crowdworkers are self-employed, they must enrol in national health insurance and the national pension scheme because Japan has universal health care and a public pension insurance system.

Employee health insurance covers about 60% of the population. National health insurance covers the rest, who are self-employed people in the agriculture and commerce sectors. Local governments operate the national health insurance system (the insurers) throughout the country. The national government provides assistance that covers half the total benefits paid, while each enrolled individual pays annual premiums in proportion to income.

Pension benefits are provided by the welfare pension scheme for employees of private companies, the mutual aid pension scheme for public servants, and the national pension scheme for every citizen. Individual business owners who are self-employed must join the national pension operated by the government. The premium is uniform (monthly 15,590 yen, or €130). Additionally, these self-employed people can join, on their account, three other types of pension schemes: additional pension (monthly premium 400 yen, or €3.3), national pen-

sion fund<sup>59</sup> (insurance premium up to a monthly 68,000 yen, or €567), and a private pension with a defined contribution plan.

**Table 10. Social Insurance for Employees and the Self-Employed**

	Employees		Self-employed	
	Social insurance	Contribution defrayer	Social ' insurance	Contribution defrayer
Health Insurance	Corporate Health Insurance Society	Equally shared by employers and employees	National Health Insurance	Self-pay
Pension	National Insurance + Employees' Pension	Equally shared by employers and employees	National Pension	Self-pay
Employment Insurance	Employment Insurance	Equally shared by employers and employees	-	-
Industrial Injury Insurance	Workers' Accident Compensation Insurance	Employers	Special enrolment	Self-pay
Nursing Care Insurance	Insurance premiums are collected from 40-year-olds through their public health insurer			

#### **b) Social Insurance for Crowdworkers**

It is evident that crowdworkers cannot receive employment insurance, so far as they are not recognised as employees. The special enrolment scheme of Workers' Accident Compensation Insurance covers some people who are not employees. Crowdworkers who are business operators can join this scheme under the current law. However, to cover most crowdworkers as solo self-employed,

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<sup>59</sup> Participants of the national pension fund in 2014 numbered 453,684: regional funds had 378 488 members (average contribution was 22,026 yen), and occupational funds had 75,196 members (average premium was 30,526 yen).

they must be added to the second type (sole proprietors) or the third type (specified workers) of WACI special enrolment.

National health insurance and the national pension cover crowdworkers as self-employed persons. Certainly, the self-employed must carry a heavy burden in comparison with employees. Additionally, some crowdsourcing sites will introduce or are considering the introduction of private medical insurance and disability income in cooperation with an insurance company.<sup>60</sup> In that sense, theoretically their social security environment is relatively well-equipped, if crowdworkers are able to have stable workloads and appropriate incomes. Needless to say, this is in reality very difficult.

## V. Conclusion

1. Since 2008 the crowdsourcing business has been growing in Japan as in other countries. The impact on the labour market is not clear at present. We have until now not experienced social or labour problems involving the crowdsourcing business and crowdwork. Nevertheless, we can easily imagine that the development of crowdsourcing will have an impact on our corporate system and employment system.
2. The crowdsourcing sites we have discussed in this paper are crowdsourcing business companies which mediate and support the transactions between many workers and the clients in general on Internet platforms. Crowdwork relationships are legally tripartite relationships. Crowdsourcing sites are not only providers in the marketplace (platforms) for trading business services (work), but also agents for the collection and payment of remuneration for jobs and the progress management of projects.
3. According to a survey by the SMA, 31% of crowdsourcing users are employees, 29% are solo self-employed, and 23% are homemakers. Even crowdworkers who are business operators are mostly solo self-employed (67%). According to a survey of freelancers, most freelancers are side jobbers (48%) and self-employed owner-workers (36%). These surveys make clear that we should make protective measures available to crowdworkers, especially crowdworkers who are solo self-employed.

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<sup>60</sup> In November 2014 Crowdworks Co., Ltd, in cooperation with a private life insurance company, started offering registered members facilities for subscribing to regular death insurance, lifetime medical insurance, and disability insurance.

4. Under current case law, it is difficult to protect crowdworkers with labour law. According to the “use-dependency” test of individual labour law, most crowdworkers are not workers under the LSA and the LCA, insofar as they perform microtasks or competition-type jobs. An exception is that some crowdworkers who engage in project-type jobs might be workers under individual labour law if they are under the direct instruction of crowdsourcers. Under the “integration into the corporate system” test, some self-employed crowdworkers are workers under the LCA.
5. In addition, the “organisational dependency” test as developed by case law in collective labour law is not appropriate. The TUA cannot cover crowdworkers who have short-term relationships with crowdsourcers under spot contracts. We should adopt a new approach, namely, the “permissibility of restrictive competition” test. Under this approach, self-employed workers can organise trade unions and enjoy their support against unfair labour practices. The question is: With whom can trade unions conduct collective bargaining? If we adopt a new criterion of “employer” under the TUA, namely, the “authority to resolve labour disputes” test, it is possible to support collective bargaining with crowdsourcing sites.
6. The Occupation Security Act allows trade unions to operate free labour supply businesses, which is one of their traditional social functions to keep jobs for union members. Now that we are expecting an increase of independent contract workers, it is important for trade unions to try new forms of labour supply businesses. As microtasks are not worth the trouble for trade unions, their platforms should specialise in project-type and competition-type jobs. In so doing, the crowdwork business of trade unions would be none other than job placement for self-employed freelancers in cyberspace.
7. From the survey of crowdworkers and freelancers we find the need to offer protective measures for crowdworkers. In particular, because crowdworkers with a monthly income of more than 200,000 yen (€1,667) account for only 6.3%, and because the annual incomes of 40% of professional freelance workers are less than 2 million yen (€16,667), a minimum wage is essential. The “uncertainty of getting jobs” (57.7%) is an endemic problem. It is therefore desirable to promote continuous direct relationships between crowdworkers and crowdsourcing companies through the experience of crowdsourcing transactions.
8. As a legal policy for crowdworkers, therefore, we should consider three reforms to labour legislation. First, revise the Homework Act to apply the

minimum wage and special WACI enrolment to crowdworkers. Second, reform the Labour Contract Act to cover independent contract workers (the solo self-employed). This would benefit not only crowdworkers, but also today's increasing number of independent contractors in general. Third, reform the Occupation Security Act to remedy the lack of regulation over the agency businesses of crowdsourcing sites. Unlike employment placement and staffing agency, the function of platforms is to be agency services which secure jobs for solo self-employed workers and pass payment to them. It is a valuable service for independent contracts between parties geographically remote from one another. At the same time, it is important to appropriately control service fees and to eliminate unfair restrictions on direct dealings between crowdworkers and crowdsourcers.

9. The project-type of crowdwork that often entails instruction by the client and the time management by the platform leaves us with an unresolved issue, which is whether we should regard the platform simply as a co-employer of the crowdworker or rather legislatively as an agency of the employment relation between the crowdworker and the client company. In the latter view, as the current agency work scheme of the Worker Dispatching Act does not create any employment relation between workers and client companies, we must acknowledge a new type of agency work where, with the help of the platform, an employment relation can exist between geographically separated crowdworkers and the client company.

## E. Summary

*Bernd Waas*<sup>1</sup>

### I. Crowdwork as Part of the Gig Economy

Crowdwork is part of a larger phenomenon, which is the platform, sharing or gig economy. Opinions are divided when it comes to measuring the benefits and the risks that come with it. The dominant view in Silicon Valley is that the gig economy, including crowdwork, offers flexibility and is both expanding opportunity and promoting economic growth. Moreover, it is argued that young workers in particular prefer the flexibility of self-employment arrangements. In the view of the proponents of the gig economy, regulation would impede innovation and slow the growth of employment. On the other hand, the sceptics fret about an increasing “imbalance of power” between platforms and crowdworkers. In their perspective, it must be asked whether participants in the gig economy are getting “a fair deal”. There are also concerns that the underlying economic model could in the long run damage an essential element in the labour market: trust.

### II. The Advantages and Drawbacks

The pros and cons of crowdwork have been extensively discussed in the U.S. chapter: On the one hand, crowdwork “allows individuals to work when they wish, from wherever they happen to be, choosing from a variety of jobs”. Moreover, “through these platforms some workers make more money than they otherwise could or simply make money they otherwise couldn’t”. Finally, crowdsourcing “can ease a variety of labor market dysfunctions”, by, for example, “more effectively bringing together individuals with work” and “drawing in new participants”.<sup>2</sup> But there are severe drawbacks, also highlighted in the U.S. chapter: On the basis of the existing arrangements between the parties concerned, “risks and responsibilities are shifted entirely to the worker, includ-

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<sup>1</sup> Bernd Waas, Professor of Labour Law and Civil Law at Goethe University Frankfurt am Main.

<sup>2</sup> *Liebman*, B V. 1.



ing buying health or other types of insurance, saving for retirement and investing in skills and training". Some platforms even look like "digital sweatshops" where workers are exploited for very low wages."<sup>3</sup>

### III. Unraveling of the Social Compact

The platform economy in general and especially crowdsourcing and crowdwork are seen by many as the culmination to date of developments that started far earlier. The position in the U.S. may serve as an illustration. For some time, "the unraveling of the mid-20th-century social compact governing the workplace" is observed due in part to an ever increasing "fissurization" of the workplace; arguably the emergence of the gig economy, including crowdwork, forms the latest phase of the "fissured workplace."<sup>4</sup> In the U.S. chapter, the author looks back to the development of labour law. She describes that over the 20th century, public policy in the U.S. shifted to "a system mixing reliance on market forces with regulation", beginning comprehensively with the New Deal legislative enactments of the 1930s. In the underlying postwar social compact, it was assumed that "a working life [was] spent at a large organization (...) under a stable contract of hire between a single employer and employees engaged in work of a continuing nature at a fixed location, with hierarchical organization of work, promotion ladders, and job security". This was the time of the standard employment relationship. Beginning in the late 1970s, however, this social order began to unravel, mainly in response to global and domestic competitive pressures and accelerating technological innovation. In the process "the employer 'vanished,' the workplace 'fissured,'<sup>5</sup> and arrangements for securing labor became 'market-mediated,'<sup>6</sup> with firms contracting for services rather than hiring employees". There are quite a few who would subscribe to the view that crowdwork forms "the ultimate stage in this process of fissurization".<sup>7</sup>

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<sup>3</sup> *Malone/Laubacher/Johns, 'The Age of Hyperspecialization' (Cambridge, June/August 2011) Harvard Business Review 10.*

<sup>4</sup> *Weil, The Fissured Workplace: Why work became so bad for so many and what can be done to improve it (Cambridge, MA, Harvard University Press, 2014).*

<sup>5</sup> See generally *Weil supra*.

<sup>6</sup> *Cappelli, 'Market-Mediated Employment: The Historical Context' in: Blair/Kochan (eds), The New Relationship: Human Capital in the American Corporation (Washington, Brookings Institution Press, 2000) 66-90.*

<sup>7</sup> *Liebman, B II. 3.*

## IV. Crowdwork: Four Different Models

In the U.S. chapter, four different models of paid online outsourcing arrangements are identified and further examined. All these models involve a client, an intermediary platform and a “pool of virtual suppliers, largely invisible and atomized”.<sup>8</sup> Work options on these platforms range from low-skill, low-pay microtasks (sometimes referred to as cognitive piecework); to online freelancing; to high-skill, more remunerative, challenge-based competitions. In the literature a typology of platforms was developed around two basic questions: (1) Who provides the project governance: platform or buyer (client)? and (2) where is the buyer’s trust placed for quality control and project-related risks: platform or supplier? Dependent on how these questions are answered, the role a platform plays can be described as that of an “aggregator”, “facilitator”, “governor” or “arbitrator”.<sup>9</sup>

## V. Are Crowdworkers “Employees”?

The key question that must be addressed in the labour law context is whether crowdworkers qualify as “employees”. This requires a close examination of this notion under the relevant national law.

### 1. The Notion of “Employee”

In the U.S., the term “employee” is defined variously in the different statutes.<sup>10</sup> Moreover, various tests apply to establish employee status. The narrowest is the common law test, which derives from the earlier “master-servant doctrine” of vicarious liability, under which it is assumed that during the time of service, “the master can exercise control over the physical activities of the servant.”<sup>11</sup> The relevant factors that are evaluated under the common law test include: the “extent of control that the employing entity exercises over the details of the work; whether the individual is engaged in a distinct occupation or work; the kind of occupation, including whether, in the locality in question, the work is usually done under the employer’s direction or by a specialist without supervi-

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<sup>8</sup> *Liebman*, B I.

<sup>9</sup> *Kaganer et al.*, ‘Managing the Human Cloud’ (2013) 54 MIT Sloan Management Review 26.

<sup>10</sup> There are demands for an adoption of a single definition of “employee” and “employer” for all workplace laws to eliminate inconsistent results; cf. *Liebman*, B VII. 2.

<sup>11</sup> Restatement (Second) of Agency §219 comment a (1958).

sion; the skill required in the particular occupation; whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; the length of time the individual is employed; the method of payment, whether by the time or by the job; whether the work in question is part of the employer's regular business; whether the parties believe they are creating an employment relationship; and whether the principal is in the business".<sup>12</sup> In any event, an evaluation of "all of the incidents of the work relationship" is required, with "no one factor being decisive."<sup>13</sup> The broadest test is what is called the "suffer or permit" test. This test often encompasses an assessment of the economic reality of the relationship. To apply this test, the courts have developed a multifactor "economic realities" test according to which the totality of the working relationship is determinative, and all facts relevant to the relationship between the worker and the employer must be considered. Formal descriptions, like an agreement stating that the worker is an independent contractor, are not controlling.<sup>14</sup> The relevant factors generally taken into account are: the "extent to which the work performed is an integral part of the employer's business; whether the worker's managerial skills affect his or her opportunity for profit and loss; the relative investments in facilities and equipment by the worker and the employer; the worker's skill and initiative; the permanency of the worker's relationship with the employer; the nature and degree of control by the employer".<sup>15</sup> Many of these factors mirror those of the common law test, though the economic realities test may be more focused than the common law test on whether the worker is operating an independent business. Even so, "it is hard to predict outcomes with multifactor tests, as the decision maker may be more important than the actual test being applied".<sup>16</sup> More recently, "economic dependence", which can be a relevant factor, has been emphasized. According to a so-called interpretive guidance that was issued in July 2015 by the administrator of the Department of Labor's Wage and Hour division,<sup>17</sup> "economic dependence" is key in determining employee status. According to this guidance a "relatively flexible work schedule alone (...) does not

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<sup>12</sup> Restatement (Second) of Agency §220.

<sup>13</sup> *Accord* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 752 n. 31 (1989).

<sup>14</sup> *See, e.g.,* Rutherford Food Corp. v. McComb, 331 U.S. 722, 728-29 (1947); Estrada v. FedEx Ground Package Sys., Inc., 64 Cal. Rptr. 3d 327, 335-336 (Cal. Ct. App. 2007).

<sup>15</sup> *Liebman*, B V. 1.

<sup>16</sup> *Liebman*, B V. 1

<sup>17</sup> Administrator's Interpretation No. 2015-1: The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors:[https://www.dol.gov/whd/workers/misclassification/ai-2015\\_1.htm](https://www.dol.gov/whd/workers/misclassification/ai-2015_1.htm)

make an individual an independent contractor rather than an employee”.<sup>18</sup> Moreover, work can be “‘integral to an employer’s business’ even if it is performed away from the employer’s premises at the worker’s home”.<sup>19</sup> Finally, “an employer’s lack of control over workers is not particularly telling if the workers work from home or offsite”.<sup>20</sup>

In Germany, employment and self-employment are distinguished by whether a person provides “dependent” services, whereby dependence usually manifests itself in such a way that the employee is subjected to the instructions of another. Case law lays down the so-called typological method for qualifying specific legal relationships. Accordingly, qualification of a legal relationship depends on the “overall picture”.<sup>21</sup> As it is the case in the U.S., the outcome of the analysis is often hard to predict. This is all the more so since an employment relationship only differs from the legal relationship of a freelance worker “by the degree of personal dependence (...) in which the service provider finds himself”.<sup>22</sup> In addition to the question about “subservience to instructions”, the courts, in determining sufficient dependence, often focus on whether a person is integrated in the business of another. The question then arises whether that person is dependent on the work organisation established by another and on its instruments/equipment.<sup>23</sup> In this context, reference is often made to “organisational dependence”. What this implies is a dependence on the equipment and tools provided by another person, as well as the requirement to collaborate with others. In the legal literature, it is sometimes argued that the legal qualification of a relationship should rather depend on a risk assessment. Accordingly, the key question must focus on the existence or non-existence of entrepreneurial risk. Anyone who voluntarily bears such risks shall be qualified as a self-employed worker. On the other hand, persons who either do not bear such risk or do so involuntarily shall be qualified as employees.<sup>24</sup> The Federal Labour Court, however, is reluctant to apply this approach and basically sticks to the “dependence-test” as described above.<sup>25</sup>

In Japan, the “use-dependency (subordination) test” applies in individual labour law. The fundamental criteria of this test are: freedom to accept business

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<sup>18</sup> Administrator’s Interpretation No. 2015-1, p. 13.

<sup>19</sup> Administrator’s Interpretation No. 2015-1, p. 7.

<sup>20</sup> Administrator’s Interpretation No. 2015-1, p. 13.

<sup>21</sup> *Waas*, C I. 2a).

<sup>22</sup> Federal Labour Court, AP BGB § 611 Abhängigkeit No. 26.

<sup>23</sup> Federal Labour Court AP BGB § 611 Abhängigkeit No. 73.

<sup>24</sup> See, especially *Wank*, Arbeitnehmer und Selbständige, 1988, p. 391.

<sup>25</sup> See Federal Labour Court of 25 May 2005 – 5 AZR 347/04.

requests and instructions on business performance, instructions on the business and how it should be carried out, and restriction of working place and time.<sup>26</sup> There are a number of supplementary criteria, namely, whether the worker can outsource the service to others (non-substitutability); whether remuneration is calculated on an hourly basis; which party—worker or employer—must bear expenses for materials or devices used to complete the job; and the degree to which the relationship between the parties is exclusive. As is the case in Germany, there are alternative concepts put forward in the legal literature. Some authors suggest the use of an “economic dependency” test along lines similar to those in Germany, while others suggest an “integration into the corporate system” test.<sup>27</sup> Apart from that, there are more and more calls for introducing, on the basis of a purposive construction of the relevant provisions, different notions of “employee” with regard to the various part of labour law.<sup>28</sup> In the existing law, a distinct (broader) notion already exists in the area of collective labour law where the so-called organisational dependency test applies. Under this test one of the requirements is incorporation into the business organisation of another. If all the requirements are fulfilled, even self-employed persons enjoy the right to bargain collectively. It is explained in the Japan chapter that this test, if properly applied, does not raise problems from the perspective of anti-trust law.<sup>29</sup>

There are a lot of commonalities between the jurisdictions concerned: First, in all countries qualification as an “employee” depends on various criteria and factors being applied by the court; this is why courts in Germany regard the term “employee” as referring to a mere “type”.<sup>30</sup> Second, the legal concept of “employee” is mandatory and cannot be disposed of by the parties to the contract. If a person on the basis of an objective legal assessment qualifies as an “employee”, the parties are not allowed to set this qualification aside by insisting that their contract is not a contract of employment. Moreover, the designation of the contractual relationship by the parties does not play a decisive role in the qualification of a specific contract as a contract of employment. The objective content of the contractual relationship, i.e., the actual contract implementation, takes centre

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<sup>26</sup> *Kezuka*, D II. 1b) aa).

<sup>27</sup> *Kezuka*, D II. 1b) aa).

<sup>28</sup> This would be in line with voices in legal literature which stress the need for a purposive approach to interpretation of statutory coverage issues; see, in particular, *Davidov*, *A Purposive Approach to Labour Law* (Oxford, Oxford University Press, 2016),

<sup>29</sup> *Kezuka*, D II. 1c) bb).

<sup>30</sup> Federal Labour Court, AP BGB § 611 Abhängigkeit No. 34.

stage. Third, “economic dependence” may be gaining in importance; with recent emphasis in the U.S. However, it may be fair to say that in all countries “economic dependence” is neither required nor in itself sufficient when determining the “employee status”.

## 2. Legal Qualification of Crowdworkers

When applying the tests under the relevant national law, there are factors that weigh in favour of independent contractor status and others that weigh in favour of employee status. To qualify a crowdworker as an employee in an individual case, in any event, can by no means be ruled out. This is particularly true if there are significant elements of control. Moreover, what is stated in the U.S. chapter might apply to Japan and Germany as well: “The strongest case for employee status would be made by those providers who develop some permanence in their relationship with [the platform] or particular requesters, performing a high volume of HITS for one or more, on a regular basis, becoming in effect part of their workforce”.<sup>31</sup> In many cases, however, the assessment will not lead to affirming employee status. Again, what is said in the U.S. chapter seems to be relevant in the other countries as well: Platforms regularly provide “minimal governance, giving [them] comparably little ‘control’ over providers’ work”. Requesters, too, regularly exercise little direct supervision over providers. For their part, providers have unrestricted discretion as to how many hours per week they decide to work, if at all. Nor is there permanence to the relationships unless they so choose.<sup>32</sup> Based on the traditional tests that apply in Japan (“use-dependency” test) and Germany (dependence), the same in principle holds true in these two countries. And even if entrepreneurial opportunities plays a role in determining employee status—which, in fact, on the basis of existing case law is not the case in Germany, for instance<sup>33</sup>—there will often be no serious limits to these opportunities, as “while working on the platform, [providers] are completely free to schedule their own time, determine the use of and make investments in their own equipment, and work for any other platform, or any other business”.<sup>34</sup>

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<sup>31</sup> *Liebman*, B V. 2a).

<sup>32</sup> *Liebman*, B V 2a).

<sup>33</sup> *Waas*, C I. 2a). *Liebman*, B III.1 (entrepreneurial opportunities is a factor under the U.S. common law test).

<sup>34</sup> *Liebman*, B V. 4.

## VI. Crowdwork: Who Is the Employer?

Determination of the employee status of crowdworkers is no easy task. But this is not the only problem, as it is also difficult to identify the employer in a crowdsourcing setup. This is even more so since in most legal systems the notion of “employer” has been somewhat neglected. In Germany, for instance, where no statutory definition of the term exists, the courts hardly substantiated the notion of “employer” as such, but indirectly derive the definition from the term “employee”.<sup>35</sup>

In the U.S. the picture is somewhat different. There, two or more statutory employers may be found to be joint employers of the same employees if they share or codetermine those matters governing the essential terms and conditions of employment. Under the labor law, the initial inquiry is whether there is a common law employment relationship. If so, the inquiry then turns to whether the putative joint employer possesses sufficient control over employees’ essential terms and conditions of employment to permit meaningful collective bargaining.<sup>36</sup> Recently, the Department of Labor’s wage and hour administrator issued an interpretation under wage and hour laws, stressing that the notion of “joint employment” is to be understood rather extensively.<sup>37</sup> The interpretation describes both horizontal and vertical joint employment relationships, but for the context of crowdwork platforms vertical joint employment is most relevant. It exists “where the employee has an employment relationship with one employer (typically a staffing agency, subcontractor, labor provider, or other intermediary employer) and the economic realities show that he or she is economically dependent on, and thus employed by, another entity involved in the work”.<sup>38</sup> The requisite analysis “examines the economic realities of the relationships”<sup>39</sup> between the employee of the intermediary employer and the other purported joint employer and does not focus only on control. Different courts might emphasize different factors, but the ultimate inquiry is one of economic dependence on the potential joint employer.<sup>40</sup> The joint employer theory is still untested in the

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<sup>35</sup> *Waas*, C I 2c).

<sup>36</sup> *Liebman*, B V. 3.

<sup>37</sup> Administrator’s Interpretation No. 2016-1: Joint employment under the Fair Labor Standards Act and Migrant and Seasonal Agricultural Worker Protection Act: [https://www.dol.gov/whd/flsa/Joint\\_Employment\\_AI.htm](https://www.dol.gov/whd/flsa/Joint_Employment_AI.htm)

<sup>38</sup> Administrator’s Interpretation No. 2016-1, p. 3.

<sup>39</sup> Administrator’s Interpretation No. 2016-1, p. 5.

<sup>40</sup> The Administrator’s Interpretation No. 2016-1, p. 11 et seq., lists seven factors that the courts look to as indicators of economic dependence: directing, controlling, or supervising the work performed; controlling employment conditions; permanency

crowdwork context, but it might be tried comparing outsourcing arrangements to the relationship between staffing or leasing agencies and their clients.<sup>41</sup> In any event, the consequences of a joint employer finding would vary.<sup>42</sup>

In Germany, this avenue looks to be less promising at this stage, however. To begin with, “joint employment” is acknowledged by the courts to a very limited extent only. It is true that joint and several liability of employers may result from an interpretation of the contract between the parties. It is also true that, according to case law, it can be the result of imperative legal values contained in existing law. A closer look, however, reveals that narrow boundaries exist for affirming employment relationships that involve a joint status of employer.<sup>43</sup> For all that, the courts in Germany have developed the legal concept of the “indirect employer”. According to the courts, an “indirect employment relationship” exists when an employee is employed by another person, who, for his part is an employee of a third party (the entrepreneur) whereby the work is performed directly for the entrepreneur and with the entrepreneur’s knowledge. It is assumed that such an “indirect employment relationship” aims to establish subsidiary liability of the entrepreneur with regard to the payment of wages, in particular. The rationale is that an entrepreneur is liable if he directly benefits from the work performed. Once again, however, the concept seems of little value at this stage, as there is the requirement that the intermediary must be an employee himself, which will not usually be the case with platforms.

## VII. Intermediate Categories

Most European countries do not acknowledge an intermediate category between employees and self-employed persons. Germany forms one of the few exceptions: While the employee is characterised by personal dependence, the qualification as an “employee-like person” relates to his or her economic dependence. Employee-like persons are persons who are “economically dependent and in need of social protection comparable to an employee ...”, work on the basis of a contract of service or a contract for work and services for other persons, perform the services they are obliged to perform personally and essential-

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and duration of relationship; repetitive and rote nature of work; integral to business; work performed on premises; performing administrative functions commonly performed by employers.

<sup>41</sup> *Liebman*, B V. 3.

<sup>42</sup> *Liebman*, B V. 3.

<sup>43</sup> *Waas*, C I. 2b) cc).



ly without collaboration with employees and a) predominantly work for a one person or b) on average, more than half of the total remuneration they are entitled to for the performance of work is paid by one person".<sup>44</sup> However, qualifying as an employee-like person is not the door-opener to full labour law protection. Instead, employee-like persons are only entitled to a minor share of the rights of employees. Apart from that, it might be difficult to establish that a crowdworker is an employee-like person. As the crowdworker typically performs services for very different firms, it would usually be quite difficult to prove economic dependence on one firm.

In the U.S. no intermediate category exists. The same applies in Japan. However, in the U.S. there have been debates over whether an intermediate legal category between employees and self-employed persons should be introduced with the purpose to extend certain protections to individuals who would otherwise not fall under the protection of labor law.<sup>45</sup> A possible model could be Canada, where a "dependent contractor" category was created for purposes of collective bargaining eligibility under provincial labor laws. It is argued, on the one hand, that there is "a fine-grained spectrum of intermediate business models between pure marketplace and pure ... employer" which renders the binary legal choice between employees and self-employed persons inefficient and would suggest the need for an intermediary category.<sup>46</sup> On the other hand, there are worries that a new classification could make the question of qualification even more complicated and that it could "encourage further erosion of workplace standards rather than expand the groups of workers entitled to statutory protections".<sup>47</sup>

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<sup>44</sup> § 12a of the Act on Collective Bargaining Agreements.

<sup>45</sup> See, e.g., *Harris/Krueger*, 'or Modernizing Labor Laws for Twenty-First-Century Work: The Independent Worker', The Hamilton Project (Washington, December 2015) suggesting to introduce the category of "independent worker"; the proposal is discussed by *Liebman*, B VI. 1c).

<sup>46</sup> See, e.g., *Hagiul/Biederman*, 'Companies Need an Option Between Contractor and Employee', *Harvard Business Review* (Cambridge, 21 August 2015); A Hagiul and J Wright, 'Controlling Versus Enabling', *Harvard Business School Working Paper* (Cambridge, 16 July 2016); *Liebman*, B VI. 1b).

<sup>47</sup> *Liebman*, B VI. 1b).

## VIII. Legal Protection Outside the Scope of Labour Law

If labour law does not offer protection to crowdworkers—and this may be the outcome in many cases—this does not imply that they are not protected at all. The German position may be illustrative. There, a limited protection may be derived from the so-called general clauses of civil law, according to which illegal and immoral agreements are void. Even more importantly, the provisions on the review of the general terms and conditions provide a certain level of protection. The key focus of these regulations is the so-called content review. According to the Civil Code, provisions in general terms and conditions are, for instance, void “if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user”.<sup>48</sup> Such an “unreasonable disadvantage” must be presumed to exist in case of doubt, when a provision’s “fundamental notion deviates from and is incompatible with legal regulations” or when it “limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised”.<sup>49</sup>

In other countries, this kind of legal protection outside the scope of labour law may be more limited. This seems to be the case in the U.S., where the principle of freedom of contract—“deeply embedded in American legal culture”—assumes “that the parties are free to choose with whom to contract, whether to contract, and on what terms to contract, and therefore that their agreed-to terms should not be invalidated”.<sup>50</sup>

## IX. Legal Reform

*De lege lata*, protection of crowdworkers is limited. This has prompted a discussion on how better protection could be achieved. The ideas being floated range from rather piecemeal attempts to amend the existing law to more fundamental reforms. As far as the latter are concerned, the debate in the U.S. seems to be more advanced than in most other countries. This is especially true with regard to what the U.S. chapter describes as “reexamining the link between social protections and employment”.<sup>51</sup> For instance, former U.S. president Barack Obama some time ago proposed both a system of wage insurance for the worker who

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<sup>48</sup> Section 307(1) sentence 1 of the Civil Code.

<sup>49</sup> Section 307(2) of the Civil Code.

<sup>50</sup> *Liebman*, B V. 4.

<sup>51</sup> *Liebman*, B VI. 2.

suffers a pay cut when changing jobs and portability of retirement savings.<sup>52</sup> Other ideas that have been discussed recently are a “shared security system”; “portable benefits for independent workers”; mandatory payments by all workers, whether employees or independent contractors, into the national social security system to afford access to a range of benefits; and, most far-reaching, the introduction of a universal basic income.<sup>53</sup>

Numerous proposals exist to modify existing labour law. For instance, there are demands in all the countries concerned to modify existing notions of “employee” (and “employer”) in order to better accommodate the protection needs of crowdworkers or, more generally, workers in the gig economy. It has been suggested both in Germany and Japan to extend (parts of) labour law protection to “solo-entrepreneurs”. And, as described above, there is a lively debate in the U.S. whether an intermediary category between employees and self-employed persons should be established.<sup>54</sup>

The relations in the platform economy including crowdwork are triangular in nature, involving the platform, the worker and the client. In labour law, the “classic” triangular relationship is temporary agency work. While there is a relationship between client and temporary worker, there is another relationship between the agency and the client and still another between the agency and the temporary worker. This similarity alone suggests a need to consider making platforms subject to laws regulating temporary work (or staffing) agencies, or crafting equivalent laws.<sup>55</sup> This is even more so if the business model of a given platform functions like that of a traditional agency. In any event, “strict disclosure and recordkeeping requirements could also be imposed on crowdwork platforms, and these requirements could mirror (...) current regulation of temporary or staffing agencies”.<sup>56</sup>

One element of protection that already exists in the law of all the countries concerned seems to draw particular attention: the protection of so-called homeworkers. This seems plausible, since analogies can be drawn to industrial

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<sup>52</sup> *Obama*, State of the Union Address (12 January 2016) <[www.nytimes.com/2016/01/13/us/politics/obama-2016-sotu-transcript.html](http://www.nytimes.com/2016/01/13/us/politics/obama-2016-sotu-transcript.html)>

<sup>53</sup> Cf. the discussion by *Liebman*, B VI. 2.

<sup>54</sup> Cf. also the discussion of the possible status of an „independent contractor“ as a hybrid category between employee and self-employed by *Cherry/Aloisi*, *Dependent Contractors' in the Gig Economy: A Comparative Approach*, in: Saint Louis University School of Law – Legal Studies Research Paper Series No. 2016-15.

<sup>55</sup> *Liebman*, B V. 4, *Kezuka*, D II. 1c) bb).

<sup>56</sup> *Liebman*, B V. 4.

homework and the “putting out” system common in some industries in the late 19th and early 20th centuries. As observed in the U.S. chapter, considerations for home-based outsourcers and crowdwork companies are similar: “the lack of need to supervise the work, the desire to control labor costs and the benefit of avoiding collective action and legal regulation”.<sup>57</sup> As regards the U.S., existing legislation on homeworkers provides that all industrial homeworkers “shall be presumed to be employees of their employer and not independent contractors”.<sup>58</sup> One suggestion is to design an analogous crowdworker protection law that “could similarly state that crowdworkers are to be presumed employees of the platform—for the limited purpose of ensuring that minimum wage, overtime and child labor provisions are complied with”. In Japan, crowdworkers do not qualify as homeworkers under the existing legislation as they are not engaged in manufacturing and processing goods by using the raw materials and parts of products provided by the contractors.<sup>59</sup> However, the Japan chapter suggests amending the existing legislation to make the minimum wage scheme that applies under the appropriate act available for crowdworkers. In Germany, too, amendments of the Homework Act have been put forward. In this context it might be important to turn to what the U.S. chapter calls “restoring worker voice and power”.<sup>60</sup> The Homework Act in Germany looks to be particularly promising in this regard, since lawmakers assigned an important role to trade unions and what are called “associations of principals” in terms of monitoring compliance with the legal obligations. This is particularly evident in a provision of the act that gives trade unions and associations of principals the right to inspect the lists of homeworkers that principals must keep. The legislation thus explicitly recognises that these associations’ interest in such information is justified.

There are many other suggestions that are worth further examination. For instance, the U.S. chapter mentions California’s “responsible contractor” law, which prohibits a firm from entering into a contract for certain types of labour if the contracting party knows, or should have known, that the contract does not provide “sufficient” funds to allow compliance with applicable labour laws. As suggested, “elements of these laws could be adapted as a model for requirements on specialized registration, licensing, disclosure and recordkeeping” for

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<sup>57</sup> Finkin, ‘Beclouded Work, Beclouded Workers in Historical Perspective’ (2016) 37 *Comparative Labor Law & Policy Journal* 607-08.

<sup>58</sup> NY Labor Code § 361-a.

<sup>59</sup> *Kezuka*, D IV. 2a) aa) (2).

<sup>60</sup> *Liebman*, B VI. 3.

crowdwork platforms.<sup>61</sup> Comparative labour law not only highlights the issues but may even be helpful in finding the right answers.

As indicated, it may be worth exploring possible ways to make it easier for crowdworkers to organise and eventually to bargain collectively. The U.S. chapter describes demands to create platforms that provide a meeting place where workers can build community and organise and by doing so correct information asymmetries between platforms and workers. There are also interesting developments like the use of browser extensions allowing workers (providers) to rate firms and view ratings submitted by fellow workers.<sup>62</sup> However, there may also be real “limits of digital organizing”.<sup>63</sup> Apart from that, there are, as mentioned earlier, legal problems, since granting independent contractors the right to bargain collectively raises the issue of restrictions posed by anti-trust law. This applies not only in the U.S. but also in Japan<sup>64</sup> and in Germany and Europe as a whole.<sup>65</sup> This notwithstanding, as observed in the U.S. chapter, there is “growing fascination with the medieval model of the ‘guild’ to represent independent contractors or provide benefits”.<sup>66</sup>

## X. The Task Ahead

The three countries whose systems are explored in this book have a lot to offer in terms of possible answers to the problem of properly protecting crowdworkers (and workers in the gig economy in general) without unduly hampering innovation in the labour market. Policy-makers, the social partners and labour market participants face the huge task of getting it right.

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<sup>61</sup> *Liebman*, B VII. 1b).

<sup>62</sup> *Liebman*, B VI. 3b). See also *Klebe*, AuR 2016, p. 281.

<sup>63</sup> *Liebman*, B VI. 3b).

<sup>64</sup> *Kezuka*, D II. 1c) bb).

<sup>65</sup> See, in particular, ECJ of 4 December 2015 Case C-413/13 – FNV Kunsten Informatie en Media; *Heuschmid/Hlava*, AuR 2015, 194; *Bayreuther*, NJW 2017, 357ff.

<sup>66</sup> *Liebman*, B VI. 3c).



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